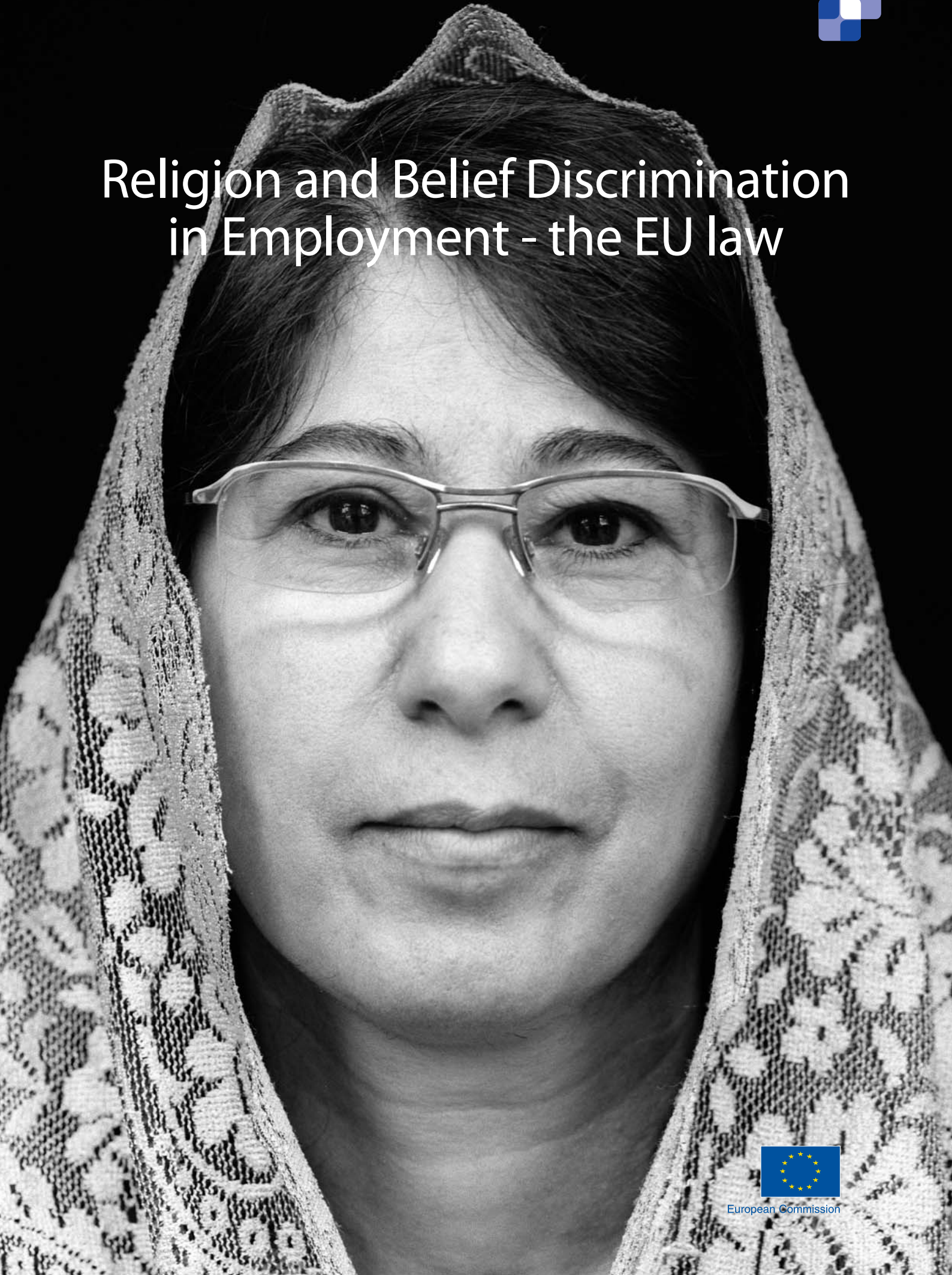




Religion and Belief Discrimination in Employment - the EU law



European Commission

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European Network of Legal Experts in the non-discrimination field

European Commission

Directorate-General for Employment, Social Affairs
and Equal Opportunities

Unit G.2

Manuscript completed in November 2006

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The text of this report was drafted by Lucy Vickers on the authority of the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or Belief and Sexual Orientation) managed by:

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This publication has been commissioned by the European Commission under the framework of the European Community Action Programme to combat discrimination (2001-2006). This programme was established to support the effective implementation of new EU anti-discrimination legislation. The six-year Programme targets all stakeholders who can help shape the development of appropriate and effective anti-discrimination legislation and policies, across the EU-25, EFTA and EU candidate countries.

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Luxembourg: Office for Official Publications of the European Communities, 2006

ISBN 92-79-03114-7

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Printed in Belgium

PRINTED ON WHITE CHLORINE-FREE PAPER

Table of Contents

	Executive Summary	4
I	Introduction	7
II	The Religion and Belief Ground of the Directive	11
	Direct discrimination	12
	Indirect Discrimination	13
	The question of comparators	14
	Harassment	15
	Remedies and Enforcement	16
III	A duty of reasonable accommodation?	19
IV	Defining Religion and Belief	25
	Defining Religion	26
	Defining Belief	29
	Political Opinion	30
	Does belief include non-belief?	30
	Determining an individual's religion or belief	31
V	The Relationship Between Religion and Race and Ethnicity	33
VI	The Relationship Between Human Rights Protection and the Directive	37
	The Complementary Relationship	38
	Limiting Rights	39
	Rights in Tension	40
	European Experience of Competing Rights	41
	<i>Autonomy of Religious Organisations</i>	41
	<i>Religious Symbols</i>	42
	<i>Religion and Sexual Orientation Discrimination</i>	43
	<i>Equal Treatment of Different Religious Groups</i>	44
	<i>Religious Freedom and Privacy</i>	44
	Addressing the tensions within the Directive	45
VII	The relationship between provisions on Religion and Gender	47
	Headscarves, freedom of religion and gender equality	48
	Lifestyle requirements	52
VIII	Genuine Occupational Requirements and the Religious Ethos Exemption	55
	Transposition of Article 4	57
	European Experience of Religious Occupational Exceptions	60
	Determining the Proportionality of Occupational Requirements	61
IX	Conclusion	63
	Bibliography	65

Executive Summary

The Employment Equality Directive¹ introduced in 2000 requires all Member States to protect against discrimination on grounds of religion and belief in employment, occupation and vocational training. This report provides an overview of the provisions on religion and belief and examines the approach taken to implementation by Member States. The report also identifies some of the problematic legal issues which are likely to arise, and considers what should be the proper scope of protection against discrimination on grounds of religion and belief. The complexity of this question comes from the fact that while Europe is committed to upholding religious freedom, it is equally committed to equality and other fundamental 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.

The Directive protects against direct and indirect discrimination, harassment and victimisation on grounds of religion or belief. The provisions are in similar terms for those existing in EC law concerning other grounds of discrimination such as sexual orientation and sex discrimination. Direct discrimination occurs where a person is treated less favourably on grounds of religion and belief. It cannot be justified, but there is a defence where a genuine occupational requirement can be identified, and it is proportionate to impose that requirement. Indirect discrimination arises where an apparently neutral requirement would put persons of a particular religion or belief at a particular disadvantage compared with other persons. It can be justified if there is a legitimate aim for the requirement and the means of achieving the aim are appropriate and necessary. It is not yet clear what types of factor courts will accept as justifying either indirect religious discrimination or the imposition of genuine occupational requirements based on religion or belief. It is suggested that a tension could develop between providing adequate protection for the religious freedom of employers and employees, and achieving consistency in treatment as between different grounds of discrimination within European Law, particularly as between sex discrimination and discrimination on grounds of religion and belief.

It is arguable that provisions on indirect discrimination impose a duty on employers which is similar to a duty to make reasonable accommodation for the needs of religious staff. The extent of any such duty will be determined by the scope of the justification defence available in indirect discrimination cases. In interpreting 'justification' under the Directive in such cases, courts will need to decide whether to require similar levels of protection against indirect religious discrimination as they do for sex discrimination. To do so will be to impose on employers a fairly onerous duty of accommodation of religious practice. This may give rise to additional problems in terms of creating equality between employees of different religions, as well as achieving a fair balance between the interests of those who are religious and those who are not.

One preliminary question which arises under the Directive is how to define religion or belief. In common with most international documents dealing with rights based on religion and belief, the terms are not defined within the Directive itself. Although not defined, it is likely that courts will draw on the experience of the European Court of Human Rights which has some jurisprudence on the issue, as well as the experience of several member states which have defined religion and belief for other purposes within their domestic law. 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. For example, Scientology is recognised in some Member States but not in others. In terms of the definition of 'belief', again the term is undefined, but it is likely that to be protected beliefs will need to have a certain level of cogency, seriousness, cohesion and importance.² There is also some inconsistency between Member States, with political beliefs protected in the some, but not in all. Other difficulties may arise out of the complexities in the relationship between religion, race and ethnicity. Within the Directives a clear distinction is drawn between religion, and race and ethnic origin, with the Racial Equality Directive being more

¹ 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] O.J. L303/16 (the Directive).

² In accordance with the ECHR case law *X, Y and Z v. UK* (1982) 31 D&R 50, and *Campbell and Cosans v. UK* (1982) 4 EHRR 293.

extensive in scope than the Employment Equality Directive under which religion is protected. Yet the boundary between race and ethnicity on the one hand, and religion on the other is not always clear: 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. Given that the boundaries between ethnicity and religion can sometimes be blurred, the hierarchy in protection between the two grounds of discrimination may give rise to difficulties if the aim of the Employment Equality Directive is to put an end to discrimination between those of different religions.

Further difficulties can arise in the relationship between the protection of religious interests and the principle of non-discrimination on grounds of gender. These interests can conflict where religious groups are not committed to gender equality. In the context of the employment relationship, issues can arise in relation to the employment of women within religious bodies, and the imposition of dress codes requirements, such as those relating to the Islamic headscarf, which predominantly affect women. Legal problems may arise with respect to the need to maintain autonomy for religious organisations; issues regarding the wearing of religious symbols or religious clothing at work; and conflicts between religious freedom and other human rights such as privacy and equality on grounds of gender and sexual orientation. That tensions exist between fundamental rights is well known: within human rights law these conflicts and tensions are dealt with by providing exceptions to the rights where necessary and proportionate to meet a legitimate aim, such as protecting the rights of others. Implicit within the non-absolute nature of many human rights is the notion of balancing competing rights, and holding them in some form of equilibrium.

The mechanism within the Directive for achieving an equilibrium between conflicting rights is via the exceptions for genuine occupational requirements, and the requirement for indirectly discriminatory rules to be justified. These mechanisms allow exceptions to the non-discrimination principle to be subject to review by courts to ensure that they are objective and reasonable. Courts need to find a balance between protecting freedom of religion and respecting the rights of others. To do this they will need to assess the proportionality of exceptions to the non-discrimination principle in the light of the need to uphold equality, to protect freedom of religion, and to protect other human rights such as privacy and freedom of speech. The assessment of proportionality should also take into account the equality interests of service users, the freedom of religion of all members of staff, the right to freedom from religion for customers and colleagues, and an interest in political or religious neutrality for the employer. Where the balance lies may depend in part on the status of the employer (for example, whether it has a religious ethos and whether it is part of the public or private sector) and whether it has a monopoly on providing particular types of employment.

In effect, the Employment Equality Directive requires resolution in the work context of many highly contested and sensitive conflicts that can arise in relation to competing rights to religious equality and to equality on grounds including gender and sexual orientation. The resolution suggested by the Directive is to provide a proper procedural basis for the consideration of competing arguments. As the German Constitutional Court has recognised, the aim in balancing such complex competing rights is to achieve 'practical concordancy'.³ This involves a recognition that the rights are not reconcilable, and yet that a *modus vivendi* must be found. If this is to be achieved, it will require an approach by the courts which is fact and culture dependent. One disadvantage of such a fact sensitive approach is that predicting the outcome in any particular case becomes difficult as so many interests are being weighed in the balance. However, the advantage of such an approach is that it can provide consistency in terms of clear procedural safeguards, to ensure that restrictions on religious freedom, and exceptions to the non-discrimination principle are only imposed after proper consideration of the varied interests at stake, in the cultural and political context of the particular member state. It may be that the role of the Directive and those who interpret it, is not so much to determine exactly where the equilibrium between the rights of workers to equality and the rights of religious groups to religious freedom and autonomy is to be found. Instead its role is to establish clear procedural safeguards so as to ensure that the correct issues are considered in the proportionality equation.

³ German Classroom Crucifix case, BVerfGE 93, 1, 1 BvR 1087/91.

Suranga | 1984

Part I

Introduction

The Employment Equality Directive requires all Member States to protect against discrimination on grounds of religion and belief in employment, occupation and vocational training. The purpose of this report is to provide an overview of the provisions on religion and belief and to examine the approach taken to implementation by Member States. The report identifies and discusses some of the problematic legal issues which arise, using selected examples from the case law and legislation of Member States. It offers some suggestions as to how problems may be resolved in a way that provides adequate protection both to religious interests and to other interests that are at stake in the employment sphere.

The inclusion of religion and belief as grounds which are protected reflects principles of EU law which ensure that the law is respected within the application of Treaties, such as the European Convention on Human Rights, which protects freedom of religion and belief.⁴ It also reflects Member States' obligations under the Universal Declaration of Human Rights and ILO Convention No. 111 which prohibits discrimination on a number of grounds including religion and belief.⁵ The interpretation of the Directive should be influenced by the case law and jurisprudence of the ECtHR, the 1961 European Social Charter and the 1996 Revised European Social Charter, which between them provide for protection against discrimination, and protection for religious freedom.⁶

Yet, determining the proper scope of protection against discrimination on grounds of religion and belief raises many complex and contested questions. In part these difficulties are due to the range of ways in which religion can be protected within the democratic orders that are represented in the member states of the EU. In addition to their obligations under human rights treaties and the directive, many states also have constitutional obligations to protect religious freedom. Operating along side commitments to maintain religious freedom, many states have strong commitments to the Christian church. To take just a few examples of the many ties between religion and state across the EU, the UK has an established church; the Irish Constitution makes express reference to being founded on Christianity;⁷ Finland levies church taxes and legislation provides autonomy to the Lutheran church; and Spain and Italy have strong ties with the Catholic church, regulated by treaties with the Holy See.

Other difficulties in determining the parameters of the non-discrimination provisions of the directive come from the tensions which arise from attempting to give due protection for members of religious minorities. Groups may be minorities because they are members of new religions, or because they are members of other major world religions, but as relatively recent immigrants to Europe, do not share the strong historical links with the State. Failure to protect the religious interests of minorities may combine with other forms of discrimination such as racial discrimination to exacerbate the problems of minorities.

A different reason for complexity and contestation is the fundamental tension that exists between freedom of religion, protected in international law as a fundamental human right, and the right to equality. At times these rights work in tandem, and are complementary. Protection against religious discrimination will enable religious freedom to be more fully enjoyed, along with freedom of expression, freedom of association, the right to privacy and freedom of conscience. These various human rights can only flourish where religious groups are given space to operate free from discrimination.

However, the two rights are also in tension. Particular problems arise because of potential conflict between the collective rights of religious people, and the rights of those outside the religious group. The aim of the Directive may

⁴ Article 6(2) EU Treaty, and Recital 1 Directive.

⁵ Recital 4 of the Directive.

⁶ See further De Schutter, *The Prohibition of Discrimination under European Human Rights Law* (human european consultancy and the Migration Policy Group (MPG), 2005), published by the European Commission, DG Employment, Social Affairs and Equal Opportunities.

⁷ The Preamble of the Irish Constitution states: "In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Eire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, ... Do hereby adopt, enact, and give to ourselves this Constitution". In a similar manner, in its Preamble, the Polish Constitution declares that it is established by " (...) We, the Polish Nation - all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, Equal in rights and obligations towards the common good - Poland, (...) Recognizing our responsibility before God or our own consciences (...).

have been to regulate relations in civil society, by protecting the civil liberties and equality rights of members of different religious groups.⁸ However, protection against religious discrimination can lead to restrictions on the freedom of religious groups to keep themselves separate from non-members in order to maintain the integrity of the group.

Protecting the religious freedom of one group will, at times, inevitably involve acting contrary to the interests of those outside the group. For example, full enjoyment of freedom of religion and freedom of association will entail allowing religious groups to employ those who share the same religion. The immediate consequence is that individuals who do not share the group religion, or who do not share all aspects of it will be treated less favourably than those of the same religion as the employer. This raises a number of difficult questions. To what extent does freedom of religion or freedom of association demand that religious groups should be able to work with co-religionists in an employment relationship? If religious groups employ others, does religious freedom require that they be able to refuse to employ those from outside the group? Can they demand that any religious employees live their non-working lives in accordance with the tenets of their faith? Will dismissal for non-compliance breach the non-discrimination principle? Will it also infringe employees' rights to privacy?

Further tensions can arise between equality and religious freedom: for example, where a religious group does not believe in the equality of women, then there will be tensions between full enjoyment of religious freedom, and proper protection of sex equality. Similarly, equality on grounds of sexual orientation can conflict with some religious beliefs.

The difficulty in reconciling the competing interests between religious rights and equality rights is not always directly addressed in the Directive, but will necessarily be played out in developing case law on the religion and belief ground. The interaction of the right to freedom of religion with the non-discrimination principle, together with the lack of a clear definition of the fundamental term 'religion and belief' mean that the scope of this part of the Directive is far from clear. These various difficulties will be explored further below.

