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# Law and Religion in the Workplace

## Droit et religion au travail

*Proceedings of the XXVII<sup>th</sup> Annual Conference  
Alcalá de Henares, 12-15 November 2015*

*Actes du XXVII<sup>ème</sup> colloque annuel  
Alcalá de Henares, 12-15 novembre 2015*



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MIGUEL RODRÍGUEZ BLANCO (ed.)

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These proceedings are dedicated to Professor Richard Puza  
who was elected to the European Consortium  
for Church and State Research in 1999  
and became an emeritus member in 2014.

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## PREFACE

This volume contains the proceedings of the XXVII<sup>th</sup> Annual Meeting of the European Consortium for Church and State Research, held in Alcalá de Henares during the days 12-15 November 2015, about the topic “Law and Religion in the Workplace”.

The conference was divided in five working sessions. Each session was introduced by a paper, making a comparative pan-European analysis, and suggesting themes for group discussion. These papers are published in the first part of this book: 1) Religious freedom at work; 2) Religious ministers and labour law; 3) Autonomy of churches and human rights of the workers; 4) Religion in the workplace in the case-law of the European Court of Human Rights; 5) Indirect discrimination and reasonable accommodation in the manifestations of religion in the workplace.

The second part of the book contains the national reports delivered from participants from the European Union countries. The reports gave responses to the following questions addressed in the *grille thématique* distributed among the delegates:

**I. Religious freedom at work.** How does your national law deal with religious freedom at work? In particular:

- a) What are the key instruments or sources of law on religious freedom at work in your country? What are the key elements of this law? How is religion defined? Are non-religious beliefs protected?
- b) Which manifestations of religious beliefs are protected?
- c) What is the rationale of the approach? Is it ‘equality’ or ‘religious freedom’ or both or is there some other foundation?
- d) What effect, if any, has the jurisprudence of the European Court of Human Rights had in the national approach?

**II. Religious ministers and labour law**

- a) What is the definition of religious minister according to the secular law of your country?

- b) What is the labour *status* of religious ministers when working for their respective denominations?
- c) What is the labour *status* of religious ministers when working in other institutions? (chaplains, teachers of religions in schools etc)
- d) Are ministers of all denominations subject to the same labour law *status*?
- e) What case-law has developed regarding the work of ministers of religion?

### **III. Autonomy of churches and human rights of the workers**

- a) In what terms is the autonomy of churches recognized in your country? Is it considered a manifestation of the collective dimension of religious freedom?
- b) Are churches exempted from the general norms concerning anti-discrimination? To what extent?
- c) What effects, if any, has European Union law had in this area?
- d) What case-law has developed in this area?

I am pleased to record my gratitude to the institutions and entities which have contributed to the XXVII Annual Meeting of the European Consortium for Church and State Research: *Universidad Internacional de La Rioja, Universidad de Alcalá* and *Banco Santander-Universidades*. The meeting was planned as a central activity of the research project DER2013-45649-P. This project, funded by the Spanish *Ministerio de Economía y Competitividad*, has supported also the publication of this book.

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## THEMATIC OVERVIEW



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# RELIGIOUS FREEDOM AND ACCOMMODATION OF CONFLICTING WORLDVIEWS IN THE WORKPLACE

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## 1. INTRODUCTION

Religion has shown a remarkable resilience. It has survived the process of modernization and secularization, overcoming powerful intellectual adversaries, such as Enlightenment, Positivism, Scientism, Marxism, Darwinism, materialism, pragmatism and utilitarianism. Similarly, it overcame the processes of urbanization, industrialization and proletarianization<sup>1</sup>. It also managed to adapt to the universalization of education, scientific and technological development, democratization and market economy. In the twenty-first century religion presents great vitality in some of the most advanced states and in emerging economies. It remains a core aspect of individual and collective identity, ethos and sense of purpose.

The events of September 11, 2001 sharpened the awareness of this phenomenon<sup>2</sup>. More recently, the rise of the Islamic State has reignited the fears of religious fundamentalism. Religious extremism is seen as a fundamental danger<sup>3</sup>. But this is not just a problem of the secular west against the religious rest. The emergence of a serious moral and financial crisis affecting the global economic system has led some to speak of about the need to reintroduce moral and religious discourse in the sphere of public political and economic discourse<sup>4</sup>. Others go as far as to speak about the need of a new spirituality of work in the twenty-first century<sup>5</sup>.

On the one hand, religion remains important in the BRIC countries. Brazil is known for its religious vitality. India remains strongly religious. Russia went back

<sup>1</sup> (WALD 2009, 471 ss).

<sup>2</sup> (ZAHEER 2007, 497).

<sup>3</sup> (GUIORA 2009, 753 ff).

<sup>4</sup> (SANDEL 2012, 3 ff).

<sup>5</sup> (GOMEZ 2006, 791 ss.).

to its Christian Orthodox roots, while China became the largest Bible printer in the world<sup>6</sup>. Not less significant is the fact that something is going on that may affect the future structural performance of secularism. Some influential western secular intellectuals, such as Jürgen Habermas<sup>7</sup>, Antony Flew<sup>8</sup> and Thomas Nagel<sup>9</sup>, have made public their inner misgivings about the rational viability and consistency of the secular worldview.

At the same time, the world has been getting smaller and more globalized. Societies are now more complex and diverse. Different worldviews – religious and secular – along with multiple traditions, habits, norms, customs and rites are called to coexist within a constitutional and legal framework. Religious diversity has increased dramatically in the West<sup>10</sup>. This framework is not really neutral from a religious and moral point of view, even when it presents itself as secular. It always relies on some hidden religious, philosophical and moral assumptions<sup>11</sup>.

Since most members of these diverse societies have to work together to feed themselves and raise their families, this state of affairs confronts us with delicate issues regarding the presence of religion in the workplace, whether in public employment relations – subordinate to constitutional principles and the pursuit of the public interest – or in private employment relationships, where contractual freedom and the pursuit of particular interests prevail. This raises important questions of worldview-based persecution and discrimination in the workplace that concern individuals members of majority and minority religions or of no religion at all.

The solution to these questions requires the definition and balancing of the competing rights and interests of employers, employees and the community as a whole. Freedom and equality are the cornerstones of today's Constitutional State. Both the national constitutions of most western states and international human rights law provide for freedom of religion, the right to work and the principle of equality and non-discrimination in labor relations.

The Declaration of Philadelphia of 1944, which restated the objectives of the International Labor Organization (ILO), affirmed that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity. A few years later, the Universal Declaration on Human Rights of 1948, proclaimed that everyone has the right to work regardless of race, color, sex,

<sup>6</sup> (JENKINS s.d.).

<sup>7</sup> (HABERMAS 2001).

<sup>8</sup> (FLEW 2007, 35 ff, 157 ff.).

<sup>9</sup> (NAGEL 2012).

<sup>10</sup> (COLOMBO 2013, 12).

<sup>11</sup> (AHDAR 2013, 404 ff).

language, religion, political or other opinion, national or social origin, property, birth or other status<sup>12</sup>.

Both declarations inspired, among others, the ILO Discrimination (Employment and Occupation) Convention (No. 111)<sup>13</sup>. Since then, the harmonization of religious freedom with other relevant rights in the workplace became an increasingly critical point on the external efficacy, or horizontal effectiveness of fundamental rights against third parties<sup>14</sup>. At this time we will add only a few brief notes on this important issue, with special attention to some problems facing the private sector.

## 2. FREEDOM OF RELIGION IN THE WORKPLACE

### 2.1. Religion and Work

There are many points of contact between religion and the workplace. In the ancient world, religion could have various meanings and purposes. It could have cosmological, fertility and political dimensions and manifestations. Sometimes it celebrated the beauty and regularity of the Sun, the Moon and the Stars. It could also be related to the natural cycles of sowing and harvesting. In many cases it served the purpose of justifying and legitimizing the political power of the Emperor-God. This state of affairs was abruptly challenged in the book of Exodus, when Moses confronted the Egyptian Pharaoh, descendent of Ra (Sun God), in the name of the God of the forced workers. Suddenly, work and working conditions acquired a religious and political relevance. Moses denounced oppression, promoted collective action and labor liberation and offered the vision of an alternative society, based on law and justice<sup>15</sup>.

The Exodus narrative established an indissoluble connection between human dignity, freedom, including freedom from basic physical and social needs, and work. For the first time in the ancient world, the domain of labor relations acquired a moral, religious and transcendent meaning, in a way that echoed to this day<sup>16</sup>. The fact that the God of the slaves had confronted the gods of the emperors reverberated throughout the centuries. Since then, the Judeo-Christian thought on the dignity of work and of workers influenced Martin Luther, John Calvin, John Locke, Adam Smith, Immanuel de Siéyès, Karl Marx and Martin Luther King Jr., in areas such as weekly rest, salary payment obligation, prohibition of inhumane conditions and the notion of peasant and worker oppression as injustice. Much of the labor legislation

<sup>12</sup> Articles 2.º and 23.º of the UDHR.

<sup>13</sup> Adopted in 25 June 1958 and entered into force in 15 June 1960.

<sup>14</sup> (CANOTILHO 2003, 1285 ff).

<sup>15</sup> (BECKER 2004, 28 ff.).

<sup>16</sup> (SANGER 1996, 177 ff).

enacted in order to protect the rights of workers and to combat discrimination had a religious background<sup>17</sup>.

The second connection between religion and labor law has to do with the fact that the workplace is often the space / time where the individual spends most of his/her life. The Protestant Reformation, through the contributions of Luther and Calvin, is widely known to have stressed this intimate connection between religious conviction and secular vocation, exploring the bond between religious morality, work ethic and social ethic<sup>18</sup>. This link was clearly perceived by Adam Smith in Calvinist Scotland, for whom political economy was inseparable from moral philosophy<sup>19</sup>. Max Weber popularized this connection, albeit in a highly debatable way<sup>20</sup>. We still feel this strong connection in the German language Martin Luther helped so much to consolidate. In the life of the individual person, work plays a dual role.

On the one hand, it helps him/her to identify and realize his/her sense of *calling, mission and purpose (Lebensaufgabe)*, a substantial part of which may depend on his/her religious convictions. This makes the concept of *profession (Beruf)* closely linked to that of *vocation (Berufung)*, and provides ordinary work with inherent meaning. On the other hand, it allows him/her to guarantee the *material basis of existence (Lebensgrundlage)* and to provide for him/herself, family and religious community and to make a valuable contribution to society<sup>21</sup>. Although Protestantism emphasized these ideas, they have always been present in Catholic thought, having been restated in modern times by the Papal Encyclical *Rerum Novarum*, of 1891.

This is why the rights of economic initiative and work are part of a broader set of fundamental rights of the economic life (*Grundrechte des Wirtschaftslebens*), being a part of the constitutional framework of an order of economic freedom and competition. Work, in a broad sense, is an important means of personal fulfilment and social and economic self-determination<sup>22</sup>. Hence the importance of the theme of religion in industrial relations, and there will be large areas of overlap and tension. So it is important in this field to guarantee the right not to “pretend to be someone else” in the workplace, understood as the right not to be required to put religion “in the closet”.

Work is intimately linked to the free development of personality, to the individual contribution to society and to the immediate satisfaction of basic personal and family economic, social and cultural needs<sup>23</sup>. This means that work is inseparable from

<sup>17</sup> (KÖHLER 2008, 975 ss).

<sup>18</sup> (ARRUÑADA 2010, 890 ff).

<sup>19</sup> (BLOSSER 2011, 46 ff).

<sup>20</sup> (WEBER (1904) 2010).

<sup>21</sup> We borrow the expressions from the decision “*Apotheken Urteil*”, BVerGE, 7, 377, of the German Constitutional Court.

<sup>22</sup> (BERKA 2010, 506 ff).

<sup>23</sup> (NIEDRICH 2011, 28).

fundamental questions about human dignity and human rights. It is deeply concerned with the discussion around the same values and ethical questions with which religion has struggled over the centuries, such as those relating to the dignity of manual and intellectual work, the worker's status, working conditions, the days of work and rest, salary, wages, the right to strike, the purpose of work, social support in the event of unemployment, sickness, aging and disability or taxation<sup>24</sup>. Besides, working time and conduct frequently conflict with religious mandates in areas such as worship, religious observance, symbols, dress, food and permissible behavior and social interaction, raising legal questions concerning dismissal and accommodation<sup>25</sup>.

## 2.2. Theoretical Framework

At first, the relation between freedom of religion and labor law may not seem especially difficult and complicated. One might think that it raises trivial legal issues to resolve in the calm and tranquil waters of the constitutional principles of dignity, religious freedom and equality, along with its corollaries of separation between the confessions and the state and the religious neutrality of public authorities.

However, this calm is dangerously misleading, since it conceals the existence of deeper issues involving the debates concerning worldviews and cultural diversity, the need for a minimum of cultural homogeneity within societies, the tension between modernity and secularization, and the defense of Judeo-Christian foundations of the western Constitutional State in the face of the challenges of militant secularism and political Islam. Behind the affirmation of these principles, the workplace is today at the center of intense cultural and ideological battles<sup>26</sup>.

It has become an increasingly critical point of daily test of religious freedom<sup>27</sup>. Even the search for an appropriate model with which to understand the relation between freedom of religion and labor law has proved to be a difficult and controversial task. We will consider two basic models<sup>28</sup>.

### 2.2.1. *Systems theory*

A model that has been proposed to understand the relationship between religion and the work is based on the use of systems theory. This model aims at describing the process of modernization, secularization and functional differentiation of various social subsystems<sup>29</sup>. According to it, religion should not attempt to provide a met-

<sup>24</sup> (KHAN 2001, 289 ss).

<sup>25</sup> (DINGEMANS, et al. 2013, 373 ss).

<sup>26</sup> (SEIFERT 2009, 530).

<sup>27</sup> (SOSSIN 2009, 486 ff).

<sup>28</sup> (J. E. MACHADO 2010, 9 ff).

<sup>29</sup> (LUHMANN 1995).

anarrative of all social life. This would threaten individual and collective political, religious, economic, social and cultural freedoms. Religion is nothing but a simple self-referential functionally differentiated social subsystem, coexisting with many other subsystems such as politics, economy, science, culture, etc.<sup>30</sup>.

Religion is a meaning producing social system, capable of unifying the diverse and chaotic social experience and provide a coherent framework for the immanent and transcendent, physical and metaphysical, material and ideal elements of human existence. It is able to perform this function even in the absence of scientific and empirical experimentation and verification. According to systems theory, each system has its own function, logic, code and rules. All subsystems tend to be relatively closed, while at the same time exchanging some information with each other<sup>31</sup>. Religion is the realm of doctrine, creed, worship, symbol and rite. It distinguishes itself from the other social systems by producing a sense of the transcendent, spiritual and sacred that separates it from the other systems.

This view assumes a sharp distinction between a religious sphere and its secular environment. It places worship, organized religion and religious activity within the closed and *autopoietic* religious system. It relegates economics and the workplace to the domain of the immanent, the material and the profane. The business activity of a corporation is seen as a purely secular activity. Once taking part in the economic system, by means of his/her work, the individual must conform to the code of that system and leave behind all the traces of its participation in politics or religion. He/she must accept the logic of the economic and labor market, premised on the relation between supply and demand, and abide by its rules. Competitiveness, productivity, customer service and consumer satisfaction are some of the most important rules of the system. In order to live in the modern society, men and women must learn to compartmentalize their lives and parts of their days<sup>32</sup>.

Underlying this model is the assumption that religion is essentially a vestige of mankind's mythical and irrational existence, which should contained in order not to contaminate other domains of life where rationality and progress have made significant advances. The problem is that it underestimates how the functioning of all spheres of life requires the explicit or implicit acceptance of assumptions and presuppositions about the origin, meaning and destiny of human beings, which will in turn influence the values, interests and preferences they will form and protect<sup>33</sup>. In a deep sense, all subsystems are religious systems. Since religion produces the

<sup>30</sup> (LUHMANN e KIESERLING 2013).

<sup>31</sup> (LADEUR e AUGSBERG 2007, 143 ss.).

<sup>32</sup> (COLOMBO 2013, 19).

<sup>33</sup> (AHDAR 2013, 407 ff).

existential and moral meaning that projects order and coherence onto the plane of human experience, it is impossible to separate it from the “profane” spheres of life.

Religion will to a large extent determine the existential and moral criteria on which political decisions, economic policies, workplace conditions, scientific experiments and technological devices will be assessed. In the real world of human beings, everything is connected to everything. Indeed, on various issues it not possible to understand how to separate religion from politics and policy formation (v.g. Christian Democratic parties, Islamist parties), the economy (e.g. Protestant Ethic and the Spirit of Capitalism, Christian social doctrine), the financial system (v.g. Islamic banking), education (v.g. veil in schools, religious schools, Amish school children) and work (v.g. Sabbath; use of religious symbols and apparel in the workplace). Therefore, it is unrealistic to try to separate religion from the workplace and the economy. To view religion as a separate system from other social subsystems is to ignore the facts and to try to reduce reality to a preconceived abstract model<sup>34</sup>.

### 2.2.2. *Worldviews theory*

Another model draws attention to the fact that all individuals and societies inevitably adhere to certain worldviews (*Weltanschauung*), each with its own existential and normative postulates allowing for identity building, sense making, reality interpretation and social action. A worldview is a way of looking at the Universe, life and humanity from a particular vantage point in a given historical and cultural context. It provides the “cultural system”, “plausibility structure”, “root paradigms”, “world outlook”, “world hypothesis”, “model of reality”, “ethos” or “culture unconscious”, in other words, the “fundamental cognitive, affective, evaluative presuppositions a group of people make about the nature of things and which they use to order their lives”<sup>35</sup>.

A worldview provides a cosmogony, an anthropology, a morality, an epistemology and a philosophy of history. It may have religious dimensions, generally tied to the belief in an immaterial reality, but can also aspire to be secular, naturalistic, materialistic, empiricist, positivist and non-religious in nature<sup>36</sup>. In any case, it will rest on a speculative and fideistic basis, since complete knowledge of reality is impossible. Every political community tends to rely on a dominant worldview, being, in a sense, a community of faith<sup>37</sup>. The beliefs of a given community will shape its understandings about the relevance, meaning and scope of personhood, human dignity, freedom and

<sup>34</sup> (WALD 2009, 481).

<sup>35</sup> (HIELBERT 2008, 13 ff).

<sup>36</sup> (NEURATH (1929) 1973, 299 ff).

<sup>37</sup> (GEERTZ 1993, 87 ff). Geertz define religion in a broad sense, as a set of cultural patterns, in a way that could encompass different non-theistic and naturalistic world views. According to him, religion is: (1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and

equality. There is no worldview neutral standpoint when it comes to determining the existence and content of these values and principles.

The adherence to a worldview is not necessarily conscious, nor entirely consistent. In many cases people will not even be aware of the extent to which their own thoughts and actions depend on certain worldviews<sup>38</sup>. Even the adherence to systems theory betrays the previous adoption of a particular worldview. However, the reality is characterized by the regional dominance and coexistence of the worldviews of five major religious traditions: Judaism, Christianity, Islam, Hinduism and Buddhism<sup>39</sup>. They provide the epistemic, intellectual, moral and normative frameworks which are the foundation of religion, politics, law, economics, family, science, culture or sport and make them interconnected and interdependent. These spheres of life are inseparable from certain axioms or assumptions about being and value which are rooted in a particular worldview.

According to this model, one's involvement in each and every one of these spheres of life is always rooted in religious or naturalistic presuppositions derived from a particular worldview. Religious people will get involved in all these fields with their own religious doctrines, objectives and imperatives in mind. Religion is a holistic undertaking<sup>40</sup>. This means that religion, religious concerns, and religious freedom issues will inevitably emerge in all domains of life. "Organized religion" is not confined to a particular self-referential religious system, but expresses itself in all areas or life, including law. The legal system is part of a *normative universe* created out of a particular worldview<sup>41</sup>. It affirms normative principles and values which itself it is not able to generate. This is so because law is inextricably bound up with the values and aspirations of the dominant worldview. Both international human rights law and constitutional law are worldview constructs, as even a cursory analysis of the historical development of these bodies of law will make clear<sup>42</sup>.

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motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic".

<sup>38</sup> Reinold Niebuhr suggests that not even Immanuel Kant was totally aware of the extent to which his own views on human dignity were influenced by the presuppositions of his Christian tradition. In Niebuhr's words. "Kant's maxim that human beings must always be treated as ends and never as means, is not the axiom of rational ethics that he supposes. It cannot be, in fact, consistently applied in any ethical scheme. It is rather, a religious ideal inherited from Kant's pietistic religious worldview". (NIEBUHR 1960, 58 ff). The same point is made by Alasdair MacIntyre, when he says that "what Kant took to be the principles and presuppositions of morality as such turned out to be the principles and presuppositions of one highly specific morality, a secularized version of Protestantism which furnished modern liberal individualism with one of its founding charters". (MACINTYRE 1981 (1994), 266).

<sup>39</sup> (KRIGER e SENG 2005, 771 ff).

<sup>40</sup> (COLOMBO 2013, 3).

<sup>41</sup> (COVER 2004, 95 ff).

<sup>42</sup> (G. ZIMMERMANN 1991, 394 ff).

The foundational moral axioms of western constitutional and international law, such as the human dignity, the rule of law, equality before the law, the subordination of government to law, impartial justice, fairness and due process, freedom of conscience, belief and expression, separation of powers, separation of Church and State, solidarity towards the weak and foreigner, all have their deep roots in two millennia of dynamic interaction and tension between catholic, protestant and orthodox traditions and their Greek and Roman religious and naturalistic counterparts as well as a subsequent Islamic challenge<sup>43</sup>. Nowadays, these foundational normative values of Christian natural law and natural rights tradition coexist with a dominant naturalistic and materialistic worldview, from which no objective immaterial moral values or norms can logically be derived<sup>44</sup>. The result is the persistence of dominant and recessive elements of different conflicting worldviews, in a way that is far from consistent.

There is no neutral point of view from which the relative merit of different worldviews can be assessed. However, worldviews can be comparatively evaluated on the basis of their assumptions, internal consistency, normative implications and external congruence with the observed facts. Politics and law, far from being worldview free, will reflect the assumptions and presuppositions of a dominant worldview, along with some recessive elements of others. At the same time, every individual carries, consciously or unconsciously, a certain view of the world and will want to act accordingly, albeit in an imperfect and inconsistent form. The workplace is one of the arenas where the potential for worldview conflict is greater. The worldviews of the legislature, courts, employers and workers will not necessarily coincide and all three are bound to want to leave traces of their worldviews in the workplace. Most of the workplace litigation has to do with the conflicts between worldviews.

### 2.3. Constitutional and human rights law in a complex world

Modern constitutional, international and human rights law expresses a liberal theistic synthesis of Judeo-Christian fundamental principles of dignity, liberty, equality, rationality, justice and solidarity, with the special spin with which they emerged out the Protestant Reformation and the Enlightenment<sup>45</sup>. The emphasis on human rights – instead of human duties –, on the individual freedom of conscience

<sup>43</sup> This point has been stressed by Karl Popper, when he said: “When I call our social world ‘the best’, I have in mind... the standards and values which have come down to us through Christianity from Greece and the Holy Land; from Socrates, and from the Old and New Testament. At no other time, and nowhere else, have men been more respected, as men, then in our society. Never before have their human rights, and their human dignity, been so respected, and never before have so many been ready to bring great sacrifices for others, especially for those less fortunate than themselves. I believe these are facts.” (POPPER (1969) 1989, 496 ff).

<sup>44</sup> (A. ZIMMERMANN 2013).

<sup>45</sup> (AHDAR 2013, 406 ff).

and religion and on the supremacy of the written constitutional norm is, to a significant extent, a secularized version of the reformed doctrines of “sola gratia”, “sola fides” and “sola scriptura”<sup>46</sup>. Freedom of religion gradually emerged as a verse of *constitutional scripture* out of the Peace of Westphalia (1648), the Religious Toleration Act (1689), the Bill of The Virginia Declaration of Rights (1776) and the First Amendment to the American Constitution (1787), with a very strong emphasis on individual autonomy, which more or less helped to articulate and synchronize the different spheres of social life<sup>47</sup>.

During the XIX century, constitutional law and international law were significantly transformed through the influences of some intellectual movements such as scientism, naturalism, materialism, positivism, pragmatism, utilitarianism and imperialism. From these lines of thought it is logically impossible to derive a plausible claim to human dignity and natural rights<sup>48</sup>. Within this new conceptual framework religion and religious freedom were significantly undervalued, as traces of a pre-modern and pre- (sub-) scientific past<sup>49</sup>.

After the II World War, and the Nuremberg Trials<sup>50</sup>, these latter elements were largely repressed for a while, their being a retreat to the basic principles of the Judeo-Christian worldview, as formulated by Hugo Grotius, John Locke and Immanuel Kant<sup>51</sup>. Religious freedom and a sense of transcendent responsibility on the part of governmental institutions became again prominent, starting with the German and Italian Constitutions of 1949, and in the international human rights instruments, such as the Universal declaration of Human Rights (1948)<sup>52</sup>, the European Convention on Human Rights (1953)<sup>53</sup> and the International Covenant on Civil and Political Rights (1966)<sup>54</sup>.

In the last decades, religion and religious freedom have been facing severe attacks, overt or covert, by some threads of legal thought, such as materialism, pragmatism, secularism, laicism, and, more recently, law and economics, feminism, gay and lesbian legal studies and the new atheism<sup>55</sup>. The picture is very complex, though, there being multiple and diverse ways in which these intellectual trends interact with

<sup>46</sup> This point is recognized by Charles Taylor, when he states that “[w]estern liberalism is not so much an expression of the secular, postreligious outlook that happens to be popular among liberal intellectuals as a more organic outgrowth of Christianity”. (TAYLOR 1994, 62).

<sup>47</sup> (STOURZH 1987, 78 ff).

<sup>48</sup> (PERRY 2005).

<sup>49</sup> (NEURATH (1929) 1973).

<sup>50</sup> (OVERY 2003, 1 ff).

<sup>51</sup> (J. MACHADO 1996, 13 ss).

<sup>52</sup> Article 18.º.

<sup>53</sup> Article 9.º-.

<sup>54</sup> Article 18.º.

<sup>55</sup> (J. E. MACHADO 2009, 67 ff).

religion and freedom of religion. To complicate matters even more, societies have become more globalized, diverse and multicultural. This reality has created more claims to accommodate religion in the workplace and more litigation. It has also transformed this litigation in to a barometer which measures the collision and trepidation of religious and nonreligious worldviews.

Modern constitutional, international and human rights law are not part of a closed self-referential system, differentiated from political, religious, moral, economic and scientific reality. They express, to a large extent, some basic dominant themes of western Judeo-Christian civilization, which was particularly successful in promoting its values and principles in though out the centuries after the II World War. On the other hand, they are called to articulate these themes with multiple counter-themes which are derived from other recessive worldviews that try to affirm themselves against the dominant worldview. These counter-themes may lead to the generation of different values and principles or to a different and dissonant interpretation of traditional values and principles.

At the same time, because they still attempt to gain some systemic autonomy and neutrality towards different religious worldviews, albeit not entirely successfully, constitutional, international and human rights cannot make any claim to a privileged access to objective, eternal and universal existential and moral truth. This places these bodies of law in a somewhat awkward position. On the one hand, they keep the objective universalistic pretensions which they have inherited from their theistic roots. On the other hand, as they abandon those roots, they are left without any sound, consistent and logic foundation to claim moral objectivity and universalism<sup>56</sup>.

### 2.3.1. *Freedom of religion*

Within this philosophical, moral and legal framework, the fundamental right of freedom of religion is called to perform a complex and multilayered task. On the one hand, it expresses the radical reformation and Protestant enlightened worldview, as promoted by Roger Williams, John Milton, John Locke, Thomas Jefferson and James Madison, out of which this right has emerged and within which the values of individual belief and congregational autonomy play a central role. In this context, the principle of separation of Church and State gains significant importance, as an institutional guarantee of individual choice, church autonomy and democracy.

Freedom of religion became a very important part of western constitutional law. As it emerged in the Judeo-Christian “meme-pool”, the right of religious freedom is inseparable from the moral and rational autonomy of Man, of his/her freedom of conscience, thought and expression. These values were globalized through international

<sup>56</sup> (PERRY 2008).

law and human rights law, mainly because of the political, cultural and economic influence of western countries after the II World War.

On the other hand, freedom of religion has to accommodate those other worldviews which downplay individual and confessional autonomy, along with those within which religious institutions, hierarchies, traditions, symbols and rites occupy a central place and for whom they should continue to play a very important public role within society at large. It must be remembered that freedom of religion emerged in the context of several centuries of clash between different religious and nonreligious worldviews, including some which despised religious convictions and wanted to confine religion within a closed self-referential system devoid of any significant public relevance.

From these conflicting worldviews, different moral, ethical imperatives can be derived which extend to the various spheres of life. They will necessarily translate into conflicting views over the way in which the individual and society are supposed to behave in politics, economics, science, culture, sport and so on. This is why religious freedom has also to give some breathing space for those worldviews in which religion is secondary, if not entirely devoid of rationality and meaning, and that understand individual and collective autonomy as something which is possible only without and apart from religion.

This means that the right of freedom of religion is not a right of religious harmony, convergence and ecumenism. Religious freedom, which began as a protestant religious doctrine, is a right of doctrinal debate, intellectual tension and spiritual confrontation, albeit peaceful. Religious freedom, along with the freedoms of expression, information, press, broadcasting, association, academic research and education, assumes that society is a ceaseless and dynamic process of *spiritual confrontation* which easily translates into political, ideological, communicative and even economic competition<sup>57</sup>.

These spiritual freedoms assume that there may be true and false answers to the ultimate concerns of human existence and that the ultimate answers may lie beyond the physical sphere. They seem to recognize that science, while allowing us to empirically approach that which is observable and repeatable, is not able to give us a certain and definitive and non-speculative answers about that which is not observable nor repeatable. An ultimate rational explanation for all observable reality may rest in the notion that all that is was the result of purely irrational physical processes, or, alternatively, resulted from rational *code-based* and *information-based* metaphysical and physical processes<sup>58</sup>.

<sup>57</sup> (KLEIN 1990, 47 ff, 104 ff).

<sup>58</sup> (GITT 2000) (NAGEL 2012).

A definitive answer on the nature, meaning and purpose of reality would probably be impossible, since it could be given only by someone able to know all there is to know and to know that he/she knows all there is to know<sup>59</sup>. On the other hand, these freedoms mean to protect against the arrogance, authoritarianism, irrationality and superstition that is present in many religious and secular worldviews, not by means of public or private censorship and coercion, but by means of open and intense criticism and debate. Going beyond the arbitrarily self-imposed constraints of philosophical materialism, these spiritual freedoms assume that answers to these ultimate questions may have significant and controversial implications in all spheres of life.

At the same time, they affirm a significant amount of precaution and skepticism, in the face of ideological *doctrines of certitude*<sup>60</sup>, whose holders see themselves as certain of their views and therefore entitled to harm others in the name of those views. These are freedoms of disagreement, divergence, discordance, unconformity, debate, discussion, conflict and clash. They allow for the existence of different, opposite and antagonistic thoughts, beliefs, opinions, religions, ideologies and conducts.

At the same time, they recognize and protect the inherent dignity, rational sovereignty and freedom of choice of the individual listener, reader, viewer, believer and member<sup>61</sup>. Freedom of religion is caught in the paradox of having to manage the tension generated within value pluralism, while at the same time making the objective universal moral claim that every individual has a right to freedom of conscience and religion. It makes it possible for different worldviews to take part in the sphere of public discourse, positively shaping public opinion and political will<sup>62</sup>.

Against this complex and paradoxical background, constitutionalism and human rights law should have the limited and humble aspiration to facilitate the peaceful coexistence of different worldviews, and leave aside any ambition to present themselves as a kind “civil religion” for the globalized world. As Abner Greene puts it, “[t]here are many sources of norms by which people live their lives, the state’s laws being just one”<sup>63</sup>. This means that the State does not have, by default, an absolute and legitimate claim on our legal compliance. This is so, whether the State claims to be based on a particular worldview, or whether it purports to be worldview neutral. A State can only logically make a claim of absolute political and legal authority, if it claims (albeit incorrectly) to be based on absolute, objective and universal moral

<sup>59</sup> (BINDER 2008, 884 ss).

<sup>60</sup> (GUIORA 2009, 749).

<sup>61</sup> (KLEIN 1990, 157 ff).

<sup>62</sup> (KLEIN 1990, 134 ff).

<sup>63</sup> (GREENE 2015, 164).

truth<sup>64</sup>. Religious freedom will have to include some accommodations and exceptions, in order to avoid moral and legal absolutism<sup>65</sup>.

### 2.3.2. *Conflicting worldviews in the workplace*

Clashes between worldviews in the workplace are thus inevitable and will translate into conflicts between colliding ethical and behavioral norms. In some extreme cases, absolute worldview neutrality and compromise may be very difficult to achieve if not entirely impossible, since legal norms themselves refer, in the last resort, to a particular worldview. In those cases, the Constitutional State may be forced to retreat to that worldview that better provides a rational and coherent justification of its own principles of human dignity, freedom of conscience, human rights, democracy, separation of powers, justice and solidarity.

Freedom of religion protects freedom of conscience and belief, which includes the right to develop and sustain a certain view of the world, encompassing an insight into the origin, the meaning and destiny of human life. Freedom of religious belief is inseparable from a sense of objective morality along with freedom to act according to one's beliefs. This may include religious practice and the adoption of standards for the rites, symbols, dietary habits, clothing and other aspects of behavioral conduct. Religious freedom also includes the freedom of worship, including prayer and participation in religious services. Religious freedom seeks to remove legal and social coercion and discrimination from the sphere of religious belief and practice.

In order to be legally relevant, religion must involve a belief that is cogent, serious, sincere, cohesive and important to the subject, from which ethical and moral sentiments and imperatives can be derived. The regular attendance of religious services accompanied by the observance of specific behavioral precepts can be a good indication that we are facing a belief of this kind.

Naturally, religious freedom is not an absolute right. It must be weighed against other constitutional rights and goods that justify its restriction, such as in the latter case, public security, public order and public health. It must be stressed that religious freedom also protects religious expression, including freedom to make their religious beliefs known and to try to persuade people to accept them. This is generally known for religious proselytizing, but it is nothing more than freedom of expression as applied to the religious sphere.

These and many other issues will emerge in the civil and labor law litigation between employees and employers, involving discrimination and or unfair dismissal, discussing problems such as compensatory damages, reinstatement, payment for

<sup>64</sup> (MACINTYRE 1981 (1994), 60).

<sup>65</sup> (GREENE 2015, 161 ff.).

mental anguish and loss of enjoyment of life, among other possible damages. In this type of litigation, a reasonable balancing of competing rights plays a critical role.

### 3. FREEDOM OF RELIGION OF THE EMPLOYEE

Having considered the relevant theoretical and legal framework, we will deal with some of the major religious freedom issues facing the worker in the workplace<sup>66</sup>. Faced the impossibility of exhausting this fact intensive subject, our aim is solely to stress the legal purpose not to confront the employee with the “tragic choice” between identity and job. This is very important when dealing with issues such as religious conduct, symbols and apparel, religious expression and discrimination. The borders between these different issues are very tenuous. Sometimes they emerge together from the same constellation of facts.

#### 3.1. Religious conduct

For many people, religion and work are the fundamentals of human existence, through which individuals fulfill their spiritual and material needs. However, many think that – much like Plato and Aristotle in the famous Raphael painting “The School of Athens” – religion is pointing upwards, to the realm of the metaphysical and ideal, whereas work is pointing downwards, to the domain of the physical reality. Things are more complex, though. For many religious individuals, both religion and work point upwards and downwards simultaneously, since they are both constitutive elements of his/her self-understanding and part of the same coherent and all-encompassing worldview. There is, thus, an intimate connection not only between religious belief and religious practice, but also between religious belief and all political, economic, scientific, artistic and cultural action.

The risk of collision between government power, property rights, freedom of contract and private economic initiative of the employer, on the one hand, and the religious freedom of government and private employees, on the other hand, arises when this demand accommodation of their religious claims in areas such as, the days and times work, pauses for meditation and prayer breaks during the grieving loved ones dietary requirements, clothing and hairstyles, use of religious symbols, participation in pilgrimages, refusal of certain medical tests, religious expression, etc.<sup>67</sup>.

In many situations, employees will want to benefit from exceptional regimes in order to engage in religious observances during the normal working days or hours (v.g. Sabbath; prayer; worship). In others, they will want to abstain from performing professional activities that go against their conscience or religious beliefs (v.g.

<sup>66</sup> (NETO 2007, 230 ff) (DINGEMANS, et al. 2013, 373 ff).

<sup>67</sup> (ZAHEER 2007, 528 ss).

endorsing same-sex or polygamous marriages). This will very often require multidimensional balancing, in which the rights of co-workers, customers and recipients of goods and services must also be taken in to account. The right to religious freedom purports to enable people to combine, in a consistent way, their religious convictions with their work. The main objective of this right should be the attainment of a state of affairs in which people will not be forced to choose between their religion and their work, or their conscience and their livelihood, as sometimes was the case<sup>68</sup>.

Even the Strasbourg Human Rights Commission and Court, when interpreting article 9.º of the European Convention of Human Rights, has for a while upheld the view that the worker can keep practicing his/her religion simply by searching for another job<sup>69</sup>. The idea was that the worker was free to move away and take up another employment. When the employee knew in advance that the employer had a policy of non-accommodation, the Courts presumed that the employee had waived their right of freedom of religion<sup>70</sup>. Besides, there was always the option of practicing religion outside the workplace. Today, however, the emphasis is more on the duty of the employer to accommodate, as far as possible and to a reasonable extent, the religious convictions and demands of the employee.

This has not always been enough to protect religious freedom. In a case dealing with four different freedom or religion situations, the European Court of Human Rights had to consider the questions raised by *Ladele* and *McFarlane*<sup>71</sup>. The main issue here concerned the position of public servants and private employees and their right not to endorse same-sex *marriage* and *couples* on religious grounds. The conflict involved the balancing of rights of individuals belonging to two different groups of people who want to be able to act on what they perceive to be their own identity and still claim social and legal recognition. *Ladele* was required to register homosexual civil unions, something which she thought was against her conscience and religious beliefs. *MacFarlane* was supposed to provide counseling on relationships whenever two homosexuals would ask for it. It was a case of balancing religious orientation against sexual orientation.

Concerning the situations of *Ladele* and *Macfarlane*, the Court gave primacy to their employers' legitimate aim of providing what they understood to be non-discriminatory services. It held that differences in treatment based on sexual orientation re-

<sup>68</sup> (CHANDLER 2011, 1625).

<sup>69</sup> *Kontinnen v. Finland* (1986) 87 DR 68. *Stedman v. UK* (1997) 23 EHRR CD 168.

<sup>70</sup> *Kalaç [v Turkey]* (1997) 27 EHRR 552], paras 28-29. In this case, it was held that the applicant had, in choosing a military career, accepted of his own accord a system of military discipline that by its nature implied the possibility of special limitations on certain rights and freedoms, and he had been able to fulfil the ordinary obligations of Muslim belief.

<sup>71</sup> *Eweida and others vs. United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). 27/05/2013.

quired particularly serious justification and that same-sex couples were in a relevantly similar situation to opposite-sex couples as regards their need for legal recognition and protection of their relationships<sup>72</sup>.

From a theoretical point a view this is a delicate issue, but it deserves some commentary because it may prove to be a very litigious one. On the one hand, it is important to notice that what counts as equality and discrimination is always a function of a given worldview. People with different worldviews will have different opinions about what is equal and what is different and what legal consequences should follow from that. On the other hand, it must also be taken into account that freedom to think and chose is also, up to a certain point, freedom to discriminate on the basis of one's opinion about the relevant criteria that should be used to identify identical and different realities. This is why the Strasburg Court's understanding of the equality principle as requiring a legal, moral and social equivalence between homo and heterosexual relationships, although in line with the emerging *Zeitgeist*, is not entirely self-evident.

Those who defend the singularity and special dignity of protection of the union between one man and one women do so, not because they are a group of hateful homophobic bigots who don't respect human dignity nor the principle of equality, but because they have a different understanding on which relevant criteria should be used to apply the dignity and equality principles to define marriage. According to this position, the union between one man and one women is worthy of a special social and legal recognition because the origin, existence and genetic identity of each and every individual, in all times and places, regardless of ethnicity, nationality, sex, religion, ideology, wealth or sexual orientations and preferences, are and have been objectively and universally the result of such an union.

This can be empirically confirmed, time and again, since all human beings have inherited 23 chromosomes from one man and 23 chromosomes from one women. This objective universal fact, absolutely equal and nondiscriminatory, is considered by many to be the appropriate relevant criteria on which the institution of marriage should be built, because it is generally applicable, rationally accessible to all, ideologically neutral and it defines clear purposive, qualitative and quantitative boundaries to marriage, something that other criteria simply aren't able to do. For this position, the argument is not even religious or ideological, having nothing to do with real or imagined phobias or philiias.

This understanding postulates that in order to prioritize, incentivize and optimize the promotion of the physical and psychological wellbeing of each and every individual, without any discrimination, the State has an objective and universal reason, as well as a clear public interest, to single out that specific and original union that is

<sup>72</sup> (DINGEMANS, et al. 2013, 402 ff).

constitutive of individual existence and identity of each and every one of its citizens and residents, and which is different from all other derived forms of human relationship in all their possible combinations and permutations, and in doing so promoting the child-centered values and goods of sexual responsibility and parenting engagement and complementarity.

In light of this perspective, affirming the special political, social and legal dignity of each and every individual in every phase of his/her existence and development necessarily requires affirming the special political, social and legal dignity of the unique relationship that determines his/her human existence and identity. For those who expound this view, the promotion of “dignity for all”, far from automatically implying the equal legal status of opposite and same-sex marriages<sup>73</sup>, may reasonably be interpreted as demanding the social promotion and legal protection of the unique human relationship from which all human beings derive their existence and identity in the first place and which is qualitatively and quantitatively sealed, carved and engraved in each individual’s genome. If every human being, without exception, is the result of the union between one man and one woman, acknowledging the inherent dignity of this union is essential to protect the dignity of every human being without exception. This understanding is not based in hatred, discrimination, prejudice or bigotry, but on the principles of human dignity and equality, along with the principles of individuality and universality.

As can be seen, what is at stake is not necessarily a religious doctrine, but universal biological and anthropological realities. This means that even many nonreligious people may think that marriage, as a social and legal institution, should be based on objective, universal and rational criteria and on the pursuit of a public interest, by reference to its significance to the origin, identity and wellbeing of each and every individual, and not on subjective, arbitrary and fuzzy concepts and conceptions of autonomy, privacy, preference, sexual rights, sexual orientation and diversity, unable to set clear purposive, quantitative and qualitative boundaries on marriage.

These nonreligious people may reasonably be expected to object, on grounds of conscience or rationality, to engage in conduct that in any way would endorse homosexual, polygamous, polyamorous or zoophilic marriages, whenever, however and wherever they are performed<sup>74</sup>. This seems to be an issue about which different people, equally concerned with human rights and the recognition of the inherent dignity of each and every individual, may strongly disagree on moral and rational grounds.

On the other hand, when a given category of people defines itself predominantly by a certain conduct, and not by a biological, legal, social or economic feature or attribute, it can hardly expect, much less demand, that everyone else in society will

<sup>73</sup> (DINGEMANS, et al. 2013, 403).

<sup>74</sup> (HAYNES 2014, 121 ff)

morally agree with that conduct. In general, practices are not afforded immunity merely because they are in accord with religious convictions or express one's inner sense of identity.

This understanding might have required a court decision more sensitive to the opinions of Ladele and MacFarlane. This is so, even considering that the latter had signed up voluntarily for a postgraduate psychosexual counselling course knowing full well that he would not be able to refuse clients on the ground of their sexual orientation. From a constitutional and international human rights point of view, enacting legislation to accommodate workers and civil servants while still providing equal service to all members of the public would probably be the best solution<sup>75</sup>.

### 3.2. Religious symbols

One delicate area of collision between fundamental rights has to do with the use of religious symbols (V.G. cross, bracelet) and religious clothing (V.G. turban, headscarf). The problem is especially difficult when the employer requires the wearing of uniform or imposes a particular dress code or "Look Policy" in line with corporate image. In dealing with this issue it is important to listen to Clifford Geertz, when he states that "religious symbols formulate a basic congruence between a particular style of life and a specific (if, most often, implicit) metaphysic"<sup>76</sup>.

This helps in understanding how important symbols and apparel are to the identity of the individual. The fundamental principles of dignity, freedom, equality and solidarity characteristic of the "type" of Constitutional State would point to the need to ensure all employees a significant level of religious freedom and protection against discrimination on religious grounds in the workplace. The right approach can't just be freedom of religion through freedom to resign or to to manifest their religious beliefs in many ways outside work, since it would jeopardize the economic interests of the individual<sup>77</sup>. The most recent trend has been to balance competing rights and interests in a reasonable and proportional way<sup>78</sup>.

There has been significant litigation over these kinds of problems. In Canada, for instance, the Supreme Court determined that a Sikh could not wear a turban at work because it interfered with his capacity to wear a hard helmet. This was found to represent a "*bona fide* occupational requirement", not in violation of freedom of reli-

<sup>75</sup> (CHANDLER 2011, 1626 ff.).

<sup>76</sup> (GEERTZ 1993, 90).

<sup>77</sup> See, for instance, *Pichon and Sajous v France* [2001] ECHR No. 49853/99, in which the Court had held that pharmacists who did not want to supply contraceptives had suffered no interference with their Article 9 rights since they were able to manifest their religious beliefs in many ways outside work.

<sup>78</sup> *Eweida and others v. United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). 27/05/2013.

gion<sup>79</sup>. The European Court of Human Rights came up with a very important decision, concerning the rights of four individuals, Ms Eweida, Ms Chaplin, Ms. Ladele and Mr. McFarlane, in their work place. The problems at issue with Eweida and Chaplin were related to the wearing of crosses in a private airline company, British Airways, and a State hospital<sup>80</sup>.

The Court held that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. According to the Court, religious freedom is primarily a matter of individual thought and conscience but it also encompasses the freedom to manifest one’s belief both alone and in private but also to practise in community with others and in public”.

Freedom of religion protects views that attain a certain level of cogency, seriousness, cohesion and importance. However, the fact that every act which is in some way inspired, motivated or influenced by a belief does not necessarily constitute a “manifestation” of that belief, which means that the existence of a sufficiently close and direct nexus between an act and the underlying belief must be determined on the facts of each case. The Court held that there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question<sup>81</sup>.

Based on these doctrinal assumptions, the Court was sensitive, in the Eweida and Chaplin cases, to the importance of the rights of religious expression in the workplace<sup>82</sup>. In the case of British Airways, the wearing of the cross didn’t raise corporate image and branding concerns, although in the case of the hospital, the existence of a uniform code based on health and safety concerns could be a sufficient ground for restriction of that right. Though the Court accepted that there had been an interference with both women’s right to manifest their religion it took the view that the two cases were distinguishable.

Freedom of religion must be balanced against other rights and constitutionally protected interests, according to a methodical proportional weighting of legal goods

<sup>79</sup> *Bhinder v. Canadian National Railway Co.* (1985) 2 SCR 561.

<sup>80</sup> (DINGEMANS, et al. 2013, 394 ff).

<sup>81</sup> These formulations can be found in *Eweida and others v. United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). 27/05/2013, §§ 79 ff.

<sup>82</sup> The Court reasoned that “while [British Airways] aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida’s cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and *hijabs*, by other employees, had any negative impact on British Airways’ brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance”, *Eweida and others v. United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). 27/05/2013, § 94.

in collision. This approach tends to follow that of Title VII of the Civil Rights Act of 1964, in the United States, concerning the duty of the employers to accommodate the sincere religious practices of their actual and prospective employees. The requirement of “reasonable accommodations”, not included in the original version of Title VII, evolved out of guidelines enacted by the Equal Employment Opportunity Commission (EEOC)<sup>83</sup>. Distinction is made between constitutional and statutory claims.

When dealing with a constitutional claim by a public employee, the courts apply the standard of intermediate scrutiny, under which the Government can impose restrictions on the wearing of religious symbols if the action is “substantially related” to promoting an “important” Government interest<sup>84</sup>. When a statutory claim is made, the employer must have either offered “reasonable accommodation” for the religious practice or prove that allowing those religious practices would have imposed “undue hardship” on the employer<sup>85</sup>. For private employees there are no constitutional limitations on the ability of employers to restrict the wearing of religious clothing and/or symbols.

However, the restrictions from Title VII of the Civil Rights Act continue to apply so long as the employer has over 15 employees. Just recently, this approach was reaffirmed by the United States Supreme Court, in the case *Equal Employment Opportunity Commission vs. Abercrombie & Fitch Stores Inc.*<sup>86</sup>. The Court decided the case, which united Christian, Muslim and Jewish and other religious organizations, with an 8-1 vote, ruling in favor of the federal Equal Employment Opportunity Commission (EEOC), which sued the company on behalf of Samantha Elauf, a Muslim woman who was denied a job at a clothing store because she wore a headscarf for religious reasons. This important ruling upholds the rights of workers to equal treatment in the workplace without having to sacrifice their religious beliefs or practices. An employer may not make a religious practice, confirmed or otherwise, a factor in employment decisions.

### 3.3. Freedom of religious expression

It is important to make some observations on freedom of religious expression in the workplace. Religious expression is seen by many as a religious imperative and a religious practice. It naturally follows the centrality that religion can take in the life of a worker and his natural tendency to share their beliefs with co-workers.

<sup>83</sup> (GAWLIK 1999, 251).

<sup>84</sup> *Tenaflly Eruv Association v. Borough of Tenaflly*, 309 F.3d 144, 157 (3rd Cir. 2002).

<sup>85</sup> *Ansonia Board of Education v. Philbrook*, 479 US 60 (1986); *United States v. Board of Education for School District of Philadelphia*, 911 F.2d 882, 886 (3rd Cir. 1990); *Webb v. City of Philadelphia*, 562 F.3d. 256 (3rd Cir. 2009)).

<sup>86</sup> 575 U. S. (2015), June 1, 2015.

Since workers spend a long time together, they will naturally tend to exchange ideas on various topics they deem important (V.G. politics, religion, sports)<sup>87</sup>. Religious expression is an expected consequence of the discussion of various issues in the workplace. The problem is of particular relevance in large immigration contexts in which people with totally different religious and nonreligious worldviews and with conflicting understandings among themselves are called to coexist in the workplace<sup>88</sup>.

Individual dignity and autonomy implies that the workers have, *prima facie*, the right to speak about their worldviews in the workplace, and there is no veto right of the employer and of other employees. Talking about the ultimate concerns of existence is not, by itself, to impose a religious or atheistic worldview. Similarly, the employee is entitled, based on his religious or non-religious beliefs, to present his/her opinions on various controversial topics (i.e. abortion, homosexuality, drugs)<sup>89</sup>. Human beings take part on economic and labor activities *qua* human beings, and not as slaves deprived of personal autonomy. There is a wide scope to the protection of respectful religious discourse in the workplace, along with discourse about religious issues<sup>90</sup>.

This follows from the freedom of conscience, thought and expression, a right which, it must be remembered, protects speech that is shocking, disturbing and offensive. Indeed, the mere offensiveness of speech cannot be grounds for a prohibition, unless freedom of expression would be made dependent of pure subjective feelings. Similarly, the simple expression of religious views, even vehemently, does not constitute imposition of religion to co-workers. Nor can it be accepted that the mere fact that someone says he is a Christian, and has a position against same-sex marriage or polygamy, be used as an indictment of “homophobia”, “Islamophobia” or any other “phobia” that might be devised.

However, there may be cases where the religious or anti-religious expression can put some problems in the workplace. Think about whether, for example, a worker is constantly teased and humiliated because of their religion, or lack of it, by the employer or co-workers of another religion or no religion. The same is true of religious worker who is always molesting his colleagues with the insistent spread of his religion, against their express will<sup>91</sup>. Religious and atheistic bullying and harassment is clearly forbidden, provided it does not get confused with the legitimate manifestation of religious or atheistic beliefs<sup>92</sup>.

<sup>87</sup> (BERG, Religious Speech In The Workplace: Harassment or Protected Speech? 1999, 959).

<sup>88</sup> (SEIFERT 2009, 529 ss).

<sup>89</sup> (JOHNSON 2005, 295 ss).

<sup>90</sup> (RUAN 2008, 1 ff)

<sup>91</sup> (ZACHARIAS 2013, 147 ff).

<sup>92</sup> (DUNKUM 1996, 953 ss).

One can think of a supervisor who decides rebuke the workers under his authority with written letters with a religious language, or who uses his powers as “quid pro quo” to try to impose their religion to subordinates. Consider, also, the worker who decides flood of religious symbols your workplace, which is in constant contact with customers, suppliers, etc. In such cases it appears that the employer has a legitimate interest in ensuring a climate favorable to the company productivity and harmonious relations between workers. Likewise, also the other co-workers have the right to work in a comfortable atmosphere and not hostile<sup>93</sup>. The solution should be measured depending on the circumstances of each case<sup>94</sup>.

### 3.4. Non-discrimination

Equally sensitive are the issues involving the prohibition of discrimination. In fact, many questions concerning religious freedom can be framed in terms of religious discrimination. Consider, in particular, the prohibition of discrimination based on actual or perceived religion belief or conduct, because of association with persons (V.G. spouse, parents, children, friends, neighbors) of a particular religion, or even of one’s own religion people from discrimination. Prohibited discrimination will be present whenever a protected religious belief or conduct was a motivating factor for an adverse action on the part of the employer. The employee must show, *prima facie* at best, that he would not have suffered the adverse action but for his protected belief of conduct.

When considering discrimination, one has to take into account not only direct discrimination, or legal, but also indirect discrimination, or factual. The latter takes place whenever it is shown that a seemingly neutral employment rule, from a religious point of view, has a discriminatory impact on a given religious belief (eg obligation to work on Saturdays or Sundays), creating a disadvantage for workers without a reasonable and proportionate justification by the employer<sup>95</sup>. It occurs even when there is no legal discrimination, that is, when a norm of the company is applied uniformly to all workers, with a differential impact on workers with different religious convictions and practices. It may have to do with facially neutral standards, policies or procedures of a given entity with a discriminatory impact on a class of workers based on religion.

<sup>93</sup> (KAMINER 2000 / 2001, 81 ss.).

<sup>94</sup> For example exposure of an anti-gay poster can create an excessive burden to the company and to its diversity policy and inclusion Peterson v. Hewlett-Packard Co, 358 F.3d 599 (9th Cir. 2004).

<sup>95</sup> Thus, a rule requiring all employers to devote Adventists on Saturday may be unconstitutional for being disproportionate. See yourself Cantwell v. Connecticut, 310 U.S. 296 (1940). In turn, a rule which has the effect of requiring an Adventist to work on Saturdays can be justified based on business criteria. In this sense, James v. MSC Cruises Ltd., Case No. 2203173/05 (U.K.), reportado em 157 Equal Opportunities Rev. (2006).

Discrimination may be intentional or unintentional. When it is intentional it may be disguised in facially neutral business justifications that are nothing more than a pretext to engage in wrongful discrimination. These pseudo-justifications must be identified by fact finding procedures and critically examined and deconstructed. It is not easy to distinguish between pretext justifications from credible business justifications. The task must be performed carefully on a case by case basis. The actual or prospective employee must demonstrate that they lack rational plausibility and accuracy as a matter of fact as well as substantial motivating force. In other words, he/she must discredit the employer's non-discriminatory reasons for the adverse action. It is not clear if discrediting only some of the employer's reasons may be enough, especially when the multiple proffered reasons are alternative and independent<sup>96</sup>.

A discriminatory intent by the employer is not necessary. It suffices the existence of a discriminatory effect<sup>97</sup>. Sometimes unintentional discrimination may be the result of prevailing implicit biases against a group of people defined by their real or presumed religion. These are stereotypical associations that are so subtle that the actor is unaware of when they are triggered or how they have affected his or her actions, leading to an exaggeration of the differences between groups and the similarities within groups<sup>98</sup>. For instance, it has been shown that people with Arab or Muslim names received less callbacks for interviews than people with Swedish names when all other qualifications were the same<sup>99</sup>. The extent to which an unlawful employment practice can be motivated by either conscious or unconscious bias, as internal mental states, is still a controversial issue. In other words, is not entirely clear if implicit bias fall within intentional or unintentional discrimination as well as if and in what measure they are to be targeted by the application of antidiscrimination laws<sup>100</sup>.

Indirect discrimination, intentional or otherwise, may confront the worker with the need to choose between his/her religious belief or practice and the demands of his/her work. In cases like these, equating freedom of religion with freedom to resign or to exercise religion outside work doesn't seem a viable human rights option. In these cases, the employer must demonstrate that the rules in question have a connection with the activity of the company and are necessary to protect its brand, its image, its activity and or the recipients of its goods and services. It must also demonstrate that the violation of this norms, even if required by sincerely held religious beliefs, has a disproportionate impact on the entity rights and interests. Otherwise, policy rules or procedures should be changed.

<sup>96</sup> (MUKHERJEE 2015, 118 ff).

<sup>97</sup> (CORRADA 2009, 1412 ss).

<sup>98</sup> (EL-AMIN 2015, 1 ff, 5 ff.)

<sup>99</sup> (ROOTH 2007).

<sup>100</sup> (FISKE e KRIEGER 2006, 1052 ff)

But even if the standards, procedures and policies in question are justified, the prohibition of discrimination may require affirmative action measures (accommodation obligation). If it is true that the prohibition of discrimination prevents differential treatment (unfavorable to the employee) because of religion, so it is that material equality implies an accommodation obligation implying differentiated treatment (favorable to the employee) because of religion. It should be noted, however, that a restrictive and discriminatory impact can be derived from the labor legislation, and the State prove its necessity and proportionality<sup>101</sup>.

### 3.5. Duty to accommodate

Religious accommodation should play an important role in the Constitutional State<sup>102</sup>. From a theoretical point of view, the reasonable accommodation of a religion does not mean sponsorship or support of religion, but only promoting substantive equality and individual freedom. The same does not violate the principle of separation of state and religious confessions or neutrality<sup>103</sup>. However, the accommodation of a religion can affect the feeling of equality and justice in the company. Co-workers will be unable to sympathize with the idea that someone never works on Saturday and get exactly the same as those who have to do. Maybe that's why some jurisprudence considers that there is an excessive burden for the company when the accommodation the cost exceeds a cost of minis, at a cost considered trivial. The accommodation of religion requires a balance of the company and worker rights and the rights of many workers. The accommodation of a sabbatarian can create unequal treatment, to force colleagues to work on Saturdays<sup>104</sup>.

The accommodation obligation requires the adoption of specific weighting criteria. Prima facie, the company has a duty to accommodate religion at work and bear the costs, provided they are *de minimis*. This is important, insofar as the burden of equality requirements on businesses can be problematic, from the standpoint of productivity and efficiency, and endanger the rights of other workers to work and keep their livelihood. Hence, the weighting must meet criteria such as the actual costs of the eventual replacement of *sabbatarian* worker or of the accommodation of other types of religious claims (v. g. diet, clothing)<sup>105</sup>.

In this area it seems relevant to cater not only to the economic costs, but also the impact of accommodation on the company's image. It should also be taken into account the size, operating costs and positive results of the employer. An accommoda-

<sup>101</sup> (SOSSIN 2009, 491).

<sup>102</sup> (NETO 2007, 233 ff).

<sup>103</sup> (CLEARY 1998, 102 ss).

<sup>104</sup> TWA v. HARDISON [432 U.S. 63 (1977)].

<sup>105</sup> (ZERANGUE 1986, 1265 ss). (NETO 2007, 236 ff).

tion which may be very costly for a company may be irrelevant to another. Similarly, co-workers can see their rights restricted by the duty to accommodate the religion of a worker on reasonable terms<sup>106</sup>. However, accommodation cannot impose disproportionate costs on them. It may happen that the need to accommodate the religious practices of one worker leads to much animosity among employees of other religious denominations, creating an atmosphere of hostility, conflict and lower productivity. The accommodation should seek the least restrictive alternative means to harmonize the rights in presence<sup>107</sup>.

Faced with these problems, the labor law judge should avoid pure speculation on different scenarios and should not base His/her decisions on speculative considerations. For example, decisions on the merit or demerit of religion accommodation of a worker cannot rely on hypothetical damage invoked by the employer. The judge should not decide in the absence of evidence. The invocation of undue hardship by the company refusing accommodation of the worker's freedom of religion must be empirically based. Accommodation costs may have to be reasonably shared between the company, the worker and the co-workers. For example, the accommodation of the religious beliefs and practices of a worker who does not wish to work during the hours or days of some religious festivities may imply a reduction in his/her remuneration<sup>108</sup>. For its part, the mere sense of discomfort and unpleasantness that the accommodation may generate on the part of the co-workers should not, by itself, be a ban on accommodation.

Similarly, although the burden of proof of the impossibility of accommodation should lie with the undertaking, there are limits to what it has to prove. Having accommodated the employee's religion in a reasonable way, the employer should not have to prove that all the alternatives proposed by the worker would be disproportionate. For this reason, the law should give priority, as far as possible, to the path of bilateral negotiation and voluntary commitment<sup>109</sup>. The accommodation of religion has some costs, as with other forms of accommodation (V.G. the disabled, parental obligations), but it should be done on reasonable and balanced way<sup>110</sup>. If reasonable accommodation is not possible, that should be taken into account when dealing with the issue of unemployment benefits<sup>111</sup>.

<sup>106</sup> (DUVALL 2006, 1485).

<sup>107</sup> (ZAHEER 2007, 507)

<sup>108</sup> *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

<sup>109</sup> *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

<sup>110</sup> (SMITH 2001, 1443 ss).

<sup>111</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

#### 4. FREEDOM OF RELIGION OF THE EMPLOYER

There are no worldview neutral employers. Every employer has a given ethos, even if when not aware of that. In many cases it simply adopts the dominant worldview, conforming to the *Volksgeist* or to the *Zeitgeist*. However, some employers will adopt a different worldview, with its own ethos and morality. One can think, for instance, in a Baptist Theological Seminary, a Catholic University or an Islamic Financial Institution. This will raise some legal issues concerning the borderline between choice and discrimination. Freedom to choose is, to a certain extent, freedom to discriminate.

It can be a matter of protecting the identity, autonomy and fundamental interests of employers. Let's think about the following questions: is legitimate for a company to hire only Evangelicals, Catholics or Christians? It is legitimate for a corporation to employ only religious people? It is legitimate to employ only atheists? It is legitimate to refuse a religious hiring a divorced, a single mother, an adulterer or a homosexual?

As is well understood, the solution for many of these conflicts will depend largely on the degree of institutional freedom accorded to religious institutions and on the model adopted (V.G. neutrality, tolerance or multiculturalism) in defining the relationship between the employer and the worker<sup>112</sup>. The extent of freedom and equality to recognize workers is inseparable from the religious freedom of the employer and the possibility given to it to conform to your company according to their world view, whether religious is not religious<sup>113</sup>. The solution to this problems requires a synoptic reading of various constitutional and international human rights provision and the balancing and practical concordance of competing rights and interests.

##### 4.1. Religious institutions

An important question in this context concerns the religious freedom of the employer. The problem arises immediately when the employer is a legal person of a religious nature and "ethos", that is, when it is a legal entity with a given religious orientation. It must be considered that religious institutions, as promoters of particular worldviews, are active competitors in the dynamic process of spiritual confrontation. They have legal personality and are holders of fundamental rights<sup>114</sup>. As such, they will claim for themselves the right to establish "spiritual" working relationships (eg.

<sup>112</sup> A rule prohibiting the use of the veil in public school or private elementary school can be justified by the protection of children. *Azmi v. Kirklees*, [2007] ICR 1154 (U.K.).

<sup>113</sup> (SEIFERT 2009, 563 ss).

<sup>114</sup> (KLEIN 1990, 194 ss).

clergy, monks and nuns, pastors, missionaries), not obviously reducible to an ordinary employment contract even if when similarities and analogies are present<sup>115</sup>.

At stake is the protection of its religious identity, doctrinal and ethical credibility and institutional autonomy. These values are particularly important considering the fact that religious institutions are socially evaluated by their ability to remain faithful to their teachings and to conduct themselves in ways that are consistent with them. The right of religious freedom has important collective and institutional dimensions, allowing for a broad right of religious self-definition, self-determination and self-government. The religious organization, as an *ideological employer*, will claim the right to establish statutory and contractual relationships only with people who profess the same faith and share the same moral values and perspectives and to require from them a qualified loyalty<sup>116</sup>. That is the case, for example, when they want to only hire teachers of the same faith to work within its institutions (i.e. churches, mosques, seminars, religious schools and universities).

Thus, for example, an Evangelical Church will demand that its Pastor shares the doctrinal and ethical tenets of the evangelical faith. It seems reasonable to presume that clergyman has accepted the discipline of his religious confession when he took this employment. His/her right to leave and even to create another religious confession or institution guarantees the essential nucleus of his/her freedom of religion<sup>117</sup>. It is legitimate to demand that a Catholic seminary professor is Catholic, a teacher of an Adventist school be Adventist or an animator of Islamic youth is Islamic.

Religious institutions will want to promote a certain worldview and *ethos* and can do it only through the concurrence of people with share its basic axioms and assumptions. Their interest is served only when there is a reliable chain of command

<sup>115</sup> In Portugal, the Supreme Court of Justice, in a decision of 16-06-2004, involving a minister of worship, held there is no real employment contract in labor-law sense, but rather a status linked to the holding of a confessional. It was argued that the various elements which would normally point to the existence of a legal relationship of subordinate work, giving precedence in this qualification on modalities of related contract (v.g. salary, taxation and social security, work schedule and of providing the work at one site), have no indicative value where it is established that the parties would not agree among themselves any contractual relationship. In this case, the minister of a religious association was accepted his office according to the religious doctrines and purposes held by his particular religious confession, integrating its organizational structure, where the relevant elements in the conduct of business derived from a statutory regime, and not from a contractual relationship. This view, although fairly common in the comparative case law, is not shared by all legal systems, as can be seen, in the United Kingdom, in the House of Lords decision in *Percy v. Board of National Mission of the Church of Scotland*, [2006] 2AC 28 (HL). The court considered that ecclesiastical office was not inconsistent with contractual relation, and abandoned the presumption against and intention to create legal relations (DINGEMANS, et al. 2013, 378 ff).

<sup>116</sup> (SEIFERT 2009, 556).

<sup>117</sup> *X v Denmark* (1976) 5 DR 1571.

in which the clergy know they can count on the commitment of the people who work with them. Religious employees are critical to the identity, existence, consistency and credibility of the religious organization<sup>118</sup>. Some judges, lawyers and activists have attempted to impose their own views on rights, freedom, equality and discrimination on religious organizations, since the constitutional and human rights law texts, themselves, don't offer a definitive answer to these questions. This attempt faces serious problems, though.

On the one hand, it purports to evaluate these institutions on the basis of worldviews they don't share and whose legitimacy, content and truth-value they question. To engage in this operation legitimately, these judges, lawyers and activists would logically have to come up with a plausible discourse demonstrating that they privileged access to the ideal realm of objective moral rights from which they can deduce the falsehood of the tenets of those religious organizations. This is an impossible and self-refuting task when one starts from post-modern pluralistic and relativistic assumptions about the absence of objective moral truth, which is very often the case. In the absence of a consistent and viable moral justification this amounts to imposing a particular worldview on others, something which contradicts post-modern pluralistic a relativistic assumptions.

On the other hand, this attempt assumes a radical individualistic view of human existence, ignoring the fact that individuals see themselves as parts of communities (V.G. families, religious confessions) and organize themselves collectively and institutionally to promote multiple shared material and immaterial goals. This is still an important part of their freedom. It must also be added that this attempt to impose particular view of liberty, equality and nondiscrimination seems to ignore that respect for human autonomy doesn't force anyone to belong to a given religious organization, since any group of individuals can create a religious organization that is able to reflect and promote their own religious opinions.

It also overplays the importance of labor laws relative to the right of individual and institutional religious freedom. Even if one assumes that there is one Truth, something that current post-modern legal thought rejects, the best way to search for it is by observing the comparative rational and practical merits of the different existing worldviews within an open society, something which requires a robust freedom of conscience, religion, thought and opinion. The liberal State must admit its fallibility and recognize that it makes claims about rights and principles that it is itself unable to guarantee<sup>119</sup>.

The ability to select their own clergy, ministers, teachers, or other religious functionaries plays a central role in the theological and practical self-determination of the

<sup>118</sup> (RICHARDS, et al. 2012, 268 ff).

<sup>119</sup> (BÖCKENFÖRDE 1976).

various religious communities. Without it they would be unsustainable as such<sup>120</sup>. That ability should be seen as part of the essential nucleus of institutional freedom of religion. This right should be protected by constitutional and international human rights law, as long as it doesn't contradict core dimensions of dignity and autonomy. Institutional freedom is critical for safeguarding the identity, autonomy and objectives of each religious community<sup>121</sup>.

Equality is an important goal, but it cannot be given absolute priority and protection, or else it opens the door to an authoritarian society. History has shown that the principle of equality can be seriously misconstrued and distorted, in the absence of sound moral and rational substantive parameters, as was the case in Mao Tze Dong China, where equality and nondiscrimination were pushed to the egalitarian limit and everybody end up having to think alike and dress alike. In order to avoid other forms of distortion, labor rights of workers and the principle of equality must be balanced against individual and institutional freedoms of religious expression and association<sup>122</sup>.

Doctrinal analysis of relevant case law has identified some helpful criteria that should reasonably be used in the balancing process, such as: "(1) the voluntary assumption of obligations of loyalty to the hiring institution; (2) the range of alternative employment available to the dismissed employee; (3) the importance attached to the conduct in question by the religious community; (4) the nature of the employment and its place in carrying out the mission of the organization; (5) the effect of continued employment on the credibility of the religious community in affirming and living its teachings; (6) whether less drastic measures might suffice; (7) the rights of a religious

<sup>120</sup> (RICHARDS, et al. 2012, 268 ff).

<sup>121</sup> See, for instance, Article 4(2) of Council Directive 2000/78/EC providing: "Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organizations, the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground."

<sup>122</sup> (RICHARDS, et al. 2012, 263 ff), discussing the case *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 585 US (2012), along with the cases of the European Court of Human Rights, such as *Obst v. Germany*, App. No. 425/03, Eur. Ct. H.R. (2010), concerning the dismissal of a Mormon Church director of public relations because of an extra-marital affair, and *Schuth v. Germany*, App. No. 1620-1603, Eur. Ct. H.R. (2010), dealing with a Catholic Church organist and choirmaster who had a child with a women outside the wedlock.

community to autonomy in its own affairs; and (8) the family and privacy rights of the discharged individual.”<sup>123</sup>.

These criteria are entirely adequate to a reasonable and proportional weighing of the relevant conflicting rights and interests. If equality is over-interpreted in a way that completely neutralizes autonomy and pluralism it loses its much of its substantive justification. A different solution would call into question the essential core of the right to collective religious freedom, which no longer have any useful content.

#### 4.2. Legal entities in general

Another problem relates to the question as to whether freedom of religion can be invoked a private employer who is dedicated to an economic, cultural or scientific activity but wants to promote it according to his/her own religious convictions. When it comes to religion, it is not enough to be able to worship, pray and speak. People also want to act on their religious convictions in a consistent way. For many people, the way they engage in business is an extension of worshipping God. In fact, most people would doubt of the authenticity of some entrepreneur’s religious feelings if he/she didn’t put them into practice in the course of daily business activity. That’s why religion is inseparable from the world of work and the economy. This fact may help to counter a reductionist understanding of the human being as a “profit center”<sup>124</sup>.

In the words of Thomas C Berg, “given the centrality and comprehensiveness of religious identity for the believer, it cannot be limited solely to relatively insular settings like the worship service or the house of worship. People have an interest in carrying their beliefs into public settings and civil society”<sup>125</sup>. In fact, the development of the principles of freedom, equality and justice in labor relations owes much to the religious reflection. In the modern state many activities are highly regulated, confronting the public authorities with many questions of religious accommodation in the private sphere, beyond the strict domain of labor relations<sup>126</sup>. Business and other private entities frequently invoke the sincere religious beliefs of their owners and associates<sup>127</sup>. Corporations are associations consisting of “genuine communities of individuals - investors, owners, officers, employees, and customers - coming together around a common vision or shared set of goals, values, or beliefs”<sup>128</sup>.

<sup>123</sup> (RICHARDS, et al. 2012).

<sup>124</sup> (KOHLENER 2008).

<sup>125</sup> (BERG 2015, 118).

<sup>126</sup> (BERG 2015, 38 ff), discussing the case *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), concerning businesses raised religious objections to the United States federal government’s mandate to cover contraception in employees’ health insurance.

<sup>127</sup> (STRASSER 2015, 345 ff)

<sup>128</sup> (COLOMBO 2013, 53).

#### 4.2.1. *Theoretical models*

The solution for the different problems in employer-employee relations will depend to a significant extent on the theoretic perspectives adopted. Those who see the world through systems theory will tend to separate between religious conviction and economic, cultural or scientific activity, as if they were part of distinct functionally differentiated self-referential systems. This will lead them to consider the employer entity as a religiously neutral sphere of activity, as if religion has nothing to do with other spheres of life.

Those who subscribe to worldview theory will understand that a business man will want to run his business according to the basic tenets of his worldview, because they influence his/her conduct in all spheres of life. The same applies to people involved in other activities. In this case, they will subscribe to a model of tolerance, in which the employer will have the right to adhere to a particular worldview and promote it, albeit with some obligations of tolerance and accommodation of holders of different worldviews, in some specific situations, depending on political, social, religious and economic context. Another possibility is the adherence to a multicultural model, in which the employer-entity is seen as a multicultural reality within a broader multicultural society<sup>129</sup>. These different models are ideal types, allowing for significant overlapping areas.

##### 4.2.1.1. *Neutrality*

Some argue the corporation should follow a neutrality model, as is the case with a non-denominational or secular state, the so-called “type” of the Constitutional State. According to this model, there should be a wall of separation between religion and the corporation. The latter should not take sides in religious matters, and should instead ensure full freedom and equality of all workers, looking away from all religious signs and expressions within the business landscape. According to this view, the implementation of religious policies, practices, or values by the employer is inherently discriminatory, and thus should be precluded<sup>130</sup>. In this context, the *naked public square*<sup>131</sup>, translates here into *the naked workplace*, or, as has been well said, *the naked private square*<sup>132</sup>.

The corporate employer should provide the workers with a religion-free zone. This model of “*corporate laïcité*”, is based on an abstract and formal concept of freedom and religious equality, pointing to privatization and domestication of reli-

<sup>129</sup> Considering these models, (FREELAND e VICKERS 2009, 597 ff)

<sup>130</sup> (UNDERKUFFLER 1989, 588).

<sup>131</sup> (NEUHAUS 1988).

<sup>132</sup> (COLOMBO 2013, 1 ff).

gious beliefs and practices. In a more nuanced version, it can assert a principle of respecting pluralism. Everyone is welcome into the corporation as long as they leave all the religious traces behind. According to this view, religious freedom is protected as long as religion remains private and practically irrelevant.

The workplace continues to be seen as secular space, dominated by economics, meritocracy and professionalism, while positively shaped according to the values of human dignity and equal care and respect. That would mean a ban on the discrimination of the religious and nonreligious worker, on religious or anti-religious coercion and on the establishment of religion in employment relations. For all practical effects, the corporation should remain agnostic or atheistic. Introducing a subject as “divisive” as religion into a business setting, could generate conflict among employers, employees and alienate customers, instead of promoting the unity, stability and peace that are essential to efficacy and productivity<sup>133</sup>.

According to this model, different worldviews have nothing to do with the activity of producing goods and services, nor with the question of how, when and to whom they are produced. This is to be decided by the employer, following the dictates of the market and the State. In any case, you can admit a discreet presence of religious symbols and religious communication within the company, as long as it remains subtle, non-coercive and productivity enhancing. The invitation by the superior, to participate in Bible studies may pose problems of religious neutrality of the company. But the use of posters or religious symbols may not in principle problematic. The specific context is decisive.

This view gives primacy to the specific economic interests of the company, devaluing the perspectives of those who intend to use their entrepreneurial activity to promote certain ethical views of the world, of life and own economic activity. It is insensitive to the religious freedom of the employer and the role religion can play in the world of work and the economy. Also, it disregards the fact that the economic ethics of modern work has always been strongly influenced by religious ethics. Even today, many economic and market questions, options and courses of action require taking moral decisions. However, this model has the merit of not ignoring the values of human dignity and equal respect, as well as the fact that they may limit, to a reasonable degree, the profit-making purposes of the company.

#### 4.2.1.2. *Tolerance*

Others believe that the company should adopt model of tolerance, in which the existence of a dominant religious worldview (eg Christianity, Islam, secularism) in the company coexists with legal solutions design to prevent the violation of essen-

<sup>133</sup> (COLOMBO 2013, 12).

tial dimensions of workers positive and negative religious freedom. The aim is to avoid that workers are harmed at work because of their beliefs. According to this understanding, an employer may lawfully conform to its business according to certain religious principles. The religion of the boss is the religion of the firm. This is covered not only by the freedom of religion of the business owner as such, but also by the corporate right of free exercise of religion<sup>134</sup>. This model allows the employer to conform his/her business activity according to his/her professed values and principles, in a totally transparent manner, being allowed to communicate that intention to current and prospective employees.

If the boss adheres to Jewish, Christian, Islamist or secularist worldview he may promote his/her views through the business and conform it according to its specific values and principles. According to this model, worldviews manifest their relevance in all spheres of life. Political, economic, scientific and intellectual forms of competition can also be seen as a function of worldview competition. This model assumes that there is true and false in this struggle, but the difference between them should be freely learned in the context of a free and open encounter between different worldviews. It encourages people to critically examine their beliefs and practices, subject them to periodical review and practical test in the rigors of their daily social and economic lives and, in the end, to provide a reasoned justification for keeping them.

This model allows for a principle of respect for minorities and individuals, although within the limits of the dominant trend in the company. It aims at striking a reasonable balance between the rights of the employer and the rights of the employees, although allowing for the preponderance of the former due to his/her property rights. The employer can use the corporate name, brands and apparel to promote the worldview of the firm.

The use of alternative religious clothing or symbols in employment can get a reasonable level of tolerance on the part of the company and co-workers, if that results from its own worldview. Naturally, the degree of tolerance may vary, depending on the case. For example, it may be easier to accommodate practices of known and conventional religions, including admitting discreet religious symbols, or the job dismissal on Saturday for Jews and Adventists. However, it will be difficult to accommodate practices of little-known religions or unconventional, especially when they are idiosyncratic or unusual (V.G. use of veil or burqa, consumption of psychotropic substances).

This approach has the merit of giving prominence to religious freedom of the employer and to recognize that economic activity is inextricably linked to certain values and it can be an instrument to promote values assumptions by different world-

<sup>134</sup> (COLOMBO 2013, 1 ff).

views. In addition, it makes it possible to bring the world of work and the economy other values, not strictly economic, which can be beneficial to counter the current hegemony of the profit-based cost-benefit calculations and to permeate the economy with an ethical transcendent foundation.

However, it does not remove the risk of collision between the right to promote a certain religious ethos and the right not to be discriminated against on religious grounds – particularly in cases involving the conflicting religious and ethical beliefs – and of a disproportionate violation of the right to liberty and religious equality. Here too there will be room for harmonization and practical agreement rights in collision, according to general principles of balancing and practical concordance of rights.

#### 4.2.1.3. *Multiculturalism*

A third hypothesis would consist in accommodating a multicultural model able to fully guarantee the equal treatment of every individual in the workplace. This model assumes that current multicultural societies will produce multicultural employer entities. This model downplays the freedom of religion of the individual or corporate employer and sees the corporation as a multicultural all-inclusive entity. It purports to be a pluralistic and relativistic model, although it ends up affirming the absolute truth that all the different cultures must be treated equally. It is a form of *cultural polytheism*. Everyone has its own truth and even the law is just one truth amongst many.

This model allows for two stages of development. In a first moment, it would encourage the existence of internal corporate religious pluralism, comprising multicultural directorships, administrative boards and workforces. Inclusion is the most important world. Everyone would be allowed to actively bring his/her own religious beliefs and practice to the company, as long as its economic goals are not endangered. In principle, the corporation should not be linked to the promotion of a particular worldview.

In a second moment, this model would also allow for a significant degree of external religious pluralism, requiring the equal treatment of business legal people with different worldviews and the respect for the religious ethos of religious subcultures. If there is a real possibility of creating companies subordinated to different worldviews, then the need for tolerance of minorities within each company will be weaker.

According to the multicultural model, in its external pluralism version, each person would seek employment with an employer with which they would identify to a greater extent. This model implies the absolute respect for religious identity of institutions, including the admissibility of discrimination based on gender, religion, sexual orientation and lifestyle. On the other hand, it would imply respect for different religious ethos in business, admitting the subordination of economic activity to religious norms (e.g. Islamic banking). The model assumes that even the legal rules

that may dominate business activity are the expression of one particular worldview amongst many possible alternatives.

Although encouraging internal pluralism, this model allows for the possibility of creating homogeneous work environments faithful to a given religious point of view, against a background of external pluralism. This approach has the merit of recognizing the multicultural complexity of globalized societies today. It also guards against the dangers of coerced uniformity of thought. However, because it is agnostic when it comes to truth claims, it opens the door to the indefinite coexistence of contradictory and inconsistent axioms and presuppositions, which will inevitably reflect in politics, law and economics. It tends to underrate the social and legal need for a coherent rational worldview framework and sets itself in a collision course with those who intend to use the constitutional values to ensure any evaluative coherence and principled to the state and society. Moreover, it does not prevent the dilemmas in Constitutional States marked by a dominant Judeo-Christian religious and cultural matrix.

#### 4.2.2. *Balancing and accommodation*

If the above mentioned models of neutrality, tolerance and multiculturalism are any indication, balancing and accommodation of employers and employees rights is a complex and controverted task. Business people are sometimes accused of being cold minded and “souless” beings who leave their morals at the corporation’s door and work solely to maximize shareholder wealth. They are described, in the words of Oscar Wild, as cynical men/women who know the price of everything and the value of nothing. The scandals involving corporations such as Walmart, Siemens, Zara, Dutch Petroleum, Lehman Brothers, Citigroup, Barclays, Deutsche Bank, UBS, HSBC or JP Morgan, just to give some examples, show the ethical shortcomings of this approach and underlie the fact that economic decisions have moral ramifications.

In a different vein, many people see their political engagement, business, work, art or scientific research as a way to accomplish their *purpose-driven life* and endow it with meaning<sup>135</sup>. For many businessmen it doesn’t make any sense to worship God on Sunday and act has a practical atheists in the rest of the business week. On the contrary, it would inconsistent and hypocritical. Many will want to permeate all the spheres of life in which they operate with the moral values and principles that derive from their religious or secular worldviews.

This is true in the field of economics and work<sup>136</sup>. Religiously motivated executives, investors, employees, and customers, may want to pull business corporations toward a more faith-infused model. Freedom of religion, with its individual and col-

<sup>135</sup> (WARREN 2012, 11 ff).

<sup>136</sup> (MILLER 2006, 3 ff).

lective dimensions, exists in order to make this possible<sup>137</sup>. Inevitably there will be plenty of room for collisions between the religiously grounded values of some and the fundamental rights of others.

#### 4.2.2.1. *Employers and employees*

In light of what has been said, it is hard to distinguish between a company that is “religious in nature” (V.G. printing and selling religious books) and one whose core business is not immediately religious (V.G. mining; building; banking), but assumes a religious nature because of the religious convictions of the owner. People speak of a religiously expressive corporation, defined as a business organization driven by religious values and concerns alongside a desire to turn a profit<sup>138</sup>. The legal structure that is chosen to advance the goals of individuals may be an association, a foundation or a corporation. But it is just a legal fiction through which people incorporate their economic and noneconomic values, ideals and purposes.

Legal entities don’t exist in the physical world. People with beliefs and feelings, who create those entities, do. They also are entitled to equal religious freedom, along with their corporations<sup>139</sup>. Of course, when we deal with a publicly traded corporation, with thousands of shareholders, it will be more difficult to make a plausible case for the religious freedom of the corporation, albeit not impossible if one accepts, for instance, the proposal to infuse Judeo-Christian business ethics into corporate governance<sup>140</sup>.

However, in the domain of business and work employers are legitimately expected to want to make a profit, and employees will naturally want to guarantee a stable livelihood so as to be free from physical needs. This brings to the forefront of the analysis issues of working environment, productivity, efficiency and output. Religious doctrines and ethical standards may positively shape the life of the company, including the right to work with others of the same faith in the production and exchange of a determined set of goods and services or the right to infuse the company with a certain ethos, distinct from the dominant worldview. It is not viable to expect that the market by itself will generate an ethos that will define which goods and services are to be produced, why, how, when and to whom in a way that fully and equally sat-

<sup>137</sup> This idea is stressed by (COLOMBO 2013, 4). In his words: “The desire—if not the obligation—to live one’s life in a manner wholly consistent with one’s faith generates a yearning on the part of many to form, join, and patronize associations that reflect such faith, including business associations. To the extent that law hinders the fulfillment of such desires, law inhibits the realization of the free exercise of religion.”

<sup>138</sup> (COLOMBO 2013, 16 ff).

<sup>139</sup> (COLOMBO 2013, 63). .

<sup>140</sup> (ORENBACH 2010, 370 ff)

ifies the moral sentiments of everybody. However, it is important to make sure that religion is not opportunistically invoked in order to get an exception to an otherwise applicable law<sup>141</sup>.

It must be taken into account that the sphere of business and work serves other purposes beyond the strictly religious or ideological, requiring a careful balance of different and competing economic and noneconomic rights and interests. Many people depend on their right to work to make a living and satisfy their basic individual and family needs. The prohibition of employment discrimination on the basis of religion, sex, race, or national origin serves the promotion and protection of universally protected social rights.

It must also be remembered that we live in heterogeneous, multicultural and religiously diverse societies, where employers and employees with different worldviews are called to work together. A freedom of religion issue is certain to arise when any of them is forced to any act or omission that goes against his/her religious convictions<sup>142</sup>. Both employers and employees may not be willing to compromise their religious convictions, and should not be punished for recognizing the supremacy of conscience. They should be granted a *prima facie* right not to. Faith-work integration is a legitimate concern both to employers and employees. To both, for-profit business and daily salaried work may be part of a worldview in which economic and noneconomic values cohere in a consistent whole. This demands a careful approach to the subject.

Religious freedom of the employer should *prima facie* protect the right to attempt to create a religiously homogeneous or consistent environment and to promote a business economic activity in accordance with a particular theological teaching or religious ethos. Religious freedom shouldn't confine itself to the *devotio privata*, that is, to protect religious beliefs and actions only as long as they remain private and socially irrelevant. In fact, as Ronald Colombo puts it, "religious freedom does not truly and fully exist if religious expression and practice is restricted to the private quarters of one's home or temple"<sup>143</sup>. This perspective acknowledges that economic competition may also be a stage where spiritual confrontation takes place.

This has as nothing to do with promoting inequality by means of corporate theocracy, as some say<sup>144</sup>. It is just about being able to organize one's own business activities according one's worldviews, in a pluralist political, legal and social landscape, realistically characterized by worldview divergence, in which many religious and secular faiths coexist in a state of permanent confrontation and comparative testing and evaluation. In such a pluralist environment, in which even the definition of

<sup>141</sup> (LUCENISTER 2015, 66 ff).

<sup>142</sup> (CIOCCHETTI 2014, 279 ff).

<sup>143</sup> (COLOMBO 2013, 1 ff).

<sup>144</sup> (LUCENISTER 2015, 63 ff).

freedom and equality is controverted, freedom and equality can hardly be absolutely protect to the enjoyment of all the parties.

Granting the religious freedom of the employer is concerned may mean, for example, the right to structure the activity of a financial institution in accordance with Islamic precepts, to promote Bible reading and prayer before the start of the working day, to require a specific ethical behavior on the part of the employees or to be able not to include abortion inducing contraceptives in the medical insurance benefits)<sup>145</sup>. The religiously expressive corporation should have a right to positively determine its own environment. If one denies these rights to the employer by saying that he cannot impose his/her convictions or lifestyle on his/her employees, one risks imposing the employees' convictions and lifestyles on the employer.

On the other hand, the religious and ideological freedom of the employee requires that his/her right to work is fully protected as long as he/she maintains a conduct entirely consistent with the fundamental tenets of the employer's religious or humanist orientation and is not forced to take active part in any conduct against his/her conscience. This requires the careful balancing of the competing rights of equal dignity and freedom of both the employer and the employee. The possibility of religion or a secular worldview permeating the workplace should be based on a principle of transparency and consensus and deviate of any overt or covert coercion (V.G. bullying or harassment)<sup>146</sup>. An employee will be subjected to a hostile and abusive work environment if the employer keeps using the workplace to promote religious or ideological discussion or to proselytize without taking into account the will of the employees.

As Jeremy Zacharias puts it, "this hostile work environment can occur between members of organized religions, or between a believer and non-believer; the resulting harm is the same in the end"<sup>147</sup>. Inevitably, the way religion is lived in the workplace by both employers and employees will say a great deal about its nature and character. The same applies to any sort of secular (V.G. humanist; atheistic) worldview. The attempt to create a workplace environment that is favorable to the aspirations and interests of both employers and employees will inevitably expose the ideological rift that may exist between them.

This perspective requires that both the rights of the employer and those of the employees should be subject to a delicate process of balancing and reasonable accommodation. This is one that tries to reduce the employee's conflict between his/her religious practices and the corporation's work requirements, without causing the employer an undue hardship or forcing him to act against his/her deeply and sincerely held religious beliefs. It also must take into account the rights, interests and benefits

<sup>145</sup> (CIOCCHETTI 2014, 265)

<sup>146</sup> (NETO 2007, 232 ff).

<sup>147</sup> (ZACHARIAS 2013, 151).

of other employees, including their own religious freedom and rational and moral autonomy<sup>148</sup>.

The search for a reasonable accommodation requires a special attention on the part of judges, since the risk of the creation of a hostile and abusive environment and of the resulting negative consequences to working relationships, productivity and efficiency is very real. Even if the creation, in the workplace, of an ideal speech situation in which discourse flows free and un-coerced proves an elusive task, there is merit in insisting in the fundamental value of mutual respect. This balancing process must be sensitive to the singularities of each case, striking the appropriate equilibrium. It will need to rely on a generally accepted definition of religion that may include naturalistic worldviews. It will need to assess the sincerity of the beliefs held and how important they are for the believer and his/her belief system. In doing this, care must be taken not to entangle the courts with religion<sup>149</sup>.

The accuracy of a belief may be impossible to test since many beliefs deal about past historical events and their existential and ethical meaning. It is not for the courts to decide if God exists, if Moses really freed the Hebrews from Egypt, if David really conquered Jerusalem, if Jesus rose from the dead or if the Angel Gabriel really talked to Mohamed. These alleged facts and doctrines are to be freely debated within the open sphere of discourse by those who want to debate it. Discussions about interpretative or hermeneutic accuracy should also be avoided, since these are religious questions to be decided between the believer and his/her the religious community. Courts should not require a person's belief to be an accurate portrayal of a requirement from a religious text<sup>150</sup>.

There should be a reasonable latitude for religious self-definition and self-determination in the domain of economic a labor activity, as long as there is no disproportionate harm to freedom and equality. Employers should enjoy a significant freedom to adopt a religious view on topics such as the rights of women, on sexual orientation or on the customs workers and customers (v. g. tobacco, alcohol, drugs, family life, sexual behavior, abortion).

As a legal principle, the right of religious freedom contains an inherent optimization obligation that must be taken into account in the balancing process. However, essential dimensions of work, employment, autonomy and privacy of workers should be protected, as long as they don't conflict with core aspects of employer's rights. This means, for instance, that even if the employer has a legitimate interest in assuring that the employees generally conform to the religious orientation of his/her business, it must be assured that this doesn't put it in a position of excessive interference with

<sup>148</sup> (ZACHARIAS 2013, 137 ff).

<sup>149</sup> (CIOCCHETTI 2014, 279 ff).

<sup>150</sup> (CIOCCHETTI 2014, 280 ff).

privacy rights, though micro-management and micro-control. For instance, it may even be disproportionate to require that a teacher in a Catholic school is a perfectly devout Catholic, living entirely according to the tenets of the Catholic faith.

#### 4.2.2.2. *Employers and the regulatory State*

The State plays an important role in the regulation of economic activity and labor relations, in areas such as competition, worker's rights, public safety, finance, environment or consumer protection. This means that there may be other compelling public interests that should be taken into account in the balancing process<sup>151</sup>. Generally they involve a conflict between employers' religious rights and laws of general applicability intended to protect those interests. In fact, regulatory norms increase the risk of conflicts with the individual and corporate rights of free exercise of religion<sup>152</sup>. It is to be expected that courts will tend to give more credit to laws of general applicability than they will to laws that target religion or a particular religious group.

This deference is because, as legislative bodies need to be able to pass laws to make society function and to protect the public without worrying about a myriad of exemptions for religious adherents<sup>153</sup>. However, there is an effect of *mutual limitation and conditioning* in the relationship between religious freedom, on the one hand, and public interests on the other. This means that society cannot be made to function in a way that severely impairs religious freedom, because that would jeopardize essential dimensions of human dignity and autonomy. Freedom of religion may be restricted by a law of general applicability and a law of general applicability may be restricted by freedom of religion, according to the relevant principles of constitutional systematic interpretation<sup>154</sup>.

Balancing should seek harmonization, practical concordance and maximal effectiveness and between competing rights and interests, restricting the rights if and only if that is an adequate, necessary and proportional means to protect a compelling public interest. It has to look for the least restrictive alternative<sup>155</sup>. Free exercise of religion is so crucial and central to individuals and communities that it can trump generally applicable laws. If government can meet its purpose with less impact on religious

<sup>151</sup> (CIOCCHETTI 2014, 272 ff).

<sup>152</sup> (COLOMBO 2013, 24 ff).

<sup>153</sup> (CIOCCHETTI 2014, 280 ff)

<sup>154</sup> This understanding differs from the doctrine expounded in the famous case *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), where the US Supreme Court stated that “[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities... To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”

<sup>155</sup> (COLOMBO 2013, 43).

exercise, these generally applicable laws should be invalidated or they should be waived through the carving of religious exceptions.

One thing is clear. Granting fundamental rights of freedom and equality to all individuals will not bring social harmony. On the contrary, it will only exacerbate worldview differences, from which diverse ethical norms derive. The purpose of these fundamental rights is not to impose a dominant worldview but only to assure peaceful ideological confrontation and reasonable accommodation of divergent perspectives and interests, against a background of harmonization and optimization of rights.

## 5. CONCLUSION

Worldviews positively shape politics, law, economics and all spheres of social life. What counts as human right, freedom, justice, equality and discrimination is always a function of a given worldview. There is no neutral standpoint when it comes to worldviews. In fact, there is no worldview-free workplace, much less a fundamental right to it<sup>156</sup>. In today's complex and globalized societies there is a clear clash of worldviews, which manifests itself in the workplace, in the daily interactions of employers, employees and recipients of goods and services. Religious freedom, as established in contemporary constitutional and human rights law, is in the uncomfortable position of being the expression of a worldview and, at the same time, a mediator between worldviews.

The presence of religion in the workplace requires a broad and complex set of multi-dimensional weighting. Freedom of religion can be invoked by employees and employers alike. The latter can also invoke their property rights, freedom of contract and private economic initiative, together with its interests in promoting productivity and efficiency. The co-workers of that worker claiming their freedom and religious equality also have the right to work in conditions of freedom, equality and absence of hostility and abuse. The principle of equal dignity and freedom should preside over the conflicts of rights and interests within the workplace. For its part, the community as a whole has an interest in productivity, but also a reasonable level of peaceful co-existence and social and economic integration of people with different worldviews.

Labor law should conform this domain according to principles of freedom, prohibition of coercion, inclusion and tolerance of diversity by employers and workers, preventing the creation of a hostile work environment, intimidating or offensive. However, it should not ignore that the satisfaction of demands for freedom, diversity, justice and social inclusion can in some cases become too heavy a burden of the company's productivity standpoint and, ultimately, the interests of most workers in maintaining their jobs.

<sup>156</sup> (FLYNN 1995, 501).

In this domain, courts can and should make case-sensitive judgments, striking sensible balances between religious liberty and competing rights and interests of employers, other workers, customers and recipients of their services. Courts should try to find solutions that harmonize conflicting rights and interests in a way that promotes and pursues the individual dignity and personal happiness of all involved, thus contributing to increased productivity and social integration.

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## MINISTRES DES CULTES ET DROIT DU TRAVAIL

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L'ambiguïté vers le concept du travail dans les Sacres Ecritures en équilibre entre la malédiction et la rédemption a été historiquement dépassée seulement par l'évolution de la tradition juive-chrétiens, capable de transformer le travail en valeur fondatrice de la dignité humaine et, dans le même temps, comme on peut lire dans le Talmud, d'enraciner la conviction, étrangère à la tradition grecque-romain, de désœuvrement comme valeur négative. Ce n'est pas par hasard que dans le VI siècle a.C., précisément dans la communauté chrétienne, la doctrine bénédictine élaborera sa *Règle* fondée sur la centralité du travail comme antidote à l'*otium*, considéré le seul et vrai ennemi de l'âme, et encore, beaucoup plus récemment, la Constitution conciliaire *Gaudium et Spes* n. 35 a reconnu que l'homme, par le travail, ne transforme pas seulement les choses et la société, mais perfectionne ses facultés, dépasse lui-même et va au-delà. Existe donc un devoir au travail qui descend de la même nature humaine. C'est une obligation bien connue aussi par la tradition islamique qui, dans le *Sura* 53,59, reconnaît à l'homme la chance d'obtenir quelque chose seulement à travers le travail.

Le travail comme fondement de la dignité humaine et, donc, expression d'une dimension pas seulement sociale, mais aussi spirituelle. C'est cet aspect qui constitue le cœur du problème, c'est-à-dire, le centre d'où surviennent les différentes questions relatives au rapport entre travail et spiritualité, fonction pastorale et efficacité administrative, ou si on veut, entre droit du travail et charisme. Il s'agit d'un nœud délicat surtout dans un contexte de véritable séparation entre la sphère du sacré et la dimension politique, là-bas le rapport entre le droit du travail et le travail religieusement orienté se développe de façon plus problématique et souvent contradictoire. En particulier, le cœur du problème se résume dans la question si on puisse ne pas régler la position du travail d'un ministre du culte à l'identique des autres travailleurs, ou, au contraire, la nature spirituelle et vocationnelle du travail de ce dernier soit incompatible avec les normes et l'esprit du droit du travail prévues par le système juridique étatique, en d'autres termes: code du travail et droits religieux sont-ils compatibles? La

protection juridictionnelle étatique peut s'étendre jusqu'au les conflits en matière du travail dans les différentes communautés religieuses? Un travail ou un service profanes mais inspirés par des motivations spirituelles, ou pastorales on peuvent encore les qualifier comme profanes? Ou, au contraire, un fonction ministérielle interpréter et développé dans un forme bureaucratique en quoi diffère-t-elle de travail séculaire? Encore, une activité profane déroulé à l'intérieure d'une organisation de tendance peut être subordonné au clauses religieuses?

