DISCRIMINATIONS RELIGIEUSES SUR LE LIEU DE TRAVAIL

RELIGIOUS DISCRIMINATION IN THE WORKPLACE

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This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

A word of introduction…

- An avoidable collision
- Contract vs freedom
- Freedom vs contract
- The return of God
- The secular temptation in France

Baby Loup case (France) Supreme Court, Social Law Chamber, 19 March 2013 (extract)

- In coming to this decision, while having noted that the Baby Loup organisation's internal regulations establish that "the principle of freedom of conscience and religion of all members of staff shall not prevent the observance of the principles of secularism and neutrality that apply in the exercise of activities developed by Baby Loup, either on the premises of the crèche or its annexes or when accompanying children enrolled in the crèche on outside activities," from which it can be determined that the clause in the internal regulations, which imposed a general and imprecise restriction, did not meet the requirements of article L. 1321-3 of the Labour Code and that the **dismissal, made on discriminatory grounds**, was invalid, without it being necessary to examine other grievances referred to in the letter of dismissal, the Court of Appeal, which did not draw legal consequences from its observations, violated the aforementioned texts;

Baby Loup case (continued) Plenary Assembly 25 June 2014

- But given that it is due to the combination of articles L. 1121 1 and L. 1321 3 of the Labour Code that the restrictions on employees' freedom to display their religious beliefs must be justified by the nature of the task to be undertaken and proportionate to the intended goal;
- Given that, having noted that the Baby Loup organisation's internal regulations, as amended in 2003, established that "the principle of freedom of conscience and religion of all members of staff shall not prevent the observance of the principles of secularism and neutrality that apply in the exercise of activities developed by Baby Loup, either on the premises of the crèche or its annexes or when accompanying children enrolled in the crèche on outside activities", the Court of Appeal was able to conclude, while explicitly recognising the operating conditions of a small organisation, employing only employees who were or could be in direct contact with children and their parents, that the restriction of the freedom to display one's religion imposed by the internal regulations was not general in nature, but was sufficiently precise, justified by the nature of the tasks carried out by employees of the organisation and proportionate to the aim pursued;
- And given that the reasons for describing the Baby Loup organisation as a company promoting an ethos (according to the French doctrinal conception) are erroneous but numerous, as this organisation intended not to promote and defend religious, political or philosophical beliefs, but, according to its regulations, "to develop activities aimed at young children from disadvantaged backgrounds and to work for the social and professional integration of women (...) whatever their political or religious opinions";

Luxembourg-Strasbourg: a return journey

Article 52 of the Charter of Fundamental Rights

Scope and interpretation of rights and principles

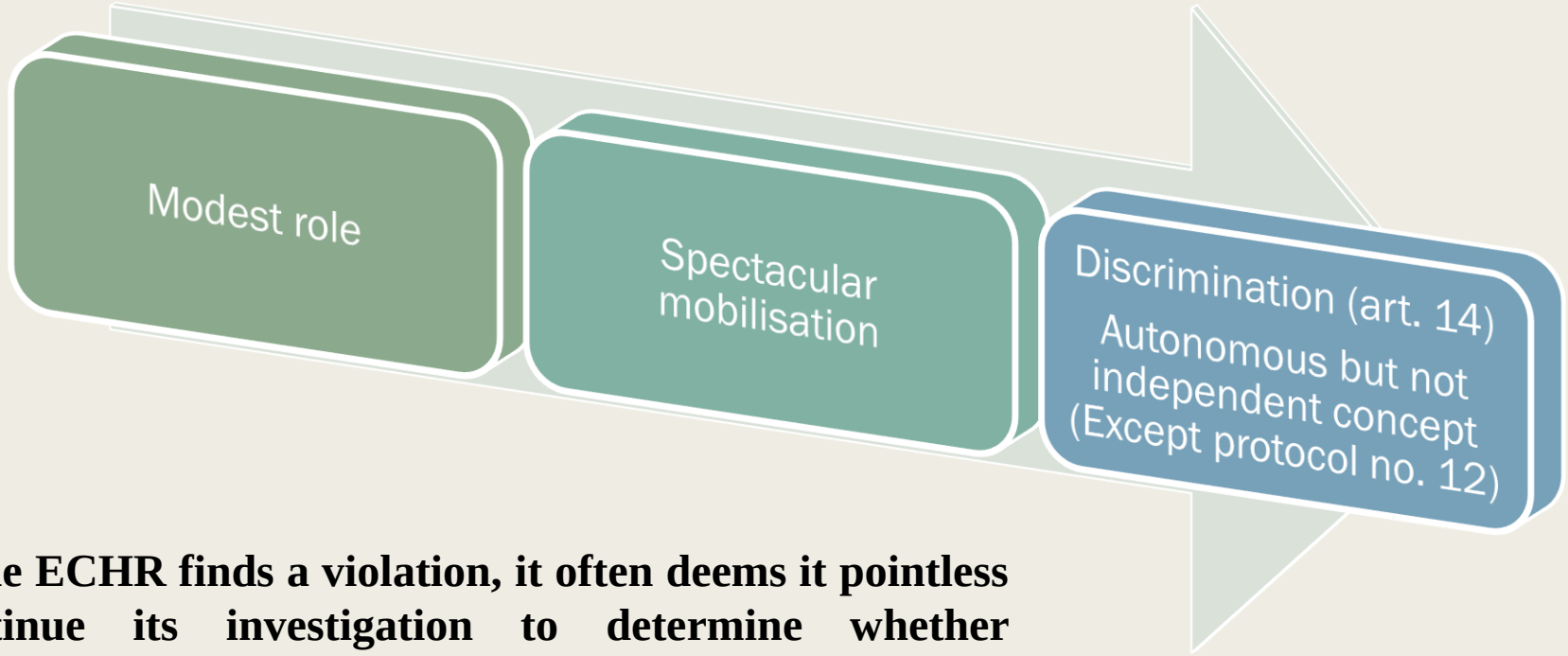
1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