The next chapter contains an overview of the religion and belief provisions of the Employment Equality Directive. It identifies the forms of discrimination covered by the Directive, together with the provisions regarding exemptions for genuine occupational requirements and the special exemptions for religious ethos organisations. Chapter 3 reviews the extent to which the Directive can or should be taken to impose a duty of reasonable accommodation on employers. The difficulties that arise in attempting to define religion or belief are considered in Chapter 4, together with a discussion of whether the Directive should be taken to include protection for political opinion. Chapter 5 considers some of the complexities in the relationship between religion, race and ethnicity. The relationship between human rights and the protection for religion under the directive is examined in Chapter 6, both the extent to which the relationship is complementary, as well as some of the tensions that exist between the two forms of protection. Particular issues considered include the question of autonomy for religious organisations; the use of religious symbols; and conflicts between religious freedom and other human rights such as privacy. Further consideration of the conflict between rights is provided in Chapter 7, in which the interplay of religion and gender is discussed. Chapter 8 assesses the scope of the genuine occupational requirement exceptions to the non-discrimination principle, and the special exception provided for religious ethos employers. The concluding chapter highlights the challenges facing those implementing and interpreting the religion and belief provisions of the Directive. *References are made throughout to the law and practice of member states. Details have been drawn from the Country Reports produced by for the European Network of Legal Experts in the non-discrimination field (on the grounds of Race or Ethnic Origin, Age, Disability, Religion or belief and Sexual Orientation).*⁹

⁸ Bell, 'A Patchwork of Protection: The New Anti-Discrimination Law Framework', 67 *Modern Law Review* (2004), 465; Bell and Waddington, 'Reflecting on inequalities in European equality law', 28 *European Law Review* (2003), 349; Bell and Waddington, 'More Equal Than Others: Distinguishing European Equality Directives', 38 *Common Market Law Review* (2001), 587.

⁹ The network is established and funded in the framework of the EC Action Programme to Combat Discrimination (2001-2006). It is managed by human european consultancy and the Migration Policy Group. All publications of the Network may be found at the following website of the European Commission : http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm#leg

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Part II

The Religion and Belief Ground of the Directive

The Employment Equality Directive prohibits direct and indirect discrimination,¹⁰ harassment,¹¹ instructions to discriminate¹² and victimisation¹³ on grounds of religion and belief.¹⁴ The definitions of these terms are identical for the different grounds, and interpretation is likely to draw on the experience of the courts in interpreting the existing EU protection against discrimination on grounds of sex. However, there are several problematic issues that are likely arising in relation to religion and belief discrimination, which may be unique to this ground.

Direct discrimination

Direct discrimination involves less favourable treatment on grounds of religion or belief. Factual examples will include where employers refuse to employ religious staff altogether, or employ some religious staff, but refuse to employ those of one particular religion. For example, an employer may have Christian staff, but refuse to employ a Scientologist. Direct discrimination will also arise where religious organisations refuse to employ those who do not share the faith of the organisation (although in some cases such cases may be covered by the ‘genuine occupational requirement’ exception).¹⁵

Direct discrimination must be ‘on grounds of’ religion or belief. The Directive is not limited to less favourable treatment on the grounds of a victim’s own religion or belief. It would therefore cover treatment based on the discriminator’s assumption about a person’s religion, even though this assumption may be mistaken; as well as discrimination based on a person’s association with people of a particular religion (for example discrimination against someone married to a member of a religious group). In many states,¹⁶ this issue is not addressed directly, but discrimination based on assumed characteristics or based on association with persons with particular characteristics is taken as being implicitly covered by the definition of direct discrimination. Some member states such as Belgium and Finland can be taken to protect on these grounds because their list of non-discrimination grounds is not exhaustive.¹⁷ Other states, such as Ireland, explicitly prohibit discrimination on the basis of an assumed characteristic,¹⁸ and discrimination by association.¹⁹

The Directive may also protect against discrimination based on the employer’s religious views; for example, a Catholic employer could dismiss an employee for marrying a divorced person, and the less favourable treatment would still be ‘on grounds of religion’. However, some states such as the UK have specifically ruled out this possibility.²⁰

¹⁰ Article 2(2).

¹¹ Article 2(3).

¹² Article 2(4).

¹³ Article 11.

¹⁴ The terms ‘religion’ and ‘belief’ are not defined in the Directive. See Chapter 4 below.

¹⁵ Article 4, and see discussion in Chapter 8 below.

¹⁶ For example, Germany, Spain, Italy, Austria. See respective Country Reports 2006: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG)).

¹⁷ Country Report Belgium: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), February 2006), Country Report Finland: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), December 2004).

¹⁸ Section 6(1) Employment Equality Act 1998-2004 and section 3(1) of the Equal Status Act 2000-2004.

¹⁹ Section 3(1)(b) Equal Status Act 2000-2004, section 6(1)(b) Employment Equality Act 2000-2004.

²⁰ In the UK regulation 3(2) of the transposing Employment Equality (Religion or Belief) Regulations 2003 provide that ‘the reference ... to religion or belief does not include [the discriminator’s] religion or belief’.

The definition of direct discrimination does not provide any general exceptions or justifications,²¹ but some specific exceptions exist. First, under the Directive, where a measure is necessary for public security, for maintenance of public order... and for the protection of the rights and freedoms of others, a general exception to the non-discrimination principle can be made.²² Second, an exception exists 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, provided that the objective is legitimate and the requirement is proportionate.²³ Thus requiring that a priest be Catholic, or that a teacher of Islam be Muslim would not involve unlawful direct discrimination. Third, a slightly wider exception exists where the employer is a church or an organisation the ethos of which is based on religion or belief. Under this exception, religious foundations such as hospitals, run with a religious ethos, can require that members of staff are loyal to that ethos. This is the case even though sharing a religious belief may not be an essential requirement for carrying to the core duties of a doctor, for example. Any such requirement must not entail discrimination on any other ground.²⁴ The scope of these exceptions is discussed in more detail below.

Indirect Discrimination

Indirect discrimination occurs 'where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief... at a particular disadvantage compared with other persons' unless it can be justified.²⁵ Factual examples will include where the employer imposes requirements in terms of uniforms or hours of work, with which it is difficult for those of particular religions to comply. A requirement to be clean shaven could cause difficulties for Sikh men; a requirement to work on Sundays could cause difficulties for Christians; and a requirement to be a member of a particular religious group to be employed by a religious organisation could cause difficulties for those of a different group.²⁶

Indirect discrimination is capable of justification where the practice or criterion can be objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary.²⁷ This should ensure that job requirements are appropriate to the job in question, and should prevent the imposition of unnecessary requirements that have a disproportionate impact on those of any particular religion.

The question of justification is usually left to domestic courts, but what is not yet clear is the type of factor that courts should accept as justifying indirect religious discrimination. For example, will market justifications be accepted? Can an employer argue that a different uniform cannot be accommodated because customers will not like it and may shop at a different store? Can an employer refuse to accommodate because it will cost them financially? Should an employer who wishes to project a contemporary image to its customers be able to show that a restriction on religious clothing is justified? The Danish Supreme Court²⁸ allowed an employer to justify clothing guidelines in order to create a religious neutral workplace, but it is unclear whether such an interpretation is consistent with the Directive.

²¹ In relation to sex discrimination, the ECJ in *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941 confirmed that direct discrimination cannot be justified.

²² Article 2(5).

²³ Article 4(1).

²⁴ Article 4(2). Any requirement as to religion or belief must constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. Note that unlike for the general exception in article 4(1), the requirement does not have to be 'determining.'

²⁵ Article 2(2).

²⁶ Such a requirement could also cause difficulties for a religious lesbian or gay person, depending on the religion involved. For discussion of the possible conflict between non-discrimination grounds, see Chapter 6 below.

²⁷ Article 2(2)(b).

²⁸ Decision of 21 January 2005, 22/2004.

In order to be proportionate, the employer should demonstrate a good reason for wanting a religiously neutral workplace, given the discriminatory effect. If having a religiously neutral workplace is accepted too readily as a legitimate aim, then the religious discrimination protection will be very weak. Moreover, the necessity for such a rule would also need to be considered: the requirement may be for the legitimate aim of presenting a particular corporate image, but it would also need to be proportionate. A number of factors will need to be considered in determining whether any indirect discrimination is justified. Factors may include the type of business, the nature of the accommodation required, whether the religious dress is necessary to the religion (rather than being common practice among the religion's adherents, or only inspired by the religion),²⁹ and the extent to which the member of staff has contact with the public.

With regard to sex discrimination the standard of justification is high: any requirement must have a legitimate aim, the means chosen for achieving that objective must correspond to a real need on the part of the undertaking, must be appropriate with a view to achieving the objective in question and must be necessary to that end.³⁰ Economic cost or customer preference will not usually justify indirect sex discrimination. It is arguable that such a high standard of justification is not appropriate in cases of religion and belief discrimination, as it would lead to difficulties for employers who attempt to achieve a fair balance between the different interests identified above.³¹ Yet if different standards of justification develop with respect to religious discrimination and gender discrimination this will lead to inconsistencies in treatment as between different grounds of discrimination within European Law.

The question of comparators

Both direct and indirect discrimination require comparisons to be made with others. Direct discrimination is defined as less favourable treatment than another 'in a comparable situation'³² and indirect discrimination involves disadvantage 'compared with other persons'³³ This immediately raises the question of when two situations will be said to be comparable. This has caused difficulties in relation to sex discrimination,³⁴ and is likely to do so in relation to religion and belief.

It is not clear from the Directive who the comparator should be. Less favourable treatment may become apparent if one compares a religious claimant with a person of no religion, for example if a secular employer refuses to employ anyone who is religious. However, it may be that the less favourable treatment only becomes apparent if the claimant is compared with a person of a different religion. For example, an employer may refuse to employ anyone who is not a Christian. Here the less favourable treatment of a Muslim will not be apparent if she is compared to a person of no religion, or to a Hindu, but only when compared to Christians. The difficulties do not end here, however, as there are yet more variables. For example, it may be that a claimant is from a minority religion, and that the less favourable treatment only shows up once the comparison is made with a person of a majority religion, rather than with the comparison with another minority religion. In a state such as the UK, which has an established church, with the Church of England recognised by law as the official church of the State,³⁵ are

²⁹ See *Arrowsmith v. UK* (1978) 19 D.&R. 5 on the distinction between activities which are motivated by religion or belief, and those which amount to a manifestation of religion. The protection of Article 9 ECHR only extends to manifestations of religion, not all religiously inspired action.

³⁰ *Bilka-Kaufhaus v. Weber von Hartz* [1986] ECR 1607.

³¹ See also the further discussion in Chapter 3 with regard to the duty of reasonable accommodation.

³² Article 2(2)(a).

³³ Article 2(2)(b).

³⁴ See *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941.

³⁵ The head of state is also head of the Church.

members of the established church comparable with a member of a different church? In Italy and Spain where there are strong ties with the Catholic Church, can treatment of Catholics be compared with treatment of those of other faiths?

Moreover, there is recognition in some states that practices which are historically Christian, such as taking Sunday as a day of rest, are so well established as to be cultural rather than religious practices.³⁶ This means that comparisons with treatment of other religions becomes complex: is treatment of one religion different from another, if one religion's practice is actually treated as cultural rather than only religious? For example a refusal to allow a Seventh Day Adventist to take Saturdays off may amount to less favourable treatment in comparison with Christians, who can take Sunday off, as only Christians are able to be off work for their religious day of rest. However, one might say that the two religious groups are not in comparable situations: it is arguable that having Sunday off is not a religious accommodation granted only to Christians, but merely the acceptance of a cultural norm.³⁷

The Directive does not provide clear answers to the question of who the correct comparator might be, and national implementing legislation has generally incorporated the wording of the Directive, or used slightly different wording, without addressing the question of comparators. It would seem that if the recitals clauses are to be respected, and the commitments to equality and respect for human rights contained within them are to be upheld, then once less favourable treatment can be shown in comparison with another group, the discrimination finding should be made, whether that comparison is with those of a majority religion, minority religion, established religion or no religion. The fact that treatment may be similar to that of a third group should not prevent a finding of discrimination as between the two chosen groups.³⁸

To return to the example of the comparison between Seventh Day Adventists and Christians above, one suggestion would be to accept that the Seventh Day Adventist is indirectly discriminated against in comparison with Christians, as a requirement to work Saturdays is particularly disadvantageous for them. However, in justifying any requirement, an employer can point to the cultural norm of working on Saturday and resting on Sunday. Hence the issue is no longer viewed as a problem of finding the correct comparator, but becomes an issue of justification. The benefit of such an approach to any applicant is that it the burden of justifying any discrimination will be on the respondent.

Harassment

The Directive deems harassment to be a form of discrimination, where there is unwanted conduct related to religion and belief with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.³⁹ Most states have implemented provisions on harassment which are similar to this definition.⁴⁰

³⁶ See the decision of the Spanish Constitutional Court (19/1985, 13 February) that the consideration of Sunday as the general day of weekly rest (article 37.1 of the Workers' Statute) is based not on a religious rule but on a secular tradition. Country Report Spain: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

³⁷ See also the observations of the ECommHR in *Ahmad v UK* (1982) 4 EHRR 126, at para 28.

³⁸ The approach is similar to that taken in equal pay cases where a woman can compare her work to men doing work of equal value for higher pay, even though there may also be some equally low paid men in the same grade.

³⁹ Article 2(3).

⁴⁰ An exception is Estonia, where the unwanted conduct must take place against a person in a relationship of subordination or dependency. Country Report Estonia: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG) 2006).

The Directive does not set out how to determine whether or not dignity is violated, nor how to determine whether an environment is hostile or offensive. This could cause particular problems with regard to religious harassment, as not only are the terms religion and belief undefined,⁴¹ but there may be a relative lack of shared understanding of the likely effects of certain behaviour on religious people. Members of the same religion will not all agree on what might cause offence. For example, would hostile debate about religious issues such as the wearing of the headscarf offend Muslims? Can a Christian who is offended by discussion of abortion claim harassment if she is offended because of her religion? Will it make a difference if the discussion would not offend other Christians, and may indeed offend some who are members of different religions or not religious at all? It is not at all clear how such questions should be determined.

Some states have begun to address this question in their implementing legislation: Slovakia refers to treatment 'which that person can justifiably perceive' as harassment;⁴² the Czech Republic covers 'conduct objectively perceived by the concerned person as unwanted, inappropriate or offensive.'⁴³ The UK uses an objective and subjective test: conduct is offensive etc. where 'having regard to all the circumstances, including in particular the perception of [the victim] it should reasonably be considered as having that effect.'⁴⁴

However, even where implementing legislation provides that the test must be objective, it is not clear exactly how such questions should be determined. In the case of well-known religions, a practical answer might be to give weight to the views of the formal authorities of the religion. However, it is arguable that such an approach will not protect the individual religious person sufficiently, as religious belief is an intensely personal matter, and levels of offence cannot be determined by outside agencies, even if those agencies are official religious bodies. Moreover, less well known religious groups may lack clear statements of faith, and it may not always be easy to come to a clear conclusion about whether individuals are justifiably offended. Yet to allow too subjective a test of offence could have a chilling effect on freedom of speech.⁴⁵

Remedies and Enforcement

The Directive provides that effective remedies must be available. Most states have transposed this provision by providing for remedies for infringement of the Directive via their general civil law procedures or employment law procedures.⁴⁶ In addition, various other forms of enforcement exist such as labour inspectorates,⁴⁷

⁴¹ See Chapter 4 below.

⁴² Section 2(5) Anti-discrimination Act, no. 365/2004.

⁴³ Section 3(5) draft anti-discrimination law (Country Report Czech Republic: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

⁴⁴ Regulation 5 Section Employment Equality (Religion and Belief) Regulations 2003.

⁴⁵ See Chapter 6 below for discussion of the interaction of the Directive with other rights such as freedom of speech.

⁴⁶ See Tobler, Remedies and Sanctions in EC non-discrimination law, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2005), Cormack and Bell, Developing Anti-Discrimination Law in Europe; the 25 Member States Compared, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2005) chapters 7&8.

⁴⁷ Finland, Hungary, Latvia, Lithuania, France, Greece, Spain and Portugal.

ombudsmen,⁴⁸ or human rights commissions or offices.⁴⁹ Member states include a range of remedies such as compensation, reinstatement, or fines. Most member states' remedies are individualistic and remedial rather than preventative, although some states, such as Ireland provide for remedies such as requiring employers to take specified courses of action as well as compensation and reinstatement.⁵⁰

⁴⁸ Spain, Cyprus.

⁴⁹ Latvia.

⁵⁰ For detail see Cormack and Bell, *Developing Anti-Discrimination Law in Europe; the 25 Member States Compared*, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2005), and Tobler, *Remedies and Sanctions in EC non-discrimination law*, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2005).

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Part III

A duty of reasonable accommodation?

The protection available to religion within the Directive is limited to the prohibition of direct and indirect discrimination, harassment and victimisation. It does not, on its face, impose a duty on employers to make reasonable accommodation for the needs of religious employees. In this regard it can be contrasted with the duty to accommodate disability which is specifically provided within the text of the Directive. One question which arises is whether the protection against discrimination on grounds of religion can be developed to include a duty of reasonable accommodation.

