

# *Fordham International Law Journal*

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*Volume 42, Issue 3*

*Article 4*

DEDICATED TO THE MEMORY OF PROFESSOR ROGER GOEBEL

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## Is the Court of Justice of the European Union Finding its Religion?

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## ARTICLE

# IS THE COURT OF JUSTICE OF THE EUROPEAN UNION FINDING ITS RELIGION?

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### I. INTRODUCTION

We had the privilege of knowing Roger Goebel for over thirty years and meeting him regularly in New York, Brussels, and elsewhere in Europe. We never failed to be struck by his truly encyclopedic knowledge of EU law, which must be virtually unique outside the European Union (“EU”) itself and extremely rare within it. Having

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discussed a wide range of EU legal issues with him almost every summer for over thirty years, we feel sure that the subject of this contribution would have been of particular interest to him.

The purpose of this Article is to discuss the recent case law of the Court of Justice of the European Union (“CJEU”) on religion. Religion is mentioned in a number of instruments in the EU legal order but until relatively recently none of these have been the subject of case-law. In the last couple of years there have been a number of interpretative judgments of the CJEU which have imbued these provisions with a degree of precision which has clarified their scope, resulting in a more easily identifiable and enforceable body of rights.

The structure of this Article is as follows. Part II sets out a chronological survey of the relevant provisions on religion in the EU legal order. Part III considers two key concepts, namely “religion or belief” and “religious organizations.” Part IV discusses the status of religious organizations within the European Union. Part V analyzes an important and controversial recent judgment on freedom of religion under the EU Charter of Fundamental Rights. Part VI concerns discrimination on the grounds of religion; and Part VII contains the conclusion.

## *II. THE RELEVANT PROVISIONS: A CHRONOLOGICAL SURVEY*

Until twenty years ago, moral issues including religion were the preserve of the European Court of Human Rights (“ECtHR”) and only arose tangentially before the Court of Justice of the European Union (“CJEU”).<sup>1</sup> The Treaty of Amsterdam, which was signed in 1997 and came into force in May 1999, introduced religion into EU law in two provisions: Article 13 and Declaration 11 annexed to that Treaty. Article 13, now Article 19 of the Treaty on the Functioning of the European Union (“TFEU”), provides for the adoption of legislation to combat discrimination on the grounds of “sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” Council Directive 2000/78, which establishes a general framework for equal treatment in employment and occupation (“the Framework

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1. See, e.g., Case C-196/87, *Steymann v Staatssecretaris van Justitie*, 1988 E.C.R. 6169 (measure imposing a restriction on free movement on a member of the Bhagwan community from another Member State); Case C-275/92, *Her Majesty’s Customs & Excise v. Schindler*, 1994 E.C.R. I-1078, ¶ 60 (establishing gambling restrictions).

Employment Directive,” or “Directive 200/78,” or “the Directive”),<sup>2</sup> is at issue in a number of the cases discussed below is based on this provision. Second, Declaration 11 on the status of churches and non-confessional organizations was appended to the Treaty of Amsterdam.<sup>3</sup>

As expressed in Article 1 of the Framework Employment Directive, its purpose is to lay down a general framework for combating discrimination on a number of grounds, including religion or belief, as it regards employment or occupation. The Framework Employment Directive has been described as performing an “exclusionary function.” It excludes religion from the range of permissible reasons an employer may legitimately invoke in order to treat one employee (or a group of employees) less favorably than another.<sup>4</sup>

The Framework Employment Directive applies to all persons who exercise an economic activity either in an employed or self-employed capacity, in the public or private sector,<sup>5</sup> with respect to conditions of access to employment or self-employment, working conditions, and related matters.<sup>6</sup> It provides for five exceptions to the principle of equal treatment.<sup>7</sup> Additionally, Member States are given the discretion to make certain exceptions from some of its provisions. Such exceptions are subject to the principle of proportionality, that is their objective must be legitimate and the means employed to achieve that objective must be necessary.

Amongst the exceptions, which Member States may make to the provision of the Directive, two are relevant to the present discussion.

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2. Council Directive 2000/78/EC to Establish a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16 [hereinafter Framework Employment Directive].

3. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997 (C 340) 1 [hereinafter Treaty of Amsterdam].

4. Case C-303/06, *S. Coleman v. Attridge Law & Steve Law*, Opinion of Advocate General Maduro, 2008 E.C.R. I-5603, ¶ 18.

5. Framework Employment Directive, *supra* note 2, art. 3(1).

6. *Id.*

7. Examples include: measures laid down by national law in the interests of public security, public order, the protection of health and the rights and freedom of others. *Id.* art. 2(5). Other examples involve differences in treatment based on nationality or conditions relating to the entry and residence of third country nationals and stateless persons and the payment of any kind by the state including state social security schemes or social protection schemes. *Id.* art. 3(2), 3(3).

Article 4(1) of the Framework Employment Directive provides that differences in treatment may be permitted by Member States where they are “based on a characteristic required for a particular occupation.” Article 4(2) of the Framework Employment Directive relates to occupational activities within churches and other public or private organizations, the ethos of which is based upon religion or belief. In such cases, a difference of treatment based upon a person’s religion or belief does not “constitute discrimination 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 organization’s ethos.”

Article 9 of the Framework Employment Directive requires Member States to provide administrative and/or judicial remedies for the enforcement of obligations under the Directive. Article 10 further obliges Member States to take necessary measures to ensure that, where a claimant establishes before a court or other competent authority facts from which it may be presumed that there has been discrimination, the burden falls on the respondent to prove that there has been no breach of the principle of equal treatment.

Also, in 2000, the Charter of Fundamental Rights of the European Union<sup>8</sup> (“the Charter”) was promulgated. For present purposes, the most important provision is Article 10, which is entitled “Freedom of thought, conscience and religion.” The only relevant paragraph is the first one, which reads:

Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

This wording is identical to that of Article 9(1) of the European Convention on Human Rights (“ECHR”).<sup>9</sup> Consequently, according to Article 52(3) of the Charter, “the meaning and scope of the rights concerned shall be the same as those laid down by the said Convention,” although EU law may ensure “more extensive protection.” Given the dearth of case law to date on Article 10 of the

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8. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 [hereinafter the Charter].

9. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9(1), Nov. 4, 1956, 213 U.N.T.S. 221.

Charter, the rulings of the ECtHR are likely to play a particularly important role for some time. What is more, Article 21 of the Charter prohibits discrimination on a range of grounds, including “religion or belief.”

Crucially, Article 51(1) of the Charter unambiguously states that the Charter only applies to the acts and omissions of the EU’s institutions and bodies, and to the Member States when they are “implementing EU law.” Beyond the scope of the Treaties, the European Union has no vocation to act as a human rights organization,<sup>10</sup> a point reinforced by Article 6(1) of the Treaty on the European Union (“TEU”) which reads: “The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.”

