

Discrimination on grounds of religion at the workplace in Europe

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Freedom of religion

- Long civilization process
- Resistance of the Churches
- ECtHR + CJEU + BVerfG: Religion is widely understood.
 - Faith as such (forum internum),
 - Exercising this religion and professing it, also in public space (forum externum).
 - BVerfG: "This includes the right of the individual to align his entire conduct with the teachings of his faith and to act according to this conviction, i.e. to live in a faith-led manner. (BVerfG 27.6.2017 - 2 BvR 1333/17).
 - Collective freedom of faith.

Churches in Europe

No uniform model:

- State churches: Denmark, England, Greece
- Laicism: France
- Mixed model: Germany (religious neutrality, but church tax, financing, public corporation).

Status of the Churches

- Art. 17 TFEU secures the core area of the existing structure between state and church. The essential elements of the institutional constitution of the churches are protected.
- Art. 17 TFEU contains no exception for the churches. Exceptions are clearly stated in the TFEU, e.g. Art. 45 IV (employees in public administration), Art. 153 V TFEU (remuneration, right of association).
- Art. 17 TFEU does not require a restriction of Art. 4 Directive 2000/78 (ECJ 17.4.2018, C-414/16 (*Egenberger*); ECJ 11.9.2019, C-68/17 (*IR v JQ*)). The interests of the churches are taken into account by Art. 4 of Directive 2000/78.

Right of churches to self-determination

- Art. 137 WRV: no state paternalism and supervision. Self-organisation and self-determination - but no "right to self-determination" (but so BVerfG 17.2.1965 - 1 BvR 732/64).
- ECtHR recognizes a right of self-determination (since ECtHR 26.10.2000, Nr. 30985/96 (*Hasan and Chaush*)).
- A balancing program has been implemented. Accordingly, it depends on whether the exercise of the right of self-determination is pursued in direct pursuit of religious purposes or is to be assigned to the wider area of the exercise of religious freedom.
- The right of the religious communities to self-determination can be restricted by means of a comprehensive consideration of all fundamental and human rights concerned.

Churches as employers using Germany as an example

- Approximately 1.3 million people work for Caritas and Diakonie, as well as for charities assigned to the two major Christian churches. Second largest employer.
- In many areas the churches have a monopoly, such as hospitals, retirement homes, social services and kindergartens. Employees are therefore often unable to choose between an ecclesiastical and a non-ecclesiastical employer.

Conflict Collective freedom of religion ↔ Protection against discrimination

- Area exception for churches?
- Interpretation of Article 4 of Directive 2000/78 or Paragraph 9 of the AGG in conformity with primary law (Article 17 TFEU)?
- Do churches decide autonomously which requirements are essential?
- Plausibility or legal control?

Equal Treatment Directive (1)

- Art. 4 para. 2 of Directive 2000/78 requires a reference to the type of activity, while § 9 para. 1 AGG permits as an alternative to the reference to the activity a justification based solely on the self-understanding of the religious community ("or").
- § Paragraph 9 (1) of the AGG deviates from this wording by stating that unequal treatment is (already) permissible "if a particular religion, taking into account the self-image of the respective religious community with regard to its right of self-determination or the nature of its activity, constitutes a justified occupational requirement " - the reference to a right of self-determination of the churches and their institutions is, however, only to be found there, but not in the wording of Directive 2000/78.

Equal Treatment Directive (2)

- For § 9 AGG it is sufficient that the institution makes the common practice of a religion or belief its task. Furthermore, Art. 4 para. 2 of the Directive requires that the ethos of the institution be based on religious principles or ideologies.
- Art. 4 para. 1 of Directive 2000/78 refers to a "certain" professional activity. § Section 9 AGG does not reflect this restriction in either paragraph 1 or paragraph 2.
- § Section 9 (1) AGG omits the provision of the Directive according to which it must be a lawful occupational requirement.
- § 9 (1) AGG, it is sufficient that it is merely a "justified occupational requirement". Art. 4 para. 2 of Directive 2000/78 presupposes that religion constitutes "genuine, legitimate and justified occupational requirement".

Consequences

- § 9 Para. 1 1st alt. AGG is not applicable.
- § Section 9 (1) AGG is to be interpreted in conformity with European law ("material in relation to the activity").

Special features of labour law - Catholic Church

"Basic order of the church service in the context of church employment relationships"
of 27.4.2015: Principle of proportionality, examination of individual cases, Ultima-Ratio-Principle, distinction between activities close to the proclamation and activities distant from the proclamation, gradation of the duties of loyalty.

- Reasons for dismissal for all employees: Public support for views that violate fundamental principles of the Catholic Church (e.g. abortion, xenophobia), serious moral misconduct, denigration or mockery of the Catholic faith.
- Reasons for dismissal for Catholic employees: leaving the church, civil marriage, registered civil partnership, renewed civil marriage after a civil divorce.