The question gives rise to some difficulty. The first difficulty is that accommodating religious personnel may be viewed as a form of detriment to others. This may cause complex problems if those without a religious view point are protected by the Directive.⁵¹ Any accommodation of one religious viewpoint has the potential to be interpreted as discrimination against those of another.⁵²

Taking the example of weekend working, employees may wish to have Saturdays off for a range of reasons, and it is not clear how, if a duty to accommodate exists, an employer or a court should prioritise between them. One member of staff may wish to partake of religious observance, another may wish to spend time in pursuing some other interest which is personally very important to her, such as joining in sporting activities, or attending a yoga class. Others may wish to have a day off in common with the rest of the family, to enrich their family life. It might be argued that these latter two reasons are less important than the religious reason, but this is far from certain, particularly if time off is requested to pursue activity related to political beliefs, such as to volunteer time with a political party.⁵³ It will also not be the case that religious activity is necessarily more important than other activity if the request for 'time off with the family' is recast as a request for time off for child care, as then the request becomes linked to another equality right, namely gender equality. For these reasons, a duty to accommodate religion and belief has the potential to create great difficulties for employers, clearly illustrating the tensions and conflicts that exist between protection for freedom to practice religion and the prohibition of discrimination on the ground of religion, referred to above.

Nonetheless, despite the difficulty involved, a duty to accommodate religion can be viewed as an essential element of protection against religious discrimination. Indeed, when religious discrimination was prohibited in the US in the 1960s, the non-discrimination provisions were soon augmented by a duty of reasonable accommodation, in recognition of the fact that religious freedom requires the protection of religious practice or observance, as well as protection of belief itself. If staff is to be protected in their rights to practice their religion, then a level of accommodation is required. As a result the Civil Rights Act of 1964 that first prohibited religious discrimination in employment was amended in 1972 to include a duty on the employer to accommodate the religious practices of employees, as long as to do so did not cause undue hardship to the employer.⁵⁴ Common accommodations can be rescheduling of work to allow for time off for religious observance and amendments to uniform or grooming rules to allow for religious dress codes.

⁵¹ This point is discussed further in Chapter 4 on the definition of religion and belief.

⁵² See the debate on this issue in the context of constitutional protection of religion in the Irish case of *Quinn's Supermarket v. Attorney General* [1972] IR 1, where it was argued that special exemption for Jewish kosher butchers from the Sunday trading laws was discriminatory against non-Jewish shop keepers. The argument was not accepted, and the exception was upheld on the basis that it was necessary adequately to protect the freedom of religion of the Jewish community.

⁵³ See discussion in Chapter 4 on whether the Directive covers political opinion.

⁵⁴ "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C.A. § 2000e j.

One of the difficulties in introducing a duty to accommodate is in determining the extent of such a duty. What level of accommodation is reasonable, and how much hardship will be taken to be 'undue'? If too much accommodation is required, one person's religious freedom can impose significant costs on others. Yet if too little accommodation is required, the requirement becomes meaningless.

In the US, the interpretation of the duty to accommodate has been somewhat restrictive, with accommodation only required where it is reasonable, and where it does not cause undue hardship.⁵⁵ Undue hardship has been interpreted to mean that there must be no more than *de minimis* cost, either in terms of financial cost or in terms of disruption, or administrative inconvenience.

Although such minimal duties may suggest the protection is meaningless, it does require that an employer makes an attempt to accommodate. In terms of hardship, although only a *de minimis* level is required, it must be actual hardship, not merely hypothetical hardship.⁵⁶ This means that the employer cannot rely, for example, on the fact that other staff might become unhappy if a particular accommodation is made, but must show that they will in fact be unhappy. In effect, the duty of reasonable accommodation puts the onus on the employer to show that they have thought about trying to accommodate and have real reasons why to do so would be difficult. Such a duty does not lead to extensive protection for staff, and thus does not offend greatly against the rights of others. If another's rights are infringed this is probably grounds not to accommodate. If however, another's rights might only hypothetically be infringed, this is not.

To what extent, then, might such an approach be required under the Directive? Given that Article 9 ECHR protects religious practice as well as religious belief, it is likely that, as in the US, a form of reasonable accommodation will be needed to protect religious practice. Although there is clearly no specific mandate to accommodate religion,⁵⁷ there are two bases upon which one can argue for the recognition of such a duty. First, as accepted in *Thlimmenos v. Greece*⁵⁸ in the ECtHR, treatment can be unequal because those in the same situation are treated differently, or because those who are different are treated the same. Failure to accommodate difference therefore amounts to unequal treatment, because it amounts to a refusal to treat different people differently.

An additional understanding of the link between discrimination and the duty to accommodate is that a failure to accommodate a request for different treatment by religious employees may amount to indirect discrimination,⁵⁹ unless the refusal to accommodate can be justified.⁶⁰ For example, employees whose requests that a work uniform be adapted to accommodate religious practice are refused would suffer indirect discrimination. The employer's requirement that staff wear the uniform would put religious members of staff at a particular disadvantage, and the requirement would need to be justified.

⁵⁵ *Trans World Airlines, Inc. v. Hardison* 432 U.S. 63, (1977), *Ansonia Board of Education v. Philbrook* 479 U.S. 60 (1986).

⁵⁶ *EEOC v. Alamo Rent-A-Car* May 26, 2006, *Opuku-Boateng v. California*, 95 F.3d 1461, 1473-74 (9th Cir. 1996).

⁵⁷ Moreover, the case law of the Article 9 ECHR does not impose a duty to accommodate religion at work. See *Ahmad v. UK* (1981) 4 EHRR 126, *Stedman v. UK* (1997) 23 EHRR CD168, both confirmed in *Kosteski v. "The Former Yugoslav Republic of Macedonia"* - 55170/00 [2006] ECHR 403, discussed further in Chapter 6 below.

⁵⁸ (2001) 31 EHRR 15.

⁵⁹ It is not clear if the concept of indirect discrimination can be used to create a duty to accommodate each religious individual. Indirect discrimination is defined in terms of group disadvantage. Thus the claimant must show that a requirement would put *persons* of a particular religion or belief at a particular disadvantage compared with others.

⁶⁰ For an assessment of the requirements of 'reasonable accommodation' see L. Waddington and A. Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination' [2002] *IJCLIR* p. 403.

Other requests for accommodation of religious practice are likely to involve time off for religious observance. Some member states make explicit provision for such arrangements. In Spain, Cooperation Agreements have been made with various religious communities (Evangelical, Jewish and Islamic) ensure reasonable accommodation of different days of rest for employees of particular religions.⁶¹ Provision is also made for religious holidays to replace those established under the general law,⁶² with the agreement of both parties.

In the absence of specific agreements for such requests to be accommodated, refusal of requests to accommodate changes in hours of work may be treated as indirect discrimination. In effect, the employer is imposing a requirement on the employees to work to a particular timetable. This puts the religious employees at a disadvantage, and would need to be justified. Whether or not the requirement is justified will depend on issues such as whether cover is required, its availability and cost, the length of time off requested, and the frequency of requests.

Thus, it is arguable that the Directive creates an indirect duty to make reasonable accommodation. If a duty of reasonable accommodation can be read into the Directive, its extent will be determined by the scope of the justification defence available in indirect discrimination cases. Where a requirement can be objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary,⁶³ there is no indirect discrimination. If this justification standard is interpreted in the same way as it is in sex equality cases, this will mean that any requirement must have a legitimate aim, the means chosen for achieving that objective must correspond to a real need on the part of the undertaking, must be appropriate with a view to achieving the objective in question and must be necessary to that end.⁶⁴ The standard of justification is thus fairly stringent, and matters of economic cost or customer preference will not usually justify indirect sex discrimination.

Using such a standard in cases relating to religious requirements would impose, in practice, fairly arduous standards on employers in terms of accommodating religious practices. In the US, the provision of a mild 'undue hardship' standard has allowed courts to find no religious discrimination in cases where accommodation would give rise to any economic cost, inconvenience or even co-worker complaints.⁶⁵ Such 'costs' would be unlikely to justify indirect sex discrimination. The standard of justification in sex discrimination cases can be contrasted with the justification of disability discrimination, where financial and other costs can be taken into account in considering whether the burden of accommodation is proportionate.⁶⁶

⁶¹ Law 24/1992, of 10 November, adopting the cooperation agreement between the State and the Federation of Evangelical Religious Entities of Spain; Law 25/1992, of 10 November, adopting the cooperation agreement between the State and the Jewish Communities of Spain; and Law 26/1992, of 10 November, adopting the cooperation agreement between the State and the Islamic Commission of Spain. For example, Friday evening and all of Saturday can be provided for Jewish workers and Seventh Day Adventists as alternatives to the general rule of Saturday afternoon or Monday morning and all of Sunday. This has to be with the agreement of all the parties, which case-law has interpreted as being possible only if this is asked for by the employee before the signing of the contract. Members of the Islamic communities belonging to the Islamic Commission can request to stop work every Friday from 13.30 to 16.30 and one hour before sundown during Ramadan, subject to an agreement with the employer, and with the hours not worked made up. (Country Report Spain: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

⁶² in article 37 of the Workers' Statute.

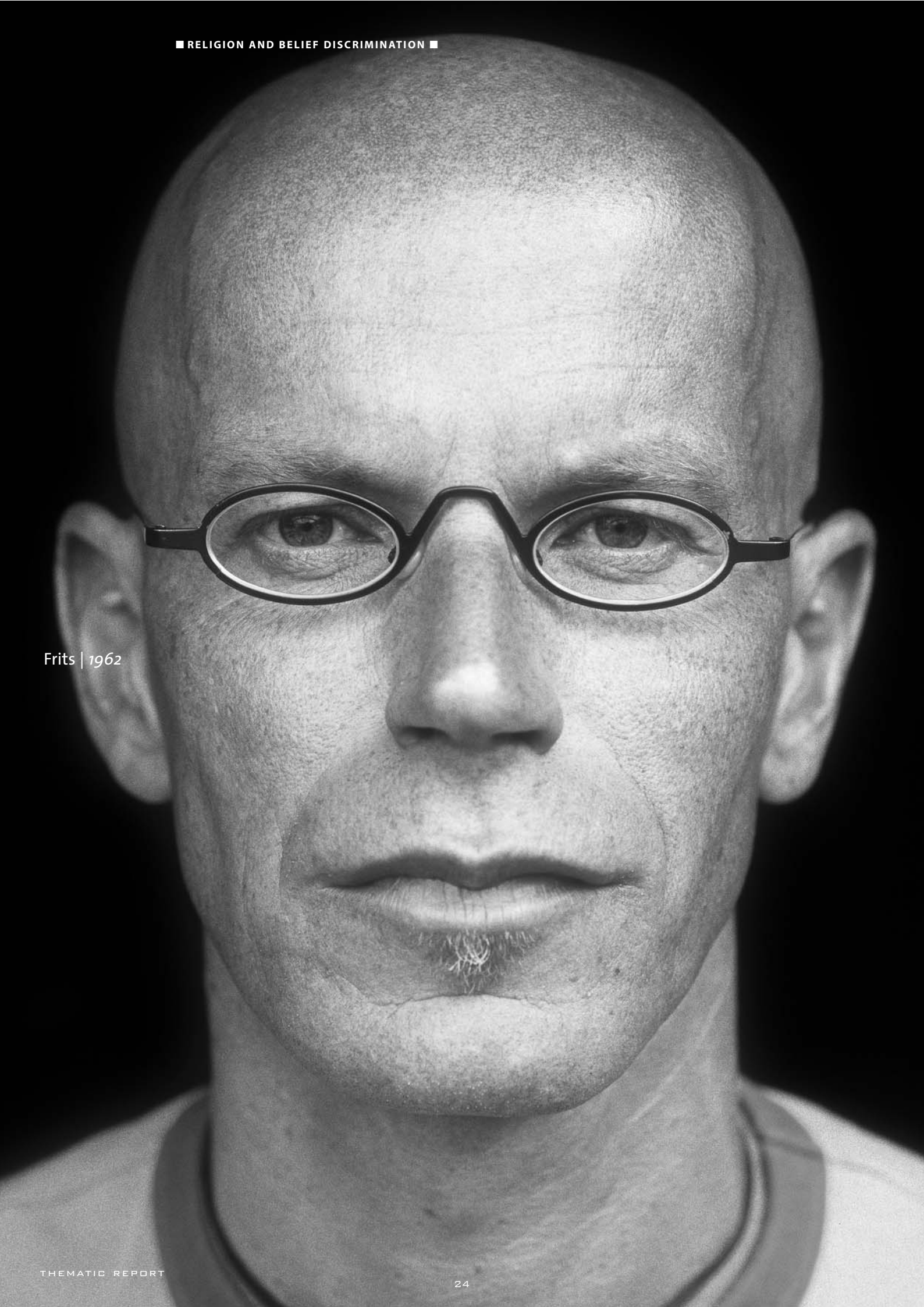
⁶³ Article 2(2)(b).

⁶⁴ *Bilka-Kaufhaus v. Weber von Hartz* [1986] ECR 1607.

⁶⁵ *Trans World Airlines v. Hardison*, 432 U.S. 63, (1976) *Turpen v. Mo.-Kan.-Tex. R.R. Co.*, 736 F.2d 1022, 1027.

⁶⁶ See Recital 21, in the Preamble to the Directive.

In interpreting 'justification' under the Directive courts will need to decide whether to require such high levels of protection against indirect religious discrimination. To do so will be to impose, in practice, a fairly onerous duty of accommodation of religious practice. This may give rise to additional problems in terms of creating equality between employees of different religions, as well as achieving a fair balance between the interests of those who are religious and those who are not.



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Part IV

Defining Religion and Belief

The terms ‘religion and belief’ are clearly fundamental to determining the proper scope of the Directive, but they remain undefined. This chapter will consider some of the difficulties faced in attempting to define these terms.

Defining religion

Although there exist a large number of recognised religions in the world, simple attempts to define the term ‘religion’ almost immediately run into difficulty. Belief in God which may unite Judaism, Islam and Christianity, is clearly insufficient as a definition, because some religions, such as Hinduism, are, arguably, polytheistic. Definitions that depend upon a ‘belief in God or gods’ would similarly fail to include Buddhism, as it does not include belief in a god. Yet these are recognised as major world religions, which will have been within the contemplation of the Directive’s drafters. The difficulties continue when one considers less well known religions such as various pagan traditions, and new religions, some of whose traditions and beliefs may be largely undocumented. Once one moves away from traditional world religions, other questions arise, such as whether a set of beliefs adhered to by only a handful or even only one person can constitute a religion.

Most of the international human rights documents protecting religious freedom do not provide definitions of religion. For example, the Universal Declaration of Human Rights avoids a definitive statement about what constitutes religion, in favour of broader terminology, which includes theistic, non-theistic and atheistic beliefs.⁶⁷

Other jurisdictions with religious discrimination prohibitions have struggled to define religion. In the US, two main approaches have been developed.⁶⁸ The first is a content based definition, concerned with identifying the core content of beliefs which make them ‘religious’ in nature, or which may make them sufficiently serious to warrant protection. Requiring a belief in God is clearly inadequate to reflect the array of belief systems that are currently protected, so a more inclusive definition may refer to a person’s ‘ultimate concern’. The idea is that everyone has concerns which are ‘ultimate’, in that they are absolute, unconditional and unqualified, and give meaning and orientation to our lives.⁶⁹ Such a test is very subjective, and many beliefs can suffice as long as they are ‘ultimate’ for the believer. This may be an advantage as it can protect minority or new religions even if they would not meet ‘objective’ standards designed by the ‘majority’.⁷⁰ Such a definition is also capable of including philosophical movements such as humanism or atheism which do not have traditional religious roots. However, its inclusiveness is also a weakness. It provides no principled way to distinguish between, for example, an ‘ultimate concern’ with football and an ‘ultimate concern’ with the tenets of Islam.⁷¹

An alternative approach to defining religion is to define by analogy.⁷² A list of criteria can be identified which are neither necessary nor sufficient in themselves to define religion, but which, if they are present in sufficient quantity, can indicate that a belief system is religious, even though another religion may share none of the same criteria.⁷³ Such an approach to defining ‘religion’ overcomes the difficulties identified above, whereby each

⁶⁷ See General Comment No. 22 (48) on Article 18 UDHR by the UN Human Rights Committee para 2, reported in (1994) 15 Human Rights L.J. 233.

⁶⁸ The approaches have been developed in academic commentary, and have met with approval in the case law. See for example, *United States v. Seeger* 380 US 163, (1965).

⁶⁹ P. Tillich ‘Dynamics of Faith’ (Harper & Row New York, 1958), cited in *Seegar* above.

⁷⁰ See ‘Toward a Constitutional Definition of Religion’ (1978) 91 Harv. L.R. 1056.

⁷¹ Macklem, ‘Reason and Religion’ in P. Oliver et. al. (eds) *Faith in Law: Essays in Legal Theory*, (Hart, Oxford, 2000) at p. 79.

⁷² This alternative approach is advocated in academic commentary. See in particular, K. Greenawalt, ‘Religion as a Concept in Constitutional Law’ (1984) 72 California L.R. 753-816; and G. Freeman III, ‘The Misguided Search for the Constitutional Definition of Religion’ (1983) 71 Georgetown L.J. 1519-1565.

⁷³ A similar approach is used by Wittgenstein to show that ‘games’ have no common feature that they all share, but that they share a family of resemblances. L. Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell, 1953).

definition can be undermined by pointing to a set of ‘religious’ views which do not seem to match the definition. Criteria could include: a belief in God or a supreme being; a comprehensive view of the world and human purposes; a belief in an after-life; communication with ‘God’ via worship and prayer; a particular perspective on moral obligations derived from a moral code or from a conception of God’s nature. This approach is capable of adaptation over time to reflect developing understandings of religion. However, reasoning by analogy remains opaque; for example, does an analogy have to be clear, or is a loose analogy sufficient?⁷⁴

Something of a compromise between the content based definitions and those which suggest reasoning by analogy, was used in the Australian High Court in *The Church of the New Faith v The Commission of Pay-roll Tax (Victoria)*.⁷⁵ The court held that no single characteristic is determinative, but that the following criteria were helpful in characterising beliefs as religious: a belief that reality extends beyond that which is capable of perception by the senses; that the ideas relate to man’s nature and place in the universe and his relation to things supernatural; that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct, or to participate in specific practices having supernatural significance; that adherents constitute an identifiable group (even if loosely knit); and that adherents themselves see the ideas as religious.⁷⁶

The implementing legislation of Member States has tended to follow the Directive in declining to define the terms, although partial definitions exist in some constitutions, and some states have explanatory notes which provide more information on how the terms should be understood. Some states have definitions for other specific purposes, such as tax exemptions.

