

Religious discrimination at the workplace

THE CJEU'S CASE LAW REGARDING HEADSCARVES

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LEGAL FRAMEWORK

Article 9 of the European Convention of Human Rights

Article 10 of the Charter of Fundamental Rights

Article 21 of the Charter of Fundamental Rights

Article 16 of the Charter of Fundamental Rights

Directive 2000/78/EC

ARTICLE 10 CFF

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

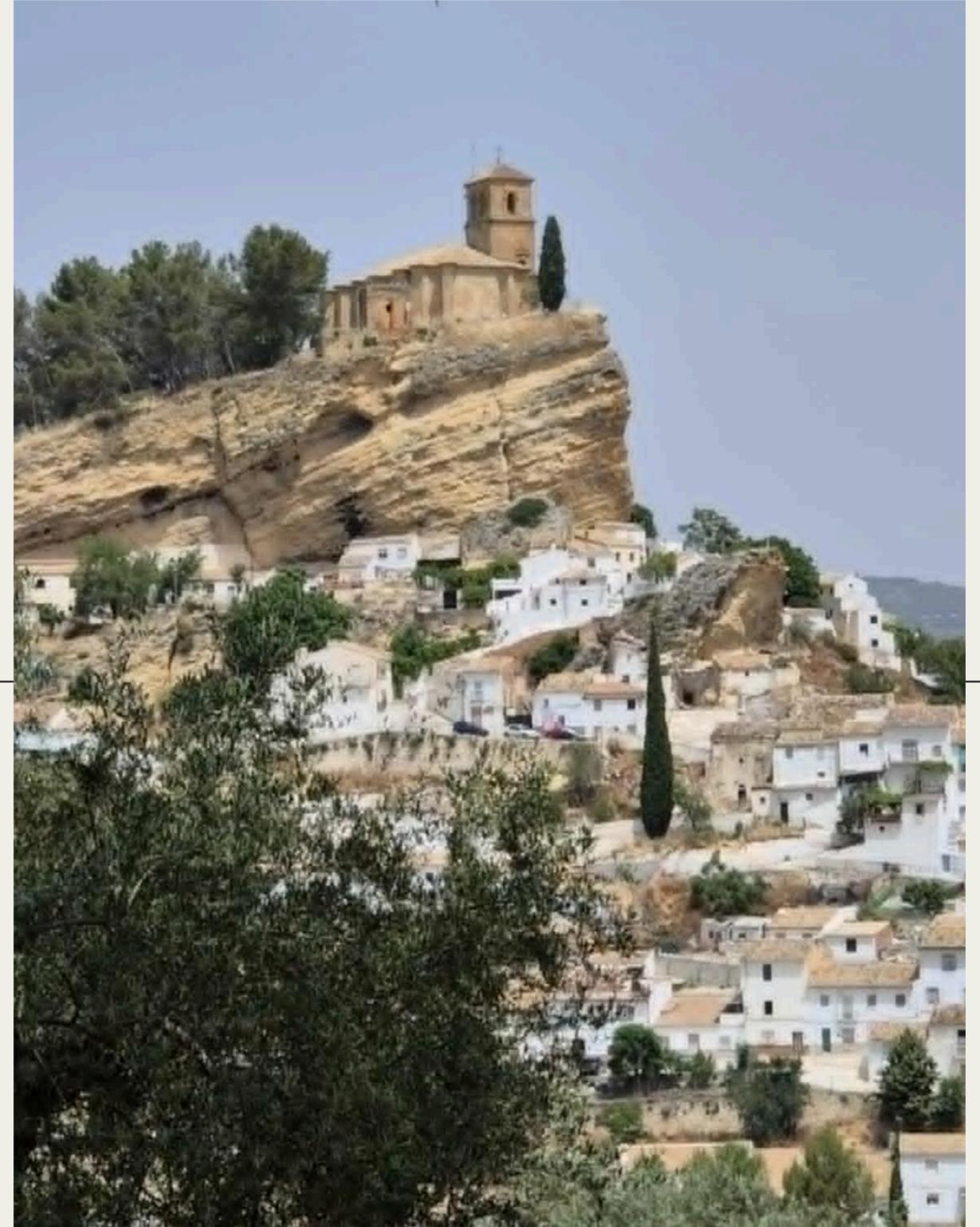
LIMITATIONS

Article 52(1) of the Charter

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.

RELIGION

the term ‘religion’ must be understood, in that regard, 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” (Cresco, para. 58).



