

Discrimination on the grounds of religion at the workplace in Europe

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Areas of focus

- I. Legal framework
- II. What is religion?
- III. Religious symbols, religiously motivated clothing
- IV. Freedom of religion
- V. Discrimination (direct / indirect)
- VI. Selected decisions (ECJ)
- VII. Pending references for a preliminary ruling

I. Legal framework

- EU legal regulations on religion and discrimination on the grounds of religion are to be found in
 - Primary legislation, and
 - Secondary legislation

I. Legal framework

- **Treaties**
 - TEU Article 6
 - TFEU Articles 10, 13, 17, 19
- **Charter of fundamental rights**
 - CFREU Articles 7, 10, 16, 21, 22

I. Legal framework

- **European Convention on Human Rights(ECHR)**
 - ECHR Articles 8, 9, 14
 - ECHR 1. ZP Article 2

I. Legal framework

- **Council Directive 2000/78/EC** of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Directive 2000/78)
 - Recitals 11, 12, 23, 24, 26, 29, 31
 - Articles 1, 2, 4, 15

I. Legal framework

- **ECJ 17.4.2018, *Egenberger*, C-414/16**
 - Important statements on relevant sources of EU law for religion and discrimination on the grounds of religion:
 - The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law (Marginal note 76).
 - That prohibition, which is laid down in Article 21(10) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on (Marginal note 76).

I. Legal framework

- **ECJ 17.4.2018, *Egenberger*, C-414/16**
 - Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contacts between individuals (Marginal note 77)

I. Legal framework

- **ECJ 17.4.2018, *Egenberger*, C-414/16**
 - Article 21 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such. (Marginal note 78).

I. Legal framework

- **ECJ 17.4.2018, *Egenberger*, C-414/16**
 - Directive 2000/78 is a specific expression of the general prohibition of discrimination laid down in Article 21 of the Charter (Marginal note 47).
 - Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds (Marginal note 75).

II. What is religion?

- Everyone has an idea of what religion is. **But can you define religion?**
- **Taxative** catalogue of grounds of discrimination
 - Gender (Directive 2006/54/EC)
 - Race or ethnic origin (Directive 2000/43/EC)
 - Religion or belief \
 - Disability | (Directive 2000/78/EC)
 - Age |
 - Sexual orientation /
- **Religion “or” belief**

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II. What is religion?

- **Religion “or” belief - connection?**
 - Article 1 Directive 2000/78 (Purpose)
 - The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of **religion or belief**, disability, age, or sexual orientation as regards employment and occupation, with a view to putting into effect into the Member States the principle of equal treatment.

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II. What is religion?

- **Statements of the ECJ on religion:**
 - The concept of religion is **not defined** in directive 2000/78 (*Achbita* Marginal note 25; *Bougnaoui* Marginal note 27)
 - The concept of religion is used in a **broad sense** (*Achbita* Marginal note 28)
 - Difference of treatment on the ground of **no denomination** is difference of treatment on grounds of religion (*Egenberger* Marginal note 43)

II. What is religion?

- **Statement of ECJ on religion**
- The concept of religion in a “broad sense?”
 - Geared to the regulation of the freedom of religion in Article 9 ECHR and Article 10 CFREU.

II. What is religion?

- **Article 9 ECHR (Freedom of thought, conscience and religion)**
 - (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) ...

II. What is religion?

- **Article 10 CFREU (Freedom of thought, conscience and religion)**
 - (1) Everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to change religion or belief and freedom, either alone or in community with others and in public or private, to **manifest** religion or belief, in worship, teaching, practice or observance. (2) ...

II. What is religion?

- **Statement of the ECJ on religion:**
- The concept of religion in the “broad sense?”
 - The concept of religion 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. (*Achbita* Marginal note 28)

II. What is religion?

- However, the foregoing still does not explain **what religion actually is**.
 - In previous ECJ decisions, it was not controversial that religion was at issue. In the *Achbita* and *Bougnaoui* case the Islamic headscarf was at issue; in the *Egenberger* case the lack of denomination was at issue.
 - .\.

II. What is religion?

- **The predominant view in the specialized literature is:**

- Pursuant to the purpose of Directive 2000/78 **religion is to be interpreted in the broad sense**
 - “Broad” here not in the sense of “forum internum/externum” but in the sense of “not limited to Christianity, Judaism and Islam”
- Religion is **not limited** to churches and to recognized religious communities.
 - On the other hand, one could also say that wherever state recognized churches and religious communities exist, a religion may in any event be assumed.

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II. What is religion?