Austria’s implementing legislation does not define religion or belief. However, the explanatory notes to their Federal Law on the Status of Religious Confessional Communities contains a non binding definition: “A structure of convictions whose content is representable and has been growing in history to explain human kind and the world in its transcendent meaning and to accompany them with specific rites, symbols and give them orientation in accordance with basic principles and doctrine.”⁷⁷ Further guidance can be found in the explanatory notes which refer to a definition of religion as: “a system to address in its dogma, practice and social manifestations the last questions of human society and individual life and to find answers to these,”⁷⁸ which suggests an approach based on the idea of an ‘ultimate concern’.

In Germany a definition of religion and belief can be found in the interpretation of the guarantee of freedom of religion by the Federal German Constitutional Court, where religion is any specific certainty as regards the whole of the world and the origin and purpose of mankind which gives sense to human life and the world, and which transcends the world.⁷⁹ Again, the approach would appear to be based on the idea of ‘ultimate concern’, although there is also some reasoning based on analogy, for example, the Federal Constitutional Court accepted as self-evident that Bahá’í is a religion,⁸⁰ relying on current trends in society, cultural tradition and the understanding of religion in general and in religious science.⁸¹

⁷⁴ See D. N. Feofanov, ‘Definition Religion: An Immodest Proposal (1994) 23 Hofstra L. R. 309; B. Clements, ‘Defining “Religion” in the First Amendment: A functional approach’ (1989) 74 Cornell L. R. 352.

⁷⁵ [1982-3] 154 C. L. R. 120.

⁷⁶ per Wilson and Deane JJ. at p. 174.

⁷⁷ Country Report Austria: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

⁷⁸ Country Report Austria: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

⁷⁹ BVerwGE (Decisions of the Federal Administrative Court) 90, 112 (115).“

⁸⁰ BVerfGE 83, 341 (353).

⁸¹ Ibid. See Country Report Germany European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

The Netherlands distinguishes in its case law between religion and belief, on the basis that for religion a 'high authority', ("God") is central. Thus the Equal Treatment Commission has found Rastafarianism to be a religion,⁸² but not 'Osho', the Bagwan Shree Rajneesh philosophy. This was instead a 'belief' or 'philosophy of life'.⁸³ In contrast, the Nazireërs were said not to be a religion or 'philosophy of life'. In this case a man was denied access to a snack bar because he did not cut his beard or hair or wash with soap because this was forbidden on the ground of his belief.⁸⁴

Some states provide a negative definition, detailing only what does not count as a religion. In Spain, article 3.2 of the Organic Law on Religious Freedom provides that "activities, intentions and entities relating to or engaging in the study of and experimentation on psychic or parapsychological phenomena or the dissemination of humanistic or spiritual values or other similar non-religious aims do not qualify for the protection provided in this Act."⁸⁵

In Belgium it is suggested⁸⁶ that the protection will be denied to the members of groups defined as "sects,"⁸⁷ being "any group with a religious or philosophical vocation... which in its organization or practice, performs illegal and damaging activities, causes nuisance to individuals or to the community or violates human dignity". This suggests that 'religions' which themselves do not respect the rights of others may be denied the status of a religion for the purpose of protection against discrimination.

Although it may seem surprising that such a fundamental element of human rights and equality protection remains undefined, the lack of a clear definition does avoid the danger of courts being bound by an outdated or under-inclusive definition. The definition can adapt to reflect modern developments in our understanding of religion.⁸⁸ However, the disadvantage of the lack of definition is that inconsistencies in treatment become more likely. For example Scientology is recognised as a religion using the definitions in Italy⁸⁹ and Australia,⁹⁰ but is not recognised in the German Labour Courts,⁹¹ nor by the UK with respect to the laws on charitable status.⁹² Such inconsistency in interpretation across the Member States is not compatible with the protection provided by the Directive, and a common position should be developed. Indeed, the ECJ has recognised the need for 'an autonomous and uniform interpretation' of the Directive throughout the Community with respect to other grounds of discrimination.⁹³ It may be that the Member States' courts will be guided by the interpretation of the

⁸² ETC Opinion 2005-162.

⁸³ ETC Opinion 2005-67.

⁸⁴ ETC Opinion 2005-28.

⁸⁵ Country Report Spain, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

⁸⁶ Country Report Belgium, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

⁸⁷ Law of 2 June 1998 creating a Centre of information and advice on sects.

⁸⁸ See Sadurski, 'On Legal Definitions of Religion' (1989) 63 Australia L.J. 834.

⁸⁹ Country Report Italy, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

⁹⁰ *The Church of the New Faith v The Commission of Pay-roll Tax (Victoria)* [1982-3] 154 C. L.R. 120.

⁹¹ Federal Labour Court, Bundesarbeitsgericht March 22 1995, Neue Juristische Wochenschrift 1996, p. 143, Country Report Germany European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2005).

⁹² See the decision of the Charity Commissioners of 17 November 1999
<http://www.charity-commission.gov.uk/Library/registration/pdfs/cosdecsum.pdf>

⁹³ 'It follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question' *Chacón Navas v. Eures Colectividades SA* (2006) C-13/05, at para 40, a case involving the definition of disability.

ECtHR which has extended its protection to Scientology.⁹⁴ Other religions that are protected by ECtHR case law have been Druidism,⁹⁵ Divine Light Zentrum,⁹⁶ and Krishna Consciousness.⁹⁷ Alternatively, it may be that Scientology will be defined as a belief rather than as a religion. The protection under the Directive is identical.

Defining Belief

Some of the difficulties caused by the lack of an agreed definition will be overcome because the protection of the Directive extends to 'religion or belief'. Yet, this does not avoid the difficulty of definition, it just shifts its location. The divide is located between religions and beliefs of sufficient seriousness, which are subject to the protection, and other beliefs which are not. In the context of the Directive, an additional question is whether political beliefs are protected.

It would seem that although beliefs do not need to be religious in nature to be protected, there is still some limit on the types of belief to be covered. For example, a belief in the superiority of one football team over another will not be covered. What is not clear, however, is exactly where the dividing line should be drawn between beliefs which are protected and those which are not. Given that the term 'belief' would encompass religious beliefs in any event, it would seem that the inclusion of the term 'religion' is intended in some way to place some parameters around the meaning of 'belief'. This limitation on the scope of protected beliefs is reflected in the ECtHR case law which provides that in order to qualify for protection beliefs do not need to be religious but must 'attain a certain level of cogency, seriousness, cohesion and importance'.⁹⁸

The use of the term 'religion' to circumscribe the parameters of the term 'belief' is also suggested in the explanatory notes to the Austrian implementing legislation. "*The term "belief" is tightly connected with the term "religion". ... Belief is a system of interpretation consisting of personal convictions concerning the basic structure, modality and functions of the world; it is not a scientific system. As far as beliefs claim completeness, they include perceptions of humanity, views of life, and morals.*"⁹⁹ In the Netherlands the term 'philosophy of life'¹⁰⁰ is used in place of 'belief',¹⁰¹ in order to place limitations on the type of belief that can be covered. The term philosophy of life requires a coherent set of ideas about fundamental aspects of human existence, and includes broad philosophies such as humanism, but does not extend to more general views about society. Although the concept of religion is used in some definitions to reflect the seriousness, completeness and cogency of beliefs before they are protected, it is very clear that beliefs do not have to be religious in terms of their content. Thus, under the ECHR atheism is protected.¹⁰²

The terminology used in Austria and the Netherlands seeks to restrict the protection of the directive to wide-ranging philosophies about the meaning of life, rather than protecting those who hold views on narrower issues. The approach suggests that belief should not extend to 'single-issue' beliefs. However, the protection of the ECHR has been extended in some cases to beliefs which are, arguably, 'single issues', such as pacifism,¹⁰³ and veganism.¹⁰⁴

⁹⁴ *X and the Church of Scientology v. Sweden* (1976) 16 D&R 68.

⁹⁵ *Chappel v. UK* (1988) 10 EHRR 510 (Eur. Comm. HR), *Pendragon v. UK* (1998) EHRR CD 179.

⁹⁶ *Swami Omkaramanda and the Divine light Zentrum v. Switzerland* (1981) 25 D&R 105 (Eur. Comm. HR).

⁹⁷ *ISKCON v. UK* (1994) 76A D&R 90.

⁹⁸ *X, Y and Z v. UK* (1982) 31 D&R 50, and *Campbell and Cosans v. UK* (1982) 4 EHRR 293.

⁹⁹ Explanatory notes of the amended Equal Treatment Act, Country Report Austria, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹⁰⁰ "levensovertuiging".

¹⁰¹ "overtuiging".

¹⁰² *Angelini v. Sweden* (1988) 10 EHRR 123 (Eur. Comm. HR).

¹⁰³ *Arrowsmith v. UK* (1978) 19 D.&R. 5.

¹⁰⁴ *H v. UK* (1993) 16 EHRR CD 44.

In some cases the consideration given to the question of definition was scant, and the cases were decided on other grounds. It might not be the case, therefore that all single issue beliefs would automatically be covered by the protection of religion and belief under the Directive. However, there seems to be a lack of consensus on where the boundaries of protected belief should lie.

Political Opinion

Further confusion can be found when one considers the question of whether the protection should extend to political opinion. Again, a wide variety of practice and expectation can be found. Protection for political opinion can be found in Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain and UK (Northern Ireland only). It seems that the remaining Member States do not provide specific protection for political opinion.

The inconsistency gives rise to several difficulties. First, some political beliefs, such as communism, might be capable of meeting the criteria for philosophies of life; others may be more clearly single issue beliefs, such as an individual's views on how health services should be funded. In some cases it may be difficult to determine the borders between beliefs and political beliefs. Beliefs on matters such as abortion could be classified as religious, or political or just general beliefs.

A second, more fundamental problem also arises in relation to those political beliefs which are deeply antagonistic to the values reflected in the Directive. It is not at all clear that the Directive was intended to protect against discrimination those with political opinions that do not share the goal of enhancing respect for dignity and human rights, eradicating racism and achieving equal treatment for men and women.¹⁰⁵ It is notable that with regard to the definition of religion in some states¹⁰⁶ there is a requirement that the religion respects the dignity of others before it is granted protection. It may be that some such requirement should be required of political groups who seek protection against discrimination under the Directive.

Does belief include non-belief?

The meaning of religion and belief within the Directive clearly includes atheism and other non-religious viewpoints. What is not clear is whether the Directive acts symmetrically, so as to protect both those with belief and all those without. The explanatory notes for the UK Regulations state that references to religion or belief include reference to an absence of a particular belief.¹⁰⁷ This does more than provide that the regulations cover atheists. It would seem additionally to mean that an employer who will only employ Christians discriminates against any applicant who is not a Christian, whether Muslim, atheist, 'unsure' or 'unconcerned'.¹⁰⁸ The point is not dealt with directly in the Directive, but if it is interpreted, to include 'absence of belief,' as suggested by the UK, this will increase the coverage of the Directive.

¹⁰⁵ See for example *Serco Ltd. v. Redfearn* [2006] EWCA Civ 659. Here a claim was made that dismissal on grounds of membership of a far-right political party with a racist ideology, was race discrimination. Redfearn was a bus driver. The alleged discrimination was either direct because of the race of the bus passengers who may be offended by his views, or indirect because membership of the political party was predominantly white. The Court of Appeal held that there was no race discrimination, as the dismissal would have applied to any racist political party.

¹⁰⁶ e.g. Belgium.

¹⁰⁷ DTI Explanatory Notes for the Employment Equality (Religion and Belief) Regulations, para 14.

¹⁰⁸ The Northern Irish case of *Gibson v. Police Authority of Northern Ireland* [2006] NIFET 00406_00 (24th May 06) takes this approach. The case involved less favourable treatment of a police constable on grounds of not being a member of the Masonic Order, an organisation which involves commitment to particular kinds of religion or belief. This was held to amount to discrimination on grounds of religion or belief.

Determining an individual's religion or belief

Apart from the question of whether a particular set of convictions constitute a religion or belief, difficulties may also arise in relation to well established religions, where there may be more than one view of what constitutes religious observance. This may arise where there is discrimination within one religious tradition. For example, a Catholic charity wishing to employ Catholics will discriminate against Protestant Christians as well as non-Christians. Whether such discrimination is proportionate 'having regard to the context' in which it occurs¹⁰⁹ is unclear. A court could take the view that the parties share the same religion, or they could take a more detailed approach and accept that the parties do not share a religion.

For the purposes of the Directive, recognition that there are many different shades of religious opinion will allow proper account to be taken of the individual's freedom of religion. This will accord with the case law of the ECtHR which recognises that the State does not have the power to assess the legitimacy of religious beliefs,¹¹⁰ and requires States to ensure that conflicting groups tolerate each other, even where they originated in the same group.¹¹¹ Thus the fact that some groups identify as being separate from others within the same broad religion should be recognised within the Directive. This approach is taken in the Netherlands, where case law from the Equal Treatment Commission suggests that an act or behaviour, which an individual claims is religious, need not be so viewed by all the others from the same group in order to be protected.¹¹² Thus individuals can still be counted as holding a religion or belief, even though they dissent from a majority religious view. Allowing the individual to determine his or her religious identity in this way gives maximum protection to individual freedom of religion.

Such an approach may give rise to some problems with regard to indirect discrimination. For example, if an employer allows variation in dress codes to accommodate most religious beliefs, can an individual or small group of individuals require a further personalised accommodation? If freedom of religion is protected on an individual level, as suggested by the approach in the Netherlands, it may be arguable that the individuals who cannot comply with the dress code have been discriminated against. However, failure to accommodate a personal view of religion does not automatically mean that there will be indirect discrimination. First, indirect discrimination requires some level of group disadvantage, and it is not clear that it can arise where there is only a very small number of persons disadvantaged.¹¹³ Second, even where a group disadvantage can be identified, any assessment of the proportionality of a failure to adapt the workplace is likely to take into account the number of individuals affected by that failure. If an employer refuses to adapt a uniform rule to reflect the dress codes of a large proportion of the local workforce, such a refusal may be viewed as disproportionate; failure to accommodate a small number of people's religious views may be more easily regarded as proportionate.

¹⁰⁹ Article 4(1).

¹¹⁰ However, see *Kosteski v. "The Former Yugoslav Republic of Macedonia"* [2006] ECHR 403, where the ECtHR accepted that investigations as to whether an employee in fact held a particular belief were not inappropriate in the context of an employment dispute.

¹¹¹ *Metropolitan Church of Bessarabia v. Moldova* Application no. 45701/99, 13 December 2001.

¹¹² Opinion 2004/148, 2004/129. Country Report Netherlands, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹¹³ Article 2(2) defines indirect discrimination as where: 'an apparently neutral provision, criterion or practice would put persons of a particular religion or belief... at a particular disadvantage...'

Marcia | 1980

Part V

The Relationship Between Religion and Race and Ethnicity

Within the Directives a clear distinction is drawn between religion, and race and ethnic origin. The material scope of the Racial Equality Directive is more extensive than that of the Employment Equality Directive. The latter applies to employment and occupation¹¹⁴ while the Racial Equality Directive applies to discrimination in employment, social security, health care, social advantage, education and access to and supply of goods and services including housing.¹¹⁵ It is thus important if one is bringing a claim for discrimination in housing or education that the claim can be founded on racial or ethnic discrimination rather than religion, even though the boundaries between the concepts is not always clear either in theory or in practice.

The differences in coverage of the two directives might suggest that there are clear boundaries between the concepts of race and ethnicity on the one hand, and religion on the other. However, at times the boundary between the two is not clear. The lack of clarity is caused by a number of factors: ethnicity is sometimes defined so as to include religious identity; and religious groups may be predominantly from one particular racial group. At times there are more fundamental complexities, with some states preferring not to recognise categories based on racial difference. Moreover, some religious groups may understand religion to encompass issues such as cultural practices or rituals, that might otherwise be understood as linked to ethnic identity.

The first reason for blurring of the boundaries between race and religion is that in some Member States, 'ethnic group' is defined to include groups that also share a religious identity. Thus Sikhs¹¹⁶ have been defined in the UK as an ethnic group, even though they are also a religious group. Similarly, Jews are also defined as both an ethnic or racial group and a religious group.¹¹⁷

A second reason for the indistinct boundary between religion and race is that in many member states, those of a particular religion are predominantly from one racial or ethnic group. For example, in Cyprus, the split between Greek-Cypriot and Turkish-Cypriot could be equally drawn between Muslim Cypriots and Christian Cypriots. Thus discrimination against Turkish-Cypriots will be indirect religious discrimination. The link between religion and minority status is also key for the other minority groups recognised within the Cypriot constitution. Maronites have complained about their designation as a religious group; they consider themselves also as "a specific ethnic group" and would prefer to be recognised as a national minority. Furthermore, the Latin community¹¹⁸ of Cyprus is not satisfied with the term "Latin" ascribed to them, as it does not properly reflect their Roman Catholic religious identity.¹¹⁹ In the UK the Muslim population is predominantly Asian, leading to findings in domestic law that discrimination against Muslims could be indirect race discrimination.¹²⁰

More fundamentally, it is arguable that the categories themselves are inherently unstable. In some states, the use of the term 'race' is itself controversial, and the term "ethnic affiliation" is preferred, as an expression of sensitivity regarding language,¹²¹ and this is reflected in the statement recital 6 of the Racial Equality Directive that the EU rejects theories which attempt to determine the existence of separate human races. Historically, the term "race"

¹¹⁴ Article 3 Framework Equality Directive 2000/78/EC.