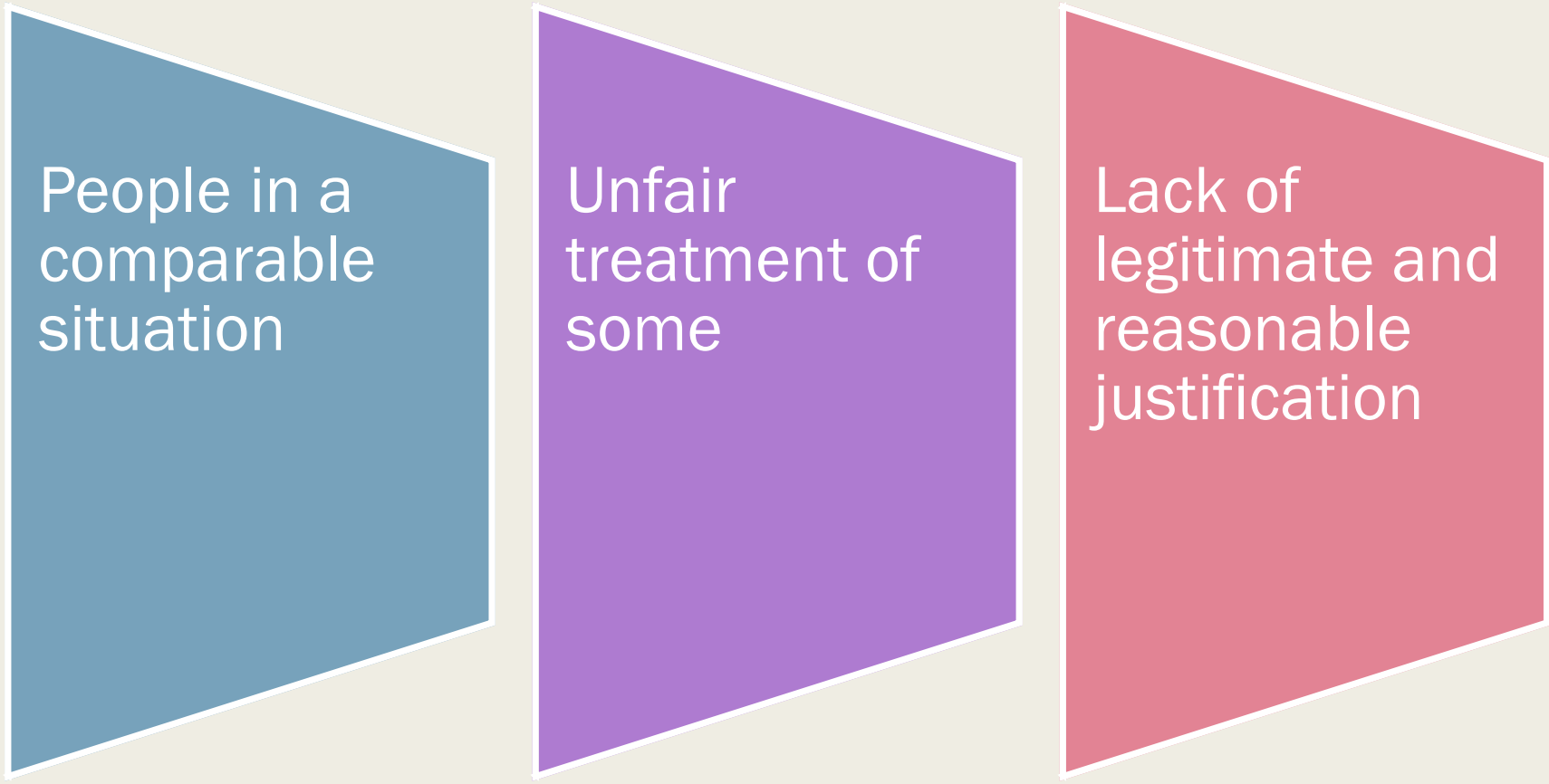
Discrimination in Strasbourg

Art. 9 and 14 have a horizontal direct effect



When the ECHR finds a violation, it often deems it pointless to continue its investigation to determine whether discrimination was also involved (except where clearly unequal treatment in the exercise of the right is fundamental to the case).