Moreover, the rights enshrined in Articles 10 and 21(1) are not absolute,<sup>11</sup> but may be justified pursuant to Article 52(1) of the Charter, which is drafted in the following terms:

Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

With the Treaty of Lisbon entering into force on December 1, 2009, the wording of the Charter underwent some important changes, although the provisions cited above were not affected.<sup>12</sup> In addition, the Lisbon Treaty fundamentally altered the status of the Charter. From being a non-binding instrument, it was transformed into a binding act with “the same legal value as the Treaties.”<sup>13</sup>

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10. This is subject to one exception: under Article 7 TEU, which applies where a Member State is found to have committed a “serious and persistent breach” of the principles of the rule of law, democracy and human rights enshrined in Article 2 TEU; in that event, the rights of that Member State, including its voting rights in the Council, may be suspended. The majorities required for the imposition of such sanctions are so high that they have never been imposed, although Poland is currently threatened with them – unlike Hungary, although its government is equally at odds with the EU’s fundamental values set out in Article 2 TEU.

11. A few of the rights set out in the Charter appear to be absolute. That is certainly the case as regards human dignity, since Article 1 provides: “Human dignity is inviolable.” No doubt, the right to life (Article 2) is also absolute. *Id.* arts. 1, 2, 52(1)

12. Consolidated Version of the Treaty on European Union, 2012 O.J. (C 326) 13 [hereinafter TEU post-Lisbon].

13. TEU post-Lisbon, *supra* note 12, art. 6(1).

The Treaty of Lisbon also inserted a new provision into the EU Treaties: Article 17 of the TFEU. The first two paragraphs read:

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
2. The Union equally respects the status under national law of philosophical and non-confessional organizations.

This provision replaces, and is identical in substance to, Declaration 11 to the Treaty of Amsterdam, which will be discussed further in Part 4.

### *III. KEY CONCEPTS*

Central to any discussion of religion in the EU legal order are the related concepts of “religion or belief” and “religious organization.” These concepts appear in all the legal provisions under discussion but are not defined in any. It has thus been left to the CJEU to define their content.

#### *A. “Religion or Belief”: A Broad Concept*

As noted earlier, the first sentence of Article 10 of the Charter (like the first sentence of its counterpart, Article 9(1) of the ECHR) speaks of “the right to freedom of thought, conscience and religion.” The term “religion or belief” does not appear until the second sentence, and then merely in passing. Nevertheless, it is by no means clear that there is any difference between the two terms; and, since the words “religion or belief” also feature in Article 21 of the Charter and Article 1 of Directive 2000/78, it is appropriate to concentrate on them here.

No definition of “religion or belief” can be found in any EU legal instrument. However, as explained in Part 4 below, Article 17 of the TFEU requires the European Union to respect the status of churches, religious associations, or communities in the Member States under national law. This would suggest that, if a particular creed is recognized as a religion in a Member State, it must also be recognized as such under EU law.

As yet, the lack of any more precise indication of what constitutes religion or belief has not posed any great difficulty for the CJEU. The cases which have come before it have concerned the major religions of the world. Thus they fall squarely within the common understanding of the concept of “religion.”

It has been argued elsewhere that “religion or belief” may be interpreted as going beyond organized religions involving, for example, a belief in a divine being or a deity as well as other philosophical beliefs on major issues such as life, death, and morality, akin to, but not amounting to a religion.<sup>14</sup> This term has been interpreted broadly by the ECtHR to extend beyond the mainstream world religions to other groups such as Jehovah’s Witnesses<sup>15</sup> and the Pentecostal Church,<sup>16</sup> as well as to non-religious beliefs including atheism and agnosticism.<sup>17</sup> We may expect the CJEU to take an equally broad view of what is a “religion or belief” given the obligation in Article 52(3) of the Charter to interpret Charter rights – in this case Article 10 – in line with the ECHR.

At the same time, in *Pretty v United Kingdom* the ECtHR held that “not all opinions or convictions constitute beliefs.”<sup>18</sup> Consequently, however firm the applicant’s view that as a motor neuron disease sufferer she had a right to assisted suicide, Article 9 of the ECHR was not engaged. From this ruling one can perhaps deduce that even a moral conviction on an issue of the utmost importance will not qualify, if it relates to an isolated question and does not form part of a world view. However, this point was not spelled out in the judgment.

A further issue arises as to just what constitutes religion: Is it a belief or does it extend to the practices and tenets of that belief? The CJEU has taken a broad view of this issue. In *Achbita*<sup>19</sup> and *Bouagnaoui*,<sup>20</sup> the CJEU held that “religion” in Article 10(1) of the Charter had to be interpreted broadly as covering both the *forum*

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14. EVELYN ELLIS & PHILIPPA WATSON, *EU ANTI-DISCRIMINATION LAW* 36 (2nd ed., 2012).

15. *Hoffmann v. Austria*, 17 Eur. H.R. Rep. 293 (1993).

16. *Larissis et al. v. Greece*, 140 Eur. H.R. Rep. 958 (1998).

17. *Kokkinakis v. Greece*, 17 Eur. H.R. Rep. 397, ¶ 31 (1993).

18. *Pretty v. United Kingdom*, 35 Eur. H.R. Rep. 1, 39 (2002); see *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 736 (Pieter van Dijk et al. eds., 2018).

19. Case C-157/15, *Achbita v. G4S Secure Solutions NV*, 2017, ¶ 27, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0157&from=EN> [<https://perma.cc/RAN9-VE8B>].

20. Case C-188/15, *Bouagnaoui v. Micropole SA*, 2017, ¶ 30, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13275247> [<https://perma.cc/86RL-AUSD>]. See EMMANUELLE BRIBOSIA & ISABELLE RORIVE, *AFFAIRES ACHBITA ET BOUGNAOUI : ENTRE NEUTRALITE ET PREJUGES* Revue trimestrielle des droits de l’homme (2017), at 1017-37; Mark Bell, *Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace*, 17 HUM. RTS. L. REV. 784 (2017).



*internum* (that is the fact of having a belief) and the *forum externum* (which is the manifestation of religious faith in public).<sup>21</sup> The latter included the wearing of the Islamic scarf by Muslim women. In reaching this conclusion the Court followed the case law of the ECtHR.<sup>22</sup>

In *Liga van Moskeeën en Islamitische Organisaties*,<sup>23</sup> specific methods of slaughtering prescribed by religious rituals were held to fall within the scope of Article 10 of the Charter. The CJEU held that the classification of a particular practice or ritual as a religious rite falling within Article 10 of the Charter cannot be affected by theological differences on the subject. It thus refused to be influenced by theological debate within the Muslim community as to whether the obligation to slaughter animals without prior stunning during the Feast of Sacrifice is absolute.<sup>24</sup>

### B. “Religious Organization:” A Question of Self-Perception?

As a general rule, religious organizations are subject to EU law save where they are expressly granted certain exemptions or privileges. But who decides what is a religious organization? Is it for an organization to declare itself to be a religious body or to embrace a particular ethos and thus to have autonomy in its employment policy? Or can its self-perception be challenged?