Pas facile répondre à ces question, toutefois, les différentes solutions juridiques adoptés au fil du temps par les différents pays de l'Union Européenne, montrent trois différentes lignes interprétatives que les juges et les législateurs ont suivi dans le temps. Avant tout celle fondé sur la conviction de la incompatibilité entre la fonction spirituelle et pastorale de l'office ministérielle et la discipline contractuelle du travail, ainsi que peut – on constater dans l'art. 23 première alinéa de la loi n. 489 du 2006 en matière de liberté religieuse et de réglementation des organisation confessionnels prévu par le législateur roumaine, en fait, généralement, sauf l'Eglise Chrétiennes Evangélique qui utilise le model de contrat de travail envers son personnels, pour ce qui concerne le recrutement ou le licenciement à l'intérieure des cultes reconnus, la loi étatique renvoie aux disposition de droit canonique et à les règlements intérieures. Dans tous ce cas pour ce qui regarde la nomination, le condition d'emploi ou le licenciement, se reporte à la discipline prévue par le droit religieuse. Une solution, pour autre, connu aussi par plusieurs autres systèmes juridiques européennes, par exemple celles grecque et polonaise et aussi française, et aussi, bien que dans un diffèrent contexte juridique, la jurisprudence irlandaise, beaucoup moins disponibles, respect aux juges britanniques, à envisager les ministres du culte dans la même façon des salariés, à la suite d'un interprétation de l'office sacerdotale plus traditionaliste et moins évolutive, aussi que on peut constater dans le cas *Fraser c. EAT*. Au fondement de ce ligne interprétative il y a la conviction qu'une activité religieuse fondée sur un engagement spirituel, on peut le lire dans le rapport française, «ne peut par elle-même être analysée comme un contrat de travail. Ni le pasteur, ni le prêtre ne concluent de contrat de louage avec respectivement une association cultuelle et un évêque, pour l'exercice de leur fonction spirituelle (Cass. Ch. civ. 23 avril 1913 et 24 décembre 1912). Dans ce cas, le juge, respectueux du principe de neutralité, refuse de qualifier les liens résultant de la constitution de la religion concernée dès lors que font défaut les éléments objectifs ou subjectifs du contrat de travail: absence de lien de subordination, activité sans caractère professionnel, intention des parties de donner à l'activité une autre qualification que celle de contrat de travail en raison de l'objet spirituel de l'engagement. Un contrat de travail peut cependant être formellement conclu entre des personnels exerçant une activité cultuelle ou pastorale et des autorités cultuelles, et le droit du travail s'applique alors. L'Église catholique et le culte israélite ont notamment retenu cette solution pour les laïcs exerçant une fonction pastorale mais également le culte juif pour les ministres officiants concernés et pour certains rabbins».

Dans un position, au contraire, intermédiaire se retrouvent toutes les systèmes normatives où l'interprétation des rapports entre ministre du culte et droit du travail se trouve, ou dans un phase de fort dynamisme jurisprudentielle ou se réfèrent au systèmes juridiques qui connaissent une particuliers degré d'élasticité qui permit eux un évolution vers solutions normatives où l'office ecclésiastique est jugé compatible avec l'office sacerdotale. C'est un phénomène bien connu, par exemple, dans le système du Royaume Uni. En fait, dans le cas *Parfitt*, et encore plus, dans le cas *Sharpe c. Worcester Diocesan Board of Finance*, les motivations développé pour justifier l'incompatibilité entre la nature spirituelle des fonctionner ministérielles et le droit du travail étatique sont devenus progressivement plus faibles à l'avantage d'un orientation jurisprudentielle toujours plus favorable à considérer la nature spirituelle du ministère sacerdotale pleinement compatible avec la dimension contractuel prévu par le droit du travail. Intéressant, a ce regard, est la position soutenu dans la *dissenting opinion* dans le cas *President of the Methodist Conference c. Preston*, où les juges de minorité ironisent sur cette opposition et sur la prétendue incompatibilité entre l'office ministérielle et l'emploi, comme si celui qui exerce des fonctions ecclésiastiques ne puisse pas voir réglé son travail par un contrat de travail subordonné. Dans la même façon, dans l'arrêt *Davies v. Presbyterian Church of Wales* le juge Temperlmann supère cette interprétation classique convaincu que un ministre du culte puisse jouer ses fonctions éminemment spirituels parmi un contrat du travail, parce-que à certaines conditions l'institut contractuelle peut cohabiter sans aucune problème avec la nature spirituelle e sacré des fonctions ministérielles, d'autre partie la nature «teandrica» de droit canonique, c'est-à-dire la parfait coprésence et cohabitation entre la dimensionne divine et tempore, justifie, sous le point de vue théorique, un solution semblable. Par ailleurs, à confirmation de cet orientation ont peut pas oublier la récent normative du 2011 élaboré par l'Eglise d'Angleterre où ont été reconnus au clergé certains droit propres des employés, et, en particulier, le droit de pouvoir saisir la juridiction du travail.

Au dehors d'un système de *common law* solutions similaires à celles adoptées en Angleterre ont les retrouvent dans le système juridique de la République de la Slovaquie. Dans le 2001, en fait, la Cour constitutionnelle de ce pays en reconnaissant que la position juridique d'un ministre du culte doit être réglé avant tout par le droit religieuse, et seulement en façon subsidiaire par le droit étatique, elle a toutefois aussi réprimandé les juges ordinaires à propos de leur position trop passive et sur le dos par rapport au droit religieuse. Pour le juge constitutionnelle slovaque, en fait, les juges, à propos du statut de l'emploi des ministres du culte, doivent être conscients que le droit religieuse est l'objet de l'avis, pas la normative à mettre en œuvre pour la résolutions des procès.

Le troisième orientation se déroule, au contraire, vers un interprétation parfaitement compatible des deux profils. Intéressant, à cet égard, le nouveau règlement de l'Eglise Evangélique Luthérienne finlandaise approuvé dans le 2013. Dans cet

norme on a voulu rendre compatible le texte statuaire aux dispositions constitutionnelles et aux principes générales du système juridiques étatique en matière de droit de travail introduisant un analogie entre le statut de l'emploi dans l'organisation de l'Eglise luthérienne et celui des employés qui travaillent dans le domaine civile. Une solution qui, en matière d'absence du lieu de travail, des notifications, des appels et de recrutement, va surement en direction d'un large réception, par le systèmes juridique ou statutaires religieuses, du régime du droit du travail étatique, dans la conviction que la normative séculaire est parfaitement compatible avec les systèmes juridiques religieuses. D'autre part aussi en Allemagne les organisations religieuses de droit privé sont sujets au droit commune en matière de travail, ainsi que les prestations de travaille dans cet contexte sont sujets aux normes de droit civil et à la discipline en matière de sécurité social. Très intéressant, à ce propos, la Convention signé en 2015 entre le Gouverne de Luxembourg et les principales organisations religieuses reconnus, où tous les ministres des cultes appartenant à cette dernière catégorie sont sujet au droit commune en matière de droit du travail. Comme prévoit l'art. 4 de la *Convention*, les ministres du Culte sont assimilés aux fonctionnaires de l'Etat quant aux régime des traitements et des pension, conformément à ce qui est prévu par la loi 10 julliet 1998. Particulier, mais à certain égard, s'inspirant de ce schéma, la solution normative prévu en Alsace e Moselle où le statut des autorités, ministres et employés des secrétariats des quatre cultes statutaires des départements du Rhin et de la Moselle est fixé par une loi locale du 15 novembre 1909 (ministres du culte) et par une loi locale du 20 mai 1911 (employés des secrétariats). «Ces personnels au nombre de 1393 en 2015 sont rémunérés par le Ministère de l'Intérieur selon des tableaux de classement hiérarchique des grades et emplois des personnels de l'Etat. Les ministres du culte et les employés des secrétariats qui n'ont pas la qualité de fonctionnaires sont des agents de droit public *sui generis*. En raison de leur statut particulier, les ministres des quatre cultes statutaires relèvent d'un régime particulier d'assurance maladie (décret 19 janvier 1951) dont l'organisation est réglée par référence au régime des fonctionnaires. Ce régime ouvre droit aux prestations en nature de l'assurance maladie, longue maladie, maternité et invalidité». Particulier, mais à certain égard, s'inspirant de ce schéma, la solution normative prévu en Alsace e Moselle où le statut des autorités, ministres et employés des secrétariats des quatre cultes statutaires des départements du Rhin et de la Moselle est fixé par une loi locale du 15 novembre 1909 (ministres du culte) et par une loi locale du 20 mai 1911 (employés des secrétariats). «Ces personnels au nombre de 1393 en 2015 sont rémunérés par le Ministère de l'Intérieur selon des tableaux de classement hiérarchique des grades et emplois des personnels de l'Etat. Les ministres du culte et les employés des secrétariats qui n'ont pas la qualité de fonctionnaires sont des agents de droit public *sui generis*. En raison de leur statut particulier, les ministres des quatre cultes statutaires relèvent d'un régime particulier d'assurance maladie (décret 19 janvier 1951) dont l'organisation est réglée par

référence au régime des fonctionnaires. Ce régime ouvre droit aux prestations en nature de l'assurance maladie, longue maladie, maternité et invalidité».

Ces différentes tendances et les questions posées au début de ces considérations méritent quelques réflexions.

**Première considération.** En général les systèmes de *common law* offrent, respect aux systèmes de *civil law*, une plus forte dynamisme du système, en permettant, à travers les politiques du cas pour cas, et du «control text», un plus fort homologation entre droit étatique et statut de l'emploi des ministres des cultes. Fait exception la normative irlandaise que, même s'inspire au modèle britannique et suive les orientements jurisprudentielles des juges anglais et écossaises, sur les questions relatives au travail des ministres du culte n'a jamais était trop conditionné par la jurisprudence anglo-saxonne. Pour le juge irlandaise, en fait, le hiatus entre contracte et ordination est insurmontable. La dimension vocationnel n'est pas redoutable au notion de contracte prévu par la loi, aussi que le devoir du travailleur, dans le première ne sont pas la conséquence du lien contractuel, mai, au contraire, des obligations qui découlent de la conscience. Les raisons de ce différence, on peut, peut-être, la reconduire au principe de réalisme et d'élasticité qui distinguent le système de common et de civil law. La prééminence de la jurisprudence permet, en fait, au système juridique, d'être plus sensible au changements sociale et aux transformations à l'intérieure des mêmes sujets religieuses sur les questions relatives au travail des ministres du culte.

**Seconde considération.** Où il y a eu un plus fort diffusion et affirmation de la culture des droits humaines et une plus convaincue politique de lutte contre les discrimination, comme démontre, par exemple, la contraposition entre le Gouverne Estonienne et l'Eglise Evangélique Luthérienne à propos de la violation présumée du principe de séparation par l'Etat, en raison d'un contrôle effectué par l'autorité étatique en rapport au supposée discrimination de genre survenus à l'intérieur de la organisation religieuse, les juges sont généralement plus favorables à appliquer aux ministres de culte, en matière de droit du travail, la normative étatique et, donc, assurer un niveau plus élevé de protection des droits humains. C'est un phénomène que ne concerne pas seulement le systèmes juridique de plus longue tradition démocratique, mais aussi une partie des différents pays européennes revenus seulement après le 1989 à un modèle de démocratie libéral. Emblématique, à ce sujet, la normative estonienne qui reconnais aux organisations religieuses la liberté de choisir le régime normative du travail plus approprié pour les propres ministres de culte. En fait, dans la loi de réforme du droit de travail de 2008 a été aboli la norme que interdisait l'application de la normative étatique en matière du droit du travail à l'intérieure des organisations religieuses. Cela force à essayer un autre significative considération. Il est un fait que dans le pays avec un plus ancienne tradition démocratique, fréquemment les garanties reconnues aux emplois par le droit du travail sont plus vastes des celles

prévues par le système normative à l'intérieur des confessions religieuses, mais cette considération souvent n'est pas valable pour les pays de plus jeune ou de plus faible tradition démocratique. Dans ces cas, en fait, souvent le rapport entre droit étatique et droit religieux, pour ce que regarde les droits fondamentaux en matière du travail, est plus favorable au droit confessionnel, c'est à dire que le droit religieux, et non ce étatique, donne des plus larges garanties des droits à faveur des ministres du culte sous le point de vue du droit de travail. Qu'est-ce que ça dit? Simplement deux choses: i) comme ce fut le cas dans la Grèce au début du 2014 avec l'approbation de la loi sur le Confessions religieuses et les institutions ecclésiastiques, norme qui a introduit la notion de «religion reconnu par l'état», le système de reconnaissance peut se transformer en un instrument d'inégalité et de discrimination à travers l'arbitraire sélection, effectué par l'état, entre les organisation religieuses reconnues et non reconnues; ii) dans ce cas, aux minorités religieuses pas reconnues ont s'applique, en général, la normative étatique en matière du travail, c'est-à-dire la discipline moins contraignante, sous le point de vue de droit de l'homme et des garanties en rapport aux travailleurs.

**Troisième considération.** La différence géométrique au égard de la position des ministres du culte en rapport à la législation du travail avance des conséquences intéressantes aussi sous le point de vue des garanties juridictionnelles. Le rôle de plus en plus importante joue par la jurisprudence de Strasbourg, en exigeant le respect du principe du juste procès prévu par l'art. 6 de la Convention européenne de droit de l'homme, a changé les orientations jurisprudentielles sur les questions relatives aux positions juridiques des ministres de culte en rapport au droit du travail. Paradigmatique est le cas de l'Allemagne, où, face au répété refus des tribunaux civils à statuer sur les litiges concernant la position professionnelle des ministres de culte, parce-que étrangère au domaine réglementé par l'État, dans les dernières années s'est imposée et consolidée une différente ligne interprétative, beaucoup plus disposés à voir dans les juges civils l'organe compétent pour décider les questions internes aux organisations religieuses relatives au rapport du travail. En ce sens, la Cour administrative fédérale allemande, ainsi que la Cour fédérale de justice, ont changé orientation permettant que questions liées au travail aux ministres, puissent être jugées par le système de justice civile, avec tous les risques que cet choix implique en termes de conformité au principe de séparation. Aussi le Luxembourg, dans le cadre de la Convention signée dans le janvier du 2015, à l'art. 4 alinéa 2 a prévu que «Le régime de service des ministres du culte (...), relève du droit commun. Il ne sortira ses effets qu'après avoir été approuvé par voie de règlement grand-ducal à prendre sur avis du Conseil d'Etat. Le régime de service des ministres du culte n'affecte pas le statut du chef du culte pris en cette qualité. Toutes les contestations qui peuvent naître de ce régime de service sont de la compétence des tribunaux du travail». Par ailleurs, il faut aussi souligner que, face à la position de l'Allemagne, des autres pays, comme par exemple l'Irlande, ont conservé,

à propos de la compétition entre les juridictions des tribunaux civils et religieuses, la tendance à reconnaître un position de faveur à la juridiction ecclésiastique.

**Quatrième considération.** On peut résumer le problème dans la formule: le poids de la tradition. Il s'agit tant de la manière dont un état a été administré dans le temps, que de la manière dont si sont développées les rapports entre les organisation religieuses et le pouvoir étatique. En ce qui concerne le première aspect il faut souligner comme dans plusieurs pays de l'Europe de l'Est qui ont connu, avant 1989, une expérience de fort centralisation étatique et de contrôle du religieux par le pouvoir administrative, sans doute a été moins complexe étendre la normative étatique en matière du travail aussi aux ministres du culte, comme démontre l'exemple de l'Estonie. Ce phénomène, on dirait, a été plus marqué surtout là où à était plus faible la présence de l'Eglise catholique, c'est-à-dire, l'existence d'un appareil administratif souvent en opposition avec le pouvoir étatique et avec un force de résistance au processus de centralisation et d'assimilation par l'état. Dans certain cas, puis, l'imbrication entre dimension religieuses et dimension étatique est moins évident, mais toutefois il existe. On peut penser au système du vœux prévu pour les agents publics repris par la hiérarchie ecclésiastique ou, on lit dans le rapport de la Roumanie: «The rights and duties of priests, deacons, singers are determined by the unilateral decision of the bishop, and they recite the faith Confession that they are obliged to sign». De même, où le modèle de politique ecclésiastique s'est configuré dans le formes des églises d'état ou d'église dominante, l'habitude à considérer les ministres du culte sujets faisant déjà partie de l'appareil administrative a rendu plus facile l'ouverture de la normative contractuelle en matière du travail à l'intérieur des systèmes juridiques religieuses. Au contraire, mai la logique c'est la même, où s'est consolidé une tradition de nature concordataire et bilatéral, régulièrement, ce-ca à favorise la conservation d'une conception des rapport de travaille des ministres du culte de nature éminemment confessionnel. Dans ce dernier cas, donc, le principe de séparation, comme témoigne l'art 2 seconde alinéa de la loi organique espagnole sur la liberté religieuse du 1980, sert comme barrage pour interdire l'application du droit étatique, et donc, les instituts qui pourrait garantir un plus haut niveau de garantie sous le point de vue des garanties des travailleur.

**Dernière considération.** La qualité de ministre du culte, son état au regard de sa religion d'appartenance n'exclut pas l'exercice d'une activité professionnelle dans une entreprise profane. Dans ce cas, souligne le rapport française, «il conclut un contrat de travail et est soumis au même régime juridique que les autres salariés. Le fait qu'un prêtre catholique devienne salarié dans le secteur commercial ou industriel en raison de ses motivations spirituelles ne change rien à l'autonomie juridique du cleric qui entre ainsi *dans l'ordre civil selon le droit commun des conventions*. Les religieuses qui dans l'exercice de leur liberté individuelle ont accepté une règle de vie

excluant le contrat de travail et qui sont engagées par un établissement notamment hospitalier peuvent être placées sous le régime d'une double convention conclue par la congrégation», où la première s'applique aux membres que la congrégation s'engage à entretenir, la seconde, au contraire, met les religieuses à disposition de l'établissement en l'absence de contrat de louage conclu individuellement par les religieuses avec l'établissement. Donc, la dialectique sacré/profane à propos de la nature juridique de rapport du travail des ministres du culte, perd beaucoup de sa problématique lorsque celui-ci, même si elle est effectuée par un ministre, semble être sans liens avec l'office sacerdotale comment peuvent être l'assistance spirituelle dans le système carcéral, ou dans les hôpitaux, ou l'enseignement de la religion dans les écoles publiques. Dans tous ces cas, la convergence des différents systèmes juridiques de régler la matière parmi le droit étatique, et la plus grande. Derrière à cette attitude, il y a, sans doute, le poids d'une conception fonctionnaliste du travail, qui ne tient pas compte de l'esprit et des raisons pour lesquels ces services sont fournis. Une interprétation que la Cour de Strasbourg dans le cas *Affaire Sindicatul Păstorul cel Bun c. Roumanie*, a épousé pleinement, en interprétant la fonction pastorale et le bout missionnaire de l'action sacerdotale comme une normale activité sujet à la logique des services et du marché, position, non sans raison, fortement critiqué de côté confessionnel.

On peut conclure en disant que dans les systèmes juridiques européens, pas seulement en ce qui concerne le droit du travail, restent très fortes les traditions et le poids des rapports entre organisations religieuses et état, qui portent à une différente déclinaison du principe de séparation et, donc, aux différentes déclinaisons du traitement normative de la position d'emplois des ministres du culte, mais surtout les différents rapports montrent la difficulté d'adapter les vieux modèles interprétatives des institutions religieuses adoptées par les états au nouveau système de pluralisme religieux et aussi à les transformations ecclésiologiques eu à l'intérieur des plusieurs communautés religieuses.

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# AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

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## 1. AUTONOMY OF CHURCHES IN THE CONSTITUTIONS OF THE EUROPEAN COUNTRIES

First of all, the question about the understanding of autonomy of churches in the constitutional law of the European countries has to be answered. Autonomy can't be understood in an absolute sense. Independent from the concrete type of the relationship between Church and State religious autonomy means the autonomy of the internal management of religious organisations. They are only "*capable of administering their own internal religious affairs if they can determine and implement the rules that govern their functioning.*"<sup>1</sup>. This term "organizing" means self-determination in legislation, administration and jurisdiction. Another question is how far the Constitutions of the European countries interpret the term "own religious affairs". We will come back to this point when we reflect on some ECHR jurisdiction and decisions of the EHCR Commission. In summa 29 cases on employment and religious autonomy and roundabout 45 decisions and judgements are reported<sup>2</sup>.

If we reflect on the reports from all participants of the Madrid conference 2015 on the topic of this essay, it is clearly to see that there occur some differences in the understanding of this autonomy. They lead back to the different viewpoints on the relation of state and religious communities according to the national tradition and the historical experience of each nation. This is not the place to give a general overview concerning the church and state relationship. Based on the received 24 national reports this essay tries to classify and category the different systems in groups, before

<sup>1</sup> Cf. Mauro GATTI, *Autonomy of Religious Organisations in the European Convention on Human Rights and the European Union Law*, L.S. ROSSI, G. DI FEDERICO (eds.), *Fundamental Rights in Europe and China. Regional Identities and Universalism*, Editoriale Scientifica, 2013, 132-153, 134.

<sup>2</sup> Cf. <http://www.strasbourgconsortium.org/topic.php?pageId=11&topicId=2>.

we discuss the question about the relation of religious autonomy of churches and the human rights of the workers in law and jurisprudence.

Looking at the legal framework of European countries in a first stage we have to differ at least two systems of law making on the topic of autonomy of churches: 1<sup>st</sup> the constitutional guarantee of autonomy for religious entities and 2<sup>nd</sup> the simple laws granting several stages of religious autonomy or independence in the law.

In a second stage we also have to keep in mind, that the autonomy of Churches in most of the countries is understood as a result or consequence of religious freedom and here especially the collective form of religious freedom.<sup>3</sup> Countries preferring a different system don't deny religious freedom as a human right, but from their historical background have another understanding of this important human right, which is finally a concretisation of human dignity.<sup>4</sup> The reasons for those differences have their historical grounds in the different development of church and state in the European regions as well as in the experience several countries made with the communist system undermining or abolishing religious entities from public affairs for at least half a century. While the churches accepted the state as substitute for the insufficient church authorities in countries where the reformation predominated, the churches in the catholic tradition insist on a full autonomy in all fields of ecclesiastical power.<sup>5</sup> The orthodox tradition enlightens a third form of arrangement between church and state.<sup>6</sup> The church remains independent in all internal affairs, but the state shows in a long lasting and nearly unbroken tradition responsibility for the material belongings of the church for example by paying the salary for the clergy and financing the theological education of the later priests. It is an open question how far this practice influences the independence of the churches, but we have also to see, that especially in the orthodox tradition from the early times on, there exists a very strong identification between the local church and the dominating ethnical group in the country.

**Constitutional guaranties** on Church autonomy in the **individual and the collective sphere** we find i.e. in the following countries: Austria, Belgium, Cyprus, Finland, Germany, Greece, Romania.

<sup>3</sup> Cf. Art. 18 United Nations Universal Declaration of Human Rights: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his **religion or belief**, and freedom, either **alone or in community with others** and in **public or private**, to manifest his religion or belief in teaching, practice, worship and observance."

<sup>4</sup> Cf. Wolfgang THÖNISSEN, Menschenwürde und Religionsfreiheit, in: Zeitschrift für evangelische Ethik 44 (2014), 23-32.

<sup>5</sup> Cf. Matthias PULTE, Grundfragen des Staatskirchen- und Religionsrechts, MBKR 1, Würzburg 2016, 49 sqq.

<sup>6</sup> Cf. P. SPYROPULOS, Einige Bemerkungen zur staatskirchenrechtlichen Ordnung Griechenlands, in: AfKR 1980, 112-121.

As a part of the **individual religious freedom** Church autonomy can i.e. assumed in the following constitutions: France, Hungary, Ireland, Italy, Latvia, Luxembourg.

## 2. HUMAN RIGHTS OF WORKERS

In a second stage we now have to identify the human rights of workers. The 2015 national reports tell about the exemptions from labour work for companies of tendency and corporate bodies of common law. The crucial question if labour rights are human rights finds no direct answer in these reports. That seems to be understandable because the academic discussion is not clear in this point of interest. Some “*endorse the character of labour rights as human rights without hesitation, while others view it with scepticism and suspicion*”<sup>7</sup>.

The UN itself backed workers rights by incorporating several into two articles of the United Nations Declaration of Human Rights<sup>8</sup>:

### Article 23

1. *Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.*
2. *Everyone, without any discrimination, has the right to equal pay for equal work.*
3. *Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.*
4. *Everyone has the right to form and to join trade unions for the protection of his interests.*

### Article 24

*Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.*

For the interpretation of law and the question discussed here, we have to identify the legal character of the rights of workers in the different constitutional systems in Europe. The fundamental rights and freedoms besides the UN Declaration of Human Rights are contained in the European Convention on Human Rights (ECHR). These rights not only affect matters of life and death like freedom from torture and killing

<sup>7</sup> Cf. Virginia MANTOUVALOU, Are Labour Rights Human Rights? In: European Labour Law Journal, 2/2012.

<sup>8</sup> United Nations, The Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, online: <http://www.un.org/en/universal-declaration-human-rights/>

but also affect your rights in everyday life. Insofar not all but some of the of the human rights effect the rights of the works, independent from the question whether the employer is a private or a public juridical person. The catalogue of the human rights in the ECHR is as follows<sup>9</sup>:

- the right to life
- **freedom from torture and degrading treatment**
- **freedom from slavery and forced labour**
- the right to liberty
- **the right to a fair trial**
- the right not to be punished for something that wasn't a crime when you did it
- **the right to respect for private and family life**
- **freedom of thought, conscience and religion, and freedom to express your beliefs**
- freedom of expression
- **freedom of assembly and association**
- **the right to marry and to start a family**
- **the right not to be discriminated against in respect of these rights and freedoms**
- the right to peaceful enjoyment of your property
- the right to an education
- the right to participate in free elections
- the right not to be subjected to the death penalty

Some of these rights compete with the right of autonomy of Churches. In these cases it must be decided which law deserves priority. Very critical in the discussion are all rights of the workers attaching their private life and family. Personal autonomy and the privacy of private life are benchmarks of a liberal western culture, which is the basis of democracy.<sup>10</sup> How far is it tolerable that an employer gives directives for the private life of the worker?<sup>11</sup> Another question is, if it is tolerable that in some countries employees of church organisations are by law excluded from the right to strike or that trade unions are hindered to access church organisations. Under these circumstances the question occurs whether the human right of freedom of association is really guaranteed and whether the right of religious freedom and the right of freedom of association rival substantially. At least trade unions complain a reduction of their institutional rights. The German constitutional court in 2015 decided that

<sup>9</sup> The rights directly effecting labour work were highlighted above.

<sup>10</sup> Cf. Clarke COCHRANE, *Religion in Public and Private Life*, 4. *The Border of Public and Private life* (Routledge Revivals), e-book, <https://books.google.de/books?isbn=1317650301> (access: 1.12.2015).

<sup>11</sup> Cf. Rex AHADAR, Ian LEIGH, *Religious Freedom in the Liberal State*, Oxford <sup>2</sup>2013, 358-372.

these rights have to be interpreted in the framework of religious freedom.<sup>12</sup> A third crucial point is if there exists an exclusive church jurisdiction in labour law. How can this stipulated with the guarantee of the state for a fair trial? Most of the European countries state in their constitution and / or in concordats or other treaties between church and state the right of the religious communities to govern their own affairs independent from state authorities. Is this a general exemption from labour law? Can this create an exception from human rights in general or has a consideration of goods to take place in every single case. Is there a real competition between the human right of freedom of religion and the human rights of workers? Is the human right of freedom of religion only an individual or even a collective human right? The answer to this last question shows the way whether there can be exemptions for the religions in labour law beyond the employment of the clerics or religious servants.

In the case of *Fernández Martínez vs. Spain*, the Grand Chamber of the European Court of Human Rights found that a Catholic bishop in Spain could decide not to renew the contract of a teacher of Catholic religion who had joined a public campaign to oppose the Catholic Church's practice of celibacy for priests. The Grand Chamber held that "*the proximity between the [teacher]'s activity and the Church's proclamatory mission*" "*is clearly very close.*" That meant he "*was voluntarily part of the circle of individuals who were bound, for reasons of credibility, by a duty of loyalty towards the Catholic Church*" and he could have his contract not renewed because he failed to live up to that duty.<sup>13</sup> From the legal point of view we have to keep in mind that there is a difference between the renewal of a time limited contract and a dismissal of a permanent contract. In the first case an employment ends regularly at a fixed data, in the second case a certain legal aquis is repealed or finalized. Therefore this case is only partly useful for arguments for an unlimited Church autonomy in labour law. Other cases for example *Schüth vs. Germany* show that it is necessary to balance the different rights and interests of the parties according to the special situation of the case. The ECHR "*reiterated that the autonomy of religious communities was protected against undue interference by the State under Article 9,*" The plaintiff *Schüth* calls for a more explicit balancing of the full range of interests involved. Exactly how that balancing is likely to come out in individual cases will depend on a variety of factors. These include:

- (1) voluntary assumption of obligations of loyalty to the hiring institution;
- (2) the range of alternative employment available to the dismissed employee;

<sup>12</sup> Cf. BVerfG (Az.: 2 BvR 2292/13); Ulf Weigelt, Warum dürfen Kirchenmitarbeiter nicht streiken, *Die Zeit* online vom 9.9.2015, <http://www.zeit.de/karriere/beruf/2015-09/arbeitsrecht-streikrecht-kirchen-mitarbeiter> (access: 1.12.2015).

<sup>13</sup> <http://www.becketfund.org/wp-content/uploads/2014/06/CASE-OF-FERNANDEZ-MARTINEZ-v.-SPAIN.pdf>.

- (3) the importance attached to the conduct in question by the religious community (or other belief, ideological or ethos society);
- (4) the nature of the employment and its place in carrying out the mission of the organization;
- (5) the effect of continued employment on the credibility of the religious community in affirming and living by its teaching;
- (6) whether less drastic measures might suffice;
- (7) the right of a religious community to independence in its own affairs;
- (8) the family and privacy rights of the discharged individual.

### 3. EXEMPTION OF CHURCHES FROM THE GENERAL NORMS OF ANTI-DISCRIMINATION

States granting or guaranteeing the full autonomy of churches logically do not interfere in the organisation of the own affairs of the religious communities insofar as there is no other human or basic law effected. Art. 21 European basic law Charter forbids any discrimination, especially because of religion or belief. This Charter has meanwhile become primary law for the members of the European communion. The charter forces the countries of the EU to transform the content into national law.<sup>14</sup> The Employment Equality Framework Directive 2000/78<sup>15</sup> focusses the same topic of anti-discrimination on the field of the work place. This directive is one of the most important regulations of the European Union. It aims to combat discrimination on grounds of disability, sexual orientation, religion or belief and age in the workplace. Art 11 defines:

*“Discrimination based on **religion or belief**, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.”*

According to this general rule, which had to be transformed into national law in between three years from 2000 on, no treatment against the three in the directive enumerated criteria could be tolerated any longer. Only a single exemption was granted by the EU directive. It related to the characteristics and the special genuine occupational requirements of the religion. Under these

*“very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the ob-*

<sup>14</sup> Cf. Peter M. HUBER: Auslegung und Anwendung der Charta der Grundrechte, in: Neue Juristische Wochenschrift 2011, 2385-2390.

<sup>15</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, in: Official Journal L 303, 02/12/2000 P. 0016 - 0022.

*jective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.”(Art. 23).*

The positive aim of the European legislation, following the thread of the US American labour legislation<sup>16</sup> some years before, was to make direct and indirect discrimination against an employee or potential employee on the grounds of religion unlawful. These provisions also make it unlawful to discriminate by way of victimization, or to harass an employee on grounds of religious belief. The regulations also extend to cover providers and of vocational training in relation to those undergoing training for any employment, and to those acting as employment agencies and giving careers advice.

There are exceptions from anti-discrimination regulations for a very small range of reasons: for genuine occupational requirements, for national security and for positive discrimination for overcoming disadvantages pertaining to adherents of a religious belief or to encourage religious adherents to take advantage of opportunities for work. These exceptions are necessary if the state guarantees religious freedom as a pre-constitutional law about which he cannot dispose.

According to the unique tradition of each member of the European Communion the members realized a different implementation of this Directive into national law. In general we have to distinguish between rights of the workers and the rights of the religious entities. While the religions in all of the European countries have the right to create and abolish any church offices according to their needs and to develop the criteria for the employees, they have the right not to be forced to overtake an employment which is against their belief. For example: A Catholic gynecologist cannot be forced to carry out an abortion, even if he is an employee of a secular hospital.

#### **4. EFFECTS OF THE EUROPEAN LAW ON THE NATIONAL LEGISLATION**

The national reports to this conference show that all of the European countries transformed the European equality standards into national law, if this was not already done before in a closer or farer sense. The General Act on Equal treatment (Directive 2007/78/EC) required this legislation from all members of the EU, but the new members (after 2007) was left some more time to align their legislation with the European standards.

Based on a research of the year 2010 we can say that only a few states didn't transpose the EC directives on Antidiscrimination into national law but there different types of legislative transposition. We can identify two different systems.

<sup>16</sup> Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352), online: <http://www.eeoc.gov/laws/statutes/titlevii.cfm> (access: 1.12.2015).

**The first system can be named as legislative implementation.** This implementation took part in two different ways. In Countries as Germany, Estonia and the Netherlands the three relevant Antidiscrimination directives have been transposed into one national Antidiscrimination law. The legalistic question in this law making process is, if this is really the ideal way, if the character of the special legal interest is different. It has to be distinguished if there is to protect a religious belief, a physical or mental disability or a sexual orientation. Only the religious belief is a protected commodity depending on the free will of the person. The others are willing independently. Because of this difference it seems to be clever to transpose the Directive into several laws. Belgium Austria and Denmark decided to take this way. They set several Antidiscrimination laws into force.

**The second system can be called the additional solution.** Besides the transposition of the Directive some countries decided to include some more grounds of discrimination in their laws. The reason for this at least in the eastern countries was the experience of the 45 years dictatorship. Besides religion other social grounds as political activities, civil and social status were added. They are more or less based on the free will of the individuals and insofar comparable with individual religious freedom too.

From the viewpoint of law-making some countries as Austria, the Czech Republic only referred to the European norms while others created a differentiated labour law in that field. We find detailed norms in Finland, France and Germany on the both levels of the labour law, the law for employers and the law for employees. *Art. 6 Code du Travail* forbids discrimination but allows a difference in treatment which has to be proportional regarding religion and rights of the employees. According to the French understanding of autonomy of Churches as part of the individual religious freedom, religions as organisation can act as “enterprises of tendency”. This term is defined by the French law. Under this law religious communities are free to organize their own belongings without any state influence. Intervention in religious affairs is prohibited. In Germany the European directive was transformed on the basis of the German constitution (GG) which guarantees the individual and collective religious freedom (Art. 4, 140 GG, Art. 137 III WRV). The legal consequence in this system is that the rights of the religious communities are not prejudiced by common law. Is there any difference between the French and the German system? On the first view there seems to be the same result. But if we look at the status of an “enterprise of tendency”<sup>17</sup> in the French law and a “corporate body of common law”<sup>18</sup> in German law we can see that there is a

<sup>17</sup> Cf. Joachim WICHERT, Tendenzbetrieb, in: Springer Gabler Verlag (ed.), Gabler Wirtschaftslexikon, online edition: <http://wirtschaftslexikon.gabler.de/Archiv/58116/tendenzbetrieb-v6.html>.

<sup>18</sup> Cf. Heinrich DEWALL, Körperschaftstatus, in: Michael Heilig, Hendrik Munsonius, 100 Begriffe aus dem Staatskirchenrecht Tübingen 2015, 152-155.

legal difference. The term “enterprise of tendency” means that the entrepreneur doesn’t only have the goal to earn money. He also has some other motives, as they were education, social welfare, science, art or religion. In this system religion is on the same rank with all the other individual motives of the entrepreneur. In the German system we find a constitutional difference between tendency and a corporate body of common law. This constitutional figure in law privileges religious beliefs and philosophies of life in a certain way. They are not on the same legal rank as enterprises of tendency, which can be found in the German labour law in § 118 BetrVG as well. The difference is that this law doesn’t have any constitutional safeguarding, while the corporate body of common law grounds in the fundamental Rights of the constitution. This is the viewpoint from the legal theory. Obviously in the legal practice both systems appear with similar effects. France and Germany show the edges of the labour legislation regarding the independence of religion in the workfield. Countries of the former eastern hemisphere adopted in one or another way the German way of law making. Religions are privileged in the society more than other non-profit organisations. Is this justifiable? Looking at the specialty of religions not only to fulfil their aims in the concrete society and time but also to lead over to man eternal dimension it is comprehensible that the two figures of law are addressed to different types of organisations. Of course it also has to be mentioned that French model isn’t against religious freedom, but from a less distant viewpoint regarding the relationship of Church and state a law that relates to the specialities of the entities seems to fit more than a very general norm. It also has to be admitted, that the simple law more easily can be changed than the constitutional law. If it is accepted, that Religions are pre-constitutional entities the state only has the right to make the legal framework that ensures the independence and self-organisation of these communities. Countries like Hungary, Latvia, Poland, Romania and Slovenia adopted this idea and system.

As a result the approaches of the implementation can be divided into three groups: the proficient, the reluctant and the ambitioned implementation group. It is interesting to see to which geographical areas the nations belong that decided to enforce the anti-discrimination directive into national law. The proficient group are the north-western countries, the reluctant named are southern European countries and the ambitioned countries are the younger members of the EU in the north-east and the south-east of Europe. Looking at this qualification only the ground of religious freedom is independent from the national definition the ground which is somehow granted self-evident.

Another point of discussion is the question how religious freedom is protected by law.<sup>19</sup> In North and Western Europe the legal consequence for any con-compliance

<sup>19</sup> Cf. Lucy VICKERS, Religious freedom, Religious Discrimination and the Workplace, Oregon 2008, 27, 179-218.

is compensation. In the South-European countries penal law protects the laws on antidiscrimination.

Regarding the question whether exemptions are granted in the European countries and how they relate to the human rights of workers we have clearly to state that all the European countries in one or another way open the way to balance the rights of the workers and the rights of the religions in the workspace. If ecclesiastical persons can sole be employed by the norms of the religious law it has to be clear if the religious law itself is sufficient to rule eventualities of labour law or if there is a necessity that this law must be assisted by common law. Therefor we have to define what the term ecclesiastical person means. If this is a circumscription for the clergy one might agree that the religious law is sufficient. On the other side the state is also responsible for the clerics as citizens. Therefor a minimum standard of basic guaranties has to be fulfilled for those employees. The RC church for example states in can 281 CIC that the clerics deserve remuneration consistent with their condition, there needs and the needs of their families, if they have so as the permanent deacons.

Regarding the lay employees of the RC Church can 231 § 2 CIC is competent which says that their remuneration has to be sufficient for their and their families needs. Of course these norms only give a rough standard on one basic element of the rights of workers. The universal acting RC church can't provide more detailed norms for the employees<sup>20</sup>.

A characteristic change in the particular church law has to be mentioned in Germany. In spring 2015 the national Bishops Conference changed the law on loyalty-obligations. While in the past a violation of these obligations was followed by a dismissal from service, now, also according to the jurisdiction of the ECHR, the events of default are more precisely defined for special groups of employees according to close to the mission of the Church. But again even in this new norms it is the Church that defines the proximity or excision of the employee to the mission. But this is no longer the only criteria. The interest of the employee to stay the employment, for this is a human right itself, has to be weighed with the interest of the Church. The ECHR had to decide in several German labour cases. Finally the court concluded: The Religions have the right to impose loyalty-obligations but they are not considered absolutely. These rights have to be weighed with the human right of workers. In concretion: There is a difference to decide in a case of a chief Physician or to decide in a case of an organist. While a Physician may find a new job in a secular professional area, an organist depends more or less on his confession. It is not out of question that an organist who remarries after divorce can be dismissed, but the court has to proof that it has reviewed the mentioned competing criteria.

<sup>20</sup> Cf. Heinrich J.F. REINHARDT, comment on c. 231 in: MKCIC, ed. by Klaus Lüdicke et al., Essen (Loose-leaf) 1987, no. 5 sq.

## 5. INFLUENCE OF CASE-LAW ON THE LEGAL PRACTICE

Insofar, looking at the jurisdiction of the ECHR<sup>21</sup>, there has to be ascertained that those decisions influenced the autonomous legislation of a Church. The question is, if this modification was necessary or if it was only a wise strategy of the Church.

**Austrian** courts respect the exemptions; religious communities organize themselves their internal ecclesiastical affairs and religious purposes.

The **Belgian** jurisdiction practically exemptions were granted by the jurisdiction, but the court decisions are not univoice.

**German Labour courts** for example have developed a distinct jurisdiction on the question of the range of loyalty obligations of employees. The employers and the employees consider these decisions if problems occur. A dismissal is not the *unica ratio* but the *ultima ratio* if other solutions fail. In Germany we have to admit that the constitutional autonomy of Churches doesn't force the Churches to adapt their law to the jurisdiction of secular courts. On the other side, if a Church wants to recruit optimal personnel it stands in a competition with other employers and the relevant law. If the acceptance in the society for the extraordinary law of the religion in labour affair is no longer communicable, a change is necessary.

In **Hungary** the jurisdiction on the exemptions differs between the interest of the church and the type of the job. A webmaster has other obligations than a religious teacher. The jurisdiction seems in principle comparable to the German jurisdiction. Regarding the Hungarian legislation our report informs that ecclesiastical persons can be employed sole by the prescripts of the church law. Employees have to fulfil the special requirements of loyalty according to the teaching of the church. Employees of the church in state institutions as religious teachers were practically granted exemptions from equal treatment in common law. The law itself doesn't have this intention. So the practice exists besides the law.

In **Ireland** the case *Quinn versus supermarket* shows that religious discrimination is permissible if this is necessary to ensure the religious freedom of the community.

In **Italy** it is up to the judge to clearly define the extent of the rights of the workers and the institution.

The administrative court of **Luxembourg** ruled in the past that it is incompetent for deciding in labour cases on religious reasons. The future will bring something new because of the new general guidelines in constitutional law which lines out stronger than ever the neutrality of the state in religious affairs.

<sup>21</sup> <http://www.strasbourgconsortium.org/topic.php?pageId=11&topicId=2>.

In **Slovenia** religions decide independent from the state about their religious personnel either clerics or laity. Discrimination of religions is forbidden, either direct or indirect. A different treatment for employees because of religious reasons is tolerated. Different treatment doesn't create discrimination. Slovenia harmonized its labour law with the European provisions on equal treatment. The mentioned exemptions keep in force.

In **Spain** we find much jurisdiction about the question of finalisation of labour contracts of church employees. The background here is, as earlier pointed out, the time-limit on employments especially for religious teachers to keep them under Church control regarding the question whether their teaching is covered by the Church doctrine or not. The autonomy of religions is accepted by the secular tribunals when they declare that they were incompetent to judge about internal religious affairs. The church authorities have the permission to impose special religious loyalty obligations and to withdraw contracts if an employee acts against his obligation.

In **Sweden** religions are not exempt from the general norms on anti-discrimination but the law allows differentiation if the work or the special function needs an exemption. I.E. no religious group must except female religious ministers, even if the Swedish Church does so. But it also has to be pointed out that this exemption is not valid for the Swedish Lutheran Church.

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# RELIGION IN THE WORKPLACE IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

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This paper focuses on an analysis of the European Court of Human Rights case law regarding employees' freedom of religion in labour relationships. Although there are multiple situations related to this issue that could lead to conflicts (e.g. garments with a religious meaning, such as the Islamic veil; symbols worn for religious purposes, such as crosses and stars of David, etc), I will focus on two issues where, in my view, the cases and decisions upheld by the European Court have established different and somewhat contradictory criteria. This illustrates the variability of case law that is resolved depending on the singular *specie facti*.

Firstly, we will examine the commemoration and celebration of religious festivities and days of rest. As we will see in Strasbourg jurisprudence, the European Commission has taken steps to establish a highly restrictive interpretation of employees' rights of religious freedom in this matter.

Secondly, in labour activity carried out within religious denominations or affiliated institutions, the Court's decisions establish a much more protective tendency regarding the rights of lay workers. It may be pointed out that perhaps the differences in treatment are based on the application of latest piece of European Union legislation against discrimination on the basis of ideological or religious beliefs in employment and occupation<sup>1</sup> and its criteria in resolving the controversy, as we will see later.

Let's start with the first issue. Regarding festivities and days of rest matters (known in American Law as sabbatarian cases) we find some old cases resolved by the European Commission in the same manner. The *specie facti* are similar.

In *Ahmad versus United Kingdom*<sup>2</sup> a Muslim teacher at a public school in London asked for an extra forty-five minutes during the Friday lunch hour in order to have

<sup>1</sup> Council Directive 2000/78/EC, November 27th. 2000.

<sup>2</sup> X v. United Kingdom, 8160/78, March 12ve. 1981.

enough time to go to the mosque for prayer and return. The Educational Authority changed his contract to a part-time one (with lower wages and fewer opportunities for promotion). That seemed to Ahmad (the teacher) to be a punishment for his religious beliefs and discrimination compared to Christian workers' treatment.

In *Konttinen versus Finland*<sup>3</sup>, a Seventh Day Adventist employee in the Finnish railways asked for permission to leave work on Fridays before sunset and not return until Saturday evening. Despite Konttinen's several requests for this leave, the company did not authorise it. Nevertheless, the employee left work for the sabbatarian rest prescribed by his religion. After several warnings, he was finally fired.

We can also find a case related to religious objection raised by an individual of the social majority: a Christian woman who did not want to work on Sundays. In *Steadman versus United Kingdom*<sup>4</sup> a travel agency employee was required to sign a new contract after working for the company for two years. The new contract obliged her to work on Sundays. She refused for religious and family reasons (she wanted to be with her husband during her religion's prescribed weekly day of rest). She was subsequently fired by the company.

The decisions handed down by the European Commission follow those already applied to ministers, clerics and parishes of established Churches fired because of externally expressed discrepancies with the doctrine or the ideology of the Church (for example, in the cases *Knudsen*<sup>5</sup>, *Ahtinen*<sup>6</sup> or *Karlsson*<sup>7</sup>). The doctrine of the European Commission can be summarized in these points:

1. The employee must inform the employer regarding his religious necessities before signing the contract if he wants the employer to respect them.
2. The dismissals are justified because the employees breached the labour contract by leaving work without permission. The reason for the absence (religious or not) does not matter. Therefore, the religious motives of the workers, regardless of their seriousness or not, are not taken into account.
3. Moreover, by signing a contract, the employees have a serious limitation on their religious freedom: they are voluntarily bound by the labour agreements. The obligations derived from the contract cannot be jeopardized for any reason, even a religious one. Therefore, if they breach the contract for religious necessities, the employer can justifiably dismiss them.
4. There is, in no way, a contradiction between labour and religious duties, because the latter, the religious obligations, could always be met by opting out of the

<sup>3</sup> 24949/94, December 3rd. 1996.

<sup>4</sup> 29107/95, April 9th. 1997.

<sup>5</sup> *Knudsen v. Norway*, 11045/85, March 8<sup>th</sup>. 1985.

<sup>6</sup> ECHR Decision *Ahtinen v. Finland*, November 23rd. 2008.

<sup>7</sup> *Karlsson v. Sweden*, 12356/86, September 8th. 1988.

job. So, in the European Court opinion, quitting the job is the best option for exercising the workers' right to religious freedom.

5. The employer can demand that the employee provide evidence of belonging to a religious denomination if he asks for an exception to labour duties. In the case of *Koteski versus Macedonic Republic*<sup>8</sup>, the Court stated that the Company justifiably refused to allow a worker to have an extra free day during a Muslim festivity, because he did not prove that he belonged to the Islamic faith.

6. The coincidence between festivities and days of rest with those of the majority religious denomination does not constitute a discrimination against minority groups.

The same conclusions could be inferred in the cases of contradictions between religious festivities and professional duties. In the European Court Decision of *Sessa versus Italy*<sup>9</sup> a Jewish lawyer, representing one party of the accusation in a criminal process, asked the judge to change the date of a court appearance because it coincided with a Jewish holiday (*Yom Kippur*). Although the petition was made four months in advance, the court did not change the date. The European Court of Human Rights did not consider that there had been interference in the lawyer's right of religious freedom: he could observe the festivity by allowing another lawyer to appear for him. But if there was interference, this was justified because it respected the rights of third parties to a quick trial and the fair administration of State justice. As Judge Tulkens put it in his dissenting opinion, the Italian court had plenty of time to change the date and, thus, attempts to accommodate the lawyer's licit request. The tribunal did not do anything at all! A new date promptly communicated to all the parties involved in the trial –said the Judge- would not disrupt the celerity of the process.

At this point, I would like to underline some conclusions of the European Court that create what one could rightly call a "highly restrictive doctrine" regarding the right to observe the religious festivities within labour relations.

The supreme position with which the Court enshrines the contract rests on two controversial statements.

Firstly, there is the equal position of the parts and the willingness of the employees to be bound by all contractual obligations. History and experience show us that this premise is partially false. The superiority of the employer is a fact that explains the existence of, for example, trade unions or complex and extensive State legislation designed to protect workers' rights (the weaker part of the relationship). A work contract is, for many job seekers, something that they can "take or leave" but never change.

Secondly, Strasbourg's declaration that "the employee could exercise his or her religion by quitting the job" is, in my point of view, nothing less than cruel. I come from a country where a job is a precious gift, due to the high rate of unemployment.

<sup>8</sup> ECHR Decision, April 13rd. 2006.

<sup>9</sup> ECHR Decision, April 3<sup>rd</sup>. 2012.

As I see it, the Court's resolutions present the workers with an unfair dilemma: either give up their rights or quit their job and suffer months –even years- of unemployment.

In stating this, I am not saying that we should forget other legitimate interests of the employer (the right to direct and organise a company) or of the labour relationship (the loyalty and good faith of the employees, and the fulfilment of the contract). But this should not require the sacrifice of the fundamental rights. A process that balances the different conflicting rights must be found.

One path toward reaching this might be the North American case law doctrine of reasonable accommodation of the justifiable religious needs of the worker into company plans. Only when the employer can prove that the accommodation constitutes an undue hardship (because it disrupts the organization, or the costs are too great a burden, or it would affect the rights of the other workers) is he justified in refusing to make such accommodation.

This solution obliges the employer to take an active role (in trying to accommodate) which is not present in Strasbourg's decisions. In contrast, it is present in the European Union Court of Justice Decision in *Prais versus Council*<sup>10</sup>, which we recall, states that if the Council is informed with enough time of the impossibility of a candidate's attendance at an examination due to a serious religious motive, the Council should adopt reasonable measures to avoid the candidate's absence and, therefore, settle on another day for the examination.

As I see it, this kind of solution approaches the one applied by the European laws against the discrimination. The European Union Directive of November 27<sup>th</sup> 2000, which rules against discrimination on the basis of ideological or religious beliefs in employment or occupation, prohibits indirect discrimination. The employer cannot enforce measures which are apparently neutral, but which can, in fact create disadvantages for certain groups. However, such measures are admissible if the employer can prove they are objectively justified by a legitimate aim and as long as the means for achieving that aim are appropriate and necessary. As with the reasonable accommodation doctrine, European Law obliges the employer to prove that his actions are not discriminatory. And the courts of justice should monitor these actions.

In fact, European anti-discriminatory Law has been taken into account in Strasbourg decisions on the matter of the work carried out in organizations with a religious ethos (so called "tendency organizations"). Religious denominations and the institutions created by them to enforce their spiritual message are tendency organizations. This is the second sphere that we will analyze in the European Court of Human Rights treatment of religion within labour relationships.

<sup>10</sup> October 27th. 1976.

It is thus recognized that the right of the employees to exercise their rights to freedom of ideology and religion is conditioned to a certain extent by whether that activity takes place in an organisation with a religious ethos. These are characterised by ethical or moral, ideological or religious ideals which permeate all of their objectives and activities, and presume that the employee will abide by this inspired concept of the world called “ethos”. For an organisation to apply for this consideration it must meet a basic requirement: to be a means or mechanism for the propagation of this ideal or ideology. The fact that religious faiths, or the institutions they create, may be considered organisations with a religious ethos is linked to the freedom of churches and communities to propagate their own creed, and to their full autonomy. However, the activity of institutions created by religions may also include producing or exchanging goods and services. So, in order for them to be considered organisations with a religious ethos, it must be clear that this activity is secondary to, and instrumental in the main objective, the propagation of the religious message.

In this issue the European Court of Human Rights has stated that a fair balance must be made between the individual rights of the workers and the collective rights of the institutions. In which matters?

Firstly, the civil courts should monitor the reasons for the dismissal of an employee who works for a religious institution. In the *Lombardi Vallauri versus Italy* case<sup>11</sup>, the plaintiff was a law professor of the Roman Catholic University of the *Sacro Cuore* of Milan. His contract was annulled because his teachings were “opposed to Roman Catholic doctrines”. Neither the University nor the Catholic hierarchy clearly stated the exact reasons or what specific teachings of the professor were opposed to Catholic doctrine. The lack of reasons to rescinding the “*venia docendi*” kept the plaintiff from defending himself properly; as a result, the civil courts could not examine and judge the case.

Secondly, in the balance between the beliefs of employees and the aims of the institution, the privacy of the employee and his or her private morality, which reflect the level of commitment and compliance with the ethos of the organisation, are also relevant. In any case, the significance of casuistic factors should be stressed. These cause variations in the solutions derived from the hypothetical conflicts between the autonomy of the employee and the religious requirements. For example, if an ideological organisation receives public funding, I think it is also logical that it should approximate the standards of pluralism and non-discrimination of the State and its institutions. Or, more importantly, the solution depends on the relationship existing between the type of activity being carried out and the aims of the organisation as a means for transmitting a religious doctrine.

<sup>11</sup> ECHR Decision, October 20th. 2009.

Two cases in Germany related to lay workers of religious entities clearly illustrate the position of the European Court on this issue. The facts in both cases are similar: a layperson was hired by a religious denomination and was later dismissed because of a substantial infringement of the loyalty duties: the employee committed adultery and it was discovered by the employer. However, the Court ruled in opposite directions in the two cases.

In the *Obst* case, of September 23rd. 2010, the Director of Public Affairs in Europe of the Mormon Church was fired because he maintained an extra-marital relationship with a woman. The Court held the Mormon Church's decision was necessary to preserve the credibility of its doctrine: matrimonial fidelity is a central pillar in the Mormon faith. Breaking the moral principles of his Church, the plaintiff became unfit to perform his professional duties.

On the contrary, in the *Schütz* case (issued on the same date) the Court held that the adultery of an organist and choir director hired by a Roman Catholic parish was not sufficient cause for firing him: his job was not directly related to the religious mission of spreading the Gospel and the requirement of complete sexual abstinence after his divorce would infringe upon a fundamental aspect of his private life. So his dismissal went against article 8 of the European Convention and it was found to be unlawful.

To summarize the European Court's doctrine, the decisions of religious denominations to end the contracts of lay workers comply with the European Convention standards if they properly balance the rights of the workers and of the denominations regarding self-organization and doctrinal autonomy. The cause of the dismissal should be clearly identified and the civil courts must verify the balancing process between individual and collective rights. The proportionality factor of the dismissal is measured by taking into account the nature of the work: if it is directly and mainly related to religious aims (acts of worship or the spreading of the message) the worker's duty of loyalty must prevail over his private life.

And here I must stress that in some points the European Court decisions are, from my point of view, controversial. I will give one example. In the *Schütz* case referred to before, the Court held, contrary to the Roman Catholic perspective, that the job of a choir director in a parish is not an activity directly related to religious aims. But I ask, "Isn't it, really?" Christian history shows us how churches have supported music as a means to pray and to approach God (from Gregorian chant to the "*cantatas*" and masses of Bach or Mozart, for example). In any case, should not the final definition of what are and what are not aims and means of the churches be the exclusive competence of religious entities, if we want to safeguard their doctrinal autonomy?

In reality we find ourselves with highly divergent decisions between sabbatarian cases and jobs in religious denominations. We also find a vague and uncertain criterion, subject to a plural interpretation, according to the cases and contexts, provided by the courts of justice. All of which can lead us to think that, in reality, what prevails in the end is the subjective, personal opinion of the judge.

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# INDIRECT DISCRIMINATION AND REASONABLE ACCOMMODATION IN THE MANIFESTATIONS OF RELIGION IN THE WORKPLACE

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La lecture des rapports nationaux révèle une forte convergence en matière de traitement juridique des manifestations des pratiques religieuses au travail. Il y a à cela une cause immédiate qui tient à l'identité des sources juridiques de protection, en particulier la Convention européenne des droits de l'Homme et le droit de l'Union européenne. Mais une telle convergence est loin de se vérifier dans tous les autres champs de protection de la liberté de religion où pourtant ce sont les mêmes sources qui s'appliquent. De fait, l'explication de cette convergence est vraisemblablement historique plutôt que formelle. Elle réside dans le fait que la société européenne est profondément sécularisée, et que le monde du travail est le lieu où cette sécularisation s'est progressivement accomplie. Le paternalisme des patrons chrétiens du 19<sup>e</sup> siècle n'a pas su résister à la diffusion de la culture ouvrière, qui a progressivement détaché les travailleurs de leur milieu religieux traditionnel. A cela s'ajoute que la culture disciplinaire de l'entreprise, au service de la production et de la rentabilité, n'a jamais laissé beaucoup de place, jusqu'à ces dernières années, à l'exercice des libertés individuelles et à l'épanouissement personnel. Aucune entreprise n'a jamais été fondée dans le seul but de procurer du bien-être à ses salariés ou de satisfaire leurs aspirations religieuses. Concrètement, cette hypothèse se vérifie dans le fait que les rapports nationaux évoquent assez peu de contentieux relatifs à la pratique religieuse au travail, même s'ils sont apparus depuis quelques années, essentiellement dans un contexte lié à la pratique de l'Islam.

## 1. LES SOURCES DE PROTECTION

Le droit de la discrimination religieuse au travail puise à deux sources complémentaires, à savoir la garantie de la liberté de religion d'une part, et l'interdiction des discriminations directes ou indirectes d'autre part. Ces deux sources agissent de façon combinée, au sens où l'égalité qui commande l'interdiction des discriminations est un principe sans substance propre, et qu'elle est au service des libertés, en l'espèce la liberté de religion dans sa double dimension positive et négative.

C'est ainsi que dans le droit de la Convention européenne des droits de l'Homme, et sous réserve d'une improbable entrée en vigueur du protocole additionnel n°12, l'article 14 interdisant les discriminations ne peut être invoqué qu'en combinaison avec un des droits protégés par la Convention, en l'occurrence l'article 9 garantissant le droit à la liberté de religion. Ces dispositions trouvent à s'appliquer à l'ensemble des Etats représentés dans le Consortium.

Mais la protection contre les discriminations au travail est également assurée, de façon plus précise, par le droit communautaire, aujourd'hui droit de l'Union, à laquelle participent les Etats représentés dans le Consortium. Plus particulièrement, la Directive 2000/78/CE du 27 novembre 2000<sup>1</sup> établit un cadre général pour lutter contre la discrimination fondée sur la religion ou les convictions, le handicap, l'âge ou l'orientation sexuelle dans les Etats membres. Cette directive institue *un cadre général en faveur de l'égalité de traitement en matière d'emploi et de Travail*, intégré selon des modalités variables dans les législations des Etats.

Le principal intérêt de cette directive, du point de vue qui intéresse le présent rapport, est qu'elle énonce un certain nombre de définitions communes, et notamment celle de discrimination directe et indirecte. Ainsi que l'énonce l'article 2, *une discrimination directe se produit lorsqu'une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait dans une situation comparable, (pour un motif fondé sur la religion)*. Quant à la discrimination indirecte, elle se produit *lorsqu'une disposition, un critère ou une pratique apparemment neutre est susceptible d'entraîner un désavantage particulier pour des personnes d'une religion ou de convictions... données, par rapport à d'autres personnes, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un objectif légitime et que les moyens de réaliser cet objectif ne soient appropriés et nécessaires*. Les dispositions antidiscriminatoires sont extrêmement nombreuses dans les législations nationales, en droit du travail mais aussi et surtout dans la loi pénale. La difficulté comme le savent les praticiens tient dans l'administration de la preuve, qui est toujours extrêmement difficile à rapporter<sup>2</sup>. Par ailleurs, la discrimination à raison de la religion tend souvent à se superposer avec une discrimination à raison des origines ou de l'appartenance ethnique, qui conduit à occulter la dimension proprement religieuse du conflit. Quant à la discrimination indirecte, elle est d'un maniement extrêmement délicat, non seulement pour des raisons de preuve, mais aussi parce qu'elle remet en cause des habitus et des cultures établis la plupart du

<sup>1</sup> Directive portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de Travail.

<sup>2</sup> Le tribunal correctionnel de Paris a condamné en décembre 2015 le patron juif d'une entreprise commerciale qui refusait d'embaucher des salariés de confession juive, afin de ne pas avoir à leur accorder le samedi. La preuve en l'occurrence a été établie par des enregistrements téléphoniques.

temps en-dehors de toute intention discriminatoire. Une entreprise peut choisir pour des raisons parfaitement légitimes de privilégier le recrutement des enfants de ses propres salariés, mais il est certain qu'une telle pratique est de nature à empêcher toute intégration des jeunes appartenant aux minorités visibles. On peut discriminer indirectement sans le vouloir.

La directive de 2000 présente également un autre intérêt en ce qui concerne la liberté de religion, à savoir que son article 4-2 reconnaît le droit pour les Eglises de déroger au droit commun des activités professionnelles dans les limites qu'il précise: « *Les États membres peuvent maintenir dans leur législation nationale en vigueur à la date d'adoption de la présente directive ou prévoir dans une législation future reprenant des pratiques nationales existant à la date d'adoption de la présente directive des dispositions en vertu desquelles, dans le cas des activités professionnelles d'églises et d'autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions, une différence de traitement fondée sur la religion ou les convictions d'une personne ne constitue pas une discrimination lorsque, par la nature de ces activités ou par le contexte dans lequel elles sont exercées, la religion ou les convictions constituent une exigence professionnelle essentielle, légitime et justifiée eu égard à l'éthique de l'organisation. Cette différence de traitement doit s'exercer dans le respect des dispositions et principes constitutionnels des États membres, ainsi que des principes généraux du droit communautaire, et ne saurait justifier une discrimination fondée sur un autre motif.*

*Pourvu que ses dispositions soient par ailleurs respectées, la présente directive est donc sans préjudice du droit des églises et des autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions, agissant en conformité avec les dispositions constitutionnelles et législatives nationales, de requérir des personnes travaillant pour elles une attitude de bonne foi et de loyauté envers l'éthique de l'organisation.* On renvoie sur ce point à la troisième partie des rapports nationaux.

A ces sources internationales généralement citées, les rapports ajoutent les sources nationales. Les constitutions écrites des Etats comprennent de façon systématique des dispositions qui garantissent la liberté de religion et interdisent les discriminations sur le fondement du principe général d'égalité. Les dispositions constitutionnelles sont complétées par les législations nationales spécifiques, et notamment celles qui ont pour objet de transposer en droit interne les directives européennes en matière de discrimination. Quant à la question de savoir qui de la liberté de religion ou de l'égalité s'avère la plus protectrice, il semble artificiel de dissocier ces deux principes qui agissent la plupart du temps de façon combinée. Mais il est vraisemblable qu'aujourd'hui c'est l'invocation d'une discrimination dans l'exercice d'une liberté qui est mise en avant bien plus que l'atteinte simple à l'exercice de la liberté. Enfin, la question de l'accommodement raisonnable n'est pratiquement pas évoquée dans les rapports. Cela ne signifie pas qu'elle ne soit pas pratiquée en

Europe. Simplement cette pratique pragmatique n'est pas conceptualisée chez nous en tant qu'instrument juridique de traitement des situations discriminatoires, comme elle l'est en Amérique du Nord.

## 2. LE CHAMP D'APPLICATION

Les principes généraux de la liberté de religion et de l'égalité trouvent application dans les relations de travail entendues dans leur sens le plus large. D'une part, ils s'appliquent dans le secteur privé, mais aussi dans les administrations publiques. Chacun des rapports nationaux rend compte de cette obligation de non-discrimination dans le secteur public, tout en soulignant les restrictions qui peuvent être imposées au fonctionnaire dans l'exercice de la liberté de religion, et qui sont assez variables selon les Etats selon le système de fonction publique qui est le leur. A l'intérieur du secteur public, on peut noter qu'un régime spécifique est parfois réservé aux agents intervenant dans le secteur éducatif.

D'autre part, lorsque les législations nationales reconnaissent le droit pour les organisations religieuses de s'organiser dans le respect de leur auto-compréhension, le principe de non-discrimination à raison de la religion ne cesse pas pour autant totalement de s'appliquer. En effet, la différence de traitement pour n'être pas discriminatoire doit se rapporter ainsi que l'exige la directive de 2000 à « *une exigence professionnelle essentielle, légitime et justifiée eu égard à l'éthique de l'organisation* », et de surcroît elle « *ne saurait justifier une discrimination fondée sur un autre motif* ». L'entreprise de tendance n'est pas totalement immunisée contre le droit commun.

Enfin, la protection contre les discriminations couvre l'ensemble de la vie professionnelle, c'est-à-dire l'embauche, les relations de travail, la carrière, ainsi que la rupture de la relation de travail.

## 3. LES LITIGES IMPLIQUANT LA RELIGION

On l'a dit, les questions soulevées ne sont pas extrêmement nombreuses, et ce sont assez souvent les mêmes qui reviennent dans les rapports nationaux. On se contentera ici d'une brève énumération:

— Le port de signes d'appartenance religieuse au travail (secteur public, milieu scolaire, entreprises privées): la question de l'interdiction des signes religieux et en particulier du foulard islamique revient de façon récurrente dans les rapports nationaux.

— La pratique des rites religieux et de la prière sur le lieu de travail.

— Les autorisations d'absence pour motifs religieux (fêtes religieuses). C'est une question posée dans de nombreux Etats, aussi bien dans le secteur public que dans le secteur privé, avec des réponses différenciées.

— Le respect des obligations alimentaires (cantines publiques, ou cantines d'entreprises). La question très peu évoquée d'une manière générale.

— L'objection de conscience pour motif religieux (refus pour un médecin hospitalier de pratiquer certains actes par exemple). Elle est reconnue dans un certain nombre de législations. Certains litiges concernent l'étendue de la clause de conscience dans le cadre professionnel.

— Le refus de pratiquer certains actes liés à la fonction: par exemple, un boucher salarié qui du jour au lendemain refuse de servir du porc.

#### 4. MODALITÉS DE RÉOLUTION DES CONFLITS RELIGIEUX DU TRAVAIL

Les rapports nationaux n'analysent pas d'une manière générale les modalités de résolution des conflits dans le monde du travail. Ainsi qu'on l'a dit précédemment, l'accommodation n'est pas présentée comme un moyen de remédier à une discrimination potentielle, mais elle est un procédé pragmatique qui apparaît adapté à la réalité du monde professionnel, en sorte que l'on peut penser qu'elle est fréquemment pratiquée dans les entreprises lorsqu'elles sont aux prises à des demandes particulières. En tout état de cause, il est vraisemblable qu'un nombre important de litiges trouvent leur solution sans qu'il soit besoin de solliciter le juge.

La saisine du juge correspond souvent à des cas d'espèce correspondant à une question controversée, et qui nécessite d'être réglée par voie de solution générale. Certains litiges tels que ceux concernant le port de signes religieux par les agents publics sont ainsi fait l'objet de décisions rendues par les cours suprêmes nationales dans plusieurs pays. Les solutions jurisprudentielles pourront le cas échéant faire l'objet d'une intervention législative.

Enfin les rapports nationaux ne permettent pas de connaître précisément les modalités de résolution des conflits religieux (solution pragmatique, adaptation du droit, recours au juge), mais c'est une question qui mériterait sans aucun doute d'être abordée au cours de la discussion générale.



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## **NATIONAL REPORTS**



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# RELIGION IN THE WORKPLACE UNDER AUSTRIAN LAW

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## I. RELIGIOUS FREEDOM AT WORK

### 1. Key Instruments

Religious freedom of the individual in respect to work is based on both religious freedom as such and equality. Hence, the individual's protection is constitutionally guaranteed by Article 14 of State's Basic Act on the General Rights of the Citizens<sup>1</sup> of 1867 and Article 9 of the ECHR<sup>2</sup>, taken alone and in conjunction with Article 14 of the ECHR.

In addition to the constitutional framework, section 17(1) of Equal Treatment Act<sup>3</sup> – which is based on Article 4(2) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation<sup>4</sup> – forbid any employment related discrimination based on – amongst others – religion or *weltanschauung*, as far as the Federation has the competence to legislate. For training and services in federal offices, sections 13 ff. of Federal Equal Treatment Act<sup>5</sup>, for training and services in provincial offices, pertinent acts of the *länder*<sup>6</sup> are applicable.

<sup>1</sup> Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger, Reichsgesetzblatt 1867/142 as amended.

<sup>2</sup> Part of the Austrian Federal Constitution.

<sup>3</sup> *Gleichbehandlungsgesetz*, Bundesgesetzblatt I 2004/66 as amended.

<sup>4</sup> OJ L 303/2000, pp. 16–22.

<sup>5</sup> *Bundes-Gleichbehandlungsgesetz*, Bundesgesetzblatt 1993/100 as amended.

<sup>6</sup> Burgenland: *Antidiskriminierungsgesetz*, Landesgesetzblatt 2005/84 as amended; Carinthia: *Antidiskriminierungsgesetz*, Landesgesetzblatt 2004/63 as amended; Lower Austria: *Gleichbehandlungsgesetz*, Landesgesetzblatt 2060-0 as amended; Salzburg: *Gleichbehandlungsgesetz*, Landesgesetzblatt 2006/31 as amended; Styria: *Landes-Gleichbehandlungsgesetz*, Landesgesetzblatt 2004/66; the Tyrol: *Antidiskriminierungsgesetz*, Landesgesetzblatt 2005/25 as amended; Upper Austria: *Antidiskriminierungsgesetz*, Landesgesetzblatt 2005/50 as amended; Vorarlberg: *Antidiskriminierungsgesetz*,

## 2. Definitions

Neither ‘religion’ nor ‘*weltanschauung*’ is defined by the aforementioned acts, but presupposed. The explanatory notes of Equal Treatment Act indicate that both concepts have to be interpreted in an extensive way<sup>7</sup>. ‘Religion’ shall not be limited to recognised religious societies. It requires, however, a belief, life guidelines and rites<sup>8</sup>. In contrast thereto, areligious beliefs and guiding principles are covered by the concept of ‘*weltanschauung*’<sup>9</sup>, under which the Supreme Court refuses to subsume political opinions on a concrete topic – as, for example, a critical opinion about asylum law<sup>10</sup> – or the case of an appellant not being a member of a political party<sup>11</sup>. Political convictions which transcend particular questions, are however protected, as the High Administrative Court deduced from the explanatory notes<sup>12</sup> to the Federal Equal Treatment Act<sup>13</sup>.

‘Religion’ is also defined in the explanatory notes to the Confessional Communities Act<sup>14</sup>. Pursuant thereto, it is understood as a historically grown fabric of describable convictions which interpret man and world in their transcendent reference and accompany them with specific rites, symbols, doctrines and appropriate instructions<sup>15</sup>.

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Landesgesetzblatt 2005/17 as amended; Vienna: *Antidiskriminierungsgesetz*, Landesgesetzblatt 2004/35 as amended.

<sup>7</sup> No. 307 of the *Beilagen zu den Stenographischen Protokollen des Nationalrates*, 22<sup>th</sup> legislative period, p. 14.

<sup>8</sup> *Ibid.* Cf. H. Hopf, K. Mayr and J. Eichinger, *GIBG. Gleichbehandlung – Antidiskriminierung* (Wien 2009), § 17 GIBG, marg. nos. 17 f.

<sup>9</sup> No. 307 of the *Beilagen zu den Stenographischen Protokollen des Nationalrates*, 22<sup>th</sup> legislative period, p. 15; cf. G. Thüsing, ‘Diskriminierung wegen politischer Überzeugung, Religion und Weltanschauung’, in T. Tomandl and W. Schrammel (eds.), *Arbeitsrechtliche Diskriminierungsverbote* (Wien 2005), pp. 1–41 (pp. 2–13 and 40 f.); Hopf, Mayr and Eichinger, *supra*, n. , § 17 GIBG, marg. nos. 39 f.

<sup>10</sup> Oberster Gerichtshof, 24 February 2009, 9 Ob A 122/07t; assenting A. Potz, commenting this decision in (2011) 58 *österreichisches Archiv für recht & religion*, pp. 217–223; dissenting J. Eichinger, ‘Diskriminierung aufgrund der Weltanschauung: auch eine politische Angelegenheit’, (2009) 27 *Recht der Wirtschaft*, pp. 768–776.

<sup>11</sup> Oberster Gerichtshof, 21 December 2009, 8 Ob A 69/09v.

<sup>12</sup> No. 285 of the *Beilagen zu den Stenographischen Protokollen des Nationalrates*, 22<sup>nd</sup> legislative period, p. 12.

<sup>13</sup> Verwaltungsgerichtshof, 15 May 2013, 2012/12/0013.

<sup>14</sup> *Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften*, Bundesgesetzblatt I 1998/ 19 as amended; see *infra*, ch. III.1.

<sup>15</sup> No. 938 of the *Beilagen zu den Stenographischen Protokollen des Nationalrates*, 20<sup>th</sup> legislative period, p. 8.

### 3. Protective Scope

Doctrine holds that on principle, the protective scope of the constitutionally guaranteed religious freedom is wide<sup>16</sup>.

Labour law is judged by civil courts. Parties of civil procedures have been able to appeal to the Constitutional Court alleging the application of unconstitutional acts of law according to Article 140(1)1d of the Constitution only since 2015<sup>17</sup>. Before that, it was left to the civil courts themselves to refer the matter to the Constitutional Court according to Article 140(1)1a *leg. cit.* and to challenge the constitutionality of acts of law.

Individual cases heard before other final instance courts concern Muslim prayers. Their compatibility with the conditions at the workplace<sup>18</sup> or with an unemployed person's obligations to attend a training course<sup>19</sup> were scrutinised by the Supreme Court or the High Administrative Court respectively. Other questions covered by the protective scope comprise religiously significant garments<sup>20</sup> or symbols<sup>21</sup>, dietary rules<sup>22</sup> or religious holidays<sup>23</sup>.

Yet, some cases, which do not constitute problems on the individual level, because they enter into private autonomy of the contract parties, may well do so, when they are compared with other contract of co-workers. In this respect, the Supreme Court held that an employer may grant a Lutheran employee Reformation Day as an

<sup>16</sup> H. KALB, R. POTZ and B. SCHINKELE, *Religionsrecht* (Wien 2003), p. 49; M. Fister, *Der Tendenzbetrieb im österreichischen und europäischen Recht* (Wien 2008), pp. 87 f.; B. Schinkele, 'Religionsfreiheit und Diskriminierungsverbot aus arbeitsrechtlicher Sicht', in U. H. J. Körnter, S. Müller, M. Kletečka-Pulker and J. Inthorn (eds.), *Spiritualität, Religion und Kultur am Krankenbett* (Wien, New York 2009), pp. 46–60 (pp. 58–60).

<sup>17</sup> Article 151(54)5 of the Constitution.

<sup>18</sup> Oberster Gerichtshof, 27 March 1996, 9 Ob A 18/96.

<sup>19</sup> Verwaltungsgerichtshof, 11. 9. 2008, 2007/08/0141, VwSlgNF [coll. of the case law of the High Administrative Court, new series] 17530 A.

<sup>20</sup> B. SCHINKELE, 'Der "Streit" um das islamische Kopftuch. Kommentar zu BVerfG 24. 9. 2003, 2 BvR 1436/02 (unter Berücksichtigung von BAG 10. 10. 2002, 2 AZR 472/01; BVerfG 30. 7. 2002, 1 BvR 792/03', (2004) 22 *Recht der Wirtschaft*, pp. 30–36 (pp. 34 f.); Thüsing, *supra*, n. , pp.16–27; M. Windisch-Graetz in R. Rebhahn (ed.), *Kommentar zum Gleichbehandlungsgesetz* (Wien, New York 2009), § 17 GIBG, marg. nos. 25 f.

<sup>21</sup> *Ibid.*, marg. no. 26.

<sup>22</sup> Windisch-Graetz, *supra*, n. , § 17 GIBG, marg. no. 34.

<sup>23</sup> Cf. Oberster Gerichtshof, 16 December 1986, 14 Ob 204/86; W. Wieshaider, 'Das Feiertagsrecht als vergessene Umsetzungsmaterie der Richtlinie 2000/78/EG', (2008) 55 *österreichisches Archiv für recht & religion*, pp. 279–289; Windisch-Graetz, *supra*, n. , § 17 GIBG, marg. nos. 27 f. and 34; A. Potz, 'Dienstverhinderung aus religiösen Gründen', in B. Schinkele, R. Kuppe, S. Schima, E. M. Synek, J. Wallner and W. Wieshaider (eds.), *Recht – Religion – Kultur. Festschrift für Richard Potz zum 70. Geburtstag* (Wien 2014), pp. 639–661.

additional day off work recognising the latter's religious practice<sup>24</sup>. The same employer will, however, be required to treat other employees accordingly.

#### 4. European Case Law

Amendment 2011<sup>25</sup> to Equal Treatment Act extended the constituent elements of deprecated discriminations to acts against persons who are in a close relationship with another person because of the latter person's – amongst others – religion or *weltanschauung*: section 19(4) of Equal Treatment Act. Thus, the legislator did not actually intend to amend the law, but to clarify that it shall be interpreted according to the CJEU's view in the *Coleman* case<sup>26/27</sup>.

According to Article II/7 of the constitutional act published in *Bundesgesetzblatt* 1964/59, as amended, the ECHR is an integral part of Austrian constitutional law, having the same power to abrogate as all other constitutional law<sup>28</sup>. The Austrian Constitutional Court hence applies ECHR directly, taking the case law of the ECtHR into account, where relevant.

In regard of labour law, the Constitutional Court distinguished the case of a parish pastor of the Reformed Church, complaining against his relocation, from the *Obst*<sup>29</sup> and *Schüth*<sup>30</sup> cases<sup>31</sup>.

## II. RELIGIOUS MINISTERS AND LABOUR LAW

There is no statutory definition of religious ministers, State refers to the concepts of the religious communities, which is demonstrated by the chosen terminology as well. Whereas State law uses 'clergy' in regard to some Churches<sup>32</sup>, it refers to 'people charged with religious care' and 'religious officeholders'<sup>33</sup>. Already in 1913, a pe-

<sup>24</sup> Oberster Gerichtshof, 16 December 1986, 14 Ob 204/86.

<sup>25</sup> Bundesgesetzblatt I 2011/7.

<sup>26</sup> CJEU (Grand Chamber), 17 July 2008, C-303/06 (*S. Coleman v. Attridge Law and Steve Law*).

<sup>27</sup> No. 938 of the *Beilagen zu den Stenographischen Protokollen des Nationalrates*, 24<sup>th</sup> legislative period, p. 6; H. Hopf, K. Mayr and J. Eichinger, *GIBG – Novelle 2011. Ergänzungsband (Wien 2011)*, § 19 *GIBG*, marg. no. 9.

<sup>28</sup> Cf. e.g. W. Berka, *Verfassungsrecht*, 4<sup>th</sup> ed. (Wien, New York 2012), marg. nos. 1173–1175.

<sup>29</sup> ECtHR, 23 September 2010, 425/03 (*Obst v. Germany*).

<sup>30</sup> ECtHR, 23 September 2010, 1620/03 (*Schüth v. Germany*).

<sup>31</sup> Verfassungsgerichtshof, 28 November 2011, B 1220/11, VfSlg. [coll. of the case law of the Constitutional Court] 19540; see *infra*, ch. II.

<sup>32</sup> Cf. e.g. Articles I, VI or VIII of Concordat, Bundesgesetzblatt 1934 II 2; sections 9–12 of Protestant Church Act (*Bundesgesetz über äußere Rechtsverhältnisse der Evangelischen Kirche*), Bundesgesetzblatt 1961/182 as amended.

<sup>33</sup> Cf. sections 8, 13 of Israelite Religious Society Act (*Gesetz betreffend die Regelung der äußeren Rechtsverhältnisse der israelitischen Religionsgesellschaft*), Reichsgesetzblatt 1890/57 as amended; sections 11, 14, 18 and 21 of Islam Act 2015 (*Islamgesetz 2015*), Bundesgesetzblatt I 39.

riod when the ecclesiastical was much less separated from the governmental realm<sup>34</sup>, the High Administrative Court had tried an approach by naming the characteristic responsibilities; accordingly, a religious minister is a teacher of doctrine, a counsellor in religious matters, who supervises or conducts service and ritual, preaches, decides ritual questions and keeps the registers<sup>35</sup>.

Pursuant to the prevailing opinion, religious ministers have a different position whether their work is

- considered part of their personal status, such as priests or members of a religious order, or
- based on a labour contract and refers to issues regulated by State law<sup>36</sup>.

The first set of cases is considered to be part of the internal matters not subject to discretion by State authorities. Since the personal status is defined by the internal law and doctrine, the situation varies from religious community to religious community. The Supreme Court adjudicated along this line for instance in the case of the claims of a Catholic priest, anchored in ecclesiastical rules on remuneration<sup>37</sup>. The Constitutional Court rejected an appeal of a Reformed pastor against a decision of a second instance disciplinary board of his Church confirming his relocation. The court stated that it lacked competence to decide because disciplinary issues are internal by nature, even if embedded in the general frame of a labour contract<sup>38</sup>.

The second set of cases is, however, framed by State law, why the religious ministers' situation of the various religious communities is similar. Accordingly, the Supreme Court held that a Protestant pastor's wage claims are subject to be decided by State courts<sup>39</sup>.

<sup>34</sup> Cf. the registers of births, deaths and marriages or the religious marriages, see thereto M. v. Hussarek, *Grundriß des Staatskirchenrechts*, 2<sup>nd</sup> ed. (Leipzig 1908), p. 23; L. Adamovich, *Handbuch des österreichischen Verwaltungsrechts*, vol. II, 5th ed. (Wien 1953), p. 26; I. Gampl, *Österreichisches Staatskirchenrecht* (Wien, New York 1971), pp. 198 f.

<sup>35</sup> Verwaltungsgerichtshof, 4 Mar 1913, no. 2570, VwSlg. [coll. of the case law of the High Administrative Court] 9491 A; Kalb, Potz and Schinkele, *supra*, n. , p. 226.

<sup>36</sup> W. SCHRAMMEL, 'Durch religiöse Motive bestimmte Arbeit und Arbeitsverhältnis', in U. Runggaldier and B. Schinkele (eds.), *Zur arbeitsrechtlichen und sozialrechtlichen Stellung von Klerikern, Ordensangehörigen und kirchlichen Mitarbeitern in Österreich* (Wien, New York 1996), pp. 83–95 (pp. 89–91); Windisch-Graetz, *supra*, n. , § 20 GIBG, marg. no. 23; Oberster Gerichtshof, 7 September 1993, 10 Ob S 137/93; Oberster Gerichtshof, 28 October 1993, 10 Ob S 191/93; dissenting Fister, *supra*, n. , pp. 178 f.; cf. Hopf, Mayr and Eichinger, *supra*, n. , § 5 GIBG, marg. nos. 56 and 60.

<sup>37</sup> Oberster Gerichtshof, 16 July 1998, 10 Ob S 204/98t, SZ [coll. of civil case law of the Supreme Court] 71/127.

<sup>38</sup> Verfassungsgerichtshof, 28 November 2011, B 1220/11, VfSlg. 19540.

<sup>39</sup> Oberster Gerichtshof, 26 November 1974, 4 Ob 41/74, SZ 47/135; cf. D. Wakolbinger, 'Auswirkungen des Antidiskriminierungsrechts auf die Loyalitätsobliegenheiten religionsgemeinschaftlicher Arbeitsverhältnisse', in T. Horvath, R. Lebesmühlbacher, F. Lehne, M. Lütte and I. Murer (eds.), *Ungleichheit im aktuellen Diskurs* (Wien 2013), pp. 67–107 (p. 70).

### III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

#### 1. Autonomy and Labour Law

Austrian law provides for two tiers of legal personalities, reserved for religious communities:

- at a lower level the private law status of Registered Confessional Communities with fewer legal and organisational requirements to be met;
- and at a higher level the public law status of Recognised Religious Societies.

Their establishment has been explained and discussed in other places<sup>40</sup>. For the following considerations it may suffice to enumerate the current list of registered or recognised bodies corporate.

At present, public law status is granted to the Catholic Church, the Protestant Church (Lutheran and Reformed), the Orthodox Church (Greek, Serbian, Rumanian, Russian, Bulgarian), the Armenian Apostolic Church, the Syrian Orthodox Church, the Coptic Orthodox Church, the Old Catholic Church, the Methodist Church, the Church of Jesus Christ of the Latter Day Saints, the New Apostolic Church, the Israelite Religious Society, the Islamic Faith Community, the Buddhist Religious Society, the Religious Society of Jehovah's Witnesses, the Islamic Alevi Faith Community and the Free Churches<sup>41</sup>. Private law status is granted to the Old Alevi Faith Community, the Bahá'í Religious Community, the Christian Community, the Hindu Religious Society, the Islamic Shiite Faith Community, the Seventh-day Adventist Church and the Pentecostal Church of God<sup>42</sup>.

Religious communities enjoy collective freedom of religion. In regard of the older status of Recognised Religious Societies, this collective freedom is anchored in Article 15 of State's Basic Act on the General Rights of the Citizens of 1867, as to other communities, it is based in Articles 9 and 11 of the ECHR<sup>43</sup>. In order to identify its scope, the Constitutional Court refers to the way religious communities see themselves<sup>44</sup>. The autonomy guaranteed in Article 15 of State's Basic Act on the

<sup>40</sup> Cf. only KALB, POTZ and SCHINKELE, *supra*, n. , pp. 93–126; K. W. Schwarz, 'Das Anerkennungsrecht aus der Sicht der Kultusbehörde', (2010) 57 *österreichisches Archiv für recht & religion*, pp. 228–236; R. Potz and B. Schinkele, 'Eintragung bzw gesetzliche Anerkennung alevitischer Gruppen in Österreich', (2011) 58 *österreichisches Archiv für recht & religion*, pp. 137–155; ECtHR, 31 July 2008, 40825/98 (*Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*); ECtHR, 26 February 2009, 76581/01 (*Verein der Freunde der Christengemeinschaft and others v. Austria*); Verfassungsgerichtshof, 1 December 2010, B 1214/09, VfSlg. 19240.

<sup>41</sup> <<http://www.bka.gv.at/site/4735/default.aspx>> (20 July 2015).

<sup>42</sup> <<http://www.bka.gv.at/site/3405/default.aspx>> (20 July 2015).

<sup>43</sup> KALB, POTZ and SCHINKELE, *supra*, n. , pp. 63–71; Wakolbinger, *supra*, n. pp. 68–72.

<sup>44</sup> See e.g. Verfassungsgerichtshof, 19 December 1955, G 9, 17/55, VfSlg. 2944; Verfassungsgerichtshof, 15 December 1959, V 11/59, VfSlg. 3657; Verfassungsgerichtshof, 10 December 1987, G 146/87 and G 147/87, VfSlg. 11574.

General Rights of the Citizens of 1867 may not be restricted, the recognised religious societies are however subject to general acts of law<sup>45</sup>.

Specifying the realm of this autonomy for the regulation of the labour relations at the workplace, section 132(1) of Labour Constitution Act<sup>46</sup> stipulates that enterprises directly serving – amongst others – religious purposes<sup>47</sup> are exempt from applying the provisions concerning the employees' participation in management (sections 110–112 *leg. cit.* and to a certain extent sections 108–109 *leg. cit.*)<sup>48</sup>. This provision is of general character and covers not only legally recognised religious societies, but also registered confessional communities and religious organisations, established private associations<sup>49</sup>.

Whereas section 132(1) *leg. cit.* refers to religious purposes in general, section 132(4) *leg. cit.* specifically<sup>50</sup> exempts enterprises serving a religious purpose<sup>51</sup> of a legally recognised religious society from applying the whole chapter II of Labour Constitution Act (sections §§ 33–134 *leg. cit.*), which is devoted to the regulation of labour relations at the workplace, as far as required by the character of the enterprise<sup>52</sup>. This latter formula was challenged before the Supreme Court, which held that it refers to such traits of character which non-religious enterprises regularly lack<sup>53</sup>. Thus the employer shall not be forced to debate with the works council whether a particular worker is still tolerable in a position directly serving religious aims<sup>54</sup>. These holdings constitute established case law of the Supreme Court<sup>55</sup>.

<sup>45</sup> Cf. Oberster Gerichtshof, 6 May 1987, 14 Ob A 29/87, SZ 60/80; Oberster Gerichtshof, 5 September 2001, 9 Ob A 184/01a; Oberster Gerichtshof, 28 January 2009, 9 Ob A 156/08v.

<sup>46</sup> Arbeitsverfassungsgesetz, BGBl 1974/22 as amended.

<sup>47</sup> Cf. Matthias Neumayr in Rudolf Strasser, Peter Jabornegg and Reinhard Resch (eds.), *Kommentar zum Arbeitsverfassungsgesetz* (Wien 2002 ff.), § 132 ArbVG, marg. no. 33 f.

<sup>48</sup> Cf. Oberster Gerichtshof, 5 September 2001, 9 Ob A 184/01a; Oberster Gerichtshof, 8 January 2009, 9 Ob A 156/08v; cf. Fister, *supra*, n. , pp. 108–114.

<sup>49</sup> Neumayr, *supra*, n. , marg. no. 35.

<sup>50</sup> Fister, *supra*, n. , pp. 113 f.

<sup>51</sup> Neumayr, *supra*, n. , marg. no. 36, identifies these religious purposes with the internal affairs mentioned by Article 15 of State's Basic Act on the General Rights of the Citizens of 1867.

<sup>52</sup> Fister, *supra*, n. , pp. 112–114.

<sup>53</sup> Oberster Gerichtshof, 6 May 1987, 14 Ob A 29/87, SZ 60/80; Oberster Gerichtshof, 5 September 2001, 9 Ob A 184/01a; Oberster Gerichtshof, 28 January 2009, 9 Ob A 156/08v.

<sup>54</sup> Oberster Gerichtshof, 6 May 1987, 14 Ob A 29/87, SZ 60/80; Oberster Gerichtshof, 25 November 2011, 9 Ob A 129/11b; cf. Fister, *supra*, n. , p. 112.

<sup>55</sup> B. Schinkele, 'Zum Tendenzschutz von gesetzlich anerkannten Kirchen und Religionsgesellschaften. Überlegungen aus Anlass des OGH-Beschlusses 28. 1. 2009, 9 ObA 156/08v', (2009) *27 Recht der Wirtschaft*, pp. 654–657 (pp. 654 f.).

Distinctions will however be indispensable where measures do not concern the ideology of the enterprise in the strict sense although the enterprise as such can be subsumed under this paragraph<sup>56</sup>.

The Supreme Court starts from the doctrine of the religious communities themselves, in order to establish whether internal ecclesiastical affairs and legitimate religious purposes according to section 132 *leg. cit.* are at stake. Case law can therefore not finally enumerate what is part of the kernel of religious activities in this sense<sup>57</sup>. The individual facts are of great importance<sup>58</sup>. Adjudicated cases comprise

- the creation and abolishment of offices, establishing requirements for hiring people, dismissal from offices<sup>59</sup>;
- ways of conduct in offices, office titles and the like<sup>60</sup>;
- the remuneration of priests<sup>61</sup>;
- the relocation of a Protestant pastor and removal from office flat connected therewith<sup>62</sup>.

There is a connection between religious and areligious purposes, which is why it is exclusively incumbent upon the religious community to decide whether a worker is suited for an ideologically important position. Religious purposes cover not only organisational and ceremonial purposes, but also educational and charitable ones<sup>63</sup>.

This became obvious in the case of a teacher at the Pedagogical Academy of the Islamic Community<sup>64</sup>. It is left to the religious societies to decide whether a teacher

<sup>56</sup> W. SCHRAMMEL, 'Probleme des Tendenzschutzes in der österreichischen Betriebsverfassung', in W. Schwarz, K. Spielbüchler, O. Martinek, K. Grillberger and P. Jabornegg (Hg.), *Möglichkeiten und Grenzen der Rechtsordnung. Festschrift für Rudolf Strasser zum 60. Geburtstag* (Wien 1983), pp. 559–581 (pp. 580 f.); U. Runggaldier, 'Das Arbeitsrecht in der Kirche: kollektivrechtliche Aspekte', in U. Runggaldier and B. Schinkele (eds.), *Zur arbeitsrechtlichen und sozialrechtlichen Stellung von Klerikern, Ordensangehörigen und kirchlichen Mitarbeitern in Österreich* (Wien, New York 1996), pp. 145–176 (pp. 165–167 with further references).

<sup>57</sup> Oberster Gerichtshof, 10 March 1987, 2 Ob 589/86; Oberster Gerichtshof, 6 May 1987, 14 Ob A 29/87, SZ 60/80; Oberster Gerichtshof, 9 July 1987, 6 Ob 611/87, SZ 60/138; Oberster Gerichtshof, 28 February 1996, 9 Ob A 12/96, SZ 69/53; Oberster Gerichtshof, 27 August 2008, 7 Ob 109/08t, SZ 2008/120 (membership); Oberster Gerichtshof, 28 January 2009, 9 Ob A 156/08v; Oberster Gerichtshof, 17 November 2009, 1 Ob 207/09m; Oberster Gerichtshof, 18 December 2009, 2 Ob 231/09y; Oberster Gerichtshof, 25 November 2011, 9 Ob A 129/11b; Oberster Gerichtshof, 20 December 2011, 4 Ob 160/11z, SZ 2011/151; Oberster Gerichtshof, 28 May 2013, 8 Ob A 77/12z; Oberster Gerichtshof, 6 June 2013, 5 Ob 203/12g, SZ 2013/56.

<sup>58</sup> Oberster Gerichtshof, 28 January 2009, 9 ObA 156/08v.

<sup>59</sup> Oberster Gerichtshof, 30 January 2007, 10 Ob 66/06p.

<sup>60</sup> Oberster Gerichtshof, 28 February 1996 9 Ob A 12/96, SZ 69/53.

<sup>61</sup> Oberster Gerichtshof, 16 July 1998, 10 Ob S 204/98t, SZ 71/127.

<sup>62</sup> Oberster Gerichtshof, 28 May 2013, 8 Ob A 77/12z.

<sup>63</sup> Oberster Gerichtshof, 5 September 2001, 9 Ob A 184/01a, SZ 74/145.

<sup>64</sup> At present, due to a modification of the legal framework regarding pedagogical academies, this particular academy was transformed into a private course of study for the post of a religious instruction

at that school has to be dismissed, because his statements are no longer in line with the religious purposes of the institution<sup>65</sup>.

In any case, section 96(1)1, 2 and 4 and sections 108–112 *leg. cit.* do not apply to enterprises and offices managing internal affairs of legally recognised religious societies, except for section 109 *leg. cit.* as far as particular changes of the enterprise are concerned. This applies only to enterprises serving these purposes directly, and although section 132(4) *leg. cit.* lacks an explicit reference, it is interpreted in the same sense<sup>66</sup>.

## 2. Exemption of Religious Communities from Anti-Discrimination Norms

Beyond constitution, anti-discrimination law is grounded in the Directives 76/07/EEC<sup>67</sup>, 2000/43/EC<sup>68</sup>, and 2000/78/EC<sup>69</sup>. The legislator used the margin set forth by Article 4(2) of the Directive 2000/78/EC to stipulate explicit exemptions in favour of religious communities. Accordingly, section 20(2) of Equal Treatment Act repeats the wording of Article 4(2) of the Directive 2000/78/EC, not specifying to which communities the exemption shall exactly apply<sup>70</sup>. Hence, Equal Treatment Act is not limited to legally recognised religious societies as is section 132(4) of Labour Constitution Act<sup>71</sup>.

Equal Treatment Regulations are considered general acts of law in terms of Article 15 of State's Basic Act on the General Rights of the Citizens of 1867, which may restrict religious autonomy<sup>72</sup>.

Whereas scholars agree that activities imparting faith and religious doctrine are covered by the exemption<sup>73</sup> and commercial, administrative and technical ones not covered<sup>74</sup>, different opinions are put forward whether the exemption applies to other areas, such as work in hospitals of an order<sup>75</sup> or not<sup>76</sup>.

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teacher for Islam at compulsory schools in Vienna, see the Act on the Organisation of Pedagogical Academies and their Courses of Study (*Hochschulgesetz 2005*), Bundesgesetzblatt I 2006/30 as amended.

<sup>65</sup> Oberster Gerichtshof, 28 January 2009, 9 ObA 156/08v.

<sup>66</sup> RUNGALDIER, *supra*, n. , pp. 163 f.

<sup>67</sup> OJ L 1976/39, pp. 40–42.

<sup>68</sup> OJ L 2000/180, pp. 22–26.

<sup>69</sup> See *supra*, ch. I.1.

<sup>70</sup> WINDISCH-GRAETZ, *supra*, n. , § 20 GIBG, marg. no. 9.

<sup>71</sup> M. WINDISCH-GRAETZ, 'Antidiskriminierung und Selbstbestimmungsrecht der Kirchen', (2008) 55 *österreichisches Archiv für recht & religion*, pp. 228–237 (p. 229); WAKOLBINGER, *supra*, n. pp. 73 f.

<sup>72</sup> FISTER, *supra*, n. , pp. 181 f.; WAKOLBINGER, *supra*, n. p. 72.

<sup>73</sup> WAKOLBINGER, *supra*, n. pp. 80 f.

<sup>74</sup> WAKOLBINGER, *supra*, n. pp. 75 and 81.

<sup>75</sup> WINDISCH-GRAETZ, *supra*, n. , p. 228

<sup>76</sup> WAKOLBINGER, *supra*, n. pp. 81 f.

Although the legislator did not make explicit use of the delegation of the directive in regard to specific requirements of loyalty to the religious employee, it has been contended that interpretation of Equal Treatment Act reach the same conclusion<sup>77</sup>.

As far as case law is concerned, references are made to general labour case law<sup>78</sup>, such as, for instance, to a decision of the Supreme Court, holding that the dismissal of a teacher at a Catholic school was not *contra bonos mores*, because the teacher had criticised the ecclesiastical attitude towards contraception<sup>79</sup>.

Section 20(2) of Equal Treatment Act with its proportionality test may hence serve as a corrective in cases of exaggerated loyalty duties<sup>80</sup>.

<sup>77</sup> WAKOLBINGER, *supra*, n. pp. 86 f. with reference to ECommHR, 6 September 1989, 12242/86 (*Rommelfanger v. Germany*), DR 62, p. 151.

<sup>78</sup> WAKOLBINGER, *supra*, n. p. 85; see *supra*, ch. III.1.

<sup>79</sup> Oberster Gerichtshof, 12 April 1995, 9 Ob A 31/95; cf. Kalb, Potz and Schinkele, *supra*, n. , pp. 276–278.

<sup>80</sup> SCHINKELE, *supra*, n. , p. 656; Wakolbinger, *supra*, n. pp. 76–79.

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# LAW AND RELIGION IN THE WORKPLACE IN BELGIUM

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## 0. GENERAL

Belgium is a federal state, which – aside from the federal level – comprises three communities (the Flemish Community, the French-speaking Community, and the German-speaking Community), three regions (the Brussels-Capital Region (Brussels), the Flemish Region (Flanders), and the Walloon Region (Wallonia)), and four language areas (the Dutch language area, the French language area, the German language area, and the bilingual Brussels-Capital area).

## I. RELIGIOUS FREEDOM AT WORK

### A. Instruments and sources

The key instrument and legal source on religious freedom, within Belgium, is the Constitution, which dates back to 1831. Concerning religious freedom at work, articles 19 and 20, on (individual) religious liberty are most directly relevant.

Article 19 guarantees freedom of worship and its free and public practice, with the (sole) exception of allowing the punishment of criminal offences committed in the exercise of said freedoms (cf. *infra* I.C).

The corollary of article 19 is contained in article 20: no person can be *forced* or obliged to contribute in any way in the acts of worship or rites of any religion or to respect its days of rest/worship.

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In addition to the Constitution, the European Convention on Human Rights (ECHR) and the case law of the Strasbourg institutions are essential when it comes to understanding religious freedom in Belgium. The protection regime offered by article 9 ECHR is applied cumulatively with the requirements flowing from the Constitution<sup>2</sup>.

Finally, federal and regional discrimination legislation (*infra* I.D) have increasingly, since the turn of the century, become important instruments to protect religious freedom at work, though sometimes also serving to restrict it.

More generally speaking, the underlying rationale of the Belgian approach, both at work and in other contexts, can be said to be a *combination* of equality and religious freedom, without – currently – one of these being predominant.

