Religious Freedom and Belief Discrimination in Germany and the United Kingdom

Religious Freedom and Belief Discrimination in Germany and the United Kingdom: Towards a Common European Standard?

by Tobias Lock[*]

Summary

This article compares how two closely related remedies, freedom of religion and the belief discrimination, are applied by domestic courts in the United Kingdom and Germany. It concludes that the current practice of the courts in these two countries differs considerably and questions why that is so given that the courts in both countries operate under essentially the same European legal framework determined by the ECHR and the EU law. It is suggested that decision-making by domestic courts is still influenced by traditional domestic remedies and that domestic courts seem to find it difficult to adapt to new remedies. The article then gauges the potential for a common European approach, which, while theoretically possible, is unlikely to be triggered by either of the two European courts. This is because cases dealing with religion often touch on core constitutional values, which both courts usually respect.

Introduction

This article contains a comparative study of the law on religious freedom and belief discrimination in Germany and the United Kingdom (UK). Religious freedom and belief discrimination are intertwined and often the same factual situation can give rise to claims under both heads. The aims of this article are to show how the two are used in practice by British and German courts and to ask whether a common European approach is possible. A comparison between the two countries is interesting for three main reasons. First, both are countries with a large population so that one can assume that they have seen ample litigation allowing for a meaningful comparative study. Second, in both countries there are sizeable numbers of people with non-traditional beliefs. In Germany, 35% of the population are non-believers and 5% are Muslim. The remaining 60% follow traditional Christian religions.[1] The numbers in the UK are similar. According to the 2011 census for England and Wales there are 25.1% of the population stating to have no belief, 4.8% Muslims, and 59.3% Christians.[2] The numbers for the UK as a whole are unlikely to differ greatly. These demographics constitute a challenge to traditional arrangements in place, which are still largely informed by the traditional majoritarian bias, in particular in the employment and education context, e.g. when it comes to dress codes or time off for worship. Third, the two countries have very different legal

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[1] Süddeutsche Zeitung, Nr. 215, 17./18.09.2011, page 6.

[2] Office for National Statistics, "Religion in England and Wales 2011", *http://www.ons.gov.uk* [Accessed June, 3 2013].

traditions. While the UK has a tradition of home grown anti-discrimination law[3], German anti-discrimination law was only introduced through obligations arising from Germany's EU membership. In contrast, Germany has a long and strong tradition of fundamental rights review, whereas this is quite a recent phenomenon in the UK.

The article shows that the current practice of the courts in these two countries differs considerably even though the two countries operate under the same European legal framework for the legal regulation of religion and belief. Both are bound by art. 9 and art. 14 of the European Convention on Human Rights (ECHR), by the EU Framework Directive, which bans belief discrimination, by the EU Race Equality Directive and by the EU Charter of Fundamental Rights (CFR). The existence of this European legal framework would suggest that the pertinent rules are applied equally throughout. It is shown that this is currently not the case and it is proposed that the current practice in the two countries under scrutiny is very much influenced by domestic legal tradition suggesting limits to EU harmonisation in the field of discrimination law generally and in relation to belief discrimination in particular. As a result, it is more difficult in the UK to succeed with a claim based on freedom of religion than with a claim based on belief discrimination whereas the situation in Germany is the exact opposite.

This article adds an important aspect to the research on how European law (EU and ECHR law) is applied in domestic courts by focusing on the law on belief discrimination and religious freedom. At the same time it contributes to the discussion on law and religion. Belief discrimination is particularly interesting for testing the understanding of domestic courts of anti-discrimination law for three reasons. First, it is a relatively new characteristic in EU anti-discrimination law, which was only introduced with the Framework Directive in 2000.[4] Second, belief discrimination protects individuals alongside religious freedom, which is a human right guaranteed both in the UK and Germany. Third, the European Court of Justice (CJEU) has not yet spoken on the issue since not a single case on belief discrimination has been referred to it. From this one can infer a lack of guidance from the CJEU, which justifies the assumption that the case law on belief discrimination has developed autonomously in the Member States.

The argument develops in three parts. The first part explains the relatively complex legal framework regarding the protection of religious freedom and against belief discrimination in both states. The second part then explores how cases on belief discrimination have been decided by the courts in both countries. It is shown that the level of protection differs between them and that in the UK cases dealing with individual beliefs were in the past more likely to succeed as anti-discrimination cases whereas in Germany such cases were more likely to succeed as freedom of religion cases. An attempt is then made at explaining why the approaches in both countries differ, and, last, the third part discusses whether a convergence in approach is likely in the future.

A Multi-Layered Legal Framework

In order to provide a background for the comparison, it is necessary to briefly sketch out the complex legal framework governing belief discrimination and the right to religious freedom at both

[3] Starting with the Race Relations Act 1965; followed by the Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Race Relations Act 1976.

[4] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

European and national level. Religious freedom and anti-discrimination law stem from a multitude of sources and their respective legal value differs between legal orders.

European law

Guarantees of religious freedom and prohibitions to discriminate on the grounds of religion and belief can be found both in the law of the EU and in the ECHR. EU primary law protects freedom of thought, conscience and religion in art. 10 CFR. Moreover, the CFR contains a chapter on equality with a relatively comprehensive anti-discrimination provision in art. 21.[5] The exact boundaries of the applicability of the Charter in the Member States have not yet been established. art. 51 CFR provides that the Member States are only bound by it when they are implementing European Union law. One can conclude from the recent decision of the CJEU in *Åkerberg Fransson* that the CJEU is opting for a wide approach to the meaning of 'implementing Union law' contained in art. 51 (1) CFR. Confirming its pre-Charter case law[6], the Court held that a Member State was bound by the Charter where it acted within the scope of EU law. The CJEU considered that criminal sanctions for non-declaration of VAT fell within that scope even though the provision of national law providing for the sanction was not adopted in direct implementation of the VAT Directives. It was sufficient that the Member State was under an EU law obligation to ensure that VAT is collected and to counter illegal activities affecting the interests of the Union according to art. 325 TFEU.[7] Member States are thus considered to implement EU law when their measures fall within the scope of obligations stemming from EU law. If such a broad reading of *Åkerberg Fransson* is correct,[8] one can assume that the CJEU will continue to hold as it did in *Kücükdeveci* that an employment dispute falls within the scope of EU law where the national legislation is allegedly contrary to a rule of EU law.[9] This would suggest that all employment disputes concerning potential discrimination contrary to one of the anti-discrimination Directives would trigger the applicability of the Charter. The (in-)famous *Mangold* decision of the CJEU has added a further source of anti-discrimination rights. The principle of anti-discrimination on the grounds of age can also be found in the general principles of European Union law[10] and it is likely that the same is true for the other characteristics found in the various anti-discrimination directives.[11]

European Union legislation is the source of several anti-discrimination Directives based on art. 19 TFEU, which are a sign of a maturing EU discrimination law that goes beyond gender discrimination to include protected grounds such as religion and belief, as well as race, disability, sexual orientation and age. The main sources of EU discrimination law are the Race Equality

[5] Art. 21 (1) provides: Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

6 On this case law cf. T. Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford: Oxford University Press, 2006), pp. 319 et seq.

[7] *Åklagaren v Hans Åkerberg Fransson* (C-617/10) February 26, 2013 at [25-26].

[8] It is important to note that the FCC demands a narrow understanding of the decision in *Åkerberg Fransson*, cf. 1 BvR 1215/07 (Anti-Terror Datei) [at] 91.

[9] *Kücükdeveci v Swedex GmbH & Co. KG* (C-555/07) [2010] E.C.R. I-365.

[10] *Mangold v Helm* (C-144/04) [2005] E.C.R. I-9981 at [75]; this was confirmed in *Kücükdeveci* (C-555/07) [2010] E.C.R. I-365.

[11] *Mangold* (C-144/04) [2005] E.C.R. I-9981 at [76]; it has been argued that there is a general principle of non-discrimination on the ground of sex, cf. E. Ellis and P. Watson, *EU Anti-Discrimination Law*, 2nd edn (Oxford: Oxford University Press, 2012), pp. 131 et seq.

Directive[12], the Framework Directive[13], and the two Gender Directives[14]. All these Directives have in the meantime been implemented in the UK and Germany.

The ECHR guarantees freedom of religion in its art. 9, which gives everyone 'the right to freedom of thought, conscience and religion', which '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 and observance.' In addition, art. 14 ECHR prohibits discrimination 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' art. 14 ECHR is not a free-standing anti-discrimination provision as it is only applicable where the complaint falls within the ambit of a freedom right under the Convention.[15] Furthermore, it is not usually applicable in horizontal relationships. In contrast to the EU Directives and domestic anti-discrimination law, art. 14 ECHR is wider with regard to its non-exhaustive list of characteristics. At the same time, it allows for direct discrimination to be justified.[16] The Convention's anti-discrimination Protocol No 12, is not binding on either the UK or Germany. As will be shown below, the status of ECHR rights in domestic law differs from country to country and so does its practical relevance.

National law

The following discussion of equality law provisions and religious freedom provisions in national law focuses on the relative value the provisions may have for claimants. This value is informed by the rank of the provision in the hierarchy of norms, which has a direct impact on the strength of judicial review, but also by the scope of provisions, in particular their applicability in private law relationships.

Germany

The highest source of domestic law within Germany is the federal constitution, the Basic Law (Grundgesetz – GG).[17] It contains a catalogue of fundamental rights, of which art. 3 and art. 4 GG are of relevance to this article. art. 3 (1) GG postulates equality before the law and art. 3 (2) and (3) contain prohibitions of discrimination, including discrimination on the basis of belief, faith and religious opinions. However, art. 3 GG is generally applicable only in vertical relationships but does not provide a remedy in relations between individuals.