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21. This two-fold aspect of religious belief and practice had already been stressed in Case C-71/11, *Bundesrepublik Deutschland v. Y & Z*, 2012, ¶ 62, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=126364&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8188508> [<https://perma.cc/8JAY-H3HH>]. This case concerned the right to asylum.

22. See *Eweida et al. v. United Kingdom*, 37 Eur. Ct. H.R. 1 (2013). The case law of the ECtHR on religious apparel is summarized by AG Sharpston in Case C-188/15, *Bougnou v. Micropole SA*, Opinion of Advocate General Sharpston, 2016, ¶ 45, <http://curia.europa.eu/juris/document/document.jsf?docid=181584&doclang=en> [<https://perma.cc/J2L2-SBN6>]; see also Gérard Gonzalez, *Liberté de religion au sein de l'entreprise*, in *CONVENTION DES DROITS DE L'HOMME ET DROIT DE L'ENTREPRISE* 61 (Laure Milano ed., 2019).

23. Case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW v. Viaams Gewest*, 2018, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=202301&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13276063> [<https://perma.cc/LKD8-9N8W>] [hereinafter *Liga*].

24. C-426/16, *Liga*, ¶ 50. An issue which was not raised before the Court was whether religious practices are to be viewed objectively or subjectively: to what extent should the Court attach importance to a person's firmly held belief that a particular practice is an integral part of her religion, even though others practicing the same religion might not share that view?

This issue has been addressed in the recent case of *IR v. JQ*,<sup>25</sup> which concerned the employment policy of a Catholic hospital, IR. This institution is primarily a non-profit organization whose purpose is to carry out the work of Caritas (the international confederation of Catholic organizations), *inter alia* by running hospitals.<sup>26</sup> It is subject to the supervision of the Archbishop of Cologne. JQ is a Catholic doctor who was dismissed by IR for failing to adhere to the tenets of the Catholic church.<sup>27</sup>

Advocate General Wathelet began his Opinion by considering whether “IR is a private organization the ethos of which is based on religion.”<sup>28</sup> This, he said, was a question of fact which was for the national court to determine.<sup>29</sup> He proceeded to give some indication of the factors which the national court might take into consideration in making its determination.<sup>30</sup> The circumstance that IR was subject to supervision by the Catholic Archbishop of Cologne and that its corporate objective is the implementation of the missions of Caritas was not sufficient in itself to establish that its ethos is based on religion.<sup>31</sup> That would have to be established by looking at its activities, in particular the healthcare services which it provides. Were these services provided in accordance with the doctrine of the Catholic church and therefore distinguishable from services provided by public hospitals? This determination must address ethical questions relating to healthcare which are of particular importance in the doctrine of the Catholic Church, and in particular abortion, euthanasia, contraception, and other measures to regulate procreation.<sup>32</sup>

Interestingly, the Court did not address this issue in its judgment, but simply proceeded on the basis that IR’s claim to be a religious organization was well founded. This approach may be queried. Where an entity claims special treatment under EU law on

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25. Case C-68/17, *IR v. JQ*, 2018, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=205521&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13276727> [<https://perma.cc/E8LP-NJYX>]

26. *Id.* ¶ 23.

27. *See id.* ¶¶ 24-26.

28. Case C-68/17, *IR v. JQ*, Opinion of Advocate General Wathelet, 2018 ¶ 45, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=202426&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13276727> [<https://perma.cc/4FM2-5BHW>].

29. *Id.*

30. *Id.*

31. *Id.* ¶ 47.

32. *Id.*

the grounds that it is a religious organization or has a particular ethos, the first step should be to ascertain whether this is in fact so.

#### IV. THE STATUS OF RELIGIOUS ORGANIZATIONS

Before considering the effects of Article 17 of the TFEU, it must be pointed out that the Member States have put in place a vast array of arrangements for their religious organizations: at one end of the spectrum is France, where the State is strongly secular<sup>33</sup> and at the other are Denmark and the United Kingdom, which have established churches.<sup>34</sup> There are countless variants in between: Germany, for instance, has no established church but allows the recognized religious organizations very considerable autonomy and collects members' dues on behalf of those organizations.<sup>35</sup> By the same token, national laws on wearing religious apparel in the workplace diverge considerably.<sup>36</sup> Moreover, attitudes to religion vary widely between Member States,<sup>37</sup> as do the rules applicable to such issues as the wearing of religious apparel. However it must be noted that whatever the status of the dominant religious organization in their territory, Member States are required by Article 9 of the ECHR and (when acting within the scope of the EU Treaties) Article 10 of the Charter to respect the freedom of religion, including the rights of religious minorities.<sup>38</sup>

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33. Article 1 of the French Constitution states *inter alia* that the French Republic is secular. See 1958 CONST. 1 (Fr.), <http://www.assemblee-nationale.fr/connaissance/constitution.asp> [https://perma.cc/3WA9-RTSN] (French); 1958 CONST. 1 (Fr.), [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/anglais/constitution\\_anglais\\_juillet2008.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constitution_anglais_juillet2008.pdf) [https://perma.cc/WVG4-5VN9] (English).

34. According to the Danish Constitution, the Evangelical Lutheran Church is established in that country. DANMARKS RIGES GRUNDLOV [CONSTITUTION] [THE CONSTITUTIONAL ACT OF DENMARK] June 5, 1953 (Den.). [http://www.stm.dk/p\\_10992.html](http://www.stm.dk/p_10992.html) [https://perma.cc/FED9-JED4] In the UK, which has no written Constitution, the Anglican Church is established in England, and the same applies to the Presbyterian Church in Scotland. Wales and Northern Ireland no longer have established churches. As matters currently stand, the UK is set to leave the EU on March 29, 2019.

35. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (BASIC LAW) art. 140 (Ger.), <https://www.bundestag.de/grundgesetz> [https://perma.cc/5RFM-AP8X]; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (BASIC LAW) art. 140 (Eng.), <https://www.btg-bestellservice.de/pdf/80201000.pdf> [https://perma.cc/WNC4-B5KV].

36. See Case C-188/15, *Bougnouli v. Micropole SA*, Opinion of Advocate General Sharpston, 2016, ¶¶ 36-37, <http://curia.europa.eu/juris/document/document.jsf?docid=181584&doclang=en> [https://perma.cc/J2L2-SBN6].

37. According to a survey compiled by the Commission in 2012, 99% of (Greek) Cypriots are avowed Christians, whereas only 34% of Czechs hold Christian beliefs. See *id.* ¶ 35.