PROHIBITION OF RELIGIOUS DISCRIMINATION

Framework Equality Directive (Directive 2000/78/EC)

Article 2(2)(a) Direct discrimination

may be justified in exceptional cases, to be interpreted strictly:

- Article 2(5) national measures for protection of public interests
- Article 4(1) genuine and determining occupational qualifications
- Article 4(2) church autonomy
- Article 7(1) positive action

Article 2(2)(b) Indirect discrimination

may be justified by a legitimate/objective aim, and the means of achieving that aim are appropriate and necessary (the means-ends relationship is proportional)

applicable only in the context of employment (Article 3(1))

SCOPE OF APPLICATION

Church autonomy

C-414/16 Egenberger

where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of **effective judicial review** by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case.

Religious employees

C-414/16 Egenberger

the genuine, legitimate and justified occupational requirement is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and **cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation.** That requirement must comply with the principle of proportionality.

see also **C-68/17 IR**



Religious holidays

C-193/17 Cresco

national legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled, if required to work on that public holiday, to a payment in addition to their regular salary for work done on that day, constitutes **direct discrimination on grounds of religion.**

Direct horizontal effect

C-68/17 IR

A national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in a manner that is consistent with Article 4(2) of Directive 2000/78 (...) to **guarantee the full effectiveness of the rights that flow from those principles, by disapplying, if need be, any contrary provision of national law.**

RITUAL SLAUGHTER

CJEU

C-336/19

Centraal Israëlitisch Consistorie van België
and Others

ECTHR

Executief van de Moslims van België and
Others v. Belgium (applications nos. 16760/22
and 10 others)

Point (c) of the first subparagraph of Article 26(2) of Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, read in the light of Article 13 TFEU and Article 10(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding legislation of a Member State which requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in the animal's death.

