HUNGARIAN LABOUR LAW
E - J O U R N A L

Religion at work: European Perspectives

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What constitutes 'religion' is an inherently complex matter in which objective factors combine with elements of each individual's subjective convictions in multilayered society where different religions and beliefs have to co-exist also with secular people. Because it includes not only the faith of an individual as such (forum internum) but also the practice and manifestation of that religion, (forum externum), the protection of religious freedom at work has became a very sensitive. Companies, whether public or private, are the place where the manifestation of religious beliefs generate tensions. Issues that, relatively recently, were seen as being of no, or at most minimal, importance have now been brought into sharp and sometimes uncomfortable focus. Issues faced by companies are very concrete one: Is a private employer permitted to prohibit a female employee of Muslim faith from wearing a headscarf in the workplace? And is that employer permitted to dismiss her if she refuses to remove the headscarf at work? Is the employer required to grant days off for religious reasons? What can an employer do when an employee refuses to shake hands with the opposite sex? What can he/she do when an employee refuses to serve gay customers? These are the very concrete issues that employers may face and the national answers could be very different. National cases do not seem to be so numerous but they often raise passionate debates, because they reflect the social tensions around the issue of the expression of religious beliefs in our societies.

This issue had been debated in an International conference held in Lyon the 19th and 20th March 2018 where national cases where presented and discussed. The articles published in this special issue are the result of this conference. They present the situation in Belgium, France, Germany, Romania, Sweden, United Kingdom. They show a variety of national situations even if the European influence (through the European Convention of Human Rights and now the Directive 2000/78 on the prohibition of discrimination based on religious beliefs) is intensifying.

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1. Diverse national approaches

There is no doubt that, as Felicia Rosioru wrote in her paper in this issue, public policies towards religion and their different forms of expression in the workplace are strictly linked to and fundamentally reflect "the role of religious expression and religion as a whole within the state's owns conception of itself".[1] Each nation has a unique culture of religion, influencing the laws and policies governing the domains where state and religion intersect.

The articles presented in this special issues reflect this diversity. A first distinction among the countries can be done between countries, where there is a relative religious homogeneity like Romania, and countries, where a dominant religion cohabits with other significant religious communities. As a consequence, there is a certain silence in Romania on religion and religious expression. There are only a few cases heard by the courts on this issue and most of them are not related to the issue of religion at work.

On the contrary, in other countries like France and Belgium, the issue of religious practices at workplace is a very sensitive one. In both countries, the debates both in media and in legal literature have focused on workers who wish to wear the veil at workplace. "The corporate context has proven to be a place of tension and confrontation between the rights of the various parties involved: the right of the employee to manifest his/her religion, the right of the employer to ensure that the work is carried out efficiently, the right to promote a brand image, the right to equal treatment, the freedom of other employees not to have religion and the right to be free from proselytism".[2]

The end of society's religious homogeneity is not the only factor explaining why religion at work has became a sensitive issue, at least in the public debate. In Belgium, but it is also the case in France, the increasing recognition of fundamental rights, especially within companies, has led minorities to assert their rights, when their religious commandments clash with employer's instructions. These national contexts could explain why French and Belgian judges have decided to delocate the answers to this issue to the ECJ.

Of course differences among different groups of countries are not only related to the religious homogeneity of national societies, and the resolution of conflicts could take various paths depending on national contexts. Indeed, British and French examples show two very different ways to approach this issue.

1 F. Rosioru in this issue.

2 See F. Kéfer in this issue.

2. Relevance of EU law and case law

The European Union witnesses and respects this diversity. Article 22 of the European Charter of Fundamental rights provides that the "Union shall respect cultural, religious and linguistic diversity" and article 17 of TFEU preserves the "status under Member State law of churches and religious associations or communities, and philosophical and non-confessional organisations." However, when adopting Directive 2000/78, whose purpose is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment, the European Union has abandoned its initial neutrality. With Directive 2000/78, the issue of religion at work has integrated the European Union sphere through the resolution of discrimination cases. The European influence is now twofold through the European Convention of Human Rights and the case law of the European Court of Human Rights and through Directive 2000/78 and its interpretation by the ECJ.

The decisions of the ECJ were therefore expected. In one year the European Court issued four landmark decisions, each one in the Grand Chamber, on discrimination based on religion (ECJ, 14 March 2017, Case C-157/15, Achbita and Case C-188/15, Bougnaoui, ECJ 17 April 2018, Case C-414/16 Egenberger and ECJ, 11 September 2018, Case C-68/17, IR), and the impact of which could be ground-breaking for many countries.

