



Elimination of Religious Discrimination at Workplace in the EU with Particular Reference to the UK

Mahmut YAVAŞI

Abstract

Some international, regional and national provisions state that every form of discrimination must be combated in order to ensure equal treatment at workplace. Council Directive 2000/78/EC contains special binding provisions with regard to religious discrimination at workplace.

Keywords: *Religious discrimination, workplace, European Union, United Kingdom.*

INTRODUCTION

Almost all major human rights treaties forbid discrimination on grounds of religion and a number of EC Treaty provisions affirm that every form of discrimination must be combated in order to ensure equal treatment at workplace.

The present paper analyses legal background of religious discrimination at workplace in the EU and its potential influence on non-Christian employees in the EU.

TREATY PROVISIONS

The concept of fundamental rights was not contained in the original EEC Treaty. For the first time, the Single European Act made reference to respect for human rights. The Preamble of the SEA subscribes to universal and regional instruments and assuming responsibility for promoting the principles of democracy, the rule of law and respect for human rights. The Preamble of the SEA also states that the EU and the Member States should work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter of 18 November 1961, notably freedom, equality and social justice.

The Preamble of the SEA underpins the EU in accordance with the Solemn Declaration of Stuttgart of 19 June 1983. Ten years after than the Declaration, a major step in integrating human rights into the EU's policies was taken with the entry into force of the Treaty on European Union. Article 2 of the TEU provides that one of the EU's objectives is to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union. Article 6(1) of the TEU provides that the Union is founded on the principles of liberty, democracy,

respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and Article 6(2) states that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of Community law. The TEU stipulates that candidate countries will have to respect these principles to join the Union. This confirms the long-standing practice of the European Court of Justice (ECJ) in using the ECHR as an embodiment of the general principles, common to the Member States. In other words, the case law of the ECJ is now reflected in Article 6(2) of the TEU.¹

The Treaty of Amsterdam marks another significant step forward in integrating human rights into the EU legal order. The Treaty of Amsterdam reaffirms, in Article 6, that the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

Prior to the Treaty of Amsterdam there was no immediate power for the Community to deal with racial or religious discrimination. Article 13 of the EC Treaty, as introduced by the Treaty of Amsterdam, puts an end to the long debate about Community competence on anti-discrimination matters. It provides a legal basis for the Council, acting unanimously, on a proposal from the Commission and after consultation with the European Parliament, to take “appropriate action” to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The Commission, together with the Council and Parliament, participated in the solemn proclamation of the Charter of Fundamental Rights on 7 December 2000. Article 10 of the EU Charter follows Article 9 of the ECHR on freedom of thought, conscience and religion, and Article 13 has a free-standing provision, along the lines of Protocol No.12 to the ECHR, which prohibits discrimination on grounds, *inter alia*, of “religion or belief”. The Charter of Fundamental Rights has not been integrated into EU law, and therefore it does not have a clearly identified legal status. However, it may be seen by the ECJ as a source of inspiration which the Community institutions and the Member States when implementing Community obligations must respect. The future of the Charter of Fundamental Rights will inevitably depend on its legal status. However, it should be noted that the Charter contains similar provisions with Protocol 12.

A Framework Directive has been issued under the power, given to Council by Article 13 of the Amsterdam, to outlaw discrimination in employment. Article 1 of the Framework Directive covers, *inter alia*, discrimination on grounds of religion or belief, in relation to employment and occupation only. The Council has also adopted a Community action programme to combat discrimination in the period from 2001 to 2006. The issues arising from the Framework Directive are among the subjects of this paper. Before going a step further in dealing with the case law of the ECJ, international measures on discrimination that the ECJ has been referring, should briefly be dealt with.

¹ Examples of decisions of the ECJ are:- Case 9/74, *Casagrande* [1974] ECR 773 with regard to human dignity; Joint Cases 17/61 and 20/61 *Klöckner-Werke AG* [1962] ECR 653 with regard to equal treatment; Case 43/75, *Defrenne v Sabena* [1976] ECR 455 with regard to non-discrimination; Case 130/75, *Prais* [1976] ECR 1589, 1599 with regard to freedom of religion and confession; Case 136/79, *National Panasonic (UK) Ltd v Commission* [1980] ECR 2033, 2056 *et seq* with regard to privacy.

INTERNATIONAL MEASURES

The UN Charter, adopted in 1945, sets forth as one of the purposes of the UN, in Article 1(3), the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The Charter repeats these prohibitions against discrimination in Article 13. Similarly, Article 18 of the Universal Declaration of Human Rights (UDHR) states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. In 1993 the Human Rights Committee in commenting on Article 18 stated that “Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions” (General Comment no 22(48) (Art. 18), 1993: 1).