[12] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.
[13] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
[14] Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37; Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.
[15] Cf. *Belgian Linguistics Case* Series A 6.
[16] E.g. in *Aziz v Cyprus* ECHR 2004-V at [36-37] the ECtHR considered whether direct discrimination on the basis of ethnicity could be justified.
[17] This discussion will concentrate on federal law since state law does not add substantively to the protection in place.

Art. 4 GG protects freedom of belief and conscience and freedom to profess a religious or political creed and the undisturbed practice of religion. In this it resembles art. 9 ECHR. The main difference is that art. 9 (2) ECHR contains an express derogation provision whereas art. 4 GG can only be derogated from where there are colliding interests of constitutional significance, such as the fundamental rights of others. Art. 4 GG does not have direct horizontal effect, and can only be indirectly applied in horizontal relationships.[18] Ordinary courts must interpret private law in accordance with the requirements of fundamental rights and where private law provisions are phrased in a general manner (so-called general clauses), fundamental rights are held to have a 'radiating effect' on private law.[19] Thus they inform and influence the interpretation of general clauses (so called *mittelbare Drittwirkung*; indirect horizontal effect).[20] Individuals have access to the Federal Constitutional Court (FCC) by way of a constitutional complaint (*Verfassungsbeschwerde)* in case their fundamental rights have been violated and where remedies in the ordinary courts have been exhausted. The FCC has the power to strike down legislation which is in violation of provisions of the Basic Law.

The EU's equality directives were transposed into German law by the *Allgemeines Gleichbehandlungsgesetz* (AGG), which entered into force in August 2006. The AGG is the first comprehensive piece of anti-discrimination legislation in Germany. The introduction of anti-discrimination law in Germany was anything but uncontroversial. The AGG's drafting process was accompanied by strong criticism and fears about its impact on freedom to contract. Freedom to contract (or private autonomy) is a fundamental right guaranteed by art. 2 (1) GG. Thus anti-discrimination provisions limiting this freedom, which includes the freedom to choose with whom to contract, were seen with great suspicion.[21] Commentators went even so far to suggest that the AGG would spell the end of private autonomy[22] and indeed of liberty. The more extreme side of the argument was summarised by *Picker* thus: If 'everyone is protected against everything', then nobody is protected against anything.[23] The hostility towards anti-discrimination law in some German legal quarters was again visible in the hefty debates following the CJEU's *Mangold* decision, which had suggested the existence of an (unwritten) general principle of anti-discrimination in EU primary law.[24] Despite this criticism, the AGG constitutes an over-implementation of the EU's Directives in that its scope is wider than required. It outlaws discrimination on the basis of all the characteristics protected in the four Directives mentioned above in the areas of employment, social protection, education and access to and supply with goods and services. Its scope thus coincides with that of the Race Equality Directive.

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[18] Cf. infra.
[19] BVerfGE 7, 198 (Lüth).
[20] BVerfGE 7, 198 (Lüth).
[21] S. Baer, "Ende der Privatautonomie oder grundrechtliche fundierte Rechtssetzung? - Die deutsche Debatte um das Antidiskriminierungsrecht" (2002) Zeitschrift für Recht und Politik 290-291; a summary of the debate in English can be found in E. Picker, "Anti-discrimination as a Program of Private Law?" (2003) 4 G. L. J. 771.
[22] Baer, "Ende der Privatautonomie oder grundrechtliche fundierte Rechtssetzung? - Die deutsche Debatte um das Antidiskriminierungsrecht" (2002) Zeitschrift für Recht und Politik 291.
[23] E. Picker, "Anti-discrimination as a Program of Private Law?" (2003) 4 G. L. J. 772.
[24] Some of the arguments can be found in C. O'Cinneide, "The Uncertain Foundations of Contemporary Anti-Discrimination Law" (2011) 11 International Journal of Discrimination and the Law 7, 16-17; the controversy ended only after a decision by the FCC confirmed that the ECJ had not acted ultra vires in finding such a general principle, cf. BVerfGE 126, 286 (Honeywell).

Germany thus turned out to be a relative latecomer and reluctant adopter of anti-discrimination legislation even though proposals for more ambitious anti-discrimination legislation had been made by amongst others the Federal Ministry of Justice during the coalition government between the social democratic party and the green party under Gerhard Schröder.[25] Thus one can see a marked contrast to the situation in the UK where the first piece of anti-discrimination legislation was introduced in 1965. It seems that the reasons for this reluctance in Germany were not limited to the fears with regard to the consequences for private autonomy mentioned above. A comprehensive study by *Solanke* on the adoption of race discrimination legislation in both countries suggests that the wider German policy on immigration and citizenship, which was not accommodating to the inclusion of immigrants into society, had a large part to play in this. While Britain accepted ethnic minority British people as part of British society from the 1960s onwards, Germany pursued a different route by making it very difficult for non-ethnic Germans to obtain German citizenship and thus to be integrated in society.[26] This difference in attitude may also explain why Britain thought it necessary to adopt anti-discrimination legislation in order to make sure that its citizens, no matter which ethnicity they have, are treated equally, whereas for Germany the issue of discrimination did not appear to feature as a problem. These findings are also of relevance for the discussion of belief discrimination in Germany. After all, in many cases the victim of belief discrimination has an immigration background.

Finally, the ECHR was transposed into German law as an act of parliament[27] so that it can be invoked in the German courts like any other federal law but it cannot be used to challenge legislation before the Federal Constitutional Court. This is because the FCC's powers of review are limited to the constitutionality of legislative acts and other state action. It does not have jurisdiction to review the compatibility of such action with the ECHR alone. Given that the ECHR does not normally provide more protection than is already guaranteed by the Basic Law the ECHR tends to be rarely invoked. In the rare cases of conflict between a decision of the FCC and the ECHR, the FCC tries to accommodate the decisions of the ECtHR as best as it can by employing the ECHR as an extrinsic aid to interpretation and by taking account of the ECtHR's decisions,[28] but it does not consider itself bound by them.[29]

One can conclude that the strongest claim under German law is one based on the fundamental rights provisions in the Basic Law. It is the highest source in German law and the FCC has the power to strike down legislation if fundamental rights are violated. The ordinary courts have

[25] Cf. Bundesministerium der Jusitz, "Diskussionsentwurf eines Gesetzes zur Verhinderung von Diskriminierungen im Zivilrecht", December, 10 2001, *http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/15_wp/adg/adg-index.htm* [Accessed June 3, 2013].
[26] I. Solanke, *Making Anti-Racial Discrimination Law* (Abingdon: Routledge, 2009), pp. 14 et seq.
[27] Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 22.08.1952 (BGBl. II S. 685).
[28] Cf. 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, 2 BvR 571/10 BVerfG (Sicherungsverwahrung) at [86-94].
[29] BVerfGE 111, 307 (Görgülü).

similar powers when it comes to conflicts between domestic law and European Union law[30], but that power is not widely used.

United Kingdom

Given its lack of a codified and entrenched constitution and the accompanying lack of constitutional review, it is no surprise that the situation in the UK differs quite substantially from that in Germany. Most strikingly, the UK did not have a codified catalogue of fundamental rights until the entry into force of the Human Rights Act 1998 (HRA) in October 2000. The HRA largely transposed the ECHR into domestic law.[31] It is binding only on 'public authorities' and is thus not directly applicable in horizontal relationships. Indirect application in horizontal relationships is however possible as the courts are placed under a duty to interpret legislation (including private law) in compliance with the HRA so far as this is possible.[32]

S. 2 (1) HRA deals with the relationship of UK courts with the ECtHR. It is their duty to take account of the decisions of the ECtHR when interpreting the Convention. This section has been interpreted narrowly to reflect the so-called mirror principle, expressed by Lord Bingham in *Ullah* as meaning:

> The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.[33]

Thus courts in the UK must generally follow the interpretation of the ECtHR.[34] They cannot invalidate legislation as this would conflict with the principle of parliamentary sovereignty, according to which Parliament has 'the right to make or unmake any law whatever [and] no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[35] Hence the power of the courts is limited to declarations of incompatibility where a legislative provision is in violation of the HRA.[36] In contrast to that, courts have the power to dis-apply conflicting rules of national law where they are in conflict with EU law.[37] Compared with Germany, the protection of fundamental rights, including freedom of religion laid down in art. 9 ECHR, is thus weaker and it is a relatively recent phenomenon.

In contrast to this, the UK has a long tradition of anti-discrimination legislation.[38] As early as 1965, many years before becoming a member of the European Economic Community (now EU), the

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[30] Cf. *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (106/77) [1978] E.C.R. 629; *Deutsche Getreide- und Futtermittel Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (119/73) [1973] E.C.R. 1369.
[31] That is art. 2-12 and 14 ECHR plus its art. 1-3 of Protocol no 1 and art. 1 of Protocol no 13.
[32] S. 3 HRA.
[33] *Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant)* [2004] UKHL 26, para 20.
[34] In exceptional cases, the courts refuse to follow ECtHR decisions, e.g. where the specific features of the common law are not reflected in such decisions, cf. *R v Horncastle and others* [2009] UKSC 14.
[35] A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn (London: Macmillan, 1915), pp. 37-38.
[36] S. 4 HRA.
[37] S. 2 European Communities Act 1972 as interpreted in *Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2)* [1990] 3 W.L.R. 818.
[38] The political background to this is described by S. Poulter, "Muslim Headscarves in School: Contrasting Legal Approaches in England and France" (1997) 17 O.J.L.S. 43, 48.