Discrimination in Strasbourg



- The ECHR "does not consider it its responsibility to deal with the issue, as the positions and interests mentioned are also be considered to decide whether the difference in treatment was justifiable. It will work on the assumption that this was about people placed in similar situations" (ECHR, Rasmussen v. Denmark, 28 Nov. 1984).

Indirect discrimination in Strasbourg

- In the Grand Chamber's ruling in D.H. and others v. Czech Republic on 13 November 2007, the Court fully recognised the concept of indirect discrimination, with an explicit basis in European Union law. *This case was based on the allegation made by eighteen Roma children that they had been placed in special schools, designed for children with mental disabilities, due to discrimination based on their ethnicity.*

- *A difference in treatment can include "the disproportionate harm caused by a policy or measure which is worded neutrally but has a discriminatory effect on a particular group" (ECHR, 13 Nov. 2007, D.H. v. Czech Republic). This disproportional impact can be demonstrated through statistics provided they are reliable and significant9*

Reasonable accommodation in Strasbourg

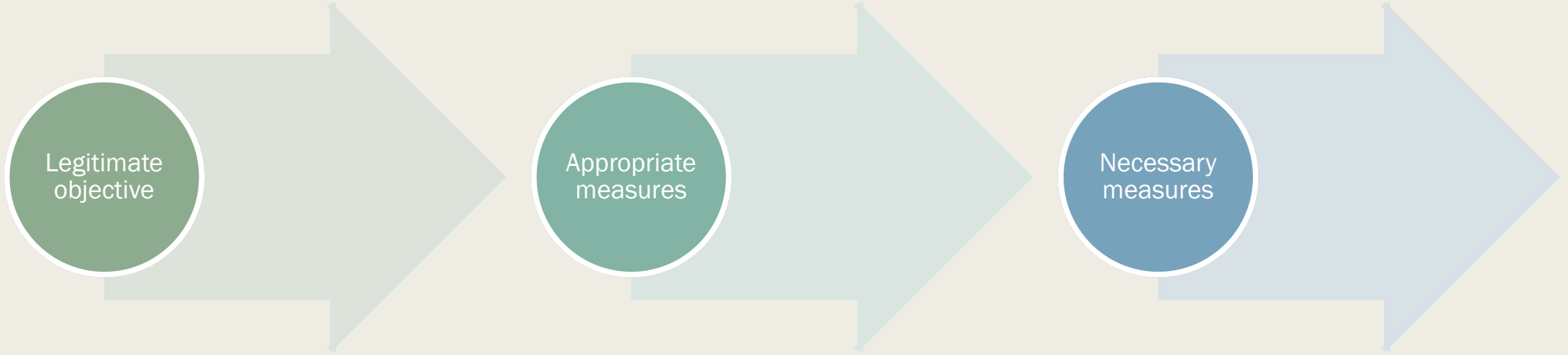
- Unlike other convictions, "a conviction for refusing on religious or philosophical grounds to wear a uniform could not imply any dishonesty or moral turpitude likely to undermine the applicant's ability to exercise this profession. " Also, by adopting this law "without introducing appropriate exceptions" to prevent people in the applicant's circumstances from being excluded from the profession of chartered accountant, the state violated article 14 and article 9 of the Convention (Thilmmenos case, cited above).
- Çam case v. Turkey, 23 Feb. 2016: "Discrimination on grounds of disability also extends to the refusal to make reasonable accommodation," defined in the United Nations Convention on the Rights of Persons with Disabilities114, as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (art. 2).
- The United Nations Convention on the Rights of Persons with Disabilities, which defines reasonable accommodation as "the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (art. 2).

Reasonable accommodation and religion

- Given their positive obligations based on article 9 of the Convention, national authorities are required to adapt meals to prisoners when they make this request on religious grounds, provided that this accommodation does not interrupt the proper administration of the prison or reduce the quality of the food provided to other prisoners (ECHR, 7 Dec., 2010, Jacobski v. Poland).

- Comp. Sessa case v. Italy (3 April 2012): The legal authority's refusal to accommodate a Jewish lawyer’s request to adjourn a hearing set for a date which coincided with a Jewish festival: the court stated it was not convinced that this attitude can be considered a restriction of the right to freedom of religion.
- A case relating to a request for Muslim pupils to be exempted from school swimming lessons, heard by the German Constitutional Court and the European Court of Human Rights (ECHR) serves as an example. Both courts decided that, provided that the school authorities permitted the students to wear covering swimming costumes (burkinis) during swimming lessons, the refusal to exempt them from mixed swimming lessons, which are compulsory and fully integrated into school curriculum, would not constitute a disproportionate attack on religious freedom (BVerfG, 8 Nov. 2016, no. 1 BvR 3237/13; ECHR 10 Jan. 2017, no. 29086/12, D. 2017. 111, and comm.).