No one may be denied any of these rights on the basis of discriminatory criteria, such as religion, ethnicity, or race. Equality of all before the law is ensured in Articles 14 and 16 of the UN International Covenant on Civil and Political Rights (ICCPR).² Article 18 of the ICCPR states that everyone shall have the right to freedom of thought, conscience and religion. Articles 2(1) and 26 of the ICCPR contain more comprehensive rights of equality, similar to the UDHR provisions.

The UN International Covenant on Economic, Social and Cultural Rights (ICESCR) attempts to give effect to the economic, social and cultural rights mentioned in the Universal Declaration. Article 2(2) of the ICESCR states that State Parties must guarantee the rights in the Covenant without discrimination of any kind as to...religion. Article 1 of UN Convention on the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families contains similar provisions.

Articles 1 and 6 of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief guarantee the free exercise of religion. Article 2 prohibits discrimination on the basis of religion or belief. Article 3 demands that discrimination on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the UN Charter, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the UDHR and enunciated in detail in the International Covenants on Human Rights.

The right to be free from workplace discrimination is also found in the ILO Constitution. The ILO Constitution also provides for non-discrimination at work in the Declaration of Philadelphia, incorporated into the Constitution in 1946. In 1958, the ILO adopted the Discrimination (Employment and Occupation) Convention (No. 111),³ which provides, in Article 1(1)(a), generally for protection from workplace discrimination on the basis of ..., religion, ..., which has the effect of nullifying or

² Note that ECJ referred this Covenant in Case No. 374/87, *Orkem v Commission* [1989] ECR 3283 para. 18.

³ The ECJ referred to Convention No. 111 in Case No. 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1978] ECR 1365, para. 28.

impairing equality of opportunity or treatment in employment or occupation. It requires, in Article 2, each member to declare and pursue a national policy designed to promote... equality of opportunity and treatment in respect of employment and occupation, with a view to eliminate any discrimination in respect thereof, in the public and private sector.

Article 6(1) of the ILO Convention, Migration for Employment (Revised) Convention, 1949 (No. 97), provides that Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory treatment no less favourable than that which it applies to its own nationals. It should be noted that conventions, if ratified, create binding obligations on States, only. The ratification of ILO Conventions cannot be accompanied by reservations, an exception to general international practice. ILO Conventions are minimum standards and do not affect any law, custom or agreement that is more favourable for employees.

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) contains no article on non-discrimination at work. However, Article 9 of the ECHR states (1) Everyone has the right to freedom of ... religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice or observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are 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.

As can be seen, Article 9 contains two elements. The first is a right to freedom of thought, conscience and religion. The second element is the freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief. As far as religious discrimination is concerned, the ECHR has described Article 9, in *Kokkinakis v Greece* [1994] 17 EHRR 397 at para. 31, as a 'precious asset for atheists, sceptics and the unconcerned'. The Court also held that "as enshrined in Article 9, freedom of thought conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, sceptics and the unconcerned." It was held in *Manoussakis v Greece* case, at para. 47, that it is not necessary for the State to approve of the beliefs once they are held. The Court stated that the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. In practice, the scope of the limitations placed on the freedom by Article 9(2) of the ECHR should wide enough to prevent the protection from being abused.

According to Article 9(2) of the ECHR a limitation must be prescribed by law and necessary in a democratic society, in the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others. For example, in *L. Dahlab v. Switzerland* case the ECHR stated that a teacher being a public servant who has to be loyal to the state has to keep this neutrality by avoiding political or religious symbols during working-times. Therefore, dismissal of a

teacher to be within the margin of appreciation under Article 9 of the ECHR and no violation of the ECHR was found.

Article 9 does not provide for equal treatment. The principle of non-discrimination is dealt with only in Article 14 of the ECHR which provides that “The enjoyment of the rights and freedoms ... shall be secured without discrimination on any ground such as ... religion It was stated in *Abdulaziz, Cabales and Balkandali v UK* case that a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims to be realized.

As it stated the Convention deals with non-discrimination in Article 14. This is not a free-standing right to protection against discrimination; it is ancillary to other Convention rights. No claim of religious discrimination can be made except in conjunction with one of the specified Convention rights. The Council of Europe has agreed a new Protocol 12 to the ECHR that is intended to replace Article 14 with a freestanding non-discrimination provision. Protocol 12 was opened to signature by the member States of the Council of Europe on 4 November 2000. Only 14 out of 46 members of the Council of Europe have ratified the Protocol. Protocol No. 12 introduces a general prohibition of discrimination going beyond but covering employment.