¹¹⁵ Article 3 Racial Equality Directive 2000/43/EC.

¹¹⁶ *Mandla v. Lee* [1983] 2 A.C. 548. In determining the meaning of ethnic group in the UK one of the factors considered was whether the group shared a religion.

¹¹⁷ See *Seide v. Gillette* [1980] IRLR 427 in the UK.

¹¹⁸ The Latins are one of the three constitutionally recognised "religious groups". They form a small community of persons of Latin ethnic origin and of Catholic faith.

¹¹⁹ See Opinion on Cyprus by the Advisory Committee on the Framework Convention for the Protection of National Minorities 2001).

¹²⁰ *J.H. Walker v. Hussain* [1996] IRLR 11.

¹²¹ See Country Report Austria: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006). See also the Country Report Germany: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

was used to refer to what were understood to be biologically distinct groups of people. More recently, however, the understanding of race has become broader, and implies a group of individuals having similar social and cultural characteristics. This broader understanding merges the concepts of race and ethnicity, and brings with it the potential for further blurring of the boundaries with religion and belief.

The blending of religion and racial identity may not be of particular importance where discrimination occurs in employment or occupation, as the protection will be similar under both Directives. However, where the scope of the Racial Equality is broader, in the areas of social security, education or health, then protection against discrimination will only be provided on grounds of race and ethnicity, and the pressure to broaden the definition of race and ethnicity to include some religious groups will continue. Unless the scope of the Employment Equality Directive is broadened to match that of the Racial Equality Directive, the potential for inconsistencies in protection available as between different religious groups will remain. In effect, a hierarchy is created, with those religious groups that can claim a separate ethnic identity being given greater protection against discrimination than those who remain only a religious group. Hierarchy as between member states could also be created if member states vary in the extent to which they recognise religious groups as ethnic groups. The creation of such hierarchies between different religious groups works against the aims of the Employment Equality Directive which is to put an end to discrimination between those of different religions.

Nico | 1954

Part VI

The Relationship Between Human Rights Protection and the Directive

The protection against religious discrimination provided by the Employment Equality Directive forms part of a range of protection in Europe for religious interests, with protection for freedom of religion also provided in the ECHR, and in the constitutions of many Member States. This chapter will consider some of the ways in which these various types of protection may strengthen each other, and may also act in tension with each other.

The complementary relationship

To an extent the recognition of the right to freedom of religion can give additional strength to the non-discrimination rights created by the Directive. Indeed the right to freedom of religion and a right to equality on grounds of religion can be seen to be deeply inter-connected. Both are founded on the concepts of dignity and equality. The idea that human beings can expect others to respect the dignity inherent in their humanity is one that has been agreed virtually universally.¹²² The concept of dignity encompasses two other elements. First, humans are equal in moral worth,¹²³ and there is an objective good in upholding their equality, and in attempting to create a society in which all can flourish. Second is the notion of autonomy, the idea that human beings are able to develop their own ideas of the good and exercise control over their lives.¹²⁴ All these aspects of the concept of dignity can be upheld by providing protection for religious freedom and protection against religious discrimination.

Respect for religious freedom and religious equality can also be demanded as an aspect of upholding minority rights. If the majority impose its values on a religious group, or forces a minority group to conform to the views of the majority, this will involve the imposition on the group of an alternative concept of good, and will undermine the autonomy and dignity of the minority group.¹²⁵ This will amount to a failure properly to treat members of the minority group as the moral equals of the majority. Thus religious freedom can be understood to be an important aspect of the 'pluralism indissociable from a democratic society'.¹²⁶

It is arguable then, that, without endorsing the views themselves, respect is due to the religious views of others because otherwise one fails to respect the choices they have made about their view of the good.¹²⁷ Thus, protection for freedom of religion can be based on the idea of respect for the dignity and autonomy of all. Additionally, to allow the exercise of this freedom to result in unjustified differences in life prospects further infringes individual dignity, and leads to arguments in favour of prohibiting religious discrimination: full enjoyment of autonomy, equality and dignity requires protection for both freedom from religious discrimination and freedom of religion.

One consequence of a recognition of the links between human rights and the non-discrimination norms of the Directive is the recognition in human rights law of the group dimension of religious rights. Not only do religious groups enjoy the right to freedom of association, but freedom of religion extends to a right to manifest religion

¹²² It is forms Article 1 of the Universal Declaration of Human Rights: 'All human beings are born free and equal in dignity and rights' as well as featuring in the preamble to the United Nations Charter, and the preambles of the ICCPR and ICESCR.

¹²³ See R. Dworkin, *Taking Rights Seriously* (Duckworth Press, 1977) and *A Matter of Principle* (Harvard University Press, Cambridge, Massachusetts, 1985).

¹²⁴ Rawls, *A Theory Of Justice* (Oxford, OUP, 1999, revised edition).

¹²⁵ See Parekh, *Rethinking Multiculturalism*, (Palgrave, Hampshire, 2000).

¹²⁶ *Kokkinakis v. Greece* [1993] 17 EHRR 397 at para 31.

¹²⁷ M. Nussbaum, 'A plea for difficulty' in Okin, *Is Multiculturalism Bad for Women* (ed. Cohen, Howard, Nussbaum, Princeton University Press, Princeton, 1999).

alone or in community with others.¹²⁸ A respect for group religious rights means that religious groups should be able to enter employment relationships, in order better to organise or facilitate religious activity. Thus restrictions on the freedom of religious groups, for example, to appoint a teacher, or a religious official may interfere with the religious freedom of the group. Similarly, restrictions on the freedom of religious individuals to work with others as part of manifesting their religious commitment, may also infringe their religious freedom. Full respect for autonomy involves the recognition that religious groups have an interest in being able to work together, or act as employers, as part of the respect due to group autonomy and dignity.

Limiting Rights

However, the link with human rights also demonstrates the types of limitations which it is acceptable to impose on religious freedom. Although the right to freedom of thought, conscience and religion is protected absolutely under Article 9 ECHR, freedom to express and act on those beliefs is not. The right to manifest belief, or practice religion, can be limited where it conflicts with the rights of others, and in such cases it can only be exercised to the extent that it is necessary and proportionate to do so.¹²⁹ Thus if accommodating religious freedom within the workplace will infringe the rights of others, courts will need to determine where the balance of interests lies: with the maintenance of religious freedom or with the interests of others.

In the context of work, the balance in human rights law will not always lie in the protection of religious freedom. In European human rights law the right to resign is often taken to provide sufficient protection for religious rights at work. For example, in *Stedman v. UK* a dismissal for refusal to work on a Sunday was not a breach of the right to freedom of religion. The employee's freedom to resign effectively guaranteed her Convention rights: she remained free to leave her job in order to exercise her religious freedom.¹³⁰ Thus, if the Directive is to be interpreted to comply with human rights norms, there is no expectation that it should create absolute rights for religious interests to be accommodated. The non-discrimination rights created by the Directive are not absolute, as exemptions apply where there are genuine occupational requirements, and indirect discrimination can be justified. In assessing the proportionality of any exceptions to the non-discrimination principle, regard may be had to the limitations that have been accepted in the scope of the duty to respect freedom of religion.¹³¹

Recognition of the link between non-discrimination and human rights is not limited to a link with freedom of religion; other human rights also interact with the equality rights. Some religious practice and ritual involves the exercise of the right to free expression, public worship involves the exercise of freedom of association, and the right to freedom of belief and conscience can also be understood as an aspect of the right to privacy. These various human rights can only flourish where religious individuals and groups are given space to operate free from discrimination.

Viewing the non-discrimination rights as connected with the right to freedom of religion and other human rights enriches our understanding of the non-discrimination rules, and the jurisprudence of the ECtHR and the constitutional provisions of member states which protect religious freedom can be used to help determine the outer boundaries of the Directive's protection.

¹²⁸ Article 9 ECHR.

¹²⁹ Restrictions must be "prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." Article 9(2) ECHR.

¹³⁰ *Stedman v. UK* (1997) 23 EHRR CD168, following *Ahmad v. UK* (1981) 4 EHRR 126. Both cases are confirmed in *Kosteski v. "The Former Yugoslav Republic of Macedonia"* - 55170/00 [2006] ECHR 403 (13 April 2006).

¹³¹ See Evans, C. *Freedom of Religion under the ECHR* (OUP, Oxford, 2001).

Rights in Tension

However, the rights to freedom of religion and freedom from discrimination can also be seen to be in tension with each other. There are several ways in which the various rights conflict. First, many religions do not recognise fundamental rights and freedoms of others, such as rights not to be discriminated against on grounds of birth, status, gender, sexual orientation or other grounds. It is therefore arguable that a society that values equality and dignity should not protect or accommodate those who do not share those fundamental values.¹³²

Secondly, clashes can arise between various human rights where religious interests are concerned. For example, once religious harassment is prohibited at work, there is an inevitable interference with individual freedom of speech; members of staff are not free to speak to colleagues as they might otherwise wish, where that speech would cause offence or create a hostile environment. Similar clashes will be found between religious freedom and privacy if employers ask for information regarding religious affiliation as part of a job application process, or impose requirements on staff regarding the morality of their private lifestyles. As with freedom of religion, the right to freedom of speech and right to privacy are not absolute, and can be restricted where necessary and proportionate for the protection of the rights of others.¹³³ Any court interpreting the provisions of the Directive will need to balance these competing rights.

Thirdly, and perhaps more fundamentally, it is not clear what connection there is between freedom of religion and non-discrimination rights (the positive aspect of freedom of religion), with a more general freedom to be protected from religion (the negative aspect of freedom of religion). The conflict between the two is recognised in the ECtHR in the case of *Kokkinakis v Greece*¹³⁴ where the Court confirmed that improper proselytism was incompatible with respect for the freedom of religion of others. However, the court drew a distinction between bearing Christian witness (an essential part of freedom to manifest one's religion) and improper proselytism, which can interfere with the freedom of conscience of others.

Another arena in which this conflict between 'freedom of religion' and 'freedom from religion' can be seen is in the treatment of religious symbols in work places or other public spaces. In some states, the maintenance of a secular public sphere is an important aspect of religious freedom. However, to insist on *laïcité* can also involve an encroachment on religious freedom. The conflict between these interests is not reconcilable: the accommodation of one interest entails a failure to accommodate the other. The difficulty is particularly pronounced in relation to employment by the state, where some level of endorsement of religion is implied by tolerating religious symbols at work; and yet where multiculturalism and pluralism may support the employment of a diverse workforce, reflecting the make up of the state's population.

The Directive does not deal directly with the intractable clash between the positive and negative aspects of freedom of religion and conscience. The rights are incompatible, and those implementing the Directive will need to find a way to hold these irreconcilable interests in some sort of equilibrium. The fact that neither the protection of religious freedom nor the principle of equality on religious grounds is absolute, together with the fact that, in European human rights law, religious freedom may be protected by the right to resign,¹³⁵ creates some space for a degree of compromise. The Directive allows for proportionate exceptions where there is a genuine occupational requirement,¹³⁶ and indirect discrimination can be justified where proportionate to do so. It is in the issue of

¹³² See Okin, *Is Multiculturalism Bad for Women?* (ed. Cohen, Howard and Nussbaum) (Princeton University Press, New Jersey, 1999).

¹³³ Article 10(2) ECHR, Article 8(2) ECHR.

¹³⁴ [1993] 17 EHRR 397.

¹³⁵ *Ahmad v. UK* (1981) 4 EHRR 126, *Stedman v. UK* (1997) 23 EHRR CD168.

¹³⁶ Article 4.

proportionality that any equilibrium will be found, although the existence of competing but valid interests suggests that discerning when a balance is fair will remain a matter of judgment, rather than a finding of fact.¹³⁷

European Experience of Competing Rights

The protection of religious freedom, equality and other human rights in the constitutions of many member states means that member states already have experience of balancing competing interests in domestic courts. Some states have also included in their implementing legislation provisions that are directed at the tensions identified above.

Issues that have been dealt with in Member States include: deciding the extent to which religious groups should enjoy autonomy in their internal affairs; the extent to which religious symbols should be banned in public places;¹³⁸ providing equal treatment for different religious groups; and the conflict between religious freedom and privacy or sexual orientation.

Autonomy of Religious Organisations: In terms of regulating the internal workings of religious organisations, several states do not apply their labour regulations to disputes involving clerics. The Czech Constitutional Court has held that dismissal of a cleric in the Union of Brethren, a Czech Protestant church was not covered by the unfair dismissal regulations, because to allow civil courts to decide disputes in the employment relationships of clerics “would represent inadmissible interference with the internal autonomy of the church and intrusion into its independent decision-making capacity.”¹³⁹

The German Constitution separates Church and State and establishes the principle of the neutrality of the state. Although religious organisations can and do play a role in public life, through the provision of schools and hospitals, this is subject to strict equal treatment of all religions. Churches and institutions related to the church are treated as autonomous as long as they have an inner relationship to the religious mission of the church. The question of whether they have such an inner relationship is determined by the churches themselves: part of their autonomy is that the State cannot determine the scope of the church’s religious mission. For Christian churches it is accepted that activities such as running kindergartens and hospitals are part of the religion mission of the Church. Although the legal autonomy of the churches is limited by the laws applicable to all (for example the laws regulating the termination of contracts) these laws are interpreted in the light of their autonomy.¹⁴⁰

Another example of the exclusion of clergy from the protection of the Directive can be found in Estonia, where the Law on Employment Contracts does not apply to “work in a religious organisation as a person conducting religious services.”¹⁴¹ Thus, the non-discrimination protection would not apply to priests, etc. However, other employees of religious institutions work on the basis of employment contracts, and will be protected by the anti-discrimination laws.¹⁴²

¹³⁷ For example, it may be difficult to find empirical evidence to show that a practice actually interferes with negative freedom from religion.

¹³⁸ The question of whether preventing the wearing of headscarves is justifiable, will be considered separately in Chapter 7. Chapter 8 will deal with the scope of Article 4(2) of the Directive, which provides for special rules on genuine occupational requirements for organisations with a religious ethos.

¹³⁹ See the decision of the Constitutional Court No. III.ÚS 136/2000, Country Report Czech Republic, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹⁴⁰ The information in this section is drawn from the Country Report Germany, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹⁴¹ Article 7 Law on Employment Contracts in 1992. The exception only applies if the founding document of the organisation does not require entry into an employment contract with the person.

¹⁴² Country Report Estonia, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

In the Netherlands too, the General Equal Treatment Act (GETA) does not apply to the internal affairs of churches, of other religious communities, or of associations of a spiritual nature. This is in order to respect the division between church and state, and to uphold the principle of freedom of religion. The restriction only concerns the internal affairs of Churches.

Although exemptions aimed at respecting the autonomy of religious groups may well accord with Article 4 of the Directive, which allows for exceptions for genuine occupational requirements, the total exclusion of such cases from the consideration of the court may leave staff unprotected. Exceptions to the non-discrimination rules are allowed, but only where they are for a legitimate aim and proportionate. It would be preferable, and more compatible with the Directive, to require any exceptions that apply to Churches to be subject to review by courts to ensure that they are objective and reasonable. Clearly, in many cases involving the appointment of clergy or others who conduct religious services or teaching, discrimination on grounds of religion is likely to be proportionate. Courts in interpreting the Directive will have regard to the clear case law of the ECtHR which protects the rights of religious groups to select their own leaders, as part of the protection due to religious groups.¹⁴³ However, it is preferable to provide review of exceptions by the Court using the standard of proportionality rather than exempting religious bodies all together.¹⁴⁴

Religious Symbols: Treatment of religious symbols in the workplace has varied across member states. Some view the need for religious neutrality as the primary right, others give precedence to the freedom of religion of the person displaying the symbol.

In Austria, the wearing of religious symbols and clothes is viewed as part of the expression of religious belief. As such it will be protected under the legal provisions implementing the Directive. Other states too have not banned the wearing or display of religious symbols. In Cyprus religious symbols are common in schools, with Christian Orthodox icons placed in the classrooms. The only state university in Cyprus has its own church inside the courtyard of the University campus.¹⁴⁵

Other states have allowed restrictions on the freedom of staff to display religious symbols at work. In Germany, restrictions on religious symbols are allowed, but they must be equal as between religions.¹⁴⁶ In Denmark, the Danish Supreme Court¹⁴⁷ allowed an employer to justify clothing guidelines in order to create a religiously neutral workplace, even though the guidelines had a negative effect on Muslim women.

In France there has been extensive debate about the limits of the application of the constitutional principle of neutrality. This involves determining the extent of neutrality in the public sector in contrast to the prerogatives of private life and the right to the public expression of faith. The Law on the application of the principle of secularity in public schools was adopted in March 2004 forbidding "...in public elementary, secondary and high schools, the wearing of signs or clothes by which a student ostensibly manifests his or her religious beliefs". Discreet religious signs remain authorized. Further instructions¹⁴⁸ state that "the prohibited signs and clothes are those by which one

¹⁴³ 'the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords.' *Hasan and Chaush v. Bulgaria* (2002) 34 EHRR 55 at para 62; see also *Serif v. Greece* (2001) 31 EHRR 20.

¹⁴⁴ The comments in this paragraph are limited to the interpretation of the religion and belief clause of the Directive.

