

“DISCRIMINATION ON GROUND OF RELIGION AND BELIEF – CHALLENGES IN EFFECTIVE PROTECTION”

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Abstract:

The protection on the ground of religion and belief is explicitly provided in the European legal system, in the European Convention on Human Rights and the law of the European Union. Religion and belief is a highly complicated and sensitive ground of discrimination with specific features compared to other grounds such as ethnicity, gender, disability, age or sexual orientation.

This paper explores the features of the religion and belief as discriminatory ground from a legal and policy stand, its specificity and challenges in effective protection. In addition, the paper elaborates the position of the international jurisdictions, such as the European Court of Human Rights and the Court of Justice of the European Union through its case law on protection of discrimination on this ground. Furthermore, the paper analyzes the intersectionality with gender and the interplay and potential conflict with other grounds of discrimination such as for example the sexual orientation. Finally, the paper presents ways forward in providing for effective protection against discrimination on ground of religion and belief, with emphasis put on the work of the equality bodies and good practices. The text uses reports and results from research and survey that have been conducted in the European Union and draws conclusions from the case law of the European Court of Human Rights and the Court of Justice of the European Union.

Key words: *anti-discrimination, belief, equality, legislation, religion*

INTRODUCTION

Contemporary societies consider that law is a powerful tool that construes the social reality and inclusion of all individuals in the modern societal life. Nowadays, this is used to tackle discrimination which results from different treatment of people with certain protected characteristic *inter alia* religion or belief as well as vigorously tackle the stereotypes and prejudicial attitudes of people against these people or groups, stigma, and social environment and structure. Stereotypes and prejudices against a certain group in the society impose limits to individual choices for members of the respective group and lead to subordination, inequality, discrimination, stigmatization, hate speech and eventually to bias-motivated violence (Poposka, 2015, pp.1-2).

Thus, the principle of equality became a fundamental principle of human rights, which is based on the equal worth and dignity of all human beings. This principle is articulated in all international and regional human rights instruments encompassing the fight against discrimination to achieve substantial equality. The legal definition of the term discrimination (lat. *discriminare, discriminatio*) understands unequal, less favourable treatment on the grounds of a personal protected characteristic, the discriminatory ground, that includes qualifications and differentiations in specific legal context. Discrimination can be observed in different forms such as direct and indirect discrimination, harassment and instruction to discriminate, and in some countries in the *sui generis* form of reasonable accommodation. (Poposka, 2012, p.2).

Religion or belief is a highly complicated and sensitive ground of discrimination with specific features compared to other grounds such as ethnicity, gender, disability, age or sexual orientation, and the paper explores its features in length. But to understand this discriminatory ground at its full, awareness of the context in which it functions is crucial. The context varies from a state to a state, from domination of one single major religion in some countries, through more than one major religion present in other, to a domination of a secular perspective in third countries. As reports shows this context is characterised by change. Namely, the perspective titled *A Growing Agenda: The Work of Equality Bodies on the Ground of Religion or Belief* explains that religious diversity is growing due to immigration and new churches emerge and/or balance of membership numbers shifts between churches; there is a decrease in the practice of religion and the power of the dominant church can decline as a result; the dominant position of a single church is increasingly challenged and there is a popular dissatisfaction with the dominant church due to its actions or response to particular issues. The experience demonstrates a range of issues that can emerge from such a context, from inter-religious conflict, through disadvantaging and discriminating against minority religions, to religion becoming a focus for security issues and anti-terrorism action (Equinet, 2015, pp.8-9).

We are living in Europe that is fully committed to equality and other fundamental freedoms and rights as it is equally committed to upholding religious freedoms. At times these rights are complementary, with protection against religious discrimination enabling full enjoyment of religious freedom; in other respects, the rights are in tension, with religious groups failing to recognise equality rights or the rights of those outside the

religious group. (Vickers, 2006, p.4) Thus, affine balancing of competing rights needs to be achieved. Furthermore, in the society often one person encompasses several protected characteristics, and thus unequal treatment may occur simultaneously on several grounds as it is the case with religion or belief that mostly intersect with gender. In such cases, a multiple discrimination occurs, i.e. discrimination on more than one ground, which does not consist only of the sum of the two discriminatory grounds, but of the discriminatory effect which is quantitatively different, i.e. synergistic.