Discrimination in Strasbourg



Religion in Strasbourg: an open concept…

- Eweida case, 15 January 2013: from the perspective of religious freedom (art. 9, ECHR)

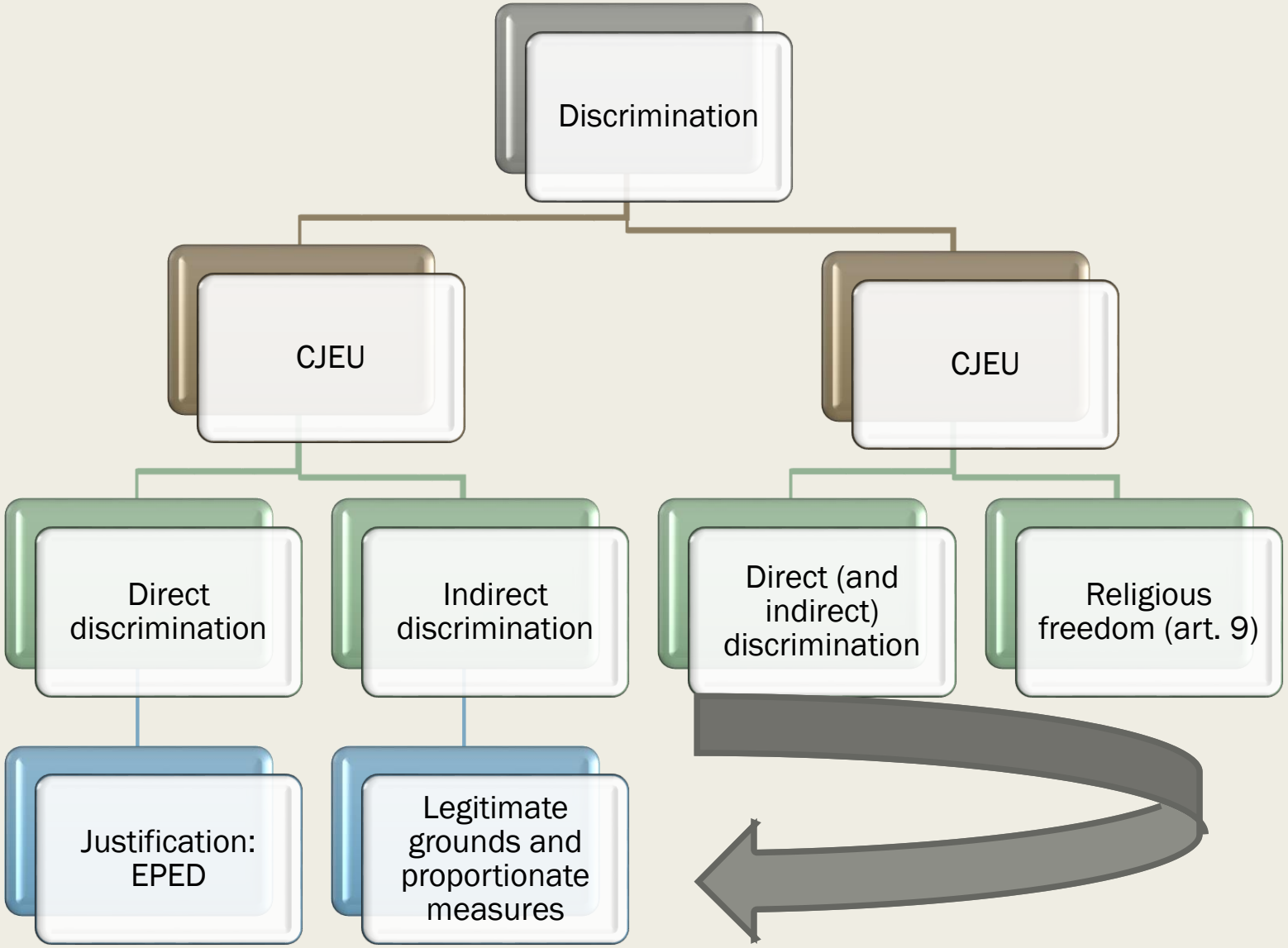
- The existence or lack of a "European consensus" on this issue also has an impact on the margin of appreciation left to the state (ECHR, 27 March 1998, Petrovic v. Austria: parental leave for fathers). The court regularly notes that "*the convention is a living instrument, which must be interpreted in the light of present-day conditions*".
- ECHR 30 June 2009, Aktas, Ghazal, Singh and others v. France Conspicuous religious symbols in educational institutions (French law of 15 March 2004)
- Leyla Sahin case v. Turkey: ban on wearing the veil at university: where questions concerning the relationship between State and religions are at stake, questions on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance (see, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek*, cited above, § 84, and *Wingrove v. United Kingdom*, judgement on 25 November 1996, *Recueil* 1996-V, pp. 1957-1958, § 58). This is particularly the case with respect to rules about wearing religious symbols in educational institutions, especially, as the legal extract for comparison shows (paragraphs 55-65 cited above), given the variation in national approaches to this issue. Indeed, it is not possible to identify a uniform Europe-wide understanding of the meaning of religion in society (*Otto-Preminger-Institut v. Austria*, decision on 20 September 1994, série A no.295-A, p. 19, § 50) and the meaning or impact of acts equivalent to the public expression of religious beliefs varies in different periods and contexts (see, for example, *Dahlab v. Switzerland* (Dec.) no.42393/98, ECHR 2001-V). Regulations on this issue can therefore vary from one country to another according to national traditions and the requirements imposed by the protection of others' rights and freedoms and law enforcement (see, *mutatis mutandis*, *Wingrove*, cited above, p. 1957, § 57). Consequently, choices as to the scope and form of such regulations must, necessarily, be left to a certain extent to the State concerned, as it depends on the national context in question (see, *mutatis mutandis*, *Gorzelik and others*, cited above, § 67, and *Murphy v. Ireland*, no.44179/98, § 73, ECHR 2003-IX).