UK adopted the Race Relations Act 1965. This was followed by the Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Race Relations Act 1976. Thus the development of anti-discrimination law in the UK was initially not influenced by Europe. Conversely, the HRA, albeit unrelated to the EU, was very much the consequence of European commitments. Thus the development in the UK was the opposite to that in Germany where there is a strong catalogue of 'indigenous' fundamental rights and where anti-discrimination law was only (reluctantly) adopted by virtue of European law. Another difference is that in UK private law anti-discrimination legislation is regarded as the basis for a statutory tort giving rise to private law remedies such as damages.[39]

The prohibition on belief discrimination in the UK, however, was only introduced following the Framework Directive with the adoption of the Employment Equality (Religion and Belief) Regulations 2003, which have now been codified, together all other anti-discrimination provisions, in the Equality Act 2010.[40] Before 2003 belief discrimination could only be argued indirectly in cases where the discrimination also constituted race discrimination, which benefited Sikhs[41] and Jews[42] but no other religions. The Equality Act 2010 contains an over-implementation of the EU Directives mentioned above. First, and in contrast to Germany, with gender reassignment, and marriage and civil partnership it protects further characteristics. Second, like the German AGG, its scope is wider than that of the Framework Directive and it extends to the provision of goods and services.

Conclusion

In conclusion of this brief overview, one can observe considerable differences in tradition and in legal value of the respective rights. Whereas in both countries the national legislation implementing the Equality Directives has the force of EU law and thus takes primacy over conflicting national law, the protection of religious freedom as a fundamental right differs. In the UK it is weaker because it is 'only' protected by an Act of Parliament. In Germany, fundamental rights are constitutional rights, which can be enforced by the constitutional court even against legislation. The two countries' traditions also differ. Whilst the UK can be said to have a long-standing anti-discrimination tradition, its fundamental rights provisions have only been in force since 2000. Germany by contrast has a long tradition of giving strong protection to fundamental rights whereas fully-fledged anti-discrimination law only appeared as recently as 2006. Despite these differences, substantially very similar provisions apply in Germany and in the UK. Both countries have implemented the relevant EU equality directives and both countries protect freedom of religion as a fundamental right. One should therefore expect that the outcome of legal proceedings in comparable cases should be the same. However, it will be shown that differences persist. Protection against belief discrimination is stronger than the protection of freedom of religion in the UK, whereas in Germany belief discrimination law does not seem to have added much to the protection already in existence and is indeed neglected.

[39] *Hall v Woolston Hall Leisure Ltd.* [2001] 1 W.L.R. 225, para 42; *Rhys-Harper v Relaxion Group Plc* [2003] UKHL 33.
[40] Note that the Equality Act does not apply to Northern Ireland.
[41] *Mandla (Sewa Singh) v Dowell Lee* [1982] UKHL 7.
[42] *R (on the application of E) v JFS Governing Body* [2009] UKSC 15.

Case study: freedom of religion and belief discrimination

The following case study focuses on the case law on freedom of religion and on belief discrimination. It will reveal that there are remarkable differences in the approach to these cases taken by the courts in Germany and in the UK. It will be argued that these differences are due to a number of factors pertaining to domestic law, e.g. the availability of 'traditional' remedies and tactical decisions of parties influenced by established domestic legal regimes. The discussion focuses on 'genuine' cases of belief discrimination: cases, in which a belief is used as a justification for discrimination by the person holding that belief, do not feature.[43]

'Religion and belief' a unique characteristic

Religion and belief is a unique characteristic in anti-discrimination law in that it is the only characteristic which has a corresponding human right, freedom of religion. Thus there are many cases which can be argued under both anti-discrimination law and freedom of religion. For instance, a female civil servant may be refused permission to wear a Muslim headscarf at work as this would be in conflict with the state's duty of neutrality in religious matters. The civil servant can argue that her right to freedom of religion has been infringed. But she could equally argue that she has been discriminated against on the basis of her belief. It would go beyond the remit of this article to offer a full-blown account of the theoretical relationship between the anti-discrimination provision and freedom of religion. For the purposes of this article it suffices to point out some key differences, which will be confirmed in the following case study. First, in order to prove discrimination it is necessary to establish a difference in treatment compared with another person or a group of persons. In particular in the context of indirect discrimination on the basis of religion, a claimant must show that other persons share his specific belief. Otherwise his claim cannot be successfully based on anti-discrimination law. Second, in religion and belief discrimination cases, the applicant will often seek treatment different to other workers rather than being treated the same.[44] For instance, in the English case of *Ladele*, the claimant, who was a registrar, sought to be exempt from certain duties regarding civil partnership ceremonies because 'marriage' between two people of the same sex was contrary to her Christian belief.[45] Third, religious freedom typically only applies in vertical situations and not in disputes between private parties, unless there is horizontal indirect effect either by virtue of the ECtHR's doctrine of positive obligations or by virtue of the German concept of *Drittwirkung*.[46]

United Kingdom

The relative weakness of religious freedom under art. 9 ECHR

Religious freedom in the UK is protected by art. 9 ECHR, which is applicable through the HRA. For this provision to apply, the ECtHR requires that the act constitutes an actual expression of that

[43] E.g. the cases of *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales* CA/2010/0007 Charity Tribunal; *R (on the application of E) v JFS Governing Body* [2009] UKSC 15; *Hall and Preddy v Bull* Case no. 9BS02095 Bristol County Court.
[44] M. Connolly, *Discrimination Law*, 2nd edn (London: Sweet & Maxwell, 2011), para. 6-052.
[45] *Ladele v Islington LBC* [2009] EWCA Civ 1357.
[46] On Drittwirkung cf. J. Fedtke, 'Drittwirkung in Germany' in Dawn Oliver and Jörg Fedtke (eds), *Human Rights and the Private Sphere* (Abingdon: Routledge, 2007), p. 125.

belief.[47] The mere fact that the behaviour was somehow motivated by a belief does not suffice. This is a rather strict stance resulting in the Court only finding behaviour to constitute a manifestation of a belief where it is mandatory for the individual claimant. While in theory this would allow the Court to make judgments on theological questions,[48] it has in practice been quite accommodating. For instance in the cases on the Muslim headscarf it accepted that the wearing of a headscarf is a manifestation of the individual's faith without much discussion.[49] Also, in its recent decision in *Eweida* the Court re-affirmed its stance that there would have to be an intimate link to the religion or belief, but at the same time held that the visible wearing of a cross by an employee fell within the scope of art. 9.[50] This stands in marked contrast to the Court of Appeal's decision in the same case, in which it did not consider the crucifix a necessary symbol of Christianity.[51]

A further hurdle for each applicant is the establishment of an interference with his belief. Under its traditional case law, the ECtHR did not consider there to be interference where the applicant had voluntarily submitted herself to a situation which leads to a restriction of the expression of her belief.[52] This is the so-called specific situation or voluntary acceptance rule. A typical example would be an employment situation where the claimant had voluntarily chosen to accept a position and would have a choice to leave the employment in order to comply with her beliefs.[53] But since the late 1990s it seemed that the ECtHR had relaxed its position on the specific situation rule. An example would be the case of *Dahlab*, where the applicant was a teacher in a Swiss state school who insisted on wearing a Muslim headscarf during lessons.[54] While the Swiss government argued that there was no interference since the applicant would have the choice to leave and teach at a private school, the Court did not address the point at all but rather decided the case on the basis of justification. This implies that the Court had accepted that there was interference with her right to freedom of religion. In a similar vein the Grand Chamber of the Court explicitly accepted interference in *Leyla Şahin* where the applicant was a student at Istanbul University and insisted on wearing a headscarf even though it was effectively banned there.[55] The recent decision in *Eweida and others* confirmed this trend. A chamber of the ECtHR explicitly reversed the specific situation rule pointing to the importance of freedom of religion in a democratic society.[56]

The application of the mirror principle prompted UK courts to apply the specific situation rule in the past. In fact, it is suggested that the UK courts' use of the specific situation rule even

[47] *Arrowsmith v United Kingdom* D.R. 8, 131.
[48] Cf. D. Harris and others, *Harris, O'Boyle, Warbrick: Law of the European Convention on Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009), p. 433.
[49] *Dahlab v Switzerland* E.C.H.R. 2001-V; *Leyla Şahin v Turkey* [GC] E.C.H.R. 2005-XI at [78].
[50] *Eweida and others v United Kingdom* (App. nos. 48420/10, 59842/10, 51671/10 and 36516/10) January 15, 2013 at [82].
[51] *Eweida v UK* (App. nos. 48420/10, 59842/10, 51671/10 and 36516/10) January 15, 2013 at [37].
[52] *Stedman v United Kingdom* (App. no. 29107/95) April, 9 1997; *Kosteski v The former Yugoslav Republic of Macedonia* (App. no. 55170/00) April, 13 2006; *X v United Kingdom* D.R. no. 22, 27; *Karaduman v Turkey* D.R. no. 74, 93.
[53] *X v UK* D.R. no. 22, 27 at [9 et seq]; *Kalaç v Turkey* E.C.H.R. 1997-IV at [27 et seq]; *Konttinen v Finland* D.R. n° 87-A, 68 at [1].
[54] *Dahlab* E.C.H.R. 2001-V.
[55] *Şahin* E.C.H.R. 2005-XI at [78]; a similar approach was taken in the cases of *Dogru v France* (App. no. 27058/05) December 4, 2008 and *Kervanci v France* (App. no. 31645/04) December 4, 2008.
[56] *Eweida* (App. nos. 48420/10, 59842/10, 51671/10 and 36516/10) January 15, 2013 at [83].