¹⁴⁵ Information from the Country Report Cyprus, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹⁴⁶ Federal Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 1436/02, Country Report Germany, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹⁴⁷ Decision of 21 January 2005, 22/2004.

¹⁴⁸ The administrative instruction of 18 May 2004, Circulaire N°2004-084 of May 18, 2004).

is immediately identified by his or her religious beliefs such as the Islamic Veil... the Kippa or a cross of manifestly excessive dimension". The terminology is neutral on its face as it applies to all religions equally. Yet the impact of the rule is not felt equally. The ban on religious symbols causes particular difficulties for Jews and Muslims, as their symbols would appear always to be banned, whereas crosses are only banned when of 'manifestly excessive dimension.' Moreover a belief that the religion requires the wearing of such symbols is more prevalent in Islam and Judaism than in Christianity, with the result again that the negative effect of the ban is greater for some religious groups than for others.

The Directive does not deal explicitly with the issue of religious symbols at work. However, the matter would seem to be covered by the provisions on indirect discrimination. If an employer bans religious symbols, this imposes a requirement (to be religiously neutral in terms of dress) on the employee, with which it is difficult for those of particular religions to comply. Any such requirement will need to be justified. In justifying any such practice it will be necessary to balance a wide range of interests. These include, but are not limited to the employer's rights to create a religiously neutral workplace, and the interests of staff and customers or service users to enjoy the negative aspects of freedom of religion, as against the freedom of religion and freedom of expression of the employee whose preferred mode of dress is prohibited, and the interest in promoting diversity at work.¹⁴⁹

Religion and Sexual Orientation Discrimination: In Hungary, the Supreme Court has dealt with a case concerning the conflict between non-discrimination on grounds of sexual orientation and freedom of religion. The case involved the dismissal of a theology student who had confessed his homosexuality to one of his professors. The Károli Gáspár Calvinist University Theological Faculty then published a declaration claiming that the church may not approve of the education, recruitment and employment of pastors and teachers of religion who conduct or promote a homosexual way of life. A case was brought by a gay and lesbian rights organization, requesting a declaration that the University had violated the right of homosexuals to equal treatment. The Supreme Court rejected the claim, taking the view that the denominational university was exempted from the obligation to provide equal treatment, because it was objectively reasonable to exclude homosexuals from theological education, given that they may become pastors in future. However, as students with a degree in theology do not automatically become pastors, it is arguable that the exemption allowed by the Supreme Court was too broad. Moreover, the decision may not be compatible with Article 4 (2) of the Employment Equality Directive, as this does not allow exceptions to the religious discrimination norm to justify discrimination on another ground such as sexual orientation.¹⁵⁰

In the UK, the conflict between the right to freedom of religion and the right to equality on grounds of sexual orientation is dealt with by a specific exception to the legislation prohibiting sexual orientation discrimination.¹⁵¹ An exception exists in relation to the employment of clergy or other religious personnel,¹⁵² where sexual orientation discrimination may take place in order to comply with religious doctrine or the religious sensibilities of a significant number of the religion's followers. The exception allows churches to refuse to appoint gay priests, or heterosexual priests who accept the ordination of gay priests. A similar exception exists in the Sex Discrimination Act,¹⁵³ to cover the refusal of some churches to ordain women.

¹⁴⁹ The treatment of the headscarves or veils will be considered in more detail in chapter 7.

¹⁵⁰ Country Report Hungary, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹⁵¹ Sex Discrimination Act 1975 s. 19, and Employment Equality (Sexual Orientation) Regulations 2003 reg. 7(3).

¹⁵² Those employed for the purposes of an organized religion.

¹⁵³ Section 19 Sex Discrimination Act 1975.

Concerns that this provision could cover a wide range of workers employed by religious organizations, such as teachers or nurses in religious foundations, were alleviated by the decision of the English High Court in the *Amicus* case,¹⁵⁴ which limited the words 'for the purposes of a religion' to the appointment of religious leaders and teachers such as priests and imams. With such a narrow interpretation, this exception probably meets the requirements of proportionality required by the Genuine Occupational Requirement exception in Article 4 of the Directive, particularly if freedom of religion is taken into account in assessing proportionality. However, as with the broad exceptions granted by some states to religious bodies discussed above, it would be preferable to provide explicitly for the proportionality of exceptions to the non-discrimination principle to be assessed by the court.

Equal Treatment of Different Religious Groups: Although many states' constitutions provide for religious equality, some such commitments co-exist with special arrangements for some specified religions. It is difficult to see how in such cases religious equality can be guaranteed. It may be that equality of treatment with regard to employment and occupation as provided by the Directive will be a mechanism whereby equality of treatment of different religious groups can be achieved.

For example, Italy's¹⁵⁵ constitution establishes that "All religious beliefs are equally free before the law"¹⁵⁶, and that "[all] shall be entitled to profess their religious beliefs freely in any form, individually or in association with others, to promote them, and to celebrate their rites in public or in private, provided that they are not offensive to public morality."¹⁵⁷ Yet alongside these equality commitments the Constitution establishes that "The State and the Catholic Church are both, each one within its own order, independent and sovereign."¹⁵⁸ In addition to the special relationship between the Catholic Church and the state, some other religious groups are also regulated by agreement with the state in matters such as holidays and other internal acts of the religious groups. Groups with agreements include Adventists, the Jewish Communities, the Assemblies of God, the Baptist movement, and the Lutheran Church. Religious groups without an equivalent agreement include Jehovah's Witnesses and Muslims, and such groups are in a weaker position when it comes to requiring accommodation of their religious interests. However, under the provisions of the Directive, employers will be required to justify any requirements they impose on staff which may put religious individuals at a disadvantage. The Directive does not provide for different treatment for religious groups who have special agreements with the state. Thus it may be that the Directive will provide a mechanism capable of reducing the potential for differential treatment of different religious groups. This does not need to involve any reduction in the protection available to groups who have entered into agreements with the state. It may instead result in a levelling up of the protection available to all religious groups.

Religious Freedom and Privacy: In Ireland, 'persons employed in another person's home for the provision of personal services' are excluded from protection against discrimination.¹⁵⁹ The term 'personal service' is defined as including but not limited to 'services that are in the nature of services in *loco parentis* or [which] involve caring for those residing in the home.'¹⁶⁰ Again this may be aimed at reconciling competing rights, in particular rights to religious freedom and privacy. However, it is arguably too broad an exemption to be in compliance with the Directive. In order to comply with the Directive, some space must be left for a Court to determine the proportionality of any requirement imposed on the recruitment of staff. In many cases, religious requirements for staff delivering personal services in a person's home may be proportionate, taking into account the competing rights to equality

¹⁵⁴ *R (on the application of Amicus – MSF and others) v. Secretary of State for Trade and Industry and others* [2004] IRLR 430.

¹⁵⁵ The information in this section is from Country Report Italy, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹⁵⁶ Article 8, section 1.

¹⁵⁷ Article 19.

¹⁵⁸ Article 7, section 1.

¹⁵⁹ Section 3 Equality Act 2004.

¹⁶⁰ Section 2(1) Employment Equality Act 1998-2004.

and to privacy. For example, it may be proportionate for a religious parent to require that a nanny share the family religion. However, such issues should be left to the judgment of the court, where the competing interests can be weighed, rather than covered by a total exemption.

Addressing the tensions within the Directive

The tensions that exist between fundamental rights are well known, with freedom of speech conflicting with privacy rights, rights to freedom of religion conflicting with equality rights and many more. Within constitutional law and human rights law, these conflicts and tensions are dealt with by providing exceptions to the rights where necessary and proportionate to meet a legitimate aim, such as protecting the rights of others. Implicit within the non-absolute nature of many human rights is the notion of balancing competing rights, and holding them in some form of equilibrium.

Within the Directive the balance is achieved through the creation of exceptions to the non-discrimination principle where there is a genuine occupational requirement with a legitimate objective, and the imposition of the requirement is proportionate. Where a requirement is necessary for the protection of the rights of others, the question of whether the exception to the non-discrimination principle is acceptable will depend on a determination of proportionality. Similarly, the justification of indirect discrimination relies on the presence of a legitimate objective and proportionate means to achieve it.

In assessing the proportionality of exceptions to the non-discrimination principle the right to freedom of religion will need to be considered. Although the right to freedom to have a religious belief is absolute under Article 9 ECHR, the right to manifest that belief is subject to the 'rights of others.' Most cases where there is conflict between religion and equality arise in the context of manifesting religion, such as wearing religious symbols, working in religiously exclusive groups and requiring time off for religious observance. Courts will need to assess the proportionality of any restrictions on religious freedom in the light of the need to uphold equality, and to protect other human rights such as privacy and freedom of speech, in order to find a balance between protecting freedom of religion and respecting the rights of others. They will also be able to take into account the fact that individual freedom of religion is ultimately protected by the right to resign.

The particular difficulties of reconciling religious freedom and gender equality will be considered in the next chapter. The final chapter considers in more detail how the genuine occupational requirement exception may be used as a vehicle to achieve proportionality in the level of protection provided to religious interests, with particular regard to employment by organisations with a religious ethos.

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Part VII

The relationship between provisions on Religion and Gender

This chapter considers the relationship between the protection of religious interests and the principle of non-discrimination on grounds of gender. At times these interests are in conflict, particularly as some religions are not committed to gender equality. In relation to the conflict that can arise between religious freedom and gender equality, this has been the subject of much debate within human rights discourse, and the conclusion is clear that equality between men and women should take precedence over religious customs and traditions.¹⁶¹

In the context of the employment relationship, issues can arise in relation to the employment of women within religious bodies; the imposition of lifestyle requirements which may have a particular impact on women, such as requirements relating to abortion or pregnancy; and dress codes requirements, such as those relating to the Islamic headscarf or veil, which again predominantly affect women.

Most of these issues will be dealt with through the genuine occupational requirement provisions, which require that any exception to the non-discrimination principle be objectively justified and proportionate to a legitimate aim. In some cases, the issue will be whether any indirect discrimination can be justified on the same basis. In the cases discussed below, there is a common theme of conflicts between religious freedom and gender equality. At times this conflict is compounded by other tensions, such as that between the positive and negative aspects of religious freedom, and between freedom of conscience, freedom of expression and privacy.

Headscarves, freedom of religion and gender equality

The debate over the wearing of headscarves at work can be viewed as part of a wider debate concerning the role of religion in influencing the education and employment opportunities of girls and women. For example, due to religious tradition, girls may be prevented from taking part in some kinds of education, such as physical training, swimming lessons and certain types of science lessons.¹⁶² Religion or tradition may also lead parents to discourage girls from higher education or vocational training, which in turn has practical consequences for employment prospects for girls or women from these religious groups.

Despite these wider concerns, most of the case law that relates to the employment sphere of the Directive, has focussed on the question of whether it is lawful to restrict the wearing of headscarves by Muslim women at work. The conflicts that arise here are singularly complex.¹⁶³ Case law in Member States and the ECtHR suggests that banning the wearing of the headscarf in certain places such as schools or state run hospitals does not breach the religious freedom of individuals. However, in upholding the legality of any ban, courts have not ruled that wearing the headscarf automatically breaches the negative right to freedom from religion, suggesting that allowing the wearing of headscarves is also compatible with basic human rights.

¹⁶¹ In 2001 the UN appointed a Special Rapporteur on Freedom of Religion or Belief. In 2002 the Rapporteur published a Study on the Freedom of Religion or Belief and the Status of Women, From the Viewpoint of Religion and Traditions. The report underlines that it is hard to distinguish the roles of culture and religion and that discrimination of women in fact is due more to social and cultural behaviour than religion in itself. The Rapporteur is clear about how conflict between religious interests and women's human rights is to be solved: paragraph 30 of the report states: "Au total, cette acception est de nature à affirmer la prééminence sur toute coutume ou tradition, qu'elle soit d'origine religieuse ou non, des principes universels de nature impérative que sont le respect de la personne et de son droit inaliénable de disposer d'elle-même, ainsi que la pleine égalité entre les hommes et les femmes. Il ne peut y avoir de compromis à cet égard." ("Respect for the 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." (English Translation).) (Report of the Special Rapporteur on Freedom of Religion or Belief in accordance with resolution 2001/42 of Commission on Human Rights, E/CN.4/2002/73/Add.2, 5 April 2002, Study on the Freedom of Religion or Belief and the Status of Women From the Viewpoint of Religion and Traditions. http://www.wunrn.com/news/02_19_06/021906_un_study.htm).

¹⁶² This is not always only applicable to women. For example, refusing to teach about evolution in religious schools could restrict future choice of job opportunity for boys as well as girls.

¹⁶³ For a detailed review of the issues raised by the headscarf debate see D. McGoldreick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart, Oxford, 2006).

The reason for controversy is that a complex array of competing interests arises in such cases. The fact that religious freedom has a positive and negative aspect is illustrated very well in the case of the wearing of headscarves by employees, especially in the public sector where others may have no choice but to come into contact with the headscarf-wearing employee. Thus if schools or hospitals allow the wearing of the headscarf, this upholds the religious freedom of the wearer, but may infringe the negative aspect of religious freedom of the pupil or patient. This is one of the inescapable conflicts in rights that have to be taken into account in assessing the correct legal response to requests to wear the headscarf at work.

It may be possible to distinguish in this context between state employment and private employment. Where the employer is the state, it is arguable that staff represents the state, and so the wearer of a headscarf infringes state neutrality. However, here again there is a competing argument, that even if staff do represent the state, the state should reflect the diversity of the community it represents, and the employment of a range of religious staff will reflect the state's commitment to religious freedom.

Moreover, it is questionable whether an individual member of staff wearing a religious symbol can really be said to infer state endorsement of those beliefs. On the one hand, the fact that those working for the state are able to wear a visible religious symbol may suggest state support for the practice. On the other hand, it is also arguable that individual dress codes are only a reflection of individual belief, and should be seen as a personal statement, and not as reflecting the views of the state. In this regard the wearing of religious symbols by individual members of staff can be distinguished from the display of religious symbols, such as crucifixes, on public buildings,¹⁶⁴ and the case can be made for allowing the wearing of religious symbols even by those who work for the state.

A further issue that is relevant to the employment by the state of women wearing the headscarf is that to restrict state employment may significantly interfere with the freedom of Muslim women to pursue their chosen profession. In some sectors, the state acts virtually as a monopoly employer, for example in the provision of health care or provision of education. To prevent the wearing of religious symbols in state employment prevents Muslim women from participating fully in both these sectors.

A possible way to deal with this issue would be to restrict the wearing of religious symbols to those members of staff who do not represent the views of the employer. For example, cleaning staff or catering staff may wear the headscarf, as they will not be taken to represent the employer, but more senior staff will be required to wear neutral dress. Such a compromise may meet the needs of the employer in demonstrating a religiously neutral 'public face', but would cause new forms of discrimination against Muslim women, as it would concentrate their employment in areas of work with less status.¹⁶⁵

The conflicts at issue here do not only relate to the freedom of religion interests of Muslim and freedom from religion interests of others. Conflict can arise between different groups of Muslims over the meaning to be ascribed to the wearing of the headscarf. In several cases at the ECtHR, reference has been made to the fact that Muslims wearing the headscarf can put under pressure those Muslims who choose not to. For example in *Sahin v Turkey*¹⁶⁶ the Court noted that the wearing of a headscarf may put other students under pressure to adopt more fundamentalist approaches to their faith. Thus, banning the headscarf can uphold the freedom of others of the same faith group to enjoy greater personal freedom in the interpretation and expression of their faith. Yet, to ban one expression of religious faith in order to maintain the freedom of others may be viewed as paternalism on the part of the state, and the extent to which it is appropriate may depend on the context in which the expression

¹⁶⁴ German Classroom Crucifix case, BVerfGE 93, 1, 1 BvR 1087/91.

¹⁶⁵ See Schiek, Just a Piece of Cloth? German Courts and Employees with Headscarves (2004) 33 Industrial Law Journal 68.

¹⁶⁶ Application No. 44774/98 Judgment of 10 November 05, paras. 115 and 116. See also Dahlab v. Switzerland Appl. No.42393/98 Decision of 15 Feb 01.

takes place.¹⁶⁷ Restrictions in schools where young children may come under this pressure may be treated differently from restrictions imposed in contexts where those under pressure are adults, who may be expected to be able to withstand such pressure.¹⁶⁸ Equally, pressure which may be exerted on pupils from teachers wearing headscarves may be treated differently from the pressure exerted by fellow pupils.

Other conflicts that arise in relation to any ban on headscarves focus on the issue of equality. First, is the issue of religious equality. Not only is there an issue of the balance between negative and positive aspects of religious freedom, but any ban on the display of religious affiliation will not effect all religions equally. A ban on the wearing of headscarves or other religious symbols is likely to result in indirect discrimination against Muslims. Such a rule will not affect the majority of Christians as their beliefs do not require specific forms of dress. Thus the rule which appears neutral puts Muslims at a particular disadvantage and will need to be justified.

Moreover, the specific group that is affected is Muslim women, a clear example of multiple discrimination.¹⁶⁹ The banning of headscarves has a direct effect on Muslim women but no effect on Muslim men. Yet on the issue of gender equality and the wearing of headscarves, again the issue is multi-faceted. The headscarf is understood by many to be illustrative of the subjection of women to the power of men. It is therefore viewed as antithetical to the interests of women to facilitate the practice by allowing headscarves to be worn at work.¹⁷⁰ Yet again this is a contested view. First, it is not the job of courts to interpret for women the meaning of their actions.¹⁷¹ Second, it is not at all clear how the equality rights of women are best expressed in this regard. If the wearing of the headscarf is symbolic of the subjection of women, then this may provide an argument in favour of banning it. However, such a conclusion is not inevitable. The effect of the ban is unlikely to be that Muslim women continue to work as doctors, judges, police officers or teachers, with heads uncovered. It is as likely that they will not enter these professions at all. Such an outcome would be counter productive in terms of achieving women's equality. In what sense would the discouragement of women from working as teachers or doctors uphold women's equality? Is the message sent to children by a teacher wearing a headscarf that women are inferior to men? Or that Muslim women believe they are inferior to men? Or that women are equal to men because they are capable of working as teachers? Or that Muslim women are equal to men as they are capable of working as teachers? It would seem again the equality arguments raised are far from conclusive.