- **Legislative materials on the Austrian equal treatment act (ETA):**

- At least a **commitment**, guidelines for the **way of life** and a **ritual** must be available for a religion.
- Apart from that, the materials refer to a **definition in the Brockhaus Encyclopaedia**. This defines religion formally as a system (of beliefs), that in doctrine, practice and forms of community takes up the questions (of meaning) of human society and individuals and tries to answer them..

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II. What is religion?

- **Legislative materials on the Austrian equal treatment act (ETA):**
- ... In accordance with the respective underlying ideas of salvation and in relation to the respective experience of “doom,” every religion has an **“aim of salvation”** and a **“path to salvation.”** This is closely related to the respective “unavailability” which is presented as personal (god, gods) and non-personal (law of the world, awareness, knowledge) **transcendence.** (RV 207 BlgNR 22. GP 14 f).

II. What is religion?

- **Legislative materials on the Austrian equal treatment act (ETA):**
- The concept of the (areligious) **“Weltanschauung”** (view of the world) is by comparison used as a collective term for all ideological, political, inter alia **guiding precepts** for life and the world as a comprehensive interpretation as well as for the **interpretation of the personal and communal position** for the individual understanding of life. Views of the world are not scientific systems but interpretive opinions in the form of personal **convictions** about the basic structure, method and function of the universe (RV 207 BlgNR 22. GP 15).

III. Religious symbols, religiously motivated clothing

- **An employer says:**
- *“I have absolutely nothing against Islam. But I do not want to have the headscarf in my company.”*
- Is that an **admissible** point with regard to the prohibition of discrimination on the grounds of religion?

III. Religious symbols, religiously motivated clothing

- In the *Achbita* case, the Belgian court of appeal (Antwerp higher labour court) ruled that there was no direct discrimination and stressed that;
 - Mrs *Achbita* was **dismissed not because of her Muslim faith, but because** she persisted in wishing to manifest that faith, visibly, during working hours, by wearing an Islamic headscarf (Marginal note 18).

III. Religious symbols, religiously motivated clothing

- The ECJ decision in the *Achbita* and *Bougnaoui* cases show without a doubt that a difference in treatment on account of the Islamic headscarf can constitute a discrimination based on religion.
- This applies basically for all religious symbols and religiously motivated clothing.
- This is not the same as the question whether it is a case of direct/indirect discrimination and whether this is justified.

IV. Freedom of religion

- **An irreligious worker says:**
 - *“Christians, Jews, Muslims -- they all always talk about only **their** freedom of religion. But I have freedom of religion too. Why must I constantly have to see crosses, headscarves, etc.? Have I no freedom of religion (in the sense of “not being bothered by the religion of other persons”)?*

IV. Freedom of religion

- **Positive / negative freedom of religion**
 - **Positive** freedom of religion
 - Is the freedom to
 - Have a religion
 - Change it
 - Profess it

IV. Freedom of religion

- **Negative** freedom of religion
 - Is also recognized by scholarship and jurisprudence
 - It refers to
 - Belonging to no religion, and
 - Not having to take part in any religious activities

IV. Freedom of religion

- **Negative** freedom of religion
 - Whether the “negative freedom of religion” of other persons can be violated by acts of “positive” freedom of religion, e.g. in the form of wearing religious symbols or clothing, is to be denied however.
 - In weighing both dimensions of the freedom of religion it is necessary to take account of special circumstances in individual cases of a differentiating approach, in order to maintain their equivalence in consideration also of the principle of tolerance.

IV. Freedom of religion

- **Negative** freedom of religion
 - This would no longer be the case if the non-exercise of religion would be the yardstick of all interests of freedom of religion.
 - The Islamic headscarf of one person as a rule does not establish a compulsion to believe nor an obligation to act with regard to religious acts, festivities or other forms of religious devotion. .\.

IV. Freedom of religion

- **Negative** freedom of religion
 - One could speak of “fundamental rights” being merely affected, but of no infringement in the negative freedom of religion. This does not establish any right not to be confronted with the manifestation of other religions.

V. Discrimination (indirect/direct)

- **Article 1 Directive 2000/78 (Purpose)**
 - The purpose of this directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

V. Discrimination (indirect/direct)

- **Article 2 Directive 2000/78** (Concept of discrimination)
 - (1) For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

V. Discrimination (indirect / direct)

- **Article 2 Directive 2000/78** (concept of discrimination)
 - (2) For the purposes of paragraph 1
 - a) direct discrimination shall be taken to occur when 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;

V. Discrimination (indirect / direct)

- **Article 2 Directive 2000/78** (Concept of discrimination)
 - (2) For the purposes of paragraph 1
 - b) 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, 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; or
 - ii) ...