went beyond what would have been required under the mirror principle. The leading decision on the question is *Begum*, which was rendered more than six years prior to the ECtHR's *Eweida* decision.[57] In this case a student at an English secondary school decided to wear a 'jilbab'[58] instead of her school uniform. As a consequence she was no longer allowed to attend school unless she wore the school uniform. The school uniform for girls was a shalwar kameeze[59] and the school uniform policy made additional allowance for Muslim girls by allowing them to wear a headscarf. The applicant argued that her choice of the jilbab was mandated by her belief and that the refusal to allow her to attend school amounted to an exclusion and constituted an unjustifiable interference with her right under art. 9 (2) ECHR. Addressing the question of interference, Lord Bingham, who gave the leading speech in the House of Lords, referred to the ECtHR's specific situation case law.[60] From this case law he drew the general conclusion that 'interference is not easily established'[61] and he considered the specific situation rule to be applicable. Lord Bingham referred to the option to attend a different school, the school uniform policy of which would allow the jilbab and concluded that there was no interference.[62] This reasoning has been rightly criticised as too strict and for extending the specific situation rule to new situations.[63] In particular, the House of Lords did not give a single reason why the rule should be extended to pupils.[64] Furthermore, it neglected the situation of a minor whose 'acceptance' of a school uniform policy upon entering the school at the age of twelve can only be fictional as school attendance is mandatory and the school is picked by the pupil's parents. This would assume that the religious beliefs of a teenager do not change over time, which is certainly not a given.[65] One can find ample criticism of this approach in particular in view of the difficulties and 'costs' which leaving a position of employment or other role, which one has voluntarily accepted, may entail.[66] Furthermore, the approach taken by the UK courts appears to be wider than that of the ECtHR and it does not take into account the relaxation of the ECtHR's stance on interference which had already manifested itself in *Dahlab* and *Şahin* at the time of the *Begum* decision.[67]

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[57] *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15.

[58] A 'jilbab' is a long coat-like garment, which conceals the shape of the female body, *Begum* [2006] UKHL 15 at [10].

[59] A shalwar kameeze is a sleeveless smock-like dress with a square neckline, revealing the wearer's collar and tie, with the shalwar, loose trousers, tapering at the ankles, *Begum* [2006] UKHL 15 at [6].

[60] *Begum* [2006] UKHL 15 at [23].

[61] *Begum* [2006] UKHL 15 at [24]; compare with the seemingly more liberal approach in *R. (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15 and the criticism of the ECtHR's case law in *Copsey v WWB Devon Clays Ltd* EWCA Civ 932.

[62] *Begum*, [2006] UKHL 15 at [25].

[63] R. Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011) p. 91; see also the speeches of Lord Nicholls and Baroness Hale who both expressed their doubts as to the non-existence of an interference.

[64] M. Hill, "Bracelets, Rings and Veils: The Accommodation of Religious Symbols in the Uniform Policies of English Schools" in M. Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Aldershot: Ashgate 2012), p. 307, 318.

[65] A similar argument is made by M. Malik, "Progressive Multiculturalism" (2010) 17 International Journal on Minority and Group Rights 447; M. Malik, "Religious Freedom and Multiculturalism: R (Shabina Begum v Denbigh High School) " (2008) 19 K.L.J. 377, 389-390.

[66] Mummery LJ in *Copsey* EWCA Civ 932 at [34]; N. Bamforth, M. Malik and C. O'Cinneide, *Discrimination Law: Theory and Context* (London: Sweet & Maxwell, 2008) pp. 873-874; EHRC, *Human Rights Review 2012*, pp. 323 et seq.

[67] *Dahlab* is not mentioned at all and Baroness Hale was the only one to refer to *Şahin* but only to the dissenting opinion of Judge Tulkens in that case.

The reasoning in *Begum* was then applied in a number of other school cases. In *R (on the application of X) v Headteachers and Governors of Y School*[68], for instance, a female student wishing to wear a niqab veil[69] was unsuccessful in her challenge of the ban on this religiously motivated choice of garment because she had been offered a place at another school. Thus Silber J in the High Court concluded, there was no interference with her right under art. 9 ECHR.[70] The most problematic consequence of this approach was that it excluded from the outset the possibility of a balancing of interests, which can only happen at the justification stage, at which point the question of voluntary acceptance can certainly be an important factor. One can conclude that under the established case law of the courts in the UK, it is difficult to succeed with claims based on art. 9 ECHR.[71]

The relative strength of anti-discrimination law

This weakness in the protection of freedom of religion has prompted applicants to explore the anti-discrimination avenue. It is recalled that despite the UK's long tradition of anti-discrimination legislation, belief discrimination was only introduced in 2003. Its scope was extended to cover the provision of 'goods, facilities and services' in 2006.[72] Thus after 2006 the route was open to wider challenges on the basis of anti-discrimination law.

It goes (almost) without saying that the interpretation of anti-discrimination law is independent of the constraints of the HRA and the ECtHR's case law. An important consequence of this development can be seen in the High Court judgment in *Watkins-Singh*.[73] The applicant, a Sikh girl, for religious reasons insisted on wearing a Kara, which is a steel bangle with a width of about 50 millimetres. This clashed with the no-jewellery policy of her school. An exemption was not granted. The applicant was first educated in complete isolation from other students and later excluded from the school. She then attended a different school, which allowed her to wear the Kara. The applicant argued *inter alia* that the school's policy constituted indirect discrimination on the grounds of race as well as religion and belief and that such discrimination was not justified. Under the House of Lords' case law on art. 9 ECHR, the applicant would not have been successful since an alternative school existed, the school uniform policy regarding jewellery of which was laxer.[74] Silber J's judgment is in remarkable contrast to the UK courts' case law on art. 9 ECHR. First, in assessing whether the applicant has been placed at a particular disadvantage compared with other people who do not share her belief, Silber J considered the argument that such a disadvantage would only

[68] *R (on the application of X) v Headteachers and Governors of Y School* [2007] EWHC 298.
[69] A niqab veil is a veil which covers the entire face save for the eyes, *X v Y* School [2007] EWHC 298 at [1].
[70] *X v Y* School [2007] EWHC 298 at [26 et seq]; this approach was also followed in *Playfoot (a minor), R (on the application of) v Millais School* [2007] EWHC 1698 (Admin); a critical analysis of both decisions can be found in Hill, "Bracelets, Rings and Veils: The Accommodation of Religious Symbols in the Uniform Policies of English Schools" in *Law, Religious Freedoms and Education in Europe*, pp. 320-322.
[71] On the likely changes to that case law after the ECtHR's decision in *Eweida* see the above discussion.
[72] Art. 46 Equality Act 2006.
[73] *Watkins-Singh* [2008] EWHC 1865 (Admin)*; R (on the application of) v Aberdare Girls' High School & Anor* [2008] EWHC 1865 (Admin).
[74] She did in fact attend such a school after having been expelled.

exist if she was required by her religion to wear the Kara to be too strict.[75] Hence Silber J did not adopt an approach parallel to the ECtHR's on what constitutes a manifestation of a belief.

Furthermore, the High Court in *Watkins Singh* explicitly did not transplant the restrictive stance taken by the House of Lords in *Begum* on interference to anti-discrimination law. The fact that she had the choice to study at another school was of no relevance for the assessment. The specific situation rule is thus not applicable in the discrimination context. In concluding that the indirect discrimination was not justified, Silber J argued that the Kara was not as ostentatious as the religious dress which was at issue in *Begum* and *X v Y School*.[76] He also pointed out that instead of refusing the claimant the right to wear the Kara, the school should have made sure that other students understood its significance and would tolerate and accept the claimant's decision to wear it.[77]

Overall the case of *Watkins-Singh* reveals a less strict approach regarding claims based on anti-discrimination law compared with claims based on freedom of religion. This can be explained first and foremost by the House Lords' narrow interpretation of the Strasbourg case law on the question of interference. Second, it seems that the long-standing tradition of anti-discrimination legislation and case law in the UK has led to a deep understanding of the underlying doctrine and principles with which the High Court did not seem to struggle. In contrast, claims based on the HRA still appear to be somewhat 'new'. The route successfully taken in *Watkins-Singh* has been confirmed in other judgments, in particular by Employment Tribunals on working hours which conflicted with employee's religious commitments and rules on religious dress.[78] Even in cases which were unsuccessful for the claimant, the courts did not transplant the House of Lords' restrictive specific situation rule to the discrimination context. Rather the cases failed either because indirect discrimination was justified[79] or because no such discrimination could be shown.[80]

However, the Court of Appeal case of *Eweida* demonstrates that indirect discrimination is not a full substitute for freedom of religion. The claimant believed it mandatory to visibly wear a cross at all times. The Court of Appeal did not agree that she had been indirectly discriminated against by her employer, who had banned her from wearing a cross with her British Airways uniform, since she could not show that other people would be similarly disadvantaged by the ban. This is because the definition of indirect discrimination in the Equality Act 2010 requires that 'persons with whom [the claimant] shares the characteristic' are put at a particular disadvantage.[81]

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[75] *Watkins-Singh* [2008] EWHC 1865 (Admin) at [51]; of course the question whether an indirectly discriminatory measure affects the core of a person's belief or merely inconveniences them in expressing a certain personal preference may be of relevance at the justification stage, cf. *Eweida v British Airways Plc* [2010] EWCA Civ 80 at [37].

[76] *Watkins-Singh* [2008] EWHC 1865 (Admin) at [77]; this distinction is somewhat artificial as it is irrelevant here: those cases were based on art. 9 whereas *Watkins-Singh* is based on the Equality Act 2006.