Special features of labour law - Protestant Church

For the establishment of employment relationships in principle church membership. This applies without restriction to employees to whom tasks of proclamation, pastoral care and possible education have been delegated. If it is justifiable according to the nature of the task, taking into account the size of the office or institution and its other staff, as well as the respective environment, and compatible with the fulfilment of the church's mission, persons who do not belong to a Christian church may also be employed for tasks below the level of office management (Richtlinie des Rates der EKD über die Anforderungen der privatrechtlichen beruflichen Mitarbeit in der EKD und des Diakonischen Werkes der EKD vom 9.12.2016).

ECtHR (1)

Various balancing criteria. Nature of the activity. The criteria were

- the type of post to be occupied (ECHR 12.6.2014 - 56030/07 (*Fernández Martínez*); ECHR 23.9.2010 - 425/03 (*Obst*); ECHR 23.9.2010 - 1620/03 (*Schüth*)),
- the credibility of the respective church in the public (ECHR 3.2.2011 - 18136/02 (*Siebenhaar*); ECHR 23.9.2010 - 425/03 (*Obst*)), for example the interest of a Catholic university that the teaching there is shaped by the Catholic faith (ECHR 20.10.2009 - 39128/05 (*Lombardi Vallauri*)).
- It was also necessary to weigh up the competing rights and interests involved (EGMR 23.9.2010 - 1620/03 (*Schüth*)).

ECtHR (2)

- A mere assertion of a violation of church autonomy is not enough. A real and substantial danger must be proven (ECHR 9.7.2013 - 2330/09 (*Sindicatul "Pastoral Cel Bun*)).
- No priority of church autonomy in the context of balancing of interests (ECHR 23.9.10 - 425/03 (*fruit*); ECHR 23.9.10 - 1620/03 (*Schüth*); ECHR 12.6.2014 - 56030/07 (*Fernández Martínez*)).
- The principle of proportionality is violated if more weight is attached to the goal of a uniform dress code than to the wish of a worker to confess her faith by wearing a discreet cross (ECHR 15.1.2013 - 48420/10 (*Eweida*)).

ECJ 17.4.2018, C-414/16 (*Egenberger*)

- Religion, according to the nature of the activity or the circumstances in which it is exercised, must be a genuine, legitimate and justified occupational requirement in the light of the ethos of the Church.
- The requirement must be necessary and objectively necessary having regard to the ethos of the nature of the professional activity in question or the circumstances in which it is carried out. It shall not include irrelevant considerations unrelated to this ethos or to the right of this church or organization to autonomy.
- The requirement must be proportionate.
- Effective judicial control. Legal control, not just plausibility control.

BAG 25.10.2018 - 8 AZR 501/14

§ 9 paragraph 1 Alt. 1 AGG is not in accordance with the legal requirements of Directive 2000/78/EC and must remain unapplied.

§ 9 paragraph 1 Alt. 2 AGG is to be interpreted in conformity with Union law as meaning that a difference in treatment on grounds of religion is permissible if a particular religion, taking into account the self-image of the respective religious community, constitutes an genuine, legitimate and justified occupational requirement according to the nature of the activities or the circumstances in which they are carried out.

Loyalty ECJ 11.9.2018, C-68/17 (IR ./. JQ; *Chefarzt*)

- In accordance with article 4(2)2 of directive 2000/78 an organisation which bases its ethos on religious principles may not decide to apply different requirements on its senior management staff depending on their denomination or lack of denomination as regards the local and genuine conduct in the sense of this ethos, without effective legal controls on such a decision in some circumstances..
- A requirement for loyal and honest conduct in line with the ethos justifies unequal treatment between senior managerial staff on the basis of their faith or lack of one only if, considering the nature of the professional activity at issue or the circumstances in which it is exercised, religion is a significant, legitimate and justified factor in accordance with the proportionality principle,
- That is for the national court to determine.

Loyalty BAG 20.2.2019, 2 AZR 746/14 (*Chefarzt*)

- A Catholic hospital may only treat its senior managerial staff differently on the basis of their religious affiliation as regards the requirement for loyal and honest conduct in line with Catholic self-conception if this represents a significant, legitimate and justified professional requirement with regard to the nature of the relevant professional activity or the circumstances in which it is exercised.
- By remarrying, the employee breached neither an effectively agreed requirement for loyalty nor a justifiable expectation of loyalty on the part of the respondent. The agreement in the employment contract between the parties is invalid under section 7(2) of the AGG, insofar as it states that being married outside the requirements of the church is deemed a serious breach of loyalty. For the obligation of loyalty to prohibit the celebration of a marriage which is invalid under the interpretation of faith and the rules of the Catholic Church is not a significant, legitimate and justified professional requirement given the nature of the complainant's activity and the circumstances in which it is exercised.

Headscarf ECJ 14.3.2017, C-188/15 (*Bougnaoui*)

- A business practice whereby a female employee may not wear an Islamic headscarf while in contact with customers constitutes illegal direct discrimination. Customer preferences are not a "significant and decisive" requirement which is reasonably proportionate to the legitimate objective pursued. Potential financial disadvantages are not a justification.
- Religion can only be a professional requirement which justifies direct discrimination "under very limited circumstances". This narrow interpretation recognises only requirements which are objectively dictated by the profession. The subjective desire of the employer to meet particular customer wishes for a ban on headscarves do not serve as a significant and decisive professional requirement.