VI. Selected decisions

- **ECJ 14.3.2017, *Achbita*, C-157/15**
 - Opinion of AG Kokott 31.5.2016, C-157/15
- **ECJ 14.3.2017, *Bougnaoui*, C-188/15**
 - Opinion of AG Sharpston 13.7.2016, C-188/15
- **ECJ 17.4.2018, *Egenberger*, C-414/16**
 - Opinion of AG Tanchev 9.11.2017, C-414/16

VI. Selected decisions

- **ECJ 14.3.2017, *Achbita*, C-157/15**

- Facts of the case:
 - Belgium; the company *G4S* provides reception services; initially unwritten rule, then agreement with works council, after which employees are prohibited from wearing visible signs of their political, philosophical or religious convictions and/or manifesting any rites ensuing therefrom; dismissal of the receptionist, Mrs *Achbita*, on account of her persistence of wearing the Islamic headscarf at the workplace.

VI. Selected decisions

- **ECJ 14.3.2017, *Achbita*, C-157/15**

- Problem:
 - Direct discrimination?
 - Indirect discrimination?
 - Legitimate aim?
 - Reasonableness?
 - Limitation to the essential?
 - Weighing of the interests of both parties

VI. Selected cases

- **ECJ 14.3.2017, *Achbita*, C-157/15**
 - Problem:
 - Indirect discrimination? Legitimate aim?
 - Article 16 of the CFREU (Freedom to conduct business)
 - The freedom to conduct business is recognized by EU law and the respective national legal provisions and practices.

VI. Selected decisions

- **ECJ 14.3.2017, *Achbita*, C-157/15**
 - Problem:
 - Concept of neutrality – The solution of “all” problems?

VI. Selected decisions

- **ECJ 14.3.2017, *Bougnaoui*, C-188/15**
 - Statement of facts:
 - France: the firm *Micropole* dispatched Mrs *Bougnaoui* as a software designer to a customer who complained to *Micropole* because of her Islamic headscarf; employees had taken the initiative; next time, “no veil;” Mrs *Bougnaoui* however refused to work without veil; she was thereupon dismissed by *Micropole*.

VI. Selected decisions

- **ECJ 14.3.2017, *Bougnaoui*, C-188/15**
 - Problem:
 - Indirect / direct discrimination?
 - Will of the employer to comply with special customer wishes
 - Genuine and determining occupational requirement within the meaning of Article 4 paragraph 1 of Directive 2000/78? \.

VI. Selected decisions

- **Directive 2000/78/EC**
- **Article 4** (Occupational requirements)
 - (1) Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, 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 proportionate.

VI. Selected decisions

- ECJ 17.4.2018, *Egenberger*, C-414/16
 - Facts of the case:
 - Germany; Mrs Egenberger, without religious affiliation, applied to Evangelisch Werk for a fixed-term consultancy position (to draw up a parallel report on racial discrimination). She was not invited to personal interview, because she is not an Evangelical.

VI. Selected decisions

- **ECJ 17.4.2018, Egenberger, C-414/16**
 - Problem:
 - **Autonomy** of churches and other organizations, whose ethos is based on religious principles and/or beliefs. Legal control?
 - Religion a lawful and justified occupational requirement within the meaning of Article 4, paragraph 2 of Directive 2000/78? \.
 - National law / EU law precedence?

VI. Selected decisions

- **Directive 2000/78/EC**
- **Article 4 – Occupational requirements**
 - (2) 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 constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. ...

VI. Selected decisions

- **Directive 2000/78/EC**
- **Article 4** - Occupational requirements (cont.)
 - (2) ... or of the context in which they are carried out, a person's religion or belief constitutes 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.
...

VI. Selected decisions

- **Directive 2000/78/EC**
- **Article 4** – Occupational requirements (continued)
 - (2) ... 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.

VII. Pending references for a preliminary ruling

- **ECJ, *IR / JQ*, C-68/17**
 - National Court: BAG 28.7.2016, 2 AZR 746/14
 - Facts of the case: Germany; Dismissal of a head physician in a Catholic hospital because he remarried
- **ECJ, *Cresco / Achatzi*, C-193/17**
 - National court: OGH 24.3.2017, 9 ObA 75/16v
 - Facts of the case: Austria; Mr *Achatzi* worked on Good Friday which according to the Austrian legal situation is a legal holiday only for members of the Evangelical Church; he did not get the day off, nor as a non Evangelical, additional holiday remuneration

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I thank you for your attention!

Herbert Hopf