[77] *Watkins-Singh* [2008] EWHC 1865 (Admin) at [85].

[78] *Williams-Drabble v Pathway Care Solutions* ET case no. 2601718/04; *Fugler v Macmillan London Hair Studios* ET case no. 2205090/04; *Noah v Sarah Desrosiers* ET case no. 2201867/07; *James v MSC Cruises Ltd* ET case no. 2203173/05; a detailed analysis can be found in Sandberg, *Law and Religion*, pp. 109-110.

[79] *Azmi v Kirklees Metropolitan Borough Council* UKEAT/0009/07.

[80] *Eweida v BA* [2010] EWCA Civ 80; *Chaplin v Royal Devon & Exeter Hospital NHS Foundation Trust* ET case no 1702886/09; *Ladele v Islington LBC*; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880; for a critical analysis of the latter two decisions, cf. Sandberg, *Law and Religion*, p. 111.

[81] S. 19 (2) Equality Act 2010.

The Court of Appeal held that it could not be established that a group of Christians existed which considered that they had to wear a cross around their neck for religious reasons,[82] so that no indirect discrimination had taken place.[83] Thus the main weakness of the law on belief discrimination is the requirement of a group disadvantage. Whereas some characteristics like gender or race rarely pose difficulties in this respect, the exact contours of a belief cannot always be objectively determined.[84] Thus it may be difficult for an individual to prove that he is a member of an affected group of people who share the same belief.[85] This shows that the law on indirect discrimination on the basis of religion does not protect a subjectively held belief as well as the ECHR, under which official doctrines are of less relevance than the individual belief of the person concerned.[86] As the ECtHR later pointed out, 'religious freedom is primarily a matter of individual thought and conscience'.[87] However, *Eweida* was unable to rely on art. 9 ECHR because of the specific situation rule. One consequence of the approach in *Eweida* was, as *Sandberg* observed, that it led to beliefs outside the mainstream being less well protected than those within.[88] In conclusion, a potential claimant in the UK would thus have been well-advised to pursue the anti-discrimination law route rather than the art. 9 route.[89] As *Sandberg* has argued, the restrictive stance by UK courts on art. 9 left it of little use.[90]

Germany

Strong protection of freedom of religion

Freedom of religion is guaranteed as a fundamental right in Art 4 GG, which has been interpreted by the FCC to encompass a right to align one's whole life to one's belief and to act in accordance with one's religious convictions. This includes not only imperative demands but also decisions based on religious convictions even where there are no compelling requirements of faith but where it is the individual's religious conviction that a certain course of action is the best and most appropriate way of dealing with a situation.[91] Compared with the ECtHR, the FCC's understanding of religious manifestations is therefore wider as it not only covers those manifestations which are an actual expression of a person's belief.

The FCC's rather wide view would not allow for a restrictive reading such as the specific situation rule. Freedom of religion under the Basic Law is engaged even where an individual

[82] The Court of Appeal's reasoning here assumes that *Eweida* considered the wearing of the cross a religious duty.
[83] *Eweida v BA* [2010] EWCA Civ 80 at [12-19]; this is criticised by L. Vickers, "Indirect discrimination and individual belief: Eweida v British Airways Plc" (2009) 11 Eccl.L.J. 197.
[84] EHRC, *Human Rights Review 2012*, 328.
[85] This was the reason Ms Eweida's claim failed in the Court of Appeal: *Eweida v BA* [2010] EWCA Civ 80.
[86] On the broad approach of the Strasbourg court, cf. Hill, "Bracelets, Rings and Veils: The Accommodation of Religious Symbols in the Uniform Policies of English Schools" in *Law, Religious Freedoms and Education in Europe*, pp. 310-311.
[87] *Eweida v UK* (App. nos. 48420/10, 59842/10, 51671/10 and 36516/10) January 15, 2013 at [80 and 89].
[88] R. Sandberg, "A Uniform Approach to Religious Discrimination? The Position of Teachers and Other School Staff in the UK" in M. Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Aldershot: Ashgate, 2012) p. 327, 341; there was some criticism that the United Kingdom's implementing legislation on the definition of indirect discrimination was not in accordance with the Framework Directive
[89] Sandberg, *Law and Religion* 108; this is echoed by Bamforth, Malik and O'Cinneide, *Discrimination Law: Theory and Context*, p. 874; confirmed by the successful outcome of *Noah v Sarah Desrosiers*.
[90] Sandberg, *Law and Religion*, p. 116.
[91] BVerfGE 32, 98 (Gesundbeter) at [106-107].

voluntarily entered into a situation and it is interfered with where the individual's right to either hold a belief or to manifest it in the described manner is restricted.[92] The possibility of voluntarily avoiding the infringement by no longer subjecting oneself to a situation would be considered as a question of proportionality when assessing the justification of an infringement. This is evident from the FCC's decision on ritual slaughter involving a Muslim butcher.[93] German law bans the slaughter of warm-blooded animals without prior stunning. Exceptions were possible where a religion prescribed that the slaughter had to happen in a particular way or where the consumption of meat of animals which had not been slaughtered in that manner was forbidden by their religion. However, the authorities did not grant an exception in this case. The FCC held this to violate the butcher's freedom of occupation coupled with his freedom of religion. Even if the actual slaughter did not constitute a religious ritual and was thus religiously neutral, a ban would also affect the butcher's customers whose decision to buy such meat was religiously motivated. The FCC considered the argument by the Federal Administrative Court in similar proceedings[94] that the customers also had the choice not to eat meat as unacceptable given the carnivorous eating habits in Germany.[95] In addition, the butcher did not need to restrict himself to selling imported meat. The decision thus stands in marked contrast to the ECtHR's decision in *Cha'are Shalom ve Tsedek v. France* where the ECtHR expressly referred to the possibility of importing meat slaughtered in a ritual manner from another country as a reason for concluding that a ban on a particular method of kosher slaughter did not constitute an interference with freedom of religion.[96] This shows that the protection of freedom of religion under the German Basic Law is more comprehensive than what the ECHR provides.

Like in the UK, religious dress has led to ample controversy in Germany. The most prominent case is that of *Ludin* where the claimant was a qualified teacher seeking employment in a state school. Most teachers in German state schools have the status of civil servant, which is a public office. Art. 33 (2) GG provides that access to a public office is based on a candidate's aptitude, qualifications and professional achievements. The provision aims at a meritocratic process, which is chiefly based on the results achieved in university and teacher training examinations. *Ludin* was one of the best of her year and would normally have been employed as a primary school teacher had it not been for her insistence on wearing a headscarf during work. The school authority refused to employ her for that reason as she was considered inept for public office. It argued that the state was under a duty to be neutral in religious matters so that a teacher, who is a representative of the state, must be neutral too. Her constitutional complaint to the FCC was successful.[97] However, the reasoning relied on a formality. The relevant administrative decision did not have a basis in legislation which would have been necessary given the interference with an important fundamental right. This meant that the state legislature in question was able to 'fix the problem' by adopting legislation stipulating that religious symbols would be banned in schools in order to ensure that the

[92] Cf. LAG Hamm 5 Sa 1782/01 at [23]; if when signing an employment contract an employee knows that the duties arising under that contract will collide with their religious duties, an employee's right to freedom of religion will not allow him to refuse performance of certain duties, cf. LAG Düsseldorf 7 Sa 581/62, Betriebsberater 1964, 597.
[93] BVerfGE 104, 337 (Schächten); confirmed in BVerfG, 1 BvR 2284/95.
[94] BVerwG 99, 1.
[95] BVerwG 99, 1, 350.
[96] *Cha'are Shalom ve Tsedek v. France* E.C.H.R. 2000-VII at [81-83].
[97] BVerfGE 108, 282 (Ludin).

state's neutrality in religious matters would be preserved. According to the FCC, such restriction might in particular be justified because of potentially conflicting interests of pupils not sharing her belief, whose negative religious freedom might be affected, and the right of parents to bring up their children according to their own beliefs.[98] As a consequence of this decision, some of the German states adopted rules effectively preventing teachers from wearing a headscarf. Challenges to these rules have hitherto been unsuccessful.[99] However, two cases are currently pending before the FCC, in which the compatibility of these rules with the GG is questioned.[100]

A certain degree of protection of religious freedom also exists in employment law and is particularly ensured by the rules on the protection against dismissal. This became evident in a 2002 case concerning a sales assistant at the perfume counter of a department store who decided to start wearing a headscarf while working.[101] The employer requested that she work without a headscarf, which she refused. As a consequence the employer terminated the employment with immediate effect stating that she was unfit to work in the department store since the store had a policy of not employing women who covered their heads, as this was unacceptable for the customers. In contrast to the *Ludin* case, the work relationship in question was governed by private law. Under German labour law, dismissal must be 'socially justified', which means that there has to be a reason for the dismissal, e.g. the employee's behaviour. Another valid reason is a characteristic of the employee, which makes her unfit to perform her duties, e.g. chronic illness.[102] This was the argument relied upon by the employer who argued that because the claimant insisted on wearing a headscarf she was unable to work as a sales assistant so that she would have to be dismissed. The Federal Labour Court disagreed with this argument and held that the employee was still capable of performing her duties as a sales assistant. Furthermore, her refusal to remove the headscarf during work could not justify dismissal on the basis of her behaviour. This would only be possible if the employer had exercised his right to direct workers proportionately. When giving instructions to employees the employer must take into account their freedom of religion under art. 4 GG.