Article 1 of this Protocol provides for a general prohibition on discrimination by stating that “(1) The enjoyment of any right set forth by law shall be secured without discrimination in any ground such as ..., religion, (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The European Social Charter of 1961 states in its preamble the enjoyment of social rights should be secured without discrimination on grounds of ..., religion,

International human rights law creates an obligation on the States providing protection against religious discrimination. All of the Member States of the EU are either signatories to, or have ratified, these international agreements, with the exception of the UN Convention on racial discrimination and ILO Convention n° 111. However, as far as religious discrimination at workplace concerned, individuals had no legally enforceable right to redress, until recent years.

CASE-LAW OF THE ECJ

Before dealing with the case law of the ECJ that outlaw discrimination on ground of, *inter alia*, religion, two crucial decisions of the ECJ should be cited here. The first one is Case No 4/73, *J. Nold KG v Commission* [1974] ECR 91 in where the ECJ held that “international treaties for the protection of human rights on which the Member States have collaborated, or of which they are signatories, can apply guidelines which should be followed within the framework of Community law.” The second one is Case No. C-12/86, *Demirel v. Stadt Schwabisch Gmund* [1987] ECR 3719 in where the ECJ refused to apply the European Convention on Human Rights and Fundamental Freedoms. In other words, while international treaties give unenforceable rights and freedom to everyone, without distinction of any kind, such as religion, the ECJ recognizes those rights only for Community citizens. The decisions of the ECJ remind the author a historic argument about human rights. It was alleged that the "human" the

Europeans referred to when they spoke of human rights was none but their own citizen; the French human, the English human or the Western human in general.

It has been stated that the right to freedom of religion, *inter alia*, is the foundation of Western Human Rights ideology (Gomien D., Haris D., and Zwaak L., 1996: 236). Affirmatively, the ECJ has stated, in Opinion 2/94, at para. 34, that respect for human rights is a condition of the lawfulness of Community acts. Community human rights are rooted in and drive from, the constitutional traditions common to the Member States and from guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (Opinion 2/94, at para. 34). It was stated in Case No. 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125 that once a fundamental human right is accepted as a principle, it is applicable as Community law. The ECJ went a step further in finding that fundamental human rights might be inspired not only by the national law of Member States but also by international treaties.⁴ Furthermore, the ECJ held, in Case 130/75, *Prais v Council*, [1976] ECR 1589 that the right to non-discrimination on religious grounds is a fundamental right to be protected by Community law.

The ECJ stated, in Opinion 2/94, at para. 33, that fundamental rights form an integral part of the general principles of law, the observance of which it ensures. Although the Community is not itself a signatory of the ECHR Convention, the ECHR has special significance in that respect. According to the ECJ the ECHR is the most important source of fundamental rights in the Community legal order⁵. However, as is stated in Case No. 44/79, *Hauver v Land Rheinland-Pfalz* [1979] ECR 3727, at paras. 14 and 15, the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. It is the duty of the ECJ to ensure the observance of fundamental rights in the field of Community law (See Joined Cases 60 and 61/84, *Cinéthèque SA v Fédération Nationale des Cinémas Français* [1985] ECR 2605, para. 26). This case was decided before the SEA and the TEU. In other words, before fundamental human rights were explicitly mentioned in the Treaties. It is now safe to say that courts of the Member States should have a duty to respect fundamental human rights, at least, *inter alia*, religious discrimination.

Member States must, as far as possible, when the Member State is acting on behalf of the Community and implementing a Community policy and when the State relies on a derogation to fundamental market freedoms, apply and implement Community rules in accordance with the fundamental rights recognized by Community law.⁶ Any fundamental right recognized by the Community, is not absolute but may be limited in

⁴ See Case No. 4/73, *supra*, paras. 12-14 (ECSC); Case No. C-260/89, *Elliniki Radiophonia Tileorassi – Anonimi Etairia (ERT-AE) v Dimotiki Etairia Pliroforissis (DEP)* [1991] ECR I-2925 paras. 41-45, Recently, Opinion 2/94, *supra*.

⁵ See generally Case No. C-260/89, *Elliniki Radiophonia Tileorassi – Anonimi Etairia (ERT-AE) v Dimotiki Etairia Pliroforissis (DEP)* [1991] ECR I-2925 paras. 41; Case No. C-219/91, *Criminal proceedings against Johannes Stephanus Wilhelmus Ter Voort* [1992] ECR I-5485 para. 34; Case No. 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 para. 18.