## B. (Legal) concept of religion

Belgian courts often employ the concepts of religion and religious rules or precepts, but their precise content remain mostly un(der)defined, and purposely so. In Belgium, as many other countries, the separation of Church and State and the core of religious freedom itself are believed to require restraint on the part of courts and authorities in assessing what may or may not constitute a religion or a religious precept<sup>3</sup>. When assessing whether a ‘religion’ is involved, judges are assumed to first base their judgments on the subjective claims of believers, and secondly on external aspects such as the existence of temples, prayer texts or ritual acts. Only when this does not yield sufficient clarity, a certain amount of analysis of what is contained within the movement may be deemed necessary<sup>4</sup>.

Formerly, this analysis used to be less reticent: up to the middle of the 20<sup>th</sup> century for instance (some) jurisprudence took the view that for something to be (legally) regarded as a religion, a practice focused on a *deity* was required<sup>5</sup>. Under the influence of on-going ‘multiculturalisation’, this somewhat ethnocentric approach, which would for instance exclude some schools of Buddhism and Taoism,<sup>6</sup> has increasingly been abandoned.

<sup>2</sup> See e.g. art. 26 Special Law on the Constitutional Court.

<sup>3</sup> Specifically for Belgium, see e.g. Supreme Court (*Cour de Cassation* or *Hof van Cassatie*) 7 November 1834, *Pas.*, I, 332.

<sup>4</sup> R. TORFS (2005), «State and Church in Belgium», in ROBBERS, G. (ed.), *State and Church in the European Union*, Trier, Nomos, 2005, 6; J. VRIELINK (2013), «Religie tussen definitie en divinitie. Over de Rokerskerk, Satanistische Zusters en Onzichtbare Roze Eenhoorns», *Nieuw Juridisch Weekblad*, Iss. 278, 190-198.

<sup>5</sup> E.g. Court of Appeal of Liège, 21 November 1949, *Pas.* 1950, II, 57.

<sup>6</sup> R. TORFS (2005), “The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Belgium”, *Emory International Law Review*, Vol. 19, 637-683.

These days, Belgian courts either employ abstract, general criteria to determine what constitutes a religion (much like the Strasbourg institutions do, by requiring that beliefs “attain a certain level of cogency, seriousness, cohesion and importance”, in order to qualify for protection under Article 9 ECHR), or – increasingly – simply start from the *assumption* of an interference with the freedom of religion, and to subsequently assess the legitimacy of this interference, avoiding the question of what constitutes a religion altogether; though the latter approach, obviously, raises complicated problems of its own<sup>7</sup>.

### C. Protected and unprotected manifestations of religious beliefs

Individual freedom of religion, in Belgium, protects the freedom of conscience and religion in its two classic dimensions, the *forum internum* and the *forum externum*. The former is considered to be absolute, providing an inner freedom to believe any belief of one’s choice (or not to believe anything). Likewise, it includes the right to change one’s (non-)belief.

Concerning the *forum externum*, religious liberty in Belgium protects a whole range of expressions or manifestations of religious convictions in both the public and private sphere. It includes the right to practice one’s belief (undisturbed, alone or in group), to give voice to one’s belief, to spread it, and proselytize.

Importantly, there is no right *not* to be confronted with religion, even at work. That is, as long as such (public) confrontations do not result in individuals being forced or obliged to follow or contribute to acts of worship or rites of any religion, as prohibited by article 20 of the Constitution<sup>8</sup> as well as by criminal provisions<sup>9</sup>.

Concerning limitations to freedom of religion, the conditions in the Constitution and the ECHR are applied cumulatively. This firstly means that so-called preemptive measures are prohibited virtually absolutely (1). Secondly, concerning the assessment of other limitations, the classic structure provided by the ECHR’s proportionality test is usually adhered to (2).

<sup>7</sup> On this issue, see J. VRIELINK (2013), «Religie tussen definitie en divinatie. Over de Rokerskerk, Satanistische Zusters en Onzichtbare Roze Eenhoorns», *Nieuw Juridisch Weekblad*, Iss. 278, 190-198.

<sup>8</sup> Article 20 basically sought to provide protection against too dominant a position of the Roman Catholic Church. Case law however is not quick to find an ‘unconstitutional’ level of confrontation or force. The Supreme Court, for instance, ruled that the obligatory presence of military personnel, during the annual *Te Deum* on the country’s national day, during which, moreover, these troops – in the execution of their work related duties – have to pay tribute to invited dignitaries (including religious leaders), did not violate the Constitution (Supreme Court 18 June 1923).

<sup>9</sup> Most notably, art. 142 of the Criminal Code renders it an offence, punishable by a fine or a prison sentence of 8 days to 2 months, to either force or hinder anyone to practice a religion, by means of violence or threats.

## 1. *Preemptive measures / prior restraints*

Public authorities in Belgium are, generally speaking, not authorized to take preemptive measures that *a priori* limit the risks of abusing any of the constitutional liberties; this includes – aside from the freedoms of expression, the press, association and education – the right to freedom of religion. ‘Preemption’ in this context would mean submitting (religious) expressions, as part of the *forum externum*, to prior restraints or authorization. To allow this would run counter to both the text of Constitution as well as the spirit in which its protection regime was designed<sup>10</sup>.

As such, the organization of a religious meeting in a place of worship can, under Belgian law, not be subject to obtaining a prior authorization from the local public authorities<sup>11</sup>.

## 2. *Other limitations*

Other limitations than prior restraints are dealt with less categorically, and are typically subjected to the proportionality test that the European Court of Human Rights (ECHR) performs in the context of limitations of article 9 ECHR (and other rights).

As such, any restriction must be authorized or prescribed by law, has to pursue one of the legitimate aims provided for in article 9 § 2 (public safety; the protection of public order, health or morals; the protection of the rights and freedoms of others), and be necessary in a democratic society (which requires a pressing social need, and that the means employed were reasonably proportionate to achieving or fulfilling that need).

## D. **Discrimination on the basis of religion**

Discrimination in employment on the basis of religion and belief was, on the federal level, first prohibited in 2003. At the time, the Federal Parliament adopted

<sup>10</sup> J. VELAERS & M.-C. FOBLETS (2014), «Religion and the State in Belgian Law», J. MARTINEZ-TORRÓN & C. DURHAM (eds.), *Religion and the Secular State. La religion et l'Etat laïque*, Washington/Madrid, Brigham Young University/Complutense University of Madrid (Fac. of Law), 99-122.

<sup>11</sup> Notably, though of limited relevance in the labour context, things are more nuanced where it concerns gatherings *outdoors*, in public. In that context, article 19 must be read in conjunction with Article 26 of the Constitution (freedom of association). This article's first paragraph provides that «Belgians have the right to gather peaceably and without arms, in accordance with the laws that can regulate the exercise of this right, without submitting it to prior authorization». Its second paragraph, however, provides that the preceding paragraph «does not apply to open air meetings, which are entirely subject to police regulations». Outdoor religious manifestations can therefore be prohibited by local authorities. However, even in those cases convincing, *in concreto* considerations of public order need to be advanced if the authorities are not to violate the freedom of religion and belief.

the Anti-discrimination Act of 25 February 2003, *inter alia* in order to implement EU Directives 2000/43/EC and 2000/78/EC. This act was repealed and replaced by the Anti-discrimination Act of 10 May 2007. Both laws cover(ed) the employment context in all its aspects, though neither was limited to it: Belgian discrimination legislation has an exceptionally broad scope and covers - in addition to employment - goods and services; social security and social benefits; membership of or involvement in an employers' organization or trade union; official documents or (police) records; access to and participation in economic, social, cultural or political activities accessible to the public.

On the level of the regions and communities similar legislation was enacted, with religion and belief being among the protected grounds on all levels<sup>12</sup>. All regional legislators attempted to harmonize the content and requirements of their statutes with the federal legislation. As such, the basic concepts, rules, prohibitions and justifications are virtually identical on all federated levels.

### 1. *Prohibited forms of discrimination*

Specifically concerning religious discrimination all laws prohibit direct and indirect discrimination, the instruction to discriminate, and intimidation. The definitions of these concepts are (mostly) in line with EU requirements.

A duty to provide reasonable accommodations on religious grounds does *not* exist on any level except, in theory, in Flanders, where a 2002 decree fails to (explicitly) restrict the reasonable accommodation duty to the ground disability<sup>13</sup>. However, this is commonly regarded as a technical mistake, and no claims for reasonable accommodations on the basis of religion (or any other grounds than disability) have been (successfully) based on this provision. The political level and society in general also tend to be rather dismissive of introducing such a duty, since it is widely perceived as granting (additional) privileges to religions and religious adherents.

### 2. *Justifications*

The justification system for direct discrimination on the basis of religion is a so-called 'closed' one in the context of employment. Outside the context of employment the justification system is (by and large) an 'open' one, that is: distinctions will not amount to direct discrimination to the extent that they can be justified by means of

<sup>12</sup> For detailed overviews, see: E. BRIBOSIA & I. RORIVE (2014), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC. Country report 2013, Belgium*, European Legal network of experts in the non-discrimination field; P. LEMMENS & J. VRIELINK (2010), *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation, revised and updated report on Belgium*, Brussels, Fundamental Rights Agency, June 2010.

<sup>13</sup> *Ibid.*

an objective and reasonable justification. Likewise, indirect discrimination in any context (including employment) can always be justified by an objective and reasonable justification.

Under the closed system, in employment, an unequal treatment may be justified where a characteristic related to ‘religion’ constitutes a genuine and determining occupational requirement in light of the “nature of the relevant specific professional activity”. In order for this to occur, the requirement is to have a legitimate aim as well as being proportionate in relation to this aim.

An additional and more specific ‘genuine and determining occupational requirement’ is provided for public and private organizations, the ethos of which is based on religion or belief (modeled after art. 4.2 EU directive 2000/78/EC). This exception is limited to distinctions on the basis of religion or belief, and may not justify distinctions (merely) on the basis of other grounds, such as sexual orientation or sex. Said organizations may also “require individuals working for them to act in good faith and with loyalty to the organization’s ethos”.

Other justifications include positive action, and direct (or indirect) distinctions that find their basis in (other) legislation.

### 3. *Remedies, proof and victimization*

The prohibition of religious discrimination is mostly a matter of civil law and remedies: only for civil servants do criminal provisions exist in this context.

On the civil level, an injunction procedure is coupled with lump sum damages, which are payable when (religious) discrimination is established. In the context of employment or social security this lump sum comes down to 6 months worth of gross income. Unless the employer is able to demonstrate that the less favorable treatment would also have occurred on other than discriminatory grounds; in that case the compensation is reduced to 3 months gross income (e.g. when the person who was discriminated against would (demonstrably) also not have been the person most suited for a job, even if he or she would not have been excluded due to discriminatory considerations).

Furthermore, acts and decrees on all levels – in line with Directive 2000/78/EC – provide for a distribution of the burden of proof among the parties in all civil (and administrative) proceedings on the basis of the Act, as well as providing protection against victimization for persons who filed complaints in relation to (alleged) discrimination, and for witnesses.

### 4. *Enforcement*

Discrimination legislation on all levels provides for a number of enforcing institutions as well as enabling certain private organizations and NGOs to bring legal actions. The former, for religious discrimination, concerns the Interfederal Equal Opportunities Center, which is Belgium’s main governmental equality

body. The Center is authorized to proceed in law in all disputes that any of the discrimination laws might give rise to, be it the federal law or any of the regional legislative acts.

Aside from the Center, a number of other public and private associations, organizations and interest groups are authorized to bring legal actions in discrimination cases. Labor organizations and trade unions may do so, for instance, as well as all associations the purpose of which is “to defend human rights and fight discrimination”.

Importantly, if the victim of discrimination is a natural person, the legal action of these organizations and institutions is admissible only if they obtained approval from the victim (in order to protect the latter’s personal decision).

## 5. *Case law*

Case law concerning religious discrimination in the employment context mostly concerns issues regarding the Islamic headscarf. Generally, this case law can be said to be quite erratic, both on a conceptual level as well as concerning the types of justifications that are accepted<sup>14</sup>.

Application of the prohibition of indirect discrimination in particular seems problematic, with some courts having ruled that no discrimination can exist if a company policy applies to all workers without distinction (thereby, in other words, ignoring potential issues of disparate impact entirely)<sup>15</sup>.

Additionally, case law has been inclined to accept that private companies may justify dismissals of individuals wearing religious signs or clothing in order to safeguard a ‘neutral’ corporate image<sup>16</sup>.

## E. **Employees in schools and religious attire**

Regulations and case law concerning religious attire and symbols worn by employees (i.e. teachers)<sup>17</sup> in public schools merit separate discussion.

<sup>14</sup> S. SOTTIAUX & J. VRIELINK (2012), «Verschillende gelijkheden? Recente Europese en nationale rechtspraak over discriminatie», in A. ALEN, G. MAES & S. SOTTIAUX (eds.), *Publiekrecht. Themis Cahier* 2011-12, nr. 70, 25-71; K. ALIDADI, *Faith, Identity, and Participation in the Workplace. A Comparative Legal Study on the Role of Religion and Belief in Individual Labour Relations and Unemployment Benefits Litigation*, doct. diss, University of Leuven, 2015.

<sup>15</sup> Labour Court of Appeal of Brussels 15 January 2008; Labour Court of Appeal of Antwerp, 23 December 2011.

<sup>16</sup> Labour Court of Brussels, 21 March 2006; Labour Court of Appeal of Brussels 15 January 2008; Labour Court of Tongres, 2 January 2013; Labour Court of Antwerp, 27 April 2010; Labour Court of Appeal of Antwerp, 23 December 2011.

<sup>17</sup> There are also regulations and rulings concerning students, but these will remain un-discussed, in light of this report’s focus on the context of work. On this issue see J. LIEVENS & J. VRIELINK, «“Sym-

Education is a competence for the communities. Within the French speaking Community, each public school is left free to decide for itself on the adoption of prohibitive measures concerning religious symbols, for both teachers and pupils. In practice, many schools have introduced bans (owing in part to the French community's close philosophical (and geographical) proximity to France, and its *laïcité*). In most Flemish public schools, teachers (and students) are subjected to a prohibition of wearing religious signs and attire as well. These bans have been the object of several court cases.

### 1. *Religion teachers*

Firstly, specifically regarding *religion teachers*, which are (constitutionally) provided by the recognized religious communities themselves,<sup>18</sup> the Council of State has ruled that prohibiting these individuals from wearing religious signs and attire on school premises is unconstitutional.

The Council's first ruling on the merits of this issue dates back to 2009. A teacher of Islamic religion in a primary public school belonging to the Flemish Community Education network (*Gemeenschapsonderwijs*) was fired, because she refused to take off her headscarf. The school in question had a regulation in place, which entailed that religion teachers could wear religious symbols, but *only* while teaching, inside their classroom. This meant that religion teachers were obliged to take off any religious symbols and attire upon leaving the classroom, and while still on school premises. The school argued this was an application of the school network's Declaration of neutrality.

On 2 July 2009, the Council of State overruled the dismissal<sup>19</sup>. The Council ruled, *inter alia*, that it was not possible to directly infer a prohibition of wearing religious symbols at school from the abstract Declaration of neutrality that the school invoked. Furthermore, the Council pointed out that it was not up to the individual school to interpret and elaborate this Declaration, since legislation (exclusively) entrusted this authority to the school network's central council.

Subsequently, and to an important extent due to problems with Islamic *students* in two schools in Antwerp, the Flemish Community Education's central council decided to clarify the Declaration of neutrality, in order for it to unequivocally prohibit the wearing of religious signs by all teachers *and* students in all of its schools, with a sole exception for religious or philosophical courses (again during classes only).

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bolenstrijd". De Raad van State en religieuze kentekens in het (gemeenschaps)onderwijs», *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid* 2014, nr. 3, 4-13.

<sup>18</sup> Art. 24, § 1, 4 Constitution.

<sup>19</sup> Council of State, 2 July 2009, no. 195.044.

A decision on the merits of this new situation in Flanders, as far as religion teachers are concerned, had not yet been handed down, when a similar issue concerning a school in the French-speaking community was adjudicated. A municipal school in Grâce-Hollogne allowed religion teachers to display religious signs inside the classroom, while they were teaching, but banned them from doing so on their way to (and from) their classes. The Council ruled that the neutrality required of subsidized public schools, could not justify prohibiting teachers of religion or moral education from wearing political, ideological or religious signs, since this type of manifestation is inherent to their functions. The Council also pointed out that the right to wear such signs cannot be restricted to the hours when the courses are taught or to the classrooms where these courses take place<sup>20</sup>.

In response to this ruling the central council of the Flemish Community Education announced that it too would henceforth allow religion teachers to wear religious signs on school premises, and not just inside the classroom.

## 2. *Regular teachers*

Lawsuits challenging bans for ‘regular’ teachers have fared differently, thus far. In 2013 the Council of State decided that a public school in Charleroi was justified, by invoking the neutrality principle as laid down in a Decree of the French Community,<sup>21</sup> to prohibit a mathematics teacher from wearing an Islamic headscarf, as an application of a general ban on all religious signs and attire<sup>22</sup>. As such, it seems that teachers in public schools, being public servants, can be held to high standards of neutrality in the exercise of their function.

## II. RELIGIOUS MINISTERS AND LABOUR LAW

Belgian legislation provides no definition of what constitutes a religious minister. Neither is the selection of ministers of religion for the sake of religious communities’ spiritual care a duty or a right of government: this is left, by and large, to the religious communities themselves (see also *infra* III).

### A. **Recognized religions vs. unrecognized religions and their ministers**

Belgium has a system of recognized religions. Presently, Belgium recognizes and subsidizes six religions and one non-religious belief: Roman Catholicism, Protestantism, Judaism, Anglicanism, Islam, Orthodoxy and the (secular-) Humanist movement

<sup>20</sup> Council of State, 15 May 2013, no. 223.201.

<sup>21</sup> Decree of 17 December 2003.

<sup>22</sup> Council of State, 27 March 2013, no. 223.042.

(or organized *laïcité*)<sup>23</sup>. Since the turn of the century, a union of Buddhist organizations is seeking to be recognized as well. Though this request has not resulted in a full formal recognition yet, things are progressing in that direction<sup>24</sup>.

In light of this system, a distinction must be made, concerning religious ministers, between ministers of ‘recognized’ religions and those of religions that are not recognized. The Constitution provides, in its article 181 § 1, that the salaries and pensions of ministers of religion are borne by the State<sup>25</sup>. This privilege, however, is limited to *recognized* religions only. While article 181 § 1 remains unchanged since 1831, the article’s second paragraph was introduced only in 1993. It serves to extend the same financial privileges to recognized non-religious beliefs as well. This arrangement created a constitutional basis for the expansion of state support for secular-humanist institutions.

Furthermore, the recognized religions and beliefs may designate chaplains, also paid by the State, in prisons and in the army. Moreover, the constitution requires that schools organized by public authorities must offer a choice between instruction in one of the recognized religions and instruction in non-religious ethics for the duration of compulsory education, and the State must pay for this instruction as well (see also *supra* I.E)<sup>26</sup>.

Aside from the recognized religions there is a range of unrecognized (minority) religions in Belgium. Ministers of these religions are *not* in the pay of the state; they are usually financed by the religious communities themselves. More generally, these religions’ legal status is not always enviable. Not only do they not receive state support, but they are liable to suffer additional disadvantages as well<sup>27</sup>.

<sup>23</sup> Roman Catholicism and Protestantism were financed from the outset. Judaism and Anglicanism followed suit in 1831 and 1835 respectively. It was not until the end of the 20<sup>th</sup> century, in 1974 and 1985, that Islam and Orthodoxy were recognized. Finally, and as mentioned, a constitutional amendment in 1993 ensured (full) recognition of the secular Humanist movement (L.-L. CHRISTIANS & A. OVERBEEKE (2014), «Applicable Religious Rules according to the Law of the State Belgium», International Academy of Comparative Law, 19<sup>th</sup> International Congress of Comparative Law, Vienna 20-27 July 2014).

<sup>24</sup> Already, the Belgian state is providing funding to the Buddhist applicants in order to enable them to fulfil the structural requirements for recognition.

<sup>25</sup> This practice, enshrined in the Constitution, already began under the French regime, after the Revolution, as a means to compensate for the nationalization of the property of the clergy, and the suppression of the so-called tithes. See H. VAN GOETHEM (1993), «Het beginsel van verdraagzaamheid in de Belgische Grondwet: een historische duiding», in J. VELAERS (ed.), *Recht en verdraagzaamheid in de multiculturele samenleving*, Antwerp, Maklu, 33-63.

<sup>26</sup> Recognition entails several additional benefits for the religions involved, but those are unrelated (or at least: less directly related) to labour issues.

<sup>27</sup> Most notably, the system of recognized religions sometimes results in a certain degree of «spill-over» in the wider religious (legal) context. Not infrequently (though by no means systematically) religious liberties and rights are wrongfully restricted —by courts or public authorities— to *recognized*

## B. Legal position of ministers

The legal position of priests and religious personnel is, for most purposes, not all that different from that of other Belgian citizens. There are, however, a number of exceptions. To begin with, the Judicial Code (art. 224, 12°) provides that ministers of recognized religions or representatives of recognized (non-religious) beliefs may not perform jury duty.

Additionally, a number of incompatibilities between combining certain religious positions with other functions flow from both the Constitution and regular legislation. Here, notably and exceptionally, being a (state paid) minister for a *recognized* religion is often considered more problematic than being a minister for a religion that is not (yet) recognized.

To begin with, article 51 of the Constitution prescribes that having “any salaried position other than that of [governmental] minister”, paid by the federal government, cannot be combined with being a Member of Parliament. This includes ministers of religion in the sense of article 181 of the Constitution to the extent that they receive payment by the State (*supra* II.A). Positions on committees or lower level representative bodies, such as municipal councils, do remain possible. Other incompatibilities with being a cleric of a recognized religion include holding the function of judge, clerk and registrar in the Constitutional Court<sup>28</sup>.

Not all incompatibilities are limited to ministers of *recognized* religions however. ‘Ministers of the religions’ in general are not allowed to become Mayors or Aldermen, for instance<sup>29</sup>. Furthermore, being a member of the Council of State (or of its *auditeurs*’ office, coordination office, and registry) or being any kind of judge is incompatible with being part of the ‘ecclesial order’ (*geestelijke stand* or *l’état ecclésiastique*) or clergy<sup>30</sup>.

There is some (though by no means extensive) case law surrounding these issues. One case concerned a priest, neither paid by the State nor acting as a parish priest, who had hoped to become a judge, and who was rejected, with the state invoking the aforementioned incompatibility. He eventually took his case to the European Commission for Human Rights. The Commission ended up ruling against him, refusing to read into article 9 (right to freedom of religion) a right to hold public office<sup>31</sup>.

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religions only. So not only do unrecognized religious groups not enjoy the advantages that recognized religions can lay claim to, but they are sometimes not even regarded as religions, pure and simple.

<sup>28</sup> Art. 44 Special Law on the Constitutional Court.

<sup>29</sup> Art. 72 New Municipal Code.

<sup>30</sup> Laws on the Council of State (art. 107); Judicial Code (art. 293).

<sup>31</sup> EComHR 8 October 1981, *H. Demeester v. Belgium*, no. 8493/79.

### C. Labour status and labour law within religious communities

Important evolutions have taken place in the relationship between employment law and religions, both regarding religious personnel and regarding lay personnel, regardless of denomination (see also *infra* III)<sup>32</sup>.

As far as religious personnel are concerned, it used to be the case – to varying degrees – that the religious element dominated the relationship of religious personnel with their churches, with religious personnel not even being regarded as employees or as being self-employed, due to *inter alia* the absence of (formal) employment contracts.

Presently however, the presumption in favor of the religious relationship has been amended. The closeness to the heart of the message and the institution plays a central part. For instance: for a pastor, the ecclesiastical relationship tends to dominate, whereas more common and secular functions tend to give way to labor law<sup>33</sup>. This development, initially triggered by pension claims by religious personnel, reflects the fact that society in general no longer considered labor in a religious context as fundamentally different from other types of work<sup>34</sup>. Legally, it also reflects the impact of the so-called ‘horizontalization’ of human rights, and the right to non-discrimination in particular.

Concerning secular or lay personnel, the development mirrors that of religious personnel, by and large, tending even more strongly towards secular labor law and its underlying principles.

### III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

Article 21, section 1 of the Belgian Constitution determines that the State has no right to intervene either in the appointment or installation of ministers of any religion (1), or to forbid ministers from corresponding with their superiors (2), or to publish the acts of these superiors (3)<sup>35</sup>.

<sup>32</sup> R. TORFS (2005), «State and Church in Belgium», in ROBBERS, G. (ed.), *State and Church in the European Union*, Trier, Nomos, 2005, 9-33; R. TORFS (1993), «Les églises et le droit du travail», in European Consortium for Church-State Research (ed.), *Churches and Labour Law in the EC Countries*, Milan/Madrid, Giuffrè/Facultad de Derecho, 35-59.

<sup>33</sup> R. TORFS (2005), «State and Church in Belgium», in ROBBERS, G. (ed.), *State and Church in the European Union*, Trier, Nomos, 2005, 9-33; A. OVERBEEKE (2014), «Het recht op bescherming van het privéleven van godsdienstleraars met dissidente opvattingen – de zaak Fernández Martínez t. Spanje», *Recht, Religie en Samenleving*, no. 2, 47-71.

<sup>34</sup> R. VERSTEGEN (1983), «Arbeidsovereenkomsten voor geestelijken: een beslissende stap», *Tijdschrift voor Sociaal Recht*, 73-84.

<sup>35</sup> Regarding the latter, article 21 points out that such publications are, however, subject to the ordinary rules of liability concerning the use of the press and publishing.

Article 21 is generally interpreted as an affirmation of the freedom of internal ecclesiastical organization<sup>36</sup>. It has always been considered a solid legal basis for the autonomy and self-government of religious communities. The provision, dating back to 1831, bears the imprint of the newly created Belgian state wanting to distance itself from the meddlesome policies of the Dutch King William I<sup>37</sup>. The provision entails that the State may not interfere with or supervise the Churches, and the latter are free to choose their own internal structure and to appoint their own personnel without State interference. It would be overstating things, however, to say that the State has no possibilities whatsoever of controlling churches and their activities<sup>38</sup>.

### A. Development

Traditionally, the review exercised by secular courts of internal labour-related decisions by religious communities remained exclusively formal, which entailed that the civil judge merely had the right to determine whether a challenged decision was in fact taken by the competent ecclesiastical authority. This approach was dominant throughout the 19<sup>th</sup> century<sup>39</sup>.

Following two decisions by the Belgian Supreme Court (*Cour de Cassation* or *Hof van Cassatie*), in 1994 and 1999,<sup>40</sup>, an evolution in this case law took place. In these cases, the Supreme Court was confronted with decisions by courts of appeal, which went beyond the traditional approach. The courts of appeal ruled that religious groups could also be legally held to observe internally prescribed procedures, and, moreover, that they were bound to respect all principles laid down in article 6 § 1 of the ECHR. While the Supreme Court declined to support this rather radical new viewpoint in its entirety, it did accept the principle that religious groups were held to act within the limits of their own procedural norms, and that it was up to the courts to verify this.

<sup>36</sup> Though at the same time, the article's second section contains an exception to this principle by providing that civil marriage must always precede the religious marriage ceremony, apart from exceptions that may be established by law, if necessary.

<sup>37</sup> M. ADAMS & A. OVERBEEKE (2008), «The Constitutional Relationship between Law and Religion in the History of Ideas: A Contemporary European Perspective», *Global Jurist*, Vol. 8, Iss. 3, 1-24.

<sup>38</sup> R. TORFS (2005), «State and Church in Belgium», in ROBBERS, G. (ed.), *State and Church in the European Union*, Trier, Nomos, 2005, 9-33; R. TORFS (2003), «Rechtsbescherming in de kerk. Nabeschouwingen», in R. TORFS *et al.* (eds.), *Recht op recht in de kerk*, Canon Law Monograph Series no. 3, Leuven, Peeters, 274.

<sup>39</sup> R. TORFS (2001), «Church autonomy in Belgium», in G. ROBBERS (ed.), *Church Autonomy: A Comparative Survey*, Frankfurt am Main, Peter Lang, 607-631; R. TORFS (2005), «The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Belgium», *Emory International Law Review*, Vol. 19, 637-683.

<sup>40</sup> Supreme Court, 20 October 1994; Supreme Court, 3 June 1999.

In taking this position, the Supreme Court went beyond the traditional position, without however accepting the option taken by the courts of appeal that had previously adjudicated the cases<sup>41</sup>.

At the same time, it should be pointed out that the Belgian Constitutional Court has, in at least one case, been highly tolerant of far-reaching intervention with religious organizational autonomy. In March 2005, the Court rejected an appeal for annulment brought by several Muslim organizations and individual Muslims against the elections for the ‘representative’ Executive Council of Muslims of Belgium (*L’Exécutif des Musulmans de Belgique* or *Executief van de Moslims van België*), in March 2005. The problem was that these elections had been entirely imposed and organized by the government, rather than by the religious community itself<sup>42</sup>.

Strikingly, in the Court’s opinion, this use of imposed elections, as a means of choosing a body to represent the Islamic community to the Belgian public authorities, did *not* amount to a violation of religious autonomy or freedom of religion. The Court considered that elections had previously been chosen by the Muslim community as an appropriate means of selection, and it believed the Belgian legal authorities could not be “be reproached for having surrounded the election with measures intended to ensure its fairness”, especially given “that the Muslim religion has neither a pre-established, universally recognized structure, nor a clergy as such”<sup>43</sup>.

## B. Non-discrimination and (de facto) autonomy

Since the turn of the century, the impact of non-discrimination legislation<sup>44</sup> is also apparent in this domain. Discrimination law can, in this context, be regarded as a double-edged sword, effectuating either *less* or *more* autonomy, depending on the situation<sup>45</sup>.

<sup>41</sup> It is not entirely certain whether this approach is compatible with the (current) way in which the ECtHR deals with similar cases (even though the Court does tend to grant a wide margin of appreciation in these matters): ECtHR 23 September 2010, *Obst v. Germany*; ECtHR, EHRM 23 September 2010, *Schüth v. Germany*; ECtHR 3 February 2011, *Siebenhaar v. Germany*; ECtHR 15 May 2012, *Fernández Martínez v. Spain*; ECtHR (GC) 12 June 2014, *Fernández Martínez v. Spain*. On this issue, see e.g. A. OVERBEEKE & D. CUYPERS (2012-13), «Schipperen naast God? Het recht op bescherming van de private levenssfeer en de vrijheid van godsdienst van het personeel van identiteitsgebonden instellingen – recente jurisprudentie van het EHRM» *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid*, no. 3, 167-193.

<sup>42</sup> OVERBEEKE, A. (2006), «Institutionele godsdienstvrijheid anno 2005 - casus Islam», *Chroniques de Droit Public/Publicrechtelijke Kronieken*, Iss. 1, 135-160.

<sup>43</sup> Constitutional Court 28 September 2005, 148/2005, B.5.8 and B.6.2. It seems highly doubtful whether this decision would have survived scrutiny by the European Court of Human Rights. See e.g. ECtHR (GC) 26 October 2000, *Hassan & Chaush v. Bulgaria*, app. no. 30985/96.

<sup>44</sup> Of which churches and other religious institutions are not (entirely) exempted: *supra* I.D.

<sup>45</sup> Though the dominant tendency does seem to be for discrimination law to *limit* autonomy.

The former may be the case, *inter alia*, due to the procedural and evidentiary impact, pertaining to the burden of proof, that discrimination law may have.

This is illustrated by a case in which the applicant was expelled from the Jehovah's Witnesses for (allegedly) not having behaved in accordance with the congregation's rules. He complained in particular about the fact that the expulsion was accompanied by instructions to congregation members to refrain from having (more than minimal) contact with expelled individuals, even if these are family members. In bringing his suit, the applicant relied on the injunction procedure in the federal anti-discrimination act (*supra* I.D.3).

The court of appeal of Liège had concluded that the applicant had not established, sufficiently convincingly, that he had been discriminated against (Court of appeal of Liège, 6 February 2006). The Supreme Court, however, quashed this decision due to it being in breach of the principle of the reversal of the burden of proof as enshrined in the Federal discrimination legislation (*supra* I.D.3), ruling that the applicant need not *unequivocally* prove discrimination, but merely that there were sufficient elements to *presume* discriminatory treatment, at which point the burden of proof would have to shift<sup>46</sup>.

The case was remanded to the Court of appeal of Mons, which again rejected the applicant's case. On the one hand, the Court held that the applicant had not invoked pertinent facts to presume the existence of discrimination. Therefore the burden of proof did not have to shift after all. On the other hand, the Court emphasized that State obligations of neutrality and the principle of autonomy forbade it to assess the legitimacy of religious beliefs and the way in which these manifest themselves (cf. *supra* I.B).

The principle of non-discrimination may, *de facto*, act as a force for greater autonomy of religious communities as well. For instance, in 2004 the Flemish Region introduced legislation that stipulated that an elected or appointed member of a church council would automatically be considered as having resigned after reaching 75 years of age. While rejecting that this rule amounted to an interference with religious autonomy *stricto sensu*, the Constitutional Court did consider the rule to constitute discrimination on the grounds of age. The Court accepted that imposing such an age limit pursued a legitimate aim, i.e. of encouraging the renewal of the membership of church councils, and thereby to ensure an effective and efficient management. However it found the rule disproportionate to this aim, as it was based on an absolute presumption that members of church councils aged 75 years would, by definition, no longer be capable to ensure good management<sup>47</sup>.

<sup>46</sup> Supreme Court 18 December 2008.

<sup>47</sup> Constitutional Court 5 October 2005, no. 152/2005. See R. TORFS (2006), «Kerkfabrieken, godsdienstvrijheid en gelijkheid», *Chronique de Droit Public*, no. 1, Brugge, Vanden Broele, 164-170.

### C. Range of activities

In addition to the basic principle of autonomy there is the issue of the precise *range* of activities that enjoy its protection. In this regard, it tends to be only the religious organization in the strict sense that *fully* enjoys the autonomy as delineated by article 21, and as elaborated by the Supreme Court.

Religions that desire to organize activities in other fields, such as health care and education, are bound by the civil legislation in that field (though more limited exceptions and exemptions often apply). In order to participate fully in such societal areas, religious representatives are required to establish a legal person, which will mostly take the form of a nonprofit organization (*Vereniging zonder Winstoogmerk* [VZW] or *Association Sans But Lucratif* [ASBL]).

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# **FREEDOM OF RELIGION OR BELIEF AT THE WORKPLACE – LEGAL FRAMEWORK AND CURRENT LEGAL DEVELOPMENTS IN BULGARIA**

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## **FREEDOM OF RELIGION OR BELIEF AT THE WORKPLACE – GENERAL FRAMEWORK**

The legal framework in Bulgaria, which covers aspects of freedom of religion or belief at work, is a range of general provisions that protect freedom of religion or belief in constitutional norms and secondary legislation as well as specific provisions in the area of employment law and social security legislation.

According to Art 13 1 of Constitution 1991<sup>1</sup> religious associations are free, and in Art 37, 1, I it is established that freedom of religion or belief is protected. The same principle is articulated and its protection is elaborated in the Denominations Act 2002<sup>2</sup> (DA2002). Art 37 1, II Const. stipulates a state duty to maintain tolerance and respect between the faithful of different denominations and between believers and non-believers<sup>3</sup>. This norm creates legal guarantees against discrimination. Act 4.4 DA2002 also states that discrimination on grounds of religion or belief is prohibited and that it is against the principle of equality and human dignity<sup>4</sup>. It also outlines that freedom of religion or belief incorporates the right to observe days of rest and attend religious services (Art 6, 1, 9 DA2002).

Art 13.2 Discrimination Act stipulates that there is an employer's duty to take into account religion or belief in connection with days of rest and working hours.

Art 3, 1, III DA2002 stipulates that privileged treatment on the basis of religion or belief is unlawful. In connection with Art 13, 2 Discrimination Act this means that

<sup>1</sup> Обн. ДВ. бр.56 от 13 Юли 1991г., изм. ДВ. бр.85 от 26 Септември 2003г., изм. ДВ. бр.18 от 25 Февруари 2005г., изм. ДВ. бр.27 от 31 Март 2006г., изм. ДВ. бр.78 от 26 Септември 2006г., изм. ДВ. бр.12 от 6 Февруари 2007г.

<sup>2</sup> Обн., ДВ, бр. 120 от 2002 г., изм. и доп.

<sup>3</sup> Preamble Constitution 1992.

<sup>4</sup> Танчев, Е. Конституция на Република България. Коментар. Авт. кол. С.: Сиела, 1999, с. 125.

employment conditions could potentially present restrictions which could be seen as privileging one religion to the detriment of another. Often restrictions determined by certain types of employment may result in de facto discrimination of an employee, who professes a religion different from that of the majority of employees.

Anti-Discrimination Act 2004 (DiscrA 2004) represents a harmonization with EU law and prohibits all forms of discrimination and the protection extends to all aspects of social life (Art 3.1 and Art 6). In Employment law the act introduces obligations for employers as parties to employment contracts<sup>5</sup>.

One of the amendments to the Employment Code (ДВ, бр. 26 от 1992 г.) in 1992 introduced two new texts – second and third recital of Art 173 relating to the use of annual leave and religious feasts for employees belonging to faiths other than Eastern Orthodox Christianity. On the basis of this article the Council of Ministers on the recommendation of the denomination determines the religious feasts on particular religious associations<sup>6</sup>.

Employers are obliged to guarantee the conditions of employment suitable for the professing of their employees' religion or belief. Art 13.2 DiscrA2004 is an attempt to consolidate employers' interests with the constitutional protection of freedom of religion or belief of employees and the ways freedom of religion or belief could be exercised in the context of employment law.

Right to freedom of religion or belief includes the freedom to shape freely one's religious beliefs as well as to choose, change and follow and practice freely one's religion, individually or in community, in public or private through worship, teaching and observance<sup>7</sup>.

<sup>5</sup> See Стайков, Ив. Понятие за дискриминация в трудовите отношения. Правен преглед, 2005, бр. 1, pp. 22-42; Задължения на работодателя за предотвратяване на дискриминационни актове на работното място. Юридически свят, 2004, бр. 1, pp. 117-134; Защита от дискриминация на работници или служители с намалена работоспособност. Правен преглед, 2004, бр. 1, pp. 101-116; Забрана за дискриминация при определяне и изплащане на трудовото възнаграждение. – Търговско право, 2005, бр. 5-6, pp. 101-121; Право на информация на работника или служителя във връзка със защитата от дискриминация. – in: Сб. на департамент „Право“ посветен на 15 години на НБУ. С.: НБУ и Фенея, 2006, pp. 277-293; Защита от дискриминация при реализация на дисциплинарната отговорност. in: Сб. научни трудове от научна конференция по повод 10 години от създаването на НБУ „Васил Левски“. Том 5 Научно направление „Социални, стопански и правни науки“. В. Търново: Изд. комплекс на НБУ, 2012, pp. 163-170; Дискриминация при прекратяване на трудовото правоотношение. Съвременно право, 2003, бр. 6, pp. 16-31.

<sup>6</sup> Each year the Council of Ministers adopts Decisions which determine the dates for religious feasts of the Catholic church, the Armenian Apostolic Church as well as all Islamic, Jewish feasts in the following year. See for example. Решение № 948 на МС от 2011 г. за определяне на дните за религиозни празници на вероизповеданията, различни от източноправославното, през 2012 г. (обн., ДВ, бр. 104 от 2011 г.).

<sup>7</sup> Art. 2 DA2002.

The emerging legal approach is in the direction of equality and anti-discrimination in relation to general questions regarding religious discrimination at the workplace and freedom of religion or belief regarding the employment status of ministers of religion. This has been a slow process of articulating emerging policy approaches in this area aided by ECHR jurisprudence as well as by the EU accession and the impact of substantive EU law in the area of anti-discrimination. This process marks a gradual departure from discriminatory practices against minority religions through refusal of registration. Public debate about Muslim religious symbols in an educational environment certainly suggests a point of tension but so far there have been no concrete legislative developments or case law which could help to interpret fully these trends.

### **THE IMPACT OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS HAD IN THE NATIONAL APPROACH**

There are a number of cases relating to Art 9 ECHR. For the purposes of this conference I will focus on any cases dealing with employment law and discrimination. The few cases which deal with the interplay between Art 9 and occasionally Art 14 are not necessarily easy to reconcile and a contextual application of these texts of the convention is the only way to even begin to work our way through these cases. Some of the central Art 9 cases against Bulgaria deal with religious autonomy and leadership and the role of the state in mitigating tensions between rival groups<sup>8</sup>. On the back of these cases emerge cases which deal with the implications

<sup>8</sup> The recent case *Karaahmed v. Bulgaria* (*Application no. 30587/13*) concludes series of cases which deal with the complex tension between religious autonomy and state interference in the exercise of freedom of religion or belief and which commenced with *Hasan and Chaush v. Bulgaria* (2002) 34 E.H.R.R. 55; 10 B.H.R.C. 646 in which the Court found a violation of Article 9 and of Article 13 (right to an effective remedy), holding that the State had interfered with the internal affairs of the Muslim religious community, favouring one faction to the complete exclusion of the hitherto acknowledged leadership. In another application, filed this time by the other Muslim rival group in the leadership contest highlighted in *Hasan and Chaush*, *Supreme Holy Council of the Muslim Community v. Bulgaria* (2005) 41 E.H.R.R. 3) the Court decided again that there had been a violation of Article 9 of the Convention and that this time another government had intervened in a disproportionate fashion; in *Holy Synod of the Bulgarian Orthodox Church and Others v. Bulgaria* (2011) 52 E.H.R.R. SE1) the applicant argued that the State had interfered in an arbitrary fashion in an internal dispute in the Bulgarian Orthodox Church with the aim of forcing all clergy and believers to submit to the leadership of the person favoured by the authorities, Patriarch Maxim. Applicants stated that the Religious Denominations Act 2002 in itself constituted an arbitrary interference with their rights under Article 9 of the Convention. The Court concluded that the actions complained of constituted State interference with the internal organization of the Bulgarian Orthodox Church and, therefore, with the rights of the applicant organization and the individual applicants under Article 9 of the Convention, interpreted in the light of Article 11. However, taking into consideration the margin of appreciation enjoyed by the national authorities in the area of their relations with religious communities, the Court accepted that in 2002 the Bulgarian authorities had

of religious divisions on the employment status of clergy and laity belonging to one of the groups<sup>9</sup>. In addition to these there are two cases which represent the intersection between forum internum and employment law<sup>10</sup> and forum internum in the case of new religious movements.

Of all cases there is only one which has considered Art 9 in connection with Art 14, the historic case of conscientious objection in the armed forces. All other cases, even when they deal specifically with employment in the strict sense, do this within the broader question of the balance between religious autonomy and state interference. The landmark cases highlighted complex problems associated with state sponsored schisms in the post-communist period with different governments backing different leaderships within the majority religion, the Bulgarian Orthodox Church (BOC), and the mainstream Muslim leadership represented by the Office of the Chief Mufti. In almost every case (some of the cases were filed before the ECHR by each of the rival leaderships) the Court did take into account the government's legitimate desire to maintain social peace and legal certainty but considered the government's intervention disproportionate. On the back of these cases, however, an ECHR case seen in connection with the landmark cases dealing with state interference into the internal affairs of religious associations presented an interesting link between Art 9 and employment rights of the applicant. This was the first occasion for the Court to consider the state sponsored schisms outside of the question of state interference and in connection with an application by individuals who had lost their jobs by betting on the wrong horse in the schism of the BOC and were refusing to work for a leadership they did not recognize. On this occasion the court did not have to consider state interference in this particular case and proposed that Art 9 does not give a right to choose the leadership one likes. This take is difficult to reconcile with the earlier religious autonomy cases. In the former the Court had to balance between governments' legitimate concerns and the disproportionate means of pursuing them within the context of autonomous religious associations. In the latter the Court focused on

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legitimate reasons to consider some form of action with the aim of helping to overcome the conflict in the Church, if possible, or limiting its negative effect on public order and legal certainty. Nevertheless, the Court found that while the leadership dispute in the Bulgarian Orthodox Church was a source of legitimate concern for the State authorities, their intervention was disproportionate.

<sup>9</sup> *Pantusheva and Others v. Bulgaria* (Application number: 40047/04); *Sotirov and Others v. Bulgaria* Application number: 13999/05 The Court held that Article 9 does not guarantee to believers a right to choose the religious leaders of their communities or to oppose decisions by the religious organization regarding the election or appointment of ministers.

<sup>10</sup> *Ivanova v. Bulgaria* (2008) 47 E.H.R.R. 54; 23 B.H.R.C. 208; [2007] E.L.R. 612.

The Court unanimously declared admissible the applicant's complaints that her right to freedom of religion was violated because her employment was terminated on account of her religious beliefs (Article 9), which amounted to discrimination on religious grounds (Article 14, in conjunction with Article 9).

the ways in which rights of individuals are balanced with the rights of a religious association as a corporate body. What comes out of this case seems to suggest that rejecting a particular religious leadership and loosing one's job as a result of that does not necessarily make a compelling Art 9 case.

It proved difficult to reconcile these cases in the minds of Bulgarian policy makers, courts and prosecution service. The complex balancing act, which has to be applied to justify proportionate state interference in the internal affairs of religious associations, appears to have made institutions of the state reluctant to interfere, particularly in the internal affairs of the Bulgarian Orthodox Church. The state sponsored schisms in the nineties seem to have left the political community with a sense that any interference would be damaging to their political credentials. It appears that the above ECHR cases have not developed more sophisticated rights based approaches in relation to the existing legal culture, but rather paradoxically – a chilling effect in relation to any state interference. While this indicates a developing legal culture which takes very seriously internal institutional autonomy of religious association (at least the internal autonomy of the majority religion), it also presents a problem. As we see in the case of breaches of social security legislation, such approaches to religious autonomy have made the Bulgarian Orthodox Church outside of the law when senior bishops have failed to safeguard the social welfare and minimum wage of members of their clergy and their officials. In all other cases the Public Prosecution Service acts promptly in applying criminal law for any late payment of social security contributions. In the case of the Bulgarian Orthodox Church, it is reluctant to do so.

## **THE LEGAL STATUS OF RELIGIOUS MINISTERS**

### **There is no explicit legal definition for ministers of religion.**

Art 29 DA2002 speaks of employment relations between ministers of religion (in Bulgarian the term *sveshtenosluzhiteli* means literally sacred servants) and employees of religious institution. The act does not give a definition and leaves to the statutes of individual registered religious associations to define the term of their religious ministers. The terminology which emerges tends to refer to Orthodox and Catholic ministers as priests and to protestant ministers as pastors or refers to ministers of religion with the general term spiritual leaders (*dikhovenstwo*).

## **EMPLOYMENT LAW AND RELIGIOUS MINISTERS**

The Denomination Act states in Article 30 (1) that the registered religions can set up health, social and educational establishments. These establishments are, according to Article 31, supervised by the Ministry of Health, the Ministry of Labour and Social Policy, and the Ministry of Education, Youth and Science respectively. Article

32 further regulates that access to such establishments cannot be made dependent on affiliation to the respective religious community.

One of the issues relating to religious organizations in Bulgaria is the status of ministers of religion.

Article 29 of the Denominations Act (2002) states that 'labour relations of the clergy and the officers of the religious institution are arranged according to the statute of the religious institutions [in conformity with] the labour and social laws'.

The Clergy of the Orthodox Church is appointed with an ordinance from their Metropolitan bishop and the churches are obliged to pay pension contributions, health and social insurance. In practice it is public knowledge that several diocesan bishops systematically avoid paying salaries to their clergy and many priests have to take additional employment as teachers and even bricklayers.

Today most Muslim clerics attached to the Office of the Chief Mufti also have employment contracts, but this is a recent development. In some cases, either they are on a part-time employment contract, or they fulfil their religious obligations on a voluntary basis. The way the funding stream works is through collections which are transferred to the Office of the Chief Mufti which then pays the salaries of 500 imams out of 920-1000. This is a fairly recent development and reflects a major change in the employment status of the Muslim community which until very recently had no single imam employed with an employment contract.

Minority religions in Bulgaria operate in a fashion which is not dependent on the arrangements of the Labour legislation. The spiritual leader of the Jewish community is an Israeli citizen who only visits Bulgaria on holidays. The congregations maintain the synagogues and employ synagogue employees with minimal wage and employment contracts.

Catholics rely entirely on their congregations which are self-sufficient, their priests do not receive state salaries, they do not have any labour relations with an employer, there are no contractual arrangements and the only connecting point with the state system is health insurance which is compulsory.

According to § 1, 3 of the Transitional regulations of the Denominations Act 2002 a 'religious institution' is registered in accordance with the statute as a legal person and its governing bodies and constitution.

In accordance with Art 10 of the Social Security Code, social security contributions are due from the moment employment commences and finish when employment terminates. Exercise of employment activity is every activity which relates to the functioning of an association and activities on behalf of the association.

Art 1, para 1 of the Ordinance for remuneration and income on which social security contributions are paid, the contributions for the persons covered by Art 4 are calculated on the received or contracted but unpaid gross remuneration and income for employment.

Art 29 DA2002 stipulates that employment relations of religious ministers and employees of religious institutions are governed by the constitution of the religious organization, employment legislation and social security legislation.

Social security covers illness, disability, old age and death, accident and unemployment of elected office holders with clerical status within the Bulgarian Orthodox church and other registered denominations under DA2002 when such election has not resulted in an employment contract (Art. 4, 1, 8 of the Social Security Code).

For employees of the Bulgarian Orthodox Church and other denominations the social security contributions are paid in by the central governing body of the denomination only if the employees have not been paid for their services. Otherwise contributions are paid in through the general provisions.

There is no case law, as far as I am aware, but in interviews with priests on the ground a concerning picture emerges. A number of dioceses do not and have not been paying priests' salaries for years. Part of the problem is that in some cases when salaries are paid through state subsidies the funds are transferred to the diocese rather than directly to the priests. This then results in delays but also gives the option for the bishop to allocate these funds to other activities. As a result many priests undertake additional employment, often even manual labour.

A recent article on the running of the Diocese of Veliko Tirnovo, a major diocese which incorporates the medieval capital of the Second Bulgarian Empire and the second biggest monastery, indicates some large discrepancies in the enforcement of the otherwise comprehensive social security legislation<sup>11</sup>. Based on this very recent research it appears that the diocese of Tirnovo does not pay salaries and social insurance for many of its Orthodox priests and that not all priests and churches are even on the social security register. I have had a chance to confirm these findings and from my conversations with Orthodox clerics I get the impression that this is a recurring pattern in many other Orthodox dioceses. What is more peculiar is that the State Prosecution services have so far not pursued the matter in any of these cases. In contrast to this any other organization which is in minor arrears is regularly pursued by the authorities. It seems that social security legislation has created an interesting paradox. On the one hand the primary legislation creates a fairly high level of legal certainty as far as employment status of any citizen is concerned. On the other it seems that the constitutional provision of separation of church and state, combined with a series of ECHR cases which highlighted a systemic interference into the internal affairs of religious associations, may have developed something of a chilling effect in relation to the application of general laws regarding employment and social insurance

<sup>11</sup> Христо Беров. Църковно устройство на Великотърновска епархия като юридическо лице – местни поделения, кадрови състав, здравно и социално осигуряване Христианство и Култура брой 100 44-58 - [http://www.hkultura.com/articles\\_2015\\_100.php#sthash.nvGdtDBZ.dpuf](http://www.hkultura.com/articles_2015_100.php#sthash.nvGdtDBZ.dpuf).

in relation to the Orthodox church. This is not unproblematic. It is very difficult to find out how wide spread the trend is but preliminary enquiries seem to suggest that it is quite widespread with priests having to take on remedial jobs as bricklayers, security guards etc in order to supplement the stipends which should have been paid by their diocese. This is certainly a matter of concern. It appears that the separation of church and state which was primarily about the complex dynamics between state interference and religious autonomy in the pre-EU accession period became about the ring fencing of the Orthodox Church from potential criminal and civil litigation. Several civil court employment cases have only highlighted the blueprint of a wide spread problem – that separation of church and state as a concept has been deployed to develop very unsatisfactory practices in relation to the clergy of the majority religion in Bulgaria. The church hierarchy effectively fails systematically to provide maintenance for its clerics, the clerics because of their act of obedience in relation to the hierarchy on a whole are reluctant to pursue the matter before civil courts, their redress before ecclesiastical courts is non-existent and the only area in which the State could and must intervene to exercise civil or criminal jurisdiction has been abandoned by public authorities which have become increasingly reluctant to intervene in fear that this could be considered as an undue state interference in ecclesiastical matters. The information published on the web site of the holy Synod of the Bulgarian Orthodox Church shows that the diocese has 345 churches and monasteries and should be paying social security contributions of 128 clerics and lay officers. The National Register has only 106 branches and 59 employees. In theory since 2015 failure to pay maintenance fees is a criminal offence sanctioned by custodial sentences and fines<sup>12</sup>. Despite the fact that at least two major dioceses (Veliko Tirnovovo and Vidin) systematically do not pay priests' stipends and social security contributions, there has been no attempt to prosecute non-compliance on such a major scale in an area of law where the State Prosecutor reacts quite promptly on any minor non-compliance.

The present text will not focus so much on the failures of internal ecclesiastical law due process but since the topic of the conference is the cross section between ecclesiastical law and employment law it will focus on the question to what extent employment law does intersect with ecclesiastical law and what would be the potential impact and what is the real impact of this intersection on religious autonomy.

In 2014 the Bulgarian Parliament passed an amendment to the Criminal Code in Art 2556 which introduces criminal liability for employers who fail to pay social

<sup>12</sup> See. Данни за Великотърновска епархия, актуални към 27.05.2013: [http://bg-patriarshia.bg/index.php?file=turnovo\\_diocese.xml](http://bg-patriarshia.bg/index.php?file=turnovo_diocese.xml) Срв. Фирмено досие под Булстат: 104042503. Вж.: <http://goo.gl/uAalZT> Срв. Справка свързани лица с Великотърновска епархия - <http://goo.gl/5nkeSt> 2015/ брой 3 (100).

security contributions for his employees<sup>13</sup>. This fairly radical measure is aimed at preventing the development of a black labour market and facilitating a robust system of social security. This text has a direct relevance to all religious organisations as employers and has in many ways created a greater sense of transparency about the status of the clergy of minority religions in Bulgaria.

Two recent cases in Bulgarian civil courts have effectively shaped the Employment law of the Bulgarian Orthodox Church. In both cases the civil courts determine that the court should not interfere in internal institutional affairs, such as the reinstatement of an excommunicated priest, but in both cases establish that the metropolitan is an employer with all legal responsibilities proscribed by law – and this includes remuneration, paid leave, social security contributions etc.<sup>14</sup>

The Provision of Art 29 DA in connection with Art 223 Al 2 of the Constitution of BOC and Art 225 al. 1 of the Ecclesiastical Constitution provides that compulsory social security must be paid for the members of the clergy and this must cover all risks covered by social security as well as with health insurance and provided by law.<sup>15</sup>

The Parliament passed an amendment to Art 2556 the Criminal Code<sup>16</sup> which came into force on 1 January 2015. This article is imperative and applies *erga omnes*. Sanctions for failing to pay social security are 1-8 years custodial sentences, fines 500-5000 levs and a confiscation of property. It is deeply perplexing nevertheless why the Prosecution Service does not pursue the Tirmovo or indeed any other diocese which may be in the same situation.

## **AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS**

### **(a) In what terms is the autonomy of churches recognized in your country? Is it considered a manifestation of the collective dimension of religious freedom?**

The question of religious autonomy of religious associations has been the key element in the painful road to democratic transition. Religious autonomy and state interference were the elements which dominated almost three decades of the life of the two major religious associations in Bulgaria – the Bulgarian Orthodox Church and the Bulgarian Muslims. As part of the process of decommunisation of the state institutions the government of F Dimitrov, through the directorate of Religious Denominations, sacked the Patriarch and the Synod of the Bulgarian Orthodox Church in 1993 and appointed an Alternative Synod. This resulted in an extensive and painful

<sup>13</sup> See. ДВ, бр. 107 от 2014 г.

<sup>14</sup> Решение №191/05.03.2010 г. по ГР. Д. №4956/2008 на ВКС и Определение №3675/20.09.2013 г. по ГР. Д. №4580/2013 на Районен съд - Плевен.

<sup>15</sup> Автор: Румяна Станчева - гл. експерт в НОИ. Източник: Правно-информационна система „Сиела“ към 22.08.2004 г. <http://goo.gl/BRtMX5>

<sup>16</sup> See Наказателен кодекс: чл. 2556. (Нов - ДВ, бр. 107 от 2014 г., в сила от 1.01.2015 г.)

period of Schism, with two Synods and two Patriarchs promoted and supported in turn by successive governments.

A similar process of de-communisation affected the Muslim community and its Supreme council and the internal debates and the state's role in trying to resolve these debates featured in the following ECHR cases.

The result of the schism and the fact that the Denominations Act 1949 survived until 2002 made the debates about religious autonomy central to the drafting of the denominations bill. The proposed alternative bills ranged from a very liberal open system with no state interference, proposed by the Movement of Rights and Freedoms, to more communitarian proposals which eventually gathered traction. The present 2002 Act features a text which incorporates the Bulgarian Orthodox Church as religion *ex lege*, while all other religious associations have to register before the Denominations Directorate. A number of human rights organisations have raised concerns about the potential discriminatory effect of this text. In some way it could be argued that while this text is not *per se* a violation of Art 9 ECHR it will be important to monitor whether it may be interpreted in a way to justify discriminatory practices.

Religious institutions are exempt from general anti-discrimination norms. Art 7 1 *DiscrA2004* states that a differential treatment on grounds of religion, belief or gender in connection with employment by religious institutions or organizations, when the aim is legitimate and the condition is proportionate, is not discrimination. The same applies to the differential treatment of persons in the context of religious education including vocational religious education.

### **IMPACT OF EUROPEAN UNION LAW**

The impact of EU legislation pre and post Lisbon has had a major impact. Harmonization of employment legislation and anti-discrimination legislation together with commitments to fundamental rights at Treaty level has had an impact on the way employment legislation has become more transparent in terms of duties of religious organizations as employees. Despite that there is clearly plenty to be concerned about. The Government of the Republic of Bulgaria does not regularly enforce the judgments of ECHR. The examples of organizations which receive state subsidies and do not pay their priests is also a concern.

The Anti-Discrimination Act was adopted in Bulgaria to transpose a number of acts of the European Union, in particular Directive 2000/43. Article 4 of the *DiscrA* provides:

1.—All direct or indirect discrimination on grounds of gender, race, nationality, ethnicity, human genome, citizenship, origin, religion or belief, education, convictions, political allegiance, personal situation or social status, disability, age, sexual orientation, marital status, financial situation or on any other ground established in a law or in an international treaty to which the Republic of Bulgaria is a party shall be prohibited.

2.—Direct discrimination shall be taken to occur whenever, on the basis of characteristics mentioned in paragraph 1, one person is treated less favourably than another is, has been or would be treated in comparable or similar conditions.

3.—Indirect discrimination shall be taken to occur where, on the basis of characteristics mentioned in paragraph 1, one person is placed in a less favourable position compared with other persons by an apparently neutral provision, criterion or practice, unless that provision, criterion or practice is objectively justified having regard to a legitimate aim and the means of achieving that aim are appropriate and necessary.’

Furthermore, Paragraph 1 of the Supplementary Provisions of the DiscrA states:

‘For the purposes of this law ‘unfavourable treatment’ means: any act, action or omission which directly or indirectly prejudices rights or legitimate interests;

‘on the basis of characteristics mentioned in Article 4(1)’ means: on the basis of the actual — present or past — or the presumed existence of one or more such characteristics possessed by the person discriminated against or a person connected with or assumed to be connected with that person, if such connection is the basis for the discrimination;

In conclusion the general legal framework which regulates the employment status of ministers of religion in Bulgaria gives the impression that the main provisions regarding employment protect religious ministers and all available safeguards are in place. At the same another picture emerges in relation to the majority religion (the Bulgarian Orthodox Church). There appears to be a systemic problem in paying salaries and social security contributions for a large number of clergy. Apart from two cases members of the clergy choose not to pursue the matter in court in fear of marginalization and canonical sanctions. What is most striking in these cases is that the legal safety net provides a route for the state to interfere but it chooses not to. It appears that a series of ECHR cases and public debate about the complex balancing between religious autonomy and state interference has resulted in a reluctance on the part of public authorities to interfere in any internal affairs of the Bulgarian Orthodox Church even when they have a duty to investigate and prosecute criminal offences.



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# LAW AND RELIGION IN THE WORKPLACE IN CYPRUS

ACHILLES EMILIANIDES and CHRISTINA IOANNOU

## I. RELIGIOUS FREEDOM AT WORK

### A. Religious Freedom Safeguards

The employment relationships in Cyprus are governed by ordinary contract law principles and are supplemented by statutory rights and obligations where appropriate<sup>1</sup>. The main source governing religious freedom in general and at work is Article 18 of the Constitution of Cyprus which safeguards the right to religious freedom, including the freedom of religious conscience and freedom of worship<sup>2</sup>. The aforementioned provision corresponds in many ways to Article 9 of the ECHR, but it is more detailed, while its provisions cover sectors which are not recorded in Article 9. The right to freedom of thought, conscience and religion is far-reaching and profound and is safeguarded for any person. It is not limited in its application to traditional

<sup>1</sup> See in general M. ANTONIOU (ed.), *The Law of Termination of Employment in Cyprus* (Nicosia: Federation of Employers and Industrialists, 2000, in Greek), C. CHRISTODOULOU, *Labour Law Textbook* (Nicosia: Epiphaniou, 2009, in Greek), S. FLOURENTZOS, «Cyprus» in A. REITZ (ed), *Labor and Employment Law in the New EU Member and Candidate States* (American Bar Association, 2007): 85-106, G. GEORGIU *et al.*, «Basic Principles of Cypriot Employment Law» in S. KIERKERGARD, *Law Across Nations: Governance, Policy and Statutes* (Nicosia: IAITL, 2012), N. KTENAS, «Employment» in *Introduction to Cyprus Law* (Limassol: Andreas Neocleous & Co LLC, 3rd Ed, 2010): 991-1016, T. PAPAMILTIADES, «Labour Law», in *Corpus de Jure Cyprii*, vol. II (Nicosia: Cyprus Bar Council, 1988, in Greek), 265–308.

<sup>2</sup> See A. EMILIANIDES, *Law and Religion in Cyprus* (The Hague: Kluwer, 2014, 2nd), *Idem.*, «State and Church in Cyprus», in *State and Church in the European Union*, ed. G. ROBBERS, 2nd edn (Baden-Baden: NomosVerlagsgesellschaft, 2005), 231 ff.; *Idem.*, (ed), *Religious Freedom in the European Union* (Leuven: Peeters, 2011): 89-98; C. TORNARITIS, *The State Law of the Republic of Cyprus* (Nicosia: Cyprus Research Centre, 1982, in Greek), 145–148.

religions or to religions and beliefs with institutional characteristics or practices analogous to traditional religions<sup>3</sup>.

Indirectly related to religious freedom at work is Article 10 §3 of the Constitution which provides that no person shall be required to perform *forced or compulsory labour*, but this shall not include, *any service of military character if imposed or, in the case of conscientious objectors, subject to their recognition by a law, service exacted instead of compulsory military service*. The said constitutional statute, implements Article 4 §3 section b, of the ECHR.

The more particular manifestations of an individual's religious freedom are safeguarded by Article 18 of the Constitution which stipulates that every person has the right to profess his faith and to manifest his religion or belief, in worship, teaching, practice or observance, either individually or collectively, in private or in public, and to change his religion or belief<sup>4</sup>. The term *worship* embraces, but is not confined to institutional forms of worship. Freedom to manifest one's religion entails the right to exercise religious activities in public, as well as trying to convince others, through teaching, to change their religion or belief. The constitutional right to religious freedom further includes the negative aspects of such right, namely the right not to disclose one's religion<sup>5</sup>.

Interference with the right to religious freedom is in principle prohibited, irrespective of whether such interference is direct, or indirect. However, the freedom to manifest one's religion can be restricted, by virtue of Article 18 §6, so long as such limitations are prescribed by law and are necessary in the interests of: (a) the security of the Republic; (b) constitutional order; (c) public safety; (d) public order; (e) public health; (f) public morals; (g) the protection of the rights and liberties guaranteed to every person by the Constitution. In view of the above, two general principles may be accepted: (i) there has to be a legal basis for the interference with the fundamental right to religious freedom; a restriction has to be prescribed by law and in accordance with the national law. Such law must be adequately accessible, and sufficiently precise and must have been enacted by the appropriate organ, (ii) The interference has to be necessary for one of the constitutionally specified legitimate aims; a limitation which has been prescribed by law in order to facilitate interests others than those explicitly referred to in Article 18 §6 of the Constitution, shall not be considered to be legitimate.

In addition to the conditions mentioned above, any limitations on the freedom to manifest one's religion must be considered to be necessary in a democratic society,

<sup>3</sup> *Pitsillides v. The Republic* [1983] 2 CLR 374.

<sup>4</sup> *Tsivitanides v. Tsivitanides* [1956] 21 CLR 111, *Houssain v. Houssain* [1979] 1 CLR 600.

<sup>5</sup> *Elia v. The Republic* [1985] 3 CLR 38, Second Report Submitted by Cyprus pursuant to Art. 25, para. 1 of the Framework Convention for the Protection of National Minorities, 27 Oct. 2006, para. 39.

under the mandate of Article 9 §2 of the ECHR; and this has been readily accepted by the Cypriot courts. The ECHR was ratified in the internal legal order by the European Convention for the Protection of Human Rights (Ratification) Law 39/1962. Part II of the constitution of Cyprus, which guarantees the fundamental rights and liberties, is modelled on the European Convention on Human Rights; however, the provisions of the European Convention have been extended and enlarged, in some respects, with a number of social and economic rights added, in order to meet the basic requirements of a modern society<sup>6</sup>. Consequently, to the extent that it has been incorporated in constitutional provisions and to the degree that its provisions have not been altered during incorporation, the Convention enjoys limited Constitutional status<sup>7</sup>. Legislation which is contrary to the provisions of the Constitution safeguarding individual human rights may be declared unconstitutional by the trial court. Moreover, the ECHR and its Protocols have, on the basis of Article 169 §3 of the Constitution, superior force to any municipal law, either antecedent or subsequent to their ratification by law. It should be further observed that the Cypriot courts are invoking the case law of the ECtHR, not only with respect to the interpretation of the Convention, but also with respect to the interpretation of the corresponding constitutional provisions. Therefore, the courts will try, wherever possible, to interpret the relevant constitutional provisions in a manner which is consistent with the interpretation adopted by the ECtHR<sup>8</sup>.

## B. Non-Discrimination Safeguards

In addition to the protection provided on the basis of religious freedom described above, non-discrimination also provides the framework for protecting religious freedom at work. The right of equality is safeguarded in Article 28 of the Constitution and includes non-discrimination on grounds of religion in the workplace. Furthermore, the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, has been implemented into Cypriot Law with Law

<sup>6</sup> Acknowledged in several judgments of the Supreme Court of Cyprus, such as *Attorney-General v. Ibrahim* [1964] CLR 195: 225, *Attorney-General v. Afamis* 1 RSCC 121: 125–126. See further A. EMILIANIDES, *Constitutional Law in Cyprus* (The Hague: Kluwer, 2013), P. EVANGELIDES, *The Republic of Cyprus and Its Constitution with Special Regard to Constitutional Rights* (Difo – Druck GmbH, 1996); C. TORNARITIS, «The Social and Economic Rights under the Law of the Republic of Cyprus», in *Melanges Bridel* (Lausanne: ImprimeriesRéunies, 1968), 533–556.

<sup>7</sup> See A. EMILIANIDES, *Beyond the Constitution of Cyprus* (Thessaloniki: Sakkoulas, 2006, in Greek).

<sup>8</sup> See further A. LOIZOU, *Cyprus and the European Convention on Human Rights* (Athens: Sakkoulas, 2003, in Greek); C. TORNARITIS, ‘The Operation of the European Convention for the Protection of Human Rights in the Republic of Cyprus’ *Cyprus Law Review* 3 (1983): 455–464; C. Clerides, ‘The Operation of the European Convention on Human Rights in the Civil Courts of Cyprus’ *Cyprus Law Review* 39–40 (1992): 6029–6043 (in Greek).

58(I)/2004<sup>9</sup> concerning equal treatment in employment and occupation<sup>10</sup>. The purpose of Law 58(I)/2004 is, according to section 3 of the Law, to set out a framework in order to prevent discrimination on grounds of, *inter alia*, religion or belief, in the area of employment and occupation, so that the principle of equal treatment might be effected. Section 4 of Law 58(I)/2004 provides that the scope of this Law extends to all public and private sector bodies, including public authorities, local administrative authorities, as well as public or private organizations.

Discrimination on the grounds of religion or belief is unlawful with respect to access to employment, self-employment, or occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion. Discrimination on grounds of religion is further prohibited with regard to access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, employment and working conditions, including dismissals and pay, membership of, and involvement in, an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided for by such organizations. Discrimination on grounds of religion exists if a person is treated less favourably on grounds of religion than another person is, has been, or would be treated in a comparable situation.

Section 6 of Law 58(I)/2004 further prohibits indirect discrimination on grounds of religion; section 2 of Law 58(I)/2004 provides that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion, at a particular disadvantage, compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Indirect discrimination may occur where there is failure to treat different individuals or groups differently, without any objective justification, in such a manner so that an apparently neutral provision which theoretically applies to everybody, in essence constitutes a disguised discriminatory provision which discriminates between the claimant and other persons.

Section 9 of the Law concerns cases of positive action. It provides that, a more favourable treatment in employment, even if it is apparently an indirect discrimination, does not constitute discrimination in the meaning of the Law, if it is aimed

<sup>9</sup> Law 58(I)/2004 also transposes Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. It is noted that Law 58(I)/2004 does not however transpose the disability component of Directive 2000/78/EC, which is transposed by Law 57(I)/2004.

<sup>10</sup> See A. EMILIANIDES, «Age Discrimination in Cyprus», in *Age Discrimination in Europe*, ed. VAN KEMPEN, VON STEINAU & RYLEY (The Hague: Kluwer Law International, 2009).

at preventing or compensating for disadvantages linked to racial or ethnic origin, religion or belief, age or sexual orientation. According also to Section 10, any unfavourable treatment or adverse implication for any person, who makes a complaint against an employer or is involved in proceedings aimed at enforcing the principle of equal treatment, is prohibited.

## II. RELIGIOUS MINISTERS AND LABOUR LAW

Religious ministers primarily perform a spiritual function. In accordance with one view religious ministers should not be considered as employees of the religious organization, but should rather be considered as performing a spiritual mission<sup>11</sup>. The only Supreme Court case where the status of a religious minister was considered concerned a member of the clergy of the Greek Orthodox Church. In the aforementioned case of *Sideras* it was held that the relationship between the religious minister and the church is one of employee and employer, irrespective of the fact that the main purpose of the working relationship is a spiritual one<sup>12</sup>. It was accordingly held that the purpose of the function carried out by a religious minister was not profit-making and accordingly a religious minister could not be considered as a self-employed person.

In accordance with the decision of the Supreme Court in the case of *Sideras*, religious ministers are properly considered as employees, and thus, the general provisions of employment law are applicable with respect to their status as employees. This applies to ministers of all denominations and accordingly the status of religious ministers when working for their respective denominations will be the normal legal status of any other employee. However, in view of the peculiar and unique characteristics that the status of a religious minister entails, certain exceptions from the general provisions of employment law might be recognized in the appropriate cases; the extent to which the principle of organizational religious freedom may circumvent the application of the general provisions of employment law has not yet been settled, and has to be examined on a case by case basis and in the light of all relevant considerations. There would normally be no exceptions in the legal status of religious ministers when they are employed by other non-religious institutions, such as in the case of teachers of religion in schools; these persons will be treated in the same manner as if they had not been religious ministers.

The definition of who is a religious minister might be considered as a wide one. In the case of *Andreou* the Apostolic Church of Jesus Christ had requested the exception of the obligation to serve in the National Guard of one of its members, who was

<sup>11</sup> See also *Davies v. Presbyterian Church of Wales* [1986] 1 WLR 323 (HL).

<sup>12</sup> *Sideras v. The Minister of Labour and Social Securities* [1989] 3 CLR (in Greek).

the main deacon of ecclesiastical music of the Church<sup>13</sup>. The Minister of Defence did not grant the exception, arguing that a deacon of music might not be considered as a member of the clergy. The Court observed that the applicant had been consecrated as a member of the clergy of the Apostolic Church and that he had been authorized to perform sermons, take care of the religious needs of his community, attend religious ceremonies and represent the Church, and in general to perform willingly all services that the Church requires him to render. In view of the above, the Court held that the applicant was a member of the clergy, since such a term ought to be examined in the light of the specific circumstances of each individual Church and in order to comply in the best possible way with the principle of religious freedom.

Work permits for religious ministers have also been considered by the Supreme Court. In the case of *Levantis*, the applicant was a Greek national married to a Greek Cypriot, and resident in Cyprus<sup>14</sup>. His application for a permit to work as a Religious Officer of the Church of God of Prophecy was rejected. He accordingly filed a recourse before the Supreme Court where he argued that the decision prevented him from exercising and expressing his religious duties as a Religious Officer of the Church of God of Prophecy in Cyprus, that there was discrimination and unequal treatment against him as a religious officer of the said Church, that his freedom of worship is violated and that he was compelled, in a manner tantamount to the exercise of moral pressure, to change his religion. The Supreme Court rejected the application and held that Article 18 of the Constitution safeguards freedom of religion and not entitlement to work permit, a matter which is regulated specially by the Laws of Cyprus. The applicant was free to profess any religion he wished, while the refusal of a work permit did not prevent him from attending his Church or otherwise manifesting his religion or belief. Thus, it was held that there was no violation of Article 18 of the Constitution.

While it can be generally accepted that granting work permits to aliens falls within the discretionary powers of the State and that religious freedom does not entail a right to be granted a work permit, it is suggested, on the other hand, that the aforementioned decision of the Supreme Court presents certain problems. The said alien was a resident of Cyprus who had married a Cypriot and who intended to work as a religious minister of a Church; rejecting his application for a work permit should not be arbitrary so as to cause concerns that this was due to his religious beliefs and to the fact that he wanted to work as a religious officer of that particular Church. There seemed to be no justification why the application for a work permit was rejected in the case of *Levantis* and this raises serious concerns of religious discrimination.

<sup>13</sup> *Andreou v. The Republic*, Case 50/2006, judgment of the Supreme Court of Cyprus of 4 Jun. 2007, in Greek).

<sup>14</sup> *Levantis v. The Republic* [1988] 3 CLR 2483.

As a result of an agreement between the Republic of Cyprus and the Orthodox Church, the Church has transferred some of its immovable property to the Republic, which in return contributes to the payment of the salaries of the parish clergy in rural areas. The government decided that this agreement should also extend to the clergy of the three religious groups of the Republic (Roman Catholics, Maronites and Armenians) and as of 1 January 1999 the state has also begun to pay the salaries of a number of priests of the three religious groups, despite the fact that only the Orthodox Church had granted any immovable property to the Republic. This was due to the fact that the three religious groups and the Orthodox Church should be treated on an equal basis in view of the system of coordination, which is in force in the Republic of Cyprus<sup>15</sup>.

The status of the clergymen of the Orthodox Church and of the three religious groups of the Republic, however, remains one of private law, and not one of public law, even if the salary of such clergymen may be paid by the State. This is due to the fact that the exact terms of an agreement between the State and the various constitutionally recognized religious communities, are that the State has agreed to compensate the Orthodox Church and the three religious groups with respect to the payment of salaries of some of their clergymen; the agreement is therefore between the State and the religious communities and not between the State and the specific clergymen whose salaries are paid by the State. The clergymen have employment contracts with, and receive instructions from, their respective Church and not the State; consequently, the State does not itself function as the employer, but simply funds the Churches, who function as the employers of the clergymen. The above view is consistent with the fact that the various religious organizations, including the Orthodox Church and the three religious groups, are not considered legal persons under public law, but only legal persons under private law of a peculiar nature;<sup>16</sup> therefore, the status of the employees of those Churches ought, in principle, to remain one of private law and not of public law. In view of the above, the employment relationship between a religious organization and an employee is governed by the general provisions of employment law.

<sup>15</sup> A. EMILIANIDES, «Financing of Religions in Cyprus». In B. BASDEVANT-GAUDEMET and S. BERLINGO (eds), *The Financing of Religious Communities in the European Union* (Peeters: Leuven, 2009): 111-117; *Idem.*, «Equal Promotionist Neutralism and the Case of Cyprus» in M. MORAVČICOVA, *Financing of Churches and Religious Societies in the 21st Century* (Bratislava: Institute for State-Church Relations, 2010): 135-144; *Idem.*, «Il Finanziamento delle cinque Religioni: Il Caso Cipriota», *Quaderni di Diritto e Politica Ecclesiastica* 1 (2006): 123 ff.

<sup>16</sup> *Autocephalous Orthodox Church of Cyprus v. The House of Representatives* [1990] 3 CLR 338 (in Greek); A. Emilianides, 'Religious Entities as Legal Persons: Cyprus', in *Churches and Other Religious Organisations as Legal Persons* (Leuven: Peeters, 2007), 51; *Idem.*, 'The Constitutional Position of the Charter of the Church of Cyprus', *Nomokanonika* 2 (2005): 50 ff. (in Greek).

It could, however, be argued that in the light of Article 110 of the Constitution, recognizing administrative religious autonomy to the Orthodox Church and the three religious groups, the general provisions of employment law should not apply with respect to religious ministers of the Orthodox Church, or the three religious groups of the Republic. According to this view the employment relationship between the religious ministers and the Orthodox Church, or the members of the three religious groups, should be governed exclusively by the provisions of the Charter of the Orthodox Church, or the internal law provisions of the three religious groups and not by the legislation of the State. In view, however, of the fact that the employment relationships do not constitute matters which would have fallen within the jurisdiction of the Greek Communal Chamber, but instead matters which would have, in any case, fallen within the exclusive jurisdiction of the House of Representatives in accordance with the constitutional provisions (and accordingly would fall out of the competence granted to religious organisations under the Constitution), the aforementioned view does not seem convincing.

The Orthodox Church and the three religious groups enjoy exclusive competence only with respect to matters of a religious nature which would have otherwise fallen within the competence of the Greek Communal Chamber, and not to matters such as employment law. Consequently, so long as the relevant provisions of general employment law do not contain an exception clause concerning religious organizations, it is submitted that the employment law relationships of all religious organizations are governed by the general provisions of employment law. Specific problems concerning the application of the general provisions of employment law with regard to religious ministers might be more easily solved if the application of such provisions is considered within the wider context of the organizational religious freedom of each religious community and the spiritual role that each religious minister has to perform; therefore, each particular case ought to be examined within the framework of religious freedom protection. In any event, with respect to other employees of the religious organization, there seems to be no ground on the basis of which the application of the general provisions of employment law might be disqualified.

### III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

Article 18 §2 of the Constitution provides that all religions whose doctrines or rites are not secret are free. For a religion to be constitutionally protected it need not register with the authorities; the only requirement is that its doctrines or rites are not secret. Article 18 § 3 further provides that all religions are equal before the law and no legislative, executive or administrative act of the Republic shall discriminate against any religious institution or religion. There should, in principle, be no discrimination between newly established religions, or religions which represent religious minor-

ities<sup>17</sup>. In general, religious communities enjoy a considerable extent of religious autonomy according to Cypriot Law and are regulated not by state laws, but by their own internal Canon Law provisions.

The Constitution has introduced a system of coordination between the Republic of Cyprus and the major religions and Christian creeds<sup>18</sup>. Such a system is based upon the autonomy of religious organizations, which are distinct from the State and deal restrictively with their own affairs. The State has recognized broad discretionary powers with regard to the main religions' internal affairs, administration of their property, family matters, and in general matters of communal character. The model prevailing in Cyprus is essentially a pluralistic model, which recognizes and embraces the public dimension to religion, while at the same time attempting cooperation with all religions. The administrative organization of the five main religions of the island (Orthodox Christian, Islamic, Roman Catholic, Maronite and Armenian) is explicitly safeguarded in Article 110 of the Constitution. Other religions enjoy, to their full extent, all the freedoms safeguarded by Article 18 of the Constitution<sup>19</sup>.

The scope of Law 58(I)/04, harmonising Directive 2000/78/EC, extends also to churches and other religious organizations by virtue of the definition of the terms 'employer' and 'employee' in section 2 of Law 58(I)/2004. However, the aforementioned provisions are subject to certain exceptions, with respect to religious organizations. Section 7 of Law 58(I)/2004 provides that in the case of occupational activities within churches and other public or private organizations whose ethos is based on religion or belief, a difference of treatment rooted in a person's religion or belief shall not constitute discrimination, provided that the nature of such an activity or treatment constitutes a genuine, legitimate and justified occupational requirement, with regard to the ethos of the organization. Hence section 7 of the Law allows a requirement that a person should be of a particular religion or belief in order to be employed in a church or any other religious organization; the application of the principle of non-discrimination with respect to employment loosens in favour of the application of the principle of organizational religious freedom<sup>20</sup>.

<sup>17</sup> *The Minister of Interior v. The Jehovah's Witnesses Congregation (Cyprus) Ltd* [1995] 3 CLR 78 (in Greek).

<sup>18</sup> A. EMILIANIDES, «The Constitutional Framework of the Relations between Church and State in the Republic of Cyprus», *Nomokanonika* 1 (2006): 37 ff. (in Greek); C. PAPANATHAS, *On the Administrative Organisation of the Church of Cyprus* (Thessaloniki: 1981), 34.

<sup>19</sup> *Ktimatiki Eteria Neas Taxeos v. The Chairman and Members of the Municipal Committee of Limassol* [1989] 3 CLR 461.

<sup>20</sup> See in general R. AHDAR & I. LEIGH, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), 305 ff.

Moreover, section 5 of Law 58(I)/2004, which corresponds to Article 4 of Council Directive 2000/78/EC, clarifies that a difference of treatment on any ground shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. It could be well argued that section 5 of Law 58(I)/04 covers the cases where a church refuses to employ women as members of the clergy; in the latter cases it is indisputable that a difference of treatment on the ground of sex is strictly related to the nature of the particular activities concerned and the context in which they are carried out, in view also of the principle of organizational religious freedom. However, whether the exemption could also apply with respect to other employees of the religious organization besides religious ministers is debatable; the church or the religious organization in question would have to prove that hiring a female layperson in order to perform certain duties might be problematic, for instance, due to the fact that this might be scandalizing for the male religious ministers who would have to work with the female employee. Whether in such a case, the criteria of the existence of a genuine and legitimate occupational requirement or the principle of proportionality are fulfilled, is quite doubtful.

It is further considered that should section 5 be considered as a sufficient basis to justify differentiation of treatment on the grounds of sex, it could also justify differentiation on the grounds of sexual orientation, in so long as such differentiation was explicitly based upon Canon Law provisions and was related to the principle of organizational religious freedom. Again, it is doubtful whether such differentiation in treatment might equally apply with respect to laypersons who are employed by the church or the religious organization without performing religious duties, such as accountants, secretaries, or legal counsels. Therefore, while section 7 of Law 58(I)/04 explicitly exempts cases where religious organizations differentiate between their employees, or refuse to hire employees on grounds of religion or belief, section 5 also provides an exemption, in the proper cases, with respect to difference in treatment on grounds of sex or sexual orientation<sup>21</sup>.

<sup>21</sup> A. EMILIANIDES, «Discrimination Law in Cyprus» in M. HILL, *Religion and Discrimination Law in the European Union* (Trier: European Consortium for State and Church Research, 2012): 79-85.

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# LAW AND RELIGION IN THE WORKPLACE IN THE CZECH REPUBLIC

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## I. RELIGIOUS FREEDOM AT WORK

### Key instruments and sources of law on religious freedom at work in the Czech Republic

The Czech law deals with religious freedom at work in accordance with

- provisions of Czech constitutional law,
- obligations from ratified international treaties, and
- provisions of several Czech legal acts, before all with
  - the Act on Employment No. 435/2004 Sb.<sup>1</sup>,
  - the Labour Code No. 262/2006 Sb., and
  - the Anti-Discrimination Act No. 198/2009 Sb.

### Provisions OF CZECH CONSTITUTIONAL LAW

Provisions of Czech constitutional law are contained in the *Constitution of Czech Republic* (Act No. 1/1993 Sb.), and in the *Charter of Fundamental Rights and Freedoms* from 9 January 1991<sup>2</sup> (Charter), which is, according to the Constitution, a part of constitutional order of the Czech Republic<sup>3</sup>.

The Charter emphasizes that “democratic values constitute the foundation of the state, so that it may not be bound either to an exclusive ideology or to a particular

<sup>1</sup> Sb. = Collection of Laws of the Czech Republic (before 1993 Collection of Laws of the Czech and Slovak Federal Republic).

<sup>2</sup> For the first time the Charter was published as a federal Act of the Czech and Slovak Federal Republic from 9 January 1991, under No. 23/1991 Sb.

<sup>3</sup> The Constitution incorporated the Charter in the constitutional order of the Czech Republic on the date of the foundation of the Czech Republic as an independent state on 1 January 1993, by its Articles 3 and 112. The Charter was newly published under No. 2/1993 Sb.

religious faith”<sup>4</sup>. We can regard this provision as a defence against the danger of *enforced atheism* by the state, which was a harsh reality in the period of the totalitarian communist state (1948–1989).

Flat insistency on the principle that the state does not identify with any religion is not only the reception of provisions of international agreements binding in the Czech Republic, but also a reaction to a historically remote experience of the Catholic Church being above the law in the time, when Czech lands were a part of Austrian monarchy. The close relationship between “the throne and alter” was typical in the time prior to Cisleithan Constitution of 1867, and also later, in its weakened form, which lasted until the end of the monarchy in 1918<sup>5</sup>. It was excluded in independent democratic Czechoslovakia (1918–1948).

*The Charter includes freedom of religion in the catalogue of fundamental human rights and freedoms* (Articles 5–16). The enjoyment of these rights is guaranteed to all “without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status”<sup>6</sup>.

“When employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be used for purposes other than those for which they were enacted.”<sup>7</sup> Religious freedom is expressly protected by *Articles 15 and 16 of the Charter*. These articles read:

#### Article 15

(1) The freedom of thought, conscience, and religious conviction is guaranteed. Everyone has the right to change his or her religion or faith or to have no religious conviction.

(2) The freedom of scholarly research and of artistic creation is guaranteed.

(3) No one may be compelled to perform military service if such is contrary to his conscience or religious conviction. Detailed provisions shall be laid down in a law<sup>8</sup>.

<sup>4</sup> Charter, Art. 2, section 1.

<sup>5</sup> See Jiří Rajmund TRETERA, Zábaj HORÁK, *Religion and Law in the Czech Republic*, Wolters Kluwer, Alphen aan den Rijn, 2014, p. 37, paragraph 72.

<sup>6</sup> Charter, Art. 3, section 1.

<sup>7</sup> Charter, Art. 4, section 4.

<sup>8</sup> After 13 January 2005, when the Czech Army became fully professional, said provision lost somewhat its inherent importance under peace conditions. But it can be used in case of call of a citizen to serve in the armed forces during the timely limited military exercises under peace conditions, or to full service in case of threat to the country or time of war.

### Article 16

(1) Everyone has the right to freely manifest his or her religion or faith, either alone or in community with others, in private or public, through teaching, practice, or observance.

(2) Churches and religious societies govern their own affairs; in particular, they establish their own bodies and appoint their clergy, as well as found religious orders and other church institutions, independent of state authorities.

(3) The conditions under which religious education is provided at state schools shall be set by statutes.

(4) The exercise of these rights may be limited by law in the case of measures necessary in a democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others.

### International treaties, which bind the Czech Republic

“Promulgated international treaties, the ratification of which has been approved by the Parliament and which are binding in the Czech Republic, shall constitute a part of the legal order; should an international treaty make provisions contrary to a law, the treaty shall prevail.”<sup>9</sup> That implies that international treaties come *second in the hierarchy of rules of law* of the Czech Republic, directly after constitutional acts.

High on the list of international treaties which are binding in the Czech Republic are:

*The European Convention on Human Rights* (1950),

*The International Covenant on Civil and Political Rights* (1966), and

*The International Covenant on Economic, Social and Cultural Rights* (1966).

### Act on Employment No. 435/2004 Sb.

Section 4 of this Act secures that all types of employers shall ensure equal treatment of all natural persons exercising their right to employment. *Any form of discrimination of persons exercising their right to employment is prohibited.*

Section 12, subsection 2, of this Act reads:

“When selecting employees, an employer may not request information concerning their nationality, racial or ethnic origin, political convictions, trades union membership, religion, philosophical opinions, sexual orientation, unless this is in accordance with a special legal regulation,<sup>10</sup> nor any information that conflicts with good morals or personal details that are not related to fulfilling the obligations of an

<sup>9</sup> Constitutional Act No. 1/1993 Sb., Constitution of the Czech Republic, Art. 10.

<sup>10</sup> Act No. 198/2009 Sb., on Equal Treatment and on Legal Protective Measures Against Discrimination and on the Change to Certain Acts (Anti-discrimination Act).

employer as set forth in a special legal regulation. At the request of the job seeker, the employer shall be obliged to prove the necessity of acquiring the personal details that have been requested. The selection of employees must guarantee equal opportunities for all natural persons applying for a job. The provisions of Section 4 also apply here.”

### **Act No. 262/2006 sb., the Labour Code**

Under Czech labour law, employees enjoy numerous rights in connection with the commencement, course and termination of employment. The relationship between an employer and an employee is regulated by an employment contract, the essentials of which are prescribed by the rules of the labour law of the Czech Republic, contained primarily in a comprehensive code, which is the Labour Code. Disputes between an employer and an employee arising out of the employment established by a contract shall be resolved by a court upon a motion filed by one of the parties.

The Labour Code applies fully to only a part of the employees of religious communities, namely to those who work for those communities and their branches as parties to a contractually established employment of a non-pastoral nature.

The Labour Code regulates position of employees in its sections 16, 17 and 316, subsection 4, which read:

#### Section 16

(1) Employers shall ensure equal treatment for all employees as regards employee working conditions, remuneration for work and other emoluments in cash and in kind (of monetary value), vocational (professional) training and opportunities for career advancement (promotion).

(2) Any form of discrimination in labour relations is prohibited. The terms, such as direct discrimination, indirect discrimination, harassment, sexual harassment, persecution, an instruction to discriminate and/or incitement to discrimination, and the instances in which different treatment is permissible, are regulated in the Anti-Discrimination Act<sup>11</sup>.

(3) Different treatment arising from the nature of occupational activities where this different treatment is a substantial requirement necessary for work performance is not considered as discrimination; the purpose followed by this derogation must be legitimate and the requirement must be adequate. Measures which are justified and aimed at preventing, or levelling out, disadvantages arising from the fact that a certain individual belongs to a group in respect of which relevant reason is laid down in the Anti-Discrimination Act shall not be deemed as discrimination.

<sup>11</sup> Act No. 198/2009 Sb., the Anti-discrimination Act.

### Section 17

Remedial measures relating to protection against discrimination in labour relations are regulated in the Anti-Discrimination Act.

### Section 316, subsection 4

The employer may not require from an employee information that does not directly relate to performance of work and to basic labour relationship [...]. The employer may not require in particular the information on [...] (g) religion or confession [...].

### **Anti-discrimination Act No. 198/2009 Sb.**

The Anti-discrimination Act permits, under specific conditions, differential treatment in the case of employers who are religious communities. Its section 6, subsection 4, contains the following provision:

“A different treatment is applied in matters of the right to employment, access to employment or vocation in the case of paid employment performed in churches or religious societies, where, by reason of the nature of such work or the circumstances in which it is carried out, the religious belief, faith or worldview constitutes a genuine, justified and legitimate occupational qualification with respect to the ethos of the church or religious society.”

### ***Definition of religion***

The Czech law does not define social phenomenon of *religion* as such. The meaning of this word is probably considered to be generally clear and well known in our culture. On the other hand such a definition is rather uneasy and nobody feels the need of its creation for purposes of legal order.

We suppose that government or courts will use in case of doubt an *expertise opinion* of an independent expert. As we know, the expertise opinions are used during the registration procedure of religious communities performed by the Ministry of Culture. The expertise can be done by scientific institutions like departments for *religious studies* of universities<sup>12</sup>.

The Act on Churches and Religious Societies No. 3/2002 Sb. *defines* in its section 3 letter a) *religious communities*, but only for “its proper purpose”, i.e. for interpretation of its own text. It uses these words:

“A church or religious society is a voluntary association of individuals with its own structure, administrative organs, internal regulations, religious practices, and ex-

<sup>12</sup> Religious studies are special subject at the Czech universities, before all at faculties of philosophy. Many specialists do research and teach the subject as a discipline, which brings common teaching about all religions and differs from theology in this way. Study plans make difference between theology and religious studies.

pressions of faith, established for the observance of specific religious faith, whether in public or private, and, in particular, for the purpose of gathering together for worship, instruction, and spiritual service [...].”

We suppose that above mentioned characterization of religious communities can help in defining of religion in particular case.

### ***Protection of nonreligious beliefs***

Nonreligious beliefs are protected by this constitutional provision:

“[...] Everyone has the right to change his or her religion or faith or to have no religious conviction.”<sup>13</sup>

All beliefs, religious and nonreligious, can use freedom of expression, the right to assembly, the right to associate<sup>14</sup>. Some members of nonreligious beliefs found associations (legal persons), e.g. associations of *atheists* or associations of *agnostics*.

After 1990 were renewed organization “Libre Pensée” and Free Masonry organizations, some organizations of this movement were newly founded. They are recognized as associations.

Nonreligious beliefs are protected in the same way as religions by provisions of Penal Code – Act No. 40/2009 Sb., or by Misdemeanours Act No. 200/1990 Sb.

### ***Protection of manifestations of religious beliefs***

Manifestations of religious beliefs, which are protected, are individual and collective teaching, practice, and observance of religion. It is guaranteed by the Charter of Fundamental Rights and Freedoms, art. 16, section 1, which reads:

“Everyone has the right to freely manifest his or her religion or faith, either alone or in community with others, in private or public, through teaching, practice, or observance.”

### ***The reason of protection of religion at work***

The reason of protection of religion at work is before all religious freedom, but also equality. All individuals have the same rights to believe some religion or not to believe any religion, and to manifest it, or not manifest it.

The equal status of all religions (registered or nonregistered) and of nonbelievers (without distinction of different groups of nonbelievers) is the main postulate of the free and equal democratic society in the Czech Republic.

<sup>13</sup> Charter, Art. 15, section 1.

<sup>14</sup> Charter, Art. 17, 19 and 20.

## *The jurisprudence of the European Court of Human Rights and its effect on the Czech national approach*

The jurisprudence of the European Court of Human Rights has effect on judicial decisions of Czech courts, before all of the Supreme Court and the Constitutional Court. Authors of legal literature in the field of labour law and antidiscrimination law often quote jurisprudence of the European Court of Human Rights, too.

## **II. RELIGIOUS MINISTERS AND LABOUR LAW. THE DEFINITION OF RELIGIOUS MINISTER ACCORDING TO THE CZECH LAW**

### **Religious ministers as workers of religious communities**

Act No. 3/2002 Sb., on churches and religious societies, uses the term religious ministers, but does not define them. According to this Act the registered religious communities themselves, and religious communities asking for a registration, determine, who is a religious minister of each of them. There are 38 religious communities registered up to date (to 3 July 2015). Most of them define in the basic document presented to the registering body, i.e. to Ministry of Culture, who is their religious minister. Some of them have no religious ministers.

Basic document is a statement of the most fundamental provisions of the legal order of the respective religious community. A state body is not, as a matter of fact, authorized to interfere with the basic document howsoever, i.e., approve it, reject it, or demand that it be changed. The purpose of the basic document is merely to make the legal system of a religious community and the principles of its organization available to state bodies and to the general public, i.e., to third persons who come into contact with the religious community. Religious community is entitled to alter and amend this document on its own initiative at any time after the registration.

### **Other pastoral workers of religious communities**

Many religious communities employ for pastoral reasons in addition to religious ministers other pastoral workers of both genders, such as pastoral assistants, who are “lay” from the point of view of respective religious community. Basic documents can describe also office of such workers entrusted with pastoral activities. Then they have same position as religious ministers.

### **Non-pastoral employees of religious communities**

To describe status of religious ministers and other pastoral employees of religious communities in the Czech Republic precisely, we have to say some words about non-pastoral employees of religious communities.

Non-pastoral employees of religious communities and their branches are vergers, sacristans, sextons, gravamen, accountants, gardeners, archivists, secretaries, librarians, lawyers, construction supervisors, repairmen, charity and hospital workers, economists, professional drivers, cleaners, carers and other social workers who provide care services at institutions or at home, and workers in other professions.

Nowadays, when the Act No. 428/2012 Sb., on Property Settlement with Churches and Religious Societies, came into force, there are new employment positions in institutions of religious communities: administrators and workers of forest and agricultural property.

There arises, runs and terminates an employment relationship, established by an employment agreement in compliance with the Labour Code, between these employees and individual branches of religious communities, which are legal persons, or as the case may be with the whole religious community, in particular in the case of less numerous religious communities. Courts competent to settle disputes are Czech courts. Not a single case has so far attracted either the attention of the mass media or of professional literature. It is possible that no such case has yet arisen, or that such a case has not attracted significant attention.

### ***The labour status of religious ministers when working for their respective denominations***

The status of persons who have been taken on by religious communities in accordance with their own internal regulations as their ministers or lay pastoral workers is deemed to be a service relationship, not to be an employment relationship. It is regulated by the internal rules of the religious community based on a constitutional principle of the autonomy of religious communities.

### ***The labour status of religious ministers when working in other institutions***

Labour status of religious ministers and other pastoral workers of both gender, when working in public institutions, e.g. military chaplains, prison chaplains, chaplains of posttraumatic cure of the Czech police, chaplains of fire rescue services, hospital chaplains, social facilities' chaplains and school chaplains, are employed according to the secular provisions of the Czech Republic. They are thus appointed and dismissed on recommendation by their religious community.

Legal status of teachers of religion in schools is the same. Number of pastoral workers, before all women, is high among this group.

### ***Ministers of all denominations subject to the same labour law status***

There no special provisions for employment of different denominations. All have their status derived from the internal provisions of their religious community.

Chaplains in public facilities and schools, and teachers of religion in schools, have the same position according to the secular rules.

### *Case-law developed regarding the work of ministers of religion*

The service relationship of ministers and other pastoral workers within a religious community has been dealt with in more detail by the Constitutional Court, which has adjudicated on said issue several times after the adjudication of general courts of four tiers of Czech judicial system (district court, regional court, high court, Supreme Court).

The first one is a decision of the *Constitutional Court* of 26 March 1997, file no. I ÚS 211/96<sup>15</sup>. It rejected the jurisdiction of secular courts in disputes concerning the termination of a service relationship involving members of the clergy and other pastoral employees of religious communities. The process had been initiated by two former ministers of the Czechoslovak Hussite Church – the married couple *Z. Duda and E. Dudová* – who were unsatisfied with always the same judgments of Czech general courts. According to the opinion of the Constitutional Court, the persons carrying out pastoral service act on behalf of religious communities, and shall follow their internal rules. Only religious communities can judge the abilities of these persons for pastoral service, and decide on their appointment or dismissal. As a result, state courts do not decide on the appointment of pastoral workers by religious communities, because in such a case they would unduly interfere with the religious communities' internal autonomy and their right to independent decision-making. As for salaries, or rather other civil claims of ministers, state courts are competent, according to Article 7 of the Code of Civil Procedure,<sup>16</sup> to decide on issues of labour law, where the private character of a religious community comes to the fore as a legal entity. In these civil cases, a judicial proceeding does not interfere with the internal autonomy of religious communities and their decision-making power.

On 30 January 2001, the *European Court of Human Rights* decided in the case of *Duda & Dudová v. the Czech Republic*, and upheld the argumentation of the Czech Constitutional Court<sup>17</sup>.

