



ERA

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Trier

**RELIGIOUS DISCRIMINATION:
AN INTRODUCTION TO THE DEBATE
AND ITS LEGAL FRAMEWORK**

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OVERVIEW

- I. New religious intolerance and the law
- II. Fundamental rights
- III. Horizontal effect in labour relations ?
- IV. Margin of appreciation ?

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1°New religious intolerance ?

- M. Nussbaum (2012): "New religious intolerance"
- 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*" (Opinion C-157/15)
- A new phenomenon ?
 - No: religion is at the heart of HR (from ancient times)
 - Yes: new facts: numbers of migrants, secularism, identity search
- Conflicting perceptions:
 - Head scarf= discrimination of women ?
 - Head scarf= decent dress for women ?



CONFLICTING PERCEPTIONS





Secularism

Rising of secularism (freedom "from" religion)

Discussion in France and Belgium: religious holidays

Belgian Constitutional Court (1992)

Work on Sunday and catholic holidays: many rules may have a historical religious background, but that does not matter: the purpose has changed: sports, family day, recreation.

"just a conventional day of rest"

Cf. Austrian Supreme Court: C-193/17 – Cresco Investigation

Cf. ECtHR (2011): Lautsi-case- crucifix- religious symbol ?
diverging judgements Ch. and GC.



Identity: conflicting directions

Personal identity and religion

Religion is more than only religion: cultural, social, moral (e.g. Iftar) + also reaction to exclusion and segregation

Intersectionality: hidden discrimination on basis of origin

Multiple discrimination grounds: Religion, origin, gender

Very often: discrimination on grounds of origin hidden behind discussion on religion: *"We are not racist, but there is something wrong with their religion"*:

Direct or indirect discrimination ? (Achbita: C-157/15)

National identity x Constitutional traditions

Constitutional provisions from Member States: "laïcité" (Fr.)

Art. 4(2) TFEU: C-188/15

Margin of appreciation of Member States (ECtHR) ?

German constitutional principles: C-414/16 + C-68/17



FROM POLITICAL DEBATE TO LABOUR LAW

Political debate = legal debate

Belgium, France, The Netherlands, Germany
Many (contradicting) judgements and opinions

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/social policy

Different social traditions and legal systems
How to move social partners ?



II. Fundamental rights



Religion and belief are fundamental rights

Human rights: European heritage = religious conflicts
(Hugo Grotius, Erasmus of Rotterdam)
ECHR: 1950= after WW II - Art. 9 ECHR
International treaties 1960s: Fundamental rights of migrant
workers to observe religious duties (and ILO)
Direct effect ? No !
EU-Law= different: Directive 2000/78
Prohibition of discrimination on the ground of religion
=Art. 21 Charter EU= general principle of EU-law !
Horizontal effect even against national (constitutional) law !
C-414/16 + C-68/17- Germany Religious employers
C-193/17 – Austria- Cresco Investigation



Human rights HR= rights of minorities

Camus: *"La démocratie, ce n'est pas la loi de la majorité, mais
la protection de la minorité"*
It does not concern only muslim migrants
But: other religions and beliefs as well!
Jewish religion (kippah), Sikh (turban),
Even Christians:
Jehova witnesses, fundamentalist christians
ECtHR 15-01-2013: Eweida a.o.
Religious symbols and convictions
ECtHR: Thlimmenos v. Greece (2000)
Military service- sanctions



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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CONVENTION 111 ILO

Discrimination (Employment and Occupation) Convention 25 June 1958

Ratified by all EU-MS

Art. 1: *For the purpose of this Convention the term **discrimination** includes—*

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;



EU-law:

1957: Treaty of Rome: you shall not discriminate !

Women + migrant workers from the Union

Non-discrimination is not a side-effect of EU-law

Not only about "morality" and "FR"

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 x 21



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

2. CFR-EU

Art. 10: 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.



Art. 21.1 CFR-EU

*"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, **religion or belief**, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."*



What is religion ?

Defining the undefined...= difficult

Pitfall: deciding about religious questions

Cf. Veil: religious 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 ?

Belgian Constitutional Court "unionism"

Art. 9: conscience, beliefs // religion

Church of the Flying Spaghetti Monster or Pastafarianism ?

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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 !

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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OVERVIEW

III. Horizontal effect in labour relations



FR of the employer

Good start: recognizing conflicting rights

Fundamental rights of the employer

- 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: *"Freedom to conduct a business The freedom to conduct a business in accordance with Union law and national laws and practices is recognized."*
- Art. 4.2. Dir 2000/78: Religious employers, "Tendenzbetriebe", "Entreprises de tendance", "Identiteitsgebonden ondernemingen",



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**."