38. For a particularly flagrant breach of Article 11 ECHR (freedom of assembly) read with Article 9 ECHR, see the ECtHR judgment of 8 April 2014 in *Magyar Keresztény Mennonita*

The diversity of the Member States' arrangements in this regard underlies the first judicial pronouncement from Luxembourg on Article 17(1), namely the following statement from Advocate General Kokott in *Congregación de Escuelas Pías Provincia Betania*: "Article 17 TFEU gives specific effect to and complements the more general requirement enshrined in Article 4(2) TEU on respect for the national identity of the Member States inherent in their fundamental political and constitutional structures."<sup>39</sup> Insofar as is material here, Article 4(2) of the TEU requires the European Union to respect the "national identities" of the Member States, "inherent in their fundamental structures, political and constitutional structures, political and constitutional . . . ." Significantly, despite its obvious importance, even where national identity under this provision is at stake, Member States do not enjoy unbridled freedom to do as they please: the measure in question must still be proportionate to the aim pursued.<sup>40</sup>

Equally telling is the very next paragraph of Advocate General Kokott's Opinion in the same case:

There is no doubt that Article 17 TFEU gives expression to the particular role played in society by churches in the Member States. The provision cannot, however, be construed as a sectoral exception under which the activity of the churches in general is seen as taking place outside the scope of EU law. In particular, EU law must come into play where churches are economically active . . .<sup>41</sup>

A striking illustration of this principle can be seen in the ruling of the Grand Chamber in the same case: it held, albeit without addressing

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Egyház & Others v. Hungary, Application 70945/11, Eur. Ct. H.R. (2014). The Hungarian government had withdrawn official recognition from the overwhelming majority of religious organizations in the country, thereby depriving them of privileges, subsidies and donations. Hungary has never fully complied with this ruling. See generally THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 18, at 753-54.

39. Case C-74/16, *Congregación de Escuelas Pías Provincia Betania v. Getafe*, Opinion of Advocate General Kokott, 2017, ¶ 31, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CC0074&from=EN> [<https://perma.cc/8X5Y-5XQD>] [hereinafter *Congregación de Escuelas Pías*]. See Case C-157/15, *Achbita v. G4S Secure Solutions NV*, 2017, ¶ 125, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0157&from=EN> [<https://perma.cc/RAN9-VE8B>].

40. See, e.g., Case C-202/11, *Las v. Antwerp*, 2013, ¶ 29, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0202:EN:HTML> [<https://perma.cc/6JZ5-HHJ5>]; Case C-208/09, *Sayn-Wittgenstein v. Wien*, 2010 E.C.R. I-13693, ¶ 83.

41. Case C-74/16, Opinion of Advocate General Kokott, *Congregación de Escuelas Pías*, ¶ 32.

Article 17 TFEU, that an educational tax concession granted to the Spanish Catholic Church pursuant to an agreement between Spain and the Holy See might be a State aid contrary to Article 107 TFEU.<sup>42</sup>

Similarly, in *Egenberger*<sup>43</sup> it was held that Article 17 could not be relied on to prevent a disappointed applicant for a job with a German Protestant association, who claimed to have suffered from religious discrimination contrary to Directive 2000/78, from obtaining an effective remedy. The defendant's case was based on Article 17 together with German case law to the effect that the courts must defer to the church's own perception of what activities were inextricably linked to its own ethos in such a way that membership was a necessary requirement for carrying them out.<sup>44</sup> However, this approach was rejected. The Court stressed that, while "Article 17 TFEU expresses the neutrality of the European Union towards the organization by the Member States of their relations with churches and religious associations and communities," it did not dispense such bodies from complying with the relevant provisions of EU law,<sup>45</sup> namely Article 47 of the Charter on the right to an effective remedy and Articles 9 and 10 of the Directive. This highly important ruling was subsequently confirmed in *IR v. JQ*.<sup>46</sup>

In addition, in the Finnish Jehovah's Witnesses case, the Court ruled that the EU's data protection legislation did not interfere with the "organizational autonomy" of religious entities protected by Article 17.<sup>47</sup> The organization was therefore required to abide by that legislation.

Moreover, according to Advocate General Tanchev, Article 17 cannot be understood to mean that the European Union must give its blessing to breaches of fundamental rights suffered by any of the bodies referred to in that provision at the hands of the Member States.<sup>48</sup> More

42. *Id.*

43. Case C-414/16, *Egenberger v. Evangelisches Werk für Diakonie*, 2017, at ¶¶ 55-59, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=201148&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13282861> [<https://perma.cc/H32X-2RTG>].

44. *Id.* at 31, 55-59.

45. *Id.* ¶ 15.

46. Case C-68/17, *IR v. JQ*, 2018, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=205521&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13290771> [<https://perma.cc/DMY6-MALS>].

47. Case C-25/17, *Tietosuojaalvautettu v. Jehovan Todistajat*, Opinion of Advocate General Mengozzi, 2018, ¶ 74, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CC0025> [<https://perma.cc/7C4Q-RX2N>].

48. C-414/16, *Egenberger*, ¶ 89.

specifically, the case law of the ECtHR on Articles 9 and 11 of the ECHR may not be disregarded by the European Union “in the event of a *diminution* under the law of a Member State of the status of churches, religious organizations and communities, or philosophical and non-confessional organizations.”<sup>49</sup> On this view, to take some extreme cases, the European Union could not give its blessing to a Member State’s decision to recognize only the dominant religion and ban all others, or indeed to prohibit all forms of religion.

To date, neither the Court nor the Advocates-General have ruled on Article 17(2). Consequently, there is no authority from the Court as to the meaning of “philosophical and non-confessional organizations.” It would certainly cover such groups as the Humanists in the United Kingdom<sup>50</sup> and some, if not all, associations of free masons.<sup>51</sup> The one point which appears to be clear is that paragraphs 1 and 2 are mutually exclusive. In any case, much of the case law on Article 17(1) can no doubt be applied *mutatis mutandis* to Article 17(2).

Finally, it could be argued that, according to this case law, Article 17 adds nothing to Article 4(2) of the TEU as a matter of pure law. Needless to say, no provision can be interpreted in such a manner as to render it meaningless. However, the fact is that on any view Article 17 serves to emphasize the importance of respecting the status of national law of religious, philosophical, and non-confessional organizations – provided that, as Advocate General Tanchev aptly points out, the Member States themselves act in compliance with the ECHR and the Charter of Fundamental Rights.

#### V. ARTICLE 10 OF THE CHARTER

Article 10 of the Charter was in issue in *Liga Van Moskeeen*,<sup>52</sup> which concerned a decision by the competent authorities in Flanders to stop authorizing the ritual slaughter of animals without stunning in temporary slaughterhouses in certain Belgian communes during the

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49. *Id.* ¶ 91 (emphasis in the original). This assertion may have been prompted by the Hungarian case referred to *Magyar Keresztény Mennonita Egyház*, 2014 Eur. Ct. H.R. (2014).

50. HUMANISTS UK, <https://humanism.org.uk> [<https://perma.cc/4THJ-3RKW>].

51. In France, this movement is especially well developed. See GRAND ORIENT DE FRANCE, <http://www.godf.org/index.php/accueil/index/liens/accueil/nom/Accueil> [<https://perma.cc/EA6Z-J6JL>].

52. Case C-426/16, *Liga*, 2018, ¶ 45, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=202301&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13276063> [<https://perma.cc/LKD8-9N8W>].