1. DISCRIMINATION ON GROUND OF RELIGION OR BELIEF IN ANTI-DISCRIMINATION LEGISLATION

1.1. Features of the religion or belief as discriminatory ground

The ground of religion or belief is growing in importance recently in the work of judicial and quasi-judicial bodies. Challenges exist in lacking a clear definition of this ground encompassing religion and belief, as separate components. Although there exist a number of recognized religions in the world, attempts to define it are shown as problematic. Thus, definitions related to religion have emerged in case law and it is most probably that the courts will draw on the jurisprudence of the UN Human Rights Treaty Bodies¹, European Court of Human Rights, the 1961 European Social Charter and the 1996 Revised European Social Charter, which provided for protection from discrimination and for religious freedoms. As explained by *Vickers* an advantage of the lack of a formal definition is that the concept can adapt to reflect modern developments in our understanding of religion and belief; however, a corresponding disadvantage is that the lack of definition can give rise to inconsistencies in treatment (Vickers, 2006, p.4).

The European Court of Human Rights (hereafter: ECtHR or Court) extensively interpreted Article 9 of the ECHR addressing freedom of thoughts, conscience and religion. It demonstrates that traditional religions and older faiths such as Druidism (*Chappel v. UK* and *Pendragon v. UK*) are included, as do more recent religious movements such as Jehovah's Witnesses, Scientology (*X and the Church of Scientology v. Sweden*), Krishna Consciousness (*ISKCOM v. UK*) and the Divine Light Zentrum (*Swami Omkaramamda and the Divine light Zentrum v. Switzerland*). While religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one's religion. However does not extend to all religiously inspired action (*Arrowsmith v. UK*).

Similarly to the term religion, the belief is also undefined in the legislation. It is seen as a difficult concept with contradictory interpretation from case law, and in need of definition. It can be concluded that the term belief encompasses religious, ideological, political and other main or general concepts to explain the world. It must be a comprehensive concept, rather than a single-issue statement. However even though this is

¹ See: UN Human Rights Committee, General Comment No.22 on Article 18 of the Universal declaration of Human Rights, paragraph 2. According to the Committee Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief and the terms "belief" and "religion" are to be broadly construed.

correct in principle the ECtHR through its practice extended in some cases to beliefs which are single-issues, such as pacifism in *Arrowsmith v. UK* and to veganism in *H v. UK*. Still, belief should not be merely an opinion, but life-oriented set of beliefs with “certain level of cogency, seriousness, cohesion and importance” as stated in *X, Y and Z v. UK* and *Campbell and Cosans v. UK*. The ECtHR jurisprudence, especially in the *Angelini v. Sweden* shows that belief do not have to be religious in terms of its content to be protected; on a contrary atheism is also protected under the ECHR.

1.2. Legal framework

Guarantees of religious liberty and respect for conscience and belief are inevitably found in the constitutional orders of liberal democratic societies and in international and regional, i.e. European legal documents dealing with human rights and protection against discrimination. In such human rights instruments, freedom of thought, conscience and religion is inevitably buttressed by prohibition of discrimination on grounds of religion for the obvious reason that such would clearly have an impact upon the effective exercise of the right (Murdoch, 2007, p.7). For the European context much important are Article 9 and Article 14 of the European Convention on Human Rights and Fundamental Freedoms² (hereafter: ECHR) and the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (General Framework Directive) as part of the EU law.

Article 9(1) of the ECHR provides an absolute right for individuals to hold religious and other beliefs and a qualified right to manifest religion or belief. Manifestation includes a right to worship, to teach others about a religion or belief, and to practise and observe it by wearing symbols or special clothes, or by eating certain foods. Article 9 recognises that belief systems are part of the identity of individuals and their perception of life and that respect for different beliefs is central to tolerance in a pluralistic society. According to the ECtHR case law, in *Kosteski v. “The Former Yugoslav Republic of Macedonia”* as well as *Hasan and Chaush v. Bulgaria*, the State does not have the power to assess the legitimacy of religious beliefs, and as stated in *Metropolitan Church of Bessarabia v. Moldova* require States to ensure that conflicting groups tolerate each other even where they originated in the same group. Under Article 9(2), interference with an individual’s freedom to manifest their religion or belief is permissible only if it is prescribed by law and can be justified as being necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others. For example, uniform policies at work or school, or requirements to work at certain times or carry out certain tasks may restrict the extent to which people can manifest their beliefs (Equinet, 2011, pp.9-10). Still, the ECtHR ruled in the *Vajnai v. Hungary* stating that “a legal system which applies restrictions to human rights in order to satisfy the dictates of public feeling, real or imaginary, cannot be regarded as meeting the pressing social needs recognised in democratic society, since that society must remain reasonable in its judgment” (paragraph 57). Practice shows that the cases concerning

² See: The European Convention for the Protection of Human Rights and Fundamental Freedoms, came into force on 3 September 1953. The wording of ECHR with all Protocols thereto, including the list of member-states is available on: <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

conflicts focus in particular on the justification for limiting the manifestation of a religion for reasons of "protection of the rights and freedoms of others". From another side, the prohibition of discrimination found in Article 14 of the ECHR is clearly limited as it applies only to "the rights and freedoms set forth" in the Convention. But it is also important to note that Protocol No. 12 establishes a more general prohibition of discrimination by providing that "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".