On 31 August 2000 the *Constitutional Court* ruled in an analogous case (file no. III. ÚS 136/2000) brought by a former minister of the *Unity of Brethren (Moravian Brethren)*, with the same result<sup>18</sup>.

<sup>15</sup> See Jiří Rajmund TRETERA, Záboj HORÁK, *Religion and Law in the Czech Republic*, Wolters Kluwer, Alphen aan den Rijn, 2014, p. 82, paragraphs 197–200.

<sup>16</sup> Act No. 99/1963 Sb.

<sup>17</sup> *Duda and Dudová v. the Czech Republic (Dec.)*, No. 40224/98, 30 Jan. 2001, ECHR.

<sup>18</sup> See Jiří Rajmund TRETERA, Záboj HORÁK, *The Application of the Freedom of Religion Principles of the European Convention on Human Rights in the Czech Republic*, in Achilles EMILIANIDES (ed.), *Religious Freedom in the European Union*, Peeters, Leuven, 2011, p. 101–102.

### III. AUTONOMY OF RELIGIOUS COMMUNITIES AND HUMAN RIGHTS OF THE WORKERS. AUTONOMY OF RELIGIOUS COMMUNITIES IN THE CZECH REPUBLIC

No sooner than after the restoration of the democratic legal order in Czechoslovakia in 1989 was the term autonomy, designating a feature pertaining to religious communities, used for the first time in the history of the Czech lands. This autonomy means the right of religious communities to make their own regulations, independent of the state and its bodies. It is in the Charter, namely in Article 16, section 2, which says that churches and religious societies “govern their own affairs; in particular, they establish their own bodies and appoint their own clergy, as well as found religious orders and other church institutions, independent of state authorities”. Act No. 3/2002 Sb., in section 4, subsection 3 expands on the said constitutional act:

“Churches and religious societies govern their own affairs; in particular they establish and dissolve their own bodies, appoint and dismiss their own clergy, and set up and dissolve church and other institutions in compliance with their own regulations, independent of state authorities.”

Said Act makes reference to the regulations of religious communities in many other places, and the wording of the law implies that religious communities are regarded as organizations regulated by their own independent legal systems, i.e., autonomous systems.

The principle of the autonomy of religious communities and their legal systems benefits all religious communities, regardless of whether or not they are registered by the state. The principle of autonomy is not inconsistent with the registration condition which requires that the religious community present, inter alia, a so-called basic document.

The autonomy of religious communities recognized in the Czech Republic is considered a manifestation of the collective dimension of religious freedom, both in practise and in the theory.

#### ***Religious communities and their exemption from the general norms concerning anti-discrimination***

The Anti-Discrimination Act No. 198/2009 Sb. permits, under specific conditions, differential treatment in the case of employers who are religious communities. Its section 6, subsection 4 contains the following provision:

“A different treatment is applied in matters of the right to employment, access to employment or vocation in the case of paid employment performed in churches or religious societies, where, by reason of the nature of such work or the circumstances in which it is carried out, the religious belief, faith or worldview constitutes a genuine, justified and legitimate occupational qualification with respect to the ethos of the church or religious society.”

The Anti-Discrimination Act regulates other permissible forms of treatment in its section 7, subsection 1, too. It reads:

“Difference of treatment on grounds of sex, sexual orientation, age, disability, religion, belief or opinions in the matters specified in section 1, subsection 1, lit. f) to j), shall not constitute discrimination, if the difference of treatment is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary [...]” The matters specified in section 1, subsection 1, lit. f) to j) are social security; the granting and provision of social advantages; access to and provision of healthcare; access to and provision of education; access to goods and services, including housing, to the extent as they are offered to the public, or in their supply.

“The exercise of rights arising from freedom of religion is undoubtedly a legitimate aim within the meaning of section 7, subsection 1 of the Anti-Discrimination Act; it can be said that this provision complements section 6 subsection 4 of the Anti-Discrimination Act, which exempts religious communities confined to labour relations and the like. Exemption under section 7 subsection 1 of the Anti-Discrimination Act is not also limited to a certain type of entities. Religious communities and their support subjects are likely to apply exceptions in the areas of access to and provision of education and access to goods and services. It is e.g. permissible to operate schools or school facilities (e.g. School boarding etc.) and other educational institutions such as seminaries, that accept only persons of a particular sex, sexual orientation or religion”<sup>19</sup>.

### ***Effects of European Union law***

The main effect of European Union law on Czech anti-discrimination law was usage of both EU Directives 2000/43/EC and 2000/78/EC by preparing of domestic acts (e.g. Act on Employment, and Anti-Discrimination Act).

No case law has developed in the area of religious discrimination in the Czech Republic yet.

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<sup>19</sup> Jakub Kříž, *Zákon o církvích a náboženských společnostech. Komentář [Act on Churches and Religious Societies. Commentary]*, C. H. Beck, Praha, 2011, p. 36–37.



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# LAW AND RELIGION AT THE WORK PLACE: CASE OF ESTONIA

MERILIN KIVIORG

## INTRODUCTION

One could say that the interplay between law and religion at the work place in Estonia is uncharted territory. Many social and political factors have contributed to this. For example, Estonia is not yet a country of extensive immigration<sup>1</sup>. There is a policy of strict rules for immigration and for acquiring citizenship. There are no reports, for example, about secular employers confronting employees' wishes to wear certain religious garbs, to have their work schedule corrected to meet their religious needs or for accommodation of conscientious objection to provide certain services. If these issues have occurred they must have been amicably resolved, without any public attention, regardless of which religion was involved. There was some public debate on days of rest. At the moment, Orthodox holy days are not on the list of national holidays<sup>2</sup>. Some steps have been taken, for example, some schools have recognised orthodox holy days (such as Christmas and Easter) in their school calendar. One needs to note that wearing of small Christian symbols, such as crosses at work seems to be an accepted practice, even in civil service.

Autonomy of religious communities in employment matters has been respected and has not yet become a major issue. The latter is reflected also in the fact that there is no case law on the matter. Human rights debates about the extent of autonomy of

<sup>1</sup> With the exception of the extensive in-migration administered by the Government of the Soviet Union after the Second World War, which left Estonia with a considerably large Russian-speaking minority. This minority predominantly belongs to the Orthodox Church of Moscow Patriarchate and does not present major religious-cultural challenges as such at the work place.

<sup>2</sup> The largest religious tradition in Estonia currently is the Orthodox Church, with 16% of the population considering themselves as Orthodox (12.8% in 2000). Since the census in 2000 the Orthodox community has grown in numbers and has become bigger than the historically dominant Lutheran Church. Population and Housing Census 2011, <<http://www.stat.ee/phc2011>>, 1 Aug. 2013.

religious communities especially regarding gender equality (broadly defined) have just recently started to emerge in Estonia. Perhaps as a result of soviet legacy there has been a certain amount of scepticism in Estonian society towards talks and demands about gender equality and women's rights generally. This was also reflected in the debates over adoption of both the Equal Treatment Act (*Võrdse kohtlemise seadus*)<sup>3</sup> and Gender Equality Act (*Soolise võrdõiguslikkuse seadus*)<sup>4</sup>, which originally were meant to be one legal document, but were separated to make them more palatable for the parliament to pass and for society to accept. Developments in anti-discrimination law and debate in Europe (and beyond) have brought the debate to Estonia. The recent disagreement over adoption of the Co-habitation law (*Kooseluseadus*)<sup>5</sup>, which also concerns homosexual unions, revealed tensions and hostility in Estonian society<sup>6</sup>. In this quarrel, all parties to the debate were rather unwilling to compromise. The cohabitation law does not concern autonomy of religious organisations *per se*. However, it instigated some debate over the extent of that autonomy.

It needs to be noted that international and transnational developments in anti-discrimination law have become increasingly challenging for religious communities. Due to the increase of diversity and legal conflicts that have occurred in other European states the debate over law and religion, including at the work place has gained momentum. Currently, vehemently debated immigration issues in Estonia as a result of pressure from Europe to accept more refugees and immigrants have also fuelled the discussion.

However, the effects of the interplay between anti-discrimination legislation and collective freedom of religion or belief at the work place in Estonia remain to be seen. As noted, there is currently no case law related to this matter. To date, there is only one incident involving alleged discrimination based on sexual orientation in the Evangelical Lutheran Church which was brought to the attention of the Gender Equality and Equal Treatment Commissioner. The incident is going to be discussed below.

## I. RELIGIOUS FREEDOM AT WORK

The key instruments regulating the sphere of religious freedom at work are, first of all, the Estonian Constitution, international treaties and EU law provisions

<sup>3</sup> RT I 2008, 56, 315.

<sup>4</sup> RT I 2004, 27, 181.

<sup>5</sup> RT I, 16.10.2014, 1. The law will enter into force on 1 January 2016.

<sup>6</sup> At the time of the adoption of the law some strongly argued that the parliament went against the majority opinion of the country. The parliament itself adopted the law with only a small majority (40 to 38). Already some earlier statistics painted a rather worrying picture of Estonia not being a very tolerant country in regards to different types of minorities. For example, the 2011 OECD survey indicated that Estonia is one of the least tolerant regarding minorities. OECD (2011), «Tolerance», in *Society at a Glance 2011: OECD Social Indicators*, OECD Publishing, accessed June 1, 2015, [http://dx.doi.org/10.1787/soc\\_glance-2011-30-en](http://dx.doi.org/10.1787/soc_glance-2011-30-en).

on religious freedom and the prohibition of discrimination. The current legal and political framework of religion in Estonia was designed by the Constitution adopted by the referendum of 28 June 1992<sup>7</sup>. The Estonian Constitution encompasses several important principles determining freedom of religion and the relationship between the State and religious communities. These principles are neutrality, equality and self-determination/autonomy. This Constitution meets entirely the standards of freedom characteristic of Western democracies, European and international law and was a clear indication of how Estonia wanted to identify itself after years of Soviet occupation. Various national, international and supranational sources of law determine the normative framework for religious freedom in Estonia.

Of applicable international/regional human rights instruments, the European Convention on Human Rights is the most influential; along with the Charter of Fundamental Rights of the European Union. Both instruments are legally binding in Estonia. Individual and collective religious freedom are also protected by Article 40 of the Estonian Constitution and the 2002 Churches and Congregations Act (*Kirikute ja koguduste seadus*, hereinafter CCA) sets further guarantees for this freedom<sup>8</sup>.

The second paragraph of Article 12 of the Constitution sets forth the principle of non-discrimination, prohibiting discrimination *inter alia* on the basis of religion or belief. There are two further pieces of anti-discrimination legislation in Estonia: the Equal Treatment Act and the Gender Equality Act. The Equal Treatment Act came into force on 1 January 2009<sup>9</sup>. These acts are the result of anti-discrimination legislation at the EU level and the application of both of these acts extends to relationships between private parties. The Gender Equality Act does not apply to the professing and practising of faith or working as a minister of a religion in a registered religious association (§2(2))<sup>10</sup>. The Equal Treatment Act allows exemptions for religious communities. Both legal acts will be discussed in more detail below. Several other legal acts specifically regulate employment matters and are important to determining the place of religion at work. The Employment Contracts Act was adopted on 17 December 2008 and it came into force on 1 July 2009<sup>11</sup>. Granting special privileges or restricting the rights of a person on religious grounds is forbidden in §152 of the Penal Code<sup>12</sup>. In addition, Article 41(2) of the Estonian Constitution specifically stipulates that 'beliefs shall not constitute an excuse for a legal offence'. However, no person can be held legally liable just because of his or her beliefs.

<sup>7</sup> RT I 1992, 26, 349.

<sup>8</sup> RT I 2002, 24, 135.

<sup>9</sup> RT I 2008, 56, 315.

<sup>10</sup> RT I 2004, 27, 181.

<sup>11</sup> RT I 2009, 5, 35.

<sup>12</sup> RT I 2001, 61, 364.

The law protects both religious and non-religious beliefs, while granting some extra privileges or exemptions to religious communities and individuals. Religion as such is not defined by law or in Estonian court practice. However, the law provides detailed definitions of religious associations. Specifically, the Churches and Congregations Act addresses five different types of religious organizations: (1) churches; (2) congregations; (3) associations of congregations; (4) monasteries; and (5) religious societies. Quite uniquely in Europe, the 2002 CCA gives legal definitions of all five categories of religious organizations. The 2002 CCA regulates the activities of only the first four. The first four are called ‘religious associations’. The activities of the last category, religious societies, are not regulated by the CCA (as special law), but by the Non-profit Organisations Act (*as lex generalis*).

The peculiar fact is that the purpose of the legal definitions of the 1993 Churches and Congregation Act<sup>13</sup> was explained as “educational.” It has been argued that as Estonia had been a so-called atheist country for fifty years, people had forgotten the basic terms and it was necessary to educate them with the help of the law. The same explanation was put forward for including the same definitions in the 2002 Churches and Congregations Act. The Ministry of Internal Affairs has stated that this is a transitional law and it can be changed in the future when the legal definitions used have found acceptance in society<sup>14</sup>. The Ministry of Internal Affairs has also provided an additional, more adequate explanation for legal definitions. The purpose of legal definitions is also to distinguish religious organizations from other legal persons<sup>15</sup>. This latter interpretation may have significance in employment situations regarding the scope of exemptions from anti-discrimination laws.

The laws do not provide much detail regarding which manifestations of religious beliefs are protected in the employment environment. Like the international instruments, the Constitution and the CCA protect both the right to have/choose and the right to manifest ones religion or belief both alone and in a community with others, in public or in private, unless this is detrimental to public order, health or morals<sup>16</sup>. The Constitution also provides for conscientious objection. Article 124 (2) of the Constitution stipulates that those who refuse service in the defence forces for religious or ethical reasons are obliged to participate in alternative service. Thus, conscientious objection is explicitly protected in the military environment.

<sup>13</sup> RT I 1993, 30, 510.

<sup>14</sup> Official Correspondence between the Ministry of Internal Affairs and the Chancellor of Justice, Letter of the Ministry of Internal Affairs to the Chancellor of Justice, 04 Jul. 2002 No. 10.3-3-4-/6715.

<sup>15</sup> *Ibid.*

<sup>16</sup> For a comprehensive overview of law and religion in Estonia see Merilin Kiviorg, *Law and Religion in Estonia*.

Estonian laws do not specifically talk about the wearing of religious garb. However, the CCA provides protection of the attire of the ministers and restricts the use of this attire by others. Only a person to whom a religious association has granted the corresponding permission has the right to wear the professional attire of a minister of religion prescribed in the statutes of the religious association (§21)<sup>17</sup>.

As there is no court practice it is hard to tell what is the rationale ('equality' or 'religious freedom' or both) of the approach that is going to be taken in cases involving secular work environment or working for religious organisations. The law seems to suggest that the approach is both the equality and religious freedom approaches. The approach taken may also depend on circumstances, such as, e.g., type of employer (religious or secular). One could add, that there has been lots of pragmatism applied to solving religious issues in Estonia. Hopefully this pragmatism will translate into finding suitable compromises and ultimately allows for the accommodation of religious needs.

The European Convention on Human Rights became legally binding for Estonia on 16 April 1996. The ECHR is part of the Estonian legal system and is directly applicable<sup>18</sup>. There are no religious freedom cases yet where a reference has been made to the practice of the European Court of Human Rights (hereinafter ECtHR). One could predict that although the jurisprudence of the ECtHR regarding religious freedom at work has not been consistent itself<sup>19</sup>, it is likely to be used if cases come before Estonian courts. There is an increasing amount of case law in the ECtHR, which essentially concerns conflicts between individual rights and autonomy of religious communities especially in employment matters. How this type of case law evolves and interacts with Estonian domestic solutions is a matter for future study and analysis.

## II. RELIGIOUS MINISTERS AND LABOUR LAW

Religious organisations enjoy a fair amount of autonomy to define who their ministers are. Secular law does not give a definition of a minister of a religious organisation as such. However, it does set certain restrictions on who can work as a minister. These restrictions are related to the aforementioned quite strict immigration rules and policies in Estonia. The restrictions that first appeared in the law in 1993

<sup>17</sup> RT I 2002, 24, 135.

<sup>18</sup> Estonia became a member of the Council of Europe on 14 May 1993. The same day Estonia signed the European Convention for Fundamental Rights and Freedoms (ECHR). The Estonian Parliament ratified the ECHR on 13 March 1996.<sup>2</sup> The letters of ratification were deposited on 16 April 1996. The Convention became legally binding for Estonia from that date.

<sup>19</sup> M. Kiviorg, 'Collective Religious Autonomy versus Individual Rights: A Challenge for the ECtHR?' *Review of Central and East European Law*, Volume 39, Issue 3-4, pp. 315-341.

can be argued to reflect the State's desire at the beginning of the nineties to have some control over emerging new religious movements of foreign origin. One should also note that at the time the conflict between the two Orthodox Churches in Estonia (the Russian and the Estonian Orthodox Church, one belonging to Moscow Patriarchate and the other to Constantinople) was also in full swing. This historic conflict, which simmers to this day, may have played a role as well in setting certain restrictions in the law to the position of a minister.

The law requires that a minister of a religious association be a person who has the right to vote in local government elections (CCA, § 20 (1)). According to the Local Government Council Election Act (*Kohaliku omavalitsuse volikogu valimise seadus*), an Estonian citizen or citizen of the EU has the right to vote if he or she has attained 18 years of age by Election Day, and resides permanently in the territory of the local government (§5(1))<sup>20</sup>. An alien (non-EU citizen) has the right to vote if he or she has attained 18 years of age by Election Day, resides permanently in the territory of the local government and resides in Estonia on the basis of a permanent residence permit.

A further law which can be said to provide a definition of a minister of religion is the Gender Equality Act<sup>21</sup>. The significance of this act is that it says that it does not apply to the professing and practising of faith or working as a minister of a religion in a registered religious association (§2(2)). Thus, it allows religious communities themselves to determine whether the minister be a man or a woman.

Labour relations were re-organized at the beginning of the 1990s after the regaining of independence. The first Employment Contracts Act (*Töölepingu seadus*) was adopted on 15 April 1992<sup>22</sup>. According to §7 of that act, labour law did not apply to persons who conducted religious activities in religious organizations, unless it was so prescribed in the by-laws of these religious organizations. The latter would have been the case when the by-laws prescribed entering into an employment contract with these persons. Different religious organizations have had different approaches in this area. For example, in the EELC ministers did not/do not have labour contracts. Their stipends are generally determined by the board of each congregation. Thus the protocols of the board meetings are the main grounds for paying social tax and income tax. The purpose of the law was to give more autonomy to religious organizations in employment decisions.

As to the general application of labour law, the 1992 Employment Contracts Act prohibited discrimination on the grounds of religion or belief and/or on the ground of membership in a religious association (§10(3)). This applied to ordinary employers other than religious communities and was targeted to protect individual freedom of

<sup>20</sup> RT I 2002, 36, 220.

<sup>21</sup> RT I 2008, 56, 315.

<sup>22</sup> RT I 1992, 15, 24.

religion or belief in employment relations. The Act prohibited both direct and indirect discrimination (§10<sup>23</sup>). From 1 May 2004 an amended Employment Contracts Act also specified that allowing a suitable working and rest time regime which satisfies the religious requirements of an employee was not deemed to be discrimination (§10<sup>1</sup>(5))<sup>24</sup>. These provisions were the result of Estonia joining the EU and implementation of the EU Employment Directives<sup>25</sup>.

A new Employment Contracts Act was adopted on 17 December 2008 and it came into force on 1 July 2009<sup>26</sup>. The new law replaced the previous Act and introduced significant changes in employment law. The act aims to make working relations more flexible by giving more room for negotiations and agreements between employers and employees. This new law was seen as necessary in order to stimulate the Estonian economy (the 1992 law was considered to be outdated and too rigid/formalistic for economic development). It was also necessary for the harmonization of employment law with other private law acts, most importantly with the Law of Obligations Act (*Võlaõigusseadus*)<sup>27</sup>.

As there have been no court cases regarding the application of labour law within religious communities it is still not clear how exactly the law may affect religious communities. However, a few remarks can be made on the basis of the Parliamentary debates and Explanatory Notes accompanying the law. The Explanatory Note from 10 December 2008 states that it was considered unnecessary to include in the new law the list of occupations to which the Employment Contracts Act does not apply<sup>28</sup>. Thus the explicit provision that labour law does not apply to persons who conduct religious activities in religious organizations has been dropped. It is further noted that it is important to determine the actual nature of the contract. For example, the law specifies that the provisions concerning employment contracts do not apply to contracts where the person obligated to perform the work is to a significant extent independent in choosing the manner, time and place of performance of the work (§1(4)). The Explanatory Note states that if a minister of a religious community has said degree of independence then the law does not apply.

The Ministry of Social Affairs has subsequently explained that, as a rule, work is normally done on the basis of an employment contract, but it can also be based on an authorization agreement, a contract for services or other similar agreements (as

<sup>23</sup> RT I 2004, 37, 256.

<sup>24</sup> *Ibid.*

<sup>25</sup> Council Directive (EC) 2000/78 on Employment Equality [2000] OJ L 195/16; Council Directive (EC) 2000/43/ on Racial Equality [2000] OJ L 180/22.

<sup>26</sup> RT I 2009, 5, 35.

<sup>27</sup> RT I 2002, 53, 336.

<sup>28</sup> 299 SE II, Töölepingu seaduse eelnõu seletuskiri eelnõu teise lugemise juurde, 10 Dec. 2008, Riigikogu, <[www.riigikogu.ee](http://www.riigikogu.ee)>, 1 May 2010.

specified, e.g., in the Law of Obligations Act). Compared to other contracts, an employment contract guarantees the employee greater rights and better protection, which is why from the perspective of an employee it is recommended that an employment contract be stipulated wherever possible. Moreover, in the event of a dispute as to whether the agreement in question constitutes an employment contract, it is always assumed that the parties have entered into an employment contract<sup>29</sup>.

Thus, it seems that it is still possible for religious communities to arrange their employment or service relations according to their own needs. However, in the case of a conflict it is always assumed that an employment contract has been concluded between a minister or another person and the religious community. Although the new labour law has been in force for about seven years now, its actual application and possible problems which may arise concerning religious communities are still matter of speculation. To date there is no case law regarding employment relations between religious communities and their ministers or other employees. There are many aspects of the new regulation which await clarification.

Army, prison and police chaplains are civil servants and are paid in full by the State budget. The prison chaplaincy is coordinated by the Ministry of Justice and the army chaplaincy by the Ministry of Defence. There is no chaplaincy system established in hospitals. In 2007, a chaplaincy service was established in the Estonian police force. Only people from the member churches of the Estonian Council of Churches are entitled to serve as chaplains. The institution of the chaplaincy is meant to be inter-denominational and ecumenical. Members of other religious organizations (including non-Christian) do have access to these institutions upon the request of individual believers. These visits are privately funded. The chaplaincy service is not regulated by law and needs future development. It is mainly based on the cooperation agreement between the Estonian Council of Churches and the State (17 October 2002 Protocol of Common Concerns).

The teachers of religious studies are paid from the state or municipal budget. The teachers of religious studies are required to have both theological and pedagogical preparation (although there are some exceptions). Religious education in public schools is a semi-voluntary, non-confessional (non-denominational) subject for students. It is intended to be a mix of teaching about religions and ethics. This type of religious education reflects Estonian constitutional principles of neutrality, non-discrimination and freedom of religion and belief. Teachers do not have to have approval from their respective religious communities and some may not belong to any community at all. Confessional religious education is provided for children by Sunday schools and private schools. Religious organisations can establish private educational institutions. Private educational institutions enjoy a greater amount of

<sup>29</sup> Sotsiaalministeerium, <[www.sm.ee](http://www.sm.ee)>, 1 May 2010.

autonomy regarding their syllabus, admission policies and selection of workforce according to their ethos than do public schools.

The ministers of all denominations may potentially be subject to the same labour law status. However, the State does not directly proscribe it. As noted above, the status of ministers under labour law depends on the nature of the legal relationship/contract concluded within each religious community. Religious communities enjoy some autonomy in this regard. As described above, according to the 2009 Employments Contract Act the labour law may apply to religious ministers<sup>30</sup>. This depends on the contract concluded between the religious organization and the specific minister. The Estonian Gender Equality Act and Equal Treatment Act provide an exemption from anti-discrimination regulation as regards relationships between the religious minister and his or her community, discussed below.

Religious communities themselves pay the salaries of priests and other people working for them.

Although there have been no court cases yet in relation to employment disputes there was an incident involving application of the Equal Treatment Act within religious communities. In 2010 the Estonian Evangelical Lutheran Church (hereinafter EELC) decided to exclude from the ranks of its priesthood a minister who had openly expressed his views in support of gays and had become a founder and a board member of the Association for Gay Christians<sup>31</sup>. The incident fuelled some internal discussions in the church, but also attracted public attention. The minister turned to the Gender Equality and Equal Treatment Commissioner to investigate the matter. The post of Gender Equality and Equal Treatment Commissioner had been established to monitor compliance with the requirements of the Gender Equality Act and the Equal Treatment Act. Some church members were furious about the enquiries and demanded the resignation of the Commissioner for violating church autonomy. In its official response the consistory of the EELC explained that the minister's sexual orientation as such was not the ground for the dismissal but the fact that he broke his oath by not following and obeying internal regulations of the church (including its 2009 declaration on homosexuality)<sup>32</sup>. No further legal action was taken by the church, the minister or the Commissioner. The decision of the EELC to dismiss the minister remained in force.

### III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

The general right to self-determination of persons (both individuals and groups) stems from Article 19 of the Estonian Constitution. Article 19(1) of the Constitution

<sup>30</sup> RT I 2009, 5, 35.

<sup>31</sup> «EELK praost nõuab võrdõiguslikkuse voliniku ametist lahkumist», *Delfi*, 07 November 2011.

<sup>32</sup> «EELK selgitas soovolinikule, miks tagandati üks vaimulik ametist», *Meie Kirik*, 11 October 2011.

states that: ‘all persons shall have the right to free self-realization’. The right to religious (church) autonomy is also considered to be an essential part of collective freedom of religion which is protected by Article 40 of the Constitution and by the Articles 48, 19(1) and 9(2). This was expressly stated in the Presidential veto to the first version of the 2002 Churches and Congregations Act in 2001<sup>33</sup>. Autonomy of religious associations also means the right to self-administration in accordance with religious law and prescriptions<sup>34</sup>.

Religious communities are allowed certain exemptions from the Equal Treatment Act (*Võrdse kohtlemise seadus*)<sup>35</sup>. In the case of occupational activities within religious associations and other public or private organizations, the ethos of which is based on religion or belief, a difference in treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitutes a genuine, legitimate and justified occupational requirement, because it is directly related to the organization’s ethos (§10(2)). The law also does not prejudice the right of these organizations to require individuals working for them to act in good faith and with loyalty to the organization’s ethos (§10(3))<sup>36</sup>.

The Explanatory Note states that these exceptions are based on EU anti-discrimination directives. Namely the Council Directive (EC) 2000/78 on Employment Equality and the Council Directive (EC) 2000/43/ on Racial Equality<sup>37</sup>. It also refers to Declaration No. 11 on the status of churches and non-confessional organisations, which was added to the Amsterdam Treaty.

However, at the second reading of the Equal Treatment Act in the Parliament, the head of the Constitutional Law Commission pointed out that the exemptions in law primarily relate to specific occupational requirements, noting that occupations such as church cleaner and secretary are not directly connected to the manifestation of religion or belief<sup>38</sup>. It thus appears that the Equal Treatment Act may not be applicable when the occupational requirements are not directly related to the manifestation of religion or belief.

The Gender Equality Act (*Soolise võrdõiguslikkuse seadus*) does not apply to the professing and practising of faith or working as a minister of a religion in a registered religious association (§2(2)).<sup>1</sup> However, commentaries to the Gender Equality Act

<sup>33</sup> RTL 2001, 82, 1120.

<sup>34</sup> *Ibid.*

<sup>35</sup> RT I 2008, 56, 315.

<sup>36</sup> *Ibid.*

<sup>37</sup> Council Directive (EC) 2000/78 on Employment Equality [2000] OJ L 195/16; Council Directive (EC) 2000/43/ on Racial Equality [2000] OJ L 180/22.

<sup>38</sup> XI Riigikogu stenogramm, IV Istungjätk, 21. oktoober 2008, Võrdse kohtlemise seaduse eelnõu 262 SE teine lugemine, <www.riigikogu.ee>, 1 May 2010.

(commissioned by the Ministry of Social Affairs) state that it would be reasonable, in the future, to extend the application of the law to religious organisations<sup>39</sup>.

International and transnational developments in anti-discrimination law have become increasingly (and potentially) challenging for religious communities. However, the effects of the interplay between anti-discrimination legislation and collective freedom of religion or belief in Estonia remain to be seen. Currently there is no case law in relation to this matter, nor is there any case law regarding the exemptions discussed above. In short, the scope or the future application of current anti-discrimination laws in relation to religions and religious communities is not entirely clear in Estonia.

## CONCLUSION

As there is yet no case law regarding religion at the work place it remains to be seen which kind of approach will be taken by Estonian courts when these matters come before them. As religion at the work place is a developing area throughout Europe, the interplay between domestic, international and EU law and practice in Estonia is a matter of future investigation.

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<sup>39</sup> K. ALBI *et al.*, *Soolise võrdõiguslikkuse seadus, Kommenteeritud väljaanne* (Tallinn, 2010), 23.



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# LAW AND RELIGION IN THE WORKPLACE (FINLAND)

MATTI KOTIRANTA

## I. RELIGIOUS FREEDOM AT WORK

In Finland, (a) the following national laws protect religious freedom and employee rights in the workplace:

**I. Section 11 of the Finnish Constitution** defines religious freedom as a basic right.

*Everyone has freedom of religion and conscience, implying the right to profess and practice a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community.*

*No one shall be under any obligation to participate in the practise of a religion against his or her conscience.*

**II. Chapter 3, section 8 of the Non-Discrimination Act (1325/2014)** comprises the prohibition of discrimination. The statute also implicitly covers employee salaries and the acknowledgement of their religious conviction in the workplace:

*Nobody may be discriminated against on the basis of their age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, state of health, disability, sexual orientation or other personal characteristics. Discrimination is prohibited, regardless of whether it is based on a fact or assumption concerning the person him/herself or another.*

*In addition to direct and indirect discrimination, harassment, denial of reasonable adjustments as well as an instruction or order to discriminate constitute discrimination as referred to in this Act. (1325/2014).*

*Discrimination means:*

*1) the treatment of a person less favourably than the way another person is treated, has been treated or would be treated in a comparable situation (direct discrimination);*

2) *that an apparently neutral provision, criterion or practice puts a person at a particular disadvantage compared with other persons, unless said provision, criterion or practice has an acceptable aim and the means used are appropriate and necessary for achieving this aim (indirect discrimination);*

3) *the deliberate or de facto infringement of the dignity and integrity of a person or group of people by the creation of a intimidating, hostile, degrading, humiliating or offensive environment (harassment); and*

4) *an instruction or order to discriminate.*

**III.** Section 6 of the Constitution, which also considers non-discrimination, was used as the basis for another separate equality act called **the Act on Equality between Women and Men (609/1986)**, where gender equality was promoted, particularly in working life.

However, section 2 of the abovementioned act contains restrictions on the applicability of this law to the church and other religious communities. Therefore, one recognises that it cannot be applied directly to many aspects of the religious observances of the Evangelical Lutheran Church, the Orthodox Church and other religious groups (on account of restrictions on the priesthood, the nature of religious observances, and confessions to name a few).

**IV. In chapter 2, section 2 of the Employment Contracts Act (55/2001)**, it states that “the employer shall not exercise any unjustified discrimination against employees on the basis of religion”

Further on in the same section of the act, the Non-Discrimination Act, as well as the prohibition of discrimination, are referenced:

Provisions on the prohibition of discrimination based on gender are laid down in the Act on Equality between Women and Men (1325/2014). The definition of discrimination, prohibition on sanctions and burden of proof in cases concerning discrimination are laid down in the Non-Discrimination Act (21/2004). (23/2004)

Equality and the prohibition of discrimination is governed by the Non-Discrimination Act (1325/2014). The prohibition of discrimination based on *gender* is covered by the provisions of the Act on Equality between Women and Men (609/1986).

**V. The employee’s position is further governed by the Working Hours Act (605/1996), Annual Holiday Act, Occupational Safety and Health Act (738/2002)** as well as acts covering national and municipal civil servants’ rights.

In Finland, occupational health and safety issues go above the rights of the employee. The labour laws oblige the employer and employees to follow safety regulations and instructions. It is possible for instance, that such instructions would not allow an employee to tie a scarf, if that person is working with machinery and

this may be injurious to health. For example, it is obligatory to wear a helmet when working in construction.

(b) Which manifestations of religious beliefs are protected?

When hiring an employee, the starting point is that gender, sexual orientation or religious beliefs will not affect the recruitment process (please see section 8 of the Non-Discrimination Act and the Act on Equality between Women and Men mentioned above).

The employer must recognize the employee's religious beliefs to a reasonable degree as well as their needs to practice their religion in the workplace. The notion and degree of "reasonable" depends on the employer, the workplace and the trade being practiced, as well as in relation to the ways of practicing of various religions. This also takes into consideration the right of the worker to be absent from his or her working station.

(c) What is the rationale of the approach? Is it 'equality' or 'religious freedom' or both or is there some other foundation?

When religious beliefs and demands of equality clash in the workplace, it is difficult to declare a "winner"; in other words, it is difficult to determine which carries more weight: equality or religious freedom?

One of Finland's foremost experts on its constitution, Mikael Hidén, who has also served many times as an expert on the government's Constitutional committee, has come to the conclusion that religious freedoms sometimes override the demands of equality:

Religion sometimes allows for small exceptions. Gender should not be a reason to discriminate in hiring but in the Orthodox Church, only men can serve as priests. This gender consideration has also been accepted in the Catholic Church for certain positions seen as central to its religious doctrine. This is all a part of finding an equilibrium between the freedom of religion and equality<sup>1</sup>.

Hidén also points out that not all religious points of view can be written in law and that they have to be considered on a case-by-case basis:

*I cannot say that equality in Finland always loses to religious freedom nor can I say the reverse is true. These are difficult and sensitive questions of principle. We have to accept that issues can be evaluated case-by-case*<sup>2</sup>.

<sup>1</sup> The Finnish Broadcasting Company, July 26, 2013, 2:45 pm – Hidén's statement on the provisions in section 2 of the Equality Act that exclude the Church and other religious communities.

<sup>2</sup> *Ibid.*

(d) What effect, if any, has the jurisprudence of the European Court of Human Rights had in the national approach?

In Finland, the decisions of the European Commission (since 1998 Court) of Human Rights have affected two areas in the workplace: discrimination cases (religious beliefs, ministry) and limitations to religiously determined dress codes.

### **Discrimination cases (religious beliefs, ministry)**

It is possible to find important precedents among the rulings where section 9 of the European Convention on Human Rights has been applied,<sup>3</sup> although only one of these concerned Finland, and this was the case of *Konttinen vs. Finland*, which occurred in 1994.

#### *The case Konttinen vs. Finland*

Section 9 (Freedom of thought, conscience and religion) was employed in the case of *Konttinen vs. Finland* in 1994 (ruling of the European Commission on Human Rights in the case of Appeal no. 24949/94).

In response to this appeal regarding the interpretation of the European Convention on Human Rights, the European Commission on Human Rights ruled that section 9 of the European Convention on Human Rights restricted the rights of public authorities to dismiss employees for refusing to discharge certain duties on the grounds of conscience. Section 9 was not, however, regarded as permitting the plaintiff, a member of the Adventist Church who had been dismissed by the Finnish State Railway, to absent himself from his place of work without permission on religious grounds. In the Commission's opinion, the ultimate guarantee of religious freedom was the right to resign from employment<sup>4</sup>.

The judgement reached by the European Commission on Human Rights in the case *Konttinen vs. Finland* was in conformity with the line on religious freedom adopted in the earlier case of *X vs. Denmark*<sup>5</sup>. In the present case, however, the plain-

<sup>3</sup> E.g. the cases of *X vs. Denmark* (1976), *Karlsson vs. Sweden* (1988), *Kokkinakis vs. Greece* (1993), *Otto-Preminger-Institut vs. Austria* (1994), *Kalac vs. Turkey* (1997), *Bessarabian Metropolitan Church et al. vs. Moldavia* (2001).

<sup>4</sup> Scheinin 1999, 389-383. See closer Leino 2003, 203-220.

<sup>5</sup> Case 7374/76 of the European Commission on Human Rights (*X vs. Denmark*), decision of 8.3.1976, DR 5. This was the case of a minister who had insisted that the parent of a child brought to be baptised should first receive religious instruction. It is noted in the explanation appended to the judgement that this was specifically a question of a minister of the state church of Denmark performing the duties required of him in a parish belonging to that church in insisting that the parents attended a course of five lectures of "baptismal instruction". The Ministry of Church Affairs (*Kirkeministeriet*) was of the opinion that he could not attach such conditions to the conducting of a baptism and ordered the minister to abandon this practise or else resign. When the plaintiff, known simply as Rev. X, refused to

tiff was not an employee of the Adventist Church but merely represented the doctrinal opinions of that church. His convictions were not, however, in conformity with the policies of his employer, the Finnish State Railways, which would not agree to his observance of holy days in accordance with the calendar of that church<sup>6</sup>.

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comply, the ministry had set up a consistory court of an advisory character to adjudicate on the matter. The plaintiff's demand for a public discussion of his case was not accepted, as the public prosecutor regarded the case as a disciplinary rather than a criminal matter. The consistory court nevertheless postponed discussion of the matter pending a decision from the European Commission on Human Rights.

The plaintiff had appealed to the Commission on the grounds of freedom of thought, conscience and religion as allowed for in § 9 of the European Convention on Human Rights, which included the freedom to practise religion.

In the commission's view the church as a religious body was to be understood as a community of persons who were of like mind, so that the protection afforded by § 9 could be regarded as applying to the church itself and its practise of religion. In the state church system personnel are employed precisely to teach the doctrines of the church concerned. Thus *the individual freedoms of thought, conscience and religion of a minister of such a church may be regarded as being exercised in the acts of entering employment with it, terminating that employment or resigning from membership of the church*. The commission went as far in its ruling as to indicate that a church does not have to ensure the freedom of religion of its employees and members in the same way as the state is obliged under its own legislation to ensure the religious freedom of its citizens.

In other words, the commission did not regard a minister (in the state church system) as having the right under § 9 (1) of the European Convention on Human Rights to impose conditions for the baptism of a child that were contrary to the regulations of the highest administrative authority, the Ministry of Church Affairs. The commission also ruled, contrary to the plaintiff's demands, that a matter that was internal to a particular religion or belief did not fall within its jurisdiction or within the provisions of § 6 (1) of the European Convention on Human Rights. Garde 2001, 76; Leino 2003, 205-206.

<sup>6</sup> Three further cases have been recognised in Finland that are comparable to the Kontinen case and constitute important precedents with respect to the European Convention on Human Rights but have not proceeded to the Supreme Court. *The first case* involved a Muslim woman's right to *keep her head covered during office hours*. The woman had been offered a full-time job as an office worker in a travel agency and had said that she was willing to accept the job but had informed the employer at the interview that she wished to wear a *hijab* for religious reasons. The employer did not accept this and refused to employ the woman. The authorities had then denied the woman her right to unemployment benefit on the grounds that she had herself refused employment that was offered her. The woman did not accept the decision but appealed to the Insurance Court, which concluded by a vote of 4 against 1 that the woman was entitled to unemployment benefit. The court's reasoning for the decision was that the woman had the right to practise her religion and as a Muslim woman will customarily keep her head covered, she could not be held responsible for the cancellation of the employment contract.

*The second case* concerned a woman belonging to the Jehovah's Witnesses who had been offered a temporary job as a cleaning lady in an Evangelical Lutheran church. The woman rejected the job offered for religious reasons, referring, for instance, to a line in the Epistle to the Corinthians, which forbids one "to be partners with demons". The Unemployment Benefit Society, however, concluded that the woman had rejected a job offered to her without an acceptable reason and refused to pay her daily unemployment benefit. The Appeal Board confirmed this decision on the grounds that labour policy did not consider religious beliefs an acceptable reason for rejecting a job offer. The Insurance Court overturned the decisions made by the Unemployment Benefit Society and the Unemployment Appeal Board. As in

When evaluating the dividing line laid down by the European Human Rights Commission in the case *Konttinen vs. Finland*, it should be noted that that it is impossible to reach any direct conclusions regarding the situation in Finland by comparing the individual case of a minister who lost his appeal against the state church of Denmark partly on formal grounds, in that § 6 does not apply to dismissal from a public office (*X vs. Denmark*), with that of a person whose convictions did not conform to the policies of a state-owned company (i.e. a public body)<sup>7</sup>.

Thus it may be said that in Finnish high court praxis a person who is employed by a church or other religious community and finds himself in conflict with that church or community on an issue of belief or conviction is deemed to have exercised his individual religious freedom in the act of taking up such employment. Once he has done so, he cannot thereafter appeal to the freedom of religion in order to depart from the tenets of that religious community<sup>8</sup>.

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the case of the Muslim woman, it concluded by a vote of 4 against 1 that the woman's religious beliefs were an acceptable reason for refusing to clean a Lutheran church. The Insurance Court thus ordered that the woman should be paid her daily unemployment allowance for the three weeks during which it had been denied her.

The Insurance Court based its decisions concerning both the Muslim woman and the Jehovah's Witness on the Freedom of Religion Act in the European Convention for the Protection of Human Rights and Fundamental Freedoms, its reasoning being that under the act freedom of religion could be restricted by rule of law only in cases in which the restrictions served a justified purpose, such as the maintenance of general order or the protection of health or morality.

*The third case* supporting this view concerned a decision by the Insurance Court according to which a woman belonging to the Jehovah's Witnesses had the right to reject a job as an office employee offered by the Ministry of Defence without losing her unemployment benefit. The woman thought her religious beliefs justified her refusal to work for the army in the same way as a male Jehovah's Witness may refuse military service. The Insurance Court found in favour of the woman, referring to the fact that men belonging to the Jehovah's Witnesses are exempt from both military and non-military service during peacetime.

In the light of the above cases one may ask, as Prof. Juha Seppo (1998, p. 128-129) remarks, whether or not the interpretation of the Finnish Insurance Court concerning the limits of freedom of religion follows the views adopted by the European Commission of Human Rights.

<sup>7</sup> Pellonpää 2005, 399; Leino 2003, 207.

<sup>8</sup> This is also suggested in the statement made by the Parliamentary Constitutional Committee to the Parliamentary Administrative Committee (PeVL 22/1997) on the bill for alterations to § 16c of the law on the Orthodox Church in Finland:

“— Every person enjoys the fundamental right of the freedom of speech, although more precise regulations regarding this are given in law. It is in the nature of the offices mentioned in the bill that their holders should teach in accordance with the precepts of the Orthodox Church and that they should be aware of this fact when taking up such an office.”

It is similarly noted in the statement on disciplinary proceedings that

“— It should also be said that matters concerned with the right to remain in public office have been demonstrated in the practises of the Human Rights Commission to lie beyond the scope of article 6 of the European Convention on Human Rights.” Admittedly no instances of problems or conflicts,

*On the other hand*, as also in the state churches of Denmark and Sweden (previously), instances of an office holder (including a minister) refusing to carry out certain obligations have also been interpreted in Finland purely on grounds of administrative law as neglect of duty. These decisions of the Finnish Supreme Court have mostly concerned one of two groups of cases: those in which a minister has placed conditions of his or her own on the baptism of a child,<sup>9</sup> and those in which a bishop has refused to ordain women as priests. This was the approach adopted by the Chancellor of Justice in resolution 561/24.5.1989, for example, regarding a bishop as an official of the state and considering his right to refuse to ordain women as priests in the light of this.

### **Limitations placed on religiously determined dress: basic-rights-biased interpretation**

The European Court of Human Rights (ECtHR) has somewhat ambiguously interpreted the European Convention on Human Rights (ECHR) in its praxis concerning religiously determined dress. It sees that its member countries have broad interpretation rights in these matters. The ECtHR has largely approved the limitations set by its members, to the point that it has dismissed individual cases of discrimination based on dress as unfounded, and as such did not try them. Out of those cases that were considered, only two were found to have violated the European Convention on Human Rights: Ahmet Arslan *et al.* v. Turkey (23.3.2010) and Eweidan and Chaplain v. United Kingdom (15.1.2013).

The European Court of Human Rights and UN's committee governing the International Covenant on Civil and Political Rights (the so-called ICCPR-agreement) have conflicting interpretations on the acceptability of each country's limitations regarding religiously determined dress. This has partially resulted from the fact that the ICCPR-agreement was signed many decades after the European

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or even of differences in interpretation, have arisen with regard to the doctrines of the Orthodox Church of Finland.

<sup>9</sup> One example that could be mentioned is a case in which a minister of the church at Sulkava in the Diocese of Mikkeli refused to accept a couple who were not married as godparents for a child. The Supreme Court, having first granted on 7.10.1988 an injunction on execution of the relevant decision of the Eastern Finland Court of Appeal (no. 1347, 30.8.1988), overturned the Appeal Court decision in its ruling no. 2792 of 13.10.1989 (KKO 1989:122). As result the charge of intentional neglect of duty and the accompanying punishment upheld by the Appeal Court was commuted to a charge of indiscretion in the performance of one's duties, leading to an official caution. The Supreme Court ruled that it is part of the duties of a minister to ascertain that the people proposed as godparents fulfil the requirements laid down in § 36 of the Ecclesiastical Law of 1964. Thus the minister had not exceeded his powers as the Diocesan Chapter and the Court of Appeal had maintained.

Convention on Human Rights and it better takes the protection of minorities into consideration.

*All of the cases where the ECtHR found that a violation of an individual's right to dress according to his or her religious beliefs has occurred have all been somehow connected to a specific issue.* Many of these have stemmed from limitations in schools and other learning institutions, as well as in universities, where the use of the veil as dictated by Muslim doctrine has been forbidden. Countries have justified these limitations in public learning institutions by citing requirements of neutrality, safety and general order, citing the protection of the rights and freedom of others as well as the securing of unfettered interaction between individuals. This margin of appreciation often results in the European Court of Human Rights not thoroughly examining the acceptability of the limitations, if it considers the burden of interpretation belonging to the country itself<sup>10</sup>.

On the other hand, *the ICCPR-agreement clearly maintains the country's responsibility to demonstrate the acceptability of the limitation in question.* Because of this, the ICCPR-agreement provides greater protection regarding the right to dress according to religious belief than does the Convention on Human Rights<sup>11</sup>.

So how does this difference affect cases when it is applied in Finland?

In Finland, the minimum basic rights are determined by international human rights agreements. The level of basic rights cannot be below those secured by international agreements. Both the ECHR and the ICCPR-agreement are considered legal norms and take precedence over national legal norms because of the minimum level of rights stipulated.

In 1995, through an exercise of amending its basic rights, Finland moved to a system requiring civil servants to favourably interpret basic rights. In practice, this means that a civil servant is required to select the option that best responds to an individual's basic and human rights. *In this situation the ICCPR-agreement gives an individual more protection of religious freedoms in the Finnish judicial system.* It sets the minimum level for religious freedoms, and Finland cannot go below this level. Kortteinen calls this "basic rights pluralism, which guides favourable basic rights solutions even in those cases where the interpretations of international human rights agreements differ from one another"<sup>12</sup>.

<sup>10</sup> Kortteinen 2013.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

## II. RELIGIOUS MINISTERS AND LABOUR LAW

(a) What is the definition of religious minister according to the secular law of Finland?

When studying religious ministers and labour law in the Finnish context, three different types of religious communities can be distinguished whose different status under public law also regulates them as employers and the definition of religious minister according to the secular law. According to the new Freedom of Religion Act (2003), such religious communities are (1) the Evangelical Lutheran Church, (2) the Orthodox Church and, prescribed by the Freedom of Religion Act, (3) the registered religious communities.

The Evangelical Lutheran Church of Finland along with the Orthodox Church of Finland still maintain a special public status, which includes its own law (ELCF law 1054/1993 & OCF law 985/2006<sup>13</sup>), special public status, and ELCF's right to collect church taxes from its members. The government also gives the ELCF some of its tax revenues to pay for certain activities, such as the maintenance of cemeteries and culturally significant buildings.

When speaking about positions in the ELCF, there is a distinction made between a religious office and a minister's office. *A religious office (with its full responsibilities and rights) is received upon being ordained, and is governed by church law and statutes on the rights of the office. A minister's office refers to employment for which one receives a salary (compare with civil servant).*

There are no longer offices in the Orthodox Church of Finland. All staff, including clergy, are now considered employees.

The offices and activities of registered religious communities, comprising both Christian and non-Christian communities, are so varied that it is not possible to describe them here in great detail. Mainly, their employees are under contract. Furthermore, they do not have societal obligations governed by law as do both the ELCF and Orthodox Church of Finland. Some communities are responsible for certain societal tasks, such as maintaining cemeteries and culturally valuable buildings, which are considered the activities of the ELCF and Orthodox Church of Finland. However, it is difficult to get a clear picture of the frequency and breadth of these activities in the various registered religious communities. In regards to employment rights, the priests and imams of *registered religious communities are covered by civil law and the statutes based on it, as well as by general labour laws.*

As was mentioned above, section 2 of the separate law aimed specifically at promoting sexual equality at work promulgated on the basis of section 6 of the

<sup>13</sup> The difference between laws governing the ELCF and the OCF is that the OCF does not have exclusive rights to initiate changes to laws that concern the church.

Constitution contains restrictions on the applicability of this law to the church and other religious communities, thus recognising that it cannot be applied directly to many aspects of the religious observances of the Evangelical Lutheran Church of Finland, the Orthodox Church and other religious groups (on account of restrictions on the priesthood, the nature of religious observances, confessions etc.).

(b) What is the labour status of religious ministers when working for their respective denominations?

**The ELCF** collective agreements are governed by the Church Act of the Lutheran Church, public sector collective agreements and the most important laws governing working life (such as the Employment Contracts Act, Working Time Act, Annual Holiday Act, Occupational Health and Safety Act as well as national and municipal civil servant statutes) that affect the legal position of the person holding the office.

The Church's employing organisations are the congregations, parishes, chapters and the Church administration. These are independent employers that have their own administration and who take care of recruitment on their own.

The Church's employing organizations have common decrees and conditions of service, such as the system of remuneration. In addition to the Church's employment organization, there are many other ecclesiastical organizations, such as missions, that offer employment. The conditions of service for the employees of the church, such as salary, holiday and working time, are based on collective agreements.)

The working and holiday time of people employed by the church are defined by the Working Hours Act, the Church's Working Hours statute, and the Church's collective agreement, and are based on decisions made by the Church's administration. The general definition of an employee's work week is 38 hours and 15 minutes long, whereas the work week of an office is 36 hours and 15 minutes long.

The Working Hours Act does not apply to those carrying out spiritual work, such as priests, cantors, those holding diaconal offices and youth workers. Their work is not measured in hours but their work is carried out five days a week. The holiday allocations of church personnel are usually better than those offered generally on the employment market, and are based on work experience. At their longest, holidays can reach periods of 38 days long after 15 years of service, which is the equivalent of almost eight weeks.

**The Orthodox Church of Finland (OCF)** is governed by the Orthodox Church of Finland Act (958/2006) and the OCF collective agreement as well as the aforementioned *most important laws governing working life*. The OCF Act is applied when hiring. Otherwise, the employer has the right to hire and dismiss, as well as supervise according to the Employment Contracts Act.

The stipulations of the collective agreement are applied to the personnel of the OCF, and the Orthodox seminary, as well as to organizations working within the sphere of the Orthodox Church where applicable.

In contrast, the collective agreement is not applied to archbishops, bishops and the Church's legal counsel, individuals who are in equivalent supervisory positions in the Church's administration or to monastery staff. It is not applied to those teaching religion either.

An employee's salary consists of two parts: the demand of the tasks (basic pay) and the employee's performance of those tasks. Basic pay is determined by the demand of the tasks and are 10 levels of demand on the scale. An employee's hourly wage can be calculated by dividing the monthly salary by 153, whereupon the regular weekly working time is 36 hours and 15 minutes long.

Those doing spiritual work (priests, deacons and cantors) are given two days off per calendar week, unless urgent or necessary tasks or other pressing reasons prevent it. However, days off cannot be Saturdays or Sundays, nor can they be church holidays, unless under exceptional circumstances.

Working hours are defined as the time used for work where the employee is required to be at his or her place of work and at the disposal of his or her employer. Working time is also counted outside of the workplace when said work is carried out in the name of and has been approved by the employer.

**Registered religious communities** are governed by civil laws and agreements based on those laws. The employees of these communities belong to trade unions (e.g. Palta) that negotiate collective agreements on behalf of their members. However, unionising employees working in Muslim religious communities has been weak. Few Muslim communities have full-time imams. In Finland, there is only one paid imam. The rest work on a volunteer basis, some only a few hours a week, but many work over 20 hours a week<sup>14</sup>.

(c) What is the labour status of religious ministers when working in other institutions? (chaplains, teachers of religions in schools etc.)

In Finland, religious ministers and chaplains do not work as teachers of religions in schools. Religious education in Finland is non-confessional. According to the new Act of Religious Freedom, since 2003, pupils and students receive religious education according to their own religion if the denomination is registered in Finland (a 15-year-old child can decide his or her own religion / denomination with the permission of parents).

<sup>14</sup> Imams in Finland. Imam training survey 2013, 38.

Teachers do not have to belong to any denomination and teacher education takes place in universities. Religious education is given by two types of teachers: classroom teachers and subject teachers. The classroom teachers have completed a five year M.Ed. degree. The requirement to become a subject teacher in religious education is a master's degree in Theology. The subject teachers major in Systematic Theology, Church History, Bible Studies, Practical Theology, or in Comparative Religion. Religious education teachers have exactly the same status as the teachers of other school subjects. In other words, they are not employees of the Church or of an equivalent institution but are employed and qualified by the state. The majority of religious education teachers are not ordained priests. In contrast to many European systems, the training is given by a Department of Applied Sciences of Education and not by the Faculty of Theology.

Teachers of religion belong to the Union of Religion Teachers in Finland, which represents its members in the Subject Teachers' Union (AOL) and in the body of representatives of teachers' associations in Finland (POE).

(d) Are ministers of all denominations subject to the same labour law status?

In Finland, the collective agreement system in its current form was born of the public sector in the 1970s. These agreements are made in the national, municipal and church sectors (for the ELCF and OCF up until 2005).

**The conditions of service for those holding ELCF offices** are determined in chapter 6 section 5 of church law, and by collective agreements both for offices and for contract employment made according to the law governing ELCF collective agreements.

*Collective agreements are made by the Commission for Church Employers (Kirkon työmarkkinalaitos) for parishes, parish unions and the Church. This is done according to section 1 of the Evangelical Lutheran Church's statute (827/2005) governing the Commission.*

The purpose of the agreement system is to improve working conditions and to ensure job security. The collective agreement for offices represents the minimum and maximum agreement possible while the agreement for other positions represents the minimum agreement possible. The conditions of service are agreed in these agreements, and the salaries, holidays, leaves and compensation for all those holding Church offices or other positions are also determined through these collective agreements.

There are additional rules regarding leaves of absence in the statutes governing offices. There are further rules on the annual holidays, leaves of absence and leisure time for priests, lecturers and cantors as well. These rules are set by the Church's central according to the authority given to it by church law (Collection of Church Provisions no. 68/30.5.1995)

Working and leisure time are based on the Working Hours Act and through the collective agreements made possible by the Working Hours Act.

**In the law concerning the OCF (985/2006)**, paragraph 1 of section 114 states that the Church's administration *is responsible for the collective agreement for the Church, its parishes and its monasteries*. The Union of Service Employers, Palta, negotiates the collective agreement on the OCF administration's and the OCF employees' behalf as its representative. The collective agreement is negotiated by the principle negotiators in lead groups, which manage the negotiation process and any other work concerning the development of working conditions.

This agreement, as previously mentioned, does not apply to archbishops, bishops, the Church's legal counsel, individuals who work in positions equivalent to Church administration's leadership positions or to monastery personnel.

**Registered religious communities**, which are governed by civil law, buy services related to work security from Palta, a member of the Confederation of Finnish Industries. It has collective agreements for a variety of working conditions. *What is noteworthy is that Palta, could have agreed universally binding labour decisions on behalf of religious communities.*

(e) What case-law has developed regarding the work of ministers of religion?

The newest regulations reforming the rules governing ELCF offices came into force on 1 June 2013. After that, all of the most important labour laws (e.g. Employment Contract Act, Working Hours Act, Annual Holiday Act, Occupational Health and Safety Act, as well as statutes governing national and municipal civil servants), as well as Finland's Constitution were completely renewed, while the Church law that entered into force on 1 January 1994 was still in force. For this reason, some of the rules governing the Church's offices have been rendered invalid and do not satisfy the Constitution's requirements.

The objective of the reform has been to ensure that the position of those holding Church offices is covered as collectively and comprehensively as possible, taking into consideration the requirements of the Constitution as well as the developments in civil servants' rights and labour laws. In addition, it has been hoped that the legal position of a person holding a Church office would be the same as a person holding a civil servant's position in the public sector, unless the Church's organization or activities demand otherwise. The clergy's position in particular is affected by factors stemming from Church order (e.g. ordination and apostolic guidance), which justifies certain exceptions to civil servant entitlement practices.

**The most important changes to the labour conditions affecting EKCF employees are those that concern the changes to legislative levels of church law, the requirements of church membership and requirements preventing discrimination.**

The reform includes the complete renewal of chapter 6 of the Church law as well as other provisions regarding the position of an office holder.

Firstly, many provisions have been taken from church order into church law that affect, among others, the publication of a job advertisement for an office, appointments to an office, the responsibilities of an office, leaves of absence, secondary occupations, keeping employee records as well as certain methods for recruiting priests and rules regarding the presentation of documents of appointment.

In addition, chapter 6 of the Church Order has been completely reformed. The changes mainly affect general regulations. The provisions on how parishes and parish federations select candidates to minister's positions as well as those governing the presentation of appointment documents have remained largely the same. The discretionary decision making powers of the cathedral chapter have somewhat increased regarding the extension of application times for the offices of vicar and chaplain, the modification of recruitment methods or the decision to leave an office unfilled. The method of selection for cantors has changed in that the verification of the applicant's eligibility and the selection itself no longer requires the cathedral chapter's approval.

The rules affecting parish offices stopped being in force no later than one year after the transition. Church law provisions enabling regulations on church offices were overturned. Model provisions have been transferred to Church law and to the Church Order, some with modification and others without.

**The largest grievance with the reform concerns the weakening of job security.** Disciplinary actions, seen as obsolete, were removed, which required that the system for ending service to also be renewed. The methods for ending service were harmonized, and the same methods for dismissal and termination were taken for everyone holding office. *Termination as a method of ending service is completely new for church administration.* Although the provisions regarding dismissal and termination are the same as those in civil service law and the Employment Contracts Act, *the essential change is that service in an office can now be terminated after a warning.*

Secondly, in addition to changes to membership requirements, there is also a new requirement of confirmation as a condition of eligibility. Church membership, as well as confirmation is required from all who hold a church office, and furthermore, from those who are employed in positions pertaining to religious, diaconal, educational, teaching or pastoral services, and if the position's nature is such that other reasons compel church membership.

Thirdly, even though the law does not contain specific anti-discrimination provisions, it does not mean that discrimination is condoned by the Church. Universal laws, such as the Constitution, the Act on Equality between Women and Men and the

Non-Discrimination Act, are already enforced in churches and parishes. In connection with the reform of the Non-Discrimination act, the Ministry of Justice is studying whether other non-discrimination provisions from other laws governing service can be moved to the Non-Discrimination Act.

The Church's administration has petitioned the Finnish Parliament to change the regulations affecting the Church's central administration in situations where the Commission for Church Employers (Kirkon työmarkkinalaitos) acts as a contracting party (Legal Committee report 1/2014)

The presentation proposes changes to church law and church order provisions affecting the Church's central administration as well as *repealing the law concerning the Commission for Church Employers*. This way, the Commission's position as the Church's representative in labour matters would stay intact. However, the Commission and the Church's central administration would be clarified by integrating the Commission with the Church's central administration. The administration would select decision-making members and their substitutes to the Commission's delegation from candidates proposed by the diocesan councils. *The impartial decision making power of the Commission would be protected by not permitting the General Synod to rule on labour issue decisions made by the Commission's delegation*. The proposed changes require that the current law on the Commission for Church Employers is repealed, and that the required provisions be taken into church law and church order. This is why it has been recommended that the law governing ELFC collective agreements be changed where specific (civil) law provisions have been referenced instead of church law. The government's presentation of the issue is expected in the 2015 autumn session.

The Orthodox Church of Finland is an autonomous archdiocese connected to the Ecumenical Patriarchate of Constantinople. Therefore, the Church is simultaneously a Finnish organisation governed by public law as well as a part of an international Orthodox church. This makes the position of the Orthodox Church in Finnish law unique and problematic in terms of labour laws<sup>15</sup>. The clergy's job security is weakened because of the Church's right to interpret the employee's position based on Orthodox canons. The Church Council and ultimately, the Synod, lead by the Archbishop, have the right to interpret canons in the employee's disfavour.

<sup>15</sup> The position of the Orthodox Church's canons and other spiritual regulations has been strengthened in the Orthodox Church Act (985/2006). Paragraph 1 of section 1 states that "the Orthodox Church of Finland is founded on the Bible, traditional knowledge, Orthodox dogma, canons and other Church regulations". Paragraph 3 of section 1 also defines the Church canons' relationship to the Ecumenical Patriarchate of Constantinople. This relationship is referenced in the Ecumenical Patriarchate's decision of June 6th, 1923 in what is known as the Tomos document.

*There are two interesting cases of this in Finland.* The first concerned Euro-parliamentarian Mitro Repo and the other a priest who was dismissed after remarrying. The Synod found Repo's candidature for the European Parliament against traditional canon and voted 2 to 1 against Repo to practice his priest's duties during his campaign in 2009 and during his term in Europe's parliament<sup>16</sup>. The other case concerned a widowed Orthodox priest, who was suspended from service for a year, and in November 2012 lost his priest and provost designations because he had gotten engaged to a widow. The Orthodox Church holds canon in higher esteem than law, however, many schooled in Finnish law feel that it cannot be considered over civil law and basic human rights.

### III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

(a) In what terms is the autonomy of churches recognized in Finland?

The Finnish State is neither non-denominational nor denominational. However, there are close institutional and legislative links between the State and the Lutheran Church, and the public school system, which is run primarily by the municipalities and partly financed by the State, makes non-denominational religious instruction of the majority religion a part of the curriculum. Additionally, the Orthodox Church has a special institutional status, while the Constitution and secular laws secure the freedom of religion and the rights of religious and non-religious minorities.

Members of minority religions and persons not belonging to any religious community have a constitutional right to be exempt from participation in religion. Within the school system this means separate education in the minority religion concerned, or education on ethics, or total exemption<sup>17</sup>.

The Finnish State is neutral in matters of religion, and the Lutheran Church is legally and administratively very independent in relation to the State. However, the Church Act of the Lutheran Church is an act of Parliament despite the fact that neither the President nor parliament is allowed to change the wording agreed by the

<sup>16</sup> Repo appealed the decision made by the Synod to the Supreme Administrative Court (SAC). In December 2009 the SAC denied his appeal. In the SAC's opinion, it was an internal matter of the Orthodox Church and it is its responsibility to interpret Church doctrine. Repo returned to service as a pastor in Helsinki's Orthodox parish in August 2014.

<sup>17</sup> The formulation used in the relevant laws is neutral: Based on the law of religious freedom (453/2003) and the current school laws, every student in comprehensive and upper comprehensive schools has a right to religious teaching according to his or her own confession. The communal school system is responsible for its Organization and funding. Students who do not belong to a church or religious community participate in world view studies (ethics). In the matriculation examination, it is possible to take either a test of one's own religion or of world view studies. See closer Section VIII, Religious Education of the Youth. About Historical Overview of the Finnish education system see closer <http://www.oph.fi/english/education/overview>.

General Assembly of the Church. *The Church Act includes provisions with a clear denominational character.*

In Finland no religion is given any power to control other religious communities under the State law.

Actually, the Freedom of Religion Act (2003) enacts exhaustively and in detail the legal status and foundation, rights and obligations of churches and registered religious associations.

(b) Are churches exempted from the general norms concerning anti-discrimination? To what extent?

The relevant section of the Finnish Constitution of 2000 dealing with freedom of religion and conscience, section 11, mirrors the provisions of section 9 of the European Convention to a considerable extent, stating that *(1) Everyone has freedom of religion and conscience, implying the right to profess and practice a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. (2) No one shall be under any obligation to participate in the practise of a religion against his or her conscience*<sup>18</sup>.

It is laid down in section 22 of the new Constitution that the public authorities shall be responsible for guaranteeing fundamental human rights. In accordance with the constitutional reform of 1995, these public authorities, which are deemed to include the Evangelical-Lutheran Church of Finland as mentioned in section 76 of the Constitution, are obliged and bound to take responsibility for the implementation of civil rights in all forms of public activity, including legislative, administrative and executive aspects. It is not (any longer) regarded as sufficient that the public authorities should refrain from interfering with the fundamental rights of citizens through legislative or other measures; they are instead expected to take an active role in protecting personal freedoms from external violations and to create conditions that truly foster the practical application of the principles of civil rights<sup>19</sup>. This claim applies to labour law provisions as well: Freedom of Religion Act, Equality Act, and Non-Discrimination Act as well as to obligations in the Employment Contract Act.

<sup>18</sup> The corresponding section 9 of the European Convention on Human Rights runs:

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

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

<sup>19</sup> As far as the church is concerned, this applies to it as a statutory public body, so that it can be expected to act in such a way as to ensure the civil rights of its clergy and staff.

For the Evangelical Lutheran Church of Finland<sup>20</sup> and the Orthodox Church of Finland, as communities governed by public law, the question of fundamental rights entails an active responsibility for the implementation of civil rights within their own communities. On the other hand, other registered religious associations, not being governed by public law, are subject to legislation that applies to private corporations and have the responsibilities laid down in other judicial norms (e.g. the law on equality and labour legislation), which lead *them to act at the workplace in conformity* with the actual principles of human rights and fundamental freedoms.

(c) What effects, if any, has European Union law had in this area?

See more above in section I d)

(d) What case-law has developed in this area?

In Finland, ECtHR decision-making praxis and the ICCPR-agreement have affected, in addition to the cases mentioned in section I d), two issues: (a) refusing to carry out tasks based on religious convictions and (b) religiously determined dress codes.

(a) Refusal to execute work duties

In Finland, one can refuse employment completely or can refuse doing any part of a job based on religious beliefs. One can also refuse to do work for a specific time period or an employee could, for example, request permission to use the veil or make a similar type of request. This raises questions of when an employer has the right to dismiss an employee, and when the unemployed person loses his or her unemployment benefits if they refuse a job offered to them.

The Act on Employment Insurance 30.12.2002/1290 states briefly:

*The job seeker has a valid reason to refuse employment, if the employment is against his or her religion or consciousness.*

In comparison, other approved non-physical reasons for refusing employment are included in the act as “obscene or improper” work.

There are a number of cases in this area:

- A Muslim wanted to use the veil at work and was not offered employment. Unemployment benefits could not be withheld. The vote was 4 to 1 (see Insurance Law 1713:96).

<sup>20</sup> In the case of the unique rights enjoyed by the Evangelical Lutheran Church of Finland, as laid down in the laws governing that church, one cannot, however, speak of an *active* obligation under the Constitution, as the Finnish Constitution provides for the legislative autonomy of the church, the principal mark of which is the order of enactment of ecclesiastical law (Ecclesiastical Law section 2:2, clause 1), which grants the Church Assembly the exclusive right to propose changes to this law and bars the state legislative bodies from interfering in the content of any such proposals.

- A non-Lutheran refused to clean a Lutheran church. According to Insurance Law, unemployment benefits could not be withheld. The vote was 4 to 1 (see Insurance Law 05142/96/955)

- A Jehovah's Witness refused clerical work with the Finnish Armed Forces, and unemployment benefits could not be withheld. The vote was 4-1 (see Insurance Law 12569:95).

- A "can advocate" interpretation, according to which a person can refuse to work on a Saturday without losing unemployment benefits (see Attorney General 420/1/99)

- One can also refuse work on grounds other than religious beliefs:

- A pacifist who had completed service as a conscientious objector refused work as a warehouse worker in an Armed Forces Unit, and unemployment benefits were not withheld. The vote was 3 to 2 (see Insurance Law 4286:99).

In connection with Constitutional reform in 1995, the definitions of freedom of religion and of conscience were discussed. The Government's bill (309/1993) was somewhat vague in advocating "systems dividing work".

The provision universally advocates for a system of separation that avoids placing an obligation on someone to execute tasks against his or her beliefs. For example, the conflicts occurring between the freedom of religion or conscience and tasks required in an office have to be resolved on a case-by-case basis. In that way, the regulation will not lead to a universal right to refuse the obligations of an office because of religious beliefs.

Separate to that is still the question of whether offices in the public sphere should have stricter regulations than in private corporations. In principle, the core activities of the state and municipalities are secular; specific laws prohibiting discrimination broaden freedom of religion and at the same time restrict the right of the employer to dismiss an employee. In Finland, there is no strict difference, however fundamental rights are seen to bind individual relationships to a certain degree.

#### (b) Religiously dictated dress codes

Discrimination in the Finnish workplace is monitored by occupational health and safety inspectors in regional state administration offices. Few cases regarding religious headdress and clothing have been tried in court nationally. *For example, the uniforms of security guards and police officers are regulated by laws and decrees, and religious headdress is not a part of the uniform.* This neutral uniform easily limits of access of those who use headdress, such as Sikhs and female Muslims, to those types of positions.

In Finland, the Chancellor of Justice and ombudsman monitor the activities of authorities, so they are able to take a position on whether a dress code is constitutional. Before it can go to them, a complaint must first be made, and ultimately, the court will make the decision. Another way to change the situation is to have a Member of Parliament introduce a bill on the subject.

Out of all of the regional state administrative offices, only the one in southern Finland has handled four cases dealing with religious headdress and clothing. Of these, three concern the use of the veil and one with using a turban.

A bus driver in Vantaa named Sukhдарshan Singh Gill was refused the right to wear his turban. His employer, Veolia Transport, justified this by citing the company's uniform dress code and occupational safety.

Similarly, a hotel manager in Turku defended his/her decision to ban the use of the veil to preserve "the neutrality of hotel reception", meaning that the veil might detract from the customer service experience.

At the end of March 2014, the Helsinki District Court fined a manager of the clothing retailer Guess for discrimination because he/she had dismissed an employee who wore the veil. In the manager's opinion, the veil did not suit the image of the store, among other things. The District Court ruled that the employee was placed in a disadvantageous situation without cause because of her use of the veil.

The ruling involving religious headdress is the first of its kind in Finland so in the future, it will serve as precedence and a guide for employers. The message is thus: the employer must allow religious headdress in the workplace unless a valid reason, such as occupational safety, prevents it.

As previously mentioned, occupational health and safety issues overrule employee rights. This occurred in 2006 in a case where the prosecutor claimed that a restaurant manager was not guilty of discrimination when he refused to let a female Muslim wear her veil during a customer service internship. The manager justified his/her decision citing image and occupational safety reasons. The student was given clear instructions on the dress code for the kitchen and dining room; the same veil could not be used during the cooking as for the serving of the food. He/she further justified the decision by stating that the customers wanted their servers to use a uniform. The student did not remove her veil. Instead, she left the establishment.

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# LIBERTÉ DE RELIGION ET TRAVAIL - RAPPORT FRANÇAIS

B. BASDEVANT-GAUDEMET, F. MESSNER, P.-H. PRÉLOT

## I. COMMENT LE DROIT NATIONAL RECONNAÎT-IL LA LIBERTÉ RELIGIEUSE AU TRAVAIL?

### a) Aspects légaux

#### a.1. *Sources protectrices de la liberté de religion en France*

C'est la constitution qui au niveau le plus élevé de la hiérarchie des normes protège la liberté de religion. Elle le fait sans distinction du lieu ou des circonstances où cette liberté s'exerce, en sorte qu'il n'y a aucune raison d'en exclure *a priori* le lieu de travail ou l'activité professionnelle. Le Préambule de la Constitution de 1946, qui fait partie du droit constitutionnel positif, interdit ainsi toute forme de discrimination à raison de la religion dans le travail: « *nul ne peut être lésé dans son travail ou son emploi, en raison... de ses opinions et de ses croyances* ».

Aux termes de l'article 10 de la Déclaration des droits de l'homme et du citoyen de 1789, « *nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi* ». L'article 1er de la Constitution énonce quant à lui que « *la France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances* ». Ce sont ces dispositions générales qui garantissent au niveau constitutionnel la liberté de religion. Outre qu'elles sont assez imprécises au regard de l'article 9 de la Convention, on remarque que la garantie de la liberté des croyances est indissociable de l'énoncé aux termes duquel « *la France est une République laïque* ». La question posée ici est de savoir dans quelle mesure le principe constitutionnel de laïcité trouve lui aussi à s'appliquer dans le cadre de l'activité professionnelle.

Si une telle question se pose, c'est notamment parce qu'il existe en France un secteur public important, et qu'on ne peut parler de la religion au travail sans inclure dans la réflexion plus de 5 Millions d'agents publics, employés de l'Etat, des collectivités territoriales, et du secteur hospitalier public. Les règles juridiques applicables

varient ainsi de façon sensible selon que la personne exerce son activité dans le secteur public ou dans une entreprise privée.

## a.2. *Aspects substantiels de la protection*

### 1.° *Les agents publics*

Pour les agents publics, c'est le **Statut général de la Fonction publique** qui s'applique d'une manière générale. L'article 6 de ce statut énonce que « *la liberté d'opinion est garantie aux fonctionnaires* » et qu'« *aucune distinction, directe ou indirecte, ne peut être faite entre les fonctionnaires en fonction de leurs opinions politiques, syndicales, philosophiques ou religieuses...* ». La liberté d'opinion du fonctionnaire vise à le protéger contre toute forme de discrimination à l'embauche et dans le déroulement de la carrière.

Mais les agents publics ont également une obligation de neutralité, destinée à garantir aux usagers une égalité de traitement de la part des autorités publiques. C'est le principe de laïcité qui exprime cette exigence de neutralité dans le champ religieux, et ce principe est appliqué de manière très stricte, puisqu'il fait obstacle à toute manifestation des opinions religieuses dans la sphère professionnelle. Dans un avis du 3 mai 2000 Delle Marteaux, le Conseil d'Etat a en effet énoncé que si tous les agents publics bénéficient « *de la liberté de conscience qui interdit toute discrimination dans l'accès aux fonctions comme dans le déroulement de la carrière qui serait fondée sur la religion, le principe de laïcité fait obstacle à ce qu'ils disposent, dans le cadre du service public, du droit de manifester leurs croyances religieuses* ». Par suite, le fait pour un agent « *de manifester dans l'exercice de ses fonctions ses croyances religieuses, notamment en portant un signe destiné à marquer son appartenance à une religion, constitue un manquement à ses obligations* ».

### 2.° *Les salariés*

Pour toutes les personnes qui n'ont pas la qualité d'agent public, en particulier pour les salariés du secteur privé, ce sont les dispositions du Code du travail qui trouvent à s'appliquer. D'une manière générale, l'exercice d'une activité professionnelle n'est pas de nature à priver le salarié de l'exercice de ses droits fondamentaux, et notamment de sa liberté de religion. Ainsi que le souligne l'article L 1121-1 du Code du travail, « *nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives de restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché* ». De la même façon, le règlement intérieur de l'entreprise « *ne peut contenir... des dispositions apportant aux droits des personnes et aux libertés individuelles et collectives des restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché* ». Autrement dit, le salarié bénéficie de la liberté de religion, mais celle-ci

peut faire l'objet de **restrictions** dont le juge vérifie qu'elles sont à la fois justifiées et proportionnées. Dans son arrêt du 25 juin 2014 (n° 612) l'assemblée plénière de la Cour de cassation a ainsi estimé qu'à la différence des autorités publiques, une structure privée (en l'espèce une crèche accueillant de jeunes enfants) ne pouvait se prévaloir du principe de laïcité pour interdire le port de signes religieux à ses salariés, mais qu'une telle interdiction pouvait néanmoins se justifier ponctuellement, pour autant qu'elle soit justifiée et proportionnée au sens de l'article L 1121-1 du Code du travail.

### a.3. *Définition de la liberté de religion et protection éventuelle des convictions non religieuses*

Lorsque le salarié se prévaut de la liberté de religion dans l'entreprise, il le fait généralement en référence à une des religions pratiquées sur le territoire national, et l'employeur comme au reste le juge s'en remet aux critères classiques de définition. Il n'existe pas à notre connaissance de contentieux concernant la nature religieuse ou non religieuse des prescriptions invoquées. On s'en remet d'une manière générale à la connaissance empirique que l'on a des grandes traditions religieuses ainsi qu'à la sincérité présumée des convictions invoquées. Il n'existe pas en revanche de protection des convictions non religieuses au titre de la liberté de religion, pas plus qu'il n'existe de protection spécifique des convictions non-religieuses.

### b) **Manifestations de la liberté religieuse protégées au travail?**

— **Port de signes d'appartenance religieuse:** il est interdit dans le secteur public, et peut être limité dans l'entreprise privée, sous condition de répondre aux exigences de nécessité et de proportionnalité (supra).

— **Respect des prescriptions alimentaires:** il n'existe pas d'obligation pour l'employeur de fournir son alimentation au salarié, sauf cas particulier. Les services de restauration collective ne sont pas tenus de prévoir des menus spécifiques. La jurisprudence n'impose pas de proposer de nourriture hallal ou casher, la mise à disposition de menus végétariens, ou « *sans porc* », est considérée comme suffisante.

— **Pratique de la prière sur le lieu de travail:** la jurisprudence n'impose pas à l'entreprise d'autoriser la prière. La liberté de religion du salarié est satisfaite dès lors que cette pratique peut être satisfaite dans le cadre de la vie privée. Des lieux de prière ont pu toutefois être aménagés dans certaines grandes entreprises. Par ailleurs, il existe dans l'armée une aumônerie militaire, à l'intention des militaires que leurs obligations statutaires écartent parfois durablement de la vie sociale.

— **Autorisations d'absence pour la pratique de la religion:** L'article L3132-3 du Code du travail énonce que « *dans l'intérêt des salariés, le repos hebdomadaire est donné le dimanche* ». Autrement dit la question de la pratique hebdomadaire se pose pour les cultes non chrétiens. Dans le secteur public, le Conseil d'Etat a estimé

que le chef de service était fondé à invoquer « *les nécessités du fonctionnement normal du service public* » pour refuser à un employé de se rendre à la mosquée chaque vendredi de 14 à 15 heures (CE 16 février 2004, Ahmed X.). En revanche, les agents publics peuvent bénéficier d'autorisations d'absence pour les principales fêtes de leur religion. Le dispositif est aménagé sous la forme de notes de service du ministre, indiquant pour chaque religion les fêtes pouvant faire l'objet d'autorisations. Mais l'octroi de l'autorisation n'est pas de droit, le chef de service apprécie si l'absence est « *compatible avec le fonctionnement normal du service* ». Le code du travail est quant à lui silencieux sur ces questions, en sorte qu'il n'existe aucune obligation pour l'employeur.

— **Objection de conscience religieuse de l'employé:** Dans le secteur public, l'agent ne peut refuser d'accomplir, pour des motifs religieux, une des tâches qui lui sont confiées. La loi ne reconnaît que de façon très marginale le droit à l'objection de conscience, par exemple au bénéfice des médecins qui refusent de pratiquer des interruptions de grossesse. Dans le secteur privé, la Cour de cassation a considéré, à propos d'un salarié d'un magasin d'alimentation affecté au rayon boucherie qui refusait d'être en contact avec de la viande de porc, que « *si l'employeur est tenu de respecter les convictions religieuses de son salarié, celles-ci, sauf clause expresse, n'entrent pas dans le contrat de travail et l'employeur ne commet aucune faute en demandant au salarié d'exécuter la tâche pour laquelle il a été embauché dès l'instant que celle-ci n'est pas contraire à une disposition d'ordre public* » (Cass. Soc. 24 mars 1998). Autrement dit, les modalités de la prise en compte des convictions religieuses pourront être définies par voie contractuelle.

**c) Fondements de cette approche: liberté de religion, égalité et non-discrimination, autre?**

Dans le secteur public, le régime applicable aux agents repose sur un fondement de laïcité et de non-discrimination. Dans le secteur privé, le régime applicable aux salariés est plus libéral, il repose sur un fondement de non-discrimination et de liberté de religion.

**d) Influence de la Cour européenne des droits de l'Homme sur le droit français**

L'influence de la jurisprudence de la Cour européenne des droits de l'Homme dans le domaine des rapports de travail est moindre que dans d'autres domaines, pour la simple raison que la jurisprudence européenne a relativement peu investi le champ des relations professionnelles. Il reste que le législateur comme le juge français sont attentifs aux exigences de la Cour européenne. Il n'y avait pas en 2000 de précédent européen à l'avis du Conseil d'Etat interdisant aux agents publics le port de signes d'appartenance religieuse (Marteau, 2000), mais la question était en débat (Dahlab, 2001), et le Conseil d'Etat tout en rendant une décision ferme

avait la conviction de rester dans les limites de la Convention européenne. Dans la décision Ebrahimian c/ France du 26 novembre 2015, la Cour a finalement validé la conception française de la neutralité de la fonction publique, interdisant le port de tout signe d'appartenance religieuse dans l'exercice de ses fonctions. Quant au Code du travail, il formule en matière de restriction à la liberté de religion les exigences de justification légitime et de proportionnalité qui sont au fondement de la Convention elle-même.

## II. LES MINISTRES DU CULTE

Il n'existe pas en droit français de « *statut général* » de ministre de culte fixé par l'Etat. Le principe de laïcité exige en ce domaine une réserve de l'Etat. Chaque culte s'organise librement et organise le statut de ses ministres. La situation particulière des personnels religieux est cependant prise en compte par les différentes branches du droit sans que les qualifications retenues par l'une des branches ne soient applicables à l'autre. La qualification d'un ministre du culte en droit fiscal ne poursuit pas la même finalité qu'en droit social.

### **L'exclusion du contrat de travail**

En droit français, à l'exception des ministres des cultes statutaires des départements du Rhin et de la Moselle, des ministres du culte catholique rémunérés par le département de Guyane et des aumôniers de l'armée, des établissements pénitenciers et hospitaliers rémunérés par une personne publique, la relation juridique entre un ministre du culte et l'autorité cultuelle n'est pas formellement qualifiée. La jurisprudence considère qu'une activité religieuse fondée sur un engagement spirituel ne peut par elle-même être analysée comme un contrat de travail. Ni le pasteur, ni le prêtre ne concluent de contrat de louage avec respectivement une association cultuelle ou un évêque, pour l'exercice de leur fonction spirituelle (Cass. Ch. civ. 23 avril 1913 et 24 décembre 1912). Dans ce cas, le juge, respectueux du principe de neutralité, refuse de qualifier les liens résultant de la constitution de la religion concernée dès lors que font défaut les éléments objectifs ou subjectifs du contrat de travail: absence de lien de subordination, activité sans caractère professionnel, intention des parties de donner à l'activité une autre qualification que celle de contrat de travail en raison de l'objet spirituel de l'engagement.

### **Les exceptions à l'exclusion du contrat de travail**

Un contrat de travail peut cependant être formellement conclu entre des personnels exerçant une activité cultuelle ou pastorale et des autorités cultuelles. Le droit du travail s'applique alors. L'Église catholique et le culte israélite ont notamment retenu cette solution pour les laïcs exerçant une fonction pastorale mais également le culte juif pour les ministres officiants concernés et pour certains rabbins.

Les laïcs exerçant de manière permanente des fonctions spirituelles et pastorales qui leur sont confiées par l'évêque par une lettre de mission sont titulaires d'un contrat de travail. Pour les religieux non clercs placés dans la même situation, le contrat de travail n'est pas retenu. En acceptant la fonction définie dans la lettre de mission le permanent de la pastorale assume une obligation contractuelle de fidélité à la foi et à la morale catholique en communion avec l'Église. Mais le licenciement pour perte de mission canonique ne pourra en toute hypothèse être admis que lorsque la mission confiée relève du seul domaine spirituel et dans le respect d'un certain nombre de standards: respect de la procédure, exactitude matérielle et absence d'abus de droit. Les modèles de lettre de mission et de contrats de travail sont établis par la conférence des évêques de France. Plusieurs diocèses parisiens ont conclu des conventions collectives avec les représentants des salariés. L'Église catholique de France négocie depuis juin 2015 avec les représentants syndicaux de ses 12.000 salariés. L'objectif de cette négociation est de constituer une branche professionnelle en vue d'améliorer sa politique de ressources humaines. Mais l'ouverture de cette possibilité n'ouvre pas un droit à option pour le ministre du culte ou le culte concerné qui pourraient alors décider de se placer dans le cadre du contrat de travail. Au contraire dans un arrêt récent la cour de cassation estime qu'un ministre du culte protestant et donc a fortiori un ministre du culte catholique ne relève pas du droit du travail (Cass sociale, 28 avril 2011, n 09-72.721). Cette analyse a été étendue aux imams (Cass soc., Achour c/ Association culturelle et culturelle de la communauté musulmane de l'agglomération d'Annecy). Par contre les ministres du culte des autres religions sont en principe regardés comme étant liés à leur organisation religieuse par un contrat de travail dès lors que celle ci n'est pas une association culturelle légalement établie (Cass sociale, 12 juillet 2005, n 03-43.354, Cavalie c/ Mission populaire évangélique de France). La même règle est appliquée aux rabbins.

### **L'exercice d'une activité profane par un ministre du culte**

La qualité de ministre du culte, son état au regard de la discipline de sa religion d'appartenance, n'exclut pas l'exercice d'une activité professionnelle dans une entreprise profane. Dans ce cas il conclut un contrat de travail et est soumis au même régime juridique que les autres salariés. Le fait qu'un prêtre catholique devienne salarié dans le secteur commercial ou industriel en raison de ses motivations spirituelles, c'est le cas des prêtres ouvriers ou, prêtres au travail ne change rien à l'autonomie juridique du clerc qui entre ainsi « *dans l'ordre civil selon le droit commun des conventions* ». Les religieuses qui dans l'exercice de leur liberté individuelle ont accepté une règle de vie excluant le contrat de travail et qui sont engagées par un établissement notamment hospitalier peuvent être placées sous le régime d'une double convention conclue par la congrégation. La première s'applique aux membres que la congrégation s'engage à entretenir, la seconde met les religieuses à disposition de l'établissement en l'absence de contrat de louage conclu individuellement par les

religieuses avec l'établissement. Mais l'existence de ces conventions particulières en diminution en raison notamment de l'effondrement des vocations religieuses, n'exclut pas par principe la possibilité de conclure un contrat de travail dès lors qu'il existe un lien direct entre la religieuse et l'hôpital. L'existence de vœux canoniques n'a pas une influence décisive dans ce cas. De même le statut canonique d'un prêtre ou d'un religieux ne fait pas obstacle à la signature d'un contrat de travail avec un établissement d'enseignement privé catholique. Leur engagement envers l'institution éducative est personnel et concerne une activité profane distincte de l'activité sacerdotale<sup>1</sup>. Enfin les personnels culturels qui exercent une activité religieuse dans un organisme profane et sont rémunéré par lui concluent en règle générale un contrat de droit public ou de droit privé. Ainsi les aumôniers rémunérés sont au regard de l'établissement ou de l'administration d'affectation dans une situation conventionnelle ou réglementaire qui s'identifie à un louage de service. Dans tous les cas de figure pour les aumôniers des établissements publics et de l'armée, il s'agit d'une relation de droit public: contrat de droit public pour les aumôniers militaires (CE, 7 septembre 2007, n 306521, Poinard) et les aumôniers des hôpitaux publics (TA Montpellier, 22 mai 1978, Pont c/ Centre hospitalier régional de Montpellier) et acte de nomination pour les aumôniers de prisons qui ne sont pas salariés mais indemnisés (CE, 7 mai 1997, n 152601, Garde des sceaux, Ministère de la Justice c /Dodu). Ces personnels accomplissent librement leur mission spirituelle mais se trouvent dans un rapport de dépendance administrative d'employé à employeur à l'égard de l'établissement public ou de l'administration dont ils sont rémunérés. Lorsqu'il n'existe pas de lien de subordination entre le ministre du culte et l'établissement –une indemnité peut par exemple être directement versée à l'évêque qui envoie une personne mandatée– l'aumônier n'étant pas dans ce cas pas lié par un contrat de travail (Cass sociale, 17 nov 1971, Tours c / Groupement hospitalier de Gaillac)

Les pasteurs de l'Eglise protestante unie de France, les rabbins du consistoire central et les officiers de l'armée du salut sont affiliés au régime général d'assurance maladie et vieillesse. L'existence d'un contrat de travail n'est plus dans le cadre de l'article L 311-2 du Code de la sécurité sociale une condition d'affiliation. En principe les ministres du culte catholique et les membres des congrégations religieuses occupant une fonction culturelle, pastorale ou spirituelle dans leur culte ou congrégation sont affiliés à la CAMAVIC (Caisse d'assurance maladie et vieillesse des cultes). La grande majorité des affiliés sont en fonction dans une institution de l'Eglise catholique. Des pasteurs de la Fédération évangélique de France, des prêtres orthodoxes et anglicans, des religieux bouddhistes et des imams relèvent également de ce régime.

<sup>1</sup> Traité de droit français des religions, dir F MESSNER, PH PRELOT, JM WOEHRLING, Paris Lexis Nexis, 2013, p 1617-1634.

## Les ministres des cultes statutaires en droit local alsacien mosellan

Le statut des autorités, ministres et employés des secrétariats des quatre cultes statutaires des départements du Rhin et de la Moselle est fixé par une loi locale du 15 novembre 1909 (ministres du culte) et par une loi locale du 20 mai 1911 (employés des secrétariats). Ces personnels au nombre de 1393 en 2015 sont rémunérés par le Ministère de l'Intérieur selon des tableaux de classement hiérarchique des grades et emplois des personnels de l'Etat. Les ministres du culte et les employés des secrétariats qui n'ont pas la qualité de fonctionnaires sont des agents de droit public *sui generis*. En raison de leur statut particulier, les ministres des quatre cultes statutaires relèvent d'un régime particulier d'assurance maladie (décret 19 janvier 1951) dont l'organisation est réglée par référence au régime des fonctionnaires. Ce régime ouvre droit aux prestations en nature de l'assurance maladie, longue maladie, maternité et invalidité. Les personnels en activité ne sont pas couverts pour les risques accidents de travail. Les cotisations sont équivalentes à celles versées par les fonctionnaires. Les prêtres étrangers non ressortissant de l'Union européenne, rémunérés par le Ministère de l'intérieur sous la forme d'une indemnité ainsi que les ministres des cultes non statutaires peuvent s'affilier à la CAMIVAC créée par une loi du 1er janvier 1978.

La loi locale de 1909 fixe également le régime de pension de retraite des ministres des cultes statutaires et des employés des secrétariats des autorités religieuses rémunérés par l'Etat. Il s'agit d'un régime spécial acquis sans cotisation. Il n'y a pas d'âge légal pour bénéficier du droit à pension. Les ministres du culte et autres personnels assimilés sont mis à la retraite quand ils ne sont plus en capacité d'exercer leur ministère physiquement ou intellectuellement. Les autorités religieuses sont souveraines: la mise à la retraite est prononcée par l'autorité qui est compétente pour destituer le ministre du culte. Elles prennent leur décision en leur âme et conscience. Les diocèses de Strasbourg et de Metz sont confrontés depuis les années 1970 à une chute brutale des vocations sacerdotales qui a entraîné la diminution du nombre de vicaires affectés aux paroisses, la vacance de nombreuses paroisses. Suite au Concile Vatican II qui a valorisé le rôle des laïcs dans l'Eglise et leur a donné accès à des ministères qualifiés de non ordonnés (Décret sur l'apostolat des laïcs, 18 novembre 1965), l'évêque de Strasbourg a sollicité auprès du gouvernement l'autorisation de recruter des laïcs « *placés en service pastoral* » sur des postes vacants de vicaires. Le Ministère de l'intérieur a donné une suite favorable à cette demande et autorise depuis 1976 les évêques de Strasbourg et de Metz à recruter des laïcs sur des postes vacants de vicaires et de desservants. Actuellement 230 laïcs rémunérés en tant que vicaires ou desservants sont au service du seul diocèse de Strasbourg pour un total de 459 prêtres en activité. Ces personnels relèvent du statut de droit public fixé par la loi locale du 15 novembre 1909 pour les ministres des cultes statutaires. En raison de leur caractère dérogatoire, les nominations de laïcs sur des postes vacants de ministres du culte sont cependant soumis à une procédure d'agrément alors que les prêtres

sont librement nommés par l'évêque sur les postes de desservant et de vicaires<sup>2</sup>. Les conjoints veufs de laïcs placés en service pastoral ont droit à une pension de réversion (TA Strasbourg, 14 novembre 2012). Une réflexion menée dans le cadre des assises du droit local en 2013<sup>3</sup> a mis en évidence le décalage entre le statut des ministres des cultes statutaires et celui des agents publics. La plupart des dispositions dont bénéficient les agents publics n'ont pas été étendues aux ministres des cultes et personnels assimilés des cultes statutaires rémunérés par le ministère de l'Intérieur: indemnité de garantie individuelle de pouvoir d'achat (GIPA), congés pour raison médicale, congés pour événements familiaux, Compte épargne temps, temps partiel. Cette situation engendre des demandes contradictoires oscillant entre une plus grande liberté des autorités religieuses dans la gestion des ministres du culte rémunérés par le ministère de l'Intérieur et leur assimilation pure et simple aux agents publics. Les responsables notamment de la communauté israélite sont en faveur d'un changement de paradigme et préconisent l'instauration d'un cadre permettant aux autorités religieuses d'agir en matière de gestion des personnels. Les personnels culturels devraient selon eux être directement gérés par les établissements publics du culte. Les supports budgétaires de rabbins et de grands rabbins pourraient être remplacés par une dotation globale versée par l'Etat à charge pour les consistoires de rémunérer ces personnels en tant qu'agents publics qui seront sanctionnés, promus et mis à la retraite conformément au droit commun, avec quelques aménagements spécifiques. Les autorités des cultes protestants partagent la même position concernant ce dernier point. Il importe pour eux que les cultes puissent promouvoir librement les meilleurs éléments. Si l'ensemble des cultes statutaires souhaite bénéficier pour leurs ministres de certains avantages, comme la GIPA et les congés formation, il n'en va pas de même pour le temps partiel. Les autorités religieuses sont dans ce cas partagées entre une vision professionnelle et une conception sacrale de la fonction de ministre du culte jugée peu compatible avec l'application du temps partiel.

### III. AUTONOMIE DES RELIGIONS ET DROITS HUMAINS DES SALARIÉS

En France comme dans les divers pays de l'Union européenne, sous le terme de liberté religieuse il convient de comprendre d'une part la liberté religieuse individuelle qui est la liberté de conscience et de pratique d'un culte pour chacun, mais aussi la liberté religieuse collective, c'est-à-dire le droit pour une religion d'avoir son organisation, ses propres instances et ses groupements qui peuvent prendre diverses formes. C'est cette autonomie des religions que nous devons envisager ici. Notre

<sup>2</sup> Traité de..., *op. cit.*, p 1699-1713.

<sup>3</sup> F MESSNER, Rapport du groupe de travail sur le droit local des cultes et l'enseignement religieux, Strasbourg, 2013.

propos n'est pas d'étudier ces groupements, communautés, associations ou congrégations, questions qui ont été traitées au second point de cet exposé. Qu'il nous suffise de prendre en considération la possibilité pour les confessions religieuses d'être présentes dans des « *entreprises de tendance* », catégorie juridique qu'il importe de définir (a) car elle comporte quelques conséquences sur la condition tant des salariés que des cadres et dirigeants (b)<sup>4</sup>.

#### a) La notion d'entreprise de tendance en droit français

Nous avons vu que le droit français garantit la liberté religieuse du salarié au sein de l'entreprise, liberté la plus large possible avec néanmoins des limites posées afin d'assurer le bon fonctionnement de l'entreprise. Parallèlement, est interdite toute discrimination religieuse qui pourrait intervenir dans l'entreprise, lors de l'embauche ou par la suite. Tels sont les principes fondamentaux du droit commun. Néanmoins, le salarié se trouve dans une situation particulière lorsqu'il travaille au sein de ce que l'on qualifie « *l'entreprise de tendance* ». De fait, dans une entreprise de tendance, le droit que possède le salarié pour exprimer, manifester, pratiquer sa religion obéit à des règles spécifiques qui elles-mêmes répondent aux exigences posées par la nature même de l'entreprise en question.

Une entreprise de tendance est celle qui affirme expressément et publiquement une orientation idéologique, spirituelle, philosophique, politique ou autre, qui est formellement adoptée et exprimée. Ph. Waquet la définit comme celle dans laquelle « une idéologie, une morale, une philosophie ou une politique est expressément prônée. Autrement dit, l'objet essentiel de l'activité de ces entreprises est la défense et la promotion d'une doctrine ou d'une éthique »<sup>5</sup>. Pour ce qui nous intéresse ici, l'entreprise de tendance religieuse est donc celle qui affiche son attachement à une religion spécifique. La référence et la fidélité à cette religion sont des éléments essentiels de l'entreprise, de son identité et de sa constitution proprement dite. La dimension religieuse conditionne l'organisation et le mode de fonctionnement de l'entreprise. L'existence de telles entreprises n'est pas propre à la France, mais leur régime juridique peut paraître plus incertain dans le droit français que dans d'autres États (l'Allemagne par exemple). De fait, aucun texte normatif du droit français n'envisage cette catégorie. Doter formellement certaines entreprises ayant une orientation religieuse d'un statut spécifique n'est guère conforme à l'esprit général du droit français des religions. Pourtant, si le droit ne « reconnaît » aucune religion, on sait qu'il

<sup>4</sup> Ces questions sont parfaitement exposées dans *le Traité de droit français des religions*, dir. F. MESSNER, P.-H. PRÉLOT, J.-M. WOEHRLING, 2.<sup>e</sup> éd., Paris, LexisNexis, 2<sup>e</sup> éd. 2013, p. 1211 sq.

<sup>5</sup> Ph. WAQUET, « Loyauté du salarié dans les entreprises de tendance », *Gazette du Palais*, 1996, p. 1427.

en « connaît » plusieurs. Grâce à ces subtilités juridiques, les entreprises de tendance « religieuses » trouvent une place dans notre système juridique.

La seule loi méritant d'être mentionnée est celle du 31 décembre 1959, dite loi Debré, organisant les rapports entre les établissements d'enseignement privé confessionnels et l'État. Sous certaines conditions, ces établissements peuvent passer avec l'État des contrats, leur permettant d'obtenir de très confortables financements publics. La loi précise que, dans ces contrats, l'État reconnaît à l'école un « caractère propre » qu'il s'engage à respecter et faire respecter.

Si le législateur n'a donné que peu d'écho au concept, la jurisprudence française s'est montrée plus ouverte à cette notion. De fait, depuis les années 1990, plusieurs arrêts concordants de la Cour de Cassation ou du Conseil d'État recourent à des expressions telles que « finalité propre », « caractère propre », et fondent leurs décisions sur l'obligation qui s'impose de respecter ces données.

La France crée ainsi son propre système. Celui-ci n'est pas en contradiction avec le droit de l'Union européenne, bien qu'il ne tire toutefois pas toutes les conséquences possibles de l'importante directive européenne n° 2000 / 78 CE (27 novembre 2000). Cette directive autorise les États (et les encourage) à adopter des dispositions en vertu desquelles, dans des organisations professionnelles d'Église ou fondées sur une religion, un régime spécifique peut être instauré; notamment, si l'engagement religieux du personnel apparaît comme une condition de la bonne marche de l'ensemble de l'organisation, il est possible d'exiger un tel engagement. Cette partie de la directive n'a pas trouvé d'écho direct dans les lois françaises. En particulier, elle n'est pas reprise dans la loi du 16 novembre 2001 relative à la lutte contre les discriminations au travail, loi qui se proposait pourtant d'adopter largement les dispositions de l'ensemble de la directive de novembre 2000. Toutefois, la loi du 27 mai 2008, dans son article 6 inséré au code du Travail (L.113-1), précise qu'il n'y a pas discrimination lorsque des « *différences de traitement répondent à une exigence professionnelle essentielle et déterminante et pour autant que l'objectif soit légitime et l'exigence proportionnée* ».