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."



ECtHR- Religious employers

- 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 ? Criteria for proportionality test ?



Employment= limitation on personal rights and freedoms:

Labour context= limitations on FR
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
Cases freedom of expression, association, privacy
Human Rights: provide judges leverage to intervene in the employment relationships: finding compromises
Religion= just one of fundamental freedoms
"legitimate religious expectations"
= *legitimate expectations of the private life/opinion*
Balance by defining "genuine occupational requirements"



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)

Why: still formal principle of equality (1^o Aristotelian principle)

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 ! Expressions must be protected also

Forum externum and limits: finding ways to accommodate

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Is religion very different ?

New challenges for Labour Law

Religion//other FR:

- privacy (new technologies),
- freedom of expression (whistle blowers- hate crimes)
- freedom of association (how do we deal with extremism?)
- freedom to strike (freedom of movements, disruptive economy)

Balancing FR "in the light" of evolving societal context is the very essence of LL

See tekst: Art. 4.2. Dir. 2000/78:

Balancing loyalty and fundamental rights of the employee

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Effective ways to solve

- Direct effect: not popular in (continental) labour law
- Indirect effect: interpretation of open norms
 - "in the light of FR"
 - "summary dismissal- misconduct"
 - "unfair dismissal" (Art. 30 CFR-EU)

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

- Difference: very important !?
- New interpretations in case law.



OVERVIEW

IV. Margin of appreciation



Margin of appreciation and identity

Margin of appreciation ?

Member States: historical tradition (national identity)

Limits: fundamental rights
= shrinking autonomy ? Yes

Employers: freedom to conduct business
(freedom of enterprise)

Limits: Employment protection law
and fundamental rights ! Horizontal effect of DL and FR
= shrinking autonomy ? Yes

Social partners: collective bargaining

Limits: EPL, fundamental rights, DL
= shrinking autonomy ? Yes



Member States: National identity and history





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



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Different constitutions

- France: laïcité as a 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

**However: United Nations CCPR-Committee:
against France niqab 17.07.2018**

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

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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)



Is EU Law diverging ?

ECtHR: solving part of the problem by allowing large margin of appreciation to member states

- Case law ECtHR: education !
- Case law ECtHR: religious employers

Conflicting FR= margin of appreciation by MS= also by the employer

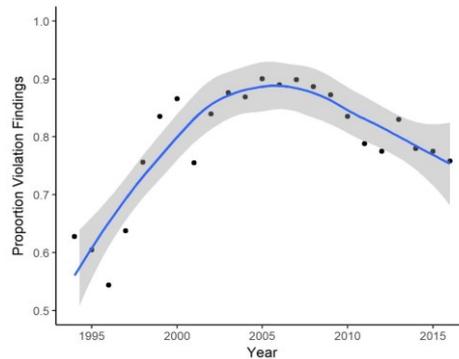
CJEU: different path ?

Headscarf cases: C-157/15 (Belgium) - C-188/15 (France)

Religious employers: C-414/16 + C-68/17 (Germany)



“Backlash and Judicial Restraint: Evidence from the European Court of Human Rights” Ø. Stiansen, E. Voeten, 2018



SOLVING THE DILEMMA REASONABLE ACCOMMODATION ?

New and strange reasoning: Reasonable accommodation for Achbita ! (Opinion C-157/15) = Another job ?

NOT IN DIRECTIVE ! Only for disability !

Reasonable accommodation as general principle for discrimination law ?

Or finetuning of “genuine professional requirement”?

Poor solution ? Religion in the back office ?

But anyway= a limitation to the right of the employer to dismiss



COLLECTIVE BARGAINING ?

Collective bargaining= mirror of society !

Collective bargaining v. discrimination law

1° Problematic: prejudices reproduced

Tense relationship

cf. Achbita-case: work rules

Causes: majority rule, positions of minorities

More than "class struggle"

Attention: first Aristotelian principle: formal equality

2° Part of the solution ?

Yes: full cooperation of all stakeholders is required

second Aristotelian principle: different treatment

reasonable accommodation= procedural

duty to accommodate= duty to negotiate



QUESTIONS FOR DEBATE

I. New religious intolerance and the law

What is the fair balance between productivity and fundamental freedom within employment ?

II. Fundamental rights

How do we balance conflicting FR within employment relations.

III. Horizontal effect in labour relations:

No escape possible: duty to "accommodate"

IV. How do we define and limit in EU-law the margin of appreciation of employers x MS ?

Or should we focus on g.o.r. ?