⁶ See Joined Cases Nos. 201 and 202/85, *Klensch v Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1979] ECR 3477; Case No. 5/88, *Wachauf v Germany* [1989] ECR 2609 paras. 17-19; Case No. C-260/89, *Elliniki Radiophonia Tileorassi – Anonimi Etairia (ERT-AE) v Dimotiki Etairia Pliroforissis (DEP)* [1991] ECR I-2925 paras. 41-45; Case No. 2/92, *R v Ministry of Agriculture, Fisheries, Food, ex p Dennis Clifford Bostock* [1994] ECR I-955, para 16; Case No. 368/95, *Vereinigte Familienpress Zeitungsverlags-und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR 3689.

order to facilitate the pursuit of the objectives of the EC Treaty. However, any restrictions must not constitute ‘a disproportionate and intolerable interference, impairing the very substance of those rights’.⁷ It follows that the Community cannot accept measures that are incompatible with observance of the human rights thus recognized and guaranteed.

THE FRAMEWORK DIRECTIVE

The EU Framework Directive covers, *inter alia*, discrimination at workplace on grounds of religion or belief.⁸ Thus, the Community has, for the first time, stated that the elimination of religious discrimination constitutes a fundamental principle of Community law, as it has said of sex discrimination. The overall effect of above mentioned EC and the EU Charter requires the Framework Directive to be implemented so as to be compatible with the rights set out in the ECHR, Convention No. 111 of the ILO, International Covenant on Civil and Political Rights.

Purpose and Scope of the Framework Directive

Community employment law applies in principle to all employees in the EU. However, the concept of an employee is not itself defined in European employment law.⁹ Thus, the Framework Directive, as the other directives in the field of employment law, only applies to persons who, in the Member States, are protected as employees under national employment law. It should be bear in mind that in some Member States, ministers of religion¹⁰ are not considered to be employees according to national employment law. In such cases they are not covered by European employment law.¹¹

The purpose of the Framework Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. However, the Framework Directive does not, like above-mentioned international measure, provide any definition of religion beyond religion or belief.

The term “religion” has been subject to a heated legal debate all over the World. Even it has been stated “the problem of defining religion has often been adduced as a

⁷ See generally Case No. C-404/92, *P. X v Commission* [1994] ECR I-4737 paras. 17-18; Case No. T-176/94, *T v Commission* [1995] ECR I-A-203 and II-621 paras 31 and 33. See also Case No. C 306/93, *SMW Winzersekt v Land Rheinland-Pfalz* [1994] ECR I-5555 paras. 20-29.

⁸ Article 1 of the Framework Directive. For the Member States’ measures to combat discrimination see Hepple B. and Choudhury T., 2001, pp. 69-70. See also COM (1999) 564 final, pp. 23-38.

⁹ For different definitions and the scope of the term “employee” see Case No. 53/81, *Levin v Staatssecretarissen van Justitie* [1982] ECR 1035; [1982] 2 CMLR 454; Case No. 66/85, *Lawrie-Blum v Land Baden-Württemberg* [1987] 3 CMLR 389; [1986] ECR 2121; Case No. 75/63, *Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177; [1964] CMLR 546; *Williams v Dutch Secretary of State* [1977] 1 CMLR 669; Case No. 139/85, *Kempf v Staatssecretaris van Justitie*, [1987] 1 CMLR 764; [1986] ECR 1741; 196/87, *Steymann v Staatssecretaris van Justice* [1988] ECR 6159; [1989] 1 CMLR 449; Case No. 344/87 *Bettray v Staatssecretaris van Justice* [1991] 1 CMLR 459; Case No. 224/84, *Johnston v Chief Constable of the RUC* [1986] ECR 1651; [1986] 3 CMLR 240.

¹⁰ A minister of religion is a religious employee whose main duty is to lead a congregation in prayer and preach about their religious beliefs. S/he does not receive a regular salary.

¹¹ See Answer given by Mrs Diamantopoulou on behalf of the Commission to Glyn Ford’s (PSE) written question E-1342/01, OJ 2001, C 364/87.

reason for not bringing in new legislation to respond to religious discrimination, or to develop law to take account of the extended religious plurality of contemporary society¹². For example, the U.S. Supreme courts (*United States v Seegar* 380 U.S. 163, 85 S.Ct. 850 13 L.Ed.2d 733 (1965)) have declined to limit religion to formal, organized or recognized faiths but have extended the scope of protection to fundamental or ethical standards and beliefs that occupy in the eyes of the possessor a place parallel to that filed by a God. According to Rohe religious freedom in Germany is, according to the unanimous opinion among legal experts and the German government and administration, not restricted to established religions like Christianity and Judaism, but also applies to Islam (Rohe M., 2003)¹³. However, the current law on blasphemy in the UK only protects the Anglican faith and does not cover any other faith. Therefore, religious discrimination was not unlawful in the employment field in mainland Britain (different rules apply in Northern Ireland) until 2nd December 2003.