The most recent cases, the Egenberger and IR cases deal with Article 4 (2) of Directive 2000/78, which allows for a limited exception to be made to the principle of non-discrimination for churches and other public or private organisations, the ethos of which is based on religion or belief. According to Article 4 (2) of the Directive, '*Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking into account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground'.*

Only few countries have not implemented Article 4 (2) of the Directive,[3] and the decisions of the ECJ would certainly interfere with national interpretations, especially of course in Germany. The

[3] Czech Republic, Belgium, Estonia, France, Lithuania, Portugal, Slovenia and Sweden. See L. Vickers: *Religion and Belief Discrimination in Employment – the EU law.* European Commission, November 2006, 58.

impact of these decisions is multipled by the recognition, by the ECJ in these two decisions, of the direct effect of Articles 21 and 47 of the Charter of Fundamental Rights of the European Union with the consequences, that a national court "hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78 to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter of Fundamental Rights of the European Union and to guarantee the full effectiveness of those articles by disapplying if need by any contrary provision of national law."[4]

In the Egenberger and the IR cases, the ECJ gives a narrow interpretation of Article 4 (2), which certainly limits the ability of Churches and other organisations to delimit themselves its scope. The decisions of religious employers to impose a specific religion and/or to impose an obligation on their employees to behave with loyalty towards the religious ethos of their employer is now subject to a proportionality test. As a consequence, the application of the two exceptions, the one of Article 4 (1) and the one of Article 4 (2), has became very similar. The approach of the ECJ contrasts slightly to the one of the European Court of Human Rights, and it could explain the silence of the ECJ with regards to the European Convention in the Egenberger and IR cases.

In Achbita and Bougnaoui, the ECJ decided that first a neutrality rule could constitute indirect, rather than direct discrimination, because such a rule would treat any employee in the same undertaking in the same way, as the ban was on all symbols of religious or political belief. As Florence Fouvet wrote, this finding is questionable. "Namely, the prohibition, although general and undifferentiated is nonetheless discriminatory. This is because the manifestation of all convictions, be they religious, philosophical or political, are protected by the rules governing the prohibition of discrimination. Therefore, a prohibition does not become permissible on the grounds that it is sweeping, encompassing sevearl protected characteristics. On the contrary, it is all the more serious. The Court of Justice thus confuses the absence of unequal treatment between persons displaying their convictions with discrimination."[5]

It is clear, that the rules governing indirect discrimination are more flexible than those relating to direct discrimination, and will leave more space for the national judges to adapt the interpretation to the national context. It could explain, why the ECJ has decided to place the debate on the ground of indirect discrimination. For the European Court, it could constitute indirect discrimination, because the rule could disadvantage employees of a particular religious group more than others.

Judges must therefore check, if a neutrality rule could be justified and is proportionate. The European Court links the justification test to Article 16 of the European Charter of Fundamental Rights on freedom to conduct a business, and states, that a "desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be

4 ECJ, 17 April 2018, Case C-414/16, Egenberger.

5 Florence Fouvet in this issue.

considered legitimate."[6] Such an internal rule would be appropriate as long as the neutrality policy is "genuilely pursued in a consistent and systematic manner".[7] This is a considerable weight given to a company's desire to promote neutral appearance, and it creates a significant level of restriction on religious employees, as Lucy Vickers wrote.[8] This is very different from the British approach, and it leaves an open question. Could the ECJ cases oblige British judges to change their position? The United Kindgom government made a public response confirming the position, the position in the UK would not change, but it could be argued, that this position does not fit with the interpretation of Article 16 given by the ECJ.

At national level, religion at work should now take into account the case law of both the ECJ and EctHR. Other international actors could also interact with national interpretations. In France, in the notorious Baby Loup case,[9] the Court of cassation found that the dismissal of the employee because she was wearing a veil was justified. However, the case was not over. She could have decided to bring the case to the EctHR, but her lawyers were not so confident on what could have been the position of the EctHR. Therefore, they decided to bring it to the Human Rights Committee for violation of Article 18 (freedom of religion) and 26 (prohibition of discrimination) of the New York Covenant on Civil and Political Rights. The Committee[10] found, that in this case the prohibition to wear her headscarf in her workplace was an obstacle to the exercise of her right to freedom to manifest her religion.

The decision of the Committee does not contradict as such with the ECJ interpretation, as the Committee stressed, that the restriction was not objectively justified, nor was dismissal a proportionate measure. The proportionality test seems, however, stricter here, than the one by the ECJ and the EctHR. One interesting aspect of the decision was, that the Committee recognised here an intersectional discrimination, based both on gender and religion. Until now, the ECJ has denied to recognise intersectional discriminations.[11] One can ask, whether this concept could not help in dealing with this issue.

Religion at work is now subject to various international influences. If it could not be easy for national judges to conciliate the different case laws of the international courts, the abundance of interpretation could also be seen as a way to enrich the debate at national level.

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6 ECJ, 14 March 2017, Case C-157/15, Achbita § 37.

7 Ibid, § 40.

8 Lucy Vickers in this issue.

9 Court of Cassation, plenary assembly, 24 June 2014, *Bull. Ass. Plén*., n°1.

10 The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights. See its decision, F.A c. France, ("Baby Loup" case), Communication 2662/2015, View adopted 10 August 2018

11 See ECJ, 24 November 2016, Case C-443/15, Parris. The case was about a discrimination based on sexual orientation and age. The ECJ stated that Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule such as that at issue in the main proceedings is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation", (§ 82).