In the law of the European Union for protection against discrimination on ground of religion or belief most important is the General Framework Directive providing protection from religion or belief discrimination in employment and vocational training. The Directive protects against direct and indirect discrimination, harassment and victimisation on grounds of religion or belief. Direct discrimination occurs where a person is treated less favourably on grounds of religion or belief and it cannot be justified. However there are specific exceptions as follows: (i) where a measure is necessary for public security, for maintenance of public order and for the protection of the rights and freedoms of others (Article 2(5)); (ii) where because of the particular occupational activities or the context in which they are carried out, a religious characteristic is a genuine and determining occupational requirement (Article 4(1)); and (iii) where the employer is a church or an organisation the ethos of which is based on religion or belief (Article 4(2)). As we can see Article 4(2) provides for a broader exception for organization with religious ethos in contrary to Article 4(1). However Article 4(2) is not without limitations; on a contrary the exception should be narrowly construed as they are derogations from the principle of equality. Namely, although they do not need to be determining, still should be genuine and occupational requirements, so must be in close relation with the job in question and in the same time cannot be used to justify discrimination on another ground. Indirect discrimination from another side rises where an apparently neutral requirement would put persons of a particular religion or belief at a particular disadvantage compared with other persons and, contrary to the direct discrimination, it can be justified if there is a legitimate aim for the requirement and the means of achieving the aim are appropriate and necessary (Article 2(2)). Although there are no religion or belief discrimination provisions outside employment at European Union level, a number of states have prohibited such discrimination in sectors such as education and the provision of goods and services.

As we can see, the international standards recognise the phenomenon of religious discrimination as a form of discrimination that should be tackled. From another side, the international judicial institutions still narrowly are interpreting whether there has been religious discrimination or a breach of Article 9 of the ECHR. The Court of Justice of the European Union has not yet ruled on the interpretation in relation to discrimination case on ground of religion and belief. Two cases from 2015 are pending with the Court,

*Achbita case*³ and *Bougnaoui case*⁴, referred by Belgium and France accordingly so the Court finally will have a chance to rule on the lawfulness of the dismissal of Muslim workers because their hijab was contrary to the neutral image that the company want to convey as well as whether the Article 4(1) of the Directive should be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the IT services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out. Yet is to be seen how the Court will rule.

2. CHALLENGES IN PROTECTION AGAINST DISCRIMINATION ON GROUND OF RELIGION OR BELIEF

Particular challenges arise because of the potential conflict between the collective rights of religious groups and the rights of those outside the religious group. Sometimes those interests are overlapping and are complementary and sometimes a tension among them can be observed.

2.1. Intersectionality with other grounds

Analysis shows that gender emerges as the key ground intersecting with the ground of religion or belief. This is particularly as a result on the focus of religious symbols, and in particular on the Muslim headscarf and face veil worn by women. The debate revolves around the question whether is lawful to restrict the wearing of headscarves by Muslim women, and according to the case law the ECtHR suggest that banning the wearing of the headscarf in certain places such as schools and state run hospitals does not breach the religious freedom of individuals, but equally human rights law does not require such bans in order to protect the rights of others. This question is rather complex and should not be decided automatically for each and every case in the same manner, but the arguments around the competing interests should be assessed on a case by case basis. Some factors to be taken in mind is the interest of the wearer of the headscarf v. the interest of the others; if the concerned entity is the state or state-sponsored institution and the wearer of a headscarf infringes state neutrality but in the same time restricting it may significantly interfere with the freedom of Muslim women to pursue their profession; need for different treatment of children in contrary to adults; the wearing of the headscarf can be seen as an exercise of the right to freedom of expression by the individual woman; maintaining security, providing for health and safety concerns of others in public places etc. For example in *Leyla Sahin v. Turkey* the ban of the public university on wearing Islamic headscarf interfered with the right of the complainant, university student who wanted to wear a hijab as manifestation of her religion, but did not amounted to violation

³ Labour Court of Appeals of Antwerpen, 23 December 2011, no. 2010/AA/453. Pending case before the Court of Cassation and the Court of Justice of the European Union, request for a preliminary ruling launched on 3 April 2015, aff. C-157/15.