Following the Framework Directive, the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) came into force on 2 December 2003 making discrimination on the grounds of religion and belief unlawful in employment and vocational training for the first time in the UK. Before then, a complainant had to rely on the Race Relations Act 1976 (RRA), and the Human Rights Act 1998, unless indirect race discrimination or where religious group is also a separate ethnic group. According to s. 1(b) of the RRA, refusal to allow time off work for religious holidays, prays might be held to constitute indirect racial discrimination against those from an ethnic or national origin that is predominantly Muslim, like Turkish¹⁴.

The recognition of a religious community as an ethnic group provided Sikhs (*Mandla v Lee* [1983] IRLR 209 and *Singh v Rowntree MacKintosh Ltd* [1979] I.C.R. 554) and Jewish people (*Seide v Gillette Industries Ltd* [1980] IRLR 427) protection from discrimination. The development of the case law in this way has resulted in “inconsistency, inequity and a hierarchy of protection and provisions afforded to different ethnic minorities.”¹⁵

Ethnic origin is a wider concept than race and identified several characteristics relevant to identifying an ethnic group (See *Mandla v Dowell Lee* [1983] 2 AC 548). In established British cases, for examples, Gypsies (*Commission for Racial Equality v Dutton* [1989] IRLR 8) have been found to constitute a racial group; but Muslims¹⁶, Rastafarians (*Crown Suppliers (Property Services Agency) v Dawkins* [1993] ICR 517)

¹² See Religious Resource and Research Centre, 2000, para. 1.5.

¹³ Two recent cases of the German Federal Labour Court certainly support this assumption. Decision 2 AZR 472/01 of 10.10.2002 and 2 BvR 1436/02 of 24.9.2003. See further Seifert A., 2003, *Federal Labor Court strengthens religious freedom at the workplace*, 4 German Law Journal, No. 6, pp. 559-569 and Mahlmann M. 2003, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, 4 German Law Journal, No. 11, pp. 1099-1116.

¹⁴ See *J.H. Walker v Hussain* [1996] IRLR 11. See also *CRE v. Precision Manufacturing Services Ltd.*, 10 October 1991, Case No 4106/91, (Summer 1992) 12 EOR Case Law Digest, 8; *Yassin v. Northwest Homecare* (Spring 1994) 19 EOR Case Law Digest 2.

¹⁵ Forum Against Islamophobia and Racism, 2002, *Towards Equality and Diversity - Implementing the Employment and Race Directives: Response from the Forum Against Islamophobia and Racism*, London, p. 13, quoted at page 94 of the Open Society Institute, 2002.

¹⁶ In the case of *Tariq v Young* (Case No. 247738/88 Equal Opportunities Review Discrimination Case Law Digest 2) an industrial tribunal held that Muslims were not capable of being regarded as constituting an ethnic group, and were only a religious grouping and thus, outside the protection of the Race Relations Act.

and Jehovah's Witnesses¹⁷ have been held not to constitute racial or ethnic groups. In a Home Office study of religious discrimination, compared with other faith groups Muslims reported the highest level of unfair treatment in employment (Weller P. Feldman A., Purdam K., 2001: 37-50).

The (British) Sex Discrimination Act 1975 has also been used as a legal instrument in the UK to provide protection against religious discrimination. For example in *Sardar v McDonalds* case, a Muslim female complainant was successful in a claim of indirect sex discrimination after she was dismissed for wearing a scarf to cover her hair (Thomson A., 1999: 2). Regulations of the SI 2003/1660 of the UK extend beyond the recognized religions and faiths to include beliefs such as unrecognized religions and beliefs, even those without religious or similar beliefs.

The question has to be answered by the ECJ for the sake of uniformity is what may constitute a religious belief. Guidance may be taken from case law on Article 9 of the ECHR which takes a fairly traditional, and largely theistic view of what constitutes a religion.

Direct and Indirect Discrimination, Harassment and Victimization

The 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever, *inter alia*, on religion or belief, as regards employment and occupation. The protection applies to all employees in relation to conditions of employment conditions for access to employment, to self-employment or to occupation, including selection criteria¹⁸ and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; employment and working conditions, including dismissals and pay; membership of, and involvement in, an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided by such organizations (Article 3(1) of the Framework Directive).

The concept of discrimination is based on a comparative model of comparing one person who has been less favorably treated than another in a comparable situation on the prohibited grounds or imposing a practice on one person having a particular religion or belief thereby putting them at a particular disadvantage as compared with other persons (Article 2(2)(a) and (b) of the Framework Directive).