Une affaire récente, largement commentée dans la presse pour les questions de fonds qu'elle soulevait, illustre les limites que le juge entend donner à la notion d'entreprise de tendance. De fait, dans l'arrêt Association Baby-Loup, du 16 juin 2014<sup>6</sup>, la cour de Cassation pourrait paraître apporter quelques précisions dans la définition de cette catégorie juridique. Une partie de l'argumentation visant à établir le caractère non abusif du licenciement de l'aide maternelle voilée consistait à soutenir que la crèche en question était une entreprise de conviction. Selon cette argumentation, la laïcité et la neutralité confessionnelle seraient des valeurs, des idéologies, consti-

<sup>6</sup> Sur cette affaire, cf. supra, I.

tutives de l'entreprise de tendance. La thèse visait à établir l'existence d'entreprise de tendance laïque. La Cour de Cassation a rejeté l'argument, considérant que le respect du pluralisme religieux correspond à une mission d'intérêt général et n'est pas constitutif d'une entreprise de tendance. La laïcité ne fonde pas une éthique dont une entreprise pourrait se prévaloir pour acquérir une telle qualification. Ce faisant, le raisonnement de la cour de Cassation est avant tout une confirmation de la valeur du principe de laïcité, principe général applicable à l'ensemble de la société et du droit français; il serait inexact de voir dans cet arrêt une limitation de la définition d'une entreprise de tendance par refus de créer une nouvelle catégorie d'entreprise de tendance laïque. En effet, l'entreprise de tendance se caractérise justement par la dérogation au droit commun et la Cour de Cassation s'est bornée à rappeler que la laïcité est le droit commun.

Constatons qu'avec précautions et nuances le droit français admet l'existence d'entreprises de tendance et admet que celles-ci puissent être caractérisées par une orientation spécifique, notamment religieuse. Si la catégorie juridique existe, les modalités de fonctionnement de l'entreprise et la condition des salariés obéissent à des règles juridiques particulières.

#### **b) Des règles dérogatoires au droit commun, applicables aux salariés et aux dirigeants d'une entreprise de tendance**

b-1°-Une obligation de loyauté s'impose au salarié. Afin de protéger le caractère propre de l'entreprise, les responsables sont en droit d'exiger des salariés qu'ils s'abstiennent de critiquer ou de contredire ouvertement l'orientation religieuse de l'entreprise. Cette obligation est plus ou moins contraignante pour le salarié, selon, d'une part, la place qu'il occupe au sein de l'institution et, d'autre part, l'engagement religieux plus ou moins complet de celle-ci.

Ce devoir de loyauté est en principe expressément inscrit dans le contrat de travail et, tout au moins, connu sans ambiguïté par le salarié dès son embauche. Lors de l'entretien d'embauche, l'employeur peut demander au salarié de veiller à promouvoir les valeurs qui constituent le fondement même de l'entreprise. L'employeur est aussi en droit de se renseigner sur la religion du candidat à l'emploi et sur sa pratique de cette religion. Il n'y a pas ici discrimination à l'embauche ou atteinte à la vie privée, dès lors que ces informations sont nécessaires à connaître pour assurer la bonne marche de l'entreprise. Pour fonder sa propre opinion, l'employeur tient compte de la dissociation qui peut exister chez nombre d'individus entre appartenance à une confession religieuse et adhésion par leur comportement aux valeurs de cette confession.

Par la suite, un changement de conduite du salarié et la distance qu'il prendrait par rapport à la religion peuvent constituer un motif légitime de licenciement. Cette question donne lieu à divers conflits et il revient aux tribunaux d'apprécier la réalité

du préjudice causé à l'entreprise par ces éventuels manques de fidélité à l'orientation voulue.

Cette exigence de loyauté est souvent inscrite dans un règlement intérieur, en des termes parfois précis et détaillés. Les précautions de rédaction du règlement ou du contrat permettent de limiter les conflits ultérieurs.

L'exigence de loyauté, dans la parole comme dans la conduite du salarié, pèse sur lui, non seulement dans l'entreprise et pendant son temps de travail, mais aussi en dehors de ce cadre. Dans un arrêt célèbre (Dame Roy, 19 mai 1978), la Cour de Cassation avait estimé, il y a près de quarante ans, que n'était pas abusif le licenciement d'une institutrice d'école privée catholique qui avait divorcé et s'était remariée. D'autres arrêts ont confirmé cette jurisprudence. Dans le même esprit, la Cour de Cassation (arrêt Fischer 20 novembre 1986) avait estimé que, même lorsqu'il existe un contrat de travail, le salarié doit, dans sa vie personnelle et non pas seulement dans l'exercice de ses fonctions professionnelles, agir « en communion de pensée et de foi avec l'employeur ».

Néanmoins, dans une affaire différente et moins ancienne (arrêt Painsecq du 17 avril 1991), la Cour de Cassation a considéré abusif le licenciement d'un sacristain homosexuel qui exerçait ses fonctions dans le cadre de l'association Fraternité Saint Pie X. Les juges ont abandonné la notion de « communion de pensée » et se sont attachés à la nature même des fonctions assurées - celles de sacristain - qui ne sont pas en lien direct avec la pratique immédiate du culte. Ils ont considéré qu'il n'y avait pas, en l'espèce, « trouble objectif » au bon fonctionnement de l'entreprise de tendance.

C'est essentiellement le principe de proportionnalité qui guide le juge, mais son application nécessite une appréciation qui ne peut se faire qu'au cas par cas: un fait ne peut être reproché au salarié que s'il constitue un trouble dans l'entreprise compte tenu de la nature des fonctions confiées et du caractère de l'entreprise; parallèlement, les limites posées à la liberté individuelle de l'employé doivent rester proportionnées à l'objectif de l'entreprise et à la nature des fonctions.

b-2°-Si des obligations sont à la charge du salarié, d'autres pèsent sur l'employeur.

Celui-ci est tenu d'indiquer au salarié le caractère de l'entreprise et les contraintes qui seront les siennes, et ceci dès l'entretien d'embauche. Puisque l'entreprise possède un caractère confessionnel expressément affiché, l'employeur devra, tout au long de la durée du contrat, faire droit aux demandes d'exercices des pratiques religieuses présentées par le salarié, dès lors que ces requêtes seront conformes au droit et aux rites propres à la religion en cause. Dans le même esprit, il doit également maintenir la tendance de l'entreprise; dans l'hypothèse où il l'abandonnerait ou la modifierait, le salarié serait en droit de le lui reprocher et de quitter l'entreprise. Le patron serait tenu pour responsable de la rupture du contrat.

Pourtant, ni l'employeur ni le salarié ne peuvent invoquer le caractère propre pour se soustraire aux dispositions d'ordre public ou de sécurité.

Dans ce cadre général, la jurisprudence tranche au cas par cas, pour concilier la protection due aux religions, aux entreprises, ainsi qu'aux salariés.

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# GERMAN NATIONAL REPORT

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## I. RELIGIOUS FREEDOM AT WORK

*(a) What are the key instruments or sources of law on religious freedom at work in your country? What are the key elements of this law? How is religion defined? Are nonreligious beliefs protected?*

### Key instruments

The Basic Law of the Federal Republic of Germany of 23 May 1949 (“Grundgesetz”) deals with religion in two different parts. Freedom of religion is dealt with in article 4 (“Freedom of Faith and Conscience”). Furthermore, the provisions regulating the relation between church and state of the 1919 Weimar Constitution (“Weimarer Reichsverfassung”) were incorporated by means of article 140 Basic Law. Articles 136-41 of the Weimar Constitution thus form an “integral part” of the text of the constitution. The relevant provisions (Articles 136-7 Weimar Constitution) are included as an annex to this report.

Finally, at the constitutional level there are non-discrimination provisions which bar discrimination on religious grounds (article 3(3) (“equality before the law”) and 33(3) Basic law, regarding equal access to civil service). Again, the provisions are included in the annex to this report.

In order to transpose several EU non-discrimination directives, the General Act on Equal Treatment (“Allgemeines Gleichbehandlungsgesetz”) was passed in 14 August 2006<sup>1</sup>. This act extends the prohibition of discrimination to horizontal settings, i.e. also labour relations. Its general aim is to “prevent or to stop discrimination on the grounds of race or ethnic origin, gender, *religion or belief*, disability, age or sexual

<sup>1</sup> Federal Law Gazette I, 2006 (no. 39 of 17 August 2006), p. 1897.

orientation” (section 1). In that regard, the General Act on Equal Treatment applies to a number of work-related situations, as provided for in section 2(1):

For the purposes of this Act, any discrimination within the meaning of Section 1 shall be inadmissible in relation to:

1. Conditions for access to dependent employment and self-employment, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of professional hierarchy, including promotion;

2. Employment conditions and working conditions, including pay and reasons for dismissal, in particular in contracts between individuals, collective bargaining agreements and measures to implement and terminate an employment relationship, as well as for promotion;

3. Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

4. Membership of and involvement in an organisation of workers or employers or any organisation whose members carry on a particular profession, including all benefits provided for by such organisations;

5. Social protection, including social security and health care;

6. Social advantages; [...]

However, section 9 of the said General Act on Equal Treatment stipulates an exception with regard to employees of religious communities (“Permissible difference of treatment on grounds of religion or belief”):

(1) Notwithstanding Section 8 [i.e. difference in treatment on grounds of “occupational requirements”], a difference of treatment on the grounds of religion or belief of *employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief*, shall not constitute discrimination where such grounds constitute a *justified occupational requirement* for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity.

(2) The prohibition of different treatment on the grounds of religion or belief shall be without prejudice to the right of the religious community referred to under Section 1, the facilities assigned to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, to require individuals working for them *to act in good faith and with loyalty to the ethos of the organisation*.

#### Definition of “religion”

In its early jurisprudence, the Federal Constitutional Court operated with a formula which has become known as the “Kulturvölkerformel”. According to this approach only those religious beliefs were protected which had developed over time “among civilised

peoples on the basis of certain common moral and ethical principles”<sup>2</sup>. Today, this formula has been abandoned and the Constitutional Court follows a broad concept according to which a certain holistic view is sufficient in order to speak of religion or belief<sup>3</sup>. Also, the Court puts great emphasis on the self-perception of the religion concerned. This approach was formed in the 1968 judgment in the *Rag Collection* (“Lumpensammler”) case:

“In determining what is to be regarded as the free exercise of religion, we must consider the self-image of the religious or ideological community. Indeed, the state, which strives to remain neutral in religious matters, must interpret basic constitutional concepts in terms of neutral, generally applicable viewpoint, and not on the basis of viewpoints associated with a particular confession or creed. Yet, in a pluralistic society in which the legal order considers the religious or ideological self-image of the individual as well as the self-image of those performing rituals associated with a particular belief, the state would violate the independence of ideological associations and their internal freedom to organize accorded by the constitution if it did not consider the ways these associations see themselves when interpreting religious activities resulting from a specific confession or creed.”<sup>4</sup>

The importance of the self-definition given by the community concerned was confirmed in a number of later judgments. Notably the decision on the *Bahá’í Religious Community*<sup>5</sup> but also decisions relating to the Islamic headscarf<sup>6</sup> may

<sup>2</sup> Federal Constitutional Court, Decision of 8 November 1960, Case 1 BvR 59/56 (12 Reports of the Federal Constitutional Court [BVerfGE] 1 at 4).

<sup>3</sup> Federal Constitutional Court, Decision of 9 March 1994, Case 1 BvR 682, 712/88 (90 Reports of the Federal Constitutional Court [BVerfGE] 112 at 115).

<sup>4</sup> Federal Constitutional Court, Decision of 16 October 1968, Case 1 BvR 241/66 (24 Reports of the Federal Constitutional Court [BVerfGE] 236 at 247-8) (English translation taken from Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* [3rd edn., Duke University Press 2012], 542).

<sup>5</sup> „Dem örtlichen Geistigen Rat der Bahá’í Tübingen und den Gläubigen der Bahá’í-Gemeinschaft steht das Grundrecht aus Art. 4 Abs. 1 und 2 GG zu. Zwar können nicht allein die Behauptung und das Selbstverständnis, eine Gemeinschaft bekenne sich zu einer Religion und sei eine Religionsgemeinschaft, für diese und ihre Mitglieder die Berufung auf die Freiheitsgewährleistung des Art. 4 Abs. 1 und 2 GG rechtfertigen; vielmehr muß es sich auch tatsächlich, nach geistigem Gehalt und äußerem Erscheinungsbild, um eine Religion und Religionsgemeinschaft handeln. Dies im Streitfall zu prüfen und zu entscheiden, obliegt – als Anwendung einer Regelung der staatlichen Rechtsordnung – den staatlichen Organen, letztlich den Gerichten, die dabei freilich keine freie Bestimmungsmacht ausüben, sondern den von der Verfassung gemeinten oder vorausgesetzten, dem Sinn und Zweck der grundrechtlichen Verbürgung entsprechenden Begriff der Religion zugrundelegen haben. Im vorliegenden Fall braucht hierauf jedoch nicht näher eingetreten zu werden, da der Charakter des Bahá’í-Glaubens als Religion und der Bahá’í-Gemeinschaft als Religionsgemeinschaft nach aktueller Lebenswirklichkeit, Kulturtradition und allgemeinem wie auch religionswissenschaftlichem Verständnis offenkundig ist“; 83 Reports of the Federal Constitutional Court [BVerfGE] 341 at 353.

<sup>6</sup> Federal Constitutional Court, Judgment of 27 January 2015, Cases 1 BvR 471/10, 1 BvR 1181/10, para. 89 (reprinted in *Europäische Grundrechtezeitschrift* (2015), 181-204). Similarly, regard-

be mentioned. The example of the headscarf is pertinent because there is a debate within the Muslim community on whether or not the headscarf is mandatory for women<sup>7</sup>. German courts rightly refused to enter into this debate arguing that it is sufficient to have a certain group within a given community which considers a certain practice mandatory. Again the notion of self-definition, within certain requirements of plausibilisation, prevails<sup>8</sup>.

### Nonreligious beliefs protected

Article 4 expressly also protects non-religious beliefs. Similarly, already in 1919 the Weimar Constitution placed communities professing non-religious beliefs (“*Weltanschauungsgemeinschaften*”) on an equal footing with churches and other religious communities (Article 137(7) Weimar Constitution)<sup>9</sup>.

#### (b) Which manifestations of religious beliefs are protected?

In its 1972 judgment in the *Oath Refusal* (“*Eidesverweigerung*”) case, the Federal Constitutional Court described the patterns of behavior covered by the “freedom of faith” and the “freedom to profess a religious creed” contained in article 4(1) Basic Law:

“Religious freedom under article 4(1) guarantees the individual a legal sphere in which he may adopt the lifestyle that corresponds to his convictions. This encompasses not only the (*internal*) *freedom to believe* or not to believe but also the individual’s

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ing the practice of ritual slaughter, Federal Constitutional Court, Judgment of 15 January 2002, Case 1 BvR 1783/99 (104 *Reports of the Federal Constitutional Court* [BVerfGE] 337 at 353 f.); Federal Administrative Court, Judgment of 23 November 2000, Case 3 C 40/99 (112 *Reports of the Federal Administrative Court* [BVerwGE] 227 at 236).

<sup>7</sup> Hilal ELVER, *The Headscarf Controversy: Secularism and Freedom of Religion*, Oxford 2012; Nisar Mohammad bin Ahmad, *The Islamic and International Human Rights Law Perspectives of Headscarf: the Case of Europe*, 2 *International Journal of Business and Social Science* (2011) 161-72.

<sup>8</sup> Martin MORLOK, in Horst DREIER (ed.), *Kommentar zum Grundgesetz*, Art. 4 para. 92; Christian Starck, in von Mangoldt/Klein/Starck (eds.), *Kommentar zum Grundgesetz*, Art. 4 Abs. 1, 2, paras. 37 f.; Juliane Kokott, in Michael Sachs (ed.), *Kommentar zum Grundgesetz*, Art. 4, paras. 17, 63 ff; Federal Constitutional Court, Decision of 1 March 1978, Cases 1 BvR 333/75; 1 BvR 174/75; 1 BvR 178/75; 1 BvR 191/75 (47 *Reports of the Federal Constitutional Court* [BVerfGE] 327 at 385); Federal Constitutional Court, Decision of 24 September 2003, Case 2 BvR 1436/02 (108 *Reports of the Federal Constitutional Court* [BVerfGE] 282 at 298 f.).

<sup>9</sup> For details see Stefan KORIOTH, in Maunz/Dürig, *Kommentar zum Grundgesetz*, Art. 140 iVm Art. 137 WRV, para. 130; Stefanie SCHMAHL, in Helge Sodan (ed.), *Kommentar zum Grundgesetz*, Art. 140 iVm Art. 137 WRV, para. 15; Hans HOFMANN, in Bruno Schmidt-Bleibtreu/Hans Hofmann/Axel Hoppeauf, *Kommentar zum Grundgesetz*, Art. 140 para. 30; Dirk EHLERS, in Michael Sachs (ed.), *Kommentar zum Grundgesetz*, Art. 140 iVm Art. 137 WRV, para. 37; Martin MORLOK, in Horst Dreier (ed.), *Kommentar zum Grundgesetz*, Art. 140 iVm Art. 137 WRV, para. 126.

right to *align his or her behavior with precepts of faith and to act in accordance with internal convictions.*"<sup>10</sup>

The scope of article 4(2) Basic Law (free exercise of religion) has been further clarified in the 1968 *Rag Collection* judgment (see above):

"The fundamental right to the free exercise of religion (article 4(2) of the Basic Law) is included within the concept of freedom of belief. This concept – whether it concerns a religious creed or a belief unrelated to religion – embraces not only the personal freedom to believe or not to believe (i.e., to profess a faith, to keep it secret, to renounce a former belief and uphold another), but *also the freedom to worship publicly, to proselytize, and to compete openly with other religions.* To this extent the unfettered exercise of religion is merely a component of the freedom to believe accorded to individuals as well as denominational and ideological groups. At least since the Weimar Constitution the free exercise of religion has been merged with freedom of belief. The particular guarantee of the free exercise of religions secured in article 4(2) of the Basic Law against encroachments by the state can be explained historically. The right originated as a rejection of the disruptions of free religious exercise that occurred during the National Socialist rule. The historical development clearly shows that article 4(2) also protects the basic rights of associations. Their religious existence and right to engage in public activity are protected in a variety of forms and modes of participation."<sup>11</sup>

While there was and continues to be an intensive debate in legal doctrine on the issue of whether or not the generally open and broad approach towards freedom of religion as developed by the Federal Constitutional Court in the decisions of the 1960s and 1970s just mentioned needs a reevaluation in the light of the more recent developments concerning the role of religion in society, the Federal Constitutional Court only recently confirmed its approach in its second headscarf decision of spring 2015. Proposals for a reinterpretation relate for example to a stricter approach regarding the scope of protection of religious freedom. It is argued that the different rights mentioned in Article 4(1) and (2) Basic Law (freedom of faith, freedom of conscience, freedom to profess a religious or philosophical creed, undisturbed practice of religion) should be distinguished properly and not blended into an overall and general right to freedom of religion<sup>12</sup>. Furthermore, there are attempts to interpret Article 136(1) Weimar Constitution as a limitation for Article 4(1) and (2) Basic Law, which does

<sup>10</sup> Federal Constitutional Court, Decision of 11 April 1972, Case 2 BvR 75/71 (33 *Reports of the Federal Constitutional Court* [BVerfGE] 23 at 28) (English translation taken from Kommers & Miller, n. 4, 546).

<sup>11</sup> See above n. 4 (Kommers & Miller, 541).

<sup>12</sup> For instance Stefan MUCKEL, *Religiöse Freiheit und staatliche Letztentscheidung*, Berlin 1997, 125 ff.; Stefan Mückl, *Religionsfreiheit und Sonderstatusverhältnisse – Kopftuchverbot für Lehrerinnen*, *Der Staat* 40 (2001), 96 (101 ff.).

not in itself for such a limitation clause<sup>13</sup>. The Federal Constitutional Court, however, refused to follow these suggestions. It refused to transpose the limitation clause contained in Article 136(1) Weimar Constitution and sticks to the approach of the *Rag collection* case according to which the scope of religious obligations is primarily determined by the religious community concerned and not by the state and its courts<sup>14</sup>.

*(c) What is the rationale of the approach? Is it 'equality' or 'religious freedom' or both or is there some other foundation?*

In an overall perspective it would seem that both, equality and religious freedom are the sources for the general approach of the Federal Constitutional Court. While for a long time there was a certain accent on freedom of religion, which is, for instance, evidenced in the *Rag collection* case, today freedom of religion often serves also equality purposes. For example, the cases on the public law status of the community of Jehovah's Witnesses interpreted the public law status for religious communities in Article 137(5) Weimar Constitution (as incorporated by Article 140 Basic Law) as an instrument for ensuring freedom of religions<sup>15</sup>. While thus primarily arguing in terms of religious freedom the Court at the same time opened the public law status, which was until then practically limited to Christian Churches, also for small groups, including those which are some-times labelled as sects. The approach was later also applied regarding the Bahá'í thus opening the status for a religious group with a non-Christian background<sup>16</sup>. It should also be mentioned that in the more recent years non-discrimination on religious grounds has gained additional importance. For instance, in its most recent headscarf case, the Federal Constitutional Court considered a provision as discriminatory which banned religious clothing for teachers from the classroom in public schools while allowing for an exception for Christian-occidental symbols<sup>17</sup>.

*(d) What effect, if any, has the jurisprudence of the European Court of Human Rights had in the national approach?*

Concerning the general approach of the Federal Constitutional Court on issues of freedom of religion and church and state relation there has only been a very limited influence of the jurisprudence of the European Court of Human Rights. In fact, as

<sup>13</sup> Stefan MUCKEL, *Religiöse Freiheit und staatliche Letztentscheidung*, Berlin 1997, 225 ff.

<sup>14</sup> Federal Constitutional Court, Decision of 27 January 2015, Cases 1 BvR 471/10, 1 BvR 1181/10, paras 86, 98 (reprinted in *Neue Juristische Wochenschrift* (2015), 1359 ff.).

<sup>15</sup> Federal Constitutional Court, Judgment of 19 December 2000, Case 2 BvR 1500/97 (102 *Reports of the Federal Constitutional Court* [BVerfGE] 370 at 387).

<sup>16</sup> Federal Administrative Court, Decision of 28 November 2012, Case 6 C 8.12 (reprinted in *Neue Zeitschrift für Verwaltungsrecht* (2012), 943).

<sup>17</sup> Federal Constitutional Court, Decision of 27 January 2015, Cases 1 BvR 471/10, 1 BvR 1181/10, para 123 (reprinted in *Neue Juristische Wochenschrift* (2015), 1359 ff.).

can be seen from the dates of the decisions referred to above, the general lines of the jurisprudence of the Federal Constitutional Court in this area had been clarified before the European Court of Human Rights developed its own jurisprudence in the area. Also, until quite recently there had been few German cases in Strasbourg relating to freedom of religion or church and state relations.

Notwithstanding the largely autonomous general approach by the Federal Constitutional Court, it should be noted that in three cases of 2013 the European Court of Human Rights scrutinized the German approach to the position of employees in church-run or church-related institutions such as hospitals, kindergarten etc. In two of the three decisions the Strasbourg Court accepted the German decisions,<sup>18</sup> while in the third a violation of the employees' rights under Article 8 ECHR was determined<sup>19</sup>. These decisions led to a quite intense debate among German scholars on whether or not the overall approach of the German labour courts and the key decision of the Federal Constitutional Court which framed the approach of the labour courts were in line with the demands under the ECHR as determined by the European Court of Human Rights<sup>20</sup>. The overall assessment is that the general approach of the German courts is not in violation of the ECHR and that the violation in the *Siebenhaar* case was the result of the specific circumstances of the case rather than an indication for a structural problem. This assessment is confirmed by the non-violation result in the other two cases. It was also expressly voiced by the ECtHR itself in the *Schüth*-case<sup>21</sup>. While there are no reasons to doubt this general assessment, it nevertheless seems appropriate to stress that the three decisions by the ECtHR serve as a reminder that the individual human rights of the employees concerned need to be properly weighed when being balanced against the right to self-determination of the employing church.

<sup>18</sup> ECtHR, Judgment of 23 September 2010, Case 425/03 – *Obst vs. Germany*; and ECtHR, Judgment of 3 February 2011, Case 18136/02 – *Siebenhaar vs. Germany*.

<sup>19</sup> ECtHR, Judgment of 23 September 2010, Case 1620/03 – *Schüth vs. Germany*.

<sup>20</sup> Christian SPERBER, Arbeitnehmer von Religionsgemeinschaften und ihr Recht auf Achtung des Privat- und Familienlebens, *Europäische Zeitschrift für Arbeitsrecht* (2011), 407 ff.; Ulrich HAMMER, Europäische Wende im kirchlichen Arbeitsrecht?, *Arbeit und Recht* (2011), 278 ff.; Martin PLUM, Kirchliche Loyalitätsobliegenheiten im Lichte der Rechtsprechung des EGMR, *Neue Zeitschrift für Arbeitsrecht* (2011), 1194 ff.; Jacob JOUSSEN, Die Folgen des Mormonen- und des Kirchenmusikerfalls für das kirchliche Arbeitsrecht in Deutschland, *Recht der Arbeit* (2011), 173 ff.; Christoph GRABENWARTER/Katharina PABEL, Das kirchliche Arbeitsrecht vor dem Europäischen Gerichtshof für Menschenrechte, *Kirche und Recht* (2011), 55 ff.; Hermann REICHOLD, Das deutsche Arbeitsrecht der Kirchen im Fokus des Europäischen Gerichtshofs für Menschenrechte, *Europäische Zeitschrift für Arbeitsrecht* (2011), 320 ff.

<sup>21</sup> Para 68: „The Court further observes that, by characterising the applicant's conduct as a serious breach within the meaning of Article 5 § 2 of the Basic Regulations, the employment tribunals regarded the employing Church's view as decisive in this connection and that, according to the Federal Employment Tribunal, the applicant's contrary opinion was not supported by the Basic Regulations or any other ecclesiastical provisions. *It finds that this approach does not in itself raise a problem with regard to its case-law* (see paragraph 58 above). “– emphasis added.

There was a certain tendency among German labour courts to have the position of the churches prevail. The Strasbourg jurisprudence thus underlines what the German Federal Constitutional Court had already said regarding these cases, namely that the balancing must take account of the individual specificities of each single case<sup>22</sup>.

## II. RELIGIOUS MINISTERS AND LABOUR LAW

(a) *What is the definition of religious minister according to the secular law of your country?*

There is no explicit definition of the term, religious ministers“for the purpose of (religious) labour law. However, the term religious ministers (in German: *Geistliche*) is regularly used in other settings to describe special rules applicable to clerics, priests and certain other employees of religious communities.

A specific example of this kind of special status concerns the right for religious ministers to refuse to give evidence or testimony<sup>23</sup>. In that context, the need to clarify the notion of religious minister arose. Due to its broad wording, the term “religious minister” is considered to encompass, in principle, members of all religious communities, whatever their form of organisation<sup>24</sup>.<sup>24</sup> Furthermore, German criminal courts adopt a broader notion than the internal definition given by many religious communities. The courts focus on the specific function of “pastoral care” (German *Seelsorge*). Thus, the term has been extended to non-ordained members of prison ministries<sup>25</sup>. Generally, in order to be considered a religious minister in this sense, employees of religious communities have to be mandated (full-time or part-time) with

<sup>22</sup> Christian WALTER, *Kirchliches Arbeitsrecht vor den Europäischen Gerichten*, 57 *Zeitschrift für evangelisches Kirchenrecht* (2012), 233 at 241 f.

<sup>23</sup> See notably section 139(2) Penal Code („Ein Geistlicher ist nicht verpflichtet anzuzeigen, was ihm in seiner Eigenschaft als Seelsorger anvertraut worden ist.“); section 53(1) Criminal Procedure Code („Zur Verweigerung des Zeugnisses sind ferner berechtigt: 1. Geistliche über das, was ihnen in ihrer Eigenschaft als Seelsorger anvertraut worden oder bekanntgeworden ist; [...]“); similarly section 383(1) no 4 Civil Procedure Code and section 102(1) General Tax Code („Die Auskunft können ferner verweigern: 1. Geistliche über das, was ihnen in ihrer Eigenschaft als Seelsorger anvertraut worden oder bekannt geworden ist, [...]“).

<sup>24</sup> Federal Court of Justice (Criminal Matters), Judgment of 15 April 2010, Case 4 StR 650/09, paras. 14-21 (reprinted in *Neue Zeitschrift für Strafrecht* (2010) 646-9).

<sup>25</sup> Federal Court of Justice (Criminal Matters), Decision of 15 November 2006, Case StB 15/06, paras. 6, 9 (51 *Reports of the Federal Court of Justice in Criminal Matters* [BGHSt] 140-44); upheld by the Federal Constitutional Court, Decision of 27 January 2007, Case 2 BvR 26/07, paras. 12-13 (reprinted in 10 *Reports of Chamber Decisions of the Federal Constitutional Court* [BVerfGK] 216-27). See also Heinrich de Wall, *Der Schutz des Seelsorgegeheimnisses (nicht nur) im Strafverfahren*, *Neue Juristische Wochenschrift* (2007), 1856-9; Federal Court of Justice (Criminal Matters), Decision of 20 July 1990, Case StB 10/90 (37 *Reports of the Federal Court of Justice in Criminal Matters* [BGHSt] 138 at 140).

duties of pastoral care and hold a “distinguished” office in their respective parishes<sup>26</sup>. Furthermore, ministers would have to be subjected to a duty of “pastoral secrecy”<sup>27</sup>. Non-ordained clerics would qualify as religious ministers in this sense if they have been commissioned full-time for pastoral care according to the internal rules of the religious community<sup>28</sup>. Following the requirement of being mandated by the religious community, it has been questioned whether clerics who consider themselves entitled to pastoral care due to their status in society qualify as religious ministers<sup>29</sup>. By contrast, the notion of religious ministers has been restricted with regard to mere “charitable” or “welfare” acts performed by ministers<sup>30</sup>.

*(b) What is the labour status of religious ministers when working for their respective denominations?*

The labour status of religious ministers depends on the organisational status of the religious community concerned. Under German law basically two organisational forms are available, the status of a public law corporation under Article 140 Basic Law and Article 137(5) Weimar Constitution and private forms under the law of associations. The Catholic and the various Protestant churches are mainly organised as public law corporations. In fact, their status was preexistent to the 1919 Weimar Constitution, which is the reason for the formulation of Article 137(5) sentence 1 Weimar Constitution, according to which “religious societies shall *remain corporations under public law insofar as they have enjoyed that status in the past*” (emphasis added). New religious communities have equal access to the status under public law which is evidenced by the decisions concerning the Jehovahs Witnesses and the Bahá’í mentioned above<sup>31</sup>. Small religious groups are usually organised in private law forms under the law of associations.

Members of religious communities organised as public law corporations (Articles 140 Basic Law and 137(5) Weimar Constitution) are entitled to appoint ecclesiastical civil servants (German *Kirchenbeamte*). This is mostly, but by no means exclusively the case with regard to religious ministers, i.e. persons concerned with tasks of pas-

<sup>26</sup> Federal Court of Justice (Criminal Matters), Judgment of 15 April 2010, Case 4 StR 650/09, para. 24 (reprinted in *Neue Zeitschrift für Strafrecht* (2010) 646-9).

<sup>27</sup> *Ibid.* para. 25.

<sup>28</sup> Federal Constitutional Court, Decision of 27 January 2007, Case 2 BvR 26/07, para. 12 (reprinted in 10 *Reports of Chamber Decisions of the Federal Constitutional Court* [BVerfGK] 216-27).

<sup>29</sup> The Federal Court of Justice (Criminal Matters) left this question eventually open; Judgment of 15 April 2010, Case 4 StR 650/09, para. 28 (concerning two Yazidi clerics; reprinted in *Neue Zeitschrift für Strafrecht* (2010) 646-9).

<sup>30</sup> Federal Court of Justice (Criminal Matters), Decision of 15 November 2006, Case StB 15/06, paras. 6, 9 (51 *Reports of the Federal Court of Justice in Criminal Matters* [BGHSt] 140 at 141).

<sup>31</sup> See notes 15 and 16 above.

toral care. Ecclesiastical civil servants are – like common civil servants – exempted from general labour law and social insurance law.

Conversely, religious communities which do not enjoy the status as public law bodies are barred from employing ecclesiastical civil servants. Rather, all their employment agreements (including those of religious ministers) are subject to general labour law (sections 622 *et seqq.* Civil Code; sections 1 *et seqq.* Employment Protection Act) and social insurance law. Generally speaking, there is no specific “religious labour law”. However, due to the guarantee of organisational self-determination (articles 140 Basic Law, 137(3) Weimar Constitution), employment agreements may lay down specific obligations of loyalty related to the nature of ecclesiastical service<sup>32</sup>. Such obligations (mostly relating to the employee’s conduct of life) may warrant a modified application of the rules of general labour law but cannot overrule the general ban on arbitrariness (article 3(1) Basic Law), the notion of *bonos mores* (section 138(1) Civil Code) and the *ordre public* (article 30 Introductory Act to the Civil Code)<sup>33</sup>. Regarding the determination of loyalty obligations for employees, labour courts have to defer, in principle, to the appraisal by the respective religious communities<sup>34</sup>. In case a violation of such loyalty obligations should be found, the labour court has to balance the guarantee of self-determination with the employee’s fundamental rights<sup>35</sup>.

(c) *What is the labour status of religious ministers when working in other institutions (chaplains, teachers of religions in schools etc.)?*

The labour status of religious ministers usually remains unaffected by the fact that they fulfil tasks as teachers of religion<sup>36</sup>. As a rule ministers teaching in schools keep their employment relationship with the respective church and receive a remuneration for their teaching activities.

<sup>32</sup> Federal Constitutional Court, Decision of 4 June 1985, Case 2 BvR 1703/83 *et al.*, paras. 59-68 (70 *Reports of the Federal Constitutional Court* [BVerfGE] 138 at 165).

<sup>33</sup> *Ibid.* para. 64.

<sup>34</sup> Federal Constitutional Court, Decision of 22 October 2014, Case 2 BvR 661/12, paras. 113-9 (not yet reported).

<sup>35</sup> *Ibid.* paras. 120-125.

<sup>36</sup> Cf. for example, Article 7 Section 7 of the Concordat between His Holiness Pius XI. and the State of Bavaria of 29 March 1924: “Soweit die Kirche den Religionsunterricht durch Priester, Diakone, Katecheten oder Lehrer im kirchlichen Dienst selbst versehen läßt, wird sie nur solche Personen als hauptberufliche Lehrkräfte verwenden, die entweder die nach den kirchlichen Vorschriften vorgesehene volle Ausbildung für Priester durchlaufen und die dabei vorgeschriebenen Prüfungen erfolgreich abgelegt haben oder deren Ausbildung der staatlicher Lehrkräfte entspricht. Die Vergütung dieses Religionsunterrichtes wird in Vereinbarungen mit den kirchlichen Oberbehörden geregelt.” A similar provision can be found in article 9 section VII of the Treaty between the Lutheran Church in Bavaria on the Right Bank of River Rhine and the State of Bavaria of 15 November 1924.

(d) *Are ministers of all denominations subject to the same labour law status?*

As already indicated, the labour law status depends on the organisational status of the religious community concerned and on whether or not this religious community if organised under public law makes use of the possibility to employ its ministers as ecclesiastical civil servants.

(e) *What case-law has developed regarding the work of ministers of religion?*

The employment relations between ministers of the protestant churches and the catholic churches are regulated by internal church law<sup>37</sup>. Until recently, German courts refused to hear cases brought by notably protestant ministers against their churches arguing that these relations re-mained outside the sphere of state-determined law and that the courts of the state thus had no jurisdiction to hear these cases<sup>38</sup>. This approach was challenged as a violation of Article 6 ECHR given the fact that no access to the state courts was provided<sup>39</sup>. The ECtHR basically followed the rationale of the German courts arguing that for Article 6 ECHR to be applicable, a “right” within the legal order of the state was a necessary prerequisite<sup>40</sup>. However, given the fact that the relationship between ministers and their churches was entirely determined by ecclesiastical law, no such right on which the applicants could rely was existent within the German legal order<sup>41</sup>. While the Federal Constitutional Court upheld the approach just described,<sup>42</sup> in its most recent juris-prudence the Federal Administrative Court<sup>43</sup> followed the example of the Federal Court of Justice (Civil Law Matters) which had already opened the way to establish the jurisdiction of the ordinary courts

<sup>37</sup> For details see Dietrich Pirson, *Das Dienstrecht der Geistlichen und Kirchenbeamten*, in Joseph Listl/Dietrich Pirson (eds.), *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland*, Vol. II, Berlin 1995, 845 ff.

<sup>38</sup> For example Federal Constitutional Court, Decision of 9 December 2008, Case 2 BvR 717/08, paras. 2-7 (14 *Reports of Chamber Decisions of the Federal Constitutional Court* [BVerfGK] 485-92); Federal Administrative Court, Decision of 30 October 2002, Case 2 C 23/01 (117 *Reports of the Federal Administrative Court* [BVerwGE] 145 ff.); Federal Court of Justice (Civil Matters), Decision of 18 February 1954, Case III ZR 311/52 (12 *Reports of the Federal Court of Justice in Civil Matters* [BGHZ] 321 ff.).

<sup>39</sup> ECtHR, Decision of 6 December 2011, Case 38254/04 – *Baudler vs. Germany*; ECtHR, Decision of 17 January 2012, Cases 32741/06, 19568/09 – *Dietrich Reuter vs. Germany*; ECtHR, Decision of 06 December 2011, Case 39775/04 – *Roland Reuter vs. Germany*.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Cf. Federal Constitutional Court, Decision of 9 December 2008, Case 2 BvR 717/08, paras. 2-7 (14 *Reports of Chamber Decisions of the Federal Constitutional Court* [BVerfGK] 485-92).

<sup>43</sup> Federal Administrative Court, Judgment of 27 February 2014, Case 2 C 19.12, paras. 9 ff (reprinted in *Neue Zeitschrift für Verwaltungsrecht* (2014), 1101).

in civil matters<sup>44</sup>. The issue is still in flux but there is a clear tendency to amend the juris-prudence refusing to establish jurisdiction of the ordinary and administrative courts<sup>45</sup>. However, irrespective of the important change regarding the question of jurisdiction, there is no doubt that regarding the substance of the disputes in question the courts will remain extremely cautious given the constitutional importance of the right of self-determination of religious communities. In practice, the result will most likely be that the state courts will accept to hear the cases but grant broad leeway to religious communities to determine the grounds on which they terminate employment relationships with their ministers.

### III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

*(a) In what terms is the autonomy of churches recognized in your country? Is it considered a manifestation of the collective dimension of religious freedom?*

The guarantee of religious “self-determination”, which largely converges with the idea of church “autonomy”, flows from article 140 Basic Law read in conjunction with article 137(3) Weimar Constitution concerning the institutional modalities of religious freedom. However, a similar guarantee can also be derived from the collective dimension of the right to religious freedom contained in article 4(1) and (2) Basic Law.

*(b) Are churches exempted from the general norms concerning anti-discrimination? To what extent?*

See above, section 9 General Act on Equal Treatment

*(c) What effects, if any, has European Union law had in this area?*

The General Act on Equal Treatment has been passed in order to transpose several EU law directives. Directive 2007/78/EC, which concerns “equal treatment in employment and occupation”, itself provides for an exception regarding religious communities (article 4(2) of the Directive: “occupational requirement”):

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds

<sup>44</sup> Federal Court of Justice (Civil Matters), Judgment of 28 March 2003, Case V ZR 261/02, (154 Reports of the Federal Court of Justice in Civil Matters [BGHZ], 306 ff.).

<sup>45</sup> Hermann WEBER, Der Rechtsschutz im kirchlichen Amtsrecht: Unrühmliches Ende einer unendlichen Geschichte?, *Neue Juristische Wochenschrift* (2009), 1179-1183; Christian KIRCHBERG, Rechtsschutz Geistlicher vor staatlichen Gerichten, *Neue Juristische Wochenschrift* (2014), 2763-2765; Klaus VON DER WEIDEN, Zugang zu staatlichen Gerichten für Geistliche und Kirchenbeamte bei dienstrechtlichen Streitigkeiten mit ihrer Religionsgesellschaft?, *jurisPR-BVerwG* 15/2014 Anm. 1.

referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of *occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief*, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, *by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos*. This difference of treatment shall be implemented *taking account of Member States' constitutional provisions and principles*, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

*(d) What case-law has developed in this area?*

Disputes concerning article 9 of the General Act on Equal Treatment were, for example, related to the question of whether article 9(2) of the Act permits a church to terminate a labour contract when the employee decides to secede from the church. The German labour courts have found that seceding from the church constitutes a severe infringement of loyalty obligations. Article 9(2) of the Act thus makes clear that the termination of a labour contract in such a setting does not constitute an illegal discrimination based on religion<sup>46</sup>. Similarly, the labour courts have found that there is no claim for compensation under article 15(2) of the Act in cases where the church

<sup>46</sup> See e.g. Federal Labour Court, Judgment of 8 September 2011, Case 2 AZR 543/10, paras. 30-7 (139 *Reports of the Federal Labour Court* [BAGE] 144-55); Judgment of 25 April 2013, Case 2 AZR 579/12, paras. 39-49 (145 *Reports of the Federal Labour Court* [BAGE] 90-106); also Regional Labour Court for Rhineland-Palatinate, Judgment of 2 July 2008, Case 7 Sa 250/08, paras. 42-7 (reprinted in 52 *Entscheidungen in Kirchensachen* [KirchE] (2008) 12-8).

re-quires applicants to belong to the religious community concerned and consequently dismisses the applications of other candidates<sup>47</sup>.

## ANNEX

### **Article 3 Basic Law (Equality before the law)**

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, home-land and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.

### **Article 4 Basic Law (Freedom of Faith and Conscience)**

(1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.

(2) The undisturbed practice of religion shall be guaranteed.

(3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

### **Article 33 Basic Law (Equal citizenship – Public service)**

(3) Neither the enjoyment of civil and political rights, nor eligibility for public office, nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be dis-advantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.

### **Article 140 Basic Law**

The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be an integral part of this Basic Law.

### **Article 136 Weimar Constitution of 1919**

(1) *Civil and political rights and duties shall be neither dependent upon nor restricted by the exercise of religious freedom.*

(2) *Enjoyment of civil and political rights and eligibility for public office shall be independent of religious affiliation.*

(3) *No person shall be required to disclose his religious convictions.* The authorities shall have the right to inquire into a person's membership in a religious society only to the extent that rights or duties depend upon it or that a statistical survey mandated by a law so requires.

(4) No person may be compelled to perform any religious act or ceremony, to participate in reli-gious exercises, or to take a religious form of oath.

<sup>47</sup> Regional Labour Court for Berlin and Brandenburg, Judgment of 28 May 2014, Cases 4 Sa 157/14 et al., paras. 87-116 (not yet reprinted).

**Article 137 Weimar Constitution of 1919**

(1) There shall be no state church.

(2) The freedom to form religious societies shall be guaranteed. The union of religious societies within the territory of the [then German] Reich shall be subject to no restrictions.

(3) *Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all.* They shall confer their offices without the participation of the state or the civil community.

(4) Religious societies shall acquire legal capacity according to the general provisions of civil law.

(5) Religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same rights upon application, if their constitution and the number of their members give assurance of their permanency. If two or more religious societies established under public law unite into a single organisation, it too shall be a corporation under public law.

(6) Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with Land law.

(7) Associations whose purpose is to foster a philosophical creed shall have the same status as religious societies.

(8) Such further regulation as may be required for the implementation of these provisions shall be a matter for Land legislation.



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# GREECE

LINA PAPADOPOULOU<sup>1</sup>

## I. RELIGIOUS FREEDOM AT WORK

### 1. Sources of law on religious freedom at work

The functioning of religion and creeds in Greece follows the “State-law rule”, which means that the State regulates ecclesiastical matters through parliamentary legislation (cf article 72 in combination with article 3 GrConst)<sup>2</sup>. There is also a prevailing religion, embodied in the Orthodox Christian Church of Greece. Thus, the Charter of the latter (hereafter: Charter) is also a legislative statute.

Accordingly, religious freedom at work is based on the same sources of law as any other field of activity<sup>3</sup>: the Constitution remains the principal source, especially Article 13§1 (freedom of religious conscience)<sup>4</sup> & §2 (freedom to worship), as well as Article 2 (human dignity) and Article 5§1 (freedom of development of one’s personality), which covers freedom of conscience in general. Religious equality is also

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Abbreviations: appl = application; CoS = Council of State (Supreme Administrative Court); CSC = Civil Servants’ Code; CL = Compulsory Law; ECHR = European Convention on Human Rights; EctHR European Court of Human Rights; GG = Government Gazette; GrConst = Greek Constitution; L = Law; Ord = Ordinance; PC = Penal Code; PD = Presidential Decree.

<sup>2</sup> Charalambos PAPANATHIS, “State and Church in Greece”, in: Gerhard ROBBERS (ed), *State and Church in the European Union*, 2nd ed., Baden-Baden: Nomos 2005, 115-138 (121).

<sup>3</sup> Cf. Constantinos PAPANATHIS, *An Introduction to Hellenic Ecclesiastical Law*, Thessaloniki: Degiorgio editions 2012, 31ff.

<sup>4</sup> Art 13§1: “Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual’s religious beliefs.”

protected not only through the general equality principle (Art. 4 GrConst) but also Article 5§2<sup>5</sup> and 13(1) section b<sup>6</sup> GrConst.

At the same time, international law also applies in this field. More specifically, the European Convention on Human Rights and Freedoms, as interpreted within the jurisdiction of the European Court of Human Rights, is also a source –although not formally, but substantially- of religious freedom at work, as both the Constitution and formal laws should be interpreted in accordance with it<sup>7</sup>. So, the general principle of non-discrimination (Art 5§2 GrConst) is supplemented by Articles 14 ECHR, 24§1, 26 and 27 ICCPR and Article 30 of the Convention on the Rights of the Child.

In addition, special anti-discrimination legislation exists (L 927/1979, as amended by L 1419/1984, which added religion as a prohibited discrimination criterion, L 2910/2001 and the recent L 4285/2014, which radically amended the law of 1979). Amongst other things, there are provisions of penal law aiming at sanctioning direct discrimination based on race, nationality, and religion.

The relevant European directives also apply (2000/78, L 3304/2005). Similarly, civil servants are prohibited from discriminating in favour of or against citizens, due to their political, philosophical or religious beliefs (Art 27§3 CSC = L 3528/2007) and disciplinary actions should be taken against those discriminating on the ground of religion while executing their duties.

## 2. The definition of religion

Neither in the Constitution nor in the statutes is there a definition of religion. Any conviction regarding God or relevant metaphysical and “ethical beliefs” may be considered as such. No prior approval or recognition is necessary for a religion to be “known”<sup>8</sup>, since such a presupposition would infringe upon the freedom of religion (see CoS 310/1997 and 493/1997), unless the religion had secret doctrines and an occult form of worship (CoS 1842/1992). Consequently, all major European denominations are considered to be “known” and thus enjoy full constitutional protection.

<sup>5</sup> It guarantees that “all persons living within the Greek territory shall enjoy full protection of their life, honour and liberty irrespective of nationality, race or language and of religious or political beliefs”.

<sup>6</sup> It specifies that “the enjoyment of civil rights and liberties does not depend on the individual’s religious beliefs”.

<sup>7</sup> Lina PAPADOPOULOU, “Die Europäisierung der Verfassungsinterpretation”, in: BRANDT, Peter / HARATSCH, Andreas / SCHMIDT, Hans-Rüdiger (Hrsg.), *Verfassung - Parteien - Unionsgrundordnung*, (Gedenksymposium für Dimitris Th. Tsatsos, BVW 2015, S. 105-150.

<sup>8</sup> According to Article 17 (Presumption of known religion) of L 4301/2014, “every religion and doctrine is assumed to be a ‘known religion’ when, for the exercise of its public worship, there is a valid permit for the establishment and operation of a church or temple”.

### 3. The key elements and the rationale of religious freedom

Article 13 GrConst declares the freedom of religious conscience as inviolable (para. 1 sec. a) and guarantees both non-discrimination on the grounds of religion (para. 1 sec. b) and freedom of worship (para. 2). Freedom of religious conscience covers all religious, as well as non-religious or atheistic, beliefs (negative freedom, freedom from religion). This means that the State should remain neutral and safeguard religious freedom against third private parties (horizontal effect), e.g. employers. Whereas freedom of religious conscience is an unlimited right, freedom to worship covers only “known” religions and underlies a series of limitations, namely, public order and morals<sup>9</sup>. So, workers and employees could be limited in their worship in the workplace, as long as this may be considered necessary in a free democratic society according to the principle of proportionality. At the same time, the Constitution provides protection for all the “known religions” against offensive publications (Art 14 GrConst).

Freedom of religion also covers religious equality and non-discrimination, and this applies also to the workplace, guaranteeing that no privileges may be recognised to workers or employees of a certain denomination only. Consequently, all employees should enjoy the same rights independently of their religious preferences. Wearing crosses or other religious symbols is not considered to be a problem, as long as employees execute their duties in a normal manner.

The rationale behind the protection of freedom of religion at work, as in all other fields, is both freedom and equality. Every individual should be free to hold their own religious beliefs and these beliefs should not prevent them from being employed in a particular position. Worship is also free, although here there are limitations, which may be more pronounced in the workplace, where the right to worship of one worker / employee should not conflict with the needs of the persons served by the former or the demands of the employers. Given the fact that religious freedom is a right which develops horizontal effect, the principle of proportionality is considered to be the mediating principle for dealing with possible conflicts.

### 4. Protected manifestations of religious and non-religious beliefs

As has already been mentioned, the freedom of religion is first and foremost the freedom of religious conscience and as such it is unrestricted as it refers to the *forum internum* of individuals.

<sup>9</sup> Konstantinos PAPAGEORGIOU, “The application of the freedom of religion – Principles of the European Convention on Human Rights in Greece”, in: European Consortium for Church and State Research, Achilles EMILIANIDES (ed), *Religious Freedom in the European Union*, Peeters 2011, 187-197 (189).

It has both a negative option, in the freedom to reveal or not to reveal one's religious or nonreligious beliefs, as well as a positive option, meaning that the State should accommodate the religious needs of its citizens and guarantee religious equality. Thus not only freedom but also religious equality is protected. Freedom of worship is also explicitly guaranteed (Article 13 para 2 GrConst), though only for "known" religions and with specific limitations<sup>10</sup>. Non-religious beliefs are also protected within the notion of freedom of conscience.

However, worship is only allowed for known religions, thus rituals of non-religious metaphysical beliefs are only protected by the right to develop freely one's personality. Within this framework there is a triad of limitations which are applicable, namely the Constitution, the rights of others and good morals.

However, there is still a field in which discrimination exists: according to Article 16 L 1771/1988, teachers in primary and nursery schools who do not belong to the Greek Orthodox Church are appointed only to public schools with more than one teaching position and can teach religion only to pupils who share their own religious beliefs. Their appointment to schools with only one teaching position is only possible if in this school there are pupils holding the same doctrines as themselves.

## 5. Effect of the jurisprudence of the European Court of Human Rights on the national approach

The jurisprudence of the ECtHR has had a wide-reaching effect on the national approach, as many cases concerning religious freedom have originated from Greece. The main issue in these cases was the criminal treatment of proselytism (Art 4 of OL 1363/1938), which was not itself found to be contrary to the Convention, although its implementation caused many concerns in respect of its compliance with Article 9 ECHR (see *Kokkinakis*, 1993). Another issue posed before the Strasbourg Court was the right to practice one's religious rituals in a house of worship. In the *Manoussakis* case (1996), the Court examined the procedure whereby permission was issued for a religious minority to operate a house of worship (see also the *Pentidis* and *Tsavachidis* cases). The Greek state was found to have violated the principle of religious freedom by convicting the religious group concerned of establishing a house of worship without a state licence, as was required by the law<sup>11</sup>. The cases that are most relevant –directly or indirectly- to the workplace, however, could be considered to be the following:

<sup>10</sup> Art 13§2: "All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited."

<sup>11</sup> See in more detail PAPAGEORGIOU, *The application of the freedom of religion*, *op. cit.*, pp. 192ff.

a) *Oath-taking*

In the *Alexandridis* case<sup>12</sup> the Court found that the oath-taking of religious character violated the principle of religious freedom<sup>13</sup>. This conclusion was corroborated by the *Dimitras* case<sup>14</sup>, in which the Court concluded that a person's obligation to disclose their religious convictions in order to avoid having to take a religious oath in criminal proceedings is a violation of Article 9 ECHR.

b) *Equal treatment of ministers of all "known religions"*

The ECtHR *Tsirlis* and *Kouloumbas* cases (1997)<sup>15</sup> are important for the topic under discussion here.

Both applicants were Jehovah Witnesses' ministers. Article 4§6 GrConst stipulates that "[e]very male Greek capable of bearing arms is obliged to contribute to the defence of the country as provided for by the law". Article 6 of L 1763/1988 ("On Greeks' Military Conscription", GG, A' 57) provided<sup>16</sup> that religious ministers of known religions could be exempted from military service, which was and is obligatory in Greece for all men, if they wished to do so. The Supreme Administrative Court (Council of State) had acknowledged that the Jehovah's Witnesses were a known religion. Nevertheless, the military courts did not take this into account and the applicants were arbitrarily kept in detention. Their treatment was considered by the ECtHR to be discriminatory when compared to that of ministers of the Greek Orthodox Church. Thus, their detention constituted a violation of article 5 ECHR<sup>17</sup>.

<sup>12</sup> ECtHR (First Section), *Alexandridis*, Appl No 19516/06, Judgement of 21.02.2008.

<sup>13</sup> See in more detail Konstantinos PAPAGEORGIOU, "Zum religiösen Eid in Griechenland", in: *Österreichisches Archiv für Recht und Religion* 2011, 372-379.

<sup>14</sup> ECtHR (First Section), *Dimitras and Others v. Greece* - 42837/06, 3237/07, 3269/07 et al., Judgment of 3.6.2010.

<sup>15</sup> ECtHR *Tsirlis* and *Kouloumpas v. Greece*, Appl No 19234/91 and 19233/91, Judgment of 29.5.1997.

<sup>16</sup> L 3421/2005 abolished this exemption, however those who were already subject to the provisions of the previous legislative regime would still be governed in principle by the earlier provisions (Article 73§1), as long as they were still qualified as religious ministers (Council of State Judgement 257/2012, Section D').

<sup>17</sup> Cf. Evangelia PSYCHOGIOPOULOU, "The European Court of Human Rights in Greece: Litigation, Rights Protection and Vulnerable Groups", in D ANAGNOSTOU and E PSYCHOGIOPOULOU (eds), *The European Court of Human Rights and the rights of marginalised individuals and minorities in national context*, Martinus Nijhoff Publishers 2010, pp. 115-136.

c) *Non-discrimination at work due to religion*

In the *Thlimmenos* case<sup>18</sup>, the applicant was a Jehovah's Witness. In 1983 the Permanent Martial Court found him guilty of insubordination for refusing to enlist in the army for religious reasons.

Six years later the executive board of the Greek chartered accountants' body refused to appoint him as a chartered accountant even though he had passed the relevant qualifying exam. Mr Thlimmenos' appeal against this decision was finally rejected in 1996. He pleaded before the ECtHR not only for the lengthy proceedings (Article 6§1 ECHR) but also that his rights under Articles 9 (freedom of religion) and 14 (prohibition of discrimination) had been violated in so far as the Greek laws on the appointment of chartered accountants had failed to distinguish between people convicted of ordinary criminal offences and those convicted of refusing to do military service for religious reasons. The Court found that the Greek state had indeed violated Articles 9 and 14 ECHR<sup>19</sup>.

In 2001 Article 4 GrConst<sup>20</sup> was accordingly amended<sup>21</sup> and an interpretational statement was added stipulating that the Constitution allowed for a formal law providing for an alternative interpretation of an individual's offering of services to their country, as long as their conscious objection to executing armed or -in general- military services was proven.

Based on this, the Council of State adjudicated (3367/2007) that the applicant had been illegally denied appointment because as a Jehovah's Witness he had not served in the army but had been convicted and served his sentence in prison. Imprisonment, the Court concluded, should be equated with army service, as a prerequisite for appointment to a position in the public sector.

d) *Elected ministers of the Muslim minority in Western Thrace*

On the basis of international treaties (Treaty of Lausanne, 1923<sup>22</sup>), the Muslim minority of Western Thrace enjoys a special protection regime. According to L 1920/1991, the Muslim religious leaders, the Muftis, are not only religious ministers

<sup>18</sup> ECtHR, *Thlimmenos v Greece*, Appl No 34369/97, Judgment of 06.04.2000.

<sup>19</sup> Cf Stelios PERRAKIS, "L'objection de conscience dans l'ordre juridique hellénique", In: European Consortium for Church-State Research, *Conscientious objection in EC countries*, Milano: Dott A. Giuffrè 1992, 195-210.

<sup>20</sup> Article 4§6 GrConst stipulates that "[e]very male Greek capable of bearing arms is obliged to contribute to the defence of the country as provided for by the law".

<sup>21</sup> Through para A of the Resolution of the 7th Revisionary Parliament (Ζ' Αναθεωρητική Βουλή) (GG, vol. A' 84/17.4.2001).

<sup>22</sup> See in more detail Konstantinos Tsitselikis, *Old and New Islam in Greece, From Historical Minorities to Immigrant Newcomers*, Leiden-Boston: Martinus Nijhoff 2012, 81ff, 97 ff.

but also higher public servants with judicial competences. Accordingly, L 2345/1920 provides that the three Muftis (in Xanthi, Komotini and Didymoteicho), apart from their religious duties, also exercise judicial ones in family issues (marriage, divorce, alimony, guardianship, tutelage, emancipation of minors, Islamic wills and testaments and intestacy) based on the sacred Islamic law (shariah)<sup>23</sup>. The muftis are civil servants appointed by Presidential Decree<sup>24</sup> and as such are paid by the State. However, all religious ministers, although civil servants and subject to State law, enjoy a much wider margin of discretion than normal civil servants based on the religious freedom as such<sup>25</sup>.

Falsely assuming the duties of a religious minister of any known religion duly appointed as such (Art 175§2 PC) is punishable by a term of imprisonment of up to one year or a monetary penalty.

Article 176 PC provides for a prison penalty of up to six months or a monetary penalty for those who publicly bear the sacerdotal vestments or other insignia of a religious minister of any known religion.

In the *Serif* case<sup>26</sup> the ECtHR had found that the applicant's conviction, based on Articles 175 & 176 PC, for having acted as a religious minister of a group of people who willingly followed him was not to be reconciled with the demands of religious pluralism in a democratic society and that consequently it was hardly justified by "a pressing social need" and not "necessary in a democratic society for the protection of public order" under Article 9§2 of the Convention.

In the similar *Agga* case, the applicant had been appointed a deputy for the post of the Mufti of Xanthi. In 1990, the two independent minority Members of Parliament, Mr Faikoglou and Mr Ahmet, requested that a new mufti be elected, implementing the legislation in existence at the time (L 2345/1920). The authorities did not act accordingly, and the Muslims elected the deputy as a mufti at the mosques of Xanthi. The state changed the law (L 1920/1991) and substituted the election with the appointment following the recommendation of a Muslims' committee that was chosen by the Governor of the Region and was presided over by the local Prefect. In 1991, in accordance with the new provisions, the Greek state appointed another mufti and, as a result, there have been two muftis ever since. Mr Agga has been indicted since then for usurpation of religious authority (Articles 175 and 176 PC) because he signed religious messages as a mufti from 1993 until

<sup>23</sup> See Lina PAPAPOPOULOU, "Trapped in History: Greek Muslim Women under the Sacred Islamic Law, in: *Annuaire International des Droits de l'homme* (AIDH), Vol. V, 2010, Religions et droits de l'home, Athens / Bruxelles: Ant.N. Sakkoulas / Bruylant, 2010, pp.397-418.

<sup>24</sup> See Article 4 of Act of Legislative Content of 24.12 1990 (GG, A' 182), ratified by Law 1920/1991 (GG A' 11).

<sup>25</sup> PAPAETHIS, *Religious Self-administration in the Hellenic Republic*, op.cit.

<sup>26</sup> Appl no. 38178/97, final judgement 14.03.2000.

1996 and eventually he lodged four applications before the ECtHR<sup>27</sup>. The European Court of Human Rights found that Greece had violated the principle of religious freedom in this case.

## II. RELIGIOUS MINISTERS AND LABOUR LAW

### 1. Definition and labour status of religious ministers according to secular law

In order to carry out its work, the Church of Greece (in the wider sense, including all relevant bodies) employs both voluntary and remunerated personnel. The former are not connected with the Church through any kind of contract. The latter are divided between those having the status of an employee on the one hand and the vocational personnel on the other hand. The vocational personnel are comprised of the parish priests, the deacons, the singers of the Church and the auxiliary staff of the parish churches<sup>28</sup>.

In the system of ‘state-law rule’ the legal status applicable to both voluntary and remunerated personnel of the legal entities of public law of the Greek Orthodox Church is regulated by Article 42 of the Charter (L 590/1977), through Ordinances of the Permanent Holy Synod of the Church of Greece. Since the latter is authorised by the Charter, which in turn is a statute, these Ordinances are at the same time state law. More specifically, the status of religion ministers is provided for by Article 33 of Ord 2/1969 (GG B’ 193) “On holy temples, parishes and priests”. The qualifications, appointment process, evaluation,<sup>29</sup> promotion, transfer, granting of any kind of permits, disciplinary proceedings, positions, insurance issues, as well as any other matter concerning the status of the employees of the Greek Church, the parish churches, the Apostolic Diaconate of the Inter-Orthodox Centre of the monasteries, as well as any other ecclesiastical public law entities, are regulated in a similar way to the provisions of the Civil Servants’ Code, by Ordinances of the Permanent Holy Synod which are published in the Government Gazette.

Parish priests, although on the State payroll<sup>30</sup>, are not considered to be civil servants but “religious ministers” (CoS 507/1983, 315/1989). Ecclesiastical employees are employed by the Legal Entities of Public Law established by the Church

<sup>27</sup> ECtHR (First Section), *Agga v Greece*, Cases 50776/99, 52912/99, Judgements of 17.01.2003 and Appl No 32186/2002 and 33331/2002, Judgement of 13.07.2006.

<sup>28</sup> Ioannis KOUKIADIS / Charalambos PAPANATHIS, “Droit du travail et religion en Grèce”, in: European Consortium for Church and State Research, *Churches and Labour Law in the EC Countries*, Proceedings of the Meeting in Madrid on 27-28 November 1992, Dott.A Giuffrè & Facultad De Derecho Madrid 1993, pp. 115-125 (116).

<sup>29</sup> See PD 53/2012 (GG A’ 105/30.4.2012) “Retention of a special evaluation system of the clergy of the Orthodox Church of Greece”.

<sup>30</sup> CL 536/1945, (GG A’ 226); CL 469/1968 (GG A’ 162).

itself and paid by the latter<sup>31</sup>. Some of them have permanent contracts, while others have fixed-term contracts. Thus they are not subject to the general “Civil Servants Code” but their legal status is provided for by Articles 37-38 of the Charter and Ord 230/2012. Fewer have contracts of private law, as provided for in Article 103 paras 2 & 3 GrConst (e.g. for administrative and secretarial duties, cleaning, maintenance of buildings etc) and are covered by Ord. No 5/1978 “Code for Ecclesiastical Servants”<sup>32</sup>. This Code is applied as *lex specialis* in parallel with the general Code for civil servants.

Accordingly, in the case of a parish priest’s dismissal, the latter does not have the right to appeal to the Council of State with the legal means (a recourse called *prosfygi*) recognised by Article 103 GrConst for all civil servants –such was the conclusion of the same Court in judgement 433/1999-, but with the legal means of petition for annulment (according to Article 95 GrConst). This falls in the more general context, within which all acts issued by ecclesiastical authorities, to they extend that they are entrusted by the State with the administration of the Greek Orthodox Church, may be submitted to or cancelled by the Council of State<sup>33</sup>. Nevertheless, a parish priest acting as Head of the Ecclesiastical Council (a state organ of the Church, which is a legal entity of public law) falls under the category “civil servants” in the meaning of Article 13 of the Penal Code, consequently increasing his criminal liability under Article 262 of the same Code (Areios Pagos 703/1997).

Through Ord. 5/1978 (Code for Ecclesiastical Servants, based on Article 42 of the Charter<sup>34</sup>), the Holy Synod of the Greek Orthodox Church has regulated the employment status of the administrative employees of the Church. Clerics and deacons, as well as other auxiliary staff members are not covered by this Ordinance. Neither are ecclesiastical education staff covered. It is worth mentioning that the legal status of the cantors of the Church (*ieropsaltes*) had been questioned<sup>35</sup>. According to the sacred canons, the cantors are considered to be lower clergy if they have acquired their position from the bishop through the laying-on of hands (*cheirothesia*).

Accordingly, the Council of State has concluded that the cantors offer spiritual and not administrative work; thus they may not be characterised as civil servants and do not fall under Article 103 GrConst (CoS 4078/1979, 1014/1982). Nevertheless,

<sup>31</sup> Council of State judgement 2919/1987.

<sup>32</sup> Cf Costas PAPAGEORGIOU, *Theory and Praxis of Ecclesiastical Law I*, Thessaloniki: Ostrakon 2014, 155ff (in Greek).

<sup>33</sup> PAPANATHIS, *State and Church in Greece*, 121.

<sup>34</sup> See also the recent Ord 4/2015 (Code for Ecclesiastical Servants of the Church of Crete).

<sup>35</sup> The relevant legislation consists of Article 53§4 Ord. 2/1969, Article 64 para 4 CL 2200/1940 and Ord. 176/2006 (GG, A ‘268’) “On cantors (*ieropsaltes*) and their status”.

the legal relationship between them and the church, which is a legal entity of public law, is of a public law nature (CoS 2919/1987, 4602/1988)<sup>36</sup>.

Ecclesiastical education is organised on the basis of state laws (see, for example, Presidential Decrees 292/1977 and 332/1998, as well as Law 3432/2006) and the teachers employed therein are considered to be civil servants, paid by the State. Concerning the parish priests who also work as teachers in state schools, questions have been raised regarding their emoluments. Given that, even if holding both positions, those priests employed in the state education sector remained mainly religious ministers and not civil servants, like all other school teachers, the Council of State concluded (CoS 4045/1983, 1508/1987) that they are not covered by Articles 103 and 104 GrConst, according to which civil servants are prohibited from holding a second position in the public sector.

Active parish priests constitute a completely separate category of public officials since their duties are primarily religious and related to worship (see Art. 37 para. 1, L. 590/1977; cf. Council of State 507/1983, 293/1986, 3185/1986, 732/1988, 3628/1992, 4548/1996, 433/1999, 4078/1999, 624/2001). Thus, from the test point of view, they are neither in the same category as civil servants, nor in that of parsons who have a parallel employee status (teachers etc.) and exercise duties as civil servants (CoS 624/2001). Consequently, those working as both clerics and teachers could continue serving at both places, as long as their total income did not exceed a certain threshold (3/5 of the gross income of the President of the Areios Pagos)<sup>37</sup>.

It is interesting to follow the reasoning of Council of State judgement CoS 986/1984 (Section C'). According to the Court, Article 13 GrConst guaranteeing freedom of religion and worship means that the individual is free not only to choose their religion but also to play an important role in achieving the aims of the relevant Church or religious community, especially through undertaking the tasks of a minister of religion. Thus, the Court continued, any limitation that might place the person in a dilemma of conscience, having to choose between their religious tasks and another post, and is not justified by the limitations of Article 13 GrConst is unconstitutional (CoS 4045/1983). In that sense, a person's capacity as a faithful member of a known religion or as a religious minister may not be considered as a prerequisite for, or obstacle to, their appointment to another position in the public sector or to holding this same position, properly acquired (see also CoS 260/1948).

<sup>36</sup> PAPAGEORGIOU, *Theory and Praxis of Ecclesiastical Law*, *op. cit.*, 45.

<sup>37</sup> PAPAGEORGIOU, *Theory and Praxis of Ecclesiastical Law*, *op. cit.*, 44.

## 2. Equal labour law status for ministers of all denominations

According to Article 13§3 GrConst, “[t]he ministers of all known religions shall be subject to the same supervision by the State<sup>38</sup> and to the same obligations towards it as those of the prevailing religion.” This means that the State is obliged to subsidise the clerics and deacons of all known denominations in the same way as it subsidises those of the Greek Orthodox Church. The state supervision is entrusted to Secretary General for Religious Affairs of the Ministry of Education and Cults<sup>39</sup>.

The recent Law 4301/2014 “on Religious Legal Entities and Religious Communities”<sup>40</sup> introduced an institutional novelty: the notion of “religions recognised by the State” (as in other European states such as Spain, Portugal etc). Recognition follows either from the law itself or upon criteria to be fulfilled, and an application to the Ministry of Education and Religious Affairs. This two-tier recognition already introduced an unequal treatment. In order for a religious community<sup>41</sup> or a Church to be recognised, it needs to have at least 300 members within a specific area or 900 members within Greece as a whole. This undermines the equal treatment of religious ministers belonging to minority religions. Accordingly, neither the labour status not the administrative or hieratic acts of religious ministers serving non-recognised religions are recognised<sup>42</sup> by the State.

Moreover, in cases where a doctrine is shared by multiple communities, only one of the latter may be recognised by the common name, while the others will be considered as if they were outlaws, at least not recognised with the desired name. This regulation changes the more liberal regime that has governed religions until now, whereby all of them were considered as known and challenges were brought before the Council of State individually.

Furthermore, an outdated Article 12 of L 1363/1938 (GG A’ 305), as amended by CL 1672/1939, stipulates that the entry into Greece of non-Greek religious min-

<sup>38</sup> Cf. PAPANATHIS, *State and Church in Greece*, 126.

<sup>39</sup> According to the new Organogram, the General Secretariat of Cults is divided in two Directions, one on Religious Administration and the other on Religious Education. Except from supervising the religions, the former is also in charge of the appointment of the general Chief Rabbi of Greece, the chief Rabbis of the Israeli communities, and the three Muslim Muftis of the Muslim minority of Western Thrace.

<sup>40</sup> See full text on [http://www.minedu.gov.gr/publications/docs2014/141210\\_Law\\_4301\\_2014\\_Organization\\_legal\\_form\\_religious\\_communities\\_organizations\\_Greece.pdf](http://www.minedu.gov.gr/publications/docs2014/141210_Law_4301_2014_Organization_legal_form_religious_communities_organizations_Greece.pdf).

<sup>41</sup> Article 1 L 4301/2014: “A religious community is a sufficient number of individuals with a particular religious confession of a known religion, permanently installed in a specific geographical area, aiming at jointly worshipping and performing tasks required by the common confession of its members”.

<sup>42</sup> According to Konstantinos PAPANATHIS in “The new legal status of religious communities after L 4301/2014”, *Armenopoulos* 2015 (under publication), the recent law is unconstitutional since the Greek Constitution speaks about “known” and not about “recognised” religions.

isters of any cult is only allowed on the basis of a permit granted by the Ministers of Education and Religion on the one hand and of Foreign Affairs on the other, with the exception of the ministers of the Greek Orthodox Church. Those who enter without a permit are subject to deportation<sup>43</sup>.

### III. AUTONOMY OF THE CHURCHES AND HUMAN RIGHTS OF THE WORKERS

#### 1. The autonomy of the churches and its relationship to the collective dimension of religious freedom

Religions and creeds in Greece are self-administered entities of public law. Not only the prevailing religion, but all the other religious communities also enjoy a constitutionally guaranteed selfadministration as a collective expression of the freedom of religion. So, for example, the Central Board of Jewish Communities in Greece and the Israeli communities, as well as the Catholic and Protestant Churches are –at least in theory- considered to be legal persons governed by public law, like the Greek Orthodox Church. On the contrary, both the Evangelist Church has been recognized by Courts as legal person of private law, and the same applies for the Armenian parishes<sup>44</sup>.

Self-administration –as opposed to autonomy- means that they can manage their own affairs but within the legal context decided by the State. Especially the self-administration of the prevailing religion, i.e. the Greek Orthodox Church, is provided for in the Constitution itself (Article 3 GrConst), and in the laws to execute the relevant constitutional provision, which allow for the special role of the Holy Synod, i.e. the supreme organ of the Church, the validity of its sacred canons and the legislative authorizations that its own Statutory Charter (L 590/1977) provides<sup>45</sup>. 45

The “Holy Synod of the Hierarchy” (HSH), as it is called in the Charter, consists of the serving prelates or “metropolitans”. The latter have not only spiritual but administrative duties, in their respective jurisdiction within a specific province. The metropolitans belong to the same category as religious ministers, clerics and deacons. The archbishop within the area of the archdiocese of Athens, and the metropolitans within their metropolises, exercise the powers attributed to them by the sacred canons and the laws.

Each parish and monastery is also a legal entity of public law. The parish is administered by the parish priest and the “ecclesiastical” council, whose members are appointed by the metropolitan council. According to the law, priests and deacons are civil servants, as are all employees of legal entities of public law.

<sup>43</sup> TSITSELIKIS, *Old and New Islam in Greece*, *op. cit.*, 91.

<sup>44</sup> PAPANATHIS, *State and Church in Greece*, *op. cit.*, 118, 135.

<sup>45</sup> Charalambos PAPANATHIS, “Religious Self-administration in the Hellenic Republic”, in: *Church Autonomy: A Comparative Survey* (Gerhard Robbers, ed., Frankfurt am Main: Peter Lang, 2001).

## 2. The exemption of the Churches from the anti-discrimination principle

The general norm concerning anti-discrimination based on religious beliefs at work is set by the Greek Constitution (especially Article 5 para 3 and Article 13 para 1b GrConst) and Law 3304/2005 implementing European Directive 2000/43 and 2000/78 of the European Council and Parliament.

According to Articles 2 and 7 of Law 3304/2005, discrimination on the ground of religion (amongst others) is prohibited in the field of work. This prohibition applies principally to all persons in the private and public sectors.

Article 9 of Law 3304/2005 implements Article 4 of Directive 2000/78 EC concerning the right of churches to take religious beliefs into consideration. It stipulates that "a different treatment based on a characteristic related to religion or belief, age, disability or sexual orientation, which due to the nature of these professional activities or context in which they are carried out, constitutes a genuine and determining occupational requirement, shall not constitute unlawful discrimination, provided that the concerned objective is legitimate and the requirement is proportionate" (para 1).

More specifically, it provides "that the difference in treatment based on religious or other beliefs of a person does not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, these beliefs constitute a genuine, legitimate and justified occupational requirement. This Act does not affect existing provisions and practices relating to professional activities within churches and associations or other organizations, the ethos of which is based on religious or other beliefs. This difference of treatment shall be subject to the general principles of Community law and can not justify discrimination on another ground.

It also does not prejudice the right of churches and other public or private organizations, the ethos of which is based on religion or belief, to require individuals working for their conduct good faith and compliance with ethical standards".

European Law did not introduce anything novel but confirmed and ratified a distinct treatment which was already established in the Greek legal order and practice. So, Churches are still able to employ people who share their beliefs and are members of their congregations, as long as they can prove that this characteristic is necessary for the specific task to be executed, based on the principle of proportionality.

For example, Article 8§1 Ord. 5/1978 on ecclesiastical workers stipulates that no one may be appointed as an ecclesiastical worker in the Greek Orthodox Church if s/he is not a Christian Orthodox him/herself and if s/he does not have the necessary ethos. Neither may an individual who expresses in words or deeds lack of respect for the Orthodox Christian religion (Article 12).

After his/her appointment, the ecclesiastical servant should take an oath expressing commitment to the Church and its Holy Synod. However, this provision is considered to have been amended by L 3812/2009, which also amended L 2190/1994 and included ecclesiastical servants -but not religious ministers such as parish priests-

as long as they were paid out of the state budget, amongst those who needed to be appointed through a process of selection based on meritocratic criteria independently of religious beliefs. The Greek Orthodox Church “hit back” and changed the rules of appointment through Ord. 198/2010 by inserting additional stages and requirements of selection (e.g. stage of at least one year’s employment in an ecclesiastical legal entity) in order to influence the selection of personnel and filter out those selected on the basis of religiously neutral criteria<sup>46</sup>.

However, no cases have been reported of candidates being excluded from working in the Church and no case-law has been developed so far in this area. This may be explained more by social rather than legal facts, more specifically by the reluctance of non-religious individuals willing to work for the Church to challenge the latter’s preference for religious people. In other words, the social reality in Greece appears to support the fact that the members of each Church should be able to be employed by it.

<sup>46</sup> PAPAGEORGIU, *Theory and Praxis of Ecclesiastical Law*, *op. cit.*, 165.

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# LAW AND RELIGION IN THE WORKPLACE IN HUNGARY

BALÁZS SCHANDA

The Basic Law (the constitution) provides for the freedom of religion in a comprehensive way including the freedom to manifest ones religion in all possible ways<sup>1</sup>. Work relations may be governed by the general labour law<sup>2</sup> or special legal regimes foreseen for civil servants, policemen, judges etc. Whereas labour law is regarded to be private law with a considerable flexibility the service relations in the public sector are governed by public law and the civil servant falls under strict hierarchy. Atypical working relations have become a significant phenomenon as a high percentage of active generations are self-employed. The majority of the active generations, however, still has a traditional employment with a labour contract, and an employer – but usually without a trade union on the workplace.

## I. RELIGIOUS FREEDOM AT WORK

There are no special rules with regard to religious expressions at the workplace. The general constitutional rules would apply. It is to be noted that – partly as a heritage of the communist rule – the general social attitude regards religion as a private issue, most people would avoid religious gestures at work. Not exercising rights certainly does not mean that rights would cease to exist but certainly the social practice is highly relevant as the same gesture can be taken very differently under different conditions. A prayer at work would be certainly protected but at most workplaces it would be highly unusual whereas at some it could be a common practice. Rights do not prevent from feeling awkward in certain situations. In other words only strong convictions deserve real protection.

<sup>1</sup> Basic Law Art. VII (1).

<sup>2</sup> Labour Code, Act I/2012.

General provisions of labour law provide for the respect of personality rights and the requirement of cooperation of parties<sup>3</sup>. An unnecessary limitation of religious rights would be unlawful and certainly the dignity of the worker has to be respected. The requirement of equal treatment has a special emphasis with regard to employment. The boundaries of rights and tolerance, however have not been tested yet. There were no court cases so far with regard to religious garments, jewelry, prayer on the workplace or anything similar. When it came to conflicts religious and non-religious beliefs would enjoy the same protection and religion could not be defined in general as it needed a case to case decision if in the given context a claim would be considered as religious or not.

## II. RELIGIOUS MINISTERS AND LABOUR LAW

Religious ministers usually do not fall under general labour law – although a religious community and a minister are free to enter a labour contract. Most ministers, would serve in a special “ecclesiastical service” that provides for an almost full exemption from requirements of state labour law. This exemption, however, is optional as religious communities do not have to make use of it. Ministers are not necessarily in ecclesiastical service but ecclesiastical service is not limited to religious ministers but can be opened to other church personal too.

The term ‘*ecclesiastical person*’ was originally developed by the taxation law for persons, who have a special ‘ecclesiastical working relationship’ with their respective church. Ecclesiastical persons can be employed in ecclesiastical service that is not employment in the sense of state law, but a relation exclusively determined by internal church law (canon law with regard to Catholic clergy). The new law on religious communities expressly provides for the special status of ecclesiastical persons:

‘Church personnel shall be natural persons who are defined in accordance with the Internal Rules of the legally recognized church, are in the service of the ecclesiastical legal entity and perform their service in specific church service relationship, in employment relationship or in another legal relationship.’<sup>4</sup>

A priest or a pastor would usually work in a special ecclesiastical service, but churches also had the possibility of employing them in another legal regime, e.g., to sign an ordinary labour contract: religious ministers can be totally exempted from requirements of labour law do not have to be exempted. It is the exclusive competence of a church to qualify someone as an ecclesiastical person. When the service of a religious minister is exclusively governed by the internal church law state courts have no jurisdiction in eventual conflicts. Consequently there is no relevant case

<sup>3</sup> Labour Code §§ 6-8.

<sup>4</sup> Act CCVI/2011. §13(1).

law – just a Constitutional Court case underlining the significance of the separation of church and state in this regard: The Constitutional Court – while dismissing the application – stated that the separation of church and state cannot be interpreted in way that it left those getting into a legal relation with a church without *remedy*. The remedies, however, can only consider the aspects regulated by state law. Aspects regulated by internal church law (canon law, or the statute of the religious community) cannot be the subject of disputes at public remedies. The Constitutional Court came to this decision at the end of a remarkable dispute between a professor of theology in the service of the Reformed Church and his Church as well as his University. The professor – a pastor of the Reformed Church – was sent into retirement by the Faculty of Theology of Debrecen. He later challenged this decision and initiated an internal church procedure. After having lost his case within the Church, he sued the Church as well as the University at a labour court, as well as for compensation. Courts in various instances remained uncertain if they had jurisdiction over a dispute between a church and its pastor, as the law stated as a consequence of the constitutional separation between church and state that ‘No state pressure may be applied in the interest of enforcing the internal laws and regulations of a church.’<sup>5</sup> The applicant considered this refusal of court as a lack of remedy in his case, what he considered to be a labour law case between an employer and a dismissed employee. After having lost at all possible instances at ordinary courts he filed a constitutional complaint with the Constitutional Court. The new law (see footnote 3....) mirrors the lesson of this case. It has to mention that Béla Szathmáry, a professor of church law at the Reformed Theological College of Sárospatak repeatedly argued in favor of “*apellatio ab abusu*”, the possibility to appeal to state courts against decisions taken in internal church disputes<sup>6</sup>. The main concern beyond the argument was the lack of an effective remedy for religious ministers. According to his suggestion not only church decisions contrary to state law, but also church decisions violating internal church regulations should be subject of scrutiny by state courts. The new law clearly rejects this possibility. The principle of separation rules out that internal regulations become subject of litigation before State courts.

Clergy serving as army chaplains or prison chaplains can become officers of the army or public employees of the law enforcement. They have a dual legal relationship: their church gives them their mandate but they enter a state service and they receive a salary from the state. Religious ministers teaching at theological faculties or at public or church-run schools are usually in ecclesiastical service, although churches had the

<sup>5</sup> Act IV/1990 (on the Freedom of Conscience and Religion, and the Churches) section 15 (2).

<sup>6</sup> SZATHMÁRY, Béla: Az *apellatio ab abusu* a magyar jogrendszerben. Magyar Jog 57 (2010), 416-422. Response: Schanda Balázs: Egyházi önállóság és vallásszabadság. Válasz Szathmáry Béla: Az *apellatio ab abusu* a magyar jogrendszerben c. cikkére. Magyar jog. - 58. (2011) 3 , p. 148-151.

right to sign a labour contract with them. It has to be noted that theological faculties are not parts of state universities in Hungary but they are maintained by the relevant denominations. Religious instruction even in public schools is delivered by the person sent and ‘employed’ by the religious community not by the school. Consequently there is no employment-like relation with a secular entity with professors or teachers providing denominational religious instruction.

Since 2012 Hungary has introduced a two-tier system with regard to the legal status of religious communities. Religious associations had to enter into a labour contract with their ministers to be recognized as such, with recognized churches,<sup>7</sup> however, this would be optional as they can avoid labour law and opt for a legal relationship entirely governed by internal law. In some respects ministers of recognized and non-recognized communities would fall under the same provisions (e.g. secrets entrusted to them enjoy the same protection), but with their labour relations there is a significant difference. It has to be noted that labour law in Hungary has become highly flexible, that means that labour contract has become almost as flexible as a civil contract, e.g. employees with the exemption of certain protected persons (like pregnant women) can be easily dismissed.

*Social security* also applies to ecclesiastical persons. In their case, the respective church agrees with the National Pension Insurance Agency on the *pension insurance* of its clergy. Usually churches insure clergy based on the minimum wages. Churches complement pensions from the public system in their own ways (either setting up their own pension agency or providing accommodation and alimentation for retired clergy).

### III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

Church autonomy is considered to be a core element of religious freedom. The institutional autonomy of churches – including church run institutions – is regarded to be as an important element of religious freedom. As churches run a significant part of the education, health care, and social care systems they are notable factors of the labour market.

Fundamental rights may have a horizontal effect under certain conditions. In general it is the state and not the church that has to respect and ensure religious freedom. The individual shall have the right to leave a religious community or a faith-based institution but in the given context it is the community or the institution that can invoke their religious freedom not the individual. A person dismissed from a church run institution for religious motives could not invoke his religious rights against the church. The internal relations in a church run institution are generally

<sup>7</sup> At present there are 31 recognized churches.

not governed by fundamental rights – aspects of equal treatment would qualify as a partial exception.

Work for churches can be carried out under four different legal regimes:

— *Ecclesiastical persons* can be employed in ecclesiastical service that is not employment in the sense of state law, but a relation exclusively determined by internal church law. A priest or a pastor would usually work in ecclesiastical service, but churches also have the possibility of employing him in another legal regime – and they are free to qualify persons in their service as ‘ecclesiastical persons’ (see above).

— Employees of church institutions in *genuine religious offices* usually would be lay persons, like cantors or catechist. They usually stay in a regular *work relation* with a church legal entity and, in their case, the requirement of a special loyalty is out of question – equal treatment considerations with regard to discrimination on the basis of religion would not apply to them.

— Employees of church institutions in *secular offices* would be a third category. This is the category where equal treatment issues raise challenges both in theory and in practice. The intention of the lawmaker was probably not grant exemption from the principle of equal treatment for employees like teachers of secular subjects at church-run schools, staff of church-run institutions of social care, etc. Positions of churches and of public authorities/equal rights advocates seem to be way apart in this regard. With two positions that are not reconcilable, one has to get a better understanding starting out from the reality of the given institutions. Many church-run institutions today are very much like secular ones: formally the institution is maintained by a church, practically it is like any other public institution. When we have a look at the origin of these institutions, it becomes obvious that originally there were no secular institutions at all. Originally in Hungary (as elsewhere in Europe) religious orders started activities and institutions such as schools, hospitals, and universities. For them, it was obvious that the institution as such is expressing the commitment of the community from the doorman to the abbot. Though numerically overwhelmingly lay persons in work relations carry out most activities in most institutions nowadays, but we still cannot forget the origins of these institutions. In the understanding of the churches it is the institution as such that carries the identity and the message of the community. At the moment, when the institution is compelled to employ persons who do not share the commitment of the institution, the very identity and the reason of the institution are at stake. Church jobs are usually not especially well paid – what prevents many conflicts – but churches have become quite careful in formulating the terms of employment in the contracts. A statement on the loyalty – the respect towards the identity of the employer – would generally be required in the contract.

— Other types of contracts may also engage people in the service of religious organizations, mainly *contracts under civil law*. For example, at a construction or reconstruction project, it is a contractor who is employing a number of workers to

carry out the actual work. The painter painting the church does not enter into any kind of contract with the church in this case. In the contract, however, that church may insist on respecting of its special character. Even in these relations it should not be tolerated that workers use swear-words or behave blasphemously.

The Act on Equal Treatment and the Promotion of Equal Opportunities implementing the Equal Treatment directive 2000/78/EC provides for an *Equal Treatment Authority* as a remedy competent in equal treatment cases. The Authority has the power of stating the breach of the equal treatment principle, to fine the institution that has violated the principle and to require changing its policies. Decisions of the Equal Treatment Authority can be challenged at the Municipal Court of Budapest. The Equal Treatment Authority did not handle many cases concerning discrimination based on religion. Some of the few cases, however, are of interest – as well as the fact that in the given cases, the Authority rejected complaints. In one case, a mission of a religious community was challenged by a person who was rejected for a position opened for a webmaster. The job description did not mention that any kind of religiosity had been required, nor the nature of the work to be done required any kind of such commitment. Prior to the oral interview, he was asked to make a statement about his religious affiliation in his CV. After stating that he was not religious, he was interviewed successfully: his professional profile was in line with the employer, and he stated his readiness to take part in religious events and to report on them on the website of the community. His agnosticism was also mentioned in the discussion. During the procedure the mission stated that from its 15 employees 3-4 had had no religious affiliation when they were hired. For the position of the webmaster, there were eight candidates, but finally the position was not filled for financial reasons. The mission stated that an understating of religious issues had been useful for the job, but not inevitable. The Authority accepted the defence of the mission as the connection between the (lack of the religious) conviction and the treatment could not be established. Religious affiliation was only taken into account by the mission insofar this was necessary for the nature of the job – the sphere where the requirement of equal treatment did not apply at all. The interview was carried out notwithstanding the agnosticism of the applicant, which shows that they have provided him a chance to demonstrate his abilities. It was also considered that finally no one was hired, and in this way there was no one to be discriminated against<sup>8</sup>. In another case, an employee dismissed from a foundation providing assistance to mentally ill carrying out its activities based on the Catholic faith complained that the reason for her dismissal was her motherhood as well as her religious conviction. The foundation managed to provide evidence in the procedure for the fact that its activities are partly based on religious

<sup>8</sup> Caase EBH 213/2007.

grounds, which means that employees have to have some kind of knowledge about religion, but do not have to be in fact religious. The procedure found no evidence for the claim that there had been a connection between the conviction of the employee and her dismissal – testimonies in the procedure stated other reasons of the dismissal<sup>9</sup>.

Employees of church-run institutions, like schools, hospitals, and institutions of social care are unlike their counterparts in public institutions not public employees, but fall under general labour law. For this type of employees, a status similar to public servants is ensured. The employment relationship of persons employed in church-run schools, hospitals, etc., shall conform to public employment with respect to wage, working time, and rest periods<sup>10</sup>. Salaries, holydays, etc., are not subject to the discretion of partners – protecting, in a way, both of them. Staff of church-run institutions are also entitled to the same discount in public transport as public servants<sup>11</sup> that shows that even minor aspects with regard to employment with church run entities is aligned to public employment.

<sup>9</sup> Government Decree 85/2007. (IV. 25.) Korm. §(1)b).

<sup>10</sup> Act CCVI. §20(2).

<sup>11</sup> Government Decree 85/2007. (IV. 25.) Korm. §(1)b).



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# LAW AND RELIGION IN THE WORKPLACE. REPORT FOR THE REPUBLIC OF IRELAND

STEPHEN FARRELL

## I. RELIGIOUS FREEDOM AT WORK

In Ireland religious freedom is based on protections found in the Constitution of Ireland. As is the case in many countries, these provisions are rather fluid and lacking in detail as to implementation, meaning that their scope and ambit has been left to be determined by the courts. Moreover, this vagueness has allowed the legislature not to address freedom of religion in the workplace in a coherent way – perhaps through a reluctance to enact that which might be unconstitutional, though possibly through an unwillingness to deal with a controversial topic which is theoretically covered by the constitutional framework. The result is a situation where legislation that does touch and concern freedom of religion at work lacks any common doctrine or rationale and demonstrates a decidedly ad hoc approach.

The Irish Constitution is enacted by the people of Éire,

In the Name of the Most Holy Trinity, for Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred<sup>1</sup>.

Article 44.2.1 sets out: ‘Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.’ Unlike Article 9 of the European Convention on Human Rights, which guarantees freedom of thought, conscience and religion without qualification and permits restrictions only with regard to expression of belief, Article 44.2.1 qualifies freedom of conscience and the profession of belief by reference to public order and morality<sup>2</sup>. Article 44.2.3 prevents the State from imposing any ‘disability or discrimination on

<sup>1</sup> Preamble, Constitution of Ireland.

<sup>2</sup> Only once has this been before the courts, when a defendant charged with destroying religious statues claimed he was sent by God. The Court of Criminal Appeal said it was not considering the validity of his religious beliefs – the defendant had damaged property and law said this was an offence.

the ground of religious profession, belief or status'. The autonomy of religious bodies from State interference is also protected under Article 44.2.5 and 44.2.6.

Given the traditionally close relationship between Church and State in the Irish Republic, the deference of law makers and courts to the Church and the exalted position given to religion throughout the constitutional order, it is unsurprising that these provisions have been interpreted as according a broad primacy to freedom of religion in relation to competing social interests and claims, as well as other constitutional values<sup>3</sup>. There is a paucity of case law in this area, but it is arguable that the Oireachtas, the Irish Parliament, is permitted and even obliged to exempt religions from the scope of generally applicable, 'neutral' enactments that inadvertently burden religious practices. Nor have the Irish courts been unwilling, on the few instances when called upon so to do, to investigate what is essential to a religion or what may or may not be considered religious doctrine. The only thread through the case law is that the trigger for constitutional religious freedom is the effect of laws upon actual religious belief and practice, as ascertained by the courts. That is, the Constitution has not been interpreted as mandating equality, but the recognition and accommodation of the actual belief systems in society.

The leading Irish case in this regard is *Quinn's Supermarket v Attorney General*<sup>4</sup>. The Plaintiff challenged laws on trading hours because these regulations exempted kosher shops in an attempt to facilitate Sabbath observance. The regulations banned the sale of meat in the evenings, but kosher butchers were exempt, as they could have incurred significant commercial disadvantage, as well as potentially restricting the access of observant Jews to fresh meat (no butcher could open on Sunday). The Plaintiff, objecting to being bound by the regulations whilst kosher butchers were exempt, argued that this was religious discrimination under Article 44.2.3. The Court accepted that Article 44.2.3 prohibits all distinctions based on religious belief, and not just discrimination<sup>5</sup>. The Supreme Court held that the Constitutional prohibition could not be limited to discrimination *against*, appearing to render the regulations unconstitutional because they applied differently on the basis of religious criteria. This equality aim was held by the Supreme Court not to be absolute, but to require placing in the context of the Constitution as a whole. It had to be attenuated where

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*Director of Public Prosecutions v Draper*, The Irish Times, 24 March 1988. See also Whyte and Hogan, *The Irish Constitution*, 3<sup>rd</sup> edn, Butterworths 1102.

<sup>3</sup> See Eoin Daly, Religion, Law and the Irish State, 84ff.

<sup>4</sup> [1972] IR 1.

<sup>5</sup> This turned on the Irish text of the regulations, with the Irish phrase being closer to distinction than discrimination, and the Irish text of laws always having precedence over the more commonly used English translations.

its application would otherwise undermine religious freedom, given that the ‘overall purpose’ of Article 44 was to protect religious freedom<sup>6</sup>. Walsh J. stated

Any law which by virtue of the generality of its application would by its effect restrict or prevent the free profession and practice of religion... would be invalid having regard to the provisions of the Constitution, unless it... saved from such restriction or prevention the practice of religion of the person or persons who would otherwise be so restricted or prevented<sup>7</sup>.

Notably, the court nevertheless struck down the law as it went beyond what was necessary in granting an exemption to the Kosher shops, in that they were exempt each day and not just on one or two days. Thus, the current constitutional provision in Ireland precludes any differential treatment between different categories of persons on the grounds of their religion, unless this differential treatment is necessary to religious freedom. This case cements the priority of religious freedom over religious equality and it can be seen that this is a very broad definition of religious freedom. The regulations challenged did not seek to restrict the profession or practice of Judaism or any other faith, but simply to allow access to meat and prevent economic hardship. Had the exemption not applied every day, but only for one or two days, it may have remained. The Court appeared to regard a limited exemption to the regulations as somehow necessary to religious freedom, despite there being no requirement to eat meat within Judaism, refrigeration was widespread by 1971, and a slight loss of trading hours hardly threatened the practice of the faith. The small number of subsequent cases make it difficult to chart how the case law has developed. In 2007 the Garda Síochána (Irish police) commissioner ruled against permitting Sikh officers from wearing the turban, based on the need for perceived impartiality on the part of the force<sup>8</sup>. It was not challenged in the courts. The Commissioner went further to state that he would reexamine the toleration of Catholic religious insignia, such as the imposition of ashes on Ash Wednesday<sup>9</sup>.

In the legislation concerning freedom of religion in the workplace there is little sign of a common thread. Religious freedom is addressed in s6(2)(e) of the Employment Equality Act 1998, which provides that to treat one person less favourably than

<sup>6</sup> No 4 at 11.

<sup>7</sup> *Ibid.*

<sup>8</sup> There is no doubt that the Garda uniform and dress standards present unique issues in accommodating cultural diversity. These are challenges faced by all facets of Irish society as diversity and integration more and more become real issues. The Garda Síochána has, historically, been seen as providing an impartial police service, policing all sections of society equally. By accommodating variations to our standard uniform and dress, including those with religious symbolism, may well affect that traditional stance and give an image of An Garda Síochána which the Commissioner feels the public would not want. Garda Press Office. <http://garda.ie/Controller.aspx?Page=3155&Lang=1> Accessed 11<sup>th</sup> July, 2015.

<sup>9</sup> Turban Ban Forces Garda into Rethink of Catholic Symbols, Irish Times, 27 August 2007.

another on the grounds that one has a different religious belief than the other, or that one has a religious belief and the other has not, will amount to unlawful discrimination<sup>10</sup>. Significantly, s6(2)(e) focuses on the person's religious beliefs rather than on his or her religion, and no definition is given as to what may constitute religion under the act. There is no clear sense of this provision having informed the drafting of other legislation in a coherent manner. In the Health (Family Planning) Act 1975, doctors are exempted from the requirement to give advice as to contraception or abortion, as they are exempt from the requirement to carry out abortions under the Protection of Life During Pregnancy Act 2013. However, Civil Registrars were not given an exemption from carrying out registration of civil partnerships when the scheme was introduced in 2010, and the recent referendum on marriage equality was meant to remove all barriers to same sex marriage without the need for further legislation, suggesting that no so-called conscience clause will be inserted for registrars. In trying to find a rationale in the legislation, ideas of neutrality, equality and religious freedom are all an awkward fit and it is easy to have some sympathy for Eoin Daly's assertion that 'the reality has been that exemptions are effectively extended on the basis of political favour and expediency.'<sup>11</sup>

The protection given to religious freedom at work is applied broadly. S692) (e) of the EEA 1998 applies it to religious beliefs and to those who profess no religion. In *Quinn's Supermarket* the Supreme Court observed

Article 44.1 acknowledges that the homage of public worship is due to Almighty God but it does so in terms which do not confine the benefit of that acknowledgement to members of the Christian faith<sup>12</sup>.

The Fifth Amendment to the Constitution of Ireland in 1972 removed a reference to the 'special position' of the Roman Catholic Church as well as a list of other 'recognised' denominations. In *Corway v Independent Newspapers*, a case concerning blasphemy, the Supreme Court went further than it did in *Quinn Supermarket* by noting.

Article 44.1 guarantees freedom of conscience, the free profession and practice of religion and equality before the law to all citizens, be they Roman Catholics, Protestants, Jews, Muslims, agnostics or atheists<sup>13</sup>.

## II. RELIGIOUS MINISTERS AND LABOUR LAW

This is an underdeveloped area of law in the Republic of Ireland. The vast majority of religious ministers in Ireland are Roman Catholic priests whose status is

<sup>10</sup> See also Cox, Corbett & Ryan, *Employment Law in Ireland*, 324ff.

<sup>11</sup> No 3 at 98.

<sup>12</sup> No 4 at 23.

<sup>13</sup> [1999] 4 IR 484, 501.

governed by Canon Law. Until recently there has been a high level of political and judicial deference to the internal regulation of the Roman Catholic Church. Also, it has not been possible to find any case before the Irish courts or the Employment Appeal Tribunal arguing as to the labour status of Catholic priests. The case law that exists concerns either ministers of other denominations or of Catholic Religious working as teachers.