⁴ Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole Univers SA. Pending case before the Court of Cassation and the Court of Justice of the European Union, request for a preliminary ruling launched on 24 April 2015, aff. C-188/15.

of Article 9. The ECtHR assessing state secularism as a public order ground of justification for an interference stated clearly that “Article 9 does not protect every act motivated or inspired by a religion or belief and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by a belief” (paragraph 66). The same reasoning the Court used in *Dahlab v. Switzerland* where the Court considered justified the ban on the headscarf in a secular state to a teacher of young children by taking into account the gender equality. To conclude any ban of wearing headscarf is likely to be potentially treated as indirect discrimination subject to general justification defense where legal aim and proportionality will need to be assessed. In order to determine whether prohibitions on headscarves or veils are proportionate and justified, a careful analysis is required of the reasons for the prohibition, their extent, and whether alternatives to prohibitions are reasonable. Furthermore, if the rule is too general or if the entity apply an inconsistent policy towards religious dress the ban itself can be unlawful. Clear evidence will be required in order to substantiate the ban.

Racial and ethnicity is another ground that intersects with religion or belief and the boundary between those two are not always clear. Some of the factors are as follows: ethnicity is sometimes defined to include religious identity; religious groups may be predominantly from one particular racial group; and some religions may encompass cultural practices or rituals that might otherwise be understood as linked to ethnic identity. For example: in the UK the Sikhs have been defined as an ethnic group even though they are a religious group, and Jews are defined as both an ethnic and a religious group (Vickers, 2006, p.34). What complicates the distinction among these grounds is the fact that in the EU law material scope of protection on grounds of religion or belief is narrower than on the ground of race and ethnicity, covering only the area of employment and occupation in contrary to the same area in addition to education, social care and protection, housing and access to goods and services covered on the ground ethnicity. Thus, many cases that could be dealt on the ground of religion or belief are addressed on the ground of ethnicity.

Age is an emerging ground for intersection as implicit issue in the field of education and explicitly in social care settings for elderly with demands for care that respects religious diversity (Equinet, 2015, p.30).

2.2. Interplay and potential conflict with other grounds

Gender, gender identity and sexual orientation are the grounds in tension with the ground of religion or belief. Tensions with gender emerge where religious groups are not committed to gender equality and can be clearly shown in relation to issues of employment of women within religious bodies, dress code requirements, sexual health, reproductive rights, abortion, and in relation to family life. According to the UN Special Rapporteur on Freedom of Religion or Belief the discrimination of women in fact is due more to social and cultural behavior than religion in itself. In its study on the Freedom of Religion or Belief and the Status of Women the Special Rapporteur stresses that “respect for human person and equality between men and women take precedence over customs and traditions, whether religious or not; here there is no room for compromise”

(paragraph 30). And in the regional level gender equality is recognised by the ECtHR in vast number of cases such as *Abdulaziz, Cabales and Balkandali v. UK*, in *Schuler-Zgraggen v. Switzerland*, and in *Konstantin Markin v. Russia*, as one of the key principles underlying the Convention and a goal to be achieved by the states. The same goes for the EU law where gender equality is considered as a core right within the EU legal order and enshrined as a general principle of EU law since 1978. Dress code requirements (headscarf and face veil) were assessed by the ECtHR extensively in number of cases such as *Dahlab v. Switzerland* and *Sahin v. Turkey*, elaborated above, as well as in *El Morsil v. France*, *Dogru and Kervanci v. France*, and *Aktas et al.*

In *Pichon and Sajous v. France* the Court had held that pharmacists who did not want to supply contraceptives had suffered no interference with their Article 9 rights because they were able to manifest their religious beliefs in many ways outside work (paragraph 59). From another side, in the context of religious organisations, the case law especially from Finland (Supreme Court, KKO:2010:74) demonstrates that in countries where women are permitted to become priests or hold similar religious positions, it will be direct sex discrimination where male priests refuse to work with female priests on purported grounds of religious convictions.