- SAS v. France on 1 July 2014 and Dakir v. Belgium on 11 July 2017: ban on concealment of the face in public spaces (importance of the concept of 'vivre-ensemble' - living together in harmony)

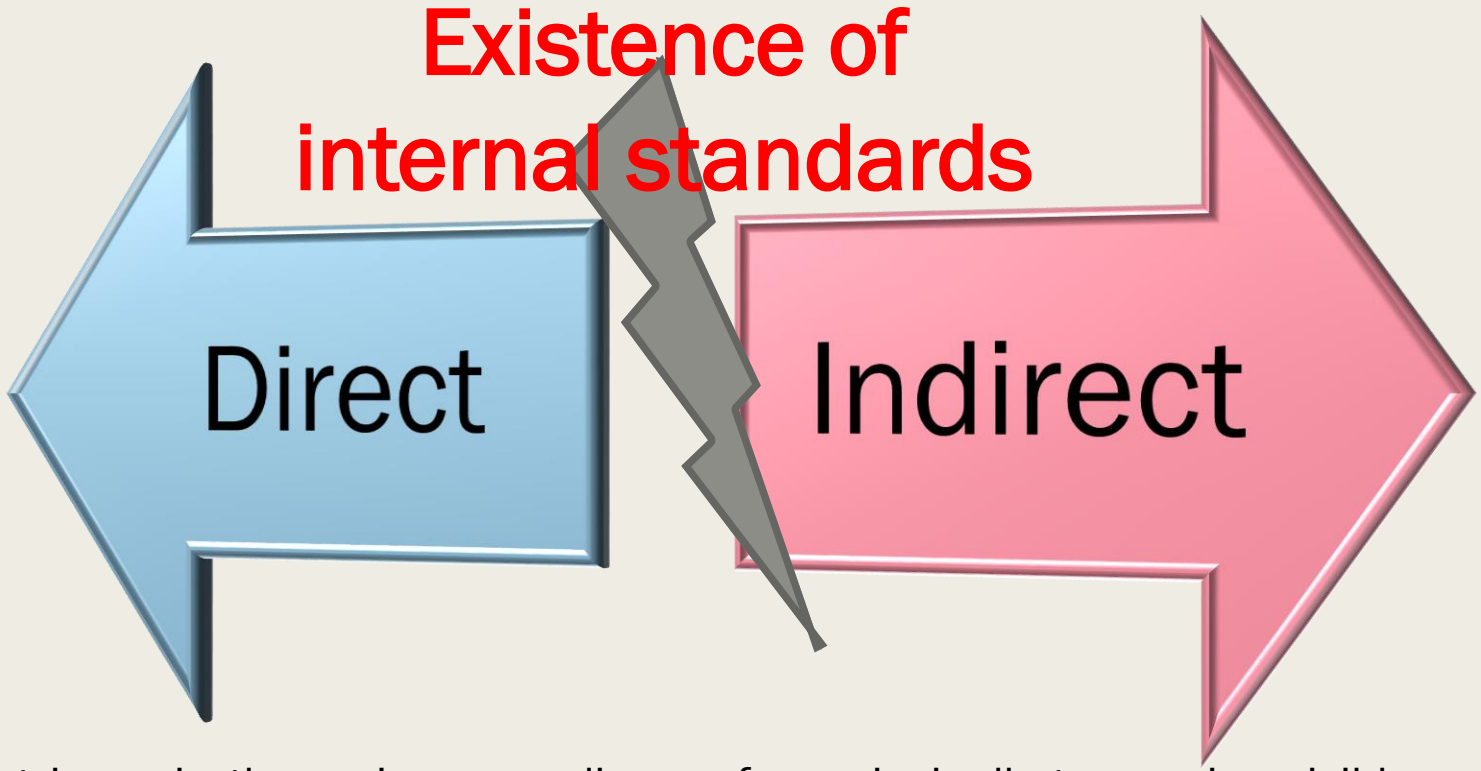
Religion (concept)