As Ireland shares a common law system with the United Kingdom, and as most religious bodies operate across both jurisdictions on the island, most religious bodies have an eye to the jurisprudence in England and Wales, in particular to judicial led new approaches to the employment status of religious ministers. The tests used to determine whether an individual may be considered to be in employment are very similar in Ireland and the U.K., and it will be prudent to consider how these tests have been interpreted by English courts recently as an aid to predicting how Irish courts may approach the same issues in the future.

In the UK the Supreme Court Case of *Preston*<sup>14</sup> seems to have turned back what was widely held to be the gradual judicial shift towards recognising clergy as employees<sup>15</sup>. In the Republic of Ireland there have been few recent cases on the matter, though the decisions of the Employment Appeals Tribunals seem to have been decided on slightly different grounds to the UK cases<sup>16</sup>. In the Republic of Ireland the tests used to define the employment relationship are similar to those north of the border. What is called the ‘control test’ is important in Irish law: ‘The essential test was whether the person alleged to be a servant was in fact working for himself or for another person.’<sup>17</sup> Whilst noting the long unchallenged dominance of the control test, Forde and Byrne warn that ‘there is no simple master test; at times greater emphasis is placed on one test over others. In particular, it is wrong to apply only the traditional control test and not to consider other distinctive aspects of the relationship.’<sup>18</sup> In addition to control there is the familiar integration test<sup>19</sup>, and the ‘parties own characterisation’ test<sup>20</sup>, which does look to how parties have characterized the relationship, but only in relatively balanced situations. In reality, this latter

<sup>14</sup> *Preston (formerly Moore) v President of the Methodist Conference* [2013] UKSC 29.

<sup>15</sup> Writing as early as 1997, Doe recognised that whilst “the classical doctrine has not disappeared... there has been a subtle shift in the classical doctrine.” Doe, N. *Ministers of Religion and Employment Law in the United Kingdom: Recent Judicial Developments* *Anuario de Derecho Eclesiastico* (1997) 349, 355.

<sup>16</sup> *O’Callaghan v O’Sullivan* [1925] 1 IR 90; *O’Dea v Briain* [1992] ILRM 364; *Millen v Presbyterian Church in Ireland* [2000] 11 ELR 292; *Representative Body of the Church of Ireland v Frazer* [2005 EAT] 16 ELR 292.

<sup>17</sup> *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 I.R. 34, 50 per Keane J.

<sup>18</sup> Forde and Byrne *Employment Law* 3<sup>rd</sup> edn (2009) Roundhall.

<sup>19</sup> *In re Sunday Tribune Ltd* [1984] I.R. 505.

<sup>20</sup> *Dower v Radio Ireland Ltd* [2000] E.L.R. 1.

test is applied only when the economic reality test (sometimes called the Enterprise test) has proven inconclusive. The limitations of the test were noted in *Re Sunday Tribune Ltd*, as Carroll J. put it ‘the court must look at the realities of the situation in order to determine whether the relationship of employer and employee in fact exists, regardless of how the parties describe themselves.’<sup>21</sup>

The classic position concerning clergy has four parts. Firstly, they are not employees, but office holders. The difference is ‘that an office is a position of a public nature, filled by successive incumbents, whose duties were defined not by agreement but by law or by the rules of the institution.’<sup>22</sup> In *Scottish Insurance Comrs v Church of Scotland*,<sup>23</sup> Lord Kineer found that the status of ministers

is not that of a person who undertakes work defined by contract but of a person who holds an ecclesiastical office, and who performs the duties of that office subject to the laws of the church to which he belongs and not subject to the control and direction of any particular master<sup>24</sup>.

More recently, in England and Wales, in the case of *Percy*<sup>25</sup> Lord Nicholls and Lord Hope both recognised that Ms Percy had been appointed to an office, but considered the category to be of little relevance<sup>26</sup> in determining whether or not a cleric could be considered to be an employee.

Secondly, it has been said that office and contract cannot co-exist. In *Barthope v Exeter Diocesan Board of Finance*,<sup>27</sup> the Industrial tribunal held that a lay readers could not be employees as they are office holders. The EAT disagreed, taking the view that an office holder could also hold a contract of employment. In the 2006 case of *Percy*, Lord Nicholls noted that the

distinction between holding an office and being an employee has long suffered from the major weakness that the concept of an “office” is of uncertain ambit. The criteria to be applied when distinguishing those who hold an office from those who do not are imprecise<sup>28</sup>.

He warned against creating a false dictotomy: that a person either holds an office or is an employee<sup>29</sup>. In the dissenting judgment in *Preston*, Baroness Hale is scathing of the ‘distraction’ provided by the idea that office holders cannot also be employees,

<sup>21</sup> In re Sunday Tribune Ltd, 508.

<sup>22</sup> *Preston* 1352 per Lord Sumption JSC.

<sup>23</sup> *Scottish Insurance Comrs v Church of Scotland* [1914] SC 16.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Percy v Church of Scotland Board of National Mission* [2006] 2 WLR 353.

<sup>26</sup> *Ibid.* 361, 374.

<sup>27</sup> *Barthope v Exeter Diocesan Board of Finance* [1979] ICR 900.

<sup>28</sup> *Percy* 359.

<sup>29</sup> *Ibid.* 360.

drawing an analogy with universities where someone may hold the office of professor under a contract of employment<sup>30</sup>.

Thirdly, clergy are said to have a spiritual role that is incompatible with contract. In *Preston*, Lord Sumption noted a second thread running through the case law, that ‘the spiritual nature of a minister of religion’s calling as making it unnecessary and inappropriate to characterise the relationship with the church as giving rise to legal relations at all.’<sup>31</sup> In *Davies v Presbyterian Church of Wales*<sup>32</sup> Lord Templeman moved away from this classic position: ‘My Lords, it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual.’<sup>33</sup> Lord Nicholls quoted this judgment with approval in *Percy*, holding that the traditional principle should not be carried too far. It cannot be carried into arrangements which on their face are to be expected to give rise to legally-binding obligations... Further, in this regard there seems to be no cogent reason today to draw a distinction between a post whose duties are primarily religious and a post within the church where this is not so<sup>34</sup>.

In *Preston*, Lord Sumption does some violence to the judgment of Lord Nicholls in *Percy*. He finds that

The decision in *Percy* is authority for the proposition that the spiritual character of the ministry did not give rise to a presumption against the contractual intention. But the majority did not suggest that the spiritual character of the ministry was irrelevant. It was a significant part of the background against which the overt arrangements governing the service of ministers must be interpreted<sup>35</sup>.

Baroness Hale considered this concept to be another ‘distraction’, differentiating between ‘the relationship between a minister of religion and her church, which is a temporal one... [and] the relationship between a minister of religion and her God which is a spiritual one’<sup>36</sup>. But despite the assertion of Baroness Hale that ‘this assumption has now been cleared out of the way’<sup>37</sup> it would seem Lord Sumption, in the leading majority judgment, has done a lot to resurrect it, albeit with very little guidance as to precisely how it ought to inform the court.

Fourthly, it has been said that the working arrangements entered into between clergy and their churches are subject to a presumption against there being an intention to create legal relations. This is something of a recent creation, arising out of

<sup>30</sup> *Ibid.* 1364.

<sup>31</sup> *Ibid.* 1353. See also, *Rogers v Booth* [1937] 2 All ER 751.

<sup>32</sup> *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323.

<sup>33</sup> *Ibid.* 329.

<sup>34</sup> *Percy* 361-362.

<sup>35</sup> *Preston*, 1362.

<sup>36</sup> *Ibid.* 1363.

<sup>37</sup> *Ibid.* 1363.

*Parfitt*<sup>38</sup> and *Davies*<sup>39</sup>, designed perhaps as a safeguard in judgments where the court recognised that clergy could potentially have a contract of employment. In considering the case law on this point the view taken by Baroness Hale was that in so far as those authorities may be explained by a presumed lack of intent to create legal relations between the clergy and their church, I cannot accept that there is any general presumption to that effect. The nature of many professionals' duties these days is such that they must serve higher principles and values than those determined by their employers. But usually there is no conflict between them, because their employers have engaged them in order that they should serve those very principles and values<sup>40</sup>.

*Preston* accepts that there is no authority for a presumption against an intention to create legal relations, but notes that the arrangements, properly examined, might well prove to be inconsistent with contractual intention<sup>41</sup>.

The position in the Republic of Ireland has received much less by way of judicial consideration. In *O'Dea v Briain*<sup>42</sup> it was accepted that a member of a religious order was an office holder, but they could also be in employment. On the facts of the case Sr. O'Dea was not claiming that she was employed by the religious order but that she was employed by its school as a teacher. The decision of her Superior to move her from Dublin to Monaghan meant she would lose her teaching job. The EAT focused on the fact as a sister and a teacher the nun operated under two codes, and that there was no guarantee that the two codes would always reconcile with one another. The power given to a religious superior through the vow of obedience was said to be absolute and that it could never have been intended to be questioned before any tribunal. This comes quite close to saying that there could have been no intention to create legal relations. The case of *Millen v Presbyterian Church in Ireland*<sup>43</sup> a minister was considered not to be an employee of the central church because, though it issued his P60, it was the local congregation that initiated the appointment, chose Mr Millen and ultimately paid his stipend. The nature of office or his spiritual duties was not considered. It is arguable that if Mr Millen had been pursuing his local congregation the decision may have been different.

In the case of *Fraser*<sup>44</sup>, the EAT gave a very strong and decisive determination which is worth reproducing in full.

<sup>38</sup> "I have no hesitation in concluding that the relationship between a church and a minister of religion is not apt, in the absence of clear indications of a contrary intention in the document, to be regulated by a contract of service." *Parfitt* per Dillon LJ at 376.

<sup>39</sup> *Davies* 329.

<sup>40</sup> *Percy* 395.

<sup>41</sup> *Preston*, 1362.

<sup>42</sup> *O'Dea v Briain* [1992] ILRM 364.

<sup>43</sup> *Millen v Presbyterian Church in Ireland* [2000] 11 ELR 292.

<sup>44</sup> *Representative Body of the Church of Ireland v Frazer* [2005 EAT] 16 ELR 292.

The claimant is an office-holder and not an employee. No contract of employment exists; the nature of the relationship cannot be analysed in contract terms because the tribunal does not accept that there was an intention to create legal relations. The nature of the relationship with the church is that of a vocation or a calling, which cannot be grounded in the common law notion of contract. The claimant's duties are defined and his activities are dictated not by contract but by conscience<sup>45</sup>.

This restatement of the traditional understanding of the legal position of clergy requires little analysis and allows little room for circumnavigation. Suffice it to say that the Tribunal has reiterated a position that is much stronger than that in *Preston*. One question is whether the stipulation that a vocation cannot be grounded in contract precludes the finding of an intention to create legal relations alongside, but parallel to, the vocation of the minister. The EAT did not find an intention to create legal relations, though it is arguable that in a different case they may do so, notwithstanding the fact that the individual concerned is a minister of religion.

In summary it would seem that religious ministers in Ireland have little hope of being considered as employees. The Irish case of *Fraser* only leaves the hope that it is so unyielding in reasserting the traditional position that a later court or EAT may consider it to be overstating the case. This is little comfort. Arguably, the better view of the law is that taken by Baroness Hale in *Preston*, more fully articulated in *Percy*, which seeks to set aside questions of office or the spiritual nature of ministry and to look at the arrangements entered into by clergy as though they were any other class of worker.

### III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF WORKERS

Article 44.2 of the Constitution of Ireland provides

Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, moveable and immoveable, and maintain institutions for religious or charitable purposes.

The property of any religious denomination or any educational institution shall not be diverted save for the necessary works of public utility and on payment of compensation.

Casey argues that Article 44.2.5 would seem to allow religious denominations to use public monies in support of policies which, if adopted by the State itself, would offend against the principle of non-discrimination in Article 44.2.3, a situation which he describes as 'Kafka-esque'<sup>46</sup>. The most obvious example being that the State could not discriminate on the grounds of religion in the recruitment of staff, but religious

<sup>45</sup> *Fraser* 296.

<sup>46</sup> Constitutional Law in Ireland (3<sup>rd</sup> edn) 571.

schools may so discriminate when appointing people to publically funded teaching posts. Admittedly, the prohibition in Article 44.2.3 is directed at the State, not at other bodies, but it is difficult to justify the circumvention of that provision by the State financing the discriminatory policy of a religious organization. It is arguable that the provision ought to be read narrowly, in preventing the State interfering in the internal affairs of religious bodies, but that where public money is involved the matter ceases to be a private one. There is limited case law on Articles 44.2.5 and 44.2.6. In *McGrath and Ó Ruairc v Trustees of Maynooth College*<sup>47</sup>, the Supreme Court adverted to Article 44.2.5 and its guarantee of the right of every religious denomination to manage its own affairs, in upholding the right of Maynooth College, a Seminary, to enforce the discipline of its statutes. In *Crichton v Land Commission and Gault*<sup>48</sup>, the Land Commission purported to acquire land used as a schoolhouse by the Church of Ireland Diocese of Kilmore. It was held, citing Article 44.2.6, that

This schoolhouse was held by a religious body for educational and religious purposes, and therefore the attempted acquisition by the Land Commission was unconstitutional and void.

The fact that this case was held before the Circuit Court makes it a poor authority for a Constitutional law provision.

The Employment Equality Acts 1998-2011 provide the basis of workplace anti-discrimination laws in Ireland. There is a very wide and much criticized exemption given to churches in s37 of the 1998 Employment Equality Act. That section provides that certain religious, educational or medical institutions under the direction or control of a body established for religious purposes, or whose objects include the provision of services in an environment that promotes certain religious values, will not be taken to have discriminated against a person if:

(a) they give more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of an institution, or

(b) they take action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.

Though no one has ever lost their job because of s37, it is thought that the case of *Flynn v Power*<sup>49</sup>, which predates the Employment Equality Acts, would be decided the same way today. This case concerned a female teacher in a Catholic school who became pregnant as a result of a relationship with a married man. She was dismissed from her employment and her dismissal was successfully justified by the defendant

<sup>47</sup> [1979] ILRM 166.

<sup>48</sup> (1950) 84 ILTR 87.

<sup>49</sup> [1985] IR 648.

on the basis that the school was established to promote a certain religious ethos and the plaintiff's lifestyle was in contravention of that ethos.

There are many uncertainties surrounding s37. It is unclear whether it relates to religious affiliation in the narrow sense, or if it extends to the level of religious observance on the part of an individual, or their orthodoxy. It is unclear how religious characteristics are to be discerned for the purposes of the section, or what lifestyle factors will be considered undermining of ethos. A further difficulty is in determining the class of persons who may undermine the ethos of an organization. There is a notable absence of any requirement of situational or occupational necessity in s37, with no requirement that the act of discrimination be necessary to the imparting of the religious beliefs of the institution. Whilst it may be argued that a teacher in a religious school must accept the ethos of the school, especially if they teach religion, it is harder to argue that the secretary or cleaner must.

The breadth of s37 and its relation to non-religious characteristics such as lifestyle or sexual orientation, is unclear. The broad provision in s37(b) would seem to widen the scope of the exemption to characteristics not directly related to religion. The present government has been critical of s37, but has taken the view that removing it would be a constitutional matter. In the Programme for Government, drawn up by the coalition partners in 2011, there was a commitment that

People of non-faith or minority religious backgrounds and publically identified LGBT people should not be deterred from training or taking up employment as teachers in the State<sup>50</sup>.

During 2012 the Government charged the Equality Authority with undertaking a public consultation on the future of s37<sup>51</sup>. Within recent months the Government

<sup>50</sup> Quoted in an INTO submission to the Equality Authority on s37. [https://www.into.ie/ROI/Publications/INTOSubmissions/Submission\\_S371.pdf](https://www.into.ie/ROI/Publications/INTOSubmissions/Submission_S371.pdf). Accessed 13<sup>th</sup> July, 2015.

<sup>51</sup> The Minister for Justice, Equality and Law Reform said in the Dail "it is unjust that people whose wages are paid by the taxpayer and who are employed to provide essential public services, like education or healthcare services, should feel oppressed or feel a need to live their lives in secret for fear that their sexual orientation should lead to victimisation by an employer". He proposed an approach to amending legislation on the lines that Section 37(1) could remain unchanged in respect of wholly autonomous religious institutions, but that for educational and medical institutions, it might be provided that more favourable treatment on the religion ground could not be based on a person's characteristics under one of the other grounds; and that "reasonable action to prevent an employee or prospective employee from undermining the religious ethos of the institution may only be taken where an employee actively undermines or seeks to undermine, or where there is a reasonable belief based on demonstrable evidence that a prospective employee would so undermine or seek to undermine, the religious ethos of the institution concerned".

Quoted in [https://www.into.ie/ROI/Publications/INTOSubmissions/Submission\\_S371.pdf](https://www.into.ie/ROI/Publications/INTOSubmissions/Submission_S371.pdf). For a converse view of s37 see <http://d2539.cp.irishdomains.com/assets/files/Section%2037%20submission.pdf>. Both accessed 13<sup>th</sup> July, 2015.

has promised changes to s37 by September, but has given no details as to what those changes might be<sup>52</sup>.

The bill that eventually gave rise to the Employment Equality Act 1998 was challenged in the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996*<sup>53</sup>. Citing *Quinn's Supermarket*, the Supreme Court held that religious discrimination was permissible where necessary to give 'life and reality'<sup>54</sup> to the constitutional guarantee of religious freedom. However, in *Quinn's Supermarket*, discrimination was held to be lawful only insofar as it is necessary to protect religious freedom, it is difficult to see how the breadth of s37 is required to protect religious freedom.

In the Irish context there has been little case law to illuminate judicial attitudes to these provisions, nor has there been consideration by the State or the national courts of European Union law in this area. The strong, if ill-defined, constitutional protection given to freedom of religion has prevented the State from pursuing a policy of neutrality, with each new case or legislative act that reflects this position further entrenching the near primacy of religious freedom over and against competing interests and claims.

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<sup>52</sup> <http://www.independent.ie/irish-news/news/bill-to-prevent-sacking-of-gay-teachers-30938317.html>. Accessed 13<sup>th</sup> July 2015.

<sup>53</sup> [1997] 3 IR 321.

<sup>54</sup> no 50 at 360.

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# LAW AND RELIGION IN THE WORKPLACE. THE ITALIAN REPORT

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## I. RELIGIOUS FREEDOM AT WORK - AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

### 1. Introduction. “The new path” of the Italian labour law

The Italian labour law during the past few years has faced a significant process of change, in the sign of political objectives such as flexibility (remarkably increased for both incoming and outgoing), the systematization of different types of dependent employment contracts, the redefinition of social welfare and the creation of a regime of “increasing protections” against unfair dismissal, primarily aimed at new employees.

This path has been implemented firstly with the “Fornero Reform” (28 June 2012, n. 92)<sup>1</sup>, then with the “Jobs Act”<sup>2</sup>, a combination of measures aimed at fully implementing the political objectives mentioned above: the “Jobs Act” has been developed around the decree law of 20 March 2014, n. 34 (also known as “Poletti Decree” from the Labour Minister Giuliano Poletti) and the Law of 10 December 2014, n. 183, and has found - at the moment - its peak in the Legislative Decrees n. 23 of 4 March 2015: “Provisions on employment indefinite contract with increasing defences, in accordance with Law of 10 December 2014, n. 183 “, which represents a measure to formalize the creation of two different legal regimes aimed to regulate the indefinite employment relationships. The first of these schemes is the one related to workers employed before the entry into force of Decree Law 23/2015 and it is characterized by wider defences under the version of the art. 18 of Law 300/1970 as emended by the Fornero Law: it is marked by the generalized protection of reinstatement in case

<sup>1</sup> TIRABOSCHI, M. (2012). Italian Labour Law after the so-called Monti-Fornero Reform (Law No. 92/2012). *The E-Journal of International and Comparative Labour Studies*, 1(3-4).

<sup>2</sup> PINI, P., & LEONARDI, M. (2015). Sulla riforma del mercato del lavoro. *il Mulino*, 64(1), 131-144.

of illegitimate dismissal. The second scheme - valid for workers hired as workmen, employees and executives after the entry into force of Decree 23/2015 - would, in the opinion of some legal writers<sup>3</sup>, greatly weakened the protection of employee's subjective legal situations, especially where it replaces the reinstatement into the workplace with a mere claim for redress in cases where the dismissal results to be illegitimate for lack of reasoning or failure to comply with procedural requirements provided for the disciplinary dismissal.

In this way, not only we have created a disparity between co-workers involved in the same duties - which may receive different protections in case of identical personal issues (and here are placed compatibility profiles of the existing legislation with the art. 3 of the Constitution.) - But also a proportionality issue between the illegality of the receiving act that terminates the employment relationship and the instruments of workers' protection<sup>4</sup>: a problem that must be tackled in perspective of art. 30 of the Charter of Fundamental Rights of European Union.

Actually, the weakening of the protection that would seem to emerge from both the so-called "Fornero Reform" and the so-called "Jobs Act" doesn't seem - at first sight - to include topics related to employee's religious freedom, which indeed seems to be better protected - especially in relation to the so-called "forum internum", i.e. the right of worker of not being discriminated on grounds of his beliefs in religious matter<sup>5</sup>.

We have finally to remember the Legislative Decree n. 81/2015: it guarantees the right of the employer to unilaterally change the employee's duties, even assigning lower tasks to the latter<sup>6</sup>.

## 2. The ban of religious discrimination

Actually, under the Italian Law, the main instrument devoted to guarantee religious freedom in the workplace is a system of different laws that ban religious discrimination<sup>7</sup>, both in the Employment Policies/Practices, both in any aspect of

<sup>3</sup> MARIUCCI, L. (2015). Il diritto del lavoro ai tempi del renzismo. *Lavoro e diritto*, 29(1), 13-38.

<sup>4</sup> MARIUCCI, L. (2015). Il diritto del lavoro ai tempi del renzismo.

<sup>5</sup> LICASTRO, A. (2015). Quando è l'abito a fare il lavoratore. La questione del velo islamico, tra libertà di manifestazione della religione ed esigenze dell'impresa. *Stato, Chiese e pluralismo confessionale*, [www.statoechiese.it](http://www.statoechiese.it), p. 7-8.

<sup>6</sup> TIRABOSCHI, M. (2015). Prima lettura del d. lgs. n. 81/2015 recante la disciplina organica dei contratti di lavoro. *ADAPT Labour Studies e-Book series*, (45).

<sup>7</sup> COGLIEVINA S. (2013). *Diritto antidiscriminatorio e religione. Uguaglianza, diversità e libertà religiosa in Italia, Francia e Regno Unito*, Libellula Edizioni - Tricase (LE), pp. 161- 167.

employment, including hiring, firing, pay, job assignments, promotions, and any other term or condition of employment<sup>8</sup>.

The struggle against religious discrimination within employment relationships began well before the reforms made in the XXI century.

The first rule intended to directly and immediately ensure the right of the worker not to suffer, during the relationship, a prejudicial treatment solely because of the faith he professed (or not professed), or because of his religious opinions, is the art. 4 l. July 15, 1966 n. 604, which strikes with the sanction of nullity all terminations induced by reasons related to the worker's religious belief<sup>9</sup>.

Although this rule is still formally in force, it necessarily has to be read in relation to art. 3 l. May 11, 1990 n. 108 that has replied the original content with some amendments, additions and clarifications as to certain aspects of the provided case<sup>10</sup>. Anyway, under article 3 of Law 108/1990 the termination of employment for religious reasons is invalid, regardless of the adopted reason.

The term "religious faith" must certainly include all possible ideological positions of the employee regarding confessional matters. So that must we must consider as moved by discriminatory reasons (and therefore prohibited) not only the terminations arising from the employee membership (or non-membership) to a religious group, but also those resulting from the assumption of any ideological position against a particular religious message<sup>11</sup>.

This interpretation obviously opens several issues related to the case where the employer can be called "*organizzazione di tendenza*" ("ideologically orientated organisation"), a term with which we identify social organizations that carry on an ideologically oriented activity or that have as its primary aim the disclosure of a certain Weltanschauung.

The notion of "ideologically orientated organisation" refers to - in other words - all socio-economic realities in which the production of goods or the provision of services is inseparably linked to the desire to achieve certain aims of an ideological

<sup>8</sup> LASSANDARI A. (2010). *Le discriminazioni nel lavoro. Nozione, interessi, tutele*, Cedam, Padova, pp. 166 – 172.

<sup>9</sup> "The dismissal grounded on political belief or religious faith, on the belonging to a trade union is void, regardless of motivation adopted".

<sup>10</sup> "The dismissal grounded on discriminatory reasons under Article 4 of the Law of 15 July 1966 n. 604 (...) is void regardless the reason given and implies, whatever the number of employees employed by the employer, the consequences set Article 18 of the Law of 20 May 1970, number 300, as amended by this law. These provisions also apply to executives".

<sup>11</sup> CHIECO, P. (2013). *Il licenziamento nullo. Flessibilità e tutele nel lavoro: Commentario della legge 28 giugno 2012 n. 92, (92)*, pp. 279 – 281.

nature: this will can be the sole purpose of the employer or can compete with a profit objective. Later we will return on this in more detail<sup>12</sup>.

It is also difficult to establish if, among the cases of discriminatory termination related to the employee's religion under art. 3 l. 108/1990, it is possible to include layoffs moved by certain religious practices that the employee has (or has not) followed in his working life or outside work.

On one hand, in fact, these terminations can be considered as related to the worker's religion only indirectly, finding instead their *causa proxima* in a violation of the obligations of fairness and diligence during the job performance.

On the other hand, it was observed that the term "religious faith" refers to not only the principles or dogmas related to ultimate existence problems, but also the set of ethical standards that the individual must follow to avoid displeasing his/her own God or to not renounce to its principles. This topic also will be further discussed.

The Law 20 May 1970, n. 300 (Workers' Statute, part of which was subject to profound changes in order to ensure a greater flexibility) has considerably contributed to expand the ban on religious discrimination during the work relationship.

Besides art. 8 of Workers' Statute, which introduced into our judicial system the ban of surveys on religious opinion<sup>13</sup>, not only for the candidate but also for the employee, however without ensuring a satisfactory confidentiality, the articles 1, 15 and 16 are relevant for what we are interested in.

Article 1 of Workers' Statute establishes, in favour of all workers, "without distinction (...) of religious faith, the right to freely express their thoughts". It is one of those statutory provisions that appear to be a simple specification, if not a mere re-statement of the rules established by the constitution. The rule has, however, a high value of principle when read in conjunction with art. 3 l. 108/90.

The combined reading of the two provisions seems to exclude in any case - or at least in case the employer is not an ideologically orientated organisation, tied to a certain religion or a certain view of the world - the legitimacy of the so-called "ideological dismissal", i.e. the dismissal that - without being put in place for discrimination purposes - directly results from opinions or criticisms expressed by the employee (also) in religious matters.

<sup>12</sup> Cerioli, J. P. (2013). Parità di trattamento e organizzazioni di tendenza religiose nel «nuovo» diritto ecclesiastico europeo. *Quaderni di diritto e politica ecclesiastica*, 21(1), 71-86.

<sup>13</sup> "The employer is not permitted, as for purposes of employment, as during the course of the labour contract, to make investigations, even through third parties, on political, union or religious opinions of the worker, as well as on facts that are irrelevant in order to evaluate employees' professional qualifications".

Therefore, all the layoffs that - regardless of the reasons given or dissimulated by the employer - have been determined by a particular ideological position of the employee will fall under the ban provided by those rules.

In articles 15 and 16 of the Workers' Statute, the legislator in 1970 sanctioned the prohibition of any agreement or act that has discrimination purposes and causes at the same time a prejudice for the discriminated worker<sup>14</sup>.

In particular, the Workers' Statute has banned any advantage, benefit or utility - either continuous or occasional - attributed by the employer to one or more employees and not extended to others, adopted with the intent to benefit (or harm) some workers because of their religion.

When the benefit is estimated in economic terms we will apply article 16 of Workers' Statute, which excludes any possibility of extending the more favourable treatments to discriminated subject: the penalty for such behaviour therefore will be not a remedy, but will be the simple conviction of the employer to pay to the employee's Pension Fund an amount corresponding to the benefit provided (but still limited to what is due in up to one year).

When, instead, the benefit cannot be assessed in economic terms, the art. 15 Workers' Statute will find application, keeping in mind in any case the already formulated observation on the unsuitability of the penalty prescribed by the rule to affect behaviours that are merely omissions of the employer.

The regulatory framework had been further clarified and has strengthened the anti-discrimination protection following the entry into force of articles 43 and 44 of the Legislative Decree of 25 July 1998, n. 286.

Articles 43 and 44 of this measure exclude the possibility of different treatment of workers based on their religious beliefs, even when this is proven on the basis of objective reasons<sup>15</sup>. It must be observed, in fact, that the prohibition of any behaviour which

<sup>14</sup> "1. It is void any agreement or act intended to:

a) make the employment of a worker to the condition that it fits or does not belong to a union association or cease to be a member of it;

b) Dismiss an employee, create a discrimination against him/her (...) or otherwise to cause him/her prejudice because of his affiliation or union activities or his participation in a strike.

2. The provisions of the preceding paragraph shall also apply to contracts or acts intended for purposes of (...) religious (...) discrimination".

<sup>15</sup> According to article 43, discrimination consists of distinction, exclusion, restriction or preference based on race, colour, national or ethnic origin or descent, religious practices or conviction, when it has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Paragraph 2 (e) of the Article 43 highlights the discriminatory behaviour of employers or their employees "who according to article 15 of the 20/04/1970 Law No. 300, as modified and integrated with the 11/12/1997 law No. 903 and of the 11/04/1990 law No. 108, undertake, directly or indirectly, any discriminatory action or behaviour producing prejudicial discriminatory outcomes

has as a “purpose” or “effect” the “injury” of a “human right” or a fundamental freedom emerges from the provisions of art. 43 and 44 of Legislative Decree no. 286/98<sup>16</sup>

For the purpose of perfecting the case therefore the use of a discriminatory “purpose” or of an “effect” assumes more significance: the alternative “purpose” / “effect” seems not only to enable a court to inhibit all behaviours directly or indirectly aimed at “discrimination”, irrespective of the existence of a concrete infringement of a human right or a fundamental freedom, but also to release the efficiency of the remedy under art. 44 paragraph 1 (a civil action against discrimination, procedural remedy aimed at ending a discriminatory practice and to remove the injurious effect) — from the relevance of employer’s *voluntas discriminandi*.

So even without the restriction of an evidence about the use of the subjective element, the court finds that, even with simple presumptions, the existent employer’s behaviour that - directly or indirectly - involves a distinction, an exclusion, restriction or preference based on the employee religious beliefs or practices and which has the effect “of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms” of the latter, will have to order the injurious behaviour to cease.

The irrelevance of the subjective element regarding the illegality of the differentiation made on the basis of the employee religious beliefs or practices, therefore leads to the conclusion that a possible difference in payment or placement with the same duties will be sanctioned by the court hearing the case, not only (art. 15 Worker’s Statute) if the employee proves that this was done for discrimination purposes, but also where he can demonstrate the simple causal link between the different treatment and his religious beliefs or practices, regardless of the existence of an employer’s *animus nocendi*.

This conclusion partially confirmed the hypothesis exemplifying in article. 43 paragraph 2 — e letter) Leg. Decree 286/98, in which it is expressly provided that in any case where it is carried out an act of discrimination by the employer or its officers, who are pursuing an act or behaviour which produces a prejudicial effect to some workers because of their membership in a confession. Moreover, this assumption is not entirely clear and complete.

First of all, it connects the illegality of the employer conduct to a detrimental effect, without requiring an *animus nocendi*, but at the same time it explicitly recalls

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for workers in the light of their belonging to a race, ethnic or linguistic group, religious confession, or their citizenship. Each prejudicial treatment deriving from the adoption of criteria which disadvantage in proportionally higher fashion workers belonging to a particular race, ethnic or linguistic group, religious confession or citizenship, and which concerns non-essential requirements to the undertaking of a working activity, constitutes indirect discrimination”.

<sup>16</sup> FAVÈ E. (2011). *La normativa italiana antidiscriminatoria applicata al rapporto di lavoro. Il Sistema della discriminazione sul lavoro, La cornice giuridica e gli strumenti di tutela* - Perocco F.; Ferrero M. - Franco Angeli, pp. 273 – 276.

art. 15 of Worker's Statute, which - as we have seen – subordinates the illegality of the act to the existence of such psychological element.

Secondly, this hypothesis does not connect the act of discrimination to the employee's religious beliefs but only to his religious affiliation, thus significantly narrowing the overall scope of the prohibition ratified in articles 43 - paragraph 1 and 44.

In our opinion it should also be noted that the merely illustrative character of this hypothesis cannot in any way impede the full and complete application of the first paragraph of article 43 also to employers, for which in any case it must be prohibited to operate distinctions, exclusions, restrictions or preferences based not only on religious beliefs but also on the religious practices followed by the employee.

Under article 44, paragraph 1 - Leg. Decree 286/98, in the event of termination based on the worker's religious beliefs and practices (unable to affect the smooth running of the service), the employee may promote a direct action so that the judge will order "the cease of the prejudicial behaviour" and adopt "any other suitable measure, under the circumstances, to remove the effects of the discrimination"<sup>17</sup>.

The court order more likely to achieve the above result seems undoubtedly represented by the declaration of nullity of the termination, and therefore - in accordance with art. 3 l. 108/90 - the reinstatement of the dismissed worker in the workplace under art. 18 l. 300/70, whatever the number of workers employed.

It should also be mentioned that the civil action against discrimination must now be processed by a mandatory settlement, pursuant to art. 410 of Code of Civil Procedure, in view of a general effort to value non-judicial methods for dispute resolution.

In summary, we can say that the general framework provided by the combined provisions of Law n. 300 of 1970 and Legislative Decree n. 286 of 1998 guarantees to the employer the widest ideological freedom in religious matters, and prohibits - in general - that the worker suffers adverse consequences because of the faith he professes or not, both before his hiring (so all distinctions, restrictions, exclusions or preferences that may affect a candidate because of his faith or world view are prohibited) and during the job performance.

### **3. The Right to practice one's religion and the ban of religious discrimination in the workplace. Religious accomodation and "obligation to repacehage"**

Ultimately, the religious freedom of the worker is essentially protected through a ban to receive favourable or prejudicial consequences to his decision to adopt a certain religious ideology.

<sup>17</sup> CASADONTE, A., & GUARISO, A. (2010). L'azione civile contro la discriminazione: rassegna giurisprudenziale dei primi dieci anni. DIRITTO, IMMIGRAZIONE E CITTADINANZA, pp. 52 – 85.

This statement, however, does not completely clear whether and to what extent the religious freedom of the worker can be protected even in the so-called “forum externum”, or in relation to those behaviors or practices that result from the need to comply with a confessional precept or to an imperative of conscience linked to a certain vision of the world.

First of all we must distinguish between a) behaviors and practices insusceptible to fall back on the exact fulfillment of the job performance and b) behavior and practices that may interfere with the proper execution of the job performance.

a) In the first case it seems that the general rule emerging from the regulatory framework described is that one of irrelevance. As the subject cannot be discriminated against for his views on religious matters, so he cannot be discriminated against for religiously motivated acts or conducts, insusceptible to affect the exact execution, and neither during the job performance nor before the hiring. As we shall see, this rule suffers from significant exceptions in the so-called “ideologically orientated organisations”.

Of course the protection during the hiring stage - although provided by regulations - cannot always be asserted on a concrete level: it is necessary that the candidate to a certain position can show that he was not hired because of his convictions in religious matters, and clearly this is not easy.

Surely this can be demonstrated when the employer takes, during the recruitment process,

— selection criteria involving distinctions, exclusions, restrictions or preferences based on religion or religious practices observed by the candidates, apart from a clear discriminatory intent; or

— apparently neutral selection criteria, that disadvantage the candidates belonging to a religious confession, provided they do not relate to the essential requirements of the employment.

As anticipated, the candidate can prove the discrimination on a presumptive way, ie on the basis of indirect elements resulting from statistical data, provided that they are serious, precise and consistent (the court values in accordance with art. 2729 cc paragraph 1, ie according to the evaluation criteria established for the simple presumptions, when to go back to an unknown fact the judge will draw the consequences from a known fact, but only if these are, in fact, serious, precise and consistent). The burden of proof rests with the subject who claims to have been discriminated against, not having found space in Italian law the provisions of article 10 of Directive 2000/78 / EC, which provides that, in the event that certain facts “from which it can be assumed” that there has been direct or indirect discrimination are adducts, it is for the defendant to prove that there has been a violation of the principle of equal treatment.

b) As regards to behaviours or practices that can interfere with the proper job performance, the picture is more complex. In Italian law, both public authorities and

private capital can limit the expression of religious freedom only when it happens in ways that are contrary to morality or whose use would infringe or impair legal interests considered to be of prevalent and of absolute importance.

It should also be remembered that the private powers of the employer may not be exercised for bringing harm to human dignity (art. 41, paragraph 2 of the Constitution), and this seems to prevent the legality of any act intended to compress the religious identity of the worker, unless this compression is not strictly necessary to ensure the correct job performance or the protection of rights and freedoms of others, with the superiority of value compared to the religious freedom of the employee. To fully examine this matter we must also, in our view, distinguish between behaviors during work and non-work behaviours.

c) As for behaviors during work, we have to distinguish between 1) by a temporary refusal or 2) absolute refusal to fulfill a certain provision for religious reasons, or 3) by the use of clothing, symbols and religious symbols during the time and in the workplace<sup>18</sup>.

1) The temporary denial is substantially configurable where the employee should refrain from providing the job performance for a necessary time for the proper conduct of religious duties matching the performance (sanctification, participating in a prayer service, etc.).

In the absence of a general law on religious freedom, the question is generally regulated by the Agreement of Villa Madama and the laws of approval of agreements between State and confessions (but they cover a limited number of devotees). There are also some collective and business agreements dealing with this issue.

Without an explicit regulation (which may also derive from the individual contract), it must be concluded that the worker cannot refrain temporarily from the service: this unregulated abstention would have, in fact, a significant illegal repercussion on the other workers, on the freedom of economic initiative of the employer or on the users.

2) The absolute refusal refers to the employee's will to not fulfil, for religious reasons, a specific task related to his qualification. That refusal, which generally results in the termination for good cause or reason, seems to be better protected when it comes from religious needs.

A legal arrangement intended to ensure the freedom of religious expression of the employee could be represented by the so-called "obligation to repacege". In fact, according to case law, the resolutely power can be legitimately exercised only where

<sup>18</sup> DE OTO A. (2012). L'osservanza di precetti religiosi in ambito lavorativo, in S. Domianello (a cura di), *Diritto e religione in Italia. Rapporto nazionale sulla salvaguardia della libertà religiosa in regime di pluralismo confessionale e culturale*, il Mulino, Bologna, pp. 185 - 199.

the employer has verified that the employees are not available in his company in ways that - for the same qualification - will allow them to exercise their religious freedom<sup>19</sup>.

This would seem to rule out the legitimacy of a termination for justified subjective reason motivated by the refusal of the employee to execute a typical task when the measure is motivated by religious needs and the subject can be usefully used in the execution of other tasks.

In this regard we should recall that the so-called “Jobs Act” has explicitly provided the individual pact of downgrading, so it has simplified the assumptions of reallocation of the “conscientious objector” worker.

It should also be noted that - according to the Court of Strasbourg - the national legislature is free to provide that the right to respect one’s religious identity cannot legitimize forms of professional conscientious objection that are resolved in the refusal to fulfill some tasks that are characteristics of the job, when the conduct in question is based on imperatives of an ethical nature and behave - for subjects having a particular sexual orientation - a disadvantage.

This principle, expressed by the ECtHR in cases *Ladele vs UK* and *MacFarlane vs UK*<sup>20</sup>, opens a series of considerations about the space that can be reserved to the employee’s freedom of conscience during the performance of tasks that may open up delicate ethical conflicts, and as the judges Vucinic and De Gaetano remember - in their dissenting opinion - the absolute primacy of conscience and Card’s words.

It should be noted that in *Newman* - in the secular state, common home of all - the neutrality required for civil servants in accordance with the principle of non-discrimination requires them to faithfully observe the law, and implies that only the legislator - applying a judgment that is balanced on the different interests at stake - will legitimize forms of conscientious objection that could result in an injury to the rights of others.

Conscientious objection of the civil servant - in the Italian legal order - can therefore be legitimately exercised only after a *interpositio legislatoris* able to harmonize the exercise with the guarantee of the civil, political, economic and social rights enjoyed by subsidiaries, also when the objecting behavior constitutes an undeniable consequence of the worker’s religious identity.

3) The use is clothing, signs and symbols with religious significance must be considered, as under article. 19 Cost. a fundamental individual right which is a corollary of the right to obtain an exception to the application of general rules to clothing or service uniform or tasks required to the personnel if it is needed to ensure the respect of that identity.

<sup>19</sup> FALSONE, M. (2013). Sul cd. obbligo di *repêchage* e la “dequalificazione contrattata”. *RIVISTA ITALIANA DI DIRITTO DEL LAVORO*, 32(1), pp. 73-80.

<sup>20</sup> See *Eweida and Others v. the United Kingdom* (2013), application nos. 48420/10, 59842/10, 51671/10 and 36516/10

This exception is however not possible - as pointed out in the case *Chaplin vs UK* - where the use of religious symbols could affect the health and safety of others: this can be done - for example - when the employee is employed for the care and assistance of sick or other incapacitated individuals or is dedicated to the production of food or drink intended for sale.

d) As for behaviours outside work, they can constitute a fair reason for termination when they are objectively in a position to have a negative impact on the smooth functioning of the employer's productive activities. In this case, therefore, certain actions or lifestyles become incompatible with the execution of work because they determine an unsuitability of the employee to perform a typical task, either for physical reasons either for reasons of image.

1) From a physical point of view it is placed on the case - for example - of the Islamic workers who, by refusing to feed and hydrate during the month of Ramadan, are temporarily unable to perform satisfactorily their contractual obligations. It is quite clear, at least in our view, that where the compliance of religious precepts is actually able to turn the typical performance in a real danger to the health and safety of the worker, the employer is able to use the dismissal tool to obey the dictates of the second paragraph of art. 41 of the Constitution.

The key to deciding on this issue, except in cases of danger to the employee personal safety, is represented by - according to the Law- in part on the ability of the behaviour to affect the relationship of trust that must exist between employee and employer, and part over the possibility that the behaviour outside work reduces the employee's productivity: for example, it must be noted that the Italian Supreme Court recently stated that the mere fact of holding and make use of drugs is not, in itself, capable of determining an injury in the bond of trust and is not, therefore, a sufficient reason to justify the dismissal of the employee.

This pronouncement (which apparently - for the theme of our written - mainly concerns the Rastafarians) nonetheless expresses the principle that the link between the behaviours outside work and the ability to affect the job performance cannot be presumed, but must be unequivocally demonstrated: in this last case it seems that the freedom of business initiative can (and should) prevail over the employee's religious needs.

2) As regards to behaviours outside work that are suitable to lead to a "loss of image" for the employer, the case considered with regard to freedom of conscience and religion concerns mainly the subjects employed by an employer that constitutes an "ideologically orientated organisation".

It is known that this expression indicate - in doctrine and jurisprudence - formations and social organizations carrying on an ideologically oriented activity or that have as its primary aim the disclosure of a certain *Weltanschauung*. The notion of "ideologically orientated organisation" refers to - in other words - all socio-economic work environments in which the production of goods or the provision of services is

inseparably linked to the desire to achieve certain aims of an ideological nature: this will can be the sole purpose of the employer or can compete with profit goals. The not-operability sphere of the ban on religious discrimination against employers / ideologically orientated organisation is generally reconnected to art. 4 of Law 108/90; it should also be noted that the Italian legislator expanded this sphere with the Legislative Decree n. 216 of 9 July 2003.

The Legislative Decree no. 216/2003 provides, infact, that the differences of treatment based on religion cannot be considered as discriminatory when the following three requirements are satisfied: a) the differences are based on the profession of a particular religion or belief; b) they are practiced within religious bodies or other public or private organizations; c) the profession of that particular religion or belief constitutes an essential requirement and it is crucial to the execution of professional activities of such institutions or organizations, in view of the nature of the activities or the context in which they are carried out (art. 3.5).

As worded, the rule seems to admit the possibility of exceptions to the principle of equal treatment, even if the employee's confessional or ideological affiliation - although not essential for the proper performance of the service itself - can be essential and decisive in the context in which the employer's activity is performed.

From this interpretation it should be inferred that our system offers to all employers that carry out their activities in an organized manner the possibility of establishing an operating environment that is religiously homogeneous: for this to happen it is sufficient that the workers' diversity in confessional membership have a negative influence, direct or indirect, on the proper conduct of the productive activity as a whole.

This framework seems non compatible with the Directive 78/2000, since it does not allow "the Member States to introduce during transposition exceptions to equal treatment for the needs of churches and similar organisations which are broader than those already existing (in legislative or other form) in the legal system when the Directive was adopted"<sup>21</sup>.

As we shall see later, the decree 216/2003 seems to justify a difference in treatment – in favour of religious employers - towards workers who lead a private life or have a sexual orientation which is not consistent with the theological principles on which the employer ground its ideology. Article 3.3 of the aforesaid decree statutes that in compliance with the principles of proportionality and reasonableness, within the employment relationship or the entrepreneurial activity, differences in treatment due to sexual orientation are not considered as discriminatory acts where, "by rea-

<sup>21</sup> FAVILLI C. (2013). REPORT ON MEASURES TO COMBAT DISCRIMINATION Directives 2000/43/EC and 2000/78/EC COUNTRY REPORT 2013, ITALY, the European Network of Legal Experts in the Non-discrimination Field (on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation).

son of the nature of the particular occupational activity concerned or of the context in which it is carried out, such characteristics constitute a genuine and determining occupational requirement for its carrying out”.

This approach may be read as a continuation of the previous decisions of the courts, which decided that the unrespect of moral codes (for instance, requiring religious marriage instead of civil marriage) of the Church-employer may justify the dismissal when the specific office of the employee is strictly connected with the theological and ideological dimension of the employer. The discretionar power of the insitution is specifically guaranteed in the Concordat in the case of the Catholic university, which enjoy the right to hire or dismiss its professors in case of violation of the moral and ideological principles on which the insitution is grounded. However, the Lombardi Vallauri case has been the subject of a recent ECHR judgment, in which the Court found violation of Article 10 of the ECHR: ECHR, 20 Oct. 2009, Lombardi Vallauri v. Italy, rec. no. 39128/05.

#### 4. The new developments of the so called “Jobs Act”

Legislative Decree No. 23 of March 4, 2015 has introduced into Italian law a new type of employment contract for an indefinite period. This model is different from the previous one as it provides different protections in the event of dismissal: these are proportional to length of service and thus create a “dual track” that divides workers into two categories, characterized by a considerable difference in legal protection and a significantly reduced chance of demand - by the worker - the reintegration into the workplace. Providing new remedies in the event of dismissal, a new conciliation and voluntary rules of procedure and procedural simplified for employees hired as of March 7, 2015, the Legislative Decree 23/2015 has effectively flexibilised the labor market, but at the same time created a weak point for the principle of equality: the compatibility of this weak point with constitutional provisions will be the subject of further investigations.

According to Article 9 co. 2, of Decree no. n. 23/2015 the new rules also apply even to non-profit employers who perform political, trade union, cultural or religious activities. This means that the so called “Ideologically orientated organisations” must be considered as subject to the ban of discriminatory dismissal established by art. 2 of the decree<sup>22</sup>. According to this rule, when the dismissal is considered discriminatory, it is void and ineffective: the employer must reinstate the employee in the workplace, regardless of the reason put forward formally and without considering the size of the enterprise. In that case, the court must also order the employer to pay damages

<sup>22</sup> CAFIERO, C. (2015). I decreti attuativi del Jobs Act, «se il gioco vale la candela». Rivista giuridica del Mezzogiorno, 29(1-2), 243-252.

suffered by a worker for the discriminatory dismissal declared void and ineffective, establishing for this purpose a compensation commensurate last salary of reference for the calculation the severance indemnity. This provision seems to expand significantly the guarantee for the ethical, religious and ideological diversity of workers even within religious organizations: in fact, it must be read in conjunction with Article 3.5 of Legislative Decree 216/2003. As already mentioned, according to the aforesaid norm there is no discriminatory dismissal when:

- a) The employer is a church or other public or private organization with an ethos based on religion or belief;
- b) The dismissal is based on religion or belief of the employee;
- c) By virtue of the nature of the activities carried out by the employer, or the context in which they are carried out, religion or belief constitute a genuine, legitimate and justified occupational, taking into account the ethics of the organization.

In the same time, according to the article 3.3 of the aforesaid Decree, there is no discriminatory dismissal when:

- a) The dismissal is based on sexual orientation of the employee;
- b) In compliance with the principles of proportionality and reasonableness, by reason of the nature of the particular occupational activity of the employer or of the context in which it is carried out, a peculiar sexual orientation constitutes a genuine and determining occupational requirement for its carrying out.

## II. THE LEGAL NATURE OF THE ACTIVITIES OF THE CLERGY IN THE FRAMEWORK OF LABOR LAW

To a quite different discipline from the above-mentioned one seems to underlie both the topic related to the legal nature of the activities of the clergy, both the hetero-directed employment relationships of staff within religious orders or congregations, namely the institutions that are part of it.

- a) The Italian legal system has confirmed the existence of an individual right of catholic priests to receive their remuneration (art. 24, law n. 222/1985). According to some authors this remuneration would be akin to a salary, for the service that the priest lends in favour of the diocese he belongs to<sup>23</sup>.

Actually, the service provided by the catholic priest is born and developed in a spiritual context, which has little or nothing to do with an employment relationship: moreover the service provided by the priest for the diocese is necessary but not sufficient for the right of remuneration; this in fact is not guaranteed if the priest has other sources of income, and this is completely abnormal for any type of employment relationship.

<sup>23</sup> VITALI E., CHIZZONITI A.G. (2013). *Diritto ecclesiastico, Manuale breve*. Milano, Giuffrè, p. 121.

The Supreme Court, in particular in its judgment no. 4871/1996, linked the remuneration with the state of need of the cleric, but also linked it to the public interest underlying that action, taking it away from the close circle of family relationships and placing it in the broader sphere of social security. To do this, it stated that the obligation to pay the Institutes for the support of the clergy finds its reasons in the need to “ensure the necessary means to live to the citizens who do not perform a paid job in the strict sense, because they perform indeed a work on the promotion of man and in for interest of the country” and on the basis of these considerations it puts the remuneration on the list of mandatory welfare benefits, as the subject of an individual right that is independent from the existence of an employment relationship or of any insurance type.

b) As to religious, the performance ratio played in favour of their order, congregation or institution - characterized by the substantial empathy that exists between the religious and the Institute - is generally considered to be devoid of the structural requirements and reciprocal obligations that are typical of the employment relationship<sup>24</sup>.

Within our jurisprudence, in this regard, there has been talk of a “real free zone of trend”, where the heterodoxy towards the values espoused by the group allows the removal of the “deviant” without any protection or providence of an economic nature.

There is in fact the strong idea that the services provided by people related to each other by belonging to a religious community are supported by the gratuity presumption<sup>25</sup>, because the activity “carried out by the religious, not employed by third parties but within the congregation and as part of it, is not a job performance pursuant to art. 2094 c.c., subject to the laws of the Italian State, but is a work of evangelization, “*religionis causa*”, in fulfillment of the purposes of the congregation itself and exclusively governed by canon law”<sup>26</sup>, so they must receive a compensation.

There are exceptions, however, as even the work of the religious can have different configurations depending on the individual user, the type of activity and of the execution rules. Therefore, it will be necessary to empirically evaluate the concrete activities carried out by the religious and his will to waive or not the compensation and other Employment Law guarantees<sup>27</sup>.

*As pointed out by the Cassation Court, the typical case of the employment relationship is indeed characterized not only by collaboration and subordination elements, but also by the onerousness. This is not the case where a certain activity,*

<sup>24</sup> BENIGNI R. (2008). L'identità religiosa nei rapporti di lavoro, Jovene, Napoli, pp. 82-84

<sup>25</sup> BOTTA R. (2001), Dieci anni di giurisprudenza in tema di religione e diritto del lavoro. Quaderni di diritto e politica ecclesiastica, pp. 730-731

<sup>26</sup> Cassation Court, Labour Law Section, 22 February 1992 n. 2195

<sup>27</sup> BENIGNI R., p. 92

*even if objectively configurable as a professional service, is not carried out with a spirit of subordination nor in view of an adequate compensation, but “affectionis vel benevolentiae causa” or in tribute to moral or religious principles. “The assessment of whether there are objective and subjective reasons that justify the free performance of objective work tasks - whose eligibility, falling into the sphere of private autonomy, not opposed to any constitutional or common principles - is remitted to the trial court”<sup>28</sup>.*

Therefore, if such verification proves that the work performed by the religious for his institution has the characteristics of continuity, professionalism and subordination bond, this will assume inevitably the onerousness connotation and therefore will be subject to the provisions of Employment Law and - given the ideological-confessional peculiarity of the employer - to the ones of the already examined ideologically oriented organizations, always after an analysis of the tasks executed by the subject.

### III. CONCLUSIONS

Trying to carry out some conclusions, it ought to be emphasized that the Italian labour law system suffers from the noticeable lack of a specific law on religious freedom. This lack causes – inter alia – the absence of a general duty of the employer to guarantee reasonable accommodations of the employers in the workplace, most of all concerning the right to refrain from work every week on his or her Sabbath, to use religious symbols, to have a place to pray, to enjoy - in the company canteen - meals which are conform to their religious laws.

Some of these claims are guaranteed in labor agreements, but it must be emphasized that this solution is not able to create a common standard of protection for the religious freedom in all the national territory. A new law on religious freedom may even solve the problem of the employees’ conscientious objection in specific situations, e.g. when a specific task required to the employee is against his/her religious or moral convictions. In the Italian framework, in this moment, the conscientious objection is guaranteed only for the medical and paramedical staff involved in the main phases of the abortion procedures and in the application of the techniques for medical assisted procreation, as far as the the employees devoted to animal testing.

It also must be emphasized a certain (and wide) availability of the Italian legal systems to protect the ideological homogeneity within the ideological institutions, even compressing the rights of workers.

It’s up to the judge to clearly define the extent to which the fundamental rights of the employer may be sacrificed on the altar of ideological loyalty, taking into account that the guarantee of the individual right to religious freedom can only be

<sup>28</sup> Cassation Court, Labour Law Section, 7 november 2003, n. 16774

ensured even (and especially) within social groups which the person belongs, since - by virtue of that pluralism which the Court of Strasbourg characterizes the European systems - "the religious interest (...) takes on the nature of (...) the situation ahead legally guaranteed to the faithful of various denominations is considered *uti singuli* both as members of social groups with a religious purpose."<sup>29</sup> On these premises, it is clear that any measure devoted to deprive the worker of his employment on grounds of ideology in religious matters can only be a "last chance", which the employer may be entitled to use only when there are no other legal instruments that can guarantee the usefulness of work performance and - consequently - the proper conduct of employees.

But behind this issue, in the background, it is necessary to start an in-depth reflection on the availability of fundamental rights. Is it possible - through the instrument of individual agreement - to give up the exercise of one or more human rights in order to achieve economic benefit? To what extent the Italian legal system - based on respect for the principle of substantive democracy - may accept that the laws of the market could collapse the freedom of expression, freedom of research, the moral freedom of individuals? Which link exists between "ideological loyalty" and respect for human dignity, as statued by?

Only a careful reflection about these questions will help the lawyer to find a balance that - to date - certainly looks very complex.

<sup>29</sup> VITALI E. (1980), *Legislatio libertatis e prospettazioni sociologiche nella recente dottrina ecclesiasticistica*, *Il Diritto Ecclesiastico*, I, p. 58.



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# LAW AND RELIGION IN THE WORKPLACE IN LATVIA

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## I. RELIGIOUS FREEDOM AT WORK

### 1. The definition of religion in Latvian laws

The content of religious beliefs, doctrines and types differs so much that numerous definitions of religion exists, and they, understandably, are different. Moreover, it must be taken into consideration that any definition is fraught with problems, is imperfect and partial. Neither the Latvian Constitution (*Satversme*) nor the Law on Religious Organisations (*Reliģisko organizāciju likums*), provides an explanation of “religion”. Legal content of the term is given in legal definitions of religious activity: religious activity is a devotion to religion or faith, to practice the cult or practicing religious or ritual ceremonies and preach teaching Law on Religious Organisations, Article 1 paragraph one). Likewise the term “religion”, “religious activities” is interpreted in dictionaries. It’s include worship services, worship ceremonies, rituals, meditation, and missionary activities (evangelisation)<sup>1</sup>. Article 99 of Latvian Constitution declares that: “*Everyone has the right to freedom of thought, conscience and religion. The Church shall be separate from the State.*” The principle of the freedom of religion is settled as purpose of the Law on Religious Organisations<sup>2</sup>.

It should be emphasized that religious beliefs, doctrine and the types of content are so different that a universal definition of religion in any case would be incomplete and one-sided. Also, international law does not provide an **explanation of religion**

<sup>1</sup> Likumdošanas aktu terminu vārdnīca [Dictionary of Legislative Terms]. Rīga: Senders,1999, p. 359.

<sup>2</sup> BALODIS R. The Application of the Freedom of Religion Principles of the European Convention on Human Rights in Latvia. Religious Freedom in the European Union: The Application of the Freedom of Religion Principles of the European Convention on Human Rights in the European Union *Proceedings of the 19<sup>th</sup> Meeting of the European Consortium for Church and State Research Nicosia (Cyprus), 15-18. november 2007*, PEETERS, Belgium 2009. p. 231-246.

**or belief.** Most of the lawyers and theologians agree that the attempt to cover all religions, trying to find a commonly acceptable, comprehensive term for religion is unsuccessful. It would not be an exhaustive list of all cases. Some believers are left to the right of final word in the definition of religion, not try to regulate these issue regulations. World practice has shown that attempts to define religion by a legal definition have failed, either because understanding of term becomes too **general**, or vice versa - **too limited**. Definition of rules of law in the case do not reach the desired effect, since they are mostly still **open to interpretation**. Narrow definition of religion can often be discriminatory against other religions. Religion gets so many forms and is interpreted so differently that it can not be adequately defined, but can only be described. The first sentence of Article 99 of Constitution lists three freedoms (1) freedom of opinion, (2) consciousness and (3) religious conviction, which provide common rights to persons with certain religious beliefs, as well as to people with a free-standing philosophical view of the world or people with atheistic and agnostic beliefs. Protection provided by Article can not be generalized to extend to the political expression of opinion, although the depth of feeling and expression can be treated as religious (for example, Communist, National Socialist, etc.)<sup>3</sup>. The religious freedom comprises two subjects that the State must protect. Firstly, it is an individual, who has the right to religious freedom of personal nature. Secondly, it is a legal person – a religious organisation that has the right to religious freedom to protect the members of the organisation”<sup>4</sup>.

## 2. Religion and legal employment relationships

As regards the regulatory enactments that regulate legal employment relationships in religious organisations, the Constitution should be mentioned first. The legislator has included in Article 99 of the Constitution both the clause on the freedom of religion and the clause on separating the Church from the State. Article 106 of the Constitution should also be mentioned with regard to legal employment relationships in religious organisations, it promulgates that everyone has the right to freely choose their employment and workplace according to their abilities and qualifications. The registration and activities of religious organisations are directly regulated by Law on Religious Organisations, but legal employment relationships are generally regulat-

<sup>3</sup> BALODIS R., DANOVSKIS E. Religion and Discrimination Law in the Latvia. Religion and Discrimination Law in the European Union. Religion in public education (Ed. M. Hill) *Proceedings of the 23th Congress of the European Consortium for Church and State St. Stephen's House. University of Oxford, 29. September – 2 October 2011*. Institute for European Constitutional Law, University of Trier, Germany 2012, p.212-213

<sup>4</sup> BALODIS R. BAZNĪCU tiesības. (The Rights of Churches) Rīga: Reliģijas Brīvības Asociācija, 2002, 173.lpp.

ed by the Labour Law (*Darba likums*). The internal matters of some (the so-called traditional churches), *inter alia*, employment relationships are regulated by special ecclesiastical laws<sup>5</sup>. The relationship between the Roman Catholic Church and the Republic of Latvia is regulated by an international Agreement with the Holy See.

### 3. Rights not to be discriminated against in employment on the basis of religion

#### 3.1. Constitutional level and Labor Law

Latvia is a member state of the European Union (EU) and therefore has implemented in legal system the general principle of equality. Latvia proclaimed its independence in 1990 and immediately joined the UN 10 December 1948 International Declaration of Human Rights, whose Article 1 defines the general principle of equality. Similarly Latvia joined UN International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both Covenants *expressis verbis* prohibits religious discrimination. Another significant step was the signing of the Convention for the Protection of Human Rights and Fundamental Freedoms. In 1998 the Constitution of Latvia was amended by Chapter VIII (Fundamental Human Rights) in which Article 91 defines human rights to legal equality and the principle of non-discrimination [*91. All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realized without discrimination of any kind.*] Religion is one of the factors of principle of equality. In many constitutions religion appears as a sign on the prohibition of discrimination. For example, the Constitution of Finland (Article 6), the Constitution of Lithuania (Article 29) and the Constitution of Switzerland (Article 8). In German case there is treated “public office is not dependent on the religious belief” (Article 136 of Weimar Constitution). In Latvia rights to **equal treatment regardless of their religion** is a protected right under the Article 91 of the Constitution.<sup>6</sup> Article 91 of the Constitution of Latvia, must be interpreted as “**classic**” **non-discrimination article**. It prohibits different treatment based on particular - **restricted** – **categories**. It should be pointed out, that nevertheless in Article 91 not included any criteria, leaving it for the interpretation of the practice, it is clear Article 91 of Constitution we can read such criteria as race, ethnicity, gender, age, language, party affiliation, political belief, religion, world

<sup>5</sup> BALODIS R. Religious education in Latvia. Grām. The Routledge International Handbook of Religious Education. Ed. Davis D.H., MIROSHNIKOVA E. ROUTLEDGE Taylor & Francis Group, Great Britain 2012. p. 206

<sup>6</sup> BALODIS R. 99.panta komentārs/ Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. (Comments on article 99 of Constitution/Commentaries on Constitution of Republic of Latvia. Chapter VIII. Fundamental Human Rights.Autoru kolektīvs prof. R.Baloža zin. Vadībā. - Rīga: Latvijas Vēstnesis, 2011. – 319 – 320.lpp.

belief, social status, financial status, service status and other similar circumstances, and, citing “other similar circumstances,” open for future development<sup>7</sup>. According to Article 89 of the Constitution the state shall recognize and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia. This means that in cases where there is doubt about the contents contained in the Constitution, it shall be interpreted as possible in accordance with international human rights law interpretation. On November 12, 2000 Latvia signed supplementary protocol 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides to establish prohibition of discrimination as a separate right.

Second paragraph of Article 29 of the Labor Law prescribes that “differential treatment based on the gender of employees is permitted only in cases where a particular gender is an objective and substantiated precondition, which is adequate for the legal purpose reached as a result, for the performance of the relevant work or for the relevant employment.” It must be noted that Article 29 paragraph nine of the Labor Law specifies that differential treatment cannot be based on, inter alia, religious conviction. Article 29 paragraph 10 of the Labor Law specifies that “in a religious organization differential treatment depending upon the religious conviction of a person is permitted in the case if a specific type of religious conviction is an objective and justified prerequisite of the relevant performance of work or the relevant employment and a taking into account the ethos of the organization.” For additional exceptions in respect of particular religious organizations please see III (4) below. The formula contained in Article 29 paragraph 2 of the Labor Law is the only exception in respect of religious conviction. Similar clause has been included in Article 3.<sup>1</sup> second paragraph of the Law on Consumer Protection, though the Law on Consumer Protection<sup>8</sup> prohibits only differential treatment in respect of gender, race, ethnic origin and disability.

### 3.2. *In the Law on Religious Organisations*

The employment relationship is mentioned only in the view articles. First, Article 19 of the Law provides that in case of termination of a religious organisation’s activity, this organisation terminates its work relationship with all its employees in

<sup>7</sup> BALODIS R., DANOVSKIS E. Religion and Discrimination Law in the Latvia. Grām. Religion and Discrimination Law in the European Union. Religion in public education (Ed. M. Hill) *Proceedings of the 23th Congress of the European Consortium for Church and State St. Stephen’s House. University of Oxford, 29. September – 2 October 2011.* Institute for European Constitutional Law, University of Trier, Germany 2012, p.212

<sup>8</sup> Consumer Rights Protection Law: Law of Republic of Latvia. *Official gazette Latvijas Vēstnesis*, 01.04.1999. Nr. 104/105(1564/1565).

accordance with the Latvian Labour Law. Secondly, Article 14 provides that religious organisations can appoint or elect and dismiss their ministers in accordance with its own statutes, and employ and dismiss other employees in accordance with the applicable labour legislation. The current Latvian Labour Law does not address the particular problems of religious organisations, which means that religious organisations are subject to the same legal rules as any other public or commercial companies.

### 3.3. *Special Church Laws for the Traditional Religious Denominations*

Arise from the Law on Religious Organizations article 5, in which seventh paragraph states that relationship of state and religious union (church) can be regulated by special laws. On this basis, in the period from 2007 to 2008 the Latvian parliament has developed and adopted seven religious union laws and one congregation law (hereinafter - Special church laws): Seventh Day Adventist Latvian Congregation Law; Latvian Baptist Union Law; Latvian United Methodist Church Law; Latvian Old Believers Pomorie Church Law; Latvian Evangelical Lutheran Church Law; Latvian Orthodox Church Law and Riga Jewish congregation Law. According to Law on Official Publications and Legal Information, second subparagraph of article 9. Part 6, in the case of conflict of laws of equal legal standing, a common law rule to the extent that it is without prejudice to special rules. Thus Law on Religious Organizations, which contains general rules, is applicable to the extent it does not restrict these special church laws. Looking at special church laws, it follows that all statutory regulations recognize the traditionalism of these specific religious organizations - long-term existence and distribution of religious organization in territory of Republic of Latvia. All special church laws provide the rights of protection of name of religious organization against its illegal use. These rights can be seen as a privilege, not determined for other registered religious organizations. A number of religious unions (church) (Seventh Day Adventist Latvian church, Latvian Baptist Union, the Latvian United Methodist Church, the Latvian Evangelical Lutheran Church and the Latvian Orthodox Church) have the right to interpret scriptures. All special church law fifth articles in addition to the Law on Religious Organizations Article 16, first paragraph lays down the right of specific religious organizations to obtain possession of movable and immovable property. Important right of religious organizations is state-recognized marriage agreements. Unlike general labor relations framework, in specific laws, all religious organizations have certain rights to base engagement, persistence, modification and termination of labor relations of employees on a person's religion, willingness and ability to act in good faith and loyalty for religious organizations teaching (doctrine) as well as other moral, behavioral norms and beliefs and principles.

NO.	SPECIAL LAWS RIGHTS	A <sup>9</sup>	B <sup>10</sup>	E <sup>11</sup>	M <sup>12</sup>	V <sup>13</sup>	L <sup>14</sup>	P <sup>15</sup>
1.	<b>Traditionalism</b>	2.§	2.§	2.§	2.§	2.§	2.§	2.§
2.	<b>Protection of name</b>	3.§	3.§	3.§	3.§	3.§	3.§	3.§
3.	<b>Right to interpret scriptures</b>	3.§	3.§	–	3.§	–	3.§	3.§
4.	<b>Rights of property</b>	5.§	5.§	5.§	5.§	5.§	5.§	5.§
5.	<b>Rights to marry</b>	7.§	8.§	8.§	6.§	7.§	8.§	9.§
6.	<b>Funereal ceremonies in cemeteries</b>	8.§	6.§	6.§	7.§	6.§	6.§	6.§
7.	<b>Right of confessional secrecy and protection of pastoral conversations</b>	9.§	9.§	9.§	8.§	8.§	9.§	10.§
8.	<b>Military service</b>	10.§	10.§	10.§	9.§	9.§	11.§	10.§
9.	<b>Relations with employees</b>	13.§	13.§	12.§	11.§	11.§	13.§	14.§
10.	<b>Spiritual activity of chaplains and its monitoring</b>	11.§	11.§	–	10.§	10.§	11.§	12.§
11.	<b>Relations with clergy</b>	–	–	–	–	–	13.§	14.§
12.	<b>Right to educate own employees, clergy (pastors)</b>	14.§	14.§	–	12.§	12.§	14.§	15.§
13.	<b>Rights for finances for educational institutions</b>	–	14.§	–	–	–	14.§	15.§
14.	<b>Autonomy of educational institution on educational content and learning process</b>	–	14.§	–	–	–	14.§	15.§
15.	<b>Funding of local government for religious festivals</b>	–	–	–	–	–	–	16.§
16.	<b>Legal status of sacred sites</b>	–	–	–	–	–	<b>else where</b>	<b>7. and 16.§</b>

<sup>9</sup> A - Seventh Day Adventist Latvian Congregation Union Law: *Latvijas Vēstnesis* (Official Gazette), No 93(3669), 12 June, 2007.

<sup>10</sup> B - Latvian Baptist Congregation Union Law: *Latvijas Vēstnesis* (Official Gazette), No 86(3662), 30 May, 2007.

<sup>11</sup> E - Riga Jewish congregation Law: *Latvijas Vēstnesis* (Official Gazette), No 98(3674), 20 June, 2007.

<sup>12</sup> M - Latvian United Methodist Church Law: *Latvijas Vēstnesis* (Official Gazette), No 91(3667), 7 June, 2007.

<sup>13</sup> V - Latvian Old Believers Pomorie Church Law: *Latvijas Vēstnesis* (Official Gazette), No 98(3674), 20 June, 2007.

<sup>14</sup> L - Latvian Evangelical Lutheran Church Law: *Latvijas Vēstnesis* (Official Gazette), No 188(3972), 3 December, 2008.

<sup>15</sup> P - Latvian Orthodox Church Law: *Latvijas Vēstnesis* (Official Gazette), No 188(3972), 3 December, 2008.

The decisions by the Church on canonical issues cannot be appealed against before a state institution. The competence of a religious organisation to determine the composition of its staff is to be considered as one among such canonical issues.

### 3.4. *Roman Catholic Church in Latvia*

While, for strengthening of rights of Roman Catholic Church, between Republic of Latvia and the Holy See is international agreement – Agreement of the Republic of Latvia and the Holy See<sup>16</sup>. According to article 1 of Agreement the Republic of Latvia and the Holy See recognizes that they, within their respective spheres of competence, are independent and autonomous, and article 4 states that with regard to freedom of religion in the Latvian laws and international agreements to which the Republic of Latvia is a part, the Catholic Church in the Republic of Latvia, together with the communities and institutions are guaranteed the right to freely determine their own internal government, to worship and to accomplish its mission through pastoral activities, including social, educational and cultural fields. With this provision the Roman Catholic Church has certain autonomy. Like in a number of special Latvian Church laws, in the Agreement, taking into account autonomy determined in article 4, the Roman Catholic Church has the right to interpret scriptures. Unlike the special laws, in article 3 of the Agreement the Republic of Latvia has recognized the right of freedom of the Roman Catholic Church, its subsidiary entities and individual Catholic to freely communicate and keep in touch with the Holy See and the other institutions of church recognized by Canon Law, including those located outside the country.

## II. RELIGIOUS MINISTERS AND LABOUR LAW

An employer is prohibited from discriminating against its employees on religious grounds; however, the norms of labour law allow discrimination in religious organisations if they dismiss a minister, who does not comply with certain denominational criteria. The case law allows concluding<sup>17</sup> that **two types of employment in a religious organisation can be identified in Latvia**: a minister and an employee. The first one occupies an ecclesiastical position, and his work is directly linked to the cult, whereas the other is an individual, who might be defined as a technical staff member, one of the service staff and whose competence does not include religious, denominational duties.

<sup>16</sup> Agreement of the Republic of Latvia and the Holy See: *Latvijas Vēstnesis* (Official Gazette), No 137(2712), 25 September, 2002.

<sup>17</sup> Latvijas Republikas Augstākās tiesas Senāta Civillietu departaments. 09.03.2011. SKC-762/2011.

A contract between the Church and its ministers and employees is not always concluded in Latvia; however, it could be said, that among the traditional religious organisations has been fostered by the reports to be submitted to the State. On 12 May 2009 the Cabinet of Ministers adopted Regulation No. 425, which established the procedure for submitting and updating the list of ministers of a religious association (church). The Regulation defines the procedure according to which the Latvian Association of Seventh-day Adventist Communities, the Union of Baptist Church in Latvia, the Latvian United Methodist Church, the Latvian Old-Believer Pomora Church, the Latvian Orthodox Church, the Latvian Evangelic Lutheran Church, the Riga Jewish Religious Community, the Bishop of the Diocese of the Catholic Church or an official, who deputizes for him (hereinafter – a religious association (church)), submits to the Ministry of Justice information on the ministers included on the list of ministers of a religious association (church), who have the right to marry and to perform the duties of a chaplain, as well as the content of the information to be submitted, the procedure for submitting and updating it. In Latvia, the denominations referred to above have the right to conclude marriages with legal force, therefore this list is required and collected. The Ministry of Justice informs on the appointed or elected ministers, who have the right to conclude marriages or to perform the duties of a chaplain, by publishing the information on its Internet home page ([www.tm.gov.lv](http://www.tm.gov.lv)), and the information on the list of ministers is publicly available.

Section 14(1) of Law on Religious Organisations provides that with regard to those employees, who are not ecclesiastics, the labour legislative enactments are binding upon religious organisations. Even though in reality employees of religious organisations use to work without employment contracts, **the courts in Latvia do not recognise the existence of legal employment relationship, unless a written employment contract has been concluded between the employee and the employer**<sup>18</sup>. Whereas if a labour contract has been concluded, then the court treats religious

<sup>18</sup> See Judgement by the Panel of Civil Cases of Riga Regional Court of 17.01.2005 in Case No. CA 1975 /21, where a person submitted a claim against the religious organisation “CHABAD-LUBAVIC CONGREGATION” to enforce compensation for overtime work, unused leave, compensation for using a private vehicle. From 1999 to 2003 the plaintiff had worked on the basis of an oral agreement, without an employment contract in writing, six days a week and eight hours per day. He had been driving pupils to school, his duties included also buying and delivering groceries, delivering prepared food to pensioners. For the work performed he was paid a salary; however, overtime work was not paid for and no leave was granted. In 2004 the employee turned to court, demanding that a written employment contract should be concluded; however, the religious organisation requested rejecting the claim, substantiating its request by noting that no legal labour relationship existed between the parties. The court rejected the claim, ruling that within the course of five years the plaintiff had not wished to bring the legal relationship with the defendant in order, had failed to submit the documents provided in the law to the defendant for drawing up the employment contract, which did not testify of his willingness to conclude legal employment relationship with the defendant in accordance with the procedure established by law. The court accepted

organisations as any other employers – legal persons<sup>19</sup>. Likewise, the courts recognise as an indubitable right of a religious organisation to decide on the number of its employees and their duties, at the same recognising the right of religious organisation to involve in the cult organisation also volunteers<sup>20</sup>. **As regards the ministers of registered religious organisations, the autonomy of the church in establishing these legal employment relationships is recognised<sup>21</sup>**. The court differentiates be-

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the defendant's arguments that the plaintiff had been buying, transporting and delivering groceries and other household products to the congregation on the basis of charity. The Labour Inspectorate had also identified breach of labour law committed by the congregation. The Court noted in its judgement that the Civil Law did not prohibit natural and legal persons from having such civil law relationships upon the change or termination of which each of the parties might demand from the other party that the promises are kept. Therefore the Court recognised that the Labour Law provisions could not be applied to the legal relationship of the parties.

<sup>19</sup> See Judgement by Jelgava Court of 2.10.2011 in Case No. C15295911, where an accountant of a congregation of the Orthodox Church was dismissed, because the accountancy unit of the congregation was closed. The accountant and the congregation signed an agreement on terminating labour relationship. She was paid a salary, as well as compensation for unused leave and an employment termination benefit in the amount of two monthly salaries. At the court hearing the plaintiff's representative noted that in all documents that had been said to the plaintiff 17 August 2011 had been indicated as the date when the plaintiff had been dismissed, but not August 5. She specified that that it was requested to recognise that the legal labour relationship had existed until 17 August 2011, not as indicated in documents specifying the claim – 31 August 2011. The Court concluded that the only dispute between the parties pertained to the time period, when the labour relationship existed; i.e., whether it had lasted until 5 August 2011, as the defendant considered, or until 17 August 2011, as the plaintiff held. The Court recognised the claim and requested the congregation to rectify the entry.

<sup>20</sup> See Judgement by Valmiera District Court of 23.05.2008 in Case No. C39047408 and Judgement by the Panel of Civil Cases of Vidzeme Regional Court of 28.10.2008 in Case No. C39047308, where the secretary of the minister of a congregation submitted a claim against the congregation requesting reinstatement in the job and enforcement of average remuneration for forced absence from work. It must be noted that the dismissed employee was also the wife of the congregation's minister, who was also dismissed on the same day as she. The congregation had taken a decision on liquidating the job position of a minister's secretary. At the court the congregation noted that the plaintiff's job position had been liquidated in connection with the change of a minister. In the future the amount of minister's direct duties would be reduced, so the efficacy and economic grounds for having the job position of a minister's secretary had disappeared. The Court recognised that in the particular case the congregation was the employer. It adopted the decision on decreasing the number of employees and gave a notice of termination to the plaintiff. Thus, the employer's will was reflected in the notice on termination and could not be called into question in this regard. The Court, in assessing the congregation's action to liquidate the position of secretary, took into consideration that it was a religious organisation that had the aim to serve the God, therefore with regard to employing paid employee the same criteria as to a merchant, who engaged in business activities with the aim of gaining profit, could not be applied. In this regard the members of the congregation, undoubtedly, can perform public duties on the basis of their religious convictions and the performance of all such duties cannot be related to legal employment relationships.

<sup>21</sup> See Judgement by the Panel of Civil Cases of Vidzeme Regional Court of 15.11.2008 in Case No. C39047308, where a minister of a Lutheran congregation submitted a claim against the congregation requesting reinstatement in his position and enforcement of average remuneration for forced absence

tween the status of a minister and other employees, both by recognising the autonomy of Churches to act on the basis of their by-laws and ecclesiastical law, recognising, however, the priority of the Labour Law<sup>22</sup>. The Latvian courts has recognised that

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from work. The minister had been dismissed from work by the head of the congregation, who based her order on Para 6 of Section 101 of the Labour Law, because the plaintiff allegedly lacked sufficient professional abilities to perform the work that had been agreed upon. The aforementioned order was approved by a decision by the Collegium of Bishops on depriving the plaintiff of the office and rights of a minister. The minister had concluded an employment contract for an unspecified period. The Court rejected the claim by concluding that the office of a priest as an ecclesiastic could not be directly linked to the legal labour relationship and the regulation established by the Labour Law. It followed from the special law – the Law on Religious Organisation and the Constitution of the Church that the election to and removal from office of a ministers was based upon a vote of confidence. Upon establishing loss of confidence, the Church had the right to divest a particular person of the office and the rights of a minister. Whereas the labour contract had been concluded with the plaintiff only because he had been appointed and elected as a minister at a particular congregation. The Court held that the fact that an employment contract had been concluded did not change the plaintiff's status, and he nevertheless remained as elected ecclesiastic, the establishment and termination of whose legal employment relationship was subject to the provisions of a special law. The Court concluded that the labour contract with the minister had been concluded only because he had been appointed and elected as a minister at a particular congregation, and, as to its nature, it was a subordinate document. The fact that an employment contract had been concluded did not change the plaintiff's status, and he nevertheless remained as elected ecclesiastic, the establishment and termination of whose legal labour relationship is subject to the provisions of a special law. The regulation of the Labour Law could be applied to the plaintiff insofar it did not collide with the special legal norms. Para 4 of Section 1 of the Law on Religious Organisations provides that a minister is an ecclesiastic. Section 14 (1) of this law provides that religious organisations elect or appoint to office and remove from office the ecclesiastics in accordance with the articles of association (constitution, by-law), but employ other employees and dismiss them from work in accordance with the labour legislative enactments. The Court concluded that in this regard the Law on Religious Organisations was a special norm *vis-à-vis* the Labour Law, and, thus, had a higher legal force. The Court concluded that in this case the fact that in addition an employment contract had been concluded with the plaintiff and the nuances in formal termination thereof was not of essential and decisive importance...

<sup>22</sup> See Judgement by the Panel of Civil Cases of Riga Regional Court of 28.10.2008 in Case No. C27222609, CA-3174-10/26, where the plaintiff had been employed as a part-time secretary of a Lutheran congregation. The employment contract was concluded for an unspecified period. The employee received a notice on terminating the employment contract that was based upon Para 3 of Section 101(1) of the Labour Law, i.e., the employee, when performing work, had acted contrary to moral principles and such action was incompatible with the continuation of employment legal relationship. The termination was based upon Article 3 in the Law of the Latvian Evangelical Lutheran Church that gives the right to the Church to establish and change employment relationships on the basis of a person's religious affiliation, readiness and ability to act in good faith and in loyalty to the teachings of the Church, as well as the totality of moral norms, principles and ideals of the Church. The plaintiff, though, was a member of another Lutheran church. In the court he pointed out that the employment contract concluded by the parties did not contain restrictions of this nature – a person's religious affiliation with another Church; likewise, he held that he was a Lutheran, albeit a member of another Lutheran church. He was of the opinion that the provisions of the law with regard to religious affiliation were applicable to affiliation with another religious denomination. The plaintiff requested the Court to recognise the notices on the

the prohibition by ecclesiastical courts to perform such office that can be taken by a narrow circle of persons cannot be recognised as an infringement upon fundamental rights<sup>23</sup>. Even though other legal proceedings have taken place<sup>24</sup>, the ones referred to

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termination of employment contract as being invalid, reinstate him in his job and payment of the average remuneration for work for the period of forced absence from work. The Court satisfied his claim, since he was able to prove that the Church had known about his affiliation with a church for a number of years, which meant that the legal employment relationship that had been established with the employee on the basis of the Labour Law norms had been terminated unlawfully. The grounds – violation of the term for giving a notice of termination of an employment contract defined in Section 101(3) of the Labour Law – within a month from the date of detecting a violation. Therefore such notice of termination could not be recognised as legally valid. The Court recognised that if the defendant, in addition to the norms of the Church articles of association, had given the notice of termination of the employment contract simultaneously also based upon Para 3 in Section 101(1) of the Labour Law, then the legality and validity of the notice of termination had to be examined also from the vantage point of the Labour Law. The Court found that the procedure that had been established for giving a notice of termination of an employment contract had been violated, the notice of termination in accordance with the judgement of the Court was to be recognised as being invalid, and the employee, upon the judgement of the Court, was to be reinstated in his former job. The Court held that the norms of the Law of the Latvian Evangelic Lutheran Church could have been applied alongside the norms of the Labour Law, as it was done; however, the Labour Law had the primacy. The Labour Law is a general legal act, whereas the Law of the Latvian Evangelic Lutheran Church – a special law, and the fact that the Law of the Latvian Evangelic Lutheran Church could be applied did not preclude the application of the Labour Law. Section 2(1) of the Labour Law provides that this law and other regulatory enactments that regulate employment legal relationships are binding on all employers irrespective of their legal status and on employees, if the relationships between an employer and an employee are based on an employment contract. Thus, apart from the labour law, other (additional) regulatory enactments may be binding; however, the Labour Law will always be binding on an employer, irrespective of its legal status (a church or not a church), if the mutual legal relationships between employers and employees are based upon an employment contract.

<sup>23</sup> Pursuant to Section 14(1) of the Law on Religious Organisations, church servants can perform both ecclesiastical and secular work. The high priest and a member of the clergy take an ecclesiastical office, but in accordance with Para 108 of the Statute of the Orthodox Church of Latvia, the official obligations of the members of the clergy are defined by the Holy Canons and decrees by the Church's supreme powers, but in accordance with Para 107 of the Statute the priests, deacons and psalmists are appointed, removed and transferred by the Reigning Primate. The hearing of the case is not subject to a court of general jurisdiction, since a decision by the Ecclesiastical Court of the Orthodox Church of Latvia on excluding a high priest from the membership of the clergy of the Orthodox Church of Latvia, divesting him of the ecclesiastical office, is being contested. The office of an ecclesiast of a religions organisation is an office that can be obtained in special procedure in accordance with the canons of the Church, which can be occupied only by persons with special qualifications and personal character traits that cannot be verified in court. The prohibition to perform such office that can be taken by a narrow circle of persons shall not be recognised as an infringement of fundamental rights (Judgement by the Senate of the Supreme Court of 09.01.2008 in Case No. SKC-94/2008)

<sup>24</sup> For example, in 2014 rabbi *Menachen Barkahan* submitted a claim to court against the Riga Jewish Religious Congregation, the Council of Latvian Jewish Congregations and Communities and a number of natural persons for injuring his dignity and respect because his rabbi's site of prayer had been liquidated and his status as a rabbi had been contested.

above are the most significant, since they outline the case law in Latvia. The Latvian court has recognised that the prohibition by ecclesiastical courts to perform such office that can be taken by a narrow circle of persons, cannot be recognised as an infringement upon fundamental right<sup>25</sup>. Even though other legal proceedings have taken place,<sup>26</sup>, the ones referred to above are the most significant, since they outline the case law in Latvia.

### III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

The state shall protect the legal rights of religious organisations as prescribed by the law. The state, municipalities and their institutions, non-governmental and other organisations shall not be authorised to interfere with the religious activities of religious organisations. The Republic of Latvia guarantees the right to freedom of religion what includes the freedom to adhere to a particular religion individually or in association with others or to have no religious affiliation, to freely change one's religion or conviction, and to freely express one's religious opinions in accordance with existing laws<sup>27</sup>. According to Latvian Constitution everyone has the right to freedom of religion. Nobody from religious groups are to be forced to register as religious organisation<sup>28</sup>, for example, some group of persons who only want to practice

<sup>25</sup> Pursuant to Section 14(1) of the Law on Religious Organisations, church servants can perform both ecclesiastical and secular work. The high priest and a member of the clergy take an ecclesiastical office, but in accordance with Para 108 of the Statute of the Orthodox Church of Latvia, the official obligations of the members of the clergy are defined by the Holy Canons and decrees by the Church's supreme powers, but in accordance with Para 107 of the Statute the priests, deacons and psalmists are appointed, removed and transferred by the Reigning Primate. The hearing of the case is not subject to a court of general jurisdiction, since a decision by the Ecclesiastical Court of the Orthodox Church of Latvia on excluding a high priest from the membership of the clergy of the Orthodox Church of Latvia, divesting him of the ecclesiastical office, is being contested. The office of an ecclesiast of a religious organisation is an office that can be obtained in special procedure in accordance with the canons of the Church, which can be occupied only by persons with special qualifications and personal character traits that cannot be verified in court. The prohibition to perform such office that can be taken by a narrow circle of persons shall not be recognised as an infringement of fundamental rights (Judgement by the Senate of the Supreme Court of 09.01.2008 in Case No. SKC-94/2008).

<sup>26</sup> For example, in 2014 rabbi Menachen Barkahan submitted a claim to court against the Riga Jewish Religious Congregation, the Council of Latvian Jewish Congregations and Communities and a number of natural persons for injuring his dignity and respect because his rabbi's site of prayer had been liquidated and his status as a rabbi had been contested.

<sup>27</sup> BALODIS R. Church and State in Latvia. In FERRARI, S. and W.C. DURHAM (Eds.). Law and Religion in Post-Communist Europe. Leuven, Paris, Dudley, MA: Peeters Publishers 2003, p. 149.

<sup>28</sup> According to the Law on Religious Organizations article 3, first paragraph, religious organizations are in order set in Law on Religious Organizations registered churches, religious associations (church) and dioceses. According to Law on Religious Organizations article 13, first paragraph, religious organizations with moment of registration acquire legal personality.

the religion, because registration means certain duties: financial and other reporting to public institutions, acquisition of property and the related assumption of responsibility, etc. Thus, the registration is not a prerequisite for the existence of a religious organization, and consequently participation in unregistered religious organizations is not prohibited and is not penalized, unless it violates any laws and regulations. Every unregistered religious group has the right to conduct services, religious rituals and ceremonies and to carry out charitable work, unless those break the law<sup>29</sup>. Currently speaking on religious organizations in the Republic of Latvia one shall speak not only on their registration, but on a special recognition of separate religious organizations by the state, which is not related to the registration institute. Depending on a form of recognition of the state the religious organizations in Latvia may be divided into two levels: traditional religious organizations and other. Traditional religious organizations are divided into Roman Catholic Church, as its status is based on an international agreement and other traditional religious organizations which by adoption of special laws in respect of them have gained a special recognition of the state<sup>30</sup>. Other are religious organizations registered pursuant to the Law on Religious Organizations<sup>31</sup>. The status of traditional churches and the autonomy of decisions are enshrined in special laws. Latvian courts have examined the issue of registering an autonomous religious organisation, but have not reviewed the issue of the autonomy of the Church in decision taking<sup>32</sup>. The autonomy of Churches is enshrined in the Law on Religious

<sup>29</sup> BALODIS R. Religious Entities as Legal Persons – Latvia. Grām. Churches and Other Religious Organisations as Legal Persons. Proceedings of the 17<sup>th</sup> Meeting of the European Consortium for Church and State Research Höör (Sweden) 17-20 November 2005/ (Ed. Lars Friedner). PEETERS, Leuven – Paris – Dudley, MA 2007 p. 150.

<sup>30</sup> BALODIS R. The Constitutional and Administrative Aspects of State and Church Regulation in the Republic of Latvia. Grām. Religion and the Secular State: National Reports *Interim National Reports issued for the occasion of XVIIIth International Academy of Comparative Law* Editor Thayer D. Servicio de Publicaciones Facultad de Derecho UNIVERSIDAD COMPLUTENSE DE MADRID in cooperation with the International Center for Law and Religion Studies J. Reuben Clark Law School, Brigham Young University, USA Spain 2015 p. 492.

<sup>31</sup> Religious organizations which are registered as unions or commercial structures, or are not registered at all cannot be construed as religious organizations that would have rights to appeal to religious freedom.

<sup>32</sup> In examining the refusals to register Orthodox autonomous congregations, the Supreme Court has recognised that pointing to historic facts in the congregation's articles of associations is not contrary to regulatory enactments. **The indication of false or erroneous information in the articles of association with regard to legal continuity cannot be the grounds for not registering a congregation. The State, (i.e.)** the register, does not have to ensure that all facts referred to in the founding documents of a religious organisation were historically correct and proven by documents. Hence, the indication of such, possibly, false or erroneous facts in the articles of association does not create legal consequences and does not prohibit registering the articles of association in a public register. This, in fact, means that Latvian courts have liberalised the strict bureaucratic procedure that had been established in the 1990s and was defined by the 1995 Law on Religious Organizations. It is a good evidence of the court

Organizations, Section 14 of which provides that the activities of registered religious organisations are based on their canonical laws or statutes (regulations)<sup>33</sup>.

**The Labour Law** of Latvia provides a detailed regulation on the relationship between the employee and the employer. Pursuant to Section 28(2) of the Labour Law, an employee by concluding a labour contract undertakes to perform specific work, subject to specified working procedures and orders given by the employer, but the employer – to pay the remuneration agreed upon and ensure fair, safe working conditions that are not harmful to health. Section 101 of the Labour Law provides that the employer has the right to give written notice of termination of an employment contract on the basis of such circumstances that are related to the conduct of an employee, his or her abilities, or in connection with implementing economic, organisational, technological or other measures of similar nature in the company. Section 7 of the Labour Law provides that everyone has an equal right to work, to fair, safe working conditions that are not harmful to health, as well as fair remuneration for work. At the same time it is provided that the rights envisaged to the participants of legal employment relationship must be ensured without any direct or indirect discrimination – irrespective of a person's race, skin colour, gender, age, disability, religious, political or other conviction, ethnic or social origin, property or marital status, sexual orientation or other circumstances. In 2006 the Labour Law was amended by adding part ten to Article 29. This norm provides that **differential treatment in a religious organisation is admissible. Based on the religious beliefs of a person, differential treatment is permitted in the case if a specific type of religious belief is an objective and substantiated pre-requisite for the relevant employment, taking into account the ethos of the organisation.** The norm referred to above does not expand the employer's discretion in the least; it only establishes the procedure with regard to cases, where the State allows differential treatment. This does not apply to other cases, since Article 34 first part of the Labour Law prescribes that if when establishing an employment relationship an employer has violated the prohibition of differential treatment, an applicant has the right to request appropriate compensation. In case of a dispute, the amount of compensation is to be determined by the court at its discretion.

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finding a balance between the legal norm and common sense, and documents of international law (*see, Judgement of 17 June 2011 by the Senate in Case No.SKA-505/2011; Judgement of 7 October 2011 in Case No.SKA-797/2011; Judgement of 22 November 2011 in Case No. SKA-542/2011; Judgement of 16 December 2011 in Case No.SKA-609/2011; Judgement of 6 January 2012 in Case No. SKA-33/2012, Judgement of 2 October 20102 by the Administrative Regional Court in Case No.A420538811*).

<sup>33</sup> In the understanding of Section 1 of the Law on Religious Organizations, religious activities include manifestation of a religion, faith or cult, performing of religious ceremonies or rituals and preaching religious teaching. Religious denominations are branches of the world religions that have their religious testimony, teaching and dogmatics, as well as cult traditions.

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# LAW AND RELIGION AT THE WORK PLACE: CASE OF LITHUANIA

DONATAS GLODENIS

## INTRODUCTION

Religion at the workplace has been mostly a non-controversial topic in Lithuania. Soviet past of Lithuania has ensured both the secularity of the public space and rigid lines between religion and workplace. It has also contributed to passivity of the workers when it comes to defending their rights. Most “religious workers“ in Lithuania are not employed by the religious communities in the conventional sense, and to a large extent they themselves are responsible for their social pension insurance and health insurance. So the topic of religion in the workplace has attracted very little public or scholarly attention thus far<sup>1</sup>.

Differentiation of religious communities into three distinct categories - state recognized traditional religious communities, state recognized non-traditional religious communities and other non-traditional religious communities - has no influence on the religious freedom expression at work, but it has some bearing on the way the state treats the religious workers when it comes to their taxes and pension/health insurance.

<sup>1</sup> Labour law within the religious communities is reviewed in less than a page in Jolanta KUZNECOVIENĖ article “State and Church in Lithuania” in Gerhard Robbers, *State and Church in the European Union*. (2nd ed). Nomos, 2005, p. 283-303. The topic is barely mentioned in Ruta Žiliukaitė and Donatas Glodenis, „State and Church“ in Ringolds BALODIS (ed.), *State and Church in the Baltic States: 2001*, Riga, 2001, and in Donatas GLODENIS, „Administrative and Financial Matters in the Area of Religious Freedom and Religious Communities: Case of Lithuania“ in *Legal Aspects of Religious Freedom, proceeding of International Conference*, 15–18 September 2008, available at <http://tinyurl.com/36xjm4n>, last accessed on July 1, 2015.

**I. RELIGIOUS FREEDOM AT WORK: HOW THE NATIONAL LAW DEALS WITH RELIGIOUS FREEDOM AT WORK**

**a) What are the key instruments or sources of law on religious freedom at work in your country? What are the key elements of this law? How is religion defined? Are non-religious beliefs protected?**

The key instruments or sources of law on religious freedom at work in Lithuania are: the Constitution, the Law on Religious Communities and Associations, Law on Personal Income Tax, the Equal Opportunity Law and the Labour Codex of Lithuania.

Article 26 of the Constitution and Article 2 of the Law on Religious Communities and Associations (hereafter - LRCA) define the principles of religious freedom in much the same terms. Article 26 paragraph 1 of the Constitution declares that “Freedom of thought, conscience and religion shall not be restricted“. Paragraph 2 stipulates, that “Each human being shall have the right to freely choose any religion or belief and, either alone or with others, in private or in public, to profess his religion, to perform religious practices, to practice and teach his belief.“ Paragraph 3 declares that “No one may compel another person or be compelled to choose or profess any religion or belief“. Paragraph 4 declares, that “Freedom of a human being to profess and spread his religion or belief may not be limited otherwise than by law and only when this is necessary to guarantee the security of society, the public order, the health and morals of the people as well as other basic rights and freedoms of the person.“ The wording of Article 2 of LRCA closely follows the wording of the Article 26 of the Constitution. Thus these norms, although they do not say anything about workplace, define basic framework of religious freedom at work.

Article 43 of the Constitution speaks about churches and other religious organizations. It stipulates that the State shall recognise the churches and religious organisations, that the recognized churches and religious organizations shall have the rights of legal person, etc., and, importantly for our topic, that “Churches and religious organisations shall conduct their affairs freely according to their canons and statutes“. This norm has been interpreted as a justification for allowing the religious communities to operate according to their own rules to some extent even in spheres that are regulated by the national laws in other voluntary organizations, for example, employment.

Religion is not defined in the national legislation, but religious communities and associations are registered as a specific type of legal persons (types are called “legal forms” in Lithuania, and there are two legal forms for religious entities: “Traditional religious community or association” and “other religious community or association”). Some legal norms regarding religion in the workplace are applicable only when they are applied in the context of a registered religious community or association.

Non-religious beliefs are protected by the Constitution along the religious beliefs, but the equivalency does not follow into every sphere of regulation.

For example, the exceptions of the equal opportunity legislation are applicable to institutionalized religious contexts only. And there is no way in Lithuania to institutionalize non-religious beliefs the same way the religious beliefs become institutionalized - it is not possible to register, for example, an atheist society "as a church".

**b) Which manifestations of religious beliefs are protected?**

The legislation of Lithuania explicitly protects only "having" religious beliefs or convictions by prohibiting discrimination based on religion or belief.

Article 2 Paragraph 1 of the Labour Code declares that one of the principles of regulation of labour relations is equality of the subjects of labour relations, irrespective of their sex, sexual orientation and, *inter alia*, their faith.

Article 96 Paragraph 1 of the Labour Code forbids to refuse employment on various grounds mentioned in Article 2 Paragraph 1 (including faith of the applicant). However, it also stipulates that the rule is not applied in cases involving requirements regarding confession of a certain religion, faith or convictions when they are applied by employing religious communities or associations, if the requirements for the employee are based on the ethos of religious community or association, are well known, reasonable and justifiable. According to the Article 129 Paragraph 3, faith of a person cannot be a reason for termination of labour relations, except for cases mentioned in the above-mentioned Article 96 Paragraph 1.

There is no legislation that would guarantee a right to have a free day on Saturday or Friday for believers belonging to religions that have Saturday or Friday as a special day, there are no provisions regarding individual needs for spacing the work day for a believer (like the requirement for a muslim to leave his workplace to pray a few times during the work hours). There are no provisions in legislation about wearing religious symbols in the workplace or about special religious clothing. Of course all of these exceptions can be argued to derive from the general provisions of the Constitution and the Law on Religious Communities and Associations listed above, but I do not know of any work relations dispute in which these norms would have been invoked.

Moreover, to the best of my knowledge, there have been no cases in courts regarding these issues. The Equal Opportunities Ombudsman as of July 31, 2015, has not ever received a complaint regarding discrimination based on religion in the workplace.

**c) What is the rationale of the approach? Is it 'equality' or 'religious freedom' or both or is there some other foundation?**

The rationale behind prohibition of discrimination is of course equality. Having a religion that is different from the religion of the majority can be a problem

in the workplace, as recent research by Milda Ališauskienė has shown<sup>2</sup>. But the lack of legislation regarding religious expression in the workplace, as well as the absence of complaints to the Equal Opportunities Ombudsman or the courts, is, in my opinion, due to historical and cultural reasons. Lithuania has been a traditionally Catholic society where religious expression was mostly related to Sunday activities and not much to the economic sphere of life, and Lithuanian society is still very homogenous. The only visually and culturally different, significant religious minority, the Jews, have perished during the Holocaust, thus making Lithuanian society even more culturally and religiously homogenous. The Soviet period, which started in 1940 and lasted till 1990, has also left a legacy of discouragement of any religious activity in the public sphere, including the workplace. For an average Lithuanian raised in soviet times it is hardly conceivable “to mix religion and workplace”. So the religious expression in the workplace has not (yet) become an issue in Lithuania. Consequently there were no court cases involving those issues to my knowledge to date.