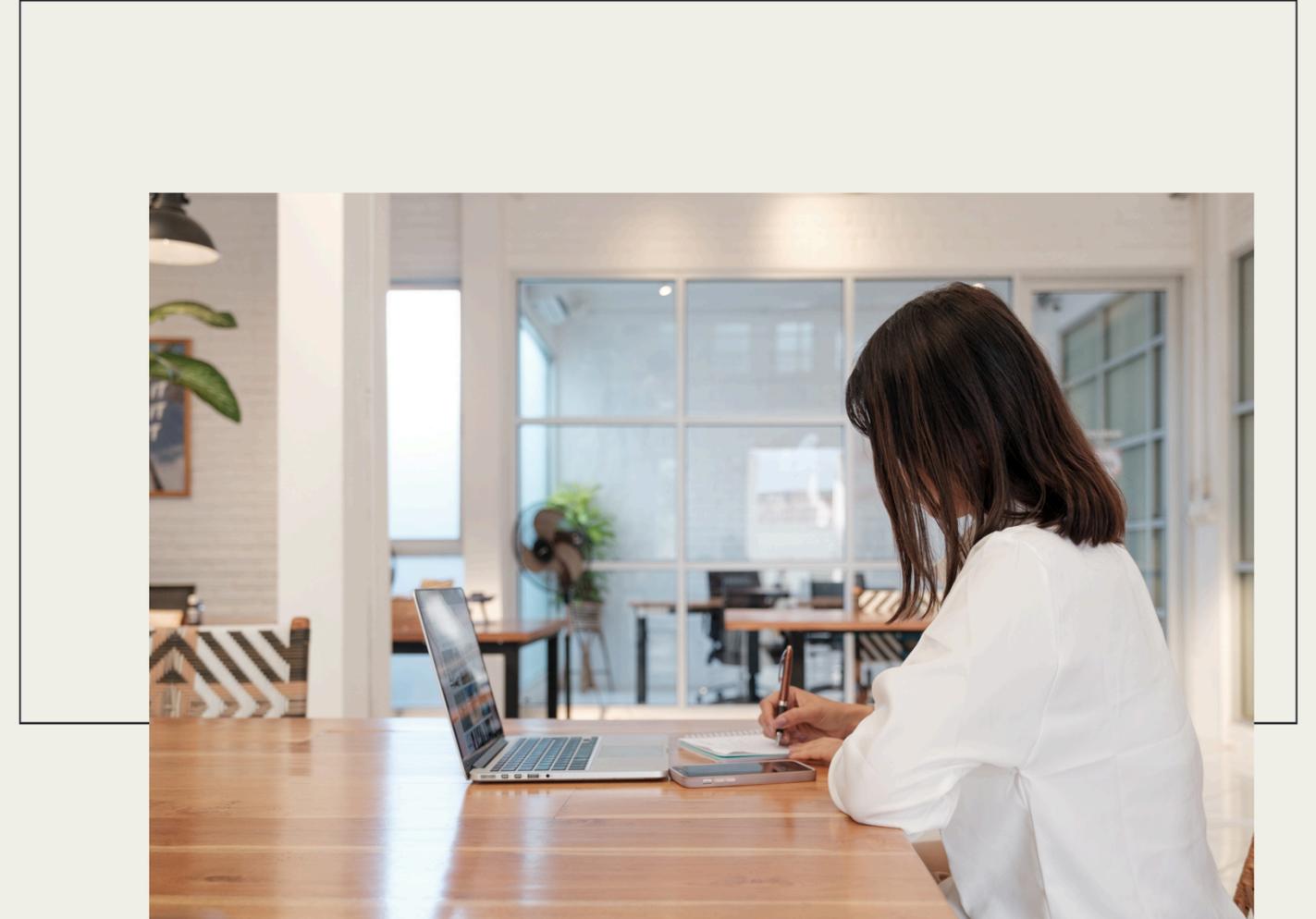


RELIGIOUS SYMBOLS

- Conflict between the constitutional principles of state neutrality / *laicite* and the direct effect of the prohibition of discrimination on ground of religion or belief
- Conflict between freedom to conduct business and freedom to manifest or even practice religion

Question:

In what circumstances does the neutrality principle amount to indirect discrimination, and can it ever be considered direct discrimination that is subject to justification?



PATH TO INTEGRATION AT WORKPLACE

Front office jobs **Achbita**

- should prohibit all visible signs of religious, philosophical, or political belief, not some.
- should be applied consistently and systematically to all employees.
- Should be limited to customer-facing roles.
- Employers should consider reassignment to non-customer-facing roles (not reiterated later).

Evaluate risk **Wabe and Müller**

- Employer should prove a genuine business need for the policy.
- show the risk of tangible harm without it.
- Requires balancing with the employee's right to manifest religion.

Wide discretion **OP**

- public office requirement
- should be applied consistently and systematically to all employees.
- no need to be limited to customer-facing roles
- national courts to weigh fundamental rights and state neutrality..

GDOQ **Bouagnaoui**

- Customer preferences (e.g., refusal of headscarf) are not valid occupational requirements.
- justification based on :
 - the nature and context of the role.
 - not on subjective or customer-driven factors.

Religioun and belief as one ground **LF**

- should be applied consistently and systematically to all employees, and in an undifferentiated way both to religion and beliefs.
- employer should prove a genuine need for the policy.
- national courts may ascribe greater importance to religion or belief than to freedom of business

A C H B I T A

Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that **the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that directive.**

By contrast, such an internal rule of a private undertaking **may constitute indirect discrimination** within the meaning of Article 2(2)(b) of Directive 2000/78 if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain.

ASMA BOUGNAOUI

Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that **the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.**

W A B E A N D M H M Ü L L E R H A N D E L

1. Article 1 and Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that an internal rule of an undertaking, prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, does not constitute, with regard to workers who observe certain clothing rules based on religious precepts, direct discrimination on the grounds of religion or belief, for the purpose of that directive, provided that that rule is applied in a general and undifferentiated way.

2. Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that a difference of treatment indirectly based on religion or belief, arising from an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, provided, first, that that policy meets a genuine need on the part of that employer, which it is for that employer to demonstrate, taking into consideration, inter alia, the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out; secondly, that that difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner; and, thirdly, that the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.

Article 2(2)(b)(i) of Directive 2000/78 must be interpreted as meaning that indirect discrimination on the grounds of religion or belief resulting from an internal rule of an undertaking prohibiting, at the workplace, the wearing of visible signs of political, philosophical or religious beliefs with the aim of ensuring a policy of neutrality within that undertaking can be justified only if that prohibition covers all visible forms of expression of political, philosophical or religious beliefs. A prohibition which is limited to the wearing of conspicuous, large-sized signs of political, philosophical or religious beliefs is liable to constitute direct discrimination on the grounds of religion or belief, which cannot in any event be justified on the basis of that provision.

4. Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that national provisions protecting the freedom of religion may be taken into account as more favourable provisions, within the meaning of Article 8(1) of that directive, in examining the appropriateness of a difference of treatment indirectly based on religion or belief.