Muslim Feast of Sacrifice. Initially, the Belgian authorities had provided temporary slaughterhouses to cater for increased demand for ritual slaughtering during this festival. But, in September 2014, the Flemish Regional Minister announced that from 2015 he would no longer authorize the use of temporary slaughterhouses at which ritual slaughtering could be practiced during that period, on the grounds that such licenses were contrary to Article 4 of Regulation 1099/2009<sup>53</sup> (the “Regulation”). Article 4(1) lays down common rules for the protection of animal welfare at the time of slaughter or killing in the European Union. However, Article 4(4) reads: “In the case of animals subject to particular methods of slaughter prescribed by religious rites, the requirements of paragraph 1 shall not apply provided that the slaughter takes place in a slaughterhouse.” The term “slaughterhouse” is defined in Article 2(k) of the Regulation as an establishment which meets the requirements of Regulation 853/2004.<sup>54</sup> The temporary slaughterhouses in question did not comply with these requirements.

The applicants in the main proceedings challenged the Minister’s decision on a number of grounds. In particular, they claimed that Article 4(4) of the Regulation was incompatible with Article 10 of the Charter and Article 9 ECHR. Addressing this issue, following a reference for a preliminary ruling, the Court, relying on the judgment of the ECtHR concerning the ritual slaughter of animals prescribed by the Jewish faith,<sup>55</sup> began by finding that the specific methods of slaughter prescribed by religious rituals fell within the scope of Article 10(1) of the Charter of Fundamental Rights.

Next, it turned to the central point, namely whether the rule laid down in Article 4(4) read together with Article 2(k) constitutes a restriction on the freedom of religion guaranteed by Article 10 of the Charter. The Court concluded that it did not. It reasoned as follows: The slaughtering arrangements laid down by Regulation 1099/2009 apply to any slaughter of animals within the European Union.<sup>56</sup> They apply in a general and neutral manner to any party which organizes the slaughtering of animals irrespective of a connection with a particular

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53. *Id.* ¶¶ 13-16.

54. Regulation 853/2004, of the European Parliament and of the Council of 29 April 2004 Laying Down Specific Hygiene Rules for on the Hygiene of Foodstuffs, art. 2(k), 2004 O.J. (L 139) 55 (EC).

55. *Cha’are Shalom Ve Tsedek v. France*, 2000 Eur. Ct. H.R. ¶ 74.

56. Council Regulation 1099/2009 of 24 September 2009 on the Protection of Animals at the Time of Killing, 2009 O.J. (L 303) 1 (EC).

religion and consequently concern in a non-discriminatory manner all producers of meat in the European Union. The main objective of Regulation 1099/2009 was the protection of animal welfare; and that could only be ensured if ritual slaughter was carried out in a slaughter house which complied with the technical specifications laid down for approved slaughterhouses in Regulation 853/2004.<sup>57</sup>

In addition, the referring court asked whether the requirement that animals could only be slaughtered in approved slaughter houses might hinder the practice of ritual slaughter for many practicing Muslims in Flanders and thus limit their freedom of religion. On this point, the Court was dismissive. It acknowledged that the establishment, at the expense of the Muslim Community, of new, approved slaughterhouses or the conversion of temporary slaughter houses into approved slaughter houses would require huge financial investments.<sup>58</sup> Nevertheless, it held that the present case “concerns only a limited number of municipalities in the Flemish Region.”<sup>59</sup> A “lack of slaughter capacity in a region of a Member State which occurs temporarily, related to the increase in demand for ritual slaughter over several days during the Feast of Sacrifice, arises from a combination of domestic circumstances which could not affect the validity” of the relevant provisions of Regulation 1099/2009.<sup>60</sup>

With respect, this reasoning amounts to making fundamental rights subject to a *de minimis* rule, which is manifestly a contradiction in terms. As already mentioned, the freedom of religion is not an absolute right so that in many circumstances “the rights and freedoms of others” must prevail.<sup>61</sup> However, to say that a person may not rely on that fundamental right because only a small geographic area is affected is quite another matter. What is more, this case does not concern an isolated event, since the problem will arise every year.

Additionally, the Court showed a cavalier approach to the considerable expenses which would, by its own admission, be incurred by the Muslim community, should they wish to comply with their religious obligations.

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57. *Id.*; Regulation 853/2004 of the European Parliament and of the Council of 29 April 2004 Laying Down Specific Hygiene Rules for on the Hygiene of Foodstuffs, 2004 O.J. (L 139/55) (EC).

58. Regulation 853/2004, *supra* note 57, ¶ 70.

59. Regulation 853/2004, *supra* note 57, ¶ 73.

60. Regulation 853/2004, *supra* note 57, ¶ 78.

61. Charter, *supra* note 8, art. 52(1).



*VI. DISCRIMINATION ON THE GROUNDS OF RELIGION**A. General*

The Framework Employment Directive<sup>62</sup> (“Directive”) prohibits discrimination, *inter alia*, on the grounds of religion or belief in the workplace.<sup>63</sup> Article 2 of the Directive adopts a broad definition of discriminatory conduct.<sup>64</sup> It prohibits both direct and indirect discrimination and instructions to discriminate against a person on any of the grounds to which it relates.<sup>65</sup>

Direct discrimination is defined as the less favorable treatment of one person over another in a comparable situation on the grounds of religion or belief.<sup>66</sup> Indirect discrimination is said to occur where “an apparently neutral provision, criterion or practice would put persons having a particular religion or belief . . . at a particular disadvantage compared with other persons” in the absence of objective justification.<sup>67</sup> Harassment in the sense of unwanted conduct taking place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment is deemed to be a form of discrimination.<sup>68</sup>

*B. Religious apparel: Muslim headscarves*

The first two judgments on religious discrimination were handed down by the CJEU on March 14, 2017.<sup>69</sup> They concerned the wearing of religious apparel in the work place, an issue which had already been the subject of consideration by the ECtHR. One case was a preliminary reference from the Belgian Court of Cassation, the highest civil court in the country;<sup>70</sup> the other was a reference from its French

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62. Framework Employment Directive, *supra* note 2.

63. *Id.* art. 1.

64. *Id.* art. 2.

65. *Id.* art. 2(4).

66. *Id.* art. 2(2)(a).

67. *Id.* art. 2(2)(b).

68. *Id.* art. 2(3).

69. Case C-157/15, *Achbita v. G4S Secure Solutions NV*, 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0157&from=EN> [<https://perma.cc/RAN9-VE8B>]; Case C-188/15, *Bougnou v. Micropole SA*, 2017, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13275247> [<https://perma.cc/86RL-AUSD>].

70. Case C-157/15, *Achbita*, ¶ 21.

counterpart.<sup>71</sup> Both concerned female employees who wished to wear the Islamic veil at their respective places of work. Samira Achbita began to work for G4S in February 2003 as a receptionist under a contract of indefinite duration. G4S is a private undertaking, which provides, *inter alia*, reception services for customers in both the private and public sectors.<sup>72</sup> G4S had a policy of “neutrality,” which meant that workers could not wear visible signs of their political, philosophical, or religious beliefs in the workplace.<sup>73</sup> In April 2006, Ms. Achbita informed her line managers that she intended to wear an Islamic headscarf during working hours in the future.<sup>74</sup>

The management of G4S informed her that this would not be tolerated because it would be contrary to its policy of neutrality.<sup>75</sup> G4S did not accept that its employees could wear any visible sign of a political, religious, or philosophical affiliation at work. Since she persisted in this course of conduct, she was dismissed.<sup>76</sup> She contested the legitimacy of her dismissal before the Belgian courts. The case ultimately came before the Cour de Cassation, which referred a question for a preliminary ruling to the CJEU.