Direct Discrimination

Direct discrimination means that employees or job applicants must not be treated less favorably than others because they follow, are perceived to follow, or do not follow a particular (or any) religion or belief. This tends to be obvious discrimination, for example, a Muslim candidate with the best qualifications and experience does not get an interview, but a Christian candidate with less qualifications does. Treating members

¹⁷ See *Lovell-Badge v Norwich City College of Further and Higher Education*, Case no: 1502237/97, (Spring 1999) 39 EOR Discrimination Case Law Digest, 4.

¹⁸ Employers shall not schedule examinations or other selection activities in conflict with a current or prospective employee's religious needs, inquire about an applicant's future availability at certain times. See Case No. 130/75, *supra*, para. 18.

of the compared groups equally badly can satisfy the principle. Direct discrimination may only be justified in the very limited circumstances where a genuine occupational requirement can be shown to apply.

Indirect Discrimination

The concept of indirect discrimination has been developed by case law of the ECJ in respect of sex and nationality.

Indirect discrimination occurs where the effect of certain requirements, conditions or practices imposed by an employer has an adverse impact disproportionately on one group or other. According to Weller P. *et al.* specific examples of unfair treatment in employment that were given by respondents included the following, in England and Wales: Dress restrictions (Muslims, Sikhs, inter-faith); Working on religious days/holidays (Christians, Jains, Jews, NRMs, Pagans, Sikhs); Lack of respect and ignorance of religious customs (Hindus, Jews, Muslims, Zoroastrians); Application and recruitment practices (Christians, Muslims, NRMs, Sikhs, Zoroastrians, inter-faith); Promotion prospects (Sikhs) (Weller P. Feldman A., Purdam K., 2001: 39).¹⁹

In contrast to direct discrimination, indirect discrimination will not be unlawful if it can be justified. To justify it, an employer must show that there is a legitimate aim, (*i.e.* a real business need) and that the practice is proportionate to that aim (*i.e.* necessary and there is no alternative means available).

Harassment

Harassment shall be deemed to be a form of discrimination. Harassment occurs when unwanted conduct related to, *inter alia*, religion takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States (Article 2(3) of the Framework Directive).

As with other grounds of discrimination, the employer is deemed liable for the acts of his employees done in the course of employment, whether or not the employer knew or approved of them. Harassment includes behavior that is offensive, frightening or in any way distressing. It may involve nicknames, teasing, name calling or other behavior that may not be intended to be malicious but nevertheless is upsetting.

Victimization

Article 11 of the Framework Directive provides that “Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. In practice, victimization may take place when an individual is treated detrimentally because he or she has made a complaint or intend to make a

¹⁹ It is possible, in some jurisdictions in Europe, for an employee who wishes to take a day off work for a religious holiday that is important to him, that cannot be refused. See the Dutch High Court’s decision of 30 March 1984, Nederlandse Jurisprudentie 1985 no. 350. The author would like thank to the Dutch Equal Treatment Office for providing him an English summary of the decision.

complaint about discrimination or harassment or has given evidence or intend to give evidence relating to a complaint about discrimination or harassment.

Putting a complaint petition to the relevant authorities or suing an employer may not only result in administrative punishment but also be considered a reason not to promote the employee. Furthermore, prosecution and investigation of a complain depends upon the decision of the highest authority of a relevant public institution. If the relevant administrative authority decides that there is no need for investigation, an infringement of any right of public employee cannot be taken before the criminal court. This requirement has to be eliminated to combat discrimination.

Positive Action

Article 7(1) of the Framework Directive states that “With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.” There is no question that selection for recruitment or promotion must be on merit, irrespective of religion or belief. However, Article 7(1) makes it possible to take certain steps to redress the effects of previous inequality of opportunity. Employers may give special encouragement to, or provide specific training for people from religions or beliefs who are in a minority in the workplace.

As in some other aspects of the Framework Directive, the ECJ decisions will clarify the concept of positive action requirement in justifying discrimination on grounds of religion, as it did in the case of discrimination on grounds of sex, in the in the context of the Equal Treatment Directive.²⁰ For examples, in C-450/93, *Kalanke v Freie Hansestadt Bremen* [1996] 1 CMLR 175²¹ decision confirmed that automatic quota schemes are contrary to the principles of existing EU equality legislation, but in C-409/95, *Hellmut Marschall v Land Nordrhein Westfalen* [1997]1 ECR. I-6363 case, which was decided by the ECJ in November 1997, indicates that many other forms of positive action are acceptable under EU law.

The Right to Discrimination on the Grounds of Religion

An employer may lawfully discriminate in selecting employees for a job where being a member of a particular religion or belief is a genuine occupational qualification for the job. The Framework Directive provides that a difference of treatment by an employer that is based on a characteristic related to religion will not constitute discrimination. In very limited circumstances, it will be lawful for an employer to treat people differently if it is a genuine occupational requirement that the job holder must be of a particular religion or belief. If the characteristic in question constitutes a genuine occupational requirement, provided that the objective is legitimate and the requirement is proportional. When deciding if this applies it is necessary to consider the nature of the work and the context in which it is carried out.