- Given that the ECHR and, consequently, the Charter offer a broad definition of the concept of "religion", as they include an individual's freedom to display their religion within the concept, it should be taken into account that the Union legislator intended to maintain the same approach when adopting Directive 2000/78, so it is appropriate to interpret the concept of "religion" listed in article 1 of this Directive as covering both the forum internum, that is the fact of having beliefs, and the forum externum, that is public display of religious faith (CJEU, 14 March 2017, G4S Secure Solution NV, paragraph 28).

Direct or indirect discrimination



Direct or indirect discrimination



The internal rule at issue in the main proceedings refers principally to wearing visible symbols of political, philosophical or religious beliefs and therefore targets all displays of such beliefs equally. It must therefore be considered that this rule treats all employees of the company in the same way, by imposing, in general and equal way, a neutral uniform with no displays of such symbols.

In this respect, the documents available to the court do not show that application of the internal regulations at issue in the main proceedings to Mrs Achbita was different to the application of this rule to any other employee.

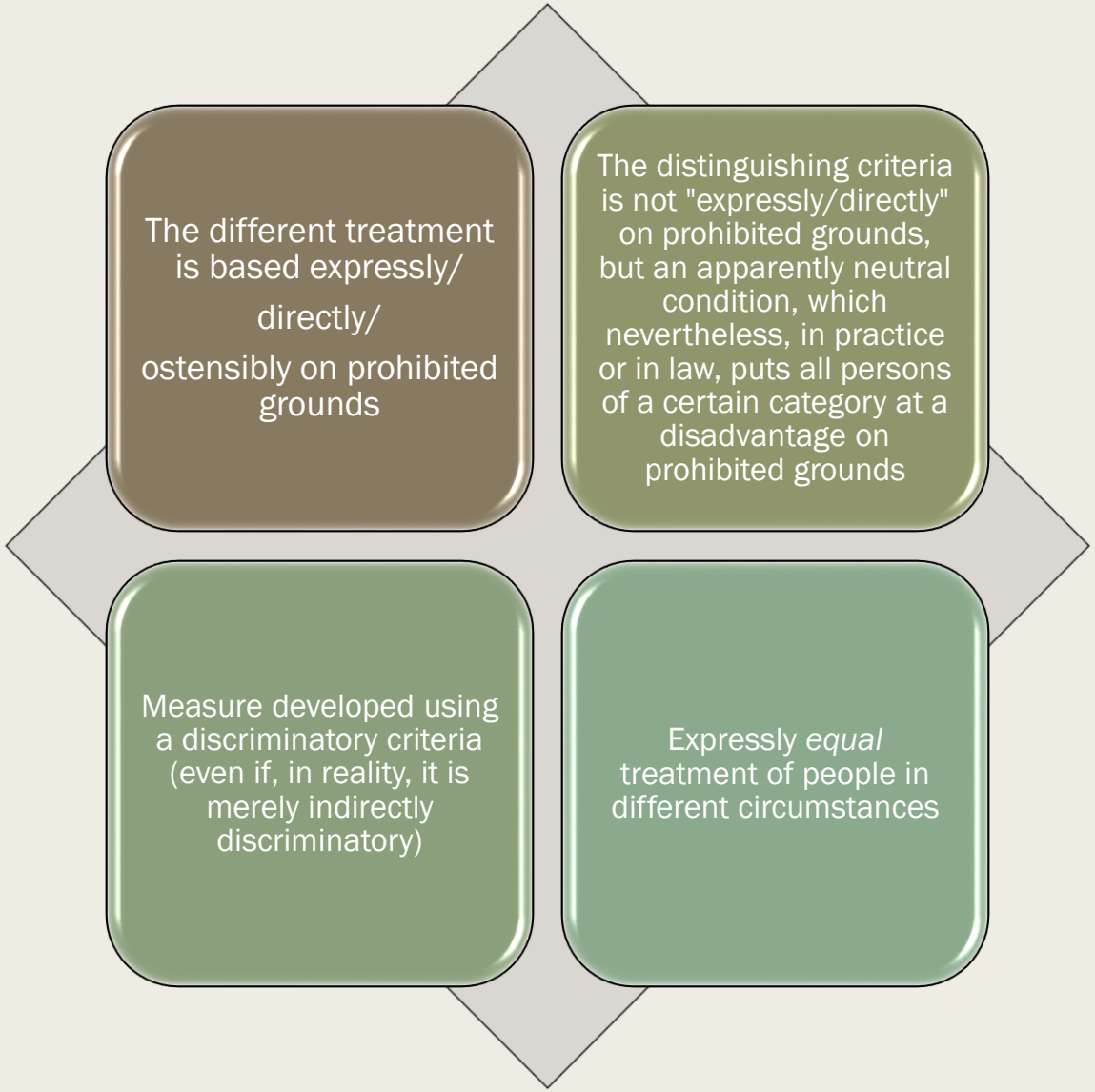
Thus, it can be concluded that internal regulations such as those in question cannot be considered a difference in treatment directly based on religion or beliefs, in the sense of article 2, paragraph 2, under a), of Directive 2000/78 (CJEU, 14 March 2017, G4S Secure Solutions case)

Internal standards... which internal standards?