OP

Article 2(2)(b) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that **an internal rule of a municipal authority prohibiting, in a general and indiscriminate manner, the members of that authority's staff from visibly wearing in the workplace any sign revealing, in particular, philosophical or religious beliefs may be justified by the desire of the said authority to establish, having regard to the context in which it operates, an entirely neutral administrative environment provided that that rule is appropriate, necessary and proportionate in the light of that context and taking into account the various rights and interests at stake.**

LF

1. Article 1 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the words ‘religion or belief’ contained therein constitute **a single ground of discrimination, covering both religious belief and philosophical or spiritual belief.**

2. Article 2(2)(a) of Directive 2000/78 must be interpreted as meaning that a provision of an undertaking’s terms of employment which prohibits workers from manifesting, through words, through clothing, or in any other way, their religious or philosophical beliefs, whatever those beliefs may be, **does not constitute**, with regard to workers who intend to exercise their freedom of religion and conscience through the visible wearing of a sign or an item of clothing with religious connotations, **direct discrimination ‘on the [ground] of religion or belief’ for the purposes of that directive, provided that that provision is applied in a general and undifferentiated way.**

Article 1 of Directive 2000/78 must be interpreted as precluding provisions of national legislation, which are intended to ensure the transposition of that directive into national law and which are construed as meaning that religious belief and philosophical belief constitute two separate grounds of discrimination, from being taken into account as ‘provisions which are more favourable to the protection of the principle of equal treatment than those laid down in [that directive]’ for the purposes of Article 8(1) thereof.

INTER AND INTRAGROUP COMPARISONS

- traditionally, Directive 2000/78 has been interpreted as prohibiting discrimination between in- and out-groups, which, in essence, entailed comparing individuals who shared a certain protected characteristic (in-group) with those who did not (out-group).
- the delineation of the comparison circle – broadly or narrowly – is capable of shaping the definitions of direct and indirect discrimination under Directive 2000/78 and may lead to divergent outcomes even when confronted with a similar set of facts (AG Bobek in Cresco)
- Recent judgments of the Court demonstrate, however, a shift towards an approach focused not on intergroup but rather on intragroup discrimination (VL case)
- Intragroup comparison requires an assessment as to the existence of discrimination within a group composed of individuals that share the same protected characteristic (...) to avoid diminishing the protection granted by Directive 2000/78, by focusing on the detection of the relative burdens suffered by certain persons belonging to a group concerned by the same protected characteristic, rather than searching for similarities and differences between two groups not related by that common characteristic. From that perspective, intragroup comparison extends the reach of Directive 2000/78 with increased sensitivity to less visible disadvantages and also extends equality protection to the less privileged individuals within a particular group.
- widening the circle of persons for intragroup comparison promotes uniformity within that group by diluting the differential elements that individualise its members, whereas reducing that circle of persons promotes diversity by rendering more visible the differential elements in need of protection.

COMPARISONS FOR WORKPLACE NEUTRALITY

if religion and religious beliefs are protected together with philosophical and spiritual beliefs, then the reference person for comparability purposes is reduced because of the broadening of the circle of persons composing the group of comparison concerned by the protected ground. In the context of internal neutrality rule within the workplace, an employee who claims discrimination because of his or her religion or religious beliefs would be considered to form part of a group including persons who profess philosophical or spiritual beliefs. No direct discrimination can, in principle, be found if the internal neutrality rule applies equally to all the members of that group because a direct causal link between that rule and the protected criterion will be less visible. That would be the case also with respect to employees of an undertaking concerned by religious clothing obligations.

By contrast, if religion and religious beliefs are protected as an autonomous ground of discrimination, the comparison will be carried out among individuals affected by reason of their religion and religious beliefs, leaving aside individuals affected by reason of their philosophical or spiritual convictions. An intragroup comparison – in relation to the internal neutrality rule at issue – would then entail an assessment of the situation of employees who observe religious clothing obligations with that of employees who are not bound by those obligations. Arguably, unequal treatment resulting from a rule which prohibits the wearing at work of clothing prescribed by religion is more likely to be regarded as inextricably linked to the protection criterion when applied to employees concerned by religious clothing obligations, given that those employees would be unable to meet the requirements of that rule unless they abandon the observance of the obligations prescribed by their faith.

AG Medina in LF

CONCLUSIONS

- workplace neutrality rules that ban all visible religious, political, or philosophical symbols seen as indirect rather than direct discrimination;
- the final assessment belongs to national courts
- workplace neutrality constitutes a legitimate aim grounded in the fundamental freedom to conduct a business (Article 16 CFF) or in case of public service neutrality in the national constitution

Thank you!

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