The question was simple: where an employer prohibits all employees from wearing outward signs of political, philosophical, and religious beliefs at the workplace, should Article 2(2)(a) of the Framework Employment Directive be interpreted as meaning that the prohibition on a female Muslim wearing a headscarf at the workplace does not constitute direct discrimination? The Court replied that the internal rule in question treated all GS4 workers the same way by requiring them all, without distinction, to dress neutrally.<sup>77</sup>

There was no evidence that the rule in question was applied differently to Ms. Achbita as compared to any other worker. Consequently, the rule did not introduce a difference in treatment that was directly based on religion or belief.<sup>78</sup>

Having found no direct discrimination in the treatment of Ms. Achbita, the CJEU conceded that the referring court might find that the

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71. Case C-188/15, *Bougnouli*.

72. Case C-157/15, *Achbita*, ¶ 10.

73. *Id.* ¶ 11.

74. *Id.* ¶ 12.

75. *Id.* ¶ 13.

76. *Id.* ¶ 16.

77. *Id.* ¶ 30.

78. *Id.* ¶ 31.

internal rule introduced a difference in treatment which was indirectly based on religion or belief; and it was for that court to ascertain whether an apparently neutral rule put persons adhering to a particular religion or belief at a disadvantage.<sup>79</sup> The Court went on to find that such a difference in treatment did not amount to indirect discrimination, if it was justified by a legitimate aim and was proportionate to the attainment of that aim.<sup>80</sup>

Then came the usual approach of the Court, which is to say that, while it is for the national court to deal with all these matters—the legitimacy of the alleged aim of the differential treatment and the validity of the means of attaining that aim in the light of the principle of proportionality—it would provide guidance to the national court to enable to give judgment on these matters. It proceeded to lay down the following principles:

- (i) a policy of political, philosophical or religious neutrality on the part of a business in its relations with its customers must be considered legitimate, notably where the employer confines this policy to those workers who are required to come into contact with the employer's customers;
- (ii) to prohibit employees from wearing visible signs of political, philosophical or religious beliefs is appropriate for ensuring that a policy of neutrality is properly applied, provided that the policy is genuinely pursued in a consistent and systematic manner;
- (iii) it fell to the national court to determine whether the prohibition was necessary to achieve the policy of neutrality. This would be the case if the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covered only G4S workers who interact with customers.

Importantly, the Court, added that it was for the national court to consider whether, instead of dismissing Ms. Achibita, it would have been possible to offer her alternative employment, which did not involve any visual contact with G4S customers.<sup>81</sup>

Without specifically articulating it, the Court appears to have sought to balance the interests of the employee with those of the employer: the employee's right to practice a religion or belief and to

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79. *Id.* ¶ 34.

80. *Id.* ¶¶ 36-42.

81. *Id.* ¶ 43.

adhere to its tenets (Article 10 of the Charter) with the employer's right to conduct a business (Article 16 of the Charter).<sup>82</sup> The latter provision reads: "The freedom to conduct a business in accordance with Union law and national laws and practices is recognized." Unlike most of the provisions in the Charter, this right has no counterpart in the ECHR; rather, it was recognized as a general principle of EU law in early case law of the CJEU on the basis of the Constitutions of certain Member States,<sup>83</sup> including Article 12(1) of the German Basic Law. Needless to say, like Articles 10 and 21(1) of the Charter, Article 16 is not absolute, but may be justified pursuant to Article 52(1). Unsurprisingly, this is a relatively weak right and the success rate of arguments founded on Article 16 is generally low, but in recent years there have been some notable exceptions.<sup>84</sup>

In any case, this balancing exercise may require mutual accommodation; both parties may have to adapt their respective positions. In the case of an employer, there may be an obligation to find, within his business organization, alternative employment for an employee whose religious practices are in conflict with his business interests. An employee may be required to accept such alternative employment if he or she wishes to continue to work for the employer, whilst still observing those religious practices which are allegedly prejudicial to the employer's business.

However, the position is not quite so simple. The extent to which each may have to accommodate the other depends upon a multiplicity of subjective factors: the level of religious observance of the employee; his or her position within the organization; the nature of the religious practice or its manifestation in issue; the type and size of the business; and the profile and interest of the workforce

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82. *Id.* ¶ 38.

83. Case 4/73, *J. Nold v. Commission of the European Communities*, 1974 E.C.R. 491; Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727.

84. Case C-70/10, *Scarlet Extended v. SABAM*, 2011 E.C.R. I-11959 (monitoring obligation imposed on an ISP); Case C-426/11, *Alemo-Herron v. Parkwood Leisure Ltd.*, 2013, <http://curia.europa.eu/juris/liste.jsf?num=C-426/11&language=EN> [<https://perma.cc/H2RM-U6M3>] (labor law); Case C-201/15, *AGET Iraklis v. Minister of Labor, Social Insurance and Social Solidarity*, 2016, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=187991&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=13341725> [<https://perma.cc/56G7-L2XB>] (labor law). See Peter Oliver, *What Purpose Does Article 16 of the Charter Serve?* in *GENERAL PRINCIPLES OF EU LAW AND EUROPEAN PRIVATE LAW* 281 (Ulf Bernitz et al. eds, 2013); PETER J. OLIVER, *THE FUNDAMENTAL RIGHTS OF COMPANIES: EUROPEAN AND US LAW COMPARED* (Hart Publishing, forthcoming 2019).

in general.<sup>85</sup> These are factors upon which the Advocate General provided guidance. A small but discreetly worn religious symbol would be more acceptable than a noticeable head-covering. Employees required to wear a uniform could be subject to stricter prohibitions on the wearing of religious symbols than employees who were free to choose the clothes they wore to work. More restraint could be expected of an employee in a high-level position within a business giving that employee authority over others. Employees who provide the external face of a business may be required to behave differently than those who have back office positions and have no contact with customers.<sup>86</sup>

In the case of G4S, a further important factor was the nature of its business. G4S offered services to a broad range of customers in the public and private sectors. These services were characterized by two factors: (i) constant face to face contact with members of the public, and (ii) the fact that such contact reflected the image not only of G4S but also of the company's customers.<sup>87</sup> Thus, not only had the company's image as portrayed by the external appearance of its workforce to be considered, but also that of its customers to whom political, philosophical, or religious beliefs might be attributed because of G4S's employees' dress.<sup>88</sup>

As to *Bouagnaoui*,<sup>89</sup> that case reached the CJEU by way of reference from the Cour de Cassation of France.<sup>90</sup> These proceedings differed from those in *Achbita* in that the French court approached the case from the point of view of Article 4(1) of the Directive. Viewed from this perspective, the question was this: was the wish of a customer not to have services provided by a person wearing an Islamic headscarf a "genuine and determining occupational requirement" such that an employee could be required not to wear a headscarf?<sup>91</sup> Ms. Bouagnaoui took a job with Micropole, as a design engineer, beginning on July 15,

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85. Case C-157/15, *Achbita v. G4S Secure Solutions NV*, Opinion of Advocate General Kokott, 2017, ¶¶ 118-22, <http://curia.europa.eu/juris/document/document.jsf?docid=179082&doclang=en> [<https://perma.cc/3NM9-YBW4>].