This type of reasoning by the Federal Labour Court is an example of the indirect horizontal effect, which the fundamental right to freedom of religion has in the German legal order. By using this 'trick', German labour law was able to protect the belief of the employee even though it was invoked with regard to a private law contract. This has since been confirmed *inter alia* in a case concerning a Muslim sales assistant who refused to handle alcoholic products while working in a supermarket.[103] The Federal Labour Court held, relying on a similar reasoning to that in the headscarf case, that the refusal could not justify dismissal since the employer's instructions to handle alcohol had been disproportionate because they had not taken into account the claimant's religious convictions. The Federal Labour Court left open whether the claimant was still fit to work for the employer because the facts had not been fully established. It explicitly stated, however, that if it proved to be impossible for the employer to accommodate the employee, the dismissal might be

[98] BVerfGE 108, 282, 299 et seq; a more detailed discussion of this decision can be found in T. Lock, "Of Crucifixes and Headscarves: Religious Symbols in German Schools" in M. Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Aldershot: Ashgate, 2012) p. 347, 356.
[99] Lock, "Of Crucifixes and Headscarves: Religious Symbols in German Schools" in, *Law, Religious Freedoms and Education in Europe*, pp. 361-363.
[100] 1 BvR 471/10 and 1 BvR 1181/10.
[101] BAG 2 AZR 472/01.
[102] § 1 Kündigungsschutzgesetz (Act for the protection against dismissal).
[103] BAG 2 AZR 636/09.

justified for this reason. This would chiefly depend on whether it was possible to devise a work schedule which would avoid the employee in question having to handle alcoholic products.

In neither labour law case did the Federal Labour Court mention the possibility of the employee having voluntarily subjected themselves to the employment or that the employee had the option to leave employment. This confirms the earlier analysis that under German law the question of voluntariness is of no relevance regarding the question of interference with freedom of religion, which stands in marked contrast to the UK courts' attitude.

The neglected role of anti-discrimination law

Discrimination on the grounds of religion and belief has thus far not featured prominently in the courts in Germany. Most cases have so far arisen in the sector of employment law and in particular with regard to religious dress. Of the cases which have been brought, many were unsuccessful. As will be shown, in these cases the introduction of anti-discrimination legislation has not had a palpable impact on the decision-making by courts. But there are a handful of cases where the AGG has made a difference and which might herald a change in the initially sceptical attitude by the German courts regarding anti-discrimination cases towards a more welcoming approach.

Many cases relating to belief discrimination which came before the courts would have been resolved in the same manner before the AGG entered into force. Interestingly, many decisions, where evidently the AGG would have provided a cause of action, do not feature it at all. For instance in a case concerning the right of a Muslim pupil to pray in his school in public, no anti-discrimination argument appears to have been made. Rather, the case was only decided on the basis of freedom of religion, the infringement with which was held to have been justified.[104] The courts based their decisions chiefly on the established legal principles described in the previous section. But even where claimants based their cases on the AGG, the labour courts were often dismissive. A number of these cases related to headscarves worn by teachers, social workers and kindergarten teachers. The claimants in the cases discussed here argued that legislation banning the wearing of headscarves by public servants was in violation of art. 4 GG and the AGG. In all cases the courts discussed the art. 4 GG issue in quite some detail concluding that the legislation in question was compliant with it to protect the neutrality of the state, the pupils' own religious freedom and the freedom of the parents to bring up their children according to their own belief.[105] When examining the decisions on the question of whether a ban on the headscarf was contrary to anti-discrimination law, one can witness a parallelism in interpretation. In the headscarf cases the courts relied upon the justificatory exception of a genuine occupational requirement[106], which necessitated the discriminatory rule. In carrying out the proportionality test necessary under this exception the Federal Labour Court merely referred to its reasoning on the constitutionality of the legislation banning religious symbols.[107] No separate proportionality test was carried out. The same parallelism of argument can be witnessed in the case mentioned above concerning the Muslim employee who refused to handle alcohol at work. It is recalled that in such purely private law employment relationships fundamental rights are not directly applicable. The Federal Labour Court

[104] BVerwG 6 C 20/10.
[105] BAG 2 AZR 499/08 at [19-25]; BAG 2 AZR 55/09 at [21-26]; BAG 2 AZR 593/09 at [26-34].
[106] § 9 AGG and art. 4 Framework Directive.
[107] BAG 2 AZR 499/08 at [28]; BAG 2 AZR 55/09 at [29]; BAG 2 AZR 593/09 at [46].

had held that it could not be excluded that the employee might be unfit to perform the duties of an employee in a supermarket and could therefore be dismissed. The same reasoning was employed when the Court addressed the question whether an indirect discrimination might be justified.[108] Hence in these cases, the introduction of anti-discrimination legislation has not led to a different outcome.

In addition to sometimes ignoring anti-discrimination law, some decisions of German courts reveal insecurity in handling discrimination cases. This is demonstrated in a decision of the Berlin Labour Court, which concerned a job applicant who had previously worked for the Stasi (the GDR's Ministry for State Security, which was a repressive secret police).[109] She claimed that she had been denied the position because of her belief in Marxism-Leninism. The court accepted that Marxism-Leninism was a belief[110], which came within the scope of the AGG. But it is remarkable that the court did not resolve the case on the basis of justification, which would have been appropriate given that the applicant had previously worked in the same company as a temporary worker and that her former employment with the Stasi had led to tensions among the workforce. Instead, the court argued that there was no indirect discrimination in the first place because the applicant was not in a position comparable to that of other potential applicants as they would not share her belief. The court's decision reveals a profound confusion.[111] What the labour court was essentially arguing was that for indirect discrimination to arise there would have to be unequal treatment between two potential applicants who share the same characteristics as the claimant. Yet the court should have asked the question whether the applicant was treated differently because she belonged to a group of potential applicants who believed in Marxism-Leninism.

Another example for a confused application of anti-discrimination law is a case which arose in the state of Bavaria and concerned an allegedly discriminatory advertisement for a so-called 'Concordat chair' at a university. Concordat chairs were established on the basis of the 1924 Concordat between the Holy See and Bavaria. They are not theology chairs, where the ethos exception might apply, but chairs of philosophy, history and pedagogics. Where appointment to such a chair is made, a Catholic bishop has a right to veto the appointment. The advertisement was explicitly for a 'Concordat chair' and the applicants argued that this was in violation of the AGG. They applied for provisional measures, which the Bavarian Higher Administrative Court was unable to grant for procedural reasons. But its decision contained hints that the advertisement might not have been compliant with the AGG.[112] In the main proceedings, however, the court left the question open whether the bishop's veto right was in compliance with the AGG since neither applicant had been selected and the veto right only applied after selection.[113] This distinction is not convincing. The fact that the veto can only be exercised after a candidate has been selected does not remove the discrimination as the selection process itself is tainted by the imminent veto of the bishop, which he is certain to exercise where a chosen candidate is not a Catholic. A refusal, binding on the

[108] Interestingly, the Court did not think that the dismissal was indirectly discriminatory.
[109] ArbG Berlin 33 Ca 5772/09.
[110] The German term found in both the Directive and the AGG is "Weltanschauung", which denotes a philosophy of life.
[111] The Berlin Labour Court (correctly) also pointed out that the actual reason for the defendant's refusal to employ her was not so much the fact that she may have been a Marxist but the fact that she had worked for the Stasi.
[112] BayVGH 7 CE 09.661 and 7 CE 09.662 at [34].
[113] BayVGH 7 ZB 11.2606.

appointing minister, by the bishop to appoint a candidate because of their religious background constitutes direct discrimination and is not justifiable under the religious ethos exception.[114]

Despite these examples of poor understanding of anti-discrimination law, there are two cases which demonstrate that the ban on belief discrimination under the AGG has produced new remedies, which would not have existed before its entry into force. In one case similar to the one on the concordat chair, a job advertisement for a position with a pension scheme for people employed by the Lutheran church stipulated a requirement that the applicant be a member of a Christian church.[115] The deciding court found that the religious ethos exception did not apply because the pension scheme did not perform any duties related to the church's Christian ethos. The other case, which might indicate a change in attitude towards the AGG and a heightened awareness of the remedies it provides dealt with a claim by a young woman who had been refused employment as a trainee dental assistant because she made it clear that she would have to wear a headscarf during work. The Berlin Labour Court found indirect discrimination and did not accept the dentist's arguments relating to health and safety or his desire for dental assistants to wear uniform clothing. The Labour Court therefore awarded the claimant compensation for non-pecuniary damage suffered.[116]

This survey of case law has revealed that initially not much changed since the entry into force of the AGG. Most cases were resolved on the basis of doctrine applicable before 2006. Arguments based on the AGG are usually dismissed with the same reasoning as arguments based on 'traditional' labour law. This author was only able to identify two cases where the AGG has had an impact. In both cases an employment contract had not yet been concluded and the applicant had been denied a position based on their religion. The relative unimportance of the AGG in German case law with a belief discrimination angle has two main reasons. The first is that, in contrast to the UK, stronger protection on the basis of freedom of religion was already in place before the entry into force of the AGG. The second reason is that both courts and counsel do not appear to be comfortable deciding traditional labour law disputes on this basis. In addition, one can witness that multiple discrimination does not feature in the case law.[117] Many cases, in particular those dealing with the headscarf, would have lent themselves to arguments of indirect sex discrimination and indirect race discrimination but these finer points of anti-discrimination law seem to have escaped the parties and the courts.