Tension with the ground of gender identity emerge in relation to the right to be recognized in the gender with which one identifies, and with the sexual orientation emerge in relation to same sex marriages and demands to protect religious ethos of institutions and entities (Equinet, 2015, p.31). In *Ladele v. UK* the ECtHR assessed whether Ms.Ladele, a Register of Marriage, when threatened with dismissal for misconduct because she refused to conduct civil partnership ceremonies for same sex partners on religious grounds has been subject of violation of Article 9 of the ECHR. Her refusal to perform a secular task due to her religious conviction amounted to discrimination against lesbian and gay service users and as stated by the Court in *Leyla Sahin case* Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing. Thus, the Court did not found violation of Article 9. The same logic the Court used in the *McFarlane case* where an avowedly-Christian counsellor who regarded homosexual activity as morally wrong and who had been dismissed by the private company for failing to give an unequivocal commitment that he was prepared to give psycho-sexual therapeutic counselling to same-sex couples, had not suffered direct or indirect discrimination nor violation of Article 9 of the ECHR.

Refusing services to civil partners i.e. double room in hotel in the home of the respondent, because of their policy for only allowing married couples to stay in double rooms based on their religious belief amounted to direct discrimination on ground of sexual orientation in the *Hall and Preddy v. Bull and Bull*. On the same line, the Belfast County Court in *Lee v Ashers Baking Co Ltd & Ors*, the famous "cake case" found the bakery liable to the plaintiff for unlawful discrimination on ground of sexual orientation due to the fact that they refused an order to bake a cake bearing the slogan "Support Gay Marriage" and a picture of the Sesame Street puppets Bert and Ernie with excuse that Ashers was "a Christian business".

As to the second point of tension between the grounds of religion or belief and the sexual orientation, demands to protect religious ethos of institutions and entities as stipulated in Article 4(2) of the Directive 2000/78/EC should be stressed that is a permissive provision (states may choose whether or not to introduce an exception into domestic legislation) that should be narrowly construed and justified on a case by case basis. This provision allows for different treatment on the grounds of religion or belief, and cannot be used to justify discrimination on another ground *inter alia* sexual orientation.

International jurisprudence shows that assessment should be done for each case separately and the most important is to balance the competing rights and holding them in some form of equilibrium. And this can be manageable only through the existing exceptions from direct discrimination i.e. the requirements for genuine occupational requirements as well as by applying rigorously the general justification defense in relation to alleged indirect discrimination.

Finally, religious discrimination and limiting the rights to manifest a religion are likely to be lawful or not breach of Article 9 of the ECHR where it is necessary to protect the rights of children. Relevant factors will be whether children's education may be affected, their health and safety, and whether they may be subject to any violence or distress (Equinet, 2011, pp.60-64). Many cases in front of the ECtHR were addressing the granting custody to one of the parents because the other is belonging to Jehovah's Witnesses. For example in the *Palau-Martinez v. France* the Court found violation of Article 8 in conjunction with Article 14 of the ECHR because the national court granted the custody of two children to the father because Mrs. Palau-Martinez belonged to the Jehovah's Witnesses. The Court was not able to conclude that there has been a reasonably proportionate relationship between the means employed and the aim pursued, protection of the children's interests.

3. CONCLUSIONS

There are potential challenges around the ground of religion or belief. One is the absence of a clear definition of what encompass religion or belief. One is certain that manifestation of religion is integral part of the religion and the belief should not be merely an opinion but life-orienting set of beliefs. But, however we define it, it is certain that religious freedoms should be understood to be an important aspect of the "pluralism indissociable from a democratic society" (*Kokkinakis v. Greece*, paragraph 31). Second challenge is connected with the religious ethos related exemption that has been used to discriminate on other grounds such as gender, gender identity and sexual orientation. Here, as elaborated extensively above, an equilibrium should be reached as to balance the rights to equality against the rights to religious freedom and autonomy. Where this equilibrium will be found will vary from case to a case and is likely to remain context and fact dependant by using the proportionality test. Third is the lack of requirement on entities (employers and service providers) to make reasonable accommodation on this ground. And final the limited scope of protection against discrimination on ground of religion or belief especially in the EU law.

A general conclusion which can be drawn from the case law elaborated above is that the international judicial institutions have generally taken a narrow approach to the interpretation of whether there has been religious discrimination or a breach of Article 9 of the ECHR. The Courts are setting high threshold for establishing that there is an interference with the right to manifest a religious belief. Especially this is valid in relation to policies concerning dress codes and organisations wishing to remain secular or neutral. In every case assessment should be done separately and the most important is to balance the competing rights and holding them in equilibrium.

It remains to be seen how the Court of Justice of the European Union will decide on the pending cases in relation to this ground. It is certain that we should expect to see upscaling of the ground of religion or belief in the future international and domestic case law.

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