86. *Id.* ¶¶ 118-19.

87. *Id.* ¶ 94.

88. *Id.* ¶¶ 93-94.

89. *Bouagnaoui v. Micropole SA*, 2017, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13275247> [<https://perma.cc/86RL-AUSD>].

90. *Id.*

91. *See id.* ¶ 19.

2008.<sup>92</sup> The company specialized in advice, engineering, and specialized training for the development and integration of decision-making solutions prior to entering into the employment of Micropole, a representative told Ms. Bougnaoui at a student fair that wearing an Islamic scarf in the workplace might be problematic when she is in contact with customers of the company.<sup>93</sup> In February 2008, she started an internship with the business. When she arrived, she wore a simple bandana, but subsequently started to wear an Islamic headscarf. Little more than a year later she was dismissed.<sup>94</sup> In her letter of dismissal, Micropole pointed out that it had been made clear at all stages of the recruitment process that, because she would be in contact with the company's customers, she would not be able to wear a veil in all circumstances.

The Court did not express any particular view on whether Ms. Bougnaoui's dismissal arose out of direct or indirect discrimination – contenting itself simply with saying that these were matters for the referring court to decide. Following its approach in *Achbita*, the Court held that, if it transpired from the facts that there was a neutral rule, which prohibited the wearing of any visible sign of political, philosophical, or religious beliefs, and if that rule resulted in persons adhering to a particular religion being put at a particular disadvantage, “it would have to be concluded that there was a difference in treatment indirectly based on religion or belief.”<sup>95</sup>

The next question was whether Micropole's policy was objectively justified. Was it a legitimate aim to adopt a policy of neutrality towards customers? If so, were the measures which the employer took legitimate and necessary? These were matters, the Court held, for the national court to decide.

The Court then went on to consider Article 4(1)–the provision on which the referring court sought guidance.<sup>96</sup> Here the question was whether the willingness of an employer to take account of a customer's wish no longer to have the services provided by a worker who wears an Islamic headscarf constitutes a “genuine and determining

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92. *Id.* ¶ 13.

93. *Id.*

94. *Id.*

95. *Id.* ¶ 32.

96. *Id.* ¶ 19.

occupational requirement.”<sup>97</sup> The Court’s reply was in the negative.<sup>98</sup> It reasoned as follows: the concept of a “genuine and determining occupational requirement” within the meaning of Article 4(1) refers to a “requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out.”<sup>99</sup> This term cannot cover “subjective considerations such as the willingness of the employer to take account of the particular wishes of the customer.”<sup>100</sup>

In both cases, the Advocates General discussed to what extent an employee could be required to modify unilaterally his or her religious based behavior and practices in the workplace.<sup>101</sup> Advocate General Kokott recognized that “for many people, religion is an important part of their personal identity.”<sup>102</sup> Advocate General Sharpston made the same point more forcefully: “I emphasize that, to someone who is an observant member of a faith, religious identity is an integral part of that person’s very being.”<sup>103</sup>

Both agreed that some moderation of religious practice in the workplace might be required. Advocate General Kokott, drawing a distinction between sex, skin color, ethnic origin, age, or disability, stated that a person’s religion was an “aspect of an individual’s private life” the practice of which he may be expected to moderate in the workplace, “be this in relation to religions practices, religiously motivated behavior or . . . clothing.”<sup>104</sup> In other words, a person can leave his religion “at the door” upon entering his employer’s premises—an option not open to those bearing certain other characteristics attracting discriminatory behavior such as sex, disability and so forth.<sup>105</sup> Indeed, this was precisely what Ms. Achbita did during the first three years of her employment with G4S: she did not wear her Islamic headscarf at work. Ms. Bougnaoui also

97. *Id.*

98. *Id.* ¶ 41.

99. *Id.* ¶ 40.

100. *Id.*

101. Case C-157/15, *Achbita v. G4S Secure Solutions NV*, Opinion of Advocate General Kokott, 2017, ¶¶ 117-22, <http://curia.europa.eu/juris/document/document.jsf?docid=179082&doclang=en> [<https://perma.cc/3NM9-YBW4>]; Case C-188/15, *Bougnaoui v. Micropole SA*, Opinion of Advocate General Sharpston, 2016, ¶¶ 120-25, <http://curia.europa.eu/juris/document/document.jsf?docid=181584&doclang=en> [<https://perma.cc/J2L2-SBN6>];

102. Case C-157/15, *Achbita*, Opinion of Advocate General Kokott, ¶ 118,

103. Case C-188/15, *Bougnaoui*, Opinion of Advocate General Sharpston, ¶ 118.

104. Case C-157/15, *Achbita*, Opinion of Advocate General Kokott, ¶ 116.

105. *See id.*

did not wear a headscarf when she commenced employment with Micropole. Advocate General Kokott concluded that the measure of restraint, which an employee can be required to exercise, “depends on a comprehensive assessment of all the relevant circumstances of the case in question.”<sup>106</sup>

In *Bougnaoui*, Advocate General Sharpston likewise acknowledged that a person’s level of observance might make particular rules “non-compulsory” and “therefore negotiable.”<sup>107</sup> Some practices might not be regarded as essential by the employee and, if asked by the employer to refrain from observing them, he or she might agree to this request.<sup>108</sup> Where a practice is essential to an employee, the matter remains a question of negotiation with the employer in order to find a solution that can be found which accommodates their respective rights: the right of the employee to practice or manifest her religious belief and the employer’s right to conduct her business.<sup>109</sup>

As to Article 16 of the Charter, Advocate General Kokott asserted that “it would appear, on an objective examination taking into account the employer’s discretion in pursuit of his business, by no means unreasonable for a receptionist such as Ms. Achbita to have to carry out her work in compliance with a particular dress code.”<sup>110</sup> In a crucial passage, she stated:

... An undertaking can and must, by definition, take into careful account the preferences and wishes of its business partners, in particular its customers, in its business practices. It would otherwise be unable to sustain its presence on the market. It nonetheless cannot pander blindly and uncritically to each and every demand and desire expressed by a third party. If, for example, a customer, even an important customer, sought to make a demand on an undertaking to the effect that he be served only by employees of a particular religion, ethnic origin, colour, sex, age or sexual orientation, or only by employees without a disability, this would quite obviously not constitute a legitimate objective . . .

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106. *Id.* ¶ 117.