Further tensions arise with regard to freedom of expression. The wearing of the headscarf can be viewed as an exercise of the right to freedom of expression by the individual woman. It is not for a court or other people to determine the meaning of this dress code for the individual woman. She may wish to express by the wearing of the headscarf a sense of modesty, or a high level of religious commitment. She may be expressing an important aspect of cultural or ethnic identity,¹⁷² or expressing political views. In some states the wearing of religious symbols will have political as well as religious connotations, with Muslim women choosing to wear the headscarf as a way to distinguish themselves from mainstream culture,¹⁷³ or a particular political group. Freedom to wear such symbols at work will need to be balanced against freedom of others to have goods and services delivered by a

¹⁶⁷ Moreover, it is not clear what evidence would be needed to support such an assertion.

¹⁶⁸ This issue was also in play in *R (On the application of Begum v. Headteacher and Governors of Denbigh High School)* [2004].

¹⁶⁹ Fredman, *Double Trouble: multiple discrimination and EU law*, *European Anti-Discrimination Law Review* Issue 2 2005.

¹⁷⁰ *Sahin v. Turkey*, Application No. 44774/98 Judgment of 10 November 05, paras. 115 and 116. See also *Dahlab v. Switzerland* Applic. No.42393/98 Decision of 15 Feb 01.

¹⁷¹ See *Sahin v. Turkey*, Dissenting opinion of Judge Tulkens para 12. See also, M. Mahlmann, *German Law Journal* Vol. 4 No. 11 Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case.

¹⁷² See Chapter 5 above for links between religious and ethnic identity.

¹⁷³ See *R. (on the application of Begum (Shabina)) v. Denbigh High School Governors* [2006] UKHL 15, for a discussion of potential meanings of the wearing of a headscarf.

politically and religiously neutral workforce. Also in the balance is the freedom of expression of an employer, who may wish to project a particular image to customers or clients.¹⁷⁴

Given the wide range of conflicting arguments that arise with regard to the wearing of headscarves, it is perhaps unsurprising that practice varies among states. France imposes a legal obligation of *laïcité*, and bans headscarves and other religious symbols in schools.¹⁷⁵ Meanwhile, in the UK the wearing of headscarves is commonplace throughout the public sector, and official uniforms are often adapted. The UK case regarding the banning of Muslim religious dress, the Jilbab, (discussed below) occurred in the context of a school which already allowed religious dress, including a uniform headscarf to be worn.

Although practice varies between states, the case law from member states where bans have been challenged follows the ECHR in providing that such bans do not breach the freedom of religion.

In Belgium, a ban on wearing headscarves in a school was challenged as a breach of freedom of religion.¹⁷⁶ On the question of whether the ban complied with Article 9(2) ECHR the Court noted the ban was precise and accessible, pursued the legitimate aim of preserving order in the teaching institution and of protecting the rights of others, in particular against unwanted proselytism, and that the restriction to the freedom of religion of the applicants was narrowly tailored to achieve that objective, so that it met the requirement of necessity.¹⁷⁷

In Denmark, the Supreme Court decided a case involving an employee who decided to wear a headscarf to work after working for a company for some time. The dress code required a work uniform, and provided that headscarves should not be worn. The employee was dismissed, and the Supreme Court held that the dismissal was not in breach of the Danish Act Prohibiting Discrimination on the Labour Market or Article 9 of the ECHR, because the dress code was enacted in order to signal that the company was politically and religiously neutral. Although the policy affected Muslim woman in a negative way, it was objectively justified.¹⁷⁸

In Germany, the Federal Labour Court has held that dismissal of a salesperson based on the wearing of a headscarf was invalid.¹⁷⁹ The case was influenced by the fact that the employer had not shown any actual financial loss caused by the wearing of the headscarf, any loss was merely hypothetical. If the employer could show actual loss, the decision ban the headscarf might have been upheld. The Federal Constitutional Court has also held that a school teacher must not be denied employment on grounds of wearing a headscarf. This case was decided on procedural grounds: a ban could equally well be constitutional, as long as it was provided for in legislation.¹⁸⁰ Thus, the decisions are fact specific and do not suggest that wearing of headscarves should generally be allowed. In effect, the German case law suggests that proper procedural processes are necessary to impose a ban on religious clothing, but that where this has been done, such a ban does not necessarily infringe religious freedom.

¹⁷⁴ Any balancing will need to be carried out in the context of a court's determination of proportionality, discussed in Chapter 2 above. If restricting a woman's freedom to wear a headscarf amounts to indirect religious discrimination, it will need to be objectively justified by a legitimate aim and the means of achieving the aim must be appropriate and necessary before it will be lawful.

¹⁷⁵ Conseil d'Etat 3 Mai 2000 Mlle Marteaux N° 217017, Conseil d'État 15/10/2003 n°244428 The prohibition of headscarves only applies to primary and secondary public schools. It does not apply to private schools, whether or not they are financed by the state, and does not apply to universities and other postsecondary education institutions, whether public or private, or to any centre offering post secondary training.

¹⁷⁶ A claim was also made that the ban breached the Directive, but the claim was not upheld on this basis as the court found that education was outside of the scope of Directive and the implementing legislation. Judgment of 14 June 2005 delivered by the Antwerp Court of Appeals (Hof van Beroep te Antwerpen, AR/2004/2811).

¹⁷⁷ Country Report Belgium, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹⁷⁸ Decision of 21 January 2005, 22/2004.

¹⁷⁹ Federal Labour Court 10 October 2002, 2 AZR 472/01.

¹⁸⁰ Federal Constitutional Court, 2 BvR 1436/02.

Similar procedural safeguards were required by the House of Lords in the UK in upholding the legality of a refusal by a school to allow a Muslim pupil to wear a jilbab to school.¹⁸¹ The case did not involve employment, but the approach is likely to be similar in such cases. Here the school had a uniform which allowed the wearing of religious dress, including a headscarf. One pupil wished to wear the more religiously conservative dress, the jilbab, a long coat like garment. The school insisted on the correct uniform being worn, a uniform that had been agreed in consultation with the local Muslim community. The school's freedom to do so was upheld by the House of Lords, because it was proportionate having regard to the individual pupil's freedom of religion, the competing interests of protecting other Muslim students from family or societal pressure to wear the more conservative style of dress, and the fact that the pupil had the option of attending a different school where the jilbab could be worn. The fact that a range of criteria had been considered by the school, including the pupil's freedom of religion, meant that the rule could be upheld. As with the decisions of other courts relating to headscarves, the court did not rule that the jilbab should be banned, merely that a ban did not breach the pupil's freedom of religion.

In terms of how the wearing of headscarves should be treated under the Directive, it would seem that any ban is likely to be potentially indirectly discriminatory as it is more difficult for Muslim women to comply with a requirement not to wear a head covering. Any such requirement would therefore need to be justified. The range of issues which may justify such a requirement is huge. Whether a court or tribunal will find a ban to be justified will depend on how they balance all the competing interests outlined above.

The approach of the Directive on such a highly contested and sensitive subject would seem to be to provide a proper procedural basis for the consideration of the competing arguments. Any requirement regarding headscarves will have to be objectively justified by a legitimate aim and the means of achieving the aim will need to be appropriate and necessary. If an employer seeks to justify on the basis of hypothetical claims (e.g. customers may object) this may not be sufficient to justify, as the employer must show the requirement is necessary. This means that a real need for the ban must be established, and the means to achieve it must be narrowly tailored to achieve its objective. In terms of legitimate aims however, justification may be possible because of the range of additional interests that may be at stake, such as the equality interests of service users, freedom of religion of other staff, the negative aspect of religious freedom for customers and colleagues,¹⁸² and an interest in political or religious neutrality for the employer. Where the balance lies may depend in part on the status of the employer and whether it has a monopoly on providing particular types of employment.

As the German Constitutional Court recognised with regard to the display of the crucifix in school, the aim in balancing such complex competing rights is to achieve 'practical concordancy'¹⁸³ This involves a recognition that the rights are not reconcilable, and yet that a *modus vivendi* must be found. If this is to be achieved, it will require an approach by the courts which is fact and culture dependent. One disadvantage is that predicting the outcome in any particular case becomes difficult as so many interests are being weighed in the balance. In effect, what the Directive can provide is consistency in terms of clear procedural safeguards, to ensure that bans on religious dress codes are only imposed after proper consideration of the varied interests at stake, in the cultural and political context of the particular member state. What is clear from the case law of Member States and the ECtHR, is that bans do not automatically breach human rights norms, but equally that human rights law does not require such bans in order to protect the rights of others.

Lifestyle requirements

A second difficulty in relation to gender and religion relates to the approach of some religions to issues of sexual morality. Such requirements may well be directed at men and women, but physiological differences and social differences can mean that they have particular impact on women. For example, it is often only with pregnancy that

¹⁸¹ R. (*on the application of Begum (Shabina)*) v. *Denbigh High School Governors* [2006] UKHL 15.

¹⁸² Note that it may be difficult to find evidence to support a claim that a negative right has been infringed.

¹⁸³ German Classroom Crucifix case, BVerfGE 93, 1, 1 BvR 1087/91.

a breach of a requirement to abstain from sexual activity outside of marriage will become public. Discrimination against women who become pregnant when unmarried may be motivated by a desire to sanction the failure to meet a requirement in terms of lifestyle, but it will also be pregnancy related, and therefore amount to sex discrimination. Similar problems, where gender and religion interact, could arise if a religious employer refused to employ anyone who has had an abortion.

The approach of member states to this issue has varied. In the UK, a teacher in a Catholic school became pregnant and was dismissed when it became known that the father of child was a priest. Her dismissal was found to be discriminatory on grounds of sex, because it was related to pregnancy. The employer's argument that the reason for dismissal was not the pregnancy, but the failure to comply with religious standards, was not accepted, because the pregnancy precipitated and permeated the decision to dismiss.¹⁸⁴

In contrast in Ireland, the High Court ruled in *Flynn v. the Sisters of the Holy Faith*,¹⁸⁵ that the dismissal of a single woman who lived with a married man was lawful as it was contrary to the religious ethos of the school. Divorce was not available in Ireland at the time of the case, and the woman became pregnant by her still married partner. Since the decision, the law in Ireland has been amended to allow divorce, and it also prohibits dismissal for reasons related to pregnancy, so a case on similar facts may be decided differently today. Nonetheless, the case illustrates the extent to which religious ethos requirements may infringe the privacy of the individual. It may also involve elements of discrimination on other grounds.

Under the Directive, differential treatment may be allowed by religious ethos organisations, to require loyalty to the religious ethos. However, in order to comply with the Directive, such treatment must be guided by the requirement that it be for a legitimate aim, and proportionate, as well as being linked to a genuine occupational requirement.

As with the headscarf cases, the difficulty in determining what is proportionate lies in resolving the conflict in rights. Where the employer is a religious body, loyalty to the organisation can be required. However, this does not give grounds for discrimination on other grounds. In some cases it might be that loyalty requirements are harder to for women to comply with, not least because it is easier to discover a breach of the lifestyle requirement in women, for example in the event of pregnancy, or because women are more likely to be single parents. Where less favourable treatment by a religious employer is linked to pregnancy, this will be direct discrimination.¹⁸⁶ If the discrimination is indirect the organisation may seek to justify the decision as necessary to uphold the religious objectives of the organisation. Whether or not it is proportionate to have a requirement of loyalty can then be determined with reference to a range of factors including the need to uphold the freedom of religion of the individual and organisation, and the need to prevent sex discrimination.

The other right that may also be taken into consideration with regard to lifestyle requirements is the right to privacy. Usually, questions of personal morality would be viewed as private, and as having little relevance to the employer. However, the extent to which staff may be entitled to view matters of personal morality as private may depend on the type of employer. It is inevitable that matters of personal morality will be relevant to a religious employer who wishes to maintain a religious ethos, as this may reflect good religious standing and loyalty to the religion. Part of having a religious ethos at work is that matters that to outsiders would be viewed as personal and private are shared. Where an employee has chosen to work for a religious organisation, it may be reasonable for the employer to insist on loyalty to the religious ethos. But this may be viewed differently if the employer, though religious in ethos, is also a monopoly employer, as can occur in health and education in some member states. Again, as with the other genuine occupational requirements, the concept of proportionality is the mechanism through which equilibrium can be achieved in balancing the competition between freedom of religion, privacy, and equality.

¹⁸⁴ *O'Neill v. Governors of St Thomas More RCVA Upper School* [1996] Industrial Relations Law Reports 372.

¹⁸⁵ [1985] I.L.R.M. 336.

David | 1981

Part VIII

Genuine Occupational Requirements and the Religious Ethos Exemption

Many of the questions that arise in relation to the Directive will ultimately be determined by considering the scope of the Genuine Occupational Requirement provisions in Article 4 of the Directive. These provide the only defence to direct discrimination. Some of the terminology and concepts are similar to that in indirect discrimination, as they both require exceptions to the non-discrimination principle to be justified as necessary for a legitimate aim and proportionate. It is through the interpretation of these concepts that the boundaries of Directive's protection against discrimination on religious grounds will be set.

The Directive contains two genuine occupational requirement exceptions: a narrower general exception for all employers¹⁸⁷ and a broader exception for organisations with a religious ethos.¹⁸⁸ Article 4(1) provides an exception to the duty not to discriminate where, having regard to the occupational activities or their context, being of a particular religion is a genuine and determining occupational requirement of the job, and there is a legitimate objective for the requirement and it is proportionate.

Article 4(1) is not particularly controversial. In the context of religious discrimination it enables the right to religious freedom and other rights to be balanced against each other in the employment context. It only applies where there is a very clear connection between the work to be done and the characteristics required: the occupational requirement must be genuine *and determining*, and it must be proportionate in the particular case involved. It will be necessary to consider the requirements of the job very closely before being able to use the exception. For example, while a Mosque may require a Muslim imam, a requirement that the cleaner be Muslim may not be allowed under this exception. While religious people may argue that they bring a specifically religious approach to their work, it cannot realistically be claimed that being of a particular religion is a determining occupational requirement for many jobs. Under Article 4(1) religious discrimination is only really likely to be lawful in cases of those employed in religious service, whose job involves teaching or promoting the religion, or being involved in religious observance.

The exception applies to all grounds of discrimination, such as sexual orientation, so for example it could be argued that an organisation providing a counselling and support service for gay and lesbian clients could refuse to employ a heterosexual counsellor.

More controversial is the additional exception to the principle of non-discrimination contained in Article 4(2), which applies only to churches or other public or private organisations which have an ethos based on religion and belief.¹⁸⁹ Here differences in treatment will not be discriminatory, where by reason of the nature of the activities or 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. The exception is broader than that provided for by Article 4(1) as the genuine occupational requirement does not have to be *determining* although it does still need to be legitimate and justified. This suggests a less rigorous approach in deciding whether the particular job requires a particular characteristic than that required by Article 4(1), where the emphasis is clearly on the nature of the job itself.

The aim of the provision is to allow a religious ethos organisation to require loyalty and good faith to its ethos. In relation to religious employers it may be possible to argue that a workplace has a particular religious ethos, because its staff is all from the same religion, and it operates according to that religious ethos. This may then lead to employers imposing religious requirements on a broader range of staff, such as administrative staff or catering or cleaning staff.

¹⁸⁶ *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941.

¹⁸⁷ Article 4(1).

¹⁸⁸ Article 4(2).

¹⁸⁹ Member states may retain practices, or provide for future legislation incorporating existing national practice: Article 4(2).

However Article 4(2) is not without limitations. Although they do not need to be determining requirements, requirements must be genuine and occupational, so must be linked to the job in question. Requirements on cleaning staff, for example, are only likely to be proportionate if it can be shown that all such staff participates in the religious purposes of the organisation. Also, the exception only applies to organisations with a religious ethos, and any discrimination will need genuinely to be for the purposes of preserving the religious ethos of the organisation. Most importantly, Article 4(2) explicitly provides that it cannot be used to justify discrimination on another ground.

Enabling exceptions to the non-discrimination principle for religious ethos organisations allows the Directive to be interpreted in accordance with the constitutional provisions of member states, many of which grant significant autonomy to religious organisations, in order to maintain their religious freedom.

Transposition of Article 4

The transposition of Article 4 into implementing legislation has not been uniform. Although some have transposed correctly, several Member States have introduced exceptions that are wider than that allowed by Article 4, and others have not provided the breadth of exception that they could have done. Although the provisions of exceptions are optional within the Directive, there will be groups who are adversely affected by the failure to provide exceptions.¹⁹⁰

Those states who have not transposed the Article 4(2) exception are the Czech Republic, Belgium, Estonia, France, Lithuania, Portugal, Slovenia and Sweden. However, although these states have no explicit transposition of the religious ethos exception, some do have constitutional or other safeguards for the freedom of religion of groups, which can operate to provide exceptions which would have an equivalent effect as Article 4(2) with respect to clergy. Thus Czech Constitutional Court has held that labour disputes involving clerics are inadmissible in the civil courts and that labour law does not apply at all in labour relationships involving clerics.¹⁹¹ In Estonia and Lithuania too, employment laws do not apply to the employment of priests.¹⁹²

The total exemption of disputes regarding clergy from the purview of the courts is technically broader than the exception provided by Article 4(2), as there is no requirement for proportionality; yet it would be difficult to imagine it not being proportionate to impose a requirement relating to religion upon the appointment of a religious leader.