²⁰ Council Directive EC 76/207/EEC. For a detailed examination of the Equal Treatment Directive see Yavaşı M., 2002/2003, pp. 59-108.

²¹ The ECJ held, at para. 3077, that a German rule which guaranteed women absolute and unconditional priority for appointment and promotion went beyond promoting equal opportunities and infringed the principle of equal treatment for men and women.

Some employers have an ethos based on a religion or belief. Where employers can show that they are founded on such an ethos they may be able to apply a genuine occupational requirement to jobs where in other circumstances such a requirement would not apply. In these cases the need for a particular religion or belief may not be a 'decisive' factor for the job but employers must still be able to show that it is a requirement of the job in order to adhere to the ethos of the organization and that it is proportionate to apply the requirement.

The Framework Directive foresees only two restrictive justifications for an unequal treatment on the grounds of religion or belief in Article 4. Wording of Article 4(1) of the Framework Directive is quite similar to Article (2) of the Equal Treatment Directive. Article 4(1) of the Framework Directive allows the Member State to provide that the unequal treatment shall not constitute a discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. Under this provision, religious groups can appoint priests, imams, leaders and religious teachers who share the group's religion. If allowing such practices requires more than ordinary administrative costs, an employer may refuse an employee's claim.

Article 4(2) of the Framework Directive deals specifically with churches and other public and private organizations based on religion or belief. In other words, the exemption provided for in Article 4(2) of the Framework Directive is in relation to a genuine and determining occupational requirement and the occupational activities of organizations whose ethos is based on religion or belief. In the case of the latter, the occupational requirement must be genuine, legitimate and justified having regard to the organization's ethos. This provision would allow the religious employer to justify differences of treatment on grounds of religion or belief which are necessary to maintain the ethos of the relevant organization or institution and to require that persons working for them act in good faith and with loyalty to the organization's ethos. Article 4(2), however, does not establish a general exemption and provides that the differences of treatment which could be justified as referring to a genuine, legitimate and justified occupational requirement for a specific job will depend on the context or the nature of the job. The Directive also states very clearly that this provision should not justify discrimination on any other ground. There should be no doubt that the exemption provided for in Article 4(2) only applies to existing national legislation or future legislation incorporating pre-existing national practices. In other words, Article 4(2) prohibits generally the introduction of new restrictions on the right to discriminate on the ground of religion from the date of the entry into force of the Framework Directive in the Member States.

Article 4(2) does not require proof of the need to discriminate against a person on grounds of religion in order to maintain or prevent the undermining of the organization's ethos, but simply proof that their religion or belief is a genuine, legitimate and justified occupational requirement having regard to that ethos. This is an easy test for an employer to satisfy.

The ECJ decisions will clarify the concept of occupational requirement in justifying discrimination on grounds of religion, as it did in the case of discrimination on grounds

of sex, in the in the context of the Equal Treatment Directive.²² Assuming a similar jurisprudence will be applied to Article 4(1) of the Framework Directive, the scope of that aspect of the derogation will be somewhat limited in justifying discrimination on grounds of religion as it would be necessary to show that a person's religion is a determining factor in their actual ability to discharge the duties of their job rather than simply showing the perception that their employer or user of the employer's services may have of them or of their religion or their beliefs.

Liability, Remedies and Compensation

Discrimination legislation applies throughout the employment relationship, during the recruitment process, in the workplace and following dismissal. An employer is liable for acts done by employees during their time at work.

A claim for discrimination can be made regardless of whether the complainant is an employee. For example, a person who has been interviewed, but not selected for the job because of religion or belief might bring a claim for discrimination based on the firm's selection procedure.

Article 10(1) of the Framework Directive shifts the burden of proof to the employer that there has been no breach of the principle of equal treatment, if the discriminated employee has established facts, from which it may be presumed that there has been an indirect discrimination.

If it can be proofed that there is discrimination based on religion or belief, the victim is compensated, the sued one can be ordered to pay compensation, including interest. It can include damages for the hurt feelings of the applicant and the loss of the chance of the job. This last part can go beyond the loss of the actual wages.

CONCLUSION

People spend more time at work than they spend in many other social situations. In order to develop greater productivity and competitiveness, any form of discrimination on the basis of religion, *inter alia*, should be eliminated. With a multi-religious EU, there comes a positive responsibility to ensure that economic inclusiveness should be extended to different faith groups. For some thinkers and politicians, Christianity should be a basis of European identity but it should also bear in mind that if we take this as a basis, this will also be a dangerous move that ignores the millions of Europeans who are not religious and, of course, also those who are not Christian.