Headscarf ECJ 14.3.2017, C-157/15 (*Achbita*)

- An internal company requirement to wear neutral clothing is not direct discrimination, since all employees are generally and indistinguishably affected by it.
- The employer's desire to express to clients a policy of political, philosophical or religious neutrality is a legitimate aim in the sense of the directive and falls in principle under the freedom to conduct a business recognised by Article 16 of the Charter of Fundamental Rights. The policy of neutrality must be consistently and systematically followed.

Indirect discrimination?

- Indirect discrimination may be justified by any legitimate aim.
- Direct discrimination can only be justified under article 4(1) of directive 2000/78.
- The approach taken by the CJEU in a ruling such as that in *Achbita* is inappropriate.
- Workplace rules which expressly prohibit the wearing of clothing which demonstrates faith impose a direct disadvantage.
- A headscarf ban does not become indirect discrimination because kippas and turbans are also banned.

Consequence for Germany

The ECJ sets minimum standards under Union law. Its specifications must not be undercut. The level of protection against discrimination in Germany may be higher (§ 8 (1) Directive 2000/78). The liberal dimension of Article 4 GG continues to apply (BAG 30.1.2019 - 10 AZR 299/18 (A) recitals 89 - 95; *Neugebauer/Sura*, RdA 2018, 355; *Klein*, NVwZ 2017, 920; *Preis/Morgenbrodt*, Zesar 2017, 309; *Sandhu*, KJ 2017, 517; *Sandhu*, ZESAR 2019, 175 in detail).

New draft rulings

- ArbG Hamburg 21.11.2018 - 8 Ca 123/18 = ECJ C-804/18
- BAG 30.1.2019 - 10 AZR 299/18 (A)
 - Comprehensive ban necessary or ban limited to certain forms of expression sufficient?
 - Adequacy - the rule or its application?
 - Priority Art. 16 GrCh over freedom of religion?

Horizontal effect - ECtHR

- Freedom rights of the ECHR establish obligation of the state to secure these rights also in the relationship between private individuals.
- ECtHR examines whether state regulations meet these mandatory protection requirements

(ECHR 13.6.1979, No 6833/74 (*Marckx*); ECHR 23.9.2010, No 1620/03 (*Schüth*); ECHR 21.7.2011, No 28274/08 (*Heinisch*).

Horizontal effect - EuGH

- The prohibition of discrimination in Art. 21 (1) GRCh is a general principle of Union law.
- Art. 21 para. 1 GRCh is a yardstick for monitoring the legality of national law (ECJ 17.4.2018, C-414/16).
- Art. 21 GRCh unfolds its effect without further Union law or national concretization and can be made a subjective right of the individual in national proceedings (ECJ 17.4.2018, C-414/16 (*Egenberger*); ECJ 11.9.2019, C-68/17 (IR ./. JQ; *chief physician*)).
- The 17 prohibitions of discrimination in Art. 21 GRCh have the same effect as the fundamental freedoms within the scope of application of Union law.

Priority EU law - conflict ECJ/BVerfG (1)

- BVerfG: Labour courts may not replace the values of churches by their own; merely test their plausibility (BVerfG 22.10.2014, 2 BvR 661/12).

Priority EU law - conflict ECJ/BVerfG (2)

ECJ: primacy of application of EU law even if a provision of national law precludes this (ECJ 15.7.1964, C-6/64 (*Costa/ENEL*)). Also vis-à-vis the constitutional law of the member states (ECJ 17.12.1970, C-11/70 (*International Trading Company*)).

Where standards of protection of fundamental rights exist in a Member State which affect the "primacy, unity and effectiveness of Union law" in the territory of that State, they shall not apply. Art. 137 WRV and § 9 para. 1 AGG are to be interpreted in conformity with Union law wherever possible.

Priority EU law - conflict ECJ/BVerfG (3)

ECJ: According to Article 4(2) of Directive 2000/78, legislation which reflects national practices existing at the time of adoption of Directive 2000/78 may be maintained. This includes both Art. 137 WRV and § 9 para. 1 AGG.

This does not freeze the BVerfG's case-law on the interpretation of those provisions at the time of adoption of Directive 2000/78. This would not be compatible with the wording of Article 4(2), which is limited to legal provisions, nor with the obligation of the courts of the Member States to amend, where appropriate, established case-law if it is based on an interpretation of national law which is incompatible with the objectives of the directive (ECJ 17.4.2018, C-414/16 (*Egenberger*) and Opinion GA *Tanchev*).

9. Conclusion

- If the churches make use of private autonomy to establish employment relationships, state labour law shall apply.
- The churches set their own ethos. In enforcing this ethos within the scope of the national legal order, they are subject to the limits of national law. So the churches may not be able to fully enforce their own ethos. The prohibitions of discrimination also apply to them.

Thank you very much for your attention!