The failure to transpose Article 4(2) means that religious groups are unable to impose religious or loyalty requirements on other employees. In some cases, such as Belgium, exceptions based on Article 4(1) apply instead, where the requirements of proportionality and necessity are stricter. As a result, it may be that some degree of religious freedom is denied to religious groups, as they are unable to impose religious requirements on staff unless they are absolutely essential to the job.

Other Member States have transposed Article 4(2) in terms that go beyond the Directive, so that religious ethos organisations are allowed to discriminate more than is allowed for under the Directive. For example, in Slovakia,

¹⁹⁰ Article 4(2) limits its exception to legislation in force at the date of adoption of the Directive, and future legislation incorporating national practices existing at the date of its adoption.

¹⁹¹ Country Report Czech Republic, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹⁹² See Article 7 Law on Employment Contracts in 1992 in Estonia. Country Reports, Estonia and Lithuania, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

the Anti-discrimination Act provides that in the case of churches and organisations whose activities are based on religion or belief, differences of treatment based on age, sex, religion or belief and sexual orientation do not amount to discrimination where they are related to employment by, or to carrying out activities for, such organisations.¹⁹³ This exception is broader than that provided by Article 4(2) because it allows religious groups to discriminate on grounds such as sex or sexual orientation, rather than just on religious grounds as provided by the Directive. Also the exception is not limited to genuine occupational requirements, but would seem to provide a total exception for religious organisations to discriminate in their employment practices, without the need to link the exception to the needs of a particular job.¹⁹⁴

In Ireland too, section 37(1) of the Employment Equality Act 1998-2004 contains an exception to the non-discrimination principle for the purposes of maintaining the religious ethos of an institution. This is broader than is allowed for in the Directive, as it does not provide that religion or belief must be relevant to the particular job in question; nor does it limit the exception to discrimination based on the grounds of religion or belief so that it cannot be used to justify discrimination on another ground.

Italy provides a different example of a failure fully to transpose the Directive. Its Decree transposing Directive corresponds to Article 4(2) except that it does not limit the exemption to religious ethos organisations, but includes “other public or private organisations” without specifying that their ethos must be based on religion or belief. This could allow religious discrimination by public and private organisations which do not have an ethos based on religion or belief.¹⁹⁵

In states such as Ireland and Slovakia, where the exception is more broadly drawn than provided by the Directive, the equality rights of others, particularly lesbian and gay people, are inadequately protected. The approach of the Directive is preferable, where any requirements regarding sexual orientation must be genuine and determining occupational requirements, which can only be upheld where it is proportionate to do so.

In the Netherlands, Article 4(2) is transposed, but the General Equal Treatment Act (GETA) does not apply at all to the *internal affairs* of churches, of other religious communities, or of associations of a spiritual nature. As with other states, the reason for this is to uphold the principle of *freedom of religion* and in the *division between state and church*. This restriction is likely to accord with the Directive, if the restriction to internal affairs limits discrimination to the appointment of religious staff for the purposes of teaching or practising the religion.

The GETA also provides for additional exceptions for Churches and other organisations with an ethos based on religion or belief. The first provides that such organisations may discriminate where it is necessary, having regard to the institution's purpose, for the duties of the post to be fulfilled, so long as the discrimination does not lead to distinction on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status.¹⁹⁶ This exception adequately transposes Article 4(2). GETA includes an additional exception for private educational establishments, allowing discrimination where necessary in order for the establishment to effectively realise its founding principles, although again such requirements may not lead to discrimination on the

¹⁹³ Country Report Slovakia, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹⁹⁴ In addition to partial transposition, debate has occurred in Slovakia over the introduction of an agreement with the Holy See allowing for staff to raise a conscientious objection in the areas of health care services, including abortion, artificial or assisted reproduction, testing and handling with human organs, embryos and human sex cells, euthanasia, cloning, sterilization and contraception; in education and training concerning sex education; in legal services regarding divorce. These proposals have now been dropped.

¹⁹⁵ See Country Report Italy, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006), where it is suggested that this may be the result of drafting error.

¹⁹⁶ Article 5(2)a General Equal Treatment Act.

sole ground of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status.¹⁹⁷ This extra exception may be too broad to conform with Article 4(2).¹⁹⁸ In terms of the requirement that discrimination on the 'sole grounds' of race, sex etc. will not be exempted, this provision may be too broad to comply with the Directive. According to the Dutch text, discrimination by a religious organisation will be lawful as long as it meets the requirements of the section, and as long as the discrimination is not on the listed grounds. It does not seem to anticipate that discrimination may be on more than one ground simultaneously. For example, discrimination against an unmarried pregnant woman may be discrimination on grounds of sex, but also discrimination on grounds of religion (for example, a failure to live in accordance with the lifestyle requirements of the religion). It would seem therefore that it is not on the 'sole ground' of sex. Under the Directive such treatment would not be lawful, unless the employer can show that the sex discrimination is indirect discrimination and justified.

The position in Germany¹⁹⁹ too would seem to be capable of conforming to the Directive, depending on interpretation. Its wording is again different from that of the Directive. In German law exceptions exist for religious communities, to reflect the principle of the neutrality of the state and the autonomy of the Church. As with other states, the internal workings of a church are not governed by public laws. However, the autonomy of churches extends beyond the internal workings of the church to all institutions related to the church, as long as the institution has an inner relationship to the religious mission of the church. The question of whether such an inner relationship exists is for the churches themselves to determine, not the state. For Christian churches it has been accepted that charitable activities, such as running hospitals, are encompassed by the religion mission of the Christian faith.

In order to respect autonomy, legal provisions do not apply to religious communities without qualification. For example, according to the Federal Constitutional Court, the Works Council Constitution Law²⁰⁰ which contains a general anti-discrimination clause is not applicable to hospitals as employers. Moreover, where labour laws do apply to churches, they must be interpreted with due regard to the special status of churches and in a way that will not interfere with church autonomy. Thus, employment can be terminated if duties and obligations of loyalty are violated. For example, a doctor in a religious hospital could be dismissed if she leaves the church concerned or marries a divorced man if this contradicts the ethos of the church concerned.

These provisions are capable of being interpreted to comply with Article 4(2), although this may depend on the amount of discretion allowed to religious employers to determine whether their activities can be viewed as part of the mission of the church. The position in Germany is that the activity of running a hospital can be part of the mission of the Christian church. What is not clear is how German courts will decide cases where the dismissal for failure to meet requirements of loyalty to religious ethos also involves discrimination on other grounds, such as sex discrimination.

In the UK an additional exception is provided in the Sexual Orientation regulations to allow discrimination on grounds of sexual orientation where necessary to comply with the doctrines of the religion, or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers. This was

¹⁹⁷ Article 5(2)c General Equal Treatment Act .

¹⁹⁸ See Country Report Netherlands, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

¹⁹⁹ See Country Report Germany, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

²⁰⁰ Section 75 Works Council Constitution Law (*Betriebsverfassungsgesetz*): employers and work councils are under an obligation to ensure that all employees are treated in conformity with the principles of law and fairness, and in particular that nobody is discriminated against because of parentage, religion, nationality, origin, political or union activities or attitudes, sex or sexual identity. See Country Report Germany, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006).

created in order to respect the autonomy and religious freedom of religious organisations and is limited to those employed for the purposes of an organized religion.²⁰¹ Employment ‘for the purposes of an organized religion’ is limited to the appointment of religious leaders and teachers such as priests and imams. It does not cover workers employed by religious organizations, such as teachers or nurses in religious foundations.²⁰² The German approach allows a much wider range of activity to be classed as religious, and therefore suggests that a wider range of jobs will be accepted as requiring loyalty to the religious ethos. Whether this accord with the Directive will depend on how strictly the requirement in Article 4(2) that religion is a ‘genuine and *occupational*’ requirement is interpreted.

European Experience of Religious Occupational Exceptions

Case law arising out of Article 4 of the Directive is not yet extensive, although a few cases can be found. However, the Member States do have experience in balancing the rights of religious ethos organisations against the equality rights of staff in their pre-existing constitutional and labour law.

In Denmark, where a young person was dismissed from a cleaning job in a Christian humanitarian organisation (the Christian Cross Army), it was accepted that, under Article 4, a requirement that all staff must be members of the National Lutheran Church was no longer permitted.²⁰³ There was no genuine occupational need for cleaning work to be carried out by a member of the same religious group. This approach would seem to contrast with that taken in Germany, where all work by a religious organisation can be seen as part of the mission of the Church.

Spain also draws a distinction between work for religious organisations that is ‘ideological’ and that which is ‘neutral’ with respect to religious organisations. Employees in ideological or confessional organisations can be expected to conform to a minimal extent with the organisation’s ethos,²⁰⁴ but only where the job is ‘ideological’ in that it involves transmitting the ideology of the institution. Those who undertake ‘neutral’ work cannot be expected to conform to the organisation’s ethos. Thus, the Constitutional Court annulled a dismissal of a ward assistant from a private Catholic hospital because the job was neutral in relation to the organisation’s ideology.²⁰⁵

Several states have special rules which apply to religious schools, where freedom of religious groups to run schools in accordance with their religious ethos has to be balanced against the equality rights of staff, and the right of parents to educate their children in accordance with their religious beliefs.²⁰⁶

In Spain there are special rules relating to schools. Organic Law 2/2006, on Education, of 3 May provides that the qualification requirements for religion teachers should be similar to those for teachers of other subjects. Teachers must be recruited on the basis of objective criteria of equality, merit and ability, and lifestyle requirements cannot be taken into account. Labour law provides that workers’ private lives cannot be invoked as a ground for dismissal.

In Greece, non-Orthodox teachers cannot be appointed to state kindergartens or primary schools unless there is more than one teaching post, so that another teacher shares the same religion as the majority of the children.²⁰⁷

²⁰¹ Regulation 7(3) Employment Equality (Sexual Orientation) Regulations 2003.

²⁰² R (*on the application of Amicus – MSF and others*) v. *Secretary of State for Trade and Industry and others* [2004] IRLR 430.

²⁰³ The case arose before the transposition of the Directive, but the Church did admit that under the Directive, such discrimination against a cleaner would not be permitted. See Country Report Denmark, European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG) 2006).

²⁰⁴ See Constitutional Court Decision, 27 March 1985, 47/1985.

²⁰⁵ See Constitutional Court Decision, 12 June 1996, 106/1996.

²⁰⁶ Article 2 Protocol 1 ECHR.

²⁰⁷ Article 16 of Law 1771/1988.

Non-Orthodox teachers can only teach religious classes to pupils of the same religion,²⁰⁸ and where a school has only one teacher non-Orthodox teachers can only be appointed if they share the religion of the children at the school.²⁰⁹

As noted above, the Netherlands provides a broader exception to the non-discrimination principle for private educational establishments, allowing discrimination where necessary for a religious ethos organisation to uphold its ethos.²¹⁰ In Ireland, an exception to the non-discrimination rules applies to discrimination by teacher training institutions, in order to ensure the availability of teachers to maintain the religious ethos of primary schools.²¹¹

In Germany, the provision of education will be viewed as part of the mission of the church. Thus labour laws will need to be interpreted in a way that will not interfere with church autonomy. If members of staff violate duties of loyalty to the ethos of a religious school, it may be that dismissal will be allowed.

Determining the Proportionality of Occupational Requirements

In many cases, the question of whether a genuine occupational requirement can be imposed by an employer will be determined by whether it is necessary and proportionate to allow it. The question will be particularly difficult where clashes between competing rights arise, for example where religious groups are intolerant of homosexuality, or do not recognise the equality of women.

There does seem to be consensus among Member States on the need to respect the religious freedom and autonomy of churches and religious groups by allowing them to choose their own staff to teach the religion and lead or participate in religious observance. Discriminatory requirements such as requirements for church leaders to be male are therefore likely to be proportionate genuine occupational requirements, as long as they are necessary for the maintenance of religious freedom.

However, proportionality is not always straightforward to determine. To take a hypothetical example, a doctor's practice could have a Muslim ethos and could require staff to share its faith. Whether such a requirement is lawful will depend first on whether the requirement to be Muslim can be viewed as a genuine occupational requirement, given the religious ethos of the employer. The fact that being a Muslim is not directly related to the work of a doctor does not matter as under Article 4(2) the occupational requirement does not need to be *determining*. Thus the creation of religiously homogenous workplaces may be acceptable even where the work is not religious in nature.

But, the religion requirement could indirectly discriminate against gay people, as loyalty towards the tenets of Islam will not be compatible with homosexual practice.²¹² Thus a requirement to be a strict Muslim²¹³ would disadvantage gay and lesbian people. The exception created by Article 4(2) should not be used to justify

²⁰⁸ Article 2 of Law 1771/1988.

²⁰⁹ Article 3 of Law 1771/1988.

²¹⁰ Article 5(2)c General Equal Treatment Act. Such requirements may not lead to discrimination on the sole ground of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status.

²¹¹ Section 12(4) Employment Equality Act 1998-2004.

²¹² The same may be said for Christianity. Note that question of whether a person can be homosexual and Muslim, or homosexual and Christian is contested. Many gay and lesbian people will identify as Muslim or Christian, although this may not be accepted by others claiming the same religious identity. The question of whether an individual is of a particular religion is not one that is appropriate for determination by courts. In the context of the employment relationship, the question of whether a person complies with a requirement to be of a particular religion is determined by the employer. See discussion on determining an individual's religion or belief in Chapter 4 above.

²¹³ The term 'strict Muslim' is also contestable. It is used here to refer to a Muslim who will not see homosexuality as compatible with Islam.

discrimination on another ground. This would suggest that religious requirements that themselves indirectly discriminate on other grounds will only be allowed where they meet the requirements of Article 4(1), in that they are determining characteristics of the job. Thus requirements to be Muslim or Catholic, or a member of any other religious denomination which does not accept homosexuality, and which may therefore involve indirect sexual orientation discrimination, will only be lawful if being of the particular religion is a defining characteristic of the job. In effect, the job must be religious in nature. It is not clear whether it is a defining characteristic of many jobs to be of a particular religion. Clearly a religious teacher or cleric must share the religion of those he or she teaches or ministers to. But is the job of a teacher of maths in a religious school, or a cleaner of a church or a doctor in a religious hospital defined by religion?

Certainly there is no agreed answer within the Member States on this as yet. In the UK and Denmark, such work would not be religious in nature. However, in Germany the work of teaching in a church school, or medical work in a religious hospital would be viewed as part of the mission of the church.

Where the imposition of a requirement to be of the particular faith indirectly discriminates against a gay or lesbian job applicant, and the requirement cannot come within the exception in Article 4, it remains open to the employer to argue that indirect discrimination can be justified as a proportionate means of achieving a legitimate aim. The acceptance in the Directive of a special exemption for religious ethos organisations indicates that the preservation of a religious ethos is a legitimate aim for an employer to pursue. Yet, it will remain difficult to show that indirect discrimination on other grounds is necessary and proportionate, given that the policy of the Directive is to end discrimination on all grounds.

The effect of the genuine occupational requirements under Article 4(2) of the Directive is that religious employers may be able to create workplaces which are homogenous in religious terms, even where the work is not religious in nature. However, if discrimination on other grounds such as sex or sexual orientation results, such a practice will be in breach of the Directive, as it will amount to indirect discrimination on the other ground. An exception may be where the work itself is religious in nature. In such a case the religious requirement, which is indirectly discriminatory on other grounds, may be justified as proportionate, because of the need to uphold religious freedom.

Part IX

Conclusion

Numerous difficulties arise with the introduction of protection against religious discrimination and these present significant challenges for those implementing and interpreting the religion and belief provisions of the Directive.

First, there is the difficulty of definition. The terms of “religion” and “belief” are left undefined, and in transposing the Directive, Member States have taken differing approaches to the issue. Some have included guidance notes; some have excluded religions or beliefs that do not themselves uphold equality; some have explicitly covered political opinion, some have excluded it. If the purpose of the Directive is to attain some level of equality across member states, the failure to define key terms may make this difficult to achieve.

A second major challenge is the fundamental conflict that arises between different rights. Many of these are incapable of a perfect resolution: to uphold freedom of religion for one will entail the infringement of another’s rights, such as rights to privacy, rights to be free from religion, rights to educate a child in accordance with a parent’s religion, or rights to be treated with equal dignity on grounds of gender or sexual orientation. In some respects these conflicts can be managed though the non-absolute nature of the various rights. The fact that indirect discrimination can be justified, and that, where proportionate to do so, genuine occupational requirements can be imposed, leaves room for the discretion of the courts to decide where the balance should lie between the competing rights.

The third complication is that religious groups also enjoy the right to religious autonomy, which will be undermined if they are not allowed to staff their organisations with those of the same religion. Here, again, an equilibrium is needed to balance the rights of workers to equality against the rights of religious groups to religious freedom and autonomy.

Determining where the point of equilibrium can be found is difficult, and is likely to remain context and fact dependant. Within the framework of the Directive, the concept of proportionality is used for this purpose, and can be used to take into account the wide range of competing rights identified above. Deciding what a proportionate response might be in any particular case remains a significant challenge, and no EU-wide consensus can be determined as yet. It may be that the role of the Directive and those who interpret it, is not so much to determine exactly where the equilibrium is to be found, but to ensure that the correct issues are considered in the proportionality equation.

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Religion and Belief Discrimination in Employment - the EU law

Luxembourg: Office for Official Publications of the European Communities

2007 — 69 pp. — 21 x 29.7 cm

ISBN 92-79-03114-7

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