In the Prigge decision (CJEC, 13 Sep. 2011), cited in support of this interpretation, a collective company agreement allowed for the possibility of taking into account certain occupational requirements deemed genuine and determining. In this decision, the court explained that "member states may authorise, through rules to that effect, the social partners to adopt measures within the meaning of article 2, paragraph 5, in the areas referred to in that provision that fall within collective agreements on the condition that those rules of authorisation are sufficiently precise so as to ensure that the measures fulfil the requirements set out in article 2, paragraph 5" note at the bottom of the page (34). This wording, cautious to say the least, does not allow with absolute certainty for a single company standard with, moreover, uncertain legal value, to be included in its definition. However it is true that the Directive does not indicate that reference to genuine and determining occupational requirements must be enshrined in law, whereas, for measures necessary "for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others", it expressly indicates that these must be "laid down by national law" (S. Robin-Olivier, RTD Eur. 2017, p. 229).

Direct discrimination

(Denis Martin, Droit social 2018)



Narrow definition of the concept of discrimination
Conclusions from Advocate General Kokott

A narrower definition of direct discrimination is required where we are not concerned with "physical characteristics that are inseparable from the individual or characteristics linked to the person” such as sex, age or sexual orientation. Behaviour based on a subjective decision or belief, such as wearing or not wearing headwear, should not benefit from the same protection.

Genuine and determining occupational requirement (Art. 4 Dir. 2000/78)

37 It should be remembered that the court has frequently judged that, according to article 4, paragraph 1, of Directive 2000/78, it a characteristic related to the grounds on which a difference of treatment is based, rather than the grounds themselves that constitute a genuine and determining occupational requirement (see judgements 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 of15 November 2016, Salaberria Sorondo, C-258/15, EU:C:2016:873, paragraph 33).

38 It should also be noted that, according to article 23 of Directive 2000/78, it is only in very limited conditions that a characteristic related, notably, to religion can constitute a genuine and determining occupational requirement.

Genuine and determining occupational requirement (Art. 4 Dir. 2000/78)

39 It is also important to highlight that, according to the very wording of article 4, paragraph 1, of Directive 2000/78, the characteristic in question can only constitute such a requirement "by reason of the nature of the particular occupational activities or the context in which they are carried out".

40 **These different indications show that the notion of "genuine and determining occupational requirement", in the sense of this article, refers to an objective requirement determined by the nature or context of the occupational activity in question. On the contrary, it cannot include subjective considerations, such as the willingness of the employer to take into account the individual wishes of the customer.**

The Court of Justice, CJEU Feryn, 10 July 2008: had already determined that public statements made by an employer indicating that he would not recruit employees with from certain ethnic or racial origins was a form of direct discrimination.

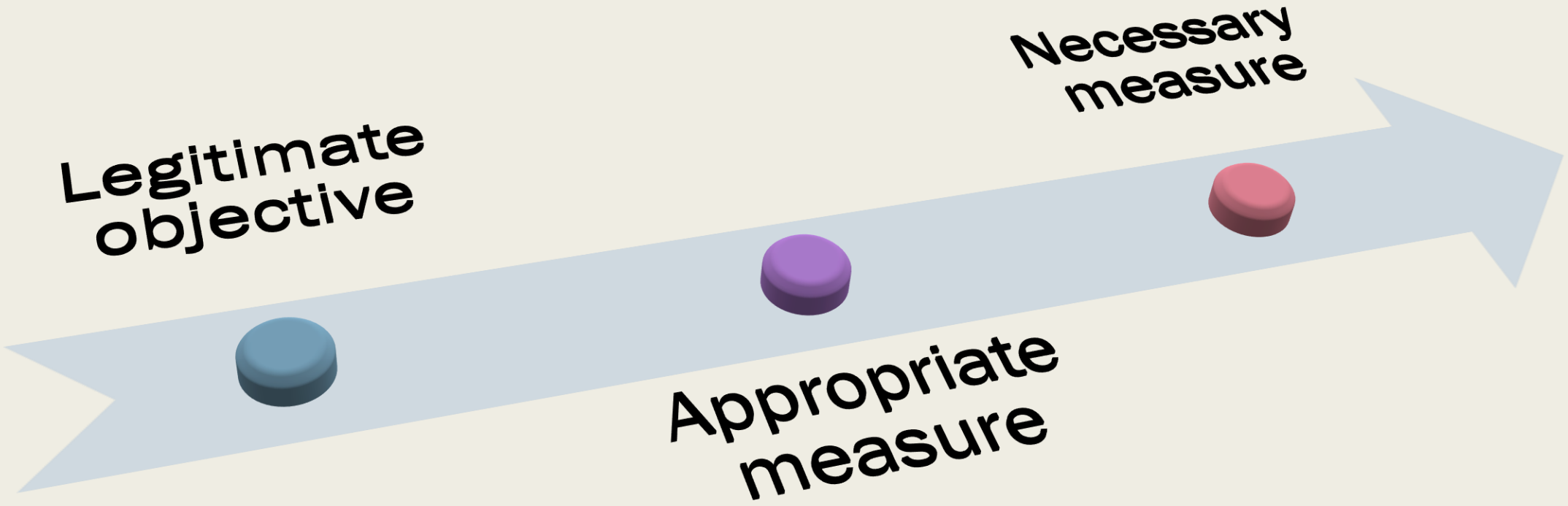
Supreme Court, Social Law Chamber, 22 Nov. 2017 (France)