Comparative analysis and possible explanations

The preceding survey of British and German case law has revealed a profound difference in the approaches taken by the national courts. While in the UK a claim has hitherto been far more likely to be successful on the basis of anti-discrimination law, in Germany there is only little evidence for

[114] § 9 AGG implementing art. 4 (2) Framework Directive.
[115] LAG Hessen 3 Sa 742/10; another, similar, case failed because the applicant did not have the necessary qualifications for the position advertised so that she could not establish indirect discrimination, BAG 8 AZR 466/09.
[116] ArbG Berlin 55 Ca 2426/12.
[117] U. Sacksofsky, *Mittelbare Diskriminierung und das Allgemeine Gleichbehandlungsgesetz http://www.antidiskriminierungsstelle.de* [Accessed June 3, 2013] pp. 15 et seq; Lock "Of Crucifixes and Headscarves: Religious Symbols in German Schools" in *Law, Religious Freedoms and Education in Europe*, p. 364.

the success of this remedy. Rather, a successful German case is usually decided on the basis of freedom of religion. The following paragraphs are an attempt to provide an explanation for this divergence.

One possible explanation can be found in the difference in relative legal value of anti-discrimination law provisions in Germany and the UK. As explained above, the HRA, which protects freedom of religion, merely allows for declarations of incompatibility of legislation whereas in cases of belief discrimination a British court would be under an EU law obligation to disapply an Act of Parliament. In this sense, a claim based on the Equality Act can be regarded as stronger than a claim based on the HRA. However, there is no evidence in the case law of the UK courts that such thinking informs their decision making. In addition, no case has thus far arisen where an Act of Parliament was in conflict with either the Equality Act 2010 or art. 9 HRA. By contrast, in the German context this argument might be applicable. While every German court, by virtue of the principle of supremacy, is obliged to disapply any legislation conflicting with the requirements of the EU Directives, the FCC has even greater powers when it comes to conflicts with art. 4 GG in that it may annul conflicting legislation. This is coupled with a lack of jurisdiction of the FCC over anti-discrimination law because a case before it must be exclusively argued on the basis of the GG. This means that a claimant is well-advised to argue the case under art. 4 GG as well as anti-discrimination law. Otherwise, recourse to the FCC might be barred.

Another possible explanation would be tradition. The UK has a longer tradition of anti-discrimination law than Germany, whilst Germany has a longer tradition of human rights review than the UK. The findings of the above case study suggest that this tradition is reflected in the outcome of cases in both countries. Whereas the impact of anti-discrimination law on the outcome of German cases has hitherto been small, its impact in UK law has been a lot greater. This is coupled with the above-mentioned scepticism of anti-discrimination law in Germany, which is seen by many as an undue interference with the constitutionally guaranteed concept of private autonomy. But this alone may be too superficial an explanation. After all, in other areas of anti-discrimination law, there has been a surge of case law in Germany and many cases have been successful. This is particularly so in cases concerning age discrimination.[118] The same is true for the UK, which since the entry into force of the HRA has experienced a human rights revolution.[119]

The most important reasons in the eyes of this author are the differences in the set-up of the legal system in the two countries. The main cause for the weakness in the protection of religious freedom in the UK is the mirror principle, which forces UK courts to follow the case law of the ECtHR. Due to the mirror principle, the UK courts have so far applied the ECtHR's specific situation rule in

[118] German courts have been very active in requesting preliminary references in age discrimination cases, e.g. in the following cases: *Sabine Hennigs v Eisenbahn-Bundesamt and Land Berlin v Alexander Mai* (C-297/10, C-298/10) September 8, 2011; *Gerhard Fuchs and Peter Köhler v Land Hessen* (C-159/10, 160/10) July 21, 2011; *Reinhard Prigge and Others v Deutsche Lufthansa AG* (C-447/09) September 13, 2011; *Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH* (C-45/09) [2010] E.C.R. I-9391; *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* (C-341/08) [2010] E.C.R. I-47; *Colin Wolf v Stadt Frankfurt am Main* (C-229/08) [2010] E.C.R. I-1; *Kücükdeveci* (C-555/07) [2010] E.C.R. I-365; *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* (C-427/06) [2008] E.C.R. I-7245; *Mangold* (C-144/04) [2005] E.C.R. I-9981.

[119] Cf. V. Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009) pp. 62 et seq., who calls the HRA the cornerstone of the new British constitution.

cases argued on the basis of religious freedom leaving claimants with little protection. In contrast, German courts are not confined to basing their decisions on the ECHR as interpreted by the ECtHR. They must (also) apply the more far-reaching art. 4 GG. For them, this reduces the need to rely on anti-discrimination law in many cases. Furthermore, the tactical considerations referred to above are important. Applicants can only invoke fundamental rights guaranteed in the Basic Law before the FCC. In addition, the main points of reference for the lower courts are the Basic Law and the FCC's case law. This is coupled with a lack of pertinent case law by the CJEU, which has famously not decided a single belief discrimination case. These differences in the respective legal orders are compounded by a lack of consensus as to how religious practices of minority religions should be accommodated.[120] The protection of minority religions is a highly controversial topic in most European societies. The legal frameworks differ considerably and so does the relationship between church and state, which is often historically determined. This seems to confirm *O'Cinneide's* more general argument that there is no evidence of a deeper European consensus underlying European equality law.[121] This lack of consensus thus becomes evident in judicial practice.

Towards a common approach?

Having sketched out the main tendencies in British and German case law, it is time to return to consider whether there is a trend towards a common European-wide approach. The comparative analysis shows that there are still considerable differences in the approaches taken by the courts in the UK and Germany. Thus the question is whether the success of earlier anti-discrimination provisions, such as those on sex discrimination, can be replicated with newer characteristics such as religion and belief.[122] A similar development is currently taking place in age-discrimination cases, where the CJEU is very active. In other words, it seems appropriate to try and gauge the potential for the convergence of standards in this area towards a common European approach in the Member States. While the ECtHR has already dealt with numerous complaints based on art. 9 ECHR, the CJEU has not yet had an opportunity to pronounce itself on belief discrimination or indeed freedom of religion under the CFR. The European Commission seems reluctant to instigate infringement proceedings against Member States in fundamental rights cases. At the same time it is only a matter of time until a national court will make a reference to the CJEU on belief discrimination. There is evidence that pressure groups are making suggestions to that effect to national courts. For instance in a headscarf case currently pending before the German Federal Constitutional Court, the Open Society Institute suggested just that in an amicus curiae brief.[123] It is unlikely that the FCC will follow this suggestion as it does not consider itself to have jurisdiction to review the compatibility of German law with EU law[124], but the amicus curiae brief shows that pressure groups have identified the issue and are keen to involve the CJEU in the discussion.

[120] O'Cinneide, "The Uncertain Foundations of Contemporary Anti-Discrimination Law" (2011) 11 International Journal of Discrimination and the Law 11.
[121] O'Cinneide "The Uncertain Foundations of Contemporary Anti-Discrimination Law" (2011) 11 International Journal of Discrimination and the Law 11.
[122] On the principle of sex discrimination cf. Ellis and Watson, *EU Anti-Discrimination Law*, pp. 23 et seq.
[123] Open Society Justice Initiative, "Observations in the cases 1 BvR 471/10 and 1 BvR 1181/10", *http://www.opensocietyfoundations.org/sites/default/files/domestic-headscarves-observations-eng-20120305.pdf* [Accessed June 3, 2013].
[124] BVerfGE 115, 276 (Sportwetten) at [77].

After all, most of the provisions on religious freedom or belief discrimination have European roots and are under the supervision of at least one of the European courts. Yet one needs to be conscious of the limits to such common development. First, the ECtHR often accords Member States a margin of appreciation in cases based on art. 9 ECHR.[125] This is because the relationship between state and religion differs considerably from country to country, with e.g. France opting for secularism (*laïcité*)[126] and countries with a state religion like Denmark so that there is no European consensus on these issues. Based on the notion of subsidiarity, the margin of appreciation doctrine allows the respondent state concerned to exercise a degree of discretion when it comes to restricting freedom of religion under the Convention, which is free from the scrutiny of the ECtHR. Nonetheless, the ECtHR is adamant that the margin of appreciation is under European supervision, but in the past the Court has been reluctant to find a respondent state to have exceeded that margin. Only in the recent case of *Eweida* did the Court reach such a finding with regard to the first of four applicants.[127] A more activist approach such as this cannot therefore be completely ruled out. But given the sensitivities involved in cases dealing with freedom of religion and taking into account the Court's reluctance to find violations of art. 9 ECHR in the past, it seems unlikely that it will make a significant contribution towards a common approach on the balancing of divergent interests. In particular, one should take into account the specific facts of *Eweida's* case, in which none of the domestic courts had carried out a proportionality test. This is because her claim had been deemed unfounded on the basis of art. 9 ECHR because of the specific situation rule and under belief discrimination because the Court of Appeal did not consider there to be a group disadvantage. It is suggested that for this reason the ECtHR felt the need to determine the proportionality of the uniform policy itself.

Second, the jurisdiction of the CJEU has its limits, too. Potential cases dealing with belief discrimination are likely to reach the CJEU as preliminary references from national courts under art. 267 TFEU. While the CJEU does not operate a margin of appreciation doctrine, it conceptualises its relationship with national courts as one of cooperation, leaving the application of the facts of the case to them.[128] It follows from this relationship that in theory the CJEU does not carry out the proportionality test because it is its role to interpret EU law and not to apply it. Yet there is ample evidence in case law where the CJEU conducted the proportionality exercise itself.[129] In a similar vein, the CJEU does not normally make an assessment as regards the objective justification for indirect discrimination. Again, it is normally for the national courts to come to a conclusion on these points.[130] But there are cases in which the CJEU provided national courts with detailed guidelines on

[125] E.g. in *Lautsi and Others v Italy* [GC] E.C.H.R. 2011 at [68 et seq]; *Dahlab* E.C.H.R. 2001-V; *Şahin* E.C.H.R. 2005-XI at [109 et seq]; interestingly in *Eweida*, the ECtHR held with regard to Eweida's case that the state had exceeded its margin of appreciation, *Eweida v UK* (App. nos. 48420/10, 59842/10, 51671/10 and 36516/10) January 15, 2013 at [94]; on the margin of appreciation in general cf. G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007) p. 80.