107. Case C-188/15, *Bougnaoui*, Opinion of Advocate General Sharpston, ¶ 118.

108. *See id.*

109. *Id.* ¶ 128.

110. Case C-157/15, *Achbita*, Opinion of Advocate General Kokott, ¶ 84.

111. *Id.* ¶¶ 90-91. On the latter point, she referred to Case C-54/07, Opinion of Advocate General Poiares Maduro, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v.*



Broadly speaking, Advocate General Sharpston took the same view, although she attached less importance to the market's view. She stated that the employer may take measures with a view to maintaining harmony within this workforce for the good of the business as a whole.<sup>112</sup> In particular, she stressed that a business may prohibit proselytizing, a practice which has “simply no place in the work context.”<sup>113</sup>

Like any constitutional court, the CJEU constantly finds itself having to balance fundamental rights against one another. In *Sky Österreich*, the Court stated that “the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them.”<sup>114</sup> This may prove to be quite a challenging task.

Like the principle of proportionality to which it is closely linked, balancing is open to criticism for its inherently vague nature: “fair balance” is a vacuous term; and the outcome is bound to vary from case to case. But what alternative is there?<sup>115</sup> In these circumstances, cogent and consistent reasoning is of the essence if judgments are to be persuasive and legal uncertainty is to be kept to the minimum.<sup>116</sup> In this regard, the rulings in *Achbita* and *Bougaouni* cannot be faulted.

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Firma Feryn NV, 2008, ¶¶ 3, 4, 16-18 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62007CC0054&from=GA> [<https://perma.cc/2PEY-G2LC>] (racial discrimination).

112. Case C-157/15, *Achbita*, Opinion of Advocate General Kokott, ¶ 116. Similarly, the ECtHR has recognized that a company may rely on Article 8 ECHR to protect the privacy of its staff. *Bernh Larsen Holding v. Norway*, 2013 Eur. Ct. H.R. ¶ 90 (2013); *Delta Pekárny v. Czech Republic*, 2014 Eur. Ct. H.R. 279, ¶ 65 (2014).

113. Case C-157/15, *Achbita*, Opinion of Advocate General Kokott, ¶ 73.

114. Case C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, Opinion of Advocate General Bot, 2012, ¶ 60 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CC0283&from=EN> [<https://perma.cc/UDT4-MDS6>]

115. See generally Niels Petersen, *How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 GER. L. J. 1387 (2013).

116. Thomas Kleinlein, *Judicial Law-Making by Judicial Restraint? The Potential of Balancing in International Economic Law*, 12 GER. L. J. 1141, 1167 (2011).

*C. Divorce and remarriage: the case of the Catholic doctor*

The case of *IR v JQ* raised the novel issue of graded discrimination.<sup>117</sup> Could a religious organization demand of its employee, practicing that religion, adherence to certain tenets of that faith, which it did not demand of its employees who were not of that religious persuasion or who did not practice any religion? Could such an organization discriminate between its own employees?

JQ is a Catholic. He is a doctor by training and had been working as the Head of the Internal Medicine Department of an IR hospital located in Dusseldorf. He was married according to the Roman Catholic rite. Following his divorce under German civil law, JQ remarried in a civil ceremony. At the date of his second marriage, his first marriage not been annulled under canon law. On learning of the second marriage, IR terminated the employment relationship. IR would have tolerated his remarriage if JQ were a non-Catholic head of department. JQ challenged the validity of his dismissal, arguing that it infringed the principle of equal treatment. IR asserted that the dismissal in question was justified. Given that JR was in a managerial position, he clearly infringed his obligations under his employment relationship with IR by entering in to a marriage, which was invalid under canon law.<sup>118</sup>

The Federal Labor Court asked whether Article 4(2) of the Framework Employment Directive could be interpreted as meaning that the Catholic Church can require an organization such as IR, where employees in managerial positions are under an obligation to act in good faith and with loyalty, to differentiate between employees who belong to the church and those who belong to another faith or to no faith at all?<sup>119</sup> The Court held that it was for the national court to determine whether requiring only employees in managerial positions who share the religion or belief on which the church or organization concerned is based to act in good faith and with loyalty is in fact a “genuine, legitimate and justified” requirement.<sup>120</sup> It then proceeded, in the guise of offering guidance to the national court to set out its view of the matter. The requirement

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117. Case C-68/17, *IR v. JQ*, Opinion of Advocate General Wathelet, ¶ 55, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CC0068&from=EN> [<https://perma.cc/KC8K-JXDG>].

118. *Id.* ¶ 28.

119. *Id.* ¶ 3.

120. *Id.* ¶ 56.

at issue concerned a particular aspect of the ethos of the Catholic Church, namely the “sacred and indissoluble” nature of marriage.<sup>121</sup>

The Court held that adherence to the notion of marriage did not appear to be necessary for the promotion of IR’s ethos, bearing in mind the activities carried out by JR, namely the provision of medical advice and care in a hospital and the management of the internal medicine department of that hospital.<sup>122</sup> This conclusion was supported by the fact that positions of medical responsibility, entailing managerial duties, similar to those performed by JQ, were entrusted to IR employees who were not of the Catholic faith and consequently not subject to the same requirement to act in good faith and with loyalty to IR’s ethos.<sup>123</sup> However, the Court went on to say that although the requirement in issue did not appear to be justified, it was ultimately a matter for the referring court to verify whether IR had established that there was a “probable and substantial” risk of undermining its ethos or its right of autonomy if it were not respected.<sup>124</sup>

#### VII. CONCLUSION

Ensuring respect for the freedom of religion is not, and was never intended to be, part of the EU’s “core business.”<sup>125</sup> That is primarily a matter for the ECtHR. Having said that, ensuring respect for “human dignity, freedom, democracy, equality, the rule of law and respect for human rights” is central to the EU, as is spelt out in Article 2 of the TEU—but only within the scope of the EU treaties.

In view of the extreme sensitivity of the cases which have come before it, the CJEU should be applauded for treading most warily. Fortunately for the Court, it has not been called upon to rule only in proceedings involving Islam: as we have seen, a number of the most important rulings have related to Christianity. This puts the Court in the comfortable position of being seen to be even-handed.

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121. *Id.* ¶ 66.

122. *Id.* ¶ 59.

123. *See id.* ¶ 67.

124. *Id.* ¶ 65.

125. Daniel Sarmiento appears to lament this, writing: “In sixty years of European integration, religion has been a missing part of Europe’s narrative, both in policy and in law.” Daniel Sarmiento, *Religion at the Court*, *DESPITE OUR DIFFERENCES* (July 17, 2018), <https://despiteourdifferencesblog.wordpress.com/2018/07/17/religion-at-the-court/> [<https://perma.cc/J7VZ-4TEL>].

As is clear from this Article, the one judgment which is a cause for major concern is the ruling in *Liga de Moskeëñ*, which controversially introduces a *de minimis* rule into the Charter and fails to respect the freedom of religion. In any event, the Court can scarcely be accused of failing to take this area of the law seriously: precisely because of its great sensitivity, all these cases have been decided by the Grand Chamber.