In coming to this decision, while having noted that no clause of neutrality banning employees from wearing visible political, philosophical or religious symbols in the workplace was included in the company's internal regulations or in a memorandum subject to the same provisions as the internal regulations through the application of article L. 1321-5 of the Labour code and that the ban on the employee from wearing an Islamic scarf when in contact with customers was based solely on a verbal command issued to an employee and targeting a specific religious symbol, which indicated the existence of direct discrimination based on religious beliefs, and while the Court of Justice's decision in response to the question of harm caused established that the employer's willingness to take into account a customer's desire to no longer receive the employer's services from an employee wearing an Islamic scarf cannot constitute a genuine and determining occupational requirement in the sense of article 4, paragraph 1, of the Directive of 27 November 2000, the Court of Appeal failed to appreciate the scope of the texts cited above;

Indirect discrimination

"It is not inconceivable that the referring court might conclude that the internal rule introduces a difference of treatment that is indirectly based on religion or belief [...] if it is established, which is for the referring court to ascertain, that the apparently neutral obligation it encompasses results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage" » (CJEU, 14 March 2017, cited above, paragraph 34).

Justifications: steps



Justification (Step no.1): legitimate grounds

Belgian case, CJEU, 14 March 2017: As regards, in the first place, the condition relating to the existence of a legitimate goal, 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.

Indeed, 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.

Justification (Step no.2): appropriateness of the measure

Belgian case, CJEU, 14 March 2017: 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 the policy is genuinely pursued in a consistent and systematic manner (see, to that effect, judgements 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).

In this regard, it was the referring court's responsibility to confirm whether G4S had established, before Mrs Achbita's dismissal, a general and equal ban on the wearing of visible signs of political, philosophical or religious beliefs for members of staff in contact with their customers.

Justification (Step no.3): necessity of the measure

Belgian case, CJEU, 14 March 2017: As regards, in 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.

Employees who are in contact with customers or employees during their contact with customers?

Reasonable accommodation: step no. 4?

Belgian case, CJEU, 14 March 2017: 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. It is for the referring court, having regard to all the material in the file, to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary.

Supreme Court, Social Law Chamber, 22 Nov. 2017 (France)

Given that it has been determined that the employer, in the goal of upholding the fundamental freedoms and rights of each employee in the work community, may include within the company's internal regulations or in memorandums subject to the same provisions as the internal regulations, through application of article L. 1321-5 of the Labour Code, a neutrality clause banning the wearing of visible political, philosophical or religious signs in the workplace, provided that this general and undifferentiated clause is only applied to employees in contact with customers; in the event of an employee's refusal to conform to such a clause when carrying out her professional activities in contact with company clients, it is for the employer to find out whether, taking into account the inherent constraints to which the company is subject and without them being required to take on an additional, it is possible to offer the employee a post not involving any visual contact with those clients, instead of dismissing her;

Prejudice in Strasbourg

Emal Boyraz case v. Turkey (2 Dec. 2014), to justify the applicant's dismissal from her position as security officer, the government claimed that she could not adequately carry out this role as it carried certain risks and responsibilities such as the requirement to use firearms and physical force in case of an attack. The court noted that this justification is based on the premise that a woman, by definition, could not deal with these risks and responsibilities56. Reflecting basic stereotypes about women in general, it does not constitute a valid reason for depriving the applicant of her job57.

Biao v. Denmark case (24 May 2016), this approach, based on the rejection of stereotypes, was applied with respect to discrimination based on ethnic origin: it established that general assumptions or prevailing social attitudes regarding people who have acquired their nationality by naturalisation could constitute a valid justification for putting them at a disadvantage58.
The