²² For "occupational requirement" see for examples, Case No. 318/86, *Commission v. France* [1988] 3 CMLR 663, para. 27 where the ECJ accepted that certain police duties could involve sex-specific duties, but nevertheless condemned France's separate recruitment systems for men and women, since they lacked transparency and made it impossible for the Community to supervise the use of Article 2(2) of the Equal Treatment Directive. See also Case No. 222/84, *Jonston v Chief Constable of the Royal Ulster Constabulary* [1986] 3 CMLR 240; Case No. 165/82, *Commission v UK (Re Equal Treatment for Men and Women)* [1983] ECR 3431; [1984] 1 CMLR 44; Case No. 248/73, *Commission v Germany (Re Sex Discrimination Laws)* [1986] 2 CMLR 588; Case No. 318/86, *Commission v France (Re Sex Discrimination in Civil Service)* [1989] 3 CMLR 663. The Court went on to hold *ibid*-case 318/86 at para. 28 that "the principle of proportionality makes it necessary to reconcile, as far as possible, equal treatment of men and women with the requirements which are decisive for carrying out the specific activity in question."

Human rights are only adequately protected where the nuances of each individual's make up are recognized and accommodated (Douzinas C. 2002: 379-405). Looking at the workplace it is obvious that commonplace rules come into conflict with religious expectations in many different ways. Observant Muslims have to take part in the congregational prayer on Friday and they have to accomplish ritual prayer on normal workdays during the week.²³ Sabbath observant Jews may not wish to work after sunset on Fridays and on Saturdays. Christians may not wish to work on Sundays. Sikhs may be unwilling to observe rules about being clean-shaven (*Panesar v. Nestlé Co Ltd* [1980] IRLR 64).

The Framework Directive attempts to accommodate some the particularity of all individuals. However, it is unlikely that specific rules that would be equally applicable to all religious groups could be drafted. For example, it may prove impossible for a jurisdiction to recognize all holy days and religious festivals. Therefore, the Framework Directive does not say that employers must provide time and facilities for religious or belief observance, changing break times in order to accommodate fasting, or in laying down rules on dress, uniform *etc.* in the workplace. However, employers are required to consider whether their codes, policies, rules and procedures indirectly discriminate against staff of particular religions or beliefs and if so whether reasonable changes might be made.²⁴ Otherwise, employers could be found guilty of discrimination if they refuse individual requests simply because of the employee's religion or belief.

The Framework Directive does not take into account specific needs of minority religious employees. The problems of Muslim female employees wearing headscarves *inter alia*, should be eliminated and their compatibility with the Framework Directive should be reviewed.

Lack of an effective enforcement mechanism for international legal instruments on discrimination is a major problem. It is hoped that the EU's recent framework directive will eliminate violation of universally accepted norms, at least, in the EU.

Although legal basis for non-discrimination has partly been established, it is extremely difficult for a victim to prove that she or he has suffered discrimination. Access to justice, insufficient protection against victimization, a poor understanding of equality concepts amongst the judiciary, inadequate and inappropriate remedies are the main topics of the problematic areas.²⁵

It seems, now, that non-discrimination right on the basis of religion and belief will automatically be protected as a general principle of Community law. Binding Framework Directive should be enforced more swiftly by national courts, and

²³ If such a Muslim is not allowed to do what his or religion requires him/her to do, she or he could never accept employment as a full-time employee, but must be content with the lesser emoluments of part-time service. Male Sikhs' religious requirement to grow hair and beard and to wear turban has also to be justified. Otherwise, they cannot take employment, for example, in Turkey.

²⁴ If an employer refused to allow a Muslim time off for prayers, or refused to allow a Muslim woman to wear a headscarf this could only amount to direct discrimination on grounds of religion if non-Muslim employees were allowed such rights.

²⁵ These problematic areas are quite similar to the findings of Fitzpatrick B., Blom, J. Knecht R. and O'Hare U, 1996, *The Utilisation of Sexual Equality Litigation in the Member States of the European Community* V/782/96 - EN (Report to the Equal Opportunities Unit, DG V).

ultimately by the ECJ.²⁶ It is to be hoped that the framework directive will succeed in the promotion of religious freedom and the prohibition of religious discrimination and intolerance at workplace.

²⁶ The ECJ has been following the ECHR in interpreting human rights. Given the *L. Dahlab v Switzerland* decision of the ECHR, *supra*, there is little reason to believe that when a dress code that bans headscarf would ever come before the ECJ, the ECJ may rule a ban on head scarves at workplaces.