**d) What effect, if any, has the jurisprudence of the European Court of Human Rights had in the national approach?**

The jurisprudence of the European Court of Human Rights is followed by the lawmakers and much more so - by the courts. For example, the religion in the workplace jurisprudence by the European Court of Human Rights has been reviewed recently in the bulletin of the Higher Administrative Court of Lithuania<sup>3</sup>, detailing the ECHR case *Eweida and Others vs. the United Kingdom*. However, since there have been no domestic court cases, there has also been no local jurisprudence on the question.

**II. RELIGIOUS MINISTERS AND LABOUR LAW**

**a) What is the definition of religious minister according to the secular law of your country?**

Law on Personal Income Tax Article 17 Paragraph 1 Point 42 lists four types of “paid” roles a person can play in a religious community:

<sup>2</sup> Milda ALIŠAUSKIENĖ. „Discrimination based on religion or belief in the labour market“ (available online: [http://www.religija.lt/sites/default/files/m.alisauskiene-diskriminacija\\_del\\_religijos\\_darbo\\_rinkoje.pdf](http://www.religija.lt/sites/default/files/m.alisauskiene-diskriminacija_del_religijos_darbo_rinkoje.pdf), last accessed on July 1, 2015).

<sup>3</sup> See, for example, a publication of the Higher Administrative Court of Lithuania *Review of decisions of European Court of Human Rights* for the period from January 1, 2013 to February 28, 2013, which details the case *Eweida and others v. United Kingdom* (p. 15-18, available online: [http://www.lvat.lt/download/1408/eztt\\_apzvalga\\_2013\\_01-2013\\_02.pdf](http://www.lvat.lt/download/1408/eztt_apzvalga_2013_01-2013_02.pdf), last accessed on July 1, 2015)

- clergy
- assistants at religious rites
- service staff
- individuals performing construction, repair and restoration work.

The law does not define each role, however, when it comes to work relations the only real difference exists only between “individuals performing construction, repair and restoration work” and the other three types. The role “clergy” usually refers to religious ministers; the role “assistant at religious rites” refers to various supplementary offices common to the Catholic church, like organists. Those are the two clearly religious roles. The “individuals performing construction, repair and restoration work” are the ones who have temporary labour contracts with the religious community and towards whom regular taxation rules apply. By contrast, the “service staff” roles are various permanent roles in a religious community that are not directly related to “spiritual” activities of religious organizations - for example, administrative workers.

**b) What is the labour status of religious ministers when working for their respective denominations?**

Except for the individuals performing construction, repair and restoration work, who have to be employed in a regular way by a religious community, all the other roles - clergy, assistants at religious rites and service staff - can work for a religious community without an employment contract. In that case, according to the Law on Personal Income Tax, they receive “sustenance” from the religious community (according to the commentary issued by State Tax Inspection, they can also receive sustenance directly from the believers for religious services provided<sup>4</sup>). Clergy, assistants at religious rites and the service staff can work for a religious community with an employment contract as well. In both cases, the Personal income tax is not deducted from their income.

Religious workers are mostly left on their own regarding the pension insurance and health insurance. Only the minimum social insurance pensions of the clergy and monastics of state-recognized traditional religious communities and state recognized non-raditional religious communities, who are not on a paid contract, are paid for by the state, as stipulates the Law on State Social Insurance Pensions, Article 2, Paragraph 1, point 11. The social insurance pensions thus accrued are very small. In case of health insurance, the state considers the clergy of traditional religious communities and the novices at the monasteries and clerical schools to be ensured, according to

<sup>4</sup> See Commentary of State Tax Inspection on the Taxes Related to Religious Communities and Associations, p. 8-9, (<https://www.vmi.lt/cms/documents/10174/8274962/RELIGINI%C5%B2+BEN-DRUOMENI%C5%B2+APMOKESTINIMO+PAAI%C5%A0KINIMAS.doc.pdf/d1b777f6-4d39-4cfb-b9e0-c37dc3f3be86>, last accessed on July 1, 2015).

the Law on Health Insurance, article 6, Paragraph 4, point 15 (so neither members of monastic orders, nor the clergy of state-recognized non-traditional religious communities are covered).

**c) What is the labour status of religious ministers when working in other institutions? (chaplains, teachers of religions in schools etc)**

When religious ministers work outside of religious community settings - as chaplains, teachers of religion, etc., they are to be employed on a regular contract. Personal income tax is applied towards the income they receive<sup>5</sup>.

A special note is due regarding religious instruction teachers in the state-run public schools. Those teachers are usually professional teachers, but they may also be religious ministers with special qualifications. The laws of the Republic of Lithuania have an exception to the secularity of the state institutions: they permit religious instruction of traditional religious communities. The parents (starting from age 14 - the pupils themselves) can have their children take either religious instruction classes or the (secular) ethics classes. In the school year 2014-2015 about 194 thousand (or 56%) of all high school students were taking religious instruction classes. Of the total of students taking religious instruction classes 98% were taking Catholic religious instruction classes (religious instruction classes of the Orthodox Church, Evangelical Lutheran, Evangelical Reformed and Jewish communities were also taught in the public schools)<sup>6</sup>.

Law on Education, Article 31, detailing the teaching of religious instruction in the public schools, also has a paragraph on requirements for teachers on religious instruction. Paragraph 5 stipulates that in order to teach religious instruction in the public schools a person must have the higher or university level education and the qualification of a pedagogue (these requirements apply to all teachers) or a person who has a special training in the sphere. But the paragraph also stipulates that such a person must have a permission (commission) to teach religious instruction issued in accordance with the requirements of the particular traditional religious community or association. The requirement to have a permission (commission) to teach religious instruction is drawn from an Agreement between the Holy See and the Republic of Lithuania on Co-operation in Education and Culture, although it is applied more broadly, not just for the Catholic Church teachers. Article 3 paragraph 2 of the Agreement stipulates that:

<sup>5</sup> See Commentary of State Tax Inspection on the Taxes Related to Religious Communities and Associations, p. 8-9, (<https://www.vmi.lt/cms/documents/10174/8274962/RELIGINI%C5%B2+BENDRUOMENI%C5%B2+APMOKESTINIMO+PAAI%C5%A0KINIMAS.doc.pdf/d1b777f6-4d39-4cfb-b9e0-c37dc3f3be86>, last accessed on July 1, 2015).

<sup>6</sup> Data obtained from the Ministry of Education of the Republic of Lithuania, June, 2014.

Teachers of the Catholic religion must have the written authorisation (*missio canonica*) of the local Bishop. Such authorisation constitutes an indispensable part of the qualification requirements for the profession. From the moment when the authorisation is withdrawn, a teacher shall lose the right to teach the Catholic religion. The procedure for the notification of the withdrawal of the authorisation shall be established by a separate agreement between the authorised institution of the Republic of Lithuania and the Conference of Lithuanian Bishops.

The agreement between the Conference of Bishops and the Ministry of Education regarding the procedure of notification of the withdrawal of the authorisation has been signed in 2009<sup>7</sup>. The agreement stipulates that upon receiving notification of withdrawal of *missio canonica* regarding a certain teacher the principal of the school is to remove the teacher from the teaching position of the Catholic religious instruction. So the teachers of religious instruction are in a very different position compared to other teachers at the state-run schools.

In practice removing a teacher who has lost grace with the Catholic Church from a teaching position of the Catholic religious instruction does not necessarily mean firing him or her. Most religious instruction teachers have double speciality - e.g., they are both religious instruction teachers and ethics teachers. So it may mean a turn in the carrier - starting the teaching of ethics.

The employment of the chaplains is dealt with in much the same way. Although there are chaplains in prisons that belong to various non-traditional religious communities, these chaplains work on strictly voluntary terms. The prison chaplains belonging to traditional religious communities also work as volunteers, supported by their religious communities. Catholic chaplains, on the other hand, can be hired by the military and by the state run hospitals. Their employment is also dependent on the will of the local bishop, who can withdraw authorisation from a chaplain, in which case the chaplain would be fired by the state run hospital or the military unit.

**d) Are ministers of all denominations subject to the same labour law status?**

Ministers of all denominations are subject to the same labour law status, but there does exist a difference in taxation. Personal income tax is not deducted from the income of clergy, assistants at religious rites and the service staff of traditional religious communities when they receive income based on work contract. But the personal income tax is applied in case of those same categories of workers who work for non-traditional religious communities. This difference in

<sup>7</sup> Text of the agreement in Lithuanian, available at [http://kaunoarkivyskupija.lt/site/files/file/pdf/lvk-lrsv-m\\_susitarimas-del-missio-canonica-netekimo2009-11-06.pdf](http://kaunoarkivyskupija.lt/site/files/file/pdf/lvk-lrsv-m_susitarimas-del-missio-canonica-netekimo2009-11-06.pdf), last accessed July 1, 2015).

taxation is based on the Article 17 Paragraph 1 Point 42 of the Law on Personal Income Tax.

As mentioned above, the State pays social insurance Pension of the ministers of state-recognized traditional religious communities, and covers for health insurance of the ministers of state-recognized traditional religious communities, thus completely leaving out the ministers of other non-traditional religious communities. Also, as mentioned above, there are differences between the chaplains of traditional religious communities and non-traditional religious communities when it comes to employment by the state institutions (military or hospitals).

**e) What case-law has developed regarding the work of ministers of religion?**

There has been a case involving a group “Osho Ojas Meditation Center”, whose leader was fined by the State Tax Inspection for providing meditation services for his followers. The leader argued before the court that he was performing religious services and therefore Personal Income Tax should not apply to his income, but the administrative court (and the Higher Administrative Court) rejected his claims and sustained the fine, arguing that he was not a religious minister as he was operating outside of registered religious communities<sup>8</sup>. At the time the fine was imposed the “Osho Ojas Meditation Center” was not registered as a religious community. Were it registered as such, no violation would have been found.

**III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS**

**a) In what terms is the autonomy of churches recognized in your country? Is it considered a manifestation of the collective dimension of religious freedom?**

In Lithuania the idea of the autonomy of the churches is understood independently of the idea of religious freedom, and is based on the wording of the article 43 paragraph 4 of the Constitution, which declares that “Churches and religious organisations shall conduct their affairs freely according to their canons and statutes“. Thus the legislation relating to the operation of religious communities has been kept to a minimum, to a point that actually makes it less than clear on how to, for example, liquidate a religious community.

<sup>8</sup> Decision of January 9, 2004 in administrative case No. N<sup>12</sup>-21-04 of Higher Administrative Court. Personal archive of the author.

**b) Are churches exempted from the general norms concerning anti-discrimination? To what extent?**

Religious communities are, to a large extent, exempt from the general norms of anti-discrimination. This exemption was negotiated by the Catholic Church in 2008, three years after the coming into effect of the Law on Equal Treatment.

The purpose of the Law on Equal Opportunity was to ensure equality of all physical persons and to prohibit limitation of their rights or privileging them because of sex, race, nationality, language, origin, social standing, faith, convictions or outlook. The law was adopted also with the aim to implement the European Union legislation on equal opportunity in the workplace, although it affects other areas besides workplace.

The exceptions are listed in the Article 3 of the said law, which defines spheres in which the law is not to be applied. It is not to be applied in family and private life, and then there are numerous exemptions for its application in religious settings, religious organizations and organizations that have overtly religious ethos, when “requirements regarding a person’s religion, belief or convictions constitute a genuine, legitimate and justified requirement, having regard to the ethos of the said organisations“. So, equal treatment is not mandatory when accepting persons to religious schools, when choosing teachers of religious instruction, etc., and, what concerns our topic - the

“requirements that persons carrying out occupational activities within religious communities and associations, as well as organisations established by them or their members, the founding documents or equivalent documents of which specify that their ethos is based on religion or belief ... should act in good faith and with loyalty to the ethos of the said organisations“.

This exemption of religious communities from the general requirements of the law has not been controversial in Lithuania.

**c) What effects, if any, has European Union law had in this area?**

European Union law was both the cause of the adoption of the Law on Equal Treatment and the model for the exceptions provided for religious communities in the law. The wording of Article 4 Paragraph 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation was directly used to formulate the exceptions in the Law on Equal Treatment of the Republic of Lithuania.

**d) What case-law has developed in this area?**

As mentioned before, the exceptions for religious communities in equal treatment legislation were not controversial in Lithuania, and so far there have been no cases in courts in the sphere of work relations in religious communities.

Part of the reason for this lack of court cases in labour relations within religious communities is the fact that most people working for religious communities are not actually employed by the religious communities. They are supported by the religious communities and serve them as ministers or work in other capacities, but they are not employed, they are not registered by the competent state authorities as working in religious communities.

### LEGAL ACTS REFERENCED

- Agreement between the Holy See and the Republic of Lithuania on Co-operation in Education and Culture (official English and Lithuanian texts: [http://www.lcn.lt/b\\_dokumentai/kiti\\_dokumentai/AS-LR-sutartis-svietimas.html](http://www.lcn.lt/b_dokumentai/kiti_dokumentai/AS-LR-sutartis-svietimas.html))
- Agreement between the Conference of Bishops and the Ministry of Education regarding the procedure of notification of the withdrawal of the authorisation (official text: [http://kaunoarkivyskupija.lt/site/files/file/pdf/lvk-lrsv-m\\_susitarimas-del-missio-canonica-netekimo2009-11-06.pdf](http://kaunoarkivyskupija.lt/site/files/file/pdf/lvk-lrsv-m_susitarimas-del-missio-canonica-netekimo2009-11-06.pdf))
- Constitution of the Republic of Lithuania (official text: <https://www.e-tar.lt/portal/lt/legalAct/TAR.47BB952431DA>, English translation: <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>).
- Labour Code of the Republic of Lithuania (official text: <https://www.e-tar.lt/portal/lt/legalAct/TAR.31185A622C9F/chCcfNyAiP>).
- Law on Education (official text: <https://www.e-tar.lt/portal/lt/legalAct/TAR.9A3AD08EA5D0/PVjGxhPykE>).
- Law on Equal Treatment (official text: [https://www.e-tar.lt/portal/lt/legalAct/TAR.0CC6CB2A9E42/TAIS\\_454179](https://www.e-tar.lt/portal/lt/legalAct/TAR.0CC6CB2A9E42/TAIS_454179), English version: [http://www.lygybe.lt/download/343/law%20on%20equal%20treatment\\_no.%20ix-1826.pdf](http://www.lygybe.lt/download/343/law%20on%20equal%20treatment_no.%20ix-1826.pdf)).
- Law on Health Insurance (official text: <https://www.e-tar.lt/portal/lt/legalAct/TAR.94F6B680E8B8/lbjuIssAzZ>).
- Law on Personal Income Tax (official text: <https://www.e-tar.lt/portal/lt/legalAct/TAR.C677663D2202/UQvUJamAGU>).
- Law on Religious Communities and Associations (official text: [https://www.e-tar.lt/portal/lt/legalAct/TAR.B4DBBD7C388A/TAIS\\_363706](https://www.e-tar.lt/portal/lt/legalAct/TAR.B4DBBD7C388A/TAIS_363706), English translation: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=385299&p\\_query=&p\\_tr2=](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=385299&p_query=&p_tr2=)).
- Law on State Social Insurance Pensions (official text: <https://www.e-tar.lt/portal/lt/legalAct/TAR.A7F77DF94F5D/RyFqYNNfvx>).

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# RELIGION AT THE WORKPLACE: LUXEMBOURG

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The aim of the paper is to sketch out the institutional framework applied within the Grand-Duchy of Luxembourg on questions related to the status of religion at the workplace. The paper focuses on the following themes: a) the general legal framework; b) the respect of religious freedom at work; c) the status of religious officials according to labour law; and d) the autonomy of the churches and human rights of the workers.

## I. THE LEGAL FRAMEWORK

The State-Church legal system applied within Luxembourg is that of ‘separation’. The rights of religious freedom, freedom of expression, as well as of public worship, are constitutionally protected (art. 19 and 20). The State, in line to the religious neutrality doctrine, respects in principle the organizational structures of the religious communities and cannot interfere in their internal affairs. On the other hand, the precise framework of relations of each cult with the State, i.e. the appointment and installation of heads of religions, the mode of appointing and dismissing other ministers of religion, the right of any of them to correspond with their superiors and to publish their acts and decisions, is practically regulated by Conventions signed between the parties involved, and passed by vote of the Chamber of Deputies (art. 22). The State is responsible for paying the salaries and pensions of the religious ministers of the ‘recognized’ cults (i.e. the communities which have signed a Convention with the State authorities) (art. 106). Moreover, the State subsidizes the religious groups for covering certain expenses (e.g. constructing or maintaining church buildings).

Within this context, the religious communities are distinguished in two groups: a) the officially recognized; and b) the non-recognized communities. The communities belonging to the first group enjoy a legal personality under public law. These are: a) The Catholic Church (the Concordat of 1801 is theoretically still in effect in line to art. 119 of the Constitution); b) the Jewish community; c) the Protestant

Church; d) the Protestant-Reformed Church; e) the Greek-Orthodox Church; f) the Anglican Church; g) the Serbian-Orthodox Church; and h) the Rumanian-Orthodox Church. The Muslim Community has not yet signed a Convention. For that reason it receives a modest State subsidy. As a non-recognized cult, its representative body is organized as a legal personality under private law. The same legal status applies to the Russian-Orthodox Church as well as some other communities (e.g. the Jehovah Witnesses)<sup>1</sup>

Overall, the set of criteria, on the basis of which the Chamber of Deputies concludes an agreement with a religious community and, thus, recognizes it officially, are:

- A relatively large number of faithful within Luxembourg;
- A relatively historical presence in the country;
- A world known cult;
- Already recognized by at least one member-state of the European Union;
- The respect of the domestic legal system and public order<sup>2</sup>.

It should be noted that while the Constitution guarantees the religious freedom frame (art. 19, 20 and 21), the State has the right to intervene directly in the organization of each cult on the grounds of articles 22, 25 and 26 of the Constitution. In particular, these clauses, as well as a number of provision of the signed Conventions (1997-8), stipulate the State's authorization to control the activities of each religious organization in relation to: a) the appointment and installation of the communal leadership; b) the open-air religious gatherings; and c) the establishment of any new religious congregation within Luxembourg. Furthermore, art. 119 defines that 'pending the conclusion of the conventions referred to in Article 22, the current provisions concerning religions shall remain in force'. The Administration has never applied this clause, which could practically lead to the prohibition of the free functioning of a religious community on the grounds of public order<sup>3</sup>.

The convention concluded between the Minister of National Education and the Roman Catholic Archbishop (1998) defined that the religious class in the primary education was an issue administered by the local authorities, i.e. the municipality,

<sup>1</sup> Gouvernement du Luxembourg, Ministère d'Etat, Département des Cultes, Rapport du Groupe d'experts chargé de réfléchir sur l'évolution future des relations entre les pouvoirs publics et les communautés religieuses ou philosophiques au Grand-Duché, [http://web.cathol.lu/IMG/pdf/rapport\\_groupe\\_experts.pdf](http://web.cathol.lu/IMG/pdf/rapport_groupe_experts.pdf), 2012.

<sup>2</sup> Norman DOE, *Law and Religion in Europe: a Comparative Introduction* (Oxford: Oxford University Press, 2011), p. 101; Réponse de l'Église catholique qui est au Luxembourg au rapport du Groupe d'experts chargé de réfléchir sur l'évolution future des relations entre les pouvoirs publics et les communautés religieuses ou philosophiques au Grand-Duché de Luxembourg, du 3 octobre 2012 (Luxembourg, le 23 novembre 2012), p. 8.

<sup>3</sup> Philippe POIRIER, 'State and Religions in Luxembourg: A "Reconciled" and "Secularized" Democracy', in François Foret and Xavier Itçaina (eds), *Politics of Religion in Western Europe Modernities in Conflict?* (Abingdon: Routledge/ECPR Studies in European Political Science, 2011), pp. 91-98.

and the representatives of the Catholic Church. The government continued to have the obligation to pay the salary of the religious class instructors in primary schools for a total of two hours course per week. Almost the same agreement applies in relation to the secondary education. The only difference is that the second party involved is not the municipal authorities, but the Administration.<sup>4</sup> 79% of primary school students chose to attend religious class in 2014; this number drops to 70% for high school students. It should be noted that the Catholic Church is the only denomination enjoying by law this preferential treatment in respect to religious education in primary and secondary schools<sup>4</sup>.

## II. RELIGIOUS FREEDOM AT WORK

The right of each individual to freely manifest her/his religion or convictions at the workplace is protected by the domestic legal order. The key instruments or sources of law on religious freedom at work in Luxembourg are: a) the Constitution; b) the Labour Code; and c) the Penal Code.

The Luxembourgish Constitution protects the religious liberty value frame both in its positive and negative form. Particularly, the freedom of religion (or of no-religion: art. 20), and of public worship as well as freedom to express one's religious opinions are guaranteed (art. 19). However, there is not a concrete definition of what the term 'religion' actually means at a legal level. In this respect, it is interesting to note that the constitutional legislator uses the term 'worship' (cult) to indicate 'religion'. In short, *freedom of religion* is identified with *freedom of worship*, viewed as its 'principal characteristic'<sup>5</sup>. The Constitutional Court's Judgement 3/1998 (20/1/1998) applied the same pattern,<sup>6</sup> abstaining to define religion as such<sup>7</sup>. It should be also noted that there are no legal provisions specifically regulating the wearing of religious symbols or clothing in the workplace.

Luxembourg has ratified Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. For its practical implementation, it has introduced art. 2 of Directive 2000/78 on the prohibition of both 'direct' and 'indi-

<sup>4</sup> Chambre des Députés (1998) A-1998-067-0001, Loi du 10 juillet 1998 portant modification des articles 22, 23 et 26 de la loi modifiée du 10 août 1912 sur l'organisation de l'enseignement primaire, <http://www.chd.lu/archives/ArchivesPortlet?selectedDocNum=0&secondList=&action=document>.

<sup>5</sup> Norma DOE, *Ibid.*, p. 25.

<sup>6</sup> Mémorial: Journal Officiel du Grand-Duché de Luxembourg/ Recueil de Législation/ A-No 2 (18 Janvier 1999) Arrêt n° 3/98 du 20 novembre 1998 (<http://www.legilux.public.lu/leg/a/archives/1999/0002/a002.pdf#page=2>).

<sup>7</sup> Tania HOFFMAN, 'Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC. Country Report: Luxembourg' (European Network of Legal Experts in the Non-discrimination Field), p. 18, [http://www.non-discrimination.net/content/media/2011-LU-Country%20Report%20LN\\_final.pdf](http://www.non-discrimination.net/content/media/2011-LU-Country%20Report%20LN_final.pdf).

rect' discrimination on grounds of religion at the workplace. The protection against discriminatory behaviour at the workplace is grounded on the principle of 'religious equality'. Within this framework, the equality of treatment principle applies for the non-religious beliefs as well. The framework of non-discrimination theoretically applies to all the fields of state activity and policy<sup>8</sup>. In practice, however, it has never assigned a work related to a specific cult to an adherent of a different religion, i.e. a Muslim to teach the religious class in public education.

In particular, 'Law 28 November 2006' prohibits:

- To treat an employee less favourably than others because of her/his religion or conviction ('direct' discrimination) (art. 1);
- To follow practices, criteria, policies or employment rules which, when equally applied to all employees, have the effect of disadvantaging people of a particular religion or belief ('indirect' discrimination) (art. 1).

The aforementioned prohibitions are applied in both the public and private sector in relation to:

- Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy.
- Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.
- Employment and working conditions, including pay and dismissals
- Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (art. 2).

Moreover, the same Law establishes the Centre for the Equality of Treatment for monitoring and reporting the implementation of the employees' related rights at the workplace (art. 8-17). The aforementioned provisions were integrated to the Labour Code of Luxembourg<sup>9</sup>.

The Penal Code defines that any violation of the right of religious expression is prohibited. In particular, art. 142 stipulates certain sanctions for those violating the right to celebrate certain religious holidays, and thus the right to refrain from working at these days (this rule practically applies on Sunday as a day off, and a number of Christian feasts, i.e. Christmas, Easter, etc.). At least theoretically, this state of affairs might be indirectly discriminatory to certain religions (e.g. Islam, Judaism), causing

<sup>8</sup> Gouvernement du Luxembourg, Service Central de la Législation, Code administratif - Fonction publique [http://www.legilux.public.lu/leg/textescoordonnes/compilation/code\\_fonction\\_publicue/Fonction\\_publicue\\_2015.pdf](http://www.legilux.public.lu/leg/textescoordonnes/compilation/code_fonction_publicue/Fonction_publicue_2015.pdf), juillet 2015.

<sup>9</sup> (Mémorial: Journal Officiel du Grand-Duché de Luxembourg/ Recueil de Législation/ A- No 207 (6 Décembre 2006) (<http://www.legilux.public.lu/leg/a/archives/2006/0207/a207.pdf#page=2>).

actually their members to abstain from the religious services. In practice, however, no official complaints or legal action have been reported against this norm, which is actually viewed as a cultural and social practice.

Moreover, art. 454 rules that discrimination on grounds of religious convictions (real or supposed) is a serious offence and is forbidden. This norm is applied in relation to both: a) the members of the recognized religions (*'religion déterminée'*), i.e. the ones having signed a convention with the Luxembourgish State; and b) the members of other religious or moral groups under the legal status of private law, i.e. the Muslim community<sup>10</sup>. The general principle of the shift of the burden of proof applies to any discrimination issue on grounds of religion as well. The religious communities are allowed to treat differently their employees on religious ground in relation to activities related to the core doctrinal and moral values of the respective cult. For instance, the Archbishop of Luxembourg can refuse to hire a non-Catholic as a teacher at the Sunday school. Following the Directive 2000/78, the general discrimination law of 28 November 2006 (article 18), integrated in the Labour Code (art. L-252-1), stipulates:

*if, in the case of occupational activities of churches or other public or private organizations, the ethos of which is based on religion or belief, a difference of treatment on a person's religion or belief has been provided for by laws or practices existing at the date of 2 December 2000, it shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.*

With regard to the Case Law, the Court of Labour (*répertoire fiscal 84/2009*, 9 Janvier 2009) ruled that harassment at the workplace on grounds of religion or convictions is a form of discrimination. As such, it is unacceptable. The employer has to take all the necessary precaution to secure her/his employees from becoming victims of discriminatory behaviour, as well as to create a working environment where the dignity of each individual is respected. The alleged victim has to prove substantially her/his allegations. The provided evidence should be 'precise and coherent'<sup>11</sup>. There are no other court judgements in respect to religious discrimination at the workplace.

<sup>10</sup> Gouvernement du Luxembourg, Service Central de la Législation, [http://www.legilux.public.lu/leg/textescoordonnes/codes/code\\_penal/CodePenal\\_PageAccueil.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/code_penal/CodePenal_PageAccueil.pdf).

<sup>11</sup> Chambre des Salariés Luxembourg, Discrimination au Travail, Notion d'égalité de salaire, *Jugement du Tribunal du Travail de Luxembourg du 9 janvier 2009 répertoire fiscal 84/2009* (<http://discrimination.csl.lu/legislation-ce-que-la-loi-prevoit/97-discrimination/jurisprudence-des-exemples-tires-des-decisions-de-justice>).

### III. RELIGIOUS MINISTERS AND LABOUR LAW<sup>12</sup>

The Luxembourgish Government signed an Agreement with the religious communities in January 2015, establishing a new legal framework regulating their relationship. The new system will be in force after the future constitutional reform, the requirement for which is a two/third majority vote of the MPs. The coalition Government composed of liberals, socialists and greens has not reached the threshold. Religious communities have signed the agreement but the main opposition party, the Christian Social People's Party, is after voting this reform on the condition of passing a package deal for the overall change of the constitutional framework. This process is not yet completed. Therefore, there exist two distinct legal frameworks, i.e. one actually in effect and one in a state of limbo until the Parliament vote the constitutional amendments before the end the legislature 2013-2018<sup>13</sup>.

All religious ministers enjoy currently the status of a 'civil servant', having the respective salary and pension rights. On the one hand, the State remunerates directly all religious ministers. On the other hand, in the name of the religious freedom principle the institutional employer of each religious official is the Head of her/his community. The Court of Labour is the competent authority to settle any dispute between the State authorities and the recognized religious communities in respect to the working conditions or the salary of the latter's officials. For certain cases brought to justice, which are related to question of religious or ethical character, the internal regularisations of the respective denomination might prevail over the secular law. In other words, the Head of the community has the liberty to fire a minister if her/his beliefs are contrary to the principles of the cult they represent. For instance, the Catholic Archbishop can depose a priest, if he is found to be advocating 'heretic' beliefs', without being subject to the standard legal framework in force for the lay-offs. The salary of ministers of each cult is defined in line to its internal structures. The special provisions in force for each 'recognized' religious community are listed below in the Annex section.

Overall, the employees in the religious organizations belong to three categories:

a) The ministers of the religious communities. As mentioned before, their salaries are paid directly by the State, if their community is officially recognized (i.e. signed a Convention) (Constitution: art.106). The Penal Code penalizes any violation of the freedom of religion and worship. In addition, the Penal Code (art. 268) stipulates that the ministers of religion avoid any attack against state activities or any laws and

<sup>12</sup> Gouvernement du Luxembourg, Service Central de la Législation, [http://www.legilux.public.lu/leg/textescoordonnes/compilation/code\\_administratif/VOL\\_1/CULTES.pdf](http://www.legilux.public.lu/leg/textescoordonnes/compilation/code_administratif/VOL_1/CULTES.pdf), juillet 2015.

<sup>13</sup> Gouvernement du Luxembourg, Convention entre l'État du Grand-Duché de Luxembourg et les communautés religieuses établies au Luxembourg, <https://www.gouvernement.lu/4369567/Convention.pdf>, janvier 2015.

regulations adopted by Parliament. The religious ministers are considered to be civil servants and they have the same duties and rights as the others (excluding bank holidays). The mufti and the imams of the Luxembourgish Muslim community are not included in this category. All ministers, regardless of the cult they serve, are subject to the same labour law status before and after the reform (the imams will be part of the new convention).

b) The teachers in charge of religious education at primary and secondary schools. They are hired and paid by the municipal authorities (primary education) and by the State (secondary education). The eligibility criteria are: a) university degree on theology; b) certificate of the State of Luxembourg; and c) certificate of the Catholic Church of Luxembourg. The Roman Catholic Church is the only denomination organizing religious class in the public schools.

c) The employees in the administration of the religious organizations, i.e. secretaries, social work and health services. They are registered and paid directly by their respective community (particularly in health services). In 2010, the Consultative Commission on Human Rights recommended that women willing to undertake an abortion, should be given sufficient guarantees by the medical institution for its political and religious neutrality even when it has a religious character<sup>14</sup>. The proposal was not taken into consideration by the then coalition Government, the main partner in which was the Christian Social People's Party.

#### IV. WORKING STATUS OF THE RELIGIOUS CLASS INSTRUCTORS<sup>15</sup>

With regard to the religious education, the Law of 6 February 2009 stipulates the respect for freedom of conscience of pupils, and with the exception of the religious class, the privileged treatment of a religious or political doctrine is prohibited (art. 4). Article 5 underlines that, except for the religious class, the teacher cannot manifest by means of clothing or wearing of religious symbols, his religious belonging.

Law of 6 February 2009 institutionalised that the students in primary schools, on request of their own parents, have the choice between a moral/social education or attending religious and moral class (art. 7). According to art. 57, the religious and moral instruction is monitored by the Catholic archbishop. It should be empha-

<sup>14</sup> J-2010-O-2557 6103/04 Projet de loi portant modification de l'article 353 du Code pénal Avis de la Commission consultative des Droits de l'Homme.

<sup>15</sup> Gouvernement du Luxembourg, Service Central de la Législation, Loi du 10 juillet 1998 portant approbation de la Convention du 31 octobre 1997 entre le Gouvernement, d'une part, et l'Archevêché, d'autre part, concernant l'organisation de l'enseignement religieux dans l'enseignement primaire, (Mém. A - 67 du 21 août 1998, p. 1338; doc. parl. 4378A). Règlement grand-ducal du 7 août 1998 portant fixation des subventions-salaires des enseignants et chargés de cours de religion, l (Mém. A - 67 du 21 août 1998, p. 1341).

sized that according to art. 60, the inspector of the Ministry of National Education exercises hierarchical power over her/his district school staff with the exception of the teachers of religion. In conjunction with that, she/he monitors all the learning activities taking place during school hours, except during religious and moral instruction. Article 3 of the Convention with the Catholic Church stipulates that the Archbishop may appoint a religious minister as a teacher of religious course<sup>16</sup>. The religion teacher is employed by the archdiocese, being under private law status. The State guarantees, as a third party, her/his payment, and compensation in the form of grant-wage payable directly. Article 4 provides a strong linguistic requirement for the teacher of religion. She/he is not eligible to work, in case she/he doesn't speak one of the three official languages (German, French and Luxembourgish). In accordance to Article 5 of the Convention, the archdiocese organizes special training for teachers of religion. Nevertheless, Article 6 indicates some professional prerequisites. The teacher of religious class must hold: the Luxembourgish education certificate or an equivalent diploma recognized by the Ministry of Education; a three year studies certificate in theology and pedagogy issued by the archdiocese, or an equivalent diploma<sup>17</sup>. The curriculum of secondary education also includes a compulsory course either on religion and morals, or on moral and social education. As regards the first, a Règlement grand-ducal, in consultation with the Council of State and the Head of denomination, determines the program guidelines, the training methods and the length and number of lessons per week. Following the Règlement

<sup>16</sup> Gouvernement du Luxembourg, Service Central de la Législation, Règlement grand-ducal du 27 avril 2009 fixant les modalités d'inscription au cours d'éducation morale et sociale et au cours d'instruction religieuse et morale ainsi que les modalités d'organisation du cours d'éducation morale et sociale aux 2e, 3e et 4e cycles de l'enseignement fondamental (Mém. A – 98 du 14 mai 2009, p. 1469).

<sup>17</sup> Philippe POIRIER, La religion dans l'enseignement public au Luxembourg. In G. Robbers (eds.) Religion in Public Education - La religion dans l'éducation publique, Institut de droit constitutionnel européen, Collection European Consortium for Church and State Research, pp. 319-361, April 2011 ; Gouvernement du Luxembourg, Service Central de la Législation, Règlement grand-ducal du 10 août 1991 concernant les lignes directrices du programme, la durée et l'organisation du cours d'instruction religieuse et morale ainsi que la formation des enseignants chargés de ce cours. (Mém. A – 69 du 1er octobre 1991, p. 1345) ; Gouvernement du Luxembourg, Service Central de la Législation, Loi du 29 juin 2005 portant a) fixation des cadres du personnel des établissements d'enseignement secondaire et secondaire technique; b) modification de la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat; c) modification de la loi modifiée du 10 mai 1968 portant réforme de l'enseignement; d) abrogation de la loi du 25 août 1971 portant création de la fonction de professeur de sciences économiques et sociales aux établissements d'enseignement secondaire; e) modification de la loi du 22 juin 1989 portant modification de la loi modifiée du 10 mai 1968 portant réforme de l'enseignement; f) modification de la loi modifiée du 4 septembre 1990 portant réforme de l'enseignement secondaire technique et de la formation professionnelle continue; g) modification de la loi du 25 juin 2004 portant organisation des lycées et lycées techniques; h) modification de la loi modifiée du 24 mai 1989 sur le contrat de travail. (Mém. A – 95 du 8 juillet 2005, p. 1702).

Grand-Ducal published in 1998 concerning the salary of religion teachers in public school<sup>18</sup>, the decision on their ranking is made by the Minister of Religious Affairs, in consultation with the Minister of Public Administration (Art.4). Teachers of religion whose career was temporarily interrupted due to the Archbishop's decision retain their former status (art 5). Finally, the Labour Court of Justice is the only competent authority to adjudicate disputes with regard to their working conditions and amounts of salary.

With regard to the Case Law, the Administrative Court ruled that it is incompetent to judge an affair, in which the plaintiff contest his working conditions as a teacher of religion, because Convention between the State and the Roman Catholic Church does not provide a relevant reference. (TA 22-3-04 (17277)).

## V. CONCLUDING REMARKS: THE CONVENTION OF JANUARY 2015

The preamble Agreement signed between the religious communities, represented by a Committee chaired by the Catholic Archbishop of Luxembourg, and the State in January 2015 stipulates the respect of the human rights framework and its applications in all fields of the religious communities' social and educational activation. Article 2 of the Agreement underlines that freedom of worship is guaranteed within the constitutional context. The religious communities should exclude any member from their own institutions, in the case of violating the state law. Article 3 stipulates the autonomy of internal organization and its freedom in recruiting personnel.

Under the new legal framework, the ministers of each cult (including for the first time, the Mufti and the Imams) will be subject to the private sector labour law, instead of being civil servants paid directly by the State treasury. After the implementation of the new agreement, the religious communities will receive State subsidies for covering the minister's salary payment and their social security. It should be noted that the state funding will be gradually reduced from €24.6 million to €8.3 million. The religious communities will be responsible for defining the wages of this category of employees, as well as the number of working positions. The Churches, being the employers of the religious ministers, have the option to use communal revenues, as a bonus payment in addition to the base salary provided by the State. The retirement age for all ministers is sixty-five (articles 4-6).

With regard to the field of religious education, the new Agreement stipulates the disestablishment of the 'two course system', institutionalizing instead the course

<sup>18</sup> Gouvernement du Luxembourg, Service Central de la Législation, Règlement grand-ducal du 7 août 1998 portant fixation des subventions-salaires des enseignants et chargés de cours de religion, 1 (Mém. A - 67 du 21 août 1998, p. 1341).

on 'values'. The new class introduced in primary and secondary education, did not change the working status of the teachers of the repealed religious course. Actually, they are automatically assume the teaching responsibility to teach the new mandatory course. The Ministry of Education is the competent authority to hire and appoint the new teachers, who are subject to the public sector labour law. The working relationship of this category of employees with the Archbishop of Luxembourg is abolished. However, they are free to leave the national education system. In case their new contract (either permanent or short-term) is signed with the Church, they will be subject to the labour law applied to the private sector.

The application of the new Convention is related to the lately published draft Law, which will establish a new framework of relations between the State and the Muslim community of Luxembourg. In particular, the Law defines the aim and the amount of state funding; the legal status of the community (legal personality under public law); the terms and conditions for their cooperation, etc. The draft Law also stipulates that the community should apply the domestic labour law concerning the weekly rest of employees (art. 6), as well as the statutory holidays (art. 7).

In conclusion, the religious and philosophical diversity keeps growing in Luxembourg, due to the unusual nature of its workforce (the commuters from the neighbouring countries and foreign residents represent 80% of private employment workforce in 2015). However, unlike its neighbouring states, the issue of religion at the workplace is not part of the public agenda, due mainly to the absence of the relevant case law, despite the fact that there have been situations when it was necessary to deal with this topic. Several professional organizations, including the Chamber of Commerce and the Chamber of Employees, were requested by their members to develop a relevant guidebook, due to the need to address questions related to days-off or alimentary practices driven by religious obligations (particularly from Muslim and/or Pentecostal workers). However, because questions related to religion within the social space have taken a central place in the public debate due to the upcoming reform promoted by the governmental, professional organizations prefer at the moment to avoid any public intervention to deal with them. The Labour Code and the Penal Code of Luxembourg forbid to treat a person in a discriminatory manner on the grounds of his/her religion or non-religion. However, the law foresees that, churches and other religious or belief based organizations, both public and private, can still apply a different treatment, as long as these practices were already in place as of December 2, 2000, without being deemed discriminatory. The criteria to be considered as legitimate for such an exemption are: a) the nature of these activities or the context in which they are exercised; and b) the religion or belief constitute a legitimate and justified requirement of the job description in respect to the objectives of the organization. The legal reform introduced by the Agreement of 2015 is considered to promote further the religious non-discrimination frame.

## ANNEXES

• **Law 10/9/1998 (Convention between the State of Luxembourg and the Roman Catholic Church)<sup>19</sup>**

Art. 3.
<i>1. Le régime de service des ministres du culte défini conformément aux dispositions de l'article 4, alinéa 2 de la Convention, relève du droit commun. Il ne sortira ses effets qu'après avoir été approuvé par voie de règlement grand-ducal à prendre sur avis du Conseil d'Etat. Le régime de service des ministres du culte n'affecte pas le statut du chef du culte pris en cette qualité. Toutes les contestations qui peuvent naître de ce régime de service sont de la compétence des tribunaux du travail.</i>
<i>2. L'article 7 de la loi du 10 avril 1976 portant réforme de la réglementation des jours fériés légaux est complété comme suit: (3) Les ministres des cultes liés à l'Etat par voie de convention au sens de l'article 22 de la Constitution et visés par ces conventions sont exclus du bénéfice du présent article. L'article A, article 1er de la loi du 1er août 1988 concernant le repos hebdomadaire des employés et ouvriers est complété comme suit: Les dispositions ne sont pas non plus applicables aux ministres des cultes liés à l'Etat par voie de convention au sens de l'article 22 de la Constitution et visés par ces conventions</i>
Art. 4.
<i>Les ministres du Culte sont assimilés aux fonctionnaires de l'Etat quant aux régimes des traitements et des pensions. Loi du 10 juillet 1998 (Mém. n°66 du 20 août 1998, p.1318)-</i>
Art. 5.
<i>L'article 8, section III, dernier alinéa de la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat est modifié comme suit: Les titulaires dont les fonctions sont reprises à l'annexe A de la présente loi sous la rubrique V. «Cultes» et qui sont classés aux grades C1 à C7 bénéficient d'un avancement en traitement de deux échelons supplémentaires après trois ans de bons et loyaux services depuis leur première nomination, sans préjudice du report de l'ancienneté acquise par le titulaire dans l'échelon auquel il était classé avant l'avancement en traitement.</i>

<sup>19</sup> Gouvernement du Luxembourg, Service Central de la Législation, Loi du 10 juillet 1998 portant approbation de la Convention du 31 octobre 1997 entre le Gouvernement, d'une part, et l'Archevêché, d'autre part, portant refixation des cadres du culte catholique et réglant certaines matières connexes, juillet 2015.

• **Jewish Community- Special provisions of the Convention**<sup>20</sup>

The Council of the community is the sole competent authority to decide on matters regarding the process of hiring or firing the rabbi and the administrative staff working for the community.

Article 6
1. <i>La fonction de grand rabbin est classée au grade C6, celle de secrétaire du consistoire et celle de ministre-officiant de la synagogue de Luxembourg au grade C3 ainsi que celle de ministre-officiant de la synagogue d'Esch-sur-Alzette au grade C1, rubrique V "Cultes" de l'Annexe A de la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat.</i>
2. <i>Les modifications et additions ci-après sont apportées à ladite loi modifiée du 22 juin 1963, annexe A - classification des fonctions, rubrique V - Cultes -: – au grade C7 est ajoutée la mention: "Culte israélite - grand rabbin"– au grade C4 sont ajoutées les mentions: – "Culte israélite - secrétaire du consistoire israélite"; – "Culte israélite - ministre-officiant de la synagogue de Luxembourg"– au grade C1 est ajoutée la mention: 3. Les modifications et additions ci-après sont apportées à ladite loi modifiée du 22 juin 1963, annexe D, rubrique V - Cultes -: – au grade C7 est ajoutée la mention de "grand rabbin"– au grade C4 sont ajoutées les mentions de "secrétaire du consistoire israélite" et de "ministre-officiant de la synagogue de Luxembourg"– au grade C1 est ajoutée la mention de "ministre-officiant de la synagogue d'Esch-sur-Alzette".</i>
Article 7
<i>L'article 22, section II, point 18° de la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat est modifié comme suit:</i>
<i>"L'auxiliaire pastoral, le ministre-officiant de la synagogue d'Esch-sur-Alzette et le vicaire bénéficiaire d'un avancement en traitement au grade C2, deux années après avoir atteint le dernier échelon du grade C1."</i>
Article 8
<i>Le rabbin élu à titre intérimaire touche une indemnité dont le montant sera fixé par le Gouvernement.</i>

<sup>20</sup> Gouvernement du Luxembourg, Service Central de la Législation, Loi du 10 juillet 1998 portant approbation de la Convention du 31 octobre 1997 entre le Gouvernement, d'une part, et les communautés israélites du Luxembourg, d'autre part, (Mém. A - 66 du 20 août 1998, p. 1324; doc. parl. 4375) modifiée par la loi du 21 décembre 1998. (Mém. A - 109 du 23 décembre 1998, p. 2723; doc. parl. 4450).

• **Reformed Protestant Church of Luxembourg- special provisions of the Convention**

The Council of the community is the sole competent authority to decide on matters regarding the process of hiring or firing the clergymen and the administrative staff working for the community.

Art. 4.
<i>1. Le Consistoire de l'Eglise Protestante Réformée du Luxembourg peut désigner des personnes pour remplir les emplois et fonctions ci-après: – un pasteur titulaire, – un secrétaire.</i>
<i>2. Sans préjudice des dispositions prévues par la Convention entre le Gouvernement et l'Eglise Protestante Réformée: 1° la nomination à la fonction de pasteur n'est subordonnée à aucune condition de nationalité; 2° le droit de révocation appartient au Consistoire de l'Eglise susvisée.</i>
Art. 5.
<i>Le pasteur titulaire et le secrétaire du Consistoire protestant visés à l'article premier sont rémunérés par l'Etat. Ils sont assimilés quant aux régimes des traitements et des pensions aux fonctionnaires de l'Etat. Le Conseil de Gouvernement peut, pour motifs graves, supprimer les traitements du pasteur et du secrétaire. Il statue sur le rapport du Membre du Gouvernement ayant les Cultes dans ses attributions qui aura entendu le Consistoire compétent en son avis et les intéressés en leurs explications.</i>
Art. 6.
<i>1. La fonction de pasteur titulaire est classée au grade C51, celle de secrétaire du Consistoire protestant au grade C31, rubrique V «Cultes» de l'Annexe A de la loi du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat, telle qu'elle a été modifiée.</i>
<i>2. Les modifications et additions ci-après sont apportées à ladite loi du 22 juin 1963 modifiée:</i>
<i>1° Annexe A – classification des fonctions, rubrique V «Cultes», au grade C3 est ajoutée la mention «culte protestant – secrétaire du Consistoire protestant réformé du Luxembourg».</i>
<i>2° Annexe D – Détermination – Tableau V «Cultes», est ajoutée au grade C3 la mention: «secrétaire du Consistoire protestant réformé du Luxembourg» avec computation de la bonification d'ancienneté au grade C3.</i>
Art. 7.
<i>Le pasteur élu à titre intérimaire touche une indemnité dont le montant sera annuellement fixé par le Gouvernement. L'intéressé est affilié au régime général de la sécurité sociale selon le caractère de son occupation.</i>

• **Protestant Churches of Luxembourg- Special provisions of the Convention**<sup>21</sup>

The Council of the community is the sole competent authority to decide on matters regarding the process of hiring or firing the clergymen and the administrative staff working for the community.

Art. 5.
<i>Les ministres du culte sont assimilés aux fonctionnaires de l'Etat quant aux régimes des traitements et des pensions.</i>
Article 6
<i>1. La fonction de pasteur titulaire est classée au grade C7, celle de secrétaire du Consistoire ainsi que celle de pasteur adjoint au grade C4, rubrique V "Cultes" de l'annexe A de la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat.</i>
<i>2. Les modifications et additions ci-après sont apportées à ladite loi modifiée du 22 juin 1963, annexe A - classification des fonctions, rubrique V - Cultes -: - au grade C7 est ajoutée la mention: "Culte protestant - pasteur du culte protestant"- au grade C4 sont ajoutées les mentions: - "Culte protestant - secrétaire du consistoire protestant du Luxembourg"; - "Culte protestant - pasteur adjoint du culte protestant". 3. Les modifications et additions ci-après sont apportées à ladite loi modifiée du 22 juin 1963, annexe D, rubrique V - Cultes -: au grade C7 est ajoutée la mention de "pasteur du culte protestant"- au grade C4 sont ajoutées les mentions de "secrétaire du consistoire protestant" et de "pasteur adjoint du culte protestant".</i>
Article 7
<i>Le pasteur élu à titre intérimaire touche une indemnité dont le montant sera fixé par le Gouvernement.</i>

<sup>21</sup> Gouvernement du Luxembourg, Service Central de la Législation, Loi du 10 juillet 1998 portant approbation de la Convention du 31 octobre 1997 entre le Gouvernement, d'une part, et l'Eglise Protestante du Luxembourg, d'autre part. (Mém. A - 66 du 20 août 1998, p. 1327; doc. parl. 4376).

- **Special provisions- Hellenic Orthodox Church of the Convention** <sup>22</sup>

The Metropolitan bishop of and Exarch of the Netherlands and Luxembourg, appointed by the Ecumenical Patriarch of Constantinople, is the sole competent authority to decide on matters regarding the process of hiring or firing the clergymen and the administrative staff working for the community.

Art. 5.
<i>L'Eglise aura un curé et un vicaire qui seront nommés et révoqués par l'archevêque métropolitain dans les conditions prévues par les règles de droit canoniques de l'Eglise.</i>
<i>Les actes de nomination et de révocation des ministres du culte orthodoxe hellénique seront notifiés au ministre des Cultes par l'archevêque métropolitain. L'archevêque métropolitain définit le régime de service des ministres du culte, lequel sera mis en application suivant les modalités à prévoir par la loi.</i>
Art. 6.
<i>Aucune condition de nationalité n'est exigée pour l'accès aux ministères du culte orthodoxe.</i>
Art. 7.
Les dispositions relatives aux traitements, indemnités et pensions qui seront à charge de l'Etat seront réglées par la loi.

<sup>22</sup> Gouvernement du Luxembourg, Service Central de la Législation Loi du 10 juillet 1998 portant approbation de la Convention du 31 octobre 1997 entre le Gouvernement, d'une part, et l'Eglise Orthodoxe Hellénique du Luxembourg, d'autre part. (Mém. A - 66 du 20 août 1998, p. 1333; doc. parl. 4377)..

• **Rumanian and Serbian Orthodox Churches- Special provisions of the Convention** <sup>23</sup>

The process of hiring or firing the clergymen and the administrative staff working for the community is regulated by the internal rules of the Rumanian Orthodox Church and the Serbian Orthodox Church, subject to the approval of the representative of the Ecumenical Patriarch of Constantinople.

Art. 2.

*Les ministres du culte des Eglises Orthodoxe Roumaine et Orthodoxe Serbe du Luxembourg sont nommés conformément aux règles de droit canonique des Eglises respectives. L'Etat est autorisé à prendre en charge les traitements et les pensions des ministres du culte des Eglises Orthodoxe Roumaine et Orthodoxe Serbe dans les limites prévues à l'article 2 de l'Avenant du 27 janvier 2003 portant extension de la Convention du 31 octobre 1997 entre le Gouvernement du Grand-Duché de Luxembourg, d'une part, et l'Eglise Orthodoxe Hellénique du Luxembourg, d'autre part.*

*Les nominations visées au présent article ne prennent effet en matière de traitement et de pension qu'à partir de leur notification au Ministre des Cultes par l'archevêque métropolitain de Belgique, exarque des Pays-Bas et du Luxembourg.*

<sup>23</sup> Gouvernement du Luxembourg, Service Central de la Législation, Loi du 11 juin 2004 autorisant l'Etat à prendre en charge les traitements et pensions des ministres du culte des Eglises Orthodoxes Roumaine et Serbe du Luxembourg et conférant la personnalité juridique de droit public auxdites Eglises. (Mém. A - 99 du 30 juin 2004, p. 1609; doc. parl. 5150).

- **Anglican Church- Special Provisions of the Convention**<sup>24</sup>

The process of hiring or firing the clergymen and the administrative staff working for the community is regulated by the internal rules of the Anglican Church, subject to the approval of the Bishop of Gibraltar, who is in charge for the European territories on behalf of the Archbishop of Canterbury.

Art. 3.
<i>Les ministres du culte sont assimilés aux fonctionnaires de l'Etat quant aux régimes des traitements et des pensions.</i>
Art. 5.
<i>L'Eglise aura un curé et un vicaire qui seront nommés et révoqués par l'évêque pour l'Europe dans les conditions prévues par les règles de droit canonique de l'Eglise. Les actes de nomination et de révocation des ministres du culte anglican seront notifiés au ministre des Cultes par l'évêque pour l'Europe. L'évêque pour l'Europe définit le régime de service des ministres du culte, lequel sera mis en application suivant les modalités à prévoir par la loi.</i>

<sup>24</sup> Gouvernement du Luxembourg, Service Central de la Législation, Loi du 11 juin 2004 autorisant l'Etat à prendre en charge les traitements et pensions des ministres du culte de l'Eglise Anglicane du Luxembourg et conférant la personnalité juridique de droit public à ladite Eglise. (Mém. A - 99 du 30 juin 2004, p. 1608; doc. parl. 5151).

• **The provisions of the Convention signed in January 2015**

Chapitre 1. – <i>Dispositions communes aux communautés religieuses</i>
Art. 2.
<i>Les communautés religieuses exercent leur culte librement et publiquement dans le cadre des droits et libertés constitutionnels et dans le respect de l'ordre public, des droits de l'Homme et de l'égalité de traitement. Elles s'engagent à écarter de l'organisation de la communauté tout membre qui agit ou appelle à agir en violation de ces principes.</i>
Art. 3
<i>Les communautés religieuses décident librement de leur organisation territoriale et personnelle, y compris pour ce qui est des aumôneries. Préalablement à la désignation d'un nouveau chef de culte par une communauté religieuse celle-ci soumet son choix à l'approbation du Gouvernement.</i>
Art. 4.
<i>Les communautés religieuses s'engagent à ne plus recruter leurs collaborateurs à charge du budget de l'État à partir de la date de l'approbation de la présente convention. À partir de cette date, tous les collaborateurs recrutés par une communauté religieuse seront engagés sous un régime de droit privé.</i>
Art. 5.
<i>Le Gouvernement prend les mesures nécessaires afin d'assurer que le personnel engagé par les communautés religieuses avant l'entrée en vigueur de la présente convention continuera à se voir appliquer les dispositions relatives aux traitements et pensions contenus dans les conventions existantes au moment de leur engagement.</i>
Art. 6.
<i>Les communautés religieuses s'engagent à inviter les ministres du culte engagés sur base des conventions visées à l'article 34 de faire valoir leurs droits à pension à l'âge de 65 ans au plus tard.</i>
Chapitre 2. – <i>Dispositions spécifiques concernant l'Église catholique du Luxembourg</i>
Art. 17.
<i>Le cours commun « éducation aux valeurs » aura comme objectif principal d'amener progressivement l'élève à confronter son vécu et sa quête de sens avec les grandes questions de l'humanité et avec des éléments de réponses issus de réflexions philosophiques et éthiques ainsi que des grandes traditions religieuses et culturelles. S'agissant d'un cours de l'enseignement public, le ministère veillera à ce que les procédures usuelles pour l'élaboration de programmes soient appliquées. Ainsi, les objectifs, compétences, contenus et méthodologies de cette nouvelle branche seront définis et formulés par une commission nationale de programmes et validés par le Ministre ayant l'éducation nationale dans ses attributions.</i>

*Dans le contexte du développement curriculaire, le Ministère de l'Education nationale, de l'Enfance et de la Jeunesse entend mettre en place de nouvelles procédures qui garantiront la participation étroite de la société civile. Il va de soi qu'un futur Conseil des Cultes comptera parmi les acteurs à être consultés régulièrement sur les questions philosophiques et religieuses.*

*Le cours commun sera intégré dans le plan d'études comme branche régulière. Il sera assuré, en application du cadre législatif actuel de l'Education nationale:*

- dans l'enseignement fondamental, par un enseignant ou, le cas échéant, par un chargé de cours de la réserve nationale des suppléants;*
- dans l'enseignement secondaire, par les enseignants des deux branches actuelles et, à moyen terme par des enseignants spécialisés.*

Art. 18.

*La convention du 31 octobre 1997 concernant l'organisation de l'enseignement religieux dans l'enseignement primaire mise en vigueur par la loi modifiée du 10 juillet 1998 est résiliée de commun accord avec la mise en vigueur des lois organisant le cours commun « éducation aux valeurs », sous condition:*

*- du respect du principe général de droit « pacta sunt servanda »;*

*- d'une offre de reprise des enseignants de religion et des chargés de cours de religion actuels qui: garantit leur rémunération et leur carrière actuelle; crée des perspectives professionnelles grâce aux procédures de validation des acquis de l'expérience et grâce à une offre de formation continue; encourage les instances responsables d'ouvrir l'accès à une formation aboutissant au concours de recrutement des instituteurs de l'enseignement fondamental, respectivement des professeurs de l'enseignement secondaire; aboutit à un emploi dans le domaine de l'Education nationale; tient compte dans ces démarches du cadre législatif et des conditions générales en vigueur du statut respectivement du fonctionnaire ou de l'employé de l'État. L'offre de reprise du personnel par l'État ainsi que les conditions formulées ci-avant seront garanties pendant une durée de trois ans à compter de la date d'introduction du nouveau cours.*

*Aux enseignants désireux de continuer leur engagement au sein de l'Eglise catholique il sera offert la possibilité de maintenir leur statut conventionnel et contractuel au service du culte catholique en dehors du cadre scolaire, et ceci jusqu'à un maximum de 40 unités ETP. Ce cadre est non renouvelable et viendra à terme avec le départ à la retraite des enseignants en application du cadre législatif actuel de la Fonction publique.*

- **PROJET DE LOI**
- **Réglant les relations entre l'Etat et les communautés musulmanes du Grand-Duché de Luxembourg et portant modification de certaines dispositions du Code du Travail**

Art. 6. L'article L.231-1 du Code du Travail dernier alinéa est remplacé par le texte suivant: „Les dispositions du présent chapitre ne sont pas non plus applicables aux salariés engagés par les communautés religieuses liées à l'Etat par voie de convention au sens de l'article 22 de la Constitution“.

Art. 7. L'article L.232-7 paragraphe (4) est remplacé par le texte suivant: „Les salariés engagés par les communautés religieuses liées à l'Etat par voie de convention au sens de l'article 22 de la Constitution sont exclus du bénéfice du présent article“.

• **Autonomy of churches and human rights of the workers**

<b>Code du Travail</b> <sup>25</sup>
<i>Section 4. – Renouvellement du contrat conclu pour une durée déterminée</i>
<i>Art. L. 122-5.</i>
<i>(1) Le contrat conclu pour une durée déterminée peut être renouvelé deux fois pour une durée déterminée.</i>
<i>(3) Par dérogation aux dispositions du présent article, peuvent être renouvelés plus de deux fois, même pour une durée totale dépassant vingt-quatre mois, sans être considérés comme contrats de travail à durée indéterminée, les contrats de travail à durée déterminée conclus:</i>
<i>6. entre l'Archevêché, d'une part, et un chargé de cours de religion, d'autre part, en vue d'assurer les remplacements temporaires prévus aux articles 7 et 8.B de la Convention approuvée à l'article 1er de la loi du 10 juillet 1998 portant approbation de la Convention du 31 octobre 1997 entre le Gouvernement, d'une part, et l'Archevêché, d'autre part, concernant l'organisation de l'enseignement religieux dans l'enseignement primaire;</i>

<b>Code Pénal</b> <sup>26</sup>
<i>Titre V – Egalité de traitement en matière d'emploi et de travail</i>
<i>Chapitre Premier.- Principe de non-discrimination</i>
<i>Art. L. 251-1.</i>
<i>(1) Toute discrimination directe ou indirecte fondée sur la religion ou les convictions, le handicap, l'âge, l'orientation sexuelle, l'appartenance ou non appartenance, vraie ou supposée, à une race ou ethnique est interdite.</i>
<i>Chapitre II.- Exceptions au principe de non-discrimination</i>
<i>Art. L. 252-1.</i>
<i>(2) Si dans les cas d'activités professionnelles d'églises et d'autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions, une différence de traitement fondée sur la religion ou les convictions d'une personne est prévue par des lois ou des pratiques existant au 2 décembre 2000, celle-ci ne constitue pas une discrimination lorsque, par la nature de ces activités ou par le contexte dans lequel elles sont exercées, la religion ou les convictions constituent une exigence professionnelle essentielle, légitime et justifiée eu égard à l'éthique de l'organisation.</i>

<sup>25</sup> Gouvernement du Luxembourg, Service Central de la Législation, Code du Travail, [http://www.legilux.public.lu/leg/textescoordonnes/codes/code\\_travail/Code\\_du\\_Travail.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/code_travail/Code_du_Travail.pdf), juillet 2015.

<sup>26</sup> Gouvernement du Luxembourg, Service Central de la Législation, Code Pénal, [http://www.legilux.public.lu/leg/textescoordonnes/codes/code\\_penal/CodePenal\\_PageAccueil.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/code_penal/CodePenal_PageAccueil.pdf), juillet 2015.

• **Jurisprudence Administrative court**

Code administratif - Fonction publique
(Loi du 29 novembre 2006)
Art. 1bis.
1. Dans l'application des dispositions de la présente loi, toute discrimination directe ou indirecte fondée sur la religion ou les convictions, le handicap, l'âge, l'orientation sexuelle, l'appartenance ou non appartenance, vraie ou supposée, à une race ou ethnie est interdite.
(Loi du 29 novembre 2006)
Art. 1bis.
Si dans les cas d'activités professionnelles d'églises et d'autres organisations publiques dont l'éthique est fondée sur la religion ou les convictions, une différence de traitement fondée sur la religion ou les convictions d'une personne est prévue par des lois ou des pratiques existant au 2 décembre 2000, celle-ci ne constitue pas une discrimination lorsque, par la nature de ces activités ou par le contexte dans lequel elles sont exercées, la religion ou les convictions constituent une exigence professionnelle essentielle, légitime et justifiée eu égard à l'éthique de l'organisation.
5. Employé de l'archevêché - employé privé - incompétence des juridictions administratives. Etant donné qu'une compétence des juridictions de l'ordre administratif pour statuer sur les litiges relatifs au classement des enseignants et chargés de cours de religion n'est arrêtée par aucune disposition légale ou conventionnelle, mais que compétence est au contraire attribuée expressément aux tribunaux de travail, le tribunal administratif est incompétent <i>ratione materiae</i> pour connaître du recours. TA 22-3-04 (17277)

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# MALTA

VINCENT A. DE GAETANO

## INTRODUCTION AND BACKGROUND

1. Malta<sup>1</sup> became an independent sovereign state on 21 September 1964. Prior to that date it had been a British Crown Colony for close to 164 years. During this long period of British domination the Maltese had been allowed to retain to an appreciable extent their own legal system and judicial system, although it goes without saying that English law<sup>2</sup> did influence the development of both systems. British imperial interests, mainly commercial and military, have helped to mould certain aspects of Maltese law. Thus, for instance, public law in Malta follows closely (some would have argued until a couple of decades ago that it followed slavishly) English public law. English law has also influenced the development of commercial (especially company) law, maritime law and fiscal law. It should however be emphasized that Malta was never a “common law jurisdiction”, and English common law<sup>3</sup> was never part of the law of Malta, even though many common law principles are found enshrined in statutory provisions (e.g. the law of evidence in criminal matters, provisions dealing with jury trials, military law and the general law on the interpretation of laws).

<sup>1</sup> The Maltese archipelago consists of the two main islands of Malta and Gozo, the very small and largely uninhabited (except in summer) island of Comino, and two uninhabited and uninhabitable islets Cominotto and Filfla.

<sup>2</sup> In spite of the influence of Roman law on Scots law, the latter has had very little, if any, direct influence on Maltese law. Nevertheless Scottish case-law and text writers remain useful for purposes of interpretation even in such unlikely areas as the general principles of criminal law and criminal liability.

<sup>3</sup> Judgments do occasionally refer to English common law for purposes of interpretation or comparison. These references must, of course, not be confused with references to the *ius commune* – a combination of Canon and Roman law – which obtained on the continent from the middle of the 12<sup>th</sup> century up till the period when rigorous codification reduced it in essence to mere jurisprudential principles. For a reference to the *ius commune*, see *Rapa Brothers Co. Ltd v. Cranes and Commercial Sales Ltd* Court of Appeal (Inferior Jurisdiction), 16 September 2004.

## RELIGIOUS FREEDOM AT WORK

2. As the overwhelming majority of the people of Malta profess to be Roman Catholics<sup>4</sup>, religious freedom at work has, at least so far, never been perceived as a problem or as requiring special legislation. In fact, current legislation addresses only discrimination in employment based on the grounds of, among others “religion or religious belief”<sup>5</sup>. Although the Constitution provides in Article 2(1) that “The religion of Malta is the Roman Catholic Apostolic Religion”, as well as that “Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education”<sup>6</sup>, “full freedom of conscience” and the enjoyment of the “free exercise of their respective mode of religious worship” is guaranteed to all persons in Malta by virtue of Article 40 of the Constitution. The only restrictions to this freedom which are permissible are those which are made “under the authority of [a] law” and then only to the extent that (i) such law “makes provision that is reasonably required in the interests of public safety, public order, public morality or decency, public health or the protection of the rights and freedoms of others” and, furthermore, (ii) provided that that provision of law or, as the case may be, the thing done under the authority thereof, is shown to be reasonably justifiable in a democratic society<sup>7</sup>. Moreover Article 9 of the ECHR has been incorporated, through the

<sup>4</sup> In 2004 the proportion of Catholics to the population of the Maltese Islands stood at 95.18% for Malta and 98.06% for Gozo. On the other hand, according to a census carried out in 2005 at the request of the Maltese Episcopal Conference, the percentage of Catholics attending Sunday Mass stood at 51.0% for Malta, 72.7% for Gozo and 52.6% for Malta and Gozo together. This indicates a sharp drop of almost 11% between 1995, when the previous census was carried out, and 2005. See *Discern: Institute for Research on the Signs of the Times, Sunday Mass Attendance Census 2005: Preliminary Report*, Malta August 2006: [http://www.discernmalta.org/pdf\\_files/census\\_2005.pdf](http://www.discernmalta.org/pdf_files/census_2005.pdf). Information taken from “The Catholic Church in Malta and Membership of the European Union – Fears, Challenges, Hopes” by Joseph P. Ellul, published in [http://www.um.edu.mt/europeanstudies/books/CD\\_CSP5/pdf/jpellul.pdf](http://www.um.edu.mt/europeanstudies/books/CD_CSP5/pdf/jpellul.pdf)

<sup>5</sup> See Regulation 1(3) of the Equal Treatment in Employment Regulations S.L.452.95, which reads as follows: “The purpose of these regulations is to put into effect the principle of equal treatment in relation to employment by laying down minimum requirements to combat discriminatory treatment on the grounds of religion or religious belief, disability, age, sex, sexual orientation and racial or ethnic origin.”

<sup>6</sup> Article 2(3) of the Constitution. Article 2(2) provides as follows: “The Authorities of the Roman Catholic Apostolic Faith have the duty and the right to teach which principles are right and which are wrong.”

<sup>7</sup> Article 40(3) of the Constitution. As regards religious instruction, sub-article (2) of this provision makes it clear that “No person shall be required to receive instruction in religion or to show knowledge or proficiency in religion if, in the case of a person who has not attained the age of sixteen years, objection to such requirement is made by the person who according to law has authority over him and, in any other case, if the person so required objects thereto: Provided that no such requirement shall be held to be inconsistent with or in contravention of this article to the extent that the knowledge of, or the proficiency or instruction in, religion is required for the teaching of such religion, or for admission to the priesthood or to a religious order, or for other religious purposes, and except so far as that requirement

European Convention Act, Cap. 319<sup>8</sup>, into domestic law; together, Article 40 of the Constitution and Article 9 of the ECHR provide a comprehensive protection to religious freedom through the mechanisms provided in Article 46 of the Constitution and Article 4 of the European Convention Act. Through the same mechanisms these two laws provide for protection against discrimination based, *inter alia*, on the grounds of religion or religious belief<sup>9</sup>.

3. Since the amendments introduced to Article 65(1) of the Constitution in 2003 (i.e. prior to Malta's accession to the EU<sup>10</sup>), all laws (which by definition includes subsidiary legislation) passed by Parliament must be "in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16<sup>th</sup> April, 2003". The combined effect of this amendment to Article 65(1) and of the provisions of Articles 6<sup>11</sup> and 116<sup>12</sup> of the Constitution is that any law passed by Parliament which does not "fully respect" human rights (including the right to freedom of conscience and of religion) may be challenged at the request of any person, and, unlike when seeking redress for a violation of the human rights provisions under the Constitution or the

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is shown not to be reasonably justifiable in a democratic society." Article 47(5) of the Education Act, Cap. 327, provides that "The parents of any minor will have the right to opt that the minor should not receive instruction in the catholic religion."

<sup>8</sup> The European Convention Act in effect incorporates the substantive provisions of the ECHR and of the First, Fourth, Sixth and Seventh Protocols thereto. On 8 December 2015 Malta signed and ratified Protocol No. 12 which will come into effect as regards Malta on 1 April 2016.

<sup>9</sup> See Article 45 of the Constitution (excerpts attached). It should be pointed out that whereas Article 45 of the Constitution grants protection against any provision of law "that is discriminatory either of itself or in its effects", as well as protection against discriminatory treatment at the hands of "any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority", Article 14 of the ECHR prohibits discrimination in "the enjoyment of the rights and freedoms set forth in the Convention". The general prohibition against discrimination is only found in Article 1 of Protocol No. 12 (see f.n. 8, above).

<sup>10</sup> The amending legislation – Act V of 2003 – came into force on 16 July 2003, but the amendment to Article 65(1) of the Constitution came into effect on 1 May 2004, the date on which Malta officially joined the EU.

<sup>11</sup> Article 6, in so far as relevant, reads as follows: "...if any other law is inconsistent with this Constitution, this constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

<sup>12</sup> Article 116: "A right of action for a declaration that any law is invalid on any ground other than inconsistency with the [fundamental human rights] provisions of articles 33 to 45 of this Constitution shall appertain to all persons without distinction and a person bringing such an action shall not be required to show any personal interest in support of his action."

European Convention Act<sup>13</sup>, that person “shall not be required to show any personal interest in support of his action”<sup>14</sup>.

4. With regard to employment in particular, the two main legal instruments are the Employment and Industrial Relations Act, Cap. 452, and the Equal Treatment in Employment Regulations<sup>15</sup> made pursuant to the aforementioned Cap. 452. This Act defines “discriminatory treatment” as “any distinction, exclusion or restriction *which is not justifiable in a democratic society including* discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, *religious conviction*, political opinion or membership in a trade union or in an employers’ association”<sup>16</sup> (emphasis added). Article 26 in particular prohibits discriminatory treatment in the advertising of vacancies or offering of employment, as well as in the selection of candidates for employment; it also prohibits the subjection of employees already in employment to discriminatory treatment “in regard to conditions of employment or dismissal”. However, sub-article (3) of this article exempts from the prohibition “any preference or exclusion which is reasonably justified taking into account the nature of the vacancy to be filled or the employment offered, or where a required characteristic constitutes a genuine and determining occupational requirement or where the requirements are established by any applicable laws or regulations”. The said Act does not deal, other than through the perspective of discrimination, with religious freedom at work.

5. The Equal Treatment in Employment Regulations is primarily intended to give effect to a number of Council Directives mentioned in Regulation 1(2)<sup>17</sup>. Regulation 3 seeks to prevent discriminatory treatment at work on the ground, among others, of “religion or religious belief”. Regulation 4(1) reiterates the “objective justification” principle in the application of different treatment by providing that a difference of treatment based, among others, on a characteristic related to grounds of religion or religious belief “shall not constitute discriminatory treatment where by reason of the nature of the particular occupational activities concerned, or of the context in which they are carried out, such characteristic constitutes a genuine and determining occupational requirement”, provided that “the objective is legitimate and the requirement is proportionate”. More significantly, sub-regulation (2) of Regulation 1 provides that “[w]hen an employer has an ethos based on religion or religious belief, and having regard to that ethos, the nature of the employment or the context in which it is carried out constitute a sufficiently genuine and legitimate justification for the employer to

<sup>13</sup> Article 46(1) and 4(1) respectively.

<sup>14</sup> In effect an action popularis.

<sup>15</sup> See f.n. 5, above.

<sup>16</sup> Article 2.

<sup>17</sup> Council Directives 76/207/EEC, 2000/78/EC, 2000/43/EC, 2002/73/EC and 2006/54/EC.

require that such work is carried out by a person with a particular religion or religious belief, any difference of treatment based on a person's religion or religious belief shall not constitute discriminatory treatment, provided that it is proportionate to apply that requirement in that particular case". Finally, sub-regulation (3) provides that employers whose ethos is based on religion or religious belief, have the right to require individuals working for them to act in good faith and with loyalty to the organization's ethos, provided that all the other provisions of the regulations are complied with. Regulation 4A specifically introduces the concept of "reasonable accommodation", but this is limited to "persons with disabilities". Finally, Regulation 6 deals with positive or affirmative action to prevent or compensate "for disadvantages linked to grounds of religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin".

6. Religion is not generally defined in Maltese law. Some laws may have a special definition connected with religious practices for the special purposes of that particular law<sup>18</sup>. In practice no problem arises with the manifestation of one's religious beliefs at the place of work, provided that such manifestation does not interfere with one's work or the operation of a business. As a result it is not uncommon at the work place – including in government offices and places to which the public have access – to see holy pictures affixed to walls, or small religious statues on desks or on display in certain corners. The crucifix is still displaced in all government offices, at the law courts and in public as well as in many private schools<sup>19</sup> and hospitals. Non-religious belief is similarly protected, both in so far as it may be considered as part of the *forum internum* ("full freedom of conscience" – Article 40(1) of the Constitution; or "freedom of thought, conscience..." – Article 9, ECHR), as well as in its external manifestation ("freedom to manifest his...belief..." – Article 9, ECHR; Article 10 of the ECHR and Article 41 [Protection of freedom of expression] of the Constitution).

<sup>18</sup> See, for example, the definition of "ecclesiastical community" in Article 30(9) of the Income Tax Act, Cap. 123; or the definition of "religious group" in Article 222A(6) of the Criminal Code, Cap. 9, which deals with the aggravation of several forms of wilful bodily harm, with the consequent increase in the punishments. In the Criminal Code religion (or religious belief) is referred to in the following provisions: Articles 54D(b)(ix) and (e)(iv) (war crimes), 82A(1)(2) (incitement to racial and other hatred), 82B (condoning, denying or trivialising genocide etc.), 82C(1) (condoning, denying or trivialising crimes against peace), 83B (general provision on xenophobia or homophobia), 163 to 165 (crimes against the religious sentiment), and 222A(2), 251D and 325(1) (increase of punishment for certain offences). A Bill currently before the House of Representatives – Bill no. 113 of 10/07/2015 is proposing the abolition of the offences (crimes) of vilification of the Roman Catholic Apostolic Religion (Art. 163) and vilification of other cults tolerated by law (Art. 164).

<sup>19</sup> The majority of private schools in Malta are run by the Catholic Church or by religious orders of the said Church.

## RELIGIOUS MINISTERS AND LABOUR LAW

7. The secular law does not define, for purposes of labour law, a “religious minister” or a “minister of religion”. Diocesan Catholic priests as well as Catholic religious who are *assigned to work* in pastoral or pastoral-related fields (including as teachers in church run schools) *either by the Ordinary or by their religious superiors*, are not regarded as being in employment, or as being bound by, or as being under, a contract of service for the purpose of the Employment and Industrial Relations Act. However, such priests or religious who, after obtaining the necessary permission according to Canon Law, take up employment elsewhere – in state or other private schools, in hospitals or elsewhere – are treated like any other employee, even if the work may involve the teaching of religion or other religious duties (such as chaplains). The only pastorally related activity which is specifically covered by a Wages Council Order (made pursuant to the aforementioned act) is that of sexton<sup>20</sup>. In so far as a minister of religion is under a contract of service as described above, the law does not make any distinction as to denominations. There is no specific domestic case-law regarding the work of ministers of religion.

## AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

8. The internal autonomy of churches and other religious denominations, religious associations or ecclesial entities has never been put in doubt<sup>21</sup>. Nor is their freedom to manifest collectively their beliefs in any way subject to restrictions. Although Article 338(j) of the Criminal Code provides that “[e]very person is guilty of a contravention<sup>22</sup> against public order, who...without being duly licensed, opens or keeps any place for public divine worship”, no authority in Malta is entrusted with the licensing of places which are opened or kept for public divine worship and therefore no licenses are in fact required. There are at present pending before the Court of Magistrates a number of prosecutions of persons who have turned garages into small mosques, but

<sup>20</sup> See the Sextons and Custodians Wages Council Order S.L. 452.70, and the Sextons and Custodians Wages Council Wage Regulation Order S.L. 452.72.

<sup>21</sup> In 2007 the Second Schedule was added to the Civil Code, Cap. 16.. Under this Schedule private organisations (including foundations and associations) require to be registered to acquire legal personality. However Rule 6 of this Schedule exempts from such registration “organisations which were recognised as being legal persons prior to [the 1<sup>st</sup> of April 2008] in terms of customary law...”. It would therefore appear that the Catholic Church, and its parishes and religious institutes, continue to enjoy legal personality. The same would apply to the Anglican Church and other denominations, existing prior to 1 April 2008, and which fall under the definition of “private organisations” (see Rule 1(8) of the said Schedule).

<sup>22</sup> A “contravention”, as opposed to a “crime”, is a minor penal offence, punishable with not more than two months’ detention (as opposed to imprisonment) or with a fine *ammenda* (as opposed to a fine *multa*).

the offence charged is not under Article 338(j) but under the relevant provisions of planning law whereby the change of use of a building is regarded as a “development” requiring planning permission. Churches and other places of worship require planning permission like any other building.

9. As to whether churches are exempted from the general norms concerning anti-discrimination, and the effect of EU law in this area, see paragraphs 4 and 5, above. No particular domestic case-law has developed in this area.



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# LAW AND RELIGION IN THE WORK PLACE: THE NETHERLANDS

SOPHIE VAN BIJSTERVELD

## 1. INTRODUCTION

Legal arrangements to accommodate religion in the workplace are a reflection of a subtle balance between values of equality and liberty. This is the case from the perspective of employees where equality refers to equal treatment of employees regardless their religion or belief, and liberty refers to freedom of religion of employees in the workplace. From the perspective of the employer organization, equality refers to equal treatment between various types of organizations regardless religious orientation and liberty refers to the freedom of faith-based organizations to give shape their religious orientation as employer. On the side of the employer organization, the outcome of the balancing act differs according to whether the employer is a part of the state organization, a non-religious private employer, a faith-based employer or a church. On the side of the employee, the outcome of the balancing act differs according to whether the employee has a civil servant status, an ‘ordinary’ status of a civil employee, or is subject to ecclesiastical law (or even a combination of the latter with one of the two former possibilities). Thus a whole range of employment relationships comes to the fore.

This article highlights the various ways in which Dutch law accommodates religion in the workplace in various types of employment relationships. It starts with an analysis of the constitutional foundations of the relationship between religion and law, in so far as it conditions the accommodation of religion within the various types of employment relationships (2). Subsequently, it discusses the way religion is legally accommodated within employment relationships in both the ‘ordinary’ private and the public sector (3). It then focuses on the legal position of religious ministers in an employment relationship with the church, as well as the legal position of religious ministers in the public sector and the ‘ordinary’ private sector (4). The following section (5) looks at the employment relationship within churches, other than that of church ministers. The article ends with a brief conclusion (6).

## 2. CONSTITUTIONAL FOUNDATIONS OF THE ACCOMMODATION OF RELIGION IN THE WORKPLACE

The Constitution provides basic traits of the system of church and state relationships and in doing so it has also relevance for the accommodation of religion in the workplace. It is within the general parameters of the constitutional system that legal arrangements to accommodate religion in the workplace are specified. Article 6 of the Constitution guarantees freedom of religion and non-religious belief. Freedom of religion not only comprises having an opinion, but includes manifesting one's religion. Article 1 of the Constitution guarantees equal treatment in equal circumstances and prohibits discrimination on the grounds of, amongst others, religion and non-religious belief. These Articles underpin separation of church and state and state neutrality towards religion. Article 23, which guarantees freedom of education, defines an 'open', inclusive neutrality of public authority schools vis-à-vis religion. It acknowledges the freedom to establish a school, to determine its denominational orientation and to administer a school. Article 23 also guarantees public financing of private (confessional) elementary schools on an equal footing as public authority schools. Through ordinary law the latter arrangement also extends to other types of schools, up to universities.

In Dutch constitutional law, it is acknowledged that the protection of fundamental rights also stretches to groups and organizations and is, therefore, not restricted to individuals. Faith-based organizations and churches, therefore, are also protected by fundamental rights. This is also the case with respect to freedom of religion. During the process of the general revision that led to the Constitution of 1983 it was also expressly acknowledged that freedom of religion, as defined in Article 6 of the Constitution, not only guarantees the liberty to hold an opinion but also the liberty to manifest one's religion in practice. Thus, institutional liberty of faith-based organizations and freedom of church organization are protected by Article 6.

Constitutionally guaranteed fundamental rights protect groups and individuals against state intrusions. However, it is generally acknowledged that fundamental rights have a horizontal dimension, that is, that they impact 'horizontal' relations, that is, relationships between civil parties amongst each other. The way in which this horizontal dimension is effectuated differs. At one side of the spectrum, legislation may be enacted to regulate relationships between civil parties, expressly with a view to fundamental rights. In the sphere of accommodation of religion in the workplace, the General Equal Treatment Act, which will be discussed in more detail below, is an example. At the other side of the spectrum, courts may take fundamental rights' aspects into account in adjudicating cases in the absence of specific legislation pertaining to the situation.

Civil servants are entitled to constitutional fundamental rights protection. The difference with other citizens is that their fundamental rights can be further restricted

if necessary. These restrictions must be in line with the ordinary requirements for restricting fundamental rights. In practice, this means that they must be specified by or – if delegation is allowed by the Constitution – pursuant to Act of Parliament.

### 3. RELIGIOUS FREEDOM IN THE WORKPLACE

The accommodation of religion in the workplace is to a large extent regulated by the General Equal Treatment Act. This Act applies to the public as well as the private sector<sup>1</sup> and forbids discrimination on the basis of amongst other things religion and belief. It applies to hiring and firing personnel and the provision of services in a wide array of social areas. Complaints against alleged violations of the Act can be filed with a quasi-judicial body which issues non-binding ‘opinions’<sup>2</sup>. This does not detract of the role of ordinary courts in applying the law.

The focus of the General Equal Treatment Act, which aims to concretize Article 1 of the constitution in both public and private labor relationships, obviously is equal treatment. The Act creates a ‘closed’ system. Exemptions and exceptions to the main principle of equal treatment require specific definition.

Both state employers and non-religious private employers are prohibited to discriminate (prospective) employees on the basis of religion or belief. This includes ‘direct’ discrimination, that is, making a distinction on the basis of religion or belief as such, such as firing an employee for wearing an Islamic headscarf; it also includes making an ‘indirect’ distinction, making a distinction which results in a discrimination on the basis of religion or belief. An example is not hiring an Islamic female candidate on the ground of her unwillingness to comply with a dress code which precludes wearing an Islamic headscarf; contrary to direct discrimination, indirect discrimination allows for justification provided that certain criteria are met. An extensive body of case law has been developed under the Act. Under the case law of the Act, an employer has also the responsibility to create a work climate free from discrimination by co-employers.

For both the public and the non-religious private sector, the General Equal Treatment Act contains a number of exceptions. For the public sector, the prohibition for discrimination is not applicable to requirements that can reasonably be set, for instance, in relation to the memberships of public boards or public advisory bodies. As a number of political parties in the Netherlands have a confessional basis, religion can indirectly play a role in such cases too. For the non-religious private sector, this prohibition does not apply, for instance, when the labor relation has a private character.

<sup>1</sup> Churches, relations within churches and the spiritual office are exempted from the Act, see below.

<sup>2</sup> This is the Netherlands Human Rights Institute (formerly, the Equal Treatment Committee).

For employers in the private sector whose organization is based on a religion and belief the General Equal Treatment Act introduces a different regime. They have the right to distinguish on grounds that are otherwise forbidden in order to uphold the religious ethos of their institution. This part of the law was the most controversial at the time of its first enactment in 1994. An elaborate formulation was chosen to make unequivocally clear that the right to institutional liberty was guaranteed, but that it was not allowed to make such distinctions if they resulted in ‘the mere fact’ of distinction on the basis of sexual orientation or civil state (think of (re-)marriage, divorce, or co-habitation). For educational establishments, the relevant clause was formulated slightly different in order to express a slightly broader room for maneuver than for non-educational faith-based organizations. The extent of liberty granted to faith-based organizations has always remained a sensitive area, perhaps not so much in practice, but all the more politically speaking. Recently, these well-understood clauses were changed after a muddy legislative process. The result is that the system of the Act remains the same, but the clauses defining the extent of institutional liberty in personnel matters were replaced by a formulation that is modeled on the formulation of the applicable European Equal Treatment Directive. The aim of the change was to restrict the liberty of faith-based institutions in hiring and firing personnel where sexuality or civil status was concerned. It remains to be seen whether or not this was achieved by the legislative change.

Another recent change in the General Equal Treatment Act is the addition of the article that expressly forbids municipal authorities to employ civil registrars who for religious reasons refuse to perform marriages between homosexual couples and to state expressly that in case of dismissal of such civil registrar the municipality does not violate the General Equal Treatment Act.

Courts can take religion positively into account in personnel matters outside of the range of the General Equal Treatment Act by interpreting open norms in civil law. In a case predating the enactment of the General Equal Treatment Act, the Supreme Court used this method in ruling whether the immediate dismissal of a Muslim employee was lawful: the employee had taken a day off on a religious holiday after her employer had denied her this. The Supreme Court argued that in a situation in which the employee applied for this day off, well in advance and providing reasons, in general no ‘urgent reason’ for such dismissal could be established, unless specific circumstances in the sphere of the conduct of business could justify this<sup>3</sup>.

A related area in which the accommodation of religion at the workplace can be an issue is that of the establishment of working hours. With the decentralization of Sunday closing law for shops from the national legislature to municipal councils and

<sup>3</sup> See HR 30 March 1984, NJ 1985, 350 (instant dismissal).

pressure of some (usually larger chains and supermarkets) to allow shop opening on Sunday, the position of both small shop owners as well as that of employees with regard to Sunday as the weekly day of rest is under pressure, if not legally than in practice.

Dutch law contains no general right to conscientious objection. This falls within ordinary labor law for the private and the public sector respectively.

Jurisprudence of the European Court on Human Rights has not had any direct impact on the national approach towards the accommodation of religion in the workplace. Rulings on religiously motivated conscientious objection in the workplace have made clear that recently enacted legislative changes that restrict the liberty of religion in the work place such as in the situation of civil registrars falls within the national margin of appreciation<sup>4</sup>.

#### 4. RELIGIOUS MINISTERS AND LABOR LAW<sup>5</sup>

Freedom of church organization is included in freedom of religion as guaranteed in Article 6 of the Constitution. Various specific laws concretize this freedom of church organization<sup>6</sup>. The Civil Code, for instance, designates churches as legal categories *sui generis* and determines that they enjoy legal personality<sup>7</sup>. Article 2:2 of the Civil Code simply states: “Churches, their independent units, and bodies in which they are united have legal personality. They are governed by their own statute in so far as this does not conflict with the law (...)” This implies that churches are, within limits, also free to define the employment relationship with clergy and laity working for the church. Churches are free as well to use general forms of labor relationships, if so desired.

The Civil Code contains a closed system of legal persons, that is, it defines the types of legal persons exhaustively. For legal persons other than churches, the Civ-

<sup>4</sup> See ECHR, 15 January 2013, *Eweida and others v. The United Kingdom* (Appl.nos. 48420/10, 59842/10, and 36516/10).

<sup>5</sup> See for an extensive study, P.T. Pel, *Geestelijken in het recht. De rechtspositie van geestelijke functionarissen in het licht van het eigen recht van de kerken en religieuze gemeenschappen in de Nederlandse rechtsorde*, Den Haag: Bju 2013; see also, P.T. Pel, ‘De rechtspositie van de voorganger’, in: L.C. van Drimmelen, T.J. van der Ploeg (red.), *Geloofsgemeenschappen en recht*, Den Haag: Bju 2014, p. 401 - 419.

<sup>6</sup> S.C. VAN BIJSTERVELD, ‘Church Autonomy in the Netherlands. The Distinctiveness of the Church. The Interplay between Legal, Popular, and Ecclesiastical Perspectives. Church Autonomy as a “Test Case,” in Hildegard Warnink (ed.), *Legal Position of Churches and Church Autonomy*, Leuven: Peeters 2001, p. 147-163; see also A.H. Santing-Wubs, *Kerken in geding: burgerlijke rechter en kerkelijke geschillen*, Den Haag: BJu, 2002.

<sup>7</sup> See also, Fabian KEIJZER, Fokko OLDENHUIS, ‘Positie van Kerkgenootschappen en vrijheid van belijden’, in: L.C. van Drimmelen, T.J. van der Ploeg, *o.c.*, p. 421 - 438.

il Code specifies the legal framework for each of these legal persons specifically. Preceding these rules, it outlines general rules that are applicable to all types of legal entities. Article 2:2, paragraph 2, exempts churches from these general provisions. However, it states that analogous application of these provisions is allowed, in so far as this does not dispute with the churches' statutes or with the nature of their internal relations (Article 2:2, paragraph 2, Civil Code). In 1985, the Supreme Court (Civil Division) held that analogous application should be the starting point for rulings in this field<sup>8</sup>. Thus, decisions of ecclesiastical authorities can be challenged e.g. on the ground that they have not been taken in good faith<sup>9</sup>.

On the basis of this provision, for example, church decisions, including those on firing clergy, can be declared void if they are not taken 'in good faith' or show major procedural defects<sup>10</sup>. Thus, a ruling of a Roman Catholic ecclesiastical court in a marriage annulment case was overturned. The damaging psychiatric report on one of the spouses was issued without having heard the person concerned. This psychiatric report, in turn, played a crucial role in the ecclesiastical court's decision.

Organizational liberty of the church is further concretized by the General Equal Treatment Act. The Act explicitly exempts churches, legal relationships within churches, and 'the spiritual office' from the application of the law. This means that churches are not bound to the Act's rules on equal treatment. It does not mean, however, that churches can act at will. Courts still have a supervisory role. Article 17 of the Constitution states that no one can be denied access to the secular court that the law provides. From this it follows that the courts have a role to play where civil law aspects are involved. When an ecclesiastical proceeding is pending or still an option, courts tend to declare a complaint inadmissible<sup>11</sup>.

Institutional freedom of the church is also taken into account outside of the Civil Code. Thus no prior dismissal permit from public authorities, for instance, is necessary for firing clergy.

Dutch law contains no definition of legal terms such as 'church', independent units of churches, 'structures in which they [churches] are united', 'the spiritual office', or 'legal relationships within churches'. In first instance, it is the each of the churches themselves that define these notions, a definition subject to marginal supervision by the courts.

Following article 2:2 Civil Code, churches themselves determine on the basis of their own ecclesiastical law how to define the legal relationship with their

<sup>8</sup> HR 15 maart 1985, NJ 1986, 191.

<sup>9</sup> See, Pr. Rb. ZWOLLE, 7 august 1998, KG 1998, 240 (dismissal ecclesiastical office holder).

<sup>10</sup> See, Hof DEN BOSCH, 2 December 1998, rolno. C971117/Ro (marriage annulment).

<sup>11</sup> See, for instance HR 19 December 2003, NJ 2004, 559 (ecclesiastical and civil proceedings); and Hof Arnhem 19 January 2010, LJM BL 0003 and BK 9957.

clergy or other workers. They are also free to opt for ‘ordinary’ labor contracts. Courts, however, have established their own competence to review whether a labor contract exists according to civil law, independent of whether an ecclesiastical employment relationship exists. This has relevance for social protection of employees. So far, clergy in Christian churches has not been regarded to have a labor relationship<sup>12</sup>. This is different for Islamic imams<sup>13</sup>. In the late 1970s, social security courts already incorporated clergy into social security law by interpreting the nature of the employment relationship independently from the nature of the ecclesiastical relationship.

Clergy may also be appointed as chaplains to penitentiary institutions or the armed forces. In such cases, they enjoy a civil servant status. However the ordinary civil servant relationship is colored by an ecclesiastical relationship with the church. Where chaplaincy services are provided under civil law contracts, depending on the nature of the services and the nature of the contract, the religious background can play a role as well<sup>14</sup>. Case law hardly exists in these areas.

## 5. AUTONOMY OF CHURCHES AND FUNDAMENTAL RIGHTS OF WORKERS

From the autonomy of the church, guaranteed by article 2:2 of the Civil Code, it follows that the church is free to give shape to a labor relationship other than with clergy in an ecclesiastical manner. In such cases, ordinary civil labor law plays a complementary role, comparable to that of a labor relationship with clergy.

Although the General Equal Treatment Act states that churches and relationships within churches as well as the spiritual office are exempt from the Act, churches may not act at will, as we have seen in the previous Section. Ultimately, it is for the courts to decide to what extent there still is a labor relationship ‘within churches’.

In areas of social life, such as education or the provision of other social services, or health care, these are often with a religious background, but not by the church. Thus, foundations or associations exist based on a religious denomination. In such cases ordinary labor relationships apply, albeit that rights and duties of employers and employees can be ‘colored’ by the faith-based context of the employment relationship.

For these situations, the General Equal Treatment Act does apply, as outlined above.

<sup>12</sup> See, HR 14 June 1991, NJ 1992, 173 (Kruis/CGK Den Bosch).

<sup>13</sup> See HR 17 June 1994, NJ 1994, 757 (imam).

<sup>14</sup> See for a recent ECHR-case, ECCHR (Grand Chamber) 12 June 2014, *Fernández Martínez v. Spain* (Appl. No. 56030/07); for a discussion of the case, see, Sophie van Bijsterveld, ‘De zaak Fernández Martínez tegen Spanje’, in: *Tijdschrift voor Religie, Recht en Beleid (TRRB)*, 2014 (5) 2, p. 84 – 93.

## 6. CONCLUSION

Dutch law takes religion into account in labor relationships. The more the church itself is involved and the more the nature of the labor relationship has an ecclesiastical nature, the larger the law is determined by institutional liberty. At the other side of the spectrum, where public institutions are involved the law hardly leaves any for taking religion into account on the side of public authorities. In effect, that is only allowed, in the context of chaplaincy services or, indirectly, where appointments to representative boards or offices are concerned.

In recent years, equality appears to be a stronger driving force for legislative change than liberty. From the perspective of the individual, this is the case as well. This can work to the benefit of the individual employee, such as it is perceived in labor relationships with faith-based institutions. It can also work to the detriment of the individual employee, in that his or her religious liberty is less taken into account by Dutch labor law. An example is the explicit prohibition of conscientious objection for civil registrars in case of the performance of same-sex marriages. The observation that the dynamics of labor law favor equality rather than liberty is especially pertinent to sensitive issues as homosexuality and civil status; as well as to working hours. With regard to wearing religious symbols equal treatment and liberty seem to coincide in that by and large the law is open to wearing such symbols (liberty for the individual and equal treatment from the side of the employer).

The underlying dynamic influencing legal developments in this field are two-fold. First, there is a growing unfamiliarity with Christianity – especially Christian orthodoxy – and a latent fear that liberal values of Dutch society in the field of sexuality, civil status and gender may be under pressure from Islam<sup>15</sup>. Second, also clergy, committed employees of faith-based organizations, and religious believers in general are neither altogether immune for changing societal values, as a result of which they themselves may not always appreciate the institutional liberty of their organizations where employment relationships are concerned or may not always have an antenna for its specific ecclesiastical dimensions. For churches and faith-based organizations as well as religiously motivated employees it has become more important to carefully think through their beliefs so that they are well-equipped to argue their positions in a secular society.

<sup>15</sup> See also, Sophie VAN BIJSTERVELD, 'Negotiating the Unfamiliar: Reflections from the Netherlands on the Archbishop of Canterbury's Lecture', in: Rex AHDAR, Nicholas ARONEY (eds.), *Shari'a in the West*, Oxford: OUP 2010, p.207-222.

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# LAW AND RELIGION IN THE WORKPLACE: POLAND

PIOTR STANISZ

When broaching the subject of the Polish regulations concerning the role played by religion in the workplace, it should be noted in the first place that Poland is relatively uniform religiously<sup>1</sup>. Under these circumstances, special attention should be drawn, on the one hand, to the regulations pertaining to the freedom enjoyed by members of religious minorities and equality of all people irrespective of their religion and beliefs, and on the other hand, to the autonomy of churches and other religious organizations, the possibility for employers whose ethos is based on religion or beliefs to protect their identity as well as the right to cultivate the relations existing between Polish culture and Catholic religion. Given the distinction between state law and norms having a religious character, typical of contemporary democratic states, attention should also be paid to regulations concerning situations when it is expected from employees that they will behave contrary to the rules adopted in their conscience.

## I. RELIGIOUS FREEDOM AT WORK

The legal regime in Poland relating to religious freedom in the workplace can be determined by reference to several different normative acts. The first thing to take into account are legal regulations relating to religious freedom in general. They were included primarily in the Constitution of 2 April 1997<sup>2</sup>. In para. 1 of Article 53, “freedom of conscience and religion” has been ensured to everyone, and in para. 2,

<sup>1</sup> See Michał RYŃKOWSKI, ‘State and Church in Poland’, in: Gerhard Robbers (ed.), *State and Church in the European Union* (Baden-Baden: Nomos 2005), pp. 419-420; Michał PIETRZAK, ‘Church and State in Poland’, in: Silvio FERRARI, W. Cole DURHAM Jr. and Elizabeth A. SEWELL (eds.), *Law and Religion in Post-Communist Europe* (Leuven – Paris – Dudley, MA: Peeters 2003), p. 218.

<sup>2</sup> *Dziennik Ustaw* (Polish Official Journal, further referred to as *Dz. U.*) 1997, no. 78, item 483, as amended.

activities covered by the guarantees of the freedom of religion have been defined. Referring to religious freedom in the negative aspect it is stated that no one “shall be compelled to participate or not participate in religious practices” (para. 6) or “may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or beliefs” (para. 7). The conditions under which it is possible to put restrictions on the freedom to manifest religion are determined by stating that such limitations may be made only by means of an act and “only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others” (para. 5)<sup>3</sup>.

It should be noted that Polish law does not have a definition of religion that has common application. As noticed by a careful observer, there is one definition in Art. 14 (para. 1 point 2 letter a) of the Act of 13 June 2003 on Granting Protection to Foreigners on Polish Territory,<sup>4</sup> according to which “the concept of religion shall in particular include holding theistic, non-theistic or atheistic beliefs”<sup>5</sup>. This definition, however, applies only to this normative act and is used to determine situations in which a foreigner qualifies for refugee status in Poland. The logic applied in its formulation is not reflected in any other Polish normative act. It can rather be concluded that the term “religion” in the Constitution is used to identify the phenomena associated with experiencing and manifesting reality recognized as supernatural<sup>6</sup>. This position was also implicitly accepted by the Constitutional Tribunal in its judgment of 16 February 1999 (SK 11/98), according to which “freedom of religion is recognized in the Constitution very broadly as it encompasses all religions and all religious associations”<sup>7</sup>. A similar assumption is made by the authors who make (indeed too categorically) allegation that the wording of Art. 53 of the Constitution is a manifestation of favouritism of believers at the expense of unbelievers, because it determines the scope of freedom of religion, and does not define the scope of freedom of conscience<sup>8</sup>. It is however true that Art. 53 of the Polish Constitution – in contrast to Art. 9 of the European Convention on Human Rights and Art. 18 of the International Covenant on Civil and Political Rights –

<sup>3</sup> The English translation of the provisions of the Constitution comes from the website of the Polish Sejm (<http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>).

<sup>4</sup> *Dz. U.* 2012, item 680, as amended.

<sup>5</sup> See Norman DOE, *Law and Religion in Europe. A Comparative Introduction* (Oxford: Oxford University Press 2011), p. 24.

<sup>6</sup> Tadeusz J. ZIELIŃSKI, ‘Pojęcie religii, wyznania, związku wyznaniowego i kościoła w Konstytucji Rzeczypospolitej Polskiej’, in: *Prawo i Religia* 2007, vol. 2, p. 30.

<sup>7</sup> Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy 1999, no. 2, item 22.