[126] M. Hunter-Henin, "Why the French don't like the burqa: laïcité, national identity and religious freedom" (2012) 61 I.C.L.Q. 613.

[127] *Eweida v UK* (App. nos. 48420/10, 59842/10, 51671/10 and 36516/10) January 15, 2013 at [94].

[128] *Da Costa* (28/62, 29/62, 30/62) [1963] E.C.R. 31; *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* (C-476/99) [2002] E.C.R. I-2891 at [40].

[129] E.g. in the anti-discrimination context in *Kreil v Bundesrepublik Deutschland* (C-285/98) [2000] E.C.R. I-69 at [23-29]; *Lommers* (C-476/99) [2002] E.C.R. I-2891 at [41 et seq]; for further examples regarding free movement law, cf. P. Craig, *EU Administrative Law*, 2nd edn(Oxford: Oxford University Press 2012) pp. 617-622.

[130] *Bilka Kaufhaus GmbH v Karin Weber von Hartz* (170/84) [1986] E.C.R. 1607, para 36.

which factors could be taken into account.[131] There is no clear pattern as to when the CJEU engages in a proportionality review of its own[132] and it is therefore impossible to predict how the CJEU would deal with cases alleging discrimination on the basis of religion. On the one hand past case law shows that the CJEU has had the courage to decide detailed questions of proportionality in anti-discrimination law, in particular in the field of sex discrimination.[133] On the other hand, its case law shows a reluctance to decide questions touching on deeply enshrined national constitutional values, which form part of a Member State's national identity and are protected by art. 4 (2) TEU.[134] For instance in *Omega*, the CJEU respected an argument made by Germany based on its constitutional concept of human dignity thereby allowing Germany to restrict the claimant's freedom to provide services under what is now art. 56 TFEU. When it comes to potential cases of belief discrimination, the national rules at stake might equally be part of the national identity. In particular state-church relationships tend to be of such quality, for instance the principle of *laïcité* in France.[135] Thus while the CJEU was rather willing to carry out a proportionality test in its earlier anti-discrimination case law, it has equally shown a degree of sensitivity for important constitutional values.

Conscious of these limits, one can identify three fields in which an alignment of the case law, if not convergence, has the potential to occur. First, it is clear that there is still potential in the German courts to improve their understanding of anti-discrimination law in general. This is likely to occur over time with an increase in CJEU case law on these questions. In particular, German courts have yet to develop an approach towards multiple discrimination, which so far has not featured in cases concerning discrimination on the basis of religion. From the latest case law of German courts one can already infer that they are becoming more comfortable with anti-discrimination law. For instance in the case mentioned above concerning a dental assistant who was dismissed for wearing a headscarf during work, the Berlin Labour Court based its decision solely on anti-discrimination law. In contrast to decisions by other German courts, it did not resort to established causes of action but applied the 'new' remedy laid down in the AGG instead.

Second, the courts in the UK are likely to follow the ECtHR's reversal of the specific situation rule in *Eweida*. Hence one can expect the strengthening of art. 9 ECHR to be replicated in British law. This would mean that cases such as *Begum* concerning religious dress and religious symbols will have to be resolved on the basis of whether a rule restricting them was proportionate.

The third area with the potential for convergence is proportionality. As already mentioned, there are procedural constraints on a common European development in both the EU and the ECHR legal order. It should be pointed out that the same factors feature in the proportionality exercise for justifying indirect belief discrimination and in the exercise of whether interference with freedom of religion is justified.[136] Recent academic discussion has revolved around the introduction of a

[131] E.g. *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG* (171/88) [1989] E.C.R. 2743 at [15]; *Nimz v Freie und Hansestadt Hamburg* (C-184/89) [1991] E.C.R. I-297 at [14].
[132] For explanations cf. Craig, *EU Administrative Law*, pp. 629 et seq.
[133] E.g. *Kreil* (C-285/98) [2000] E.C.R. I-69; *Lommers* (C-476/99) [2002] E.C.R. I-2891.
[134] On the national identity clause in general cf. A. von Bogdandy and S. Schill, "Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty" (2011) 48 C.M.L.Rev. 1417.
[135] This seems to be the view of the French Constitutional Council, Décision n° 2004-505 DC (19 November 2004) at [18].
[136] E. Howard, *Law and the Wearing of Religious Symbols* (Abingdon: Routledge 2012), p. 119.

reasonable accommodation doctrine in cases of freedom of religion and belief discrimination.[137] The concept of reasonable accommodation exists in European law only with regard to disability discrimination. According to art. 5 of the Framework Directive the employer is under a duty to take appropriate measures to accommodate a person with a disability in the employment context. It has been suggested that in the context of belief discrimination a similar duty ought to be introduced as the situation of a disabled person and a person with a belief were similar.[138] It is argued that the similarity is that in both cases the discrimination does not normally relate to the characteristic as such but to its effects.[139] A disabled person may not be able to work in a specific work environment, so that the employer must adapt the environment. The same is often true for belief discrimination where the effects of the employee's religious convictions (e.g. not being allowed to work on certain days of the week) clash with the employer's policies or practices. For this reason, it is argued that the employer's effort, or lack thereof, to provide reasonable accommodation should inform the proportionality test.[140] Reasonable accommodation has its origin in the United States Civil Rights Act 1964.[141] That legislation requires that the employer must demonstrate 'that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.' Thus the introduction of a duty to accommodate an employee would shift the burden onto the employer. The employer would have to show that they were unable to accommodate the employee. The question of whether an employee can be accommodated has already been an important consideration in some of the decisions mentioned in this article.[142] But reasonable accommodation has so far not been formally introduced. It would go beyond the remit of this article to discuss the vices and virtues of the reasonable accommodation doctrine.[143] But it could be argued that reasonable accommodation could make the proportionality test more rational and provide fixed guidelines. The question, however is whether in view of the limits to the European courts' jurisdictions such a development is likely to occur in the absence of a change in legislation. In this context one should point to the ECtHR's decision in *Eweida*, in which reasonable accommodation had been explicitly referred to by some of the interveners[144], but the Court itself remained silent on it. This suggests that it did not wish to introduce this concept as a doctrine in the law of the ECHR. Equally, it is unlikely that the

[137] E.g. by K. Alidadi, "Reasonable accommodation for religion and belief: adding value to art. 9 ECHR and the EU's anti-discrimination approach in employment" (2012) E.L.Rev. 693; Howard, *Law and the Wearing of Religious Symbols*, 128 et seq; L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart Publishing, 2008) p. 220; M. Malik, "Religious freedom, free speech and equality: conflict or cohesion?" (2011) 17 Res Publica 21; L. Waddington, "Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability?" (2011) 36 NTM/NJCM-Bulletin.

[138] Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, p. 130.

[139] Connolly, *Discrimination Law*, 73.

[140] E.g. by Alidadi, "Reasonable accommodation for religion and belief: adding value to art. 9 ECHR and the EU's anti-discrimination approach in employment" (2012) E.L.Rev. 698; A. Somek, *Engineering Equality* (Oxford: Oxford University Press, 2011), p. 182 goes even so far to suggest that without accommodation anti-discrimination law is empty.

[141] Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 185 et seq; a similar duty exists in Canada, Vickers, 198.

[142] E.g. the German decision regarding a Muslim employee refusing to handle alcohol.

[143] For this cf. the discussions by Alidadi"Reasonable accommodation for religion and belief: adding value to art. 9 ECHR and the EU's anti-discrimination approach in employment" (2012) E.L.Rev. 693; Vickers, *Religious Freedom, Religious Discrimination and the Workplace*; Waddington, "Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability?" (2011) 36 NTM/NJCM-Bulletin.

[144] *Eweida v UK* (App. nos. 48420/10, 59842/10, 51671/10 and 36516/10) January 15, 2013 at [78].

CJEU will introduce reasonable accommodation of its own accord. Even in the absence of legislation, a progressive interpretation of proportionality can result in a *de facto* duty to accommodate.[145] In particular with regard to the fact that reasonable accommodation has been explicitly legislated for in for the area of disability discrimination, it would be rather brave for the CJEU to extent this concept to other characteristics in the absence of a change in the Directive itself. This confirms the above assumption that it is unlikely that one of the two European courts will introduce a sophisticated explicit proportionality or reasonable accommodation test.

In addition to these three specific fields in which developments may occur, there is one great unknown: the EU's Charter of Fundamental Rights. It is obvious that the Charter gives the CJEU a potent tool for the development of a common human rights standard throughout the European Union. But neither its applicability within the Member States' legal orders nor its substantive content have been fully determined yet. This is coupled with a seeming reluctance on part of the European Commission to enforce compliance with the Charter by initiating infringement proceedings against Member States. While it cannot be ruled out that domestic courts will arrive at a convergent approach by themselves, very much will depend on how brave the European courts will be in developing their case law and in thereby setting and refining European-wide standards. It is in particular unclear in how far the European courts are likely to engage in a detailed review of proportionality and narrowing the margin of appreciation given to states on these questions. In view of the sensitivity of cases pertaining to the realm of law and religion, this is unlikely to occur.

[145] Waddington, "Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability?" (2011) 36 NTM/NJCM-Bulletin 192.