<sup>8</sup> Jarosław SZYMANEK, ‘Prawna regulacja wolności religijnej’, in: *Studia Prawnicze* 2006, no. 2, p. 16; Michał PIETRZAK, *Demokratyczne, świeckie państwo prawne* (Warszawa: Liber 1999), p. 283.

has been devoted to ensuring the “freedom of conscience and religion” and not the “freedom of thought, conscience and religion”<sup>9</sup>.

Some vital conclusions can be also drawn from the analysis of the practice connected with maintaining the register of churches and other religious organizations. On the basis of the decisions issued by the Minister of Administration and Digitization (acting until recently as a registration authority<sup>10</sup>) and relevant judgments it can be assumed that a community is religious in nature if it includes reference to the sacred and its objectives focus on fulfilling the spiritual needs of its members. Therefore, a group cannot be considered a religious organization if, for example, it declares that its set of beliefs is atheistic in nature and its objectives focus on participation in public life by exerting influence on state policy and governance<sup>11</sup>. Similarly, a group that has been created to parody existing religious doctrines is not a religious organization<sup>12</sup>.

The provisions concerning equality before the law and prohibiting discrimination on any grounds constitute an additional guarantee of compliance with the principles of freedom of conscience and religion. Art. 32 of the Constitution states: “1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever”. There is no doubt that the constitutional prohibition on discrimination also encompasses an infringement of rights caused by the religion or convictions of a given person.

The Republic of Poland is a party to all major international agreements that include guarantees of freedom of thought, conscience and religion. The International Covenant on Civil and Political Rights<sup>13</sup> and the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>14</sup> should be mentioned in particular (it must be noted, however, that Poland is not – as yet – bound by Protocol No. 12 to the Convention). Also, in terms of the issues discussed here, one should pay attention to the

<sup>9</sup> See Witold SOB CZAK, *Wolność myśli, sumienia i religii – poszukiwania standard europejskiego* (Toruń: Dom Wydawniczy DUET 2013), pp. 38-54.

<sup>10</sup> Following the last change, handling the issues connected with religions and national and ethnic minorities is again the responsibility of the Minister of Internal Affairs and Administration. See the Ordinance of the Council of Ministers of 20 November 2015 on establishing the Ministry of Internal Affairs and Administration, *Dz. U.* 2015, item 1946.

<sup>11</sup> The judgment of the Supreme Administrative Court of 22 January 1999 (I SA 775/98; unpublished) concerning the Polish Raëlian Movement.

<sup>12</sup> See the judgment of the Regional Administrative Court in Warsaw of 8 April 2014 (I SA/Wa 1517/13; *Lex* No. 1464959) and the unpublished decision of the Minister of Administration and Digitization of 10 October 2014 (DWRMniE-WROA.6120.10.2014), regarding the Church of the Flying Spaghetti Monster.

<sup>13</sup> *Dz. U.* 1977, No. 38, item 167.

<sup>14</sup> *Dz. U.* 1993, No. 61, item 284.

International Labor Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation<sup>15</sup>. In addition, the Concordat between the Holy See and the Republic of Poland is important for religious freedom of Catholics<sup>16</sup>. All these agreements, in accordance with Art. 91 of the Constitution, constitute part of the domestic legal order and are directly applied (unless their application depends on the enactment of a statute). At the same time they have precedence over acts if their provisions cannot be reconciled with the provisions of such acts.

Due to the fact that Poland is a member of the European Union's structures, it is obliged to respect freedom of thought, conscience and religion as one of the fundamental rights. The contents of Protocol 30 (on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom) to the Treaty of Lisbon change nothing in this matter<sup>17</sup>.

Furthermore, the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Religion, rightly referred to as the "*magna carta* of religious and philosophical freedoms"<sup>18</sup> is very important for the protection of freedom of conscience and religion in Poland. Art. 1 states clearly that freedom in question includes freedom of choice and expression of religion and beliefs (para. 2), and therefore believers of all faiths and non-believers have equal rights in public, political, economic, social and cultural life (para. 3). Attention should also be paid to the extensive (though only exemplary) catalogue of rights (Art. 2) that result from freedom of conscience and religion. Considering the problems analysed here it is worth noting that it comprises the right to exercise religious duties and to celebrate religious holidays and the right to preserve silence on matters of one's own religion or beliefs. In addition, it was stated explicitly that the persons belonging to religious communities whose religious holidays are not public holidays, may seek to receive an exemption from work at the time of celebration of such holidays. The condition for such exemption is to make up the lost working hours on another day, without the right to any additional compensation (Art. 42 para. 1 and 3)<sup>19</sup>.

<sup>15</sup> *Dz. U.* 1961, No. 42, item 218.

<sup>16</sup> *Dz. U.* 1998, No. 51, item 318.

<sup>17</sup> Official Journal of the European Union C 306, 17 December 2007.

<sup>18</sup> See Tadeusz J. ZIELIŃSKI, 'Ustawa o gwarancjach wolności sumienia i wyznania z 1989 r. jako „magna carta” swobód światopoglądowych w Polsce', in: D. WALENCIK (ed.), *Prawo wyznaniowe w Polsce (1989-2009). Analizy – dyskusje – postulaty* (Katowice – Bielsko-Biała: Wydawnictwo Wyższej Szkoły Bankowości i Finansów 2009), pp. 53-65.

<sup>19</sup> Detailed rules for the use of such exemptions are defined in the Ordinance of the Minister of Labour and Social Policy and the Minister of National Education of 11 March 1999 on Exemptions from Work or School for Persons Belonging to Churches and Other Religious Organizations to Celebrate Religious Holidays that are not Public Holidays, *Dz. U.* 1999, No. 26, item 235.

Besides, provisions of the acts on relations between the State and individual religious organizations are important for the religious freedom of their members. The Act on the Catholic Church (and also the Concordat and the Act of 18 January 1951 on non-working days<sup>20</sup>) specifies the list of Catholic religious holidays that are non-working days according to Polish law. It should be noted that currently (i.e. from the date of entry into force of the Act of 24 September 2000,<sup>21</sup> under which the Epiphany regained the status of a public holiday) all holy days of obligation applicable in the Roman Catholic Church in Poland (see CIC/1983, can. 1246) are public holidays. It is not only the result of decisions of state authorities, but also a consequence of the Decree of 4 March 2003 released by the Congregation for Divine Worship and the Discipline of the Sacraments. Under this decree Ascension Day is celebrated in Poland on Sunday, and the feast of St. Joseph, Saints Peter and Paul, and Immaculate Conception do not have the status of *de praecepto* holidays. In addition, it is worth noting that, in accordance with Art. 9 para. 2 of the Concordat, extending the list of Catholic holidays that are public holidays requires agreement of the Contracting Parties. It should also be added that in exceptional (according to many – too generally defined<sup>22</sup>) situations obliging employees to work on Sundays and public holidays is allowed in Poland. It cannot be overlooked that in the Polish Labour Code (as opposed to Directive 2003/88/EC of 4 November 2003 concerning Certain Aspects of Organization of Working Time<sup>23</sup>, whose provisions were shaped taking into account of ECJ in the case of the United Kingdom of Great Britain and Northern Ireland v. Council of the European Union of 12 November 1996, C-84/94), it is clearly stated that weekly rest to which a worker is entitled, except situations when work is permitted on Sunday, should fall on this very day (Art. 133 § 3-4)<sup>24</sup>. According to Art. 42 of the Act on the Guarantees of Freedom of Conscience and Religion, persons belonging to religious organizations whose religious holidays are not public holidays are entitled to be exempt from work (or school) for the time necessary to celebrate these holidays. The acts regulating the relations between the State and individual religious organizations usually indicate religious holidays during which members of these organizations are entitled to be granted exemption from work (or school)<sup>25</sup>.

<sup>20</sup> *Dz. U.* 2015, item 90.

<sup>21</sup> *Dz. U.* 2000, No. 224, item 1459.

<sup>22</sup> For example, Marcin A. MIELCZAREK, *Realizacja wolności religijnej w zatrudnieniu pracowniczym* (Warszawa: Difin 2013), pp. 235-245.

<sup>23</sup> Official Journal of the European Union L 299, 18 November 2003.

<sup>24</sup> Act of 26 June 1974 – Labour Code, *Dz. U.* 2014, item 1502, as amended.

<sup>25</sup> See Katarzyna KRZYSZTOFEK, 'Wolność sumienia i religii pracowników w świetle prawa polskiego i prawa europejskiego', in: Piotr STANISZ, Aneta M. ABRAMOWICZ, Michał CZELNY, Marta ORDON and Michał ZAWIŚLAK (eds.), *Aktualne problemy wolności myśli, sumienia i religii* (Lublin: Wydawnictwo KUL 2015), pp. 178-185.

Some provisions of the Labour Code have special significance for religious freedom in the workplace. Art. 11<sup>3</sup> says that any discrimination in employment, direct or indirect, on the grounds of sex, age, disability, race, religion, nationality, political opinion, trade union membership, ethnic origin, confession, sexual orientation, and also because of a fixed-term or open-ended contract or part-time or full-time employment – is unacceptable. This regulation is logically linked with the preceding Art. 11<sup>2</sup> which says that there is an obligation of equal treatment of employees with respect to their equal performance of identical duties. The provisions contained in Chapter IIa (*Equal treatment in employment*) of Section I of the Code clarify these rules. EU directives, including Directive 2000/78/EC **establishing a General Framework for Equal Treatment in Employment and Occupation**,<sup>26</sup> had, to a large extent, influence on the current wording of the provisions of the Code. Major changes aimed at implementing the above mentioned directive were made under the Act of 14 November 2003<sup>27</sup>. Some adjustments were made the following years, the last of which in accordance with the Act of 3 December 2010 on Transposing Certain EU Provisions in the Area of Equal Treatment<sup>28</sup>. The last of the mentioned acts, except for provisions aimed at introducing changes to the Labour Code, also contains legal regulations that clarify the prohibition of discrimination in specific fields outside employment (business activity, the use of social security and healthcare, etc.)<sup>29</sup>.

In accordance with the provisions of Chapter IIa of the Labour Code, “employees should be treated equally in regard to establishment and termination of employment, conditions of employment, promotion and access to training to improve professional qualifications [...]” regardless of circumstances, such as religion (Article 18<sup>3a</sup> § 1). Art. 18<sup>3b</sup> § 1 indicates exemplary effects of differentiation of situation of workers which must be regarded as a breach of the principle of equal treatment unless the employer can prove that different work situation was caused by objective reasons. The effects mentioned include the refusal to enter into or terminate the employment relationship, unfavourable remuneration for work or other conditions of employment, omission during promotion or other work-related benefits as well as omission during assigning for participation in trainings raising professional qualifications. If the employer violates the principle of equal treatment in employment, the employees are granted the right to compensation that amounts to no less than the applicable minimum wage in Poland for work (Art. 18<sup>3d</sup>). At the same time, however, there are actions mentioned which should not be regarded as a breach of the principle of equal treatment. Art. 18<sup>3b</sup>

<sup>26</sup> Official Journal of the European Union L 303, 2 December 2000.

<sup>27</sup> *Dz. U.* 2003, No. 213, item 2081.

<sup>28</sup> *Dz. U.* 2010, No. 254, item 1700, as amended.

<sup>29</sup> See Michał RYŃKOWSKI, ‘Poland’ in: Mark Hill (ed.), *Religion and Discrimination Law in the European Union* (Trier: European Consortium for Church and State Research 2010), pp. 268-269.

§ 4 is very important in terms of the issues discussed here because it is concerned with the employment within the framework of churches and other religious associations as well as organizations whose ethos is based on religion, creed or beliefs (see part III of the present article)<sup>30</sup>.

Referring to the protection of the so-called negative religious freedom of workers, one should also pay attention to the regulations explicitly providing for the rights of persons in some medical professions to refrain from performing medical procedures incompatible with their conscience. With regard to doctors, dentists, nurses and midwives the relevant statutory provisions are contained in the acts regulating the practice of these professions<sup>31</sup>. The provisions of both these laws lay down that persons performing the professions at issue have the right to refrain from providing health services that are at variance with the principles they adhere to in their conscience. However, this right is not unconditional, and the person exercising it needs to be aware of certain additional obligations. For several years, these regulations have been the subject of serious concerns raised by the representatives of the doctrine,<sup>32</sup> and their constitutionality in reference to doctors was investigated in the judgement of the Constitutional Tribunal of 7 October 2015 (K 12/14). The Tribunal stated that it is unconstitutional to oblige doctors to act against their conscience in vaguely defined ‘other urgent cases’ (the legitimacy of such an obligation in each case of the risk of loss of life or serious damage to health was not brought into question). What was also judged to be unconstitutional was the regulation according to which doctors using ‘the conscience clause’ were obliged to inform the patient about the possibility of obtaining a service in question from another doctor or at another medical facility. However, the Tribunal found no defects in the regulation obliging medical conscientious objectors to inform their superiors in advance about their intention to use ‘the conscience clause’ and to note down and justify every decision of this kind in medical records<sup>33</sup>.

<sup>30</sup> See Katarzyna KRZYSZTOFEK, ‘Wolność sumienia ...’, *op. cit.*, pp. 172-174.

<sup>31</sup> See Article 39 of the Act of 5 December 1996 on the Professions of Doctor and Dentist (*Dz. U.* 2015, item 464) and Article 12 of the Act of 15 July 2011 on the Professions of Nurse and Midwife (*Dz. U.* 2014, item 1435, as amended).

<sup>32</sup> See, for example, Leszek BOSEK, ‘Problem zakresowej niekonstytucyjności art. 39 ustawy o zawodach lekarza i lekarza dentystry’, in: Piotr Stanisz, Jakub Pawlikowski and Marta Ordon (eds.), *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne* (Lublin: Wydawnictwo KUL 2014), pp. 87-103; Andrzej Zoll, ‘Klauzula sumienia w medycynie – gwarancja czy ograniczenie wolności sumienia pracowników ochrony zdrowia?’, in: Oktawian NAWROT (ed.), *Klauzula sumienia w państwie prawa* (Sopot: Spółdzielczy Instytut Naukowy 2015), pp. 116-126.

<sup>33</sup> *Orzecznictwo Trybunału Konstytucyjnego*, 2015 – A, no. 9, item 149. See Jakub Pawlikowski, ‘Więcej wolności sumienia dla lekarzy – konsekwencje orzeczenia Trybunału Konstytucyjnego w sprawie klauzuli sumienia’, in *Medycyna Praktyczna* 2015, no. 11, pp. 1-7.

Regulations pertaining to conscientious objection are completely missing from the acts concerning other health professions and in the Labour Code. There are authors in the doctrine that reasonably suggest that general nature of the right to conscientious objection arises from the provisions of the Constitution<sup>34</sup>. Similar conclusions can be drawn not only from the Constitutional Tribunal's judgment cited above but also from its judgement of 15 January 1991 (U 8/90). Despite the lack of statutory provisions that enabled physicians to exercise their right to conscientious objection, the Tribunal stated clearly in the last judgment quoted here that the right of a doctor to refuse to provide such a service in situations when it is against his or her conscience is derived from the constitutional provisions on the freedom of conscience and religion, because "freedom of conscience does not just mean the right to represent a particular worldview, but above all the right to act according to their conscience, the right to freedom from acting under duress against their conscience"<sup>35</sup>.

None of the Polish regulations refers directly to a manifestation of a religious identity through clothing or symbols. Everyday life in Poland does not provide either (at least not well-known) examples of conflicts in this context. In accordance with general principles, it is believed that the freedom to manifest religion that could be restricted only for particularly serious (defined in the Constitution) reasons is decisive in this regard. In the workplace safety at work could be considered as such a reason<sup>36</sup>. No employee duties – as it was correctly stated by the Supreme Court in its judgment of 6 September 1990 (I 38/90 PRN) – were contravened by the administrative employee of a health clinic who refused to take the cross off the wall in her office. As a result of such behaviour, the employer terminated the contract of employment with her, which was rightly declared by the Court incompatible with the principles of social coexistence<sup>37</sup>.

Referring to the working conditions of teachers, it should be noted that in accordance with § 12 of the Ordinance of the Minister of National Education of 14 April 1992 on the Conditions and Manner of Organizing Religious Education in Public Kindergartens and Schools, "a cross can be placed in the classrooms"<sup>38</sup>. The conformity of this regulation to higher-order norms, and especially the constitutional provisions on freedom of conscience and religion, was declared by the Constitutional Tribunal

<sup>34</sup> See for example Andrzej ZOLL, 'Klauzula sumienia', in: Piotr STANISZ, Jakub PAWLIKOWSKI and Marta ORDON (eds.), *Sprzeciw sumienia ...*, *op. cit.*, p. 81.

<sup>35</sup> *Orzecznictwo Trybunału Konstytucyjnego 1986-1995*, vol. 3 (1991-1992), item 2.

<sup>36</sup> Marcin A. MIELCZAREK, *Realizacja wolności...*, *op. cit.*, pp. 186-188.

<sup>37</sup> *Orzecznictwo Sądu Najwyższego. Izba Cywilna i Pracy 1991*, no. 10-12, item 126, pp. 62-67.

<sup>38</sup> Although de facto crosses hang in most Polish schools, Poland cannot be counted among the states in which the display of such symbols in schools is compulsory (see the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Lautsi v. Italy* of 18 March 2011, Application No. 30814/06, para. 27).

in the judgment of 20 April 1993 (U 12/92)<sup>39</sup>. Moreover, it may be concluded from the Polish case law (concerning only the premises of municipal councils<sup>40</sup> and the sessions chamber of the Sejm<sup>41</sup>) that the very presence of a cross violates the freedom of conscience of people who do not identify themselves with this symbol. In the judicature it was also aptly remarked that in Polish reality the symbol of the cross not only has a strictly religious meaning, but it is also inseparably connected with Polish history and national traditions, indicating their underlying values<sup>42</sup>.

Summing up, it can be concluded that the current Polish laws relating to religious freedom in the workplace have heterogeneous origins. What is especially prominent are the aspirations to guarantee religious freedom. However, regulations relating to this freedom are usually generic in nature and only in exceptional situations refer explicitly to employment relations ensuring this freedom in the negative aspect (e.g. the right to conscientious objection) or in the positive one (e.g. regulations concerning religious holidays that are also closely linked to the implementation of an employee's right to rest). Another important factor in shaping the legislation in question are the aspirations to ensure equality irrespective of religion or beliefs (also protected under Art. 194 of the Criminal Code<sup>43</sup> which defines the offense of religious discrimination). In this regard an important factor is also respect for the autonomy of churches and other religious organizations.

## II. RELIGIOUS MINISTERS AND LABOR LAW

Responding to a question about the definition of a religious minister according to Polish law it must be said that the Polish legislature has essentially accepted the assessment and qualifications specified in the internal regulations of individual religious communities. Therefore, as the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Religion lists the elements of an application for registration of churches and other religious organizations (see Art. 32), it clearly states that the internal statutes of a religious community seeking registration should include the method of appointment and removal as well as the powers of the clergy (if existence of the clergy is assumed). If it comes to churches and other religious organizations whose legal status is regulated by separate acts, it must be assumed that the legislator tac-

<sup>39</sup> Orzecznictwo Trybunału Konstytucyjnego 1993, item 9.

<sup>40</sup> The judgment of the Court of Appeals in Łódź of 28 October 1998 (I ACa 612/98), in: *Wokanda* 1999, no. 11, pp. 44-47; the judgment of the Court of Appeal in Szczecin of 25 November 2010 (I ACa 363/10), in: *Przegląd Prawa Wyznaniowego* 2011, vol. 4, pp. 195-218.

<sup>41</sup> The judgment of the Court of Appeal in Warsaw of 9 December 2013 (I ACa 608/13), *Lex* 1428254.

<sup>42</sup> See the judgment of the Court of Appeals in Łódź of 28 October 1998 (I ACa 612/98).

<sup>43</sup> The Act of 6 June 1997 – Penal Code, *Dz. U.* 1997, No. 88, item 553, as amended.

itly agreed to the rules in force in these communities. As it was said by the Supreme Administrative Court in its judgment of 19 September 2000 (III SA 1411-1400), “in order to determine whether a given person has the status of a priest, it is necessary to examine the rules of a given religious organization”<sup>44</sup>. A specific definition of a “clergyman” can be found, admittedly, in the Act of 13 October 1998 on the System of Social Insurance (Art. 8, para. 13)<sup>45</sup>. However, it is applicable only in this act, and its purpose is merely to determine who is subject to insurance coverage on the basis of being a clergyman, as it involves a special way of financing insurance premiums (as indicated below)<sup>46</sup>.

In the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Religion it was also stated that religious organizations exercise the freedom to perform religious functions, and therefore may, in particular, establish, educate and employ clergy (Art. 19, para. 5). The Polish legislator does not claim the right to decide about the shape of reciprocal rights and obligations existing between a religious organization and its clergy. These issues are left to the legal systems of religious communities. Polish law does not regulate issues connected with performing religious services by clergy nor does it determine the rules of remuneration of such persons for fulfilling merely religious functions. Neither does it refer to the disciplinary responsibility of the clergy for improper fulfilment of religious obligations. These issues are particularly outside the scope of the Labour Code. The Supreme Court agreed with this position in the judgment of 5 May 2010. It analysed the matter of a pastor of the Evangelical-Augsburg parish who after disciplinary proceedings was finally deprived of the rights to exercise the functions of the ordained ministry and expelled from the clergy. The plaintiff demanded to establish that there was an employment relationship governed by the provisions of the Labour Code between him and the parish. As a result, he demanded that the parish would pay him the salary for the time when he did not perform the function due to decisions of ecclesiastical authority. The Supreme Court rightly stated that the ministry exercised by the pastor is subject to the regime set out by the Church and “current legislation determines that a situation when a priest is employed by the parish to exercise purely religious ministries is distinct from employment-based job”. Any interference of the State in such case must be declared inadmissible because the basis for the employment of the pastor was the so-called vocation which is regulated by the legal system of Lutheran Church<sup>47</sup>.

<sup>44</sup> *Lex* No. 47198.

<sup>45</sup> *Dz. U.* 2015, item 121, as amended.

<sup>46</sup> See Piotr STANISZ, *Ubezpieczenie społeczne duchownych w prawie polskim* (Lublin: Redakcja Wydawnictw KUL) 2001, pp. 133-141.

<sup>47</sup> *Monitor Prawa Pracy* 2011, no. 2, p. 98.

On the other hand, it should be noted that the legislator is aware that clergy gets personal income in connection with the exercise of their ministries. In the Catholic Church the revenue of priests in the parishes consists mainly of offerings made by the faithful on such occasions as the celebration of the Mass in certain intentions, providing some sacraments or sacramentals or annual pastoral visit to the homes of parishioners after Christmas. This type of income is subject to income tax in accordance with the Act of 20 November 1998 on the Lump-Sum Income Tax on Certain Revenues Earned by Natural Persons<sup>48</sup>. The rule is to pay a predetermined sum four times a year. The rate of tax which is payable quarterly is determined in annually updated annexes to this act and without precise determination of a cleric's income. The circumstances that are taken into consideration are, above all, the function performed by a priest in a parish and the size of the parish where he exercises his ministry<sup>49</sup>. The clergy that get income from pastoral activities have the right to waive the tax in the form presented and to pay tax on general principles that apply to most people in Poland who get personal income. These principles are included in the Act of 26 July 1991 on Personal Income Tax<sup>50</sup>. Waiving the tax in this form obliges clergy to keep a revenue and expense ledger, which makes it possible to determine their income and the amount of tax due.

The specific legal status of the clergy in Polish law is also determined by the rules under which these persons are subject to social and health insurance. In both cases, the mere being (broadly understood) a clergyman makes the insurance compulsory. Premiums paid for insurance of clergymen are to a large extent financed from the Church Fund which was created in 1950 as a kind of compensation for the nationalization of ecclesiastical estates<sup>51</sup>. In accordance with the provisions of the Act of 13 October 1998 on the System of Social Insurance, premiums for compulsory social insurance of the clergy are – as a rule – financed mainly from the Church Fund (80%). Only the remaining 20% is paid by the interested parties (that is, the clergy themselves or appropriate organizational units of the convents). The Church Fund, according to the regulations of the Act of 27 August 2004 on Healthcare Services Financed from Pub-

<sup>48</sup> *Dz. U.* 1998, No. 144, item 930, as amended.

<sup>49</sup> See Dariusz WALENCIK, 'Zryczałtowany podatek dochodowy od przychodów osób duchownych. Wątpliwości interpretacyjne i postulaty de lege ferenda', in: *Annales Canonici* 2008, vol. 4, pp. 231-253.

<sup>50</sup> *Dz. U.* 2012, item 361, as amended.

<sup>51</sup> See Michał RYŃKOWSKI, 'Financing of churches and religious communities in Poland', in: Brigitte BASDEVANT-GAUDEMET, Salvatore BERLINGÒ, *The Financing of Religious Communities in the European Union* (Leuven – Paris – Dudley, MA: Peeters 2009), pp. 279-280; Piotr Stanisławski, 'Relations between the State and Religious Organizations in Contemporary Poland from Legal Perspective', in: Wilhelm Rees, Maria Roca and Balázs Schanda (eds.), *Neuere Entwicklungen im Religionsrecht europäischer Staaten* (Berlin: Duncker & Humblot 2013), pp. 702-704.

lic Funds,<sup>52</sup> is also used to finance full premiums for health insurance of the clergy who are not income tax payers (i.e. do not have personal income) as well as students at higher seminaries, novices, postulants and junior brothers/sisters at religious orders (and their counterparts in non-Catholic religious organizations)<sup>53</sup>.

The above considerations apply to the members of clergy whose “professional” activity is strictly limited to exercising acts of worship and ministries. This does not mean, however, that they cannot take up employment on the basis of employment relationship (which happens quite frequently), or on other legal grounds (for example, on the basis of civil law contracts, which occurs decidedly less frequently). Currently, Polish clergy (including members of Catholic institutes of consecrated life) quite commonly take up employment as teachers of religion in public schools. Moreover, they work primarily in institutions such as universities (as academics), penitentiary institutions as well as hospitals (as chaplains). Employment of clergy based on an employment relationship is sometimes applied also within ecclesial structures. This happens in the case when the job does not result directly from the status of a clergyman (for example, in schools run by church legal persons). It is clear that the consequence of an employment relationship is to treat such a person as an employee, which results in the application of labour law and has consequences in terms of tax law and social and health insurance.

### III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS

One of the basic principles underlying the institutional relations between the State and religious organizations is respect for the autonomy and independence of the latter. According to Art. 25 para. 3 of the Constitution, “relations between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good”. Referring to this provision, it was plausibly concluded in the doctrine that “the autonomy of religious communities is primary in nature in the light of Polish law”, and is not granted by the State. Freedom of religion that is due to everyone and rooted in their dignity is the source of this autonomy<sup>54</sup>.

<sup>52</sup> *Dz. U.* 2015, item 581, as amended.

<sup>53</sup> See Piotr STANISZ, ‘Ubezpieczenie społeczne osób duchownych – charakterystyczne cechy i perspektywy zmian’, in: Marian Żukowski (ed.), *Systemy ubezpieczeń społecznych – między solidaryzmem a indywidualizmem* (Warszawa – Lublin: Zakład Ubezpieczeń Społecznych – Katolicki Uniwersytet Lubelski Jana Pawła II 2014), pp. 105-127.

<sup>54</sup> Paweł BORECKI, ‘Autonomia kościołów i innych związków wyznaniowych we współczesnym prawie polskim’, in: *Studia z Prawa Wyznaniowego* 2012, vol. 15, pp. 88-89.

The duty to respect the autonomy of churches and other religious organizations by the State was strengthened in the Constitution by the obligation to respect their independence. In this way it was emphasized that establishing by churches and other religious organizations their own law, its application and management of their own affairs should take place without any interference of the State. On the other hand, it should be noted that the autonomy and independence of churches and other religious organizations declared in Art. 25 para. 3 of the Constitution is not absolute, as it is limited to their own field of activity. It should be assumed that this field involves – generally speaking – establishing their own rules concerning the doctrine, worshiping and activities aimed at promoting the faith as well as using their own specific rules within their own organizational structure. Any restrictions on the autonomy of churches and other religious organizations in matters within their own field could be considered legitimate only if the reasons for restricting the freedom to manifest religion were verified<sup>55</sup>.

The aforementioned Art. 18<sup>3b</sup> § 4 of the Labour Code should undoubtedly be considered in connection with the obligation to respect the autonomy of churches and other religious organizations. Its wording (just as the general wording of the provisions of Chapter IIa of Section I of the Labour Code, as referred to above) is closely related to the regulations contained in Directive 2000/78/EC (in this case – Art. 4, para. 2).

Art. 18<sup>3b</sup> § 4 of the Labour Code recognizes the right of religious organizations (as well as other organizations whose ethos is based on religion or beliefs) to limit access to the employment due to criterion of religion or beliefs. It was clearly assumed that such restrictions do not constitute a breach of the principle of equal treatment when a religion or beliefs constitute a real, decisive and proportionate requirement for an employee due to the type or nature of activities carried out by an employer. The same provision stipulates that in case of employment within the framework of religious organizations (or other organizations whose ethos is based on religion or beliefs) requirement for employees to act in good faith and loyalty to ethics resulting from religion or beliefs of the employer is not a breach of the principle of equal treatment either<sup>56</sup>.

It has been signalled in the Polish doctrine that the above-mentioned provisions may undermine the autonomy of religious entities. The reason for this opinion is the way in which the legislator defined the conditions under which churches and other re-

<sup>55</sup> See Piotr STANISZ, 'Konstytucyjne zasady określające relacje Państwa z Kościołami i innymi związkami wyznaniowymi: autonomia i niezależność oraz współdziałanie', in: Józef KRUKOWSKI, Mirosław SITARZ and Henryk STAWNIAK (eds.), *Katolickie zasady relacji Państwo – Kościół a prawo polskie* (Lublin: Towarzystwo Naukowe KUL 2015), pp. 166-170.

<sup>56</sup> See Katarzyna Krzysztofek, 'Wolność sumienia ...' *op. cit.*, pp. 173-175.

ligious organizations may restrict access to employment. The basis for such claims is, primarily, an observation that only on grounds of religion or beliefs (and not, for example, sexual orientation) the limitation of the access to employment can be deemed acceptable<sup>57</sup>. These concerns seem to be exaggerated. One must note that the Labour Code explicitly recognizes the right of churches and other religious organizations to require their employees to be loyal to their ethics. Moreover, some doubts may also arise in connection with the features that are supposed to characterize occupational requirements for employees in cases when churches constrain access to employment. It seems that in the Labour Code they are formulated in a more restrictive way than in Directive 2000/78<sup>58</sup>. The practical importance of these doubts remains yet to be decided by the future case law.

It is noteworthy that similar right to limit access to professional activities on grounds of religion or beliefs by religious entities also results from the Act of 3 December 2010 on Transposing Certain EU Provisions in the Area of Equal Treatment. The primary purpose of this act is to determine ways to prevent violations of the principle of equal treatment in certain areas in terms of gender, race, ethnicity, nationality, religion, creed, beliefs, disability, age or sexual orientation. However, it is clearly stated that it does not apply to churches and other religious organizations (as well as organizations whose ethos is based on religion or beliefs), in which access to professional activities and the exercise thereof can be limited on grounds of religion or beliefs. This exclusion is applicable if the nature or conditions for exercising such activities make religion, creed or beliefs a real, decisive and proportionate occupational requirement.

## CONCLUSIONS

The discussion conducted above makes it possible to give positive assessment to the Polish regulations concerning the role played by religion in the workplace. They especially provide adequate protection of the freedom of conscience and religion of people belonging to religious minorities, without neglecting, for example, the right of ecclesiastical employers to protect their identity. This does not mean, however, that both the regulations discussed and the ensuing practice cannot raise any questions or doubts. They concern, for instance, the scope of the right to conscientious objection of people performing non-medical professions (as well as such medical professions as for example pharmacists). New problems for Polish labour law are also likely to be caused by the foreseen increase in the number of Muslims living in Poland.

<sup>57</sup> Marcin A. MIELCZAREK, *Realizacja wolności...*, *op. cit.*, pp. 148-149; 264.

<sup>58</sup> The Code states that the requirements are to be "real and decisive" as well as retaining the proportions, whereas the Directive requires them to be "genuine, legitimate and justified".

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# LAW AND RELIGION IN THE WORKPLACE: ROMANIAN REPORT

EMANUEL TĂVALĂ

## I. RELIGIOUS FREEDOM AT WORK. HOW DOES THE NATIONAL LAW DEAL WITH RELIGIOUS FREEDOM AT WORK?

The most important Romanian legal source is the constitution. Romania's current constitution was passed by the Constitutional Assembly of 21 November 1991 and entered into force after the referendum of 08 December 1991 had approved it. It was amended by Act No. 429/2003 to revise the Constitution, which was approved by a referendum on 18/19 October 2003 and entered into force after publication in the Official Gazette of Romania on 29 October 2003.

**Article 29** guarantees freedom of conscience by the following wording:

*Freedom of thought, opinion, and religious beliefs shall not be restricted in any form whatsoever. No one shall be compelled to embrace an opinion or religion contrary to his own convictions. Freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect. All religions shall be free and organized in accordance with their own statutes, under the terms laid down by law. Any forms, means, acts or actions of religious enmity shall be prohibited in the relationships among the cults. Religious cults shall be autonomous from the State and shall enjoy support from it, including the facilitation of religious assistance in the army, in hospitals, prisons, homes and orphanages.*

As shown before, religious communities can organize freely. They are to be guided by their own statutes. These statutes should be approved by the government, because the constitution states that the organization has to follow the terms laid down by law<sup>1</sup>. The approval of statutes shows the good level of cooperation between churches and the state, and is an extension of the Byzantine principle of *nomokanones*.

<sup>1</sup> Law 489/2006.

a) **Which manifestations of religious beliefs are protected?**

Freedom of conscience means citizens having the possibility to express their own opinions. Freedom of conscience is one of the primary human rights, because religious freedom, as a part of the extensive right to freedom of conscience, has its own history, which has been characterized by intolerance, death sentences, excommunications, much suffering and pain.

An analysis of Article 29 shows that freedom of conscience is to guarantee the possibility of having one's own opinion about the world and, particularly, the possibility of expressing it publicly. This includes being free to be a member of a church and to participate in religious services and rituals of that church.

Article 29(1) shows that religious freedom is not regulated separately in Romania, but rather forms part of the (much wider) field of freedom of opinion and conscience, and even freedom of thought. The following regulation in Article 29(1) is of particular importance because of the country's communist past: "*No one shall be compelled to embrace an opinion or religion contrary to his own convictions.*" The right to be part of a religion and the corresponding right to leave a religion is in accordance with European and international norms and rules in the field of individual and collective religious freedom. The constitution mentions the separation of Church and State, but at the same time guarantees the autonomy of religious organizations and forces the state to support religious organizations in their pastoral care in the military, hospitals, prisons or orphanages.

b) **What is the rationale of the approach? Is it "equality" or "religious freedom" or both or is there some other foundation?**

Guaranteeing freedom of conscience the constitution achieves equality between faithful and non-believers. The legislator thus aims to cultivate a climate of tolerance and mutual respect among citizens.

Religious cults are regulated in accordance with the rules of the constitution. The cults are "free and organized in accordance with their own statutes, under the terms laid down by law". Regarding the relations between cults, "any forms, means, acts or actions of religious enmity are prohibited". These stipulations show that the special term "*ruling or leading religion*" (as used for the Orthodox Church) no longer exists in Romania. The Romanian State protects and guarantees the religious freedom of its citizens, no matter what confession they belong to.

The constitutional rights and freedoms of the human being are interpreted and applied in accordance with the Universal Declaration of Human Rights and those treaties and conventions that Romania has entered into. These take precedence over any contradicting national laws except in those cases where Romanian laws and the constitution contain more favorable regulations for the affected.

## II. RELIGIOUS MINISTERS AND LABOUR LAW

### a) What is the definition of religious minister according to the secular law of your country?

There is no official definition of religious ministers in the secular law. The far definition for the religious ministers is to be found in the **Occupations classification in Romania** where is stipulated that a *religious minister is a person who perpetuates the sacred traditions, the practices and religious beliefs. They do celebrate religious services and rituals of a religious or confessional faith; offers spiritual and moral help and do occupy associated functions with the practice of religion.*

### b) What is the labour status of religious ministers when working for their respective denominations?

In Romania, according to art. 23 para. 1 of Law 489/2006 regarding religious freedom and the general regime of religious cults, *the cults elect, appoint, hire or terminate the appropriate staff according to its bylaws, canonic codes or regulations.*

According to art. 122 of the Statute of the Romanian Orthodox Church (ROC), *church singers and catechists are recruited, usually, from graduates of schools of religious singers. They are appointed or dismissed at the proposal of the priest and the parish council, by the bishop, in a meeting of the Standing Archdiocesan Council. For reasons of indiscipline, they can be sanctioned.*

Regarding priests, they are appointed, and the ROC Statute does not provide the conclusion of an individual employment contract, but states in art. 123 para. 2 that priests and deacons are appointed by the Diocesan Bishop in the parish, in a meeting of the Standing Archdiocesan Council, complying with the statutory and regulatory church provisions and the priests only sign a confession of faith.

Except the Gospel Christian Church in Romania where the staff has an individual contract of employment, all other recognized religious cults in Romania have the same kind of legal relationship with its clergy as the Orthodox Church, the ratio being one of service and free assumed mission<sup>2</sup>. At the beginning of the pastoral work in the unity for which he was ordained, the church staff receives from the bishop a decision which regulates the rights and duties that must be met. Therefore from the BOR Statute (recognized by Government Decision no. 58/2003) does not result that between clergy and BOR would exist individual labor contracts, but rather between them *relationships of free service and assumed mission are involved*. The rights and duties of priests, deacons, and singers are determined by the unilateral decision of

<sup>2</sup> Costel GîLCĂ, *Noi teorii în dreptul muncii* (en. *New Theories in Labour Law*), Ed. Rosetti International, Bucharest, 2012, p. 244.

the bishop, and they present the Confession of Faith that they are obliged to sign. From this perspective, the legal relations of clergy from Romania resembles rather those of civil servants, who are appointed and take an oath, than those of workers with individual employment contract, which state the obligation to inform the terms of the contract; negotiating these terms and signing the individual employment contract<sup>3</sup>. Therefore, the relations between clergy and religious cults in Romania are being built on the provisions of its own statutes and not on the specific legal rules of labor relations.

**c) What is the labour status of religious ministers when working in other institutions?**

The situation of those who work in nursing homes, prisons or schools falls under laws governing the staffing situation in those institutions, but at the same time have a working relationship with the religious cult that they represent (most often the Orthodox Church). In these cases we are talking about a case of *res mixta*. Law 489/2006 makes a single mention regarding the individual employment contract in Article 32 para. 3, this provision is designed for the religious teachers or for professors from the faculties of theology stating that *if a teacher commits serious violations of moral doctrine or worship, the religious cult can withdraw their consent to teach religion, which leads to the termination of the individual employment contract*.

It is clear that where the legislature intended to regulate the individual employment contract did so directly. It is therefore clear that where a person has an individual employment contract with an educational institution, the cult which that person belongs to, can, in given conditions, withdraw its agreement, recognizing the supremacy of the specific cult rules over labor law standards. To the extent that the cult from which the professor is part of finds that a teacher who teaches religion or works in theology faculties, has committed serious violations of moral doctrine or religion can withdraw its consent. This basically equates to the withdrawal of the authorizations provided as legal basis for the termination of the individual employment contract in art. 56 para 1 letter G of the Labour Code.

**d) Are ministers of all denominations subject to the same labour law status?**

As we have already stated, in Romania, the Gospel Christian Church opted for a relationship based on the individual employment contract, while all other religious cults have opted for a relationship of obedience.

This recognized religious cults decided, based on the autonomy it enjoys, by its own Statute, autonomously, that the inside relations are governed by the

<sup>3</sup> *Ibidem*, p. 252.

specific provisions of labor relations through concluding individual employment contracts.

**e) What case-law has developed regarding the work of ministers of religion?**

On 4 April 2008, 31 priests and 4 lay employees of the Metropolitan of Oltenia have decided to establish the “Good Shepherd” Union. Once constituted, the union asked the Craiova Court, granting legal personality and registering the union in the special register of trade unions. The representative of the Metropolitan of Oltenia opposed to this request, given that the internal status of the Romanian Orthodox Church, recognized by the Romanian state authorities by Government Decision No. 53/2008, prohibits the creation of any form of association without the prior consent of the local bishop.

On appeal, through a decision in 11 July 2008, the Dolj Court, taking into account the principle of autonomy of the religious communities and their right to organize themselves according to their own statutes, as guaranteed by the Romanian Constitution and Law 489/2006, rejected the union’s constitution request. The Court mentioned that the concept of union is foreign to the Church’s status and that based on the hierarchy that works in the Church, priests are in a relationship of obedience to their superiors, a relationship assumed by oath when becoming priests. The Court also stated that the prohibition to create any form of association within the Church, without prior approval of the hierarchy is justified by the necessary to protect the Christian Orthodox tradition and doctrine of faith, therefore by creating a union, the hierarchy would be obliged to collaborate with a new body that is foreign to traditions and canons regarding decision making in the Church (being violated the synod and hierarchical principle of the Church).

The Court also noted that under Law no. 54/2003 (Labour Law) persons exercising managerial positions are not entitled to create unions, and priests occupy such functions, each in their own parish. Dissatisfied with these resolutions, the unionists addressed to the ECHR alleging the breach of Article 11 of the European Convention on Human Rights on freedom of association. On 13<sup>th</sup> of December 2011, the First Chamber has found a violation of Article 11, condemning Romania for respecting the domestic and international rules on the distinction between the state and the church, forcing the state to intervene in an internal matter of the Church and to impose the recognition of the union, also forcing it to pay the sum of EUR 10,000 to the applicant.

Thus, it was noted that priests and the lay personnel exercise their attributions within the Orthodox Church, under an individual employment contract, receiving remuneration and contributing to the social security. Following its reasoning, the Court showed that an employment contract cannot be made cleric to such an extent, so that it can be removed from any rule of civil law. Therefore, according to the Court, the clergy and lay personnel shall enjoy the protection of Article 11 of the Conven-

tion<sup>4</sup>. Indeed in the documents submitted to ECHR there were also the individual employment contracts of those who had formed the unions. These documents began to be concluded within the Orthodox Church only in the period after the year 2000, the employment contract being a secular document that has nothing to do with the serving in the Church. Never until now there came into discussion to conclude such acts, since at the moment of ordination, a cleric takes an oath pledging obedience and submission to the bishop, in the church the hierarchy principle is one of the basic principles operating. The signing of such contracts was imposed not by high demand from the clergy that assumed their mission as it happened for 2.000 years until now, but because of the rebellious ones, which appealed to the civil courts, relativizing the canonical provisions and the jurisdiction of courts of the Orthodox Church, which had exclusive competence in judging the clauses involving the clergy. However, from the inability to prove before any civil authorities the employee quality, these employment contracts were carried out, contracts that do not change the relationship between the employee and employer even if they are signed or canceled<sup>5</sup>. As it is shown by one of those who were heavily involved in the debates of this ECHR decision, lawyer Costel Gîlcă (which is not a neophyte in the issue of the church “business”) actually claims that *the relationship between employer and employee in the Church is one of service and freely assumed mission*<sup>6</sup>. This is done precisely based on the principle of autonomy, which I mentioned in the previous pages and which offers the cults the possibility of regulating the working relationship with their ministers as they see fit and appropriate. But under the conditions of the current decision, ECHR is the one that tells and imposes the Romanian Orthodox Church the solution which the Court found that it would be most appropriate from its outlook. In essence, the Court has decided that the national instances refusal to allow the establishment of a syndicate consisting of priests to defend their economic interests in labor relations with the Orthodox Church is not a measure regarded as necessary in a democratic society.

Analyzing the labour union’s status, it was noted that this does not tend to harm the fundamental ecclesiastical values of the Orthodox Church and does not represent a threat significant enough for the state, in order to justify the refusal of foundation, since it does not combat elements of doctrinal or ecclesiological nature. The Court circumvents here as flagrant exactly the principle of cult autonomy that can be organized based on the canonical statutes and regulations, most of them being established long before the Court was established. On the basis of the separation, the State cannot impose through the public force and gives law strength to some internal canonical provisions of cults (e.g. to prohibit the marriage of monks, or that they leave their

<sup>4</sup> *Ibidem*, p. 277.

<sup>5</sup> Radu CARP, *Politograma*, Institutul European, Iasi, 2015, p. 211.

<sup>6</sup> Costel GÎLCĂ, *Gravă eroare a CEDO în stabilirea situației de fapt* – [www.juridice.ro](http://www.juridice.ro).

inheritance to others than the church), but the Church has every right to, according to their own canons, penalize people who would take advantage of the State's general law to violate the internal provisions, without the State having any censoring right over such disciplinary actions<sup>7</sup>.

Paragraph 73 of the ECHR judgment through which it is stated that the union status does not criticize the Church's teaching and canonical ordinance, *indicates a valuable judgment avoided until the final judgment by the Court*<sup>8</sup>. The very introduction of the struggle in a community of faith is a serious distortion of the message of the Church. The entire canonical organization of the Church has an aspect that also takes into account the religious belief. The relationship between clergy and the church authority is not one similar to the employer-employee ratio, the clergy being part of the community. In the absence of inside-outside report, the introduction of the union organization in the Church involves deforming the principles of internal organization of the Church and the suspension of its autonomy. Priests are involved in all the important decisions concerning their work and the work of the Church, starting with Andrei Saguna until today (although today with some reservations, after the entry into force of the new Statute of the Orthodox Church). Thus, although the canonical bishops and synods have competent canonic court judgment, however the consistories in all levels of court are made up of priests chosen by the Diocesan Assembly, and they propose disciplinary bodies to church authorities. Doubling the role of the priestly conferences and of the consistory by a union operating under state law powers endorsement represents a major interference in the internal organization of the Church, never seen before in the jurisprudence of the ECHR (CEDO).

All of this merely makes us observe the insufficient knowledge by the ECHR of the specific relations between the state and religious cults in Romania<sup>9</sup> and ignoring the provisions of the Romanian Constitution (art. 29), of the *Cults Law no. 489/2006* regarding religious freedom and the general regime of religious cults in Romania (art. 8) and of the *Statute for the organization and functioning of the Romanian Orthodox Church* recognized by the Government Decision no. 53/2008 and published in the Official Gazette no. 50/22 January 2008 - *Statute*, which clearly states the autonomy and the freedom of the Church towards the State.

Thus, the Court concluded that the elements defining the concept of "pressing social need" that could justify the interference of the authorities with the right

<sup>7</sup> Costel Gîlcă, *op.cit.*, p. 281.

<sup>8</sup> *Ibidem*.

<sup>9</sup> That is why it should be good to try to substantiate a model of church-state relationship for this geographical area, we not being able to fully integrate ourselves in any of the known models used now in Europe and even used by the ECHR (CEDO) for a better understanding and proper settlement of some causes.

to free association, in a democratic society, are not met in question, the national court not justifying the concrete manner in which the union, through its proposed statute, could have represented a threat to democracy. However we are not talking here about a threat to democracy, but of a threat addressed to the functioning of a cult recognized based on law of the state, organized on a status recognized by the state. ECHR knows that the statute of the so-called labour union would not contravene to the *Statute of the Romanian Orthodox Church*, to the *Cults Law* and *canons*. But in reality, the union (according to the Romanian Labour Law Code) has totally incompatible objectives with the sacramental and pastoral ministry of the priests, namely:

— “organizing demonstrations and strikes” (pt. 3.2 letter j of the *Union Statute letter*) statement that is contrary to the cults recognized status by the Romanian state “factors of social peace” (art. 7 para. 1 of Law no. 489/2006 regarding religious freedom and the general regime of religious cults)

— “respecting the legal provisions regarding vacations and holidays” (pt. 3.2 letter c of the *Union Statute letter*) where, in the case of the clergy this means that Saturday and Sunday, the first and second day of *Easter holidays*, *Nativity and Pentecost* and other holidays that coincide with religious holidays such as days off for the clergy members of the union, just when the believers are present in church in greater numbers;

— “ensuring the presence and representation of the union at all levels and in all church decision-making bodies” (Art. 3 pt. 2, letter i of the *Union Statute letter*), including the work of the Holy Synod (art. 3, pt. 2, letter ș), which would represent a flagrant violation of the Church’s autonomy and an attempt of the Union to become a pressure group and to circumvent the statutory consultation ways of the clergy in the diocesan meetings, in the monthly priestly administrative conferences, the pastoral circles, the every six months priestly pastoral-missionary conferences or in the *Permanent Diocesan Councils*, including in the *National Church Council and the National Church Assembly* of the Romanian Orthodox Church.

In fact, from the Court’s point of view, the reasons quoted by the court to justify the interference were exclusively of religious order, referring only to the ROC Statute and to the religious cult autonomy. However, the national court did not analyze the consequences of the employment contract regarding the workers’ rights and neither the difference between the lay employees and the clergy who were members among the union proposed for registration.

The Court accepts in its reasoning that an employer who bases his ethics on religious dogma can impose certain loyalty obligations on the employees. However, the civil judge who examines the relevance of a penalty focused on the non-compliance of those obligations, cannot, solely in the name of the religious cult autonomy omit the balance between the two interests involved, respecting a principle of proportionality.

Therefore, the European court has made a comprehensive analysis of the national court ruling, handed down during appeal, concluding that it is unsatisfactory, given that it rejected the establishment request of the union solely for religious reasons linked to the autonomy of cults and the need to preserve the Orthodox Christian tradition without a thorough analysis of the legal employment relationships between priests and ROC (*Schiüth vs. Germany*, no. 1620 to 1603, par. 69)<sup>10</sup>.

The First Chamber has concluded that the reasons invoked by the national court are not sufficient to justify the refusal of the registration of the union (*mutatis mutandis*, *Schiüth c. Germany*, para. 74; *Siebenhaar c. Germany*, February 3, 2011, no. 18136/02, par. 45, and *Obst c. Germany*, no. 425/03, para. 51).

In the divergent opinion formulated in this case it was shown that the status proposed by the complainant would have brought touching to the traditional hierarchical structure of the Church and to the decision-making method within the Romanian Orthodox Church. Following this reasoning, it was considered that, if there were some disagreements within the Orthodox Church, the national authorities are better placed than the ECHR (CEDO) to assess the facts.

### III. AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS. IN WHAT TERMS IS THE AUTONOMY OF CHURCHES RECOGNIZED IN YOUR COUNTRY? IS IT CONSIDERED A MANIFESTATION OF THE COLLECTIVE DIMENSION OF RELIGIOUS FREEDOM?

The autonomy of church and state is a principle common to many European countries, which was first introduced in Romania by Andrei Şaguna through the Organic Statute of 1869. Thus, the very first article of the Statute states that *the Romanian Greek-Orthodox Church in Hungary and Transylvania, as an autonomous church, regulates, administers and conducts its ecclesiastic, educational and foundational affairs independently, in keeping with its canonical legislation and in all its constituent parts and aspects, according to its representative form*. After the Great Union of 1918, this principle was to be taken up and implemented in order to regulate church affairs around the country, although it is not mentioned either in the 1923 Constitution, or in the 1928 Law on the General Regime of Religions, or in the 1925 Law and Statute of Church Organization.

During the communist period when the relevant legislation was quite restrictive, state control over religion was present at all levels; however, article 3 of the Statute of Eastern Orthodox Church Organization, in force since 1948, provides that *the Church*

<sup>10</sup> Alexandra NEAGU, the Case Union “The Good Shepherd” against Romania - The right to the free association of the clergy and the principle of autonomy of cults, [www.hotararicedo.ro](http://www.hotararicedo.ro) (last consulted on 16 November 2012).

*governs itself independently, by its own representative bodies.* In Romania, the state, by dint of its sovereignty, has assumed a number of rights in its relationship with the church, ever since the recognition of the latter as a separate body within the state.

**Jus reformandi** regulates the right of a state to recognize or not a religious denomination in its territory, given that the state is the only one in a position to stipulate the conditions under which religious denominations are recognized in its territory, as well as the civil rights of these denominations.

**Jus insciendi et cavendi** refers to the state right of inspection, which derives from its sovereignty, and consists of a number of ensuing rights. Among these rights, the most prominent is the right of control and supervision exercised through the Ministry / Department of Religious Affairs, which represents the state in relation to the recognized religions.

**Jus advocatiae** is the right of state protection, which recognizes the public nature of religious denominations in Romania.

Autonomy is both a relational and a jurisdictional concept. A body can only be seen as autonomous in relation to another jurisdiction, within a wider community in which they both operate. In this connection, the Romanian Constitution clearly states that: *Religious denominations are autonomous from the state and enjoy its support* (Art. 29, par. 5); however the reason why religious denominations should be granted autonomy raises numerous questions. In exercising its jurisdiction, a state may grant full autonomy to religious organizations, which means that it is not involved at all in their internal affairs, or it may grant them limited autonomy. In fact, autonomy is a label that we attach to one of the sides of two normative worlds, that is the state and the religious element, represented by religious organizations.

As a starting point, a fundamental element of the principle of autonomy is the state's obligation not to interfere with the internal affairs of religious organizations. This may appear as a correlative or implicit element of the right of self-government of religious organizations.

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# LAW AND RELIGION IN THE WORKPLACE IN THE SLOVAK REPUBLIC<sup>1</sup>

MICHAELA MORAVČÍKOVÁ<sup>2</sup>

## RELIGIOUS FREEDOM AT WORK

The Slovak Republic guarantees religious freedom in the area of labour and labour relations mainly by the *Constitution of the Slovak Republic, Constitutional Act No 23/1991 Zb. Introducing the Charter of Fundamental Rights and Freedoms* and *Act 308/1991 Zb<sup>3</sup>. on the Freedom of Belief and the Position of Churches and Religious Societies*. The Slovak Republic is also bound by the international legal instruments, i.e. the Universal Declaration of Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, International Pact on Civil and Political Rights, European Social Charter and primary law of the European Union.

Another source of labour relations regulation in the area of religious freedom and churches and religious societies is the Basic Treaty between the Holy See and the Republic of Slovakia which, according to Article 7(5) of the Constitution of the Slovak Republic, has precedence over laws (non-catholic registered churches and religious societies deal with this issue *mutatis mutandis* in the national normative treaty of analogous content – the Agreement between the Slovak Republic and Registered Churches and Religious Societies<sup>4</sup>).

<sup>1</sup> The paper is a partial outcome of the research project Vega 1/2577/12 Social Teaching of the Catholic Church in the Labor Law of the Slovak Republic.

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<sup>3</sup> “Zb. “- Colection of Acts until 1993, “Z.z. “- Collection of Acts since January, 1, 1993.

<sup>4</sup> ŽOFČINOVÁ, V., GYURI, R. OSOBITOSTI V PRACOVNOPRÁVNOM POSTAVENÍ ZAMESTNANCOV CIRKVI A NÁBOŽENSKÝCH SPOLOČNOSTÍ. In MORAVČÍKOVÁ, M., KRIŽAN, V. (Eds). *Sloboda jednotlivca a svet práce*. Praha: Leges, 2014. p. 121 -122. Križan, V. *Sloboda presvedčenia a výhrada svedomia v pracovnom práve*. In MORAVČÍKOVÁ, M., KRIŽAN, V. (Eds). *Právna ochrana slobody svedomia*. Trnava: Typi Universitatis Tyrnaviensis, 2013. p. 50 – 67.

The primary source of labour law is *Labour Code, Act No 311/2001 Z. z.* as amended. Also, we have to mention *Act No 5/2004 Z. z. on Employment Services* and *Act No 365/2004 Z. z. on Equal Treatment in Certain Areas and Protection against Discrimination* (Anti-discrimination Act).

## THE CONSTITUTION OF THE SLOVAK REPUBLIC

The 1992 Constitution of the Slovak Republic<sup>5</sup> follows the ideas and the spirit of these documents: the Universal Declaration of Human Rights from 10 December 1948, the Charter of Fundamental Rights and Freedoms, fifty-nine principles and agreements on the integration process in Europe, principles of cooperation by the spirit of equality of states, etc. In its preamble, the 1992 Constitution of the Slovak Republic acknowledges the spiritual heritage of Cyril and Methodius and the historical legacy of the Great Moravian Empire. Chapter One of the Constitution of the Slovak Republic (General Provisions), Article 1(1) states the basic principle: “*The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound by any ideology or religion.*”

Article 12 of the Constitution reads: “(1) *All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are sanctioned, inalienable, imprescriptible and irreversible. (2) Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds. (3) Everyone has the right to decide freely which national group he or she is a member of. Any influence and all manners of pressure that may affect or lead to a denial of a person’s original nationality shall be prohibited. (4) No injury may be inflicted on anyone, because of exercising his or her fundamental rights and freedoms.*”

Article 24 of the Constitution reads: “(1) *Freedom of thought, conscience, religion and belief shall be guaranteed. This right shall include the right to change religion or belief and the right to refrain from a religious affiliation. Everyone shall have the right to express his or her mind publicly. (2) Everyone shall have the right to manifest freely his or her religion or belief either alone or in association with others, privately or publicly, in worship, religious acts, maintaining ceremonies or to participate in teaching. (3) Churches and ecclesiastical communities shall administer their own affairs themselves; in particular, they shall establish their bodies, appoint clericals, provide for theological education and establish religious orders and other*

<sup>5</sup> No 460/1992 Zb.

*clerical institutions independent from the state authorities. (4) The exercise of rights under paragraphs 1 to 3 may be restricted only by a law, if it is regarding a measure necessary in a democratic society for the protection of public order, health and morals or for the protection of the rights and freedoms of others.”*

#### **ACT 308/1991 Zb. ON THE FREEDOM OF BELIEF AND THE POSITION OF CHURCHES AND RELIGIOUS SOCIETIES**

*The Act 308/1991 Zb. on the Freedom of Belief and the Position of Churches and Religious Societies, as amended by the Act 394/2000 Z. z. and Act 201/2007, takes over the provisions of Article 24 of the Constitution and specifies them. It stipulates that confession of religious belief must not be the reason for restriction of constitutionally guaranteed rights and freedoms of citizens, first of all the right to education, to work and free choice of employment and access to information. It also stipulates that a believer has the right to celebrate feasts and services according to his or her own religious belief, in accordance with generally binding legal rules.*

#### **BASIC TREATY BETWEEN THE HOLY SEE AND THE REPUBLIC OF SLOVAKIA**

*The Basic Treaty between the Holy See and the Republic of Slovakia No 321/2001 introduces the principal matter in the area in Article 6, paragraph 1: “The Holy See has the exclusive right to provide for its ecclesiastical offices according to Canon Law, and in particular to make decisions independently and exclusively in the selection of candidates for the Episcopal ministry, including the appointment, the transfer, the renunciation, and the removal of Bishops“, and in paragraph 3: “The Catholic Church has the exclusive right to decide on the appointment, transfer, renunciation and removal of a person with reference to other ecclesiastical offices or ministers relevant to its apostolic mission.”*

#### **TREATY BETWEEN THE SLOVAK REPUBLIC AND THE HOLY SEE ON PASTORAL CARE FOR CATHOLIC BELIEVERS IN THE ARMED FORCES AND ARMED UNITS OF THE SLOVAK REPUBLIC**

*The Treaty between the Slovak Republic and the Holy See on Pastoral Care for Catholic Believers in the Armed Forces and Armed Units of the Slovak Republic No 648/2002 Z. z., came into force on 27 November 2002. On the basis of this Treaty, the Ordinariate of Armed Forces and Armed Units was established, having the status of a diocese, and the Ordinary was appointed, having the status of a bishop. The Treaty regulates the pastoral care for Catholics in Armed Forces, Police Corps, in the Unit of Penitentiary Guard and Railway Guards, and for persons deprived of freedom by a decision of a State authority. The Ordinariate has both canonical and*

state legal personality<sup>6</sup>. According to Article 7 of this Treaty, the priests and the deacons permanently authorised to provide pastoral care in the Ordinariate have certain rights and duties, which have been outlined by Canon Law for diocesan ministers and deacons, and *they assume the position of employees* within the relevant unit of the Armed Forces and Armed Units. The service of the Ordinariate is specified in detail in the Statute of the Ordinariate produced by the Ordinary and issued by the Holy See and is in line with the legal order of the Slovak Republic and the principle of this Treaty.

#### **TREATY BETWEEN THE SLOVAK REPUBLIC AND THE HOLY SEE ON CATHOLIC UPBRINGING AND EDUCATION**

*The Treaty between the Slovak Republic and the Holy See on Catholic Upbringing and Education no 394/2004 Z. z.* in Article 2, paragraph 1 stipulates that the subject matter “religious education” taught in other than Catholic schools conforms with the subject “Roman Catholic religion” or “Orthodox Catholic religion” in Catholic schools, if it is taught by a person authorised by the Catholic Church, and paragraph 8 stipulates that “*Persons authorised by the proper ruling body of the Catholic Church act as observers in classes for Catholic religion. The headmasters shall enable them to perform this activity*”.

Article 3(1) reads: “*The Catholic religion is taught by teachers with professional and pedagogical qualifications in accordance with legal regulations of the Slovak Republic, who also have ecclesiastical authorisation, namely a canonical mission issued by the proper Church ruling body. Revocation of this authorisation leads to loss of the right to teach Catholic religion*”.

Article 4(4) reads: “*Teachers of Catholic theological disciplines in the universities must have a canonical mission as their personal authorisation from the proper ruling body of the Catholic Church*”.

#### **AGREEMENT BETWEEN THE SLOVAK REPUBLIC AND THE REGISTERED CHURCHES AND RELIGIOUS SOCIETIES IN THE SLOVAK REPUBLIC**

The Agreement between the Slovak Republic and the Registered Churches and Religious Societies in the Slovak Republic No 250/2002 Z. z., although of a different nature, has almost the identical wording with the one of the Basic Treaty between the Holy See and the Republic of Slovakia.

Article 6(1) reads: “*Registered churches and religious societies have exclusive right to provide for its ecclesiastical positions and offices in line with their internal*

<sup>6</sup> The Ordinary is appointed by the Holy See, he is member of the Bishops’ Conference of Slovakia and organisationally is included in the Armed Forces of the Slovak Republic.

rules. (2) *Registered churches and religious societies have exclusive right, according to their own internal rules, elect, appoint their members to the ministry, transfer and remove them and decide on the termination of their ministry.*"

The particularity of this Agreement is Article 4, paragraph 5: "*The Ministry of Foreign Affairs of the Slovak Republic shall appoint a diplomatic employee of the Permanent Mission of the Slovak Republic to the United Nations Office and other international organisations in Geneva or to other centres according to special agreement, who will be responsible for the agenda resulting from the representation of the Slovak Republic before international governmental organisations, development of cooperation between churches and registered societies with international church organisations. The diplomatic employee shall be appointed following the previous consultations with registered churches and religious societies.*"

#### **AGREEMENT BETWEEN THE SLOVAK REPUBLIC AND REGISTERED CHURCHES AND RELIGIOUS SOCIETIES ON PASTORAL CARE FOR BELIEVERS IN ARMED FORCES AND ARMED UNITS OF THE SLOVAK REPUBLIC**

*The Agreement between the Slovak Republic and Registered Churches and Religious Societies on Pastoral Care for Believers in Armed Forces and Armed Units of the Slovak Republic no. 270/2005 Z. z.* regulates the conditions for pastoral service of non-catholic clerics in armed forces and armed units. The Central Office of the Ecumenical Pastoral Care in the Armed Forces and Armed Units of the Slovak Republic was officially opened by a ceremonial service on 10 March 2007. It is the supreme body of the second structure of pastoral care in the armed forces and armed units and a parallel structure of the Catholic Ordinariate.

The Central Office of the Ecumenical Pastoral Care in the Armed Forces and Armed Units of the Slovak Republic is a legal person with derived legal personality from the concerned churches and religious societies and a legal entity according to national laws of the Slovak Republic<sup>7</sup>.

Article 5(2) reads: "*Only the Chaplain General may appoint priests and deacons in armed forces and armed units, decide on their transfer, renunciation or removal from ministry, in line with internal rules of the concerned churches and religious societies.*

*(3) Appointment and removal of priests and deacons in armed forces and armed units, in line with internal regulations of the concerned churches and religious societies, is subject to prior approval by the Ecumenical Council of Churches.*"

<sup>7</sup> The Central Office is chaired by the Chaplain General appointed by the Ecumenical Council of Churches.

Article 8 reads: “*Priests and deacons who provide pastoral service in armed forces and armed units shall have rights and obligations as defined in internal regulations of their churches and religious societies and competences of the Central Office and are employees of armed forces and armed units.*”

#### **AGREEMENT BETWEEN THE SLOVAK REPUBLIC AND REGISTERED CHURCHES AND RELIGIOUS SOCIETIES ON RELIGIOUS UPBRINGING AND EDUCATION**

*The Agreement between the Slovak Republic and Registered Churches and Religious Societies on Religious Upbringing and Education No 395/2004 Z. z.* considers the specifics of the eleven registered churches and religious societies and ensures their statuses equal of those of the Roman Catholic Church and the Greek Catholic Church in establishing church schools and in providing religious education.

#### **LABOUR CODE**

*The Labour Code No 311/2011* in its basic principles emphasises the principle of equal treatment and protection against discrimination. It rules out any restriction of rights and discrimination on the grounds of religion and belief<sup>8</sup>. It is a part of demonstrative enumeration of the grounds for discrimination ban. In case of doubt, the court must determine whether the principle of equal treatment was violated or not and whether the purpose of Directive 2000/78/ES was fulfilled.

#### **ACT ON EMPLOYMENT SERVICES**

*The Act No 5/2004 Z. z. on Employment Services*, which regulates legal relations in provision of employment services, in its Section 4, which offers a definition of the employee, reads that “*Employees of churches and religious societies who perform the cleric activity shall not be considered employees for purposes of this Act*”.

#### **ANTI-DISCRIMINATION ACT**

*The Act No 364/2004 Z. z. on Equal Treatment in Certain Areas and Protection against Discrimination* regulates the application of the principle of equal treatment and defines instruments of legal protection if this principle is not respected. In its introductory provisions<sup>9</sup> the act defines that the application of the equal treatment principle lies in the ban of discrimination on the grounds of sex, religion or belief, race, national or ethnic affiliation, adverse health condition or disability, age, sexual orientation, marital status, colour of skin, language, political or other views, national

<sup>8</sup> Article 1 of Labour Code No 341/2011 Z. z. as amended.

<sup>9</sup> Article 1, section 2.

or social origin, property, gender or any other status or on the grounds of whistleblowing or reporting criminal activity.

Discrimination on the grounds of relationship with a person of certain religion or belief and discrimination of a natural person without religion is also considered as discrimination on the grounds of religion or belief<sup>10</sup>.

Section 8(2) *explains the admissible unequal treatment*: “*In case of registered churches, religious societies or other legal persons whose activity is based on religion or belief, unequal treatment shall not be considered as discrimination based on religion if a person is an employee of such organisation or carries out activities for such organisation, and depending on the nature of such activities or in the context in which they are carried out, religion or belief represent eligible and justified requirement of occupation.*”

### **HOW IS RELIGION DEFINED?**

The Slovak legal order or case-law do not contain the definition of *religion*, however Section 4(1) of *Act 308/1991 Zb. on the Freedom of Belief and the Position of Churches and Religious Societies* defines church or religious society for purposes of the act itself: “*Church or religious society, under this act, means a voluntary association of people of the same religion in the organisation established according to the affiliation to religious belief based on internal regulations of the relevant church or religious society.*”

The following three paragraphs read: “(2) *All churches and religious societies are equal before the law. (3) Under this act, churches and religious societies are legal entities. They can make associations, establish communities, orders, societies and similar communities. (4) The State recognises only registered churches and religious communities. (5) The State can enter into cooperation agreements with churches and religious societies.*”

In case of registration, court experts determine whether it is a religious or non-religious entity.

### **ARE NON-RELIGIOUS BELIEFS PROTECTED?**

Non-religious belief is protected only within universal protection of thought, conscience and religious belief, as provided for in the Constitution, Constitutional Act Introducing the Charter of Fundamental Rights and Freedoms. Article 24 of the Constitution of the Slovak Republic in its paragraph 1 reads that everyone shall have the right to express his or her mind publicly.

<sup>10</sup> Article 1, section 2a(c).

*The Act 308/1991 Zb. on the Freedom of Belief and the Position of Churches and Religious Societies* does not cover non-religious ideological organisations. Secular humanists (civic association *Prometheus*) carry out their activities as a legal entity according to *Act No 83/1990 Zb. on Association of Citizens*.

#### **WHICH MANIFESTATIONS OF RELIGIOUS BELIEFS ARE PROTECTED?**

Individual and collective external manifestations of religion are protected. Under Article 24(2), everyone shall have the right to express freely his or her religion or belief either alone or in association with others, privately or publicly, in worship, religious act, maintaining ceremonies, or to participate in teaching. The conditions for the exercise of this right can be restricted only by law, if it is a measure required in democratic society for the protection of public order, health or ethics or rights and freedoms of others.

#### **WHAT IS THE RATIONALE OF THE APPROACH? IS IT 'EQUALITY' OR 'RELIGIOUS FREEDOM' OR BOTH OR IS THERE SOME OTHER FOUNDATION?**

We may say that the law-makers and executive power take into account equal approach and freedom of religion. In the past, after the fall of the communist regime, the principle of religious freedom was prevailing. However, following the adoption of the Anti-discrimination act, the principle of equality and equal treatment is accented.

#### **WHAT EFFECT, IF ANY, HAS THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS HAD IN THE NATIONAL APPROACH?**

The judgments of the European Court of Human Rights in the matters concerning freedom of religion are reflected in academic papers, in particular as far as the conditions for the registration of churches and religious societies are concerned<sup>11</sup>. However, they had impact neither on the church policy of the State, nor on legislative activity of the Parliament.

#### **RELIGIOUS MINISTERS AND LABOUR LAW**

The Slovak legal system does not contain the definition of ecclesiastical churches and religious societies. *The Act No 308/1991 Zb. on the Freedom of Belief and the Position of Churches and Religious Societies*, in its part regulating conditions for registration, requires that the fundamental instrument of a church or a religious society contain a method of appointment of persons performing cleric activities and

<sup>11</sup> For instance the case of *Lajda and Others v. the Czech Republic*.

their removal from office<sup>12</sup>. This is important also in terms of financial provision for registered churches and religious societies. *The Act No 218/1949 on State Economic Support for Churches and Religious Societies* reads that the State shall provide registered churches and religious societies with funds for personal benefits of clerics working as employees of churches and religious societies in cleric administration, church administration or in institutions for education of clergy<sup>13</sup>.

*The Regulation No 299/2007 Z. z. of the Government of the Slovak Republic on Personal Benefits for Clerics of Churches and Religious Societies* specifies basic salaries for clerics of churches and religious societies, according to the category of office and the pensionable service performed in the cleric administration, church administration or in the institutions for education of clergy. The offices of clerics are categorised according to complexity and difficulty of the performed activity. There are A, B, C, D, E, F or G categories, defined in the annex to act<sup>14</sup>. For example Jewish church communities in Slovakia have the following categories: A. Mashgiach, Shojet, B. Schammes, C. Hazzan, D. Chief Hazzan, E. -, F. Rabbi, G. Chief Rabbi.

The issue of financing churches and/or religious churches is the subject of discussion before every parliamentary election.

Labour relations of these employees are dealt with in Labour Code, treaties between the Slovak Republic and the Holy See, agreements between the Slovak Republic and registered churches and religious societies, regulations of churches and registered churches, and relevant laws and regulations regulating the exercise of occupation in specific area (e.g. the so-called Education Act, Act on Higher Education – Canon Mission, church mandate etc.).

The clerics of churches and religious societies which are registered, enjoy the same labour status as far as claims of churches and religious societies to national budget is concerned. Also those who serve in public institutions as chaplains or teachers enjoy the same status. In practice clerics are often in the legal position of an employee such as catechists in the relevant state and/or church schools. According to the present applicable legal status, they fall under the subsidiary authority of Labour Code<sup>15</sup>. Labour Code applies to certain labour relations only when regulations of churches do not exclude the authority of Labour Code and the specific issue is not dealt with otherwise.

Because cleric activity of churches and religious societies is rather specific, they are not fully covered by Labour Code. In fact, priests have actually labour

<sup>12</sup> § 13 c).

<sup>13</sup> § 1 1).

<sup>14</sup> § 1 1) a 2).

<sup>15</sup> BARANCOVÁ, H. *Zákonník práce. Komentár*. Bratislava, 2013: C.H.Beck, p. 170.

relationship established by employment contract, but some of its provisions result from internal regulation of the relevant church (place of performance, appointment to the office, competence assessment, change and termination of employment etc.), and some provisions result from Labour Code (obstacles at work, liability for damage, occupational safety and health, liability for occupational injuries; the same applies to annual leave if the relevant church does not have a rule governing annual leave)<sup>16</sup>.

If the employee of a church or religious society is a person that does not perform cleric activity (i.e. laic technical, administrative and auxiliary staff), the direct subject-matter scope of Labour Code shall apply.

### **WHAT CASE-LAW HAS DEVELOPED REGARDING THE WORK OF MINISTERS OF RELIGION?**

The relation between applicable laws and internal regulations of churches and religious societies was dealt with by the Constitutional Court of the Slovak Republic in its finding of 2001<sup>17</sup>. In the constitutional complaint the complainant claimed the sovereignty of the legal order of the Slovak Republic in his dispute with Roman Catholic Episcopate, which was to be resolved by general courts. In this matter, general courts refused to deal with the invalidity of the employment relationship of the priest because, according to them, the decision-making in this issue falls within the competence of the relevant body of the church.

According to Section 5(2) and Section 7(3) of *Act 308/1991 Zb. on the Freedom of Belief and the Position of Churches and Religious Societies*, churches and religious societies appoint, transfer and remove from the office persons providing pastoral service according to their internal regulation without intervention of the State bodies. However, if cleric activity is carried out within a legal relationship, such labour or civil relationship shall then follow relevant regulations of the legal order of the Slovak Republic and internal regulations of churches and religious societies shall be applied only within its framework. The courts considered the application of Labour Code only as subsidiary, in cases where the relevant regulation is not contained in internal regulation of churches. However, the Constitutional Court in its finding

<sup>16</sup> ŽOFČINOVÁ, V., GYURI, R. Osobitosti v pracovnoprávnom postavení zamestnancov cirkví a náboženských spoločností. In MORAVČÍKOVÁ, M., KRIŽAN, V. (Eds). *Sloboda jednotlivca a svet práce*. Praha: Leges, 2014. p. 121 -122. KRIŽAN, V. Sloboda presvedčenia a výhrada svedomia v pracovnom práve. In MORAVČÍKOVÁ, M., KRIŽAN, V. (Eds). *Právna ochrana slobody svedomia*. Trnava: Typi Universitatis Tyrnaviensis, 2013. p. 50 – 67.

<sup>17</sup> The finding of the Constitutional Court, file: III. ÚS 64/2000, no. 12/2001. HORŇÁČEK, J. *Konfesné právo upravujúce postavenie gréckokatolíckej cirkvi na území Slovenska po roku 1918*. Bratislava: VEDA, vydavateľstvo SAV, 2011, p. 31-32.

reproached general courts for their priority acceptance of an internal regulation of the church over the legal order of the Slovak Republic. In rendering rulings of the courts, the church law is to be only a part of the subject-matter and not legal aspect of the matter. The Constitutional Court further stated that labour or civil aspect of the exercise of cleric activity is fully subject to the legal order of the Slovak Republic. For this proceedings and the ruling of the Constitutional Court it is not important whether a labour relationship or similar legal relationship was established between the complainant and the Roman Catholic Episcopate. General courts, however, preferred Canon law, i. e. internal regulation of the church to the legal order of the Slovak Republic, so they admitted the application of the norms which are not a part of the legal order of the Slovak Republic.

In the similar case – invalidity of the employment relationship termination, the Constitutional Court ruled in 1995 differently. The Court claimed the principle of church autonomy: “... based on the principle of independency of churches from the State, the State shall not be responsible for actions of the churches in applying internal regulations to their members. Bodies of the churches are not the bodies of public power, and therefore their actions may not be reviewed by analogy as actions of the bodies of the public power”<sup>18</sup>.

#### **AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS**

##### **In what terms is the autonomy of churches recognized in your country? Is it considered a manifestation of the collective dimension of religious freedom?**

Likewise in case of individuals, churches and religious societies are also free from external pressure of the State, which is an expression of their autonomy. The principle of autonomy is reflected in the maximum possible restrictions of interventions of the State in their activities, so internal affairs of religious entities may not even be subject to court examination<sup>19</sup>.

The Article 24 of the Constitution of the Slovak Republic, paragraph 3 reads: “Churches and ecclesiastical communities shall administer their own affairs themselves; in particular, they shall establish their bodies, appoint clericals, provide for theological education and establish religious orders and other clerical institutions independent from the state authorities.”

<sup>18</sup> Resolution of the Constitutional Court, file II. ÚS 128/1995, no. 48/95.

<sup>19</sup> Constitutional Court of the Czech Republic, file Ref. Pl. US6 / 02 of 27 November 2002, resolution, file mark. Ref. I. ÚS 1244/07 of 18 October 2007. Kříž, J. Nové výzvy pro náboženskou svobodu. In: SCHEU, H., Ch. KŘÍŽ, J., DĚKANOVSKÁ, K. (eds.): Právní postavení náboženských menšin. Praha: Univerzita Karlova, 2013 p. 98 -99.

*The Act 308/1991 Zb. on the Freedom of Belief and the Position of Churches and Religious Societies* lists some (the word “some” in the Act determines that it is a demonstrative enumeration) expressions of church autonomy (paragraph 1, section 6). It is for example free determination of religious services and teaching, issuing their own regulations (if not in contradiction with applicable laws), provision of spiritual and material services, teaching, education of their cleric and laic employees in their own schools and other institutions and universities, organising assemblies without the duty to notify state authorities, owning property, establishing and owning special purpose facilities etc.

The State does not intervene into the internal structure of churches, and churches and religious societies enjoy freedom in terms of the organisation of their own structure and staff issues, hierarchy and appointments to offices. Appointment to offices by churches themselves independently, i.e. without the approval of the State, is a new, modern element which replaced the previous practice – when the State used the possibility of raising objection to appointment of bishops during the First Czechoslovak Republic and when all clerics had to hold necessary State’s approval during the communist regime 1948 – 1989.

The autonomy of churches also includes establishment of monastic and other institutions.

### **Are churches exempted from the general norms concerning anti-discrimination? To what extent?**

*Act No 365/2004 on Equal Treatment in Certain Areas and Protection against Discrimination*, the so-called Anti-discrimination act, in its Section 8 paragraph 2, as it was already said above, explains admissible unequal treatment: *In case of registered churches, religious societies or other legal persons whose activity is based on religion or belief, unequal treatment shall not be considered as discrimination based on religion if a person is an employee of such organisation or carries out activities for such organisation, and depending on the nature of such activities or in the context in which they are carried out, religion or belief represent eligible and justified requirement of occupation.*

### **What effects, if any, has European Union law had in this area? What case-law has developed in this area?**

*The Directive 2000/78/ES* affected the wording of *Act No 364/2004 Z. z. on Equal Treatment in Certain Areas and Protection against Discrimination*. However, it enshrines only the term *religion*. Academic papers deal with the issue of freedom of thoughts, conscience also in relation to conviction. They reflect judgments of the European of Human Rights<sup>20</sup> and assume that reasonable distinguishing criteria

<sup>20</sup> Cambell and Consans 1982, Rudh 1993, Kokkinakis 1993.

between the terms *belief, religion, freedom of conscience and conviction*<sup>21</sup> will be found in the future<sup>22</sup>.

No case law has developed in the area of religious discrimination in Slovakia yet.

<sup>21</sup> BARANCOVÁ, H. Teoretické problémy pracovného práva. Plzeň: Aleš Čeněk, 2013. p. 254.

<sup>22</sup> BARANCOVÁ, H. Teoretické problémy pracovného práva. Plzeň: Aleš Čeněk, 2013. p. 254.



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# LAW AND RELIGION IN THE WORKPLACE – SLOVENIA

BLAŽ IVANC<sup>1</sup>

## I. RELIGIOUS FREEDOM AT WORK

The period of Slovenia's transition from socialist and not independent country to sovereign state (June 1991) based on the constitutional democracy that respects human rights and freedoms is marked with several important changes or developments in regard to freedom of religion and work.

The first important change is the return of churches and other religious communities to the domain of public activities. As they are from 1991 onwards free to operate various social care institutions, such as elderly homes, private schools, humanitarian relief organizations, they are emerged as employers. The Catholic Church, as the major church in Slovenia, employs the highest number of employees. Within the non-profitable organizations sector in Slovenia the religious organizations employed around 75 (or 1, 5 %) of ordinary employees of a total 4.993 workers that were in 2014 employed in this sector<sup>2</sup>.

The second important change was a cessation of a lasting and systematic discrimination of believers on the working place, especially in the public service. During the socialist period believers were treated as second-class citizens<sup>3</sup> on the basis of the socialist legal regulations<sup>4</sup>.

<sup>1</sup> Dr. Blaž Ivanc, Asistant Professor, Faculty of Health Sciences – University of Ljubljana (Zdravstvena fakulteta – Univerza v Ljubljani).

<sup>2</sup> See Blaž IVANC, Rik TORFS (Ed.). *Religion and Law in Slovenia*. Alpen aan den Rijn - The Netherlands: Kluwer Law International BV, 2015, 103.

<sup>3</sup> See Zdenko ROTAR, 'The Position of Believers as Second-Class Citizens in Socialist Countries: the Case of Yugoslavia'. *Occasional Papers on Religion in Eastern Europe* Vol. 9: Iss. 3 (1989), Article 2: 1–17. Available at: <http://digitalcommons.georgefox.edu/ree/vol9/iss3/2>.

<sup>4</sup> See the Decision of the Constitutional Court in the Majhen case No. U-I-344/94 (dated 1. 6. 1995) (Official Gazette RS, No. 41/95 and OdlUS IV, 54). In this decision the Court pointed out the

A small amount of internal church regulations in the area of labour law in Slovenia began to grow and the state rules of general labour law – that are still dominant – began to supplement on the basis of a new democratic Constitution (1991) and under the influence of the International Human Rights Instruments and of the European Union Law<sup>5</sup>.

Thus, the topic of ensuring religious freedom at working place in Slovenia represented a new challenge that in the first place called for new legal instruments in the particular area.

#### a) **Key instruments or sources of law on religious freedom at work**

The Constitution of the Republic of Slovenia (1991; hereinafter: the Constitution RS) protects the freedom of belief and freedom of religion (Article 41 Constitution RS) together with the right to conscientious objection (Article 46 Constitution RS). Churches and other religious communities enjoy equal protection of their autonomy and are separated from the state (Article 7 Constitution RS).

The Constitution RS also protects the security of employment in the provision of the Article 66 that reads: “The state shall create opportunities for employment and work, and shall ensure the protection of both by law.” In addition, the right to strike is also protected: “(1) Employees have the right to strike. (2) Where required by the public interest, the right to strike may be restricted by law, with due consideration given to the type and nature of activity involved” (Article 77 Constitution RS).

To foreign citizens that are employed in Slovenia and to members of their families the Constitution gives protection by calling for legislation that regulates their special rights (Article 79 Constitution RS).

A general protection of equality is enshrined in the Article 14 Constitution RS that reads:

“(1) In Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. (2) All are equal before the law.”

The Constitution provides that human rights and fundamental freedoms should be exercised directly on its basis, whereas the manner in which they are exercised may be regulated by law whenever the Constitution so provides or where this is

discriminatory and undemocratic nature of the institute of moral and political suitability that served as one of the required conditions to obtain a working place, especially in the public sector.

<sup>5</sup> See LOVRO ŠTURM, *State and Church in Slovenia*, In: Gerhard ROBBERS (ed.) *State and Church in the European Union* (Baden-Baden: Second Edition, Nomos 2005), 485.

necessary due to the particular nature of an individual right or freedom (Article 15 Constitution RS). They are limited only by the rights of others and in such cases as are provided by the Constitution itself. The Constitution gives judicial protection to human rights and fundamental freedoms, and guarantees the right to obtain redress for their violation. It also provides that no human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that the Constitution does not recognise that right or freedom or recognises it to a lesser extent (Article 15 Constitution RS). The right to religious freedom is one of constitutional rights that may not be temporary suspended or restricted (Article 16 Constitution RS).

In addition, the International Agreement between the Republic of Slovenia and the Holy See on Legal Issues provides that the Catholic Church has the authority to nominate and employ people in accordance with the provisions of canon law (Article 5)<sup>6</sup>.

The most important statutory instruments dealing with the protection of religious freedom at work are the following bills:

- 1.—The Religious Freedom Act (hereinafter: the RF Act)
- 2.—The Employment Relationships Act (hereinafter: the ER Act)<sup>7</sup> and
- 3.—The Equal Treatment Act (hereinafter: the ET Act)<sup>8</sup>.

One of the basic principles of the ER Act is the assurance of equal treatment and prohibition of discrimination that is, *inter alia*, based on religion and belief of the individual (Article 6).

It should be stressed that the legislator anticipated a special circumstance that churches and other religious organizations appear as employers with an ethos based on religion or belief (see section III.b).

## b) **Protected manifestations of religious beliefs**

The statutory law in the area of labour law does not contain specific provisions on religious symbols, garment, specific food requirements, religious holidays etc. The ER Act is focused on the prohibition of discrimination, whereas the religious conviction is regarded as unfounded reasons for ordinary cancellation of an employment contract (Article 90 ER Act). In principle, a discrimination of job seekers or workers during their employment relationship on the basis of their belief is not tolerable.

<sup>6</sup> See also Blaž IVANC, 'Concordatos entre la República de Eslovenia y la Santa Sede: de un modelo negativo a otro positivo de separación entre el Estado y la Iglesia'. *Rev. gen. derecho canón. derecho ecles. Estado* 21 (2009):1–36.

<sup>7</sup> See Official Gazette RS, No. 21/13 and 78/13 – corr.

<sup>8</sup> See the ET Act, Official Gazette RS, No. 93/07.

### c) **Rationale of the approach**

With the exception of the prohibition of discrimination, Slovenia did not more closely determine its legislative policy in respect of a greater accommodation of religious freedom at the working place.

### d) **Effects of the ECHR Jurisprudence**

The case-law of the ECHR mostly influenced the jurisprudence of the Constitutional Court of the Republic of Slovenia, especially its Decision on the Religious Freedom Act<sup>9</sup>. However, in the jurisprudence of ordinary courts there are, at the moment, no known cases, for which one may claim that they were influenced by the case-law of the ECHR.

## II. **RELIGIOUS MINISTERS AND LABOUR LAW**

### a) **Definition of a religious minister**

The RF Act defines the legal position of a religious employee in the provision of Article 7 para. 2. Different than an ordinary church employee, a religious employee has to meet three basic conditions. First, he or she must be a member of a registered church or other religious community. Second, he or she must be dedicated to his/her religious community and exclusively execute the religious-ritual, religious-charitable, religious-educational or religious-organizational activities. Third, he or she has to act in accordance with the order, regulations, required qualifications and powers of the supreme authority of his/her church or other religious community.

### b) **Labour status of religious ministers when working for their respective denominations**

In cases, in which religious ministers' work for their church or religious community, they have the legal status of a religious employee in the sense of Article 7 para. 2 RF Act.

The ER Act defines the (ordinary) employment relationships in the provision of Article 4, which reads:

“(1) An employment relationship is a relationship between a worker and an employer whereby the worker integrates voluntarily in the employer's organised working process and in which he, in return for remuneration, continuously carries out work in person according to the instructions and under the supervision of the employer.

<sup>9</sup> See the Decision of the Constitutional Court on the Religious Freedom Act No. U-I-92/07 (dated 15. 4. 2010) (Official Gazette RS, No. 46/2010 and OdlUS XIX, 4).

(2) Each of the contracting parties in an employment relationship shall exercise the agreed and prescribed rights and obligations.”

A (working) relationship between a church or a religious community and between a religious employee lacks several elements that are characteristic for the (ordinary) labour relationships.

A religious workers relationship with a church or a religious community does not commence with concluding the employment contract as provided in Article 11 ER Act.

Quite a number of elements that are characteristic for the ordinary labour relationship, are missing in the framework of the relationship with a religious worker, per instance, there is no obligation of the “employer” to ensure the religious worker appropriate remuneration according to the Article 44 ER Act.

Since mutual obligations are less tight and marked with other specific requirements set out by the church internal and autonomous law, the religious employers’ responsibility for a religious worker is less extensive than the responsibility for an ordinary worker<sup>10</sup>.

According to the state social security and health care law, it is mandatory that a religious worker is included into:

- the obligatory social security insurance,
- the obligatory health security insurance and
- the obligatory pension and disability security insurance.

The Pension and Disability Insurance Act in the Article 19 para. 3 provides that individuals that in Slovenia execute religious service as religious ministers are included in the mandatory pension and disability assurance in accordance with the statute on religious freedom (the RF Act)<sup>11</sup>. A mandatory health insurance for a religious minister has to be concluded on the basis of the Article 15 first paragraph point 5 of the Health Care and Health Insurance Act that relates to persons that conduct their economical or other professional activities in Slovenia self-dependent as their mail or only profession.

However, there is a possibility – although in practice seldom used – that a church or a religious community fully employs a religious minister, which to a great extent modifies his/her legal status into an ordinary employee. If a religious minister has a legal status of an ordinary employee, he or she has a right to a mandatory health insurance on the basis of Article 15 para. 1 point 1 of the Health Care and Health Insurance

<sup>10</sup> See Borut KOŠIR & Andrej NAGLIČ, ‘Odgovornost katoliške Cerkve za dejanja duhovnikov in redovnikov’. *Bogoslovni vestnik* 70 no. 3 (2010): 341–351.

<sup>11</sup> See the Pension and Disability Insurance Act (Zakon o pokojninskem in invalidskem zavarovanju; Official Gazette RS, no. 96/12, 39/13, 99/13 – ZSVarPre-C, 101/13 – ZIPRS1415, 44/14 – ORZ-PIZ206, 85/14 – ZUJF-B in 95/14 – ZUJF-C).

Act (ordinary workers' status) and to a mandatory pension and disability insurance on the basis of Article 11 para. 1 of the Pension and Disability Insurance Act.

Because religious workers are entitled to the status of insured persons and thereby included in the compulsory social security insurance, they are, on the basis of the Social Security Contributions Act, obliged to pay in contributions for mandatory pension and social security insurance (Article 8), mandatory health insurance (Article 11) and other social security insurances.

**c) Labour status of religious ministers when working in other institutions**

In principle, religious ministers may also work – in the broadest meaning of the word “work” – in other institutions, whereas they may work as:

- 1) Ordinary employees or
- 2) Work on the basis of a civil law contract or
- 3) They may provide voluntary work.

Important differences exist in respect of public or private nature of the work providing institutions and even concerning their mission.

*Prisons and hospitals*

According to the 2010 Decision of the Constitutional Court on the Religious Freedom Act (see Point 147 of the Reasoning)<sup>12</sup>, the religious ministers may not be employed by prisons and public hospitals. They may, however, provide the religious assistance in these public institutions and are entitled to appropriate remuneration according to the civil law provisions (honorarium without working relationship).

*Military forces and the Police*

Quite different was the Court's decision regarding the provision of the RF Act that enabled a full employment for religious ministers as civil servants (army chaplains). The Court stressed the different frequency and intensity of specific circumstances in the Army and in the Police (requiring religious spiritual care) makes a sound reason for the different determination of the extent of the care that is provided by the state<sup>13</sup>.

For other public employers there is no formal restriction to employ religious ministers, if they are not engaged in religious activities. Religious ministers cannot be employed in public grammar/secondary schools (as there is no religious instruction), but can work at private (church) grammar/secondary schools. Only the University of Ljubljana as a public and independent university provides for theology studies and

<sup>12</sup> See the Decision of the Constitutional Court on the Religious Freedom Act No. U-I-92/07 (dated 15. 4. 2010) (Official Gazette RS, No. 46/2010 and OdlUS XIX, 4).

<sup>13</sup> *Ibidem*, see Point 175 of the Reasoning.

therefore employs a number of priests as university professors. In principle, there are no obstacles for religious ministers to work at private employers. In the case they have entered into the employment relationship by concluding a labour contract, they cannot have a status of a religious worker on the basis of the RF Act.

The RF Act introduced the right to targeted state financial support for the payment of contributions of an insured person for the social security of employees of registered churches and other religious communities. The purpose of the state support is to cover the social security contributions for the compulsory pension and disability insurance (contribution of the insured person) and for the compulsory health insurance (contribution of the insured person). The scope of the social security contributions has to be calculated at a rate of at least 60% of average salary for the penultimate month preceding the month when the insurance basis was established. On the basis of Article 27 para. 2 RF Act priests and monks are entitled to the targeted state financial support, whereas a priest must have at least secondary education and a monk (a nun) must have taken the vows of poverty, celibate and obedience. The statute gives this right to other religious employees only in the case they have an employment contract concluded with religious organization<sup>14</sup>.

#### d) **Equal treatment**

As far as the state labour law is concerned, religious ministers of all denominations are entitled to the same legal status if they meet the criteria of the RF Act.

#### e) **Case-law**

In one case the civil court decided that the Church – acting as “employer” – bears the civil responsibility for acts of a deceased priest that was found guilty of child abuse.

### III. **AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS**

#### a) **Autonomy of churches**

The autonomy of churches and other religious communities is in the first place ensured by the provision of Article 7 Constitution RS. After declaring that – on the basis of the separation principle – churches and other religious communities shall act separately from the state, the RF Act ensures their freedom of organization and the freedom to pursue their activities. It specifically prohibits the state to interfere with organization and activities of religious organizations except in cases laid down by

<sup>14</sup> See Blaž IVANČ, Rik TORFS (Ed.). *Religion and Law in Slovenia*. Alpen aan den Rijn - The Netherlands: Kluwer Law International BV, 2015, 106–7.

the law (Article 4 para. 1 RF Act). In the second paragraph of Article 4 RF Act the legislator first provided that Churches and other religious communities have equal rights and obligations. They are independent and autonomous in their organization. The RF Act obliges the state to fully respect this principle in mutual relations with religious organizations and to co-operate with them in the advancement of the human person and the common good. On the one hand, the statute guarantees the freedom of activities of religious organizations regardless of the fact whether they are registered or non-registered (Article 6 RF Act). On the other hand, the statute demands that the activities of churches and other religious communities have to be in accordance with the legal order of the Republic of Slovenia, known to the public and may not contradict the morals and public order. The statute leaves to the religious organization itself to determine the method of informing the public about its activities on the basis of its autonomous rules (Article 6 para. 2 RF Act).

The freedom of activities of churches and other religious communities, which are – in principle – legal persons governed by private law, is more closely regulated by the Article 9 RF Act that reads: Churches and other religious communities shall be organized freely and shall decide autonomously particularly about:

Formation, composition, competences and operation of their authorities;

Internal organization;

Appointment and competences of their priests of both genders... and their other religious Employees;

Rights and obligations of their members of both genders..., related to the exercise of religion, provided that in doing so they do not interfere with their religious freedom;

Association with or participation in interconfessional forms of organizing with the head office in the Republic of Slovenia or abroad.”

A major part of legal regulation of working conditions and status for religious worker in Slovenia is clearly within a Church's or a religious organization's own sphere of autonomy to make appropriate internal legal regulations.

## b) Exemptions

Having in mind a historical experience with systematic discrimination of believers during Slovenia's pre-independence era, it is important that the RF Act prohibited direct or indirect discrimination on the basis of religious belief, expression or exercise of such belief (Article 3 para. 2 RF Act). However, the statute then explicitly provides that “a difference in treatment on the basis of religious belief in employment and work of religious and other employees of churches and other religious communities shall not constitute discrimination, if due to the nature of a professional activity in churches and other religious communities or due to the context in which it is carried out, the religious belief constitutes a major legitimate and justifiable professional

requirement in respect of the ethics of churches and other religious communities” (Article 3 para. 3 RF Act).

Similarly, the 2013 ER Act tolerates differential treatment, which is based on one’s personal circumstance such as religion or belief. In the case, in which a differential treatment constitutes an essential and decisive condition for work, when it is proportionate and justified by a legitimate aim, such a differential treatment does not constitute a violation (Article 6 section 5 ER Act).

Also under the ET Act, a different treatment does not constitute a prohibited discrimination, if by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is appropriate and necessary (see Article 2.a para. 2 the ET Act).

We may conclude that Slovene labour law to some extent tolerates different treatment. When churches or religious communities appear as employers, this very fact may expose their ordinary employees to a legally tolerable different treatment, which is albeit provided by the above mentioned statutory provisions.

### c) **Effects of the EU Law**

The Slovene National Assembly in 2007 supplemented the ET Act in order to harmonize the bill with the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, which in Article 4 provided for important exceptions that were not part of the Slovene law<sup>15</sup>.

<sup>15</sup> The Article 4 on occupational requirements of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation provided: «1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos. This difference of treatment shall be implemented taking account of Member States’ constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

## d) Case-law

At the moment, there is no relevant case-law in this area.

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### CASE-LAW

#### Decisions of the Constitutional Court

- Decision of the Constitutional Court in the Majhen case No. U-I-344/94 (dated 1. 6. 1995) (Official Gazette RS, No. 41/95 and OdlUS IV, 54)
- Opinion on the Agreement between the Republic of Slovenia and the Holy See No. Rm-1/02 (dated 19 November 2003) (Official Gazette RS, No. 118/03 and OdlUS XII, 89)

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Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos».

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# LAW AND RELIGION IN THE WORKPLACE IN SPANISH LEGAL SYSTEM

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As it usually happens with other topics that are placed within the wide framework of State-Church relations, with regards to the freedom of religion in the context of labour relations it is necessary to take into account the historical background of the legal system analyzed. In the Spanish case, this background can be summarized by noting that until the last quarter of the 20<sup>th</sup> Century, Spain had a strong Catholic confessional character, which disappeared as a result of the 1978 Constitution. The Catholic uniformity that, from a sociological viewpoint, persisted among Spaniards at the beginning of the constitutional period slowly evolved towards greater religious diversity. This diversity increased in the last years of the 20<sup>th</sup> Century and the first years of this one as a result of immigration.

## I. RELIGIOUS DIVERSITY IN THE LABOUR CONTEXT

Constitutional rights in the Spanish legal system play a role in any social area in which legal relations are born or created. As the Spanish Constitutional Court has repeated from the very beginning of its interpretative activity, constitutional rights recognized and protected by the Spanish 1978 Constitution do not only affect the relations between the public authorities and citizens, but their respect is also mandatory in private relations, as it is the case of relations between a worker and his or her employer.

The Spanish 1978 Constitution guarantees the fundamental right to religious freedom, to peoples and communities, ‘without any other limitation, in their manifestations, than that necessary for the keeping of public order protected by the law’ (Art.16.1). The Spanish Constitution does not list those possible manifestations of religious freedom. Nor it does detail their content at all. However, it does provide for important interpretative criteria, since in order to interpret constitutional rights and freedoms it makes a reference to the ‘Universal Declaration on Human Rights and the treaties and agreements on those very issues ratified by Spain’ (Art.10.2). Addi-

tionally, just after the enactment of the Constitution, the Organic Law of Religious Freedom of July 1980 was passed. This law listed in detail the different aspects covered by the right to religious freedom. However, this important rule did not contain specific provisions for the cases in which those manifestations or aspects of the right were expressed in a working environment.

It can be said that, in general terms, the exercise of the right to religious freedom in Spain has not given rise to significant judicial conflicts. This is so especially in the labour arena. Also speaking in general terms, conflicts can be deemed to have been scarce until now: only very few rulings of the Spanish Supreme Court and the Spanish Constitutional Court focus on issues related to this aspect of the legal system.

The labour legislation passed by the State does not contain rules aimed at solving possible clashes between the duties of the worker within the enterprise and his or her right to religious freedom. At the general level, the most important provision is that contained in Art. 4.2 of the Statute of Workers, which forbids that workers are 'discriminated directly or indirectly for employment, or once they have been employed, on grounds of (...) of religion or beliefs'. This prohibition becomes enforceable thanks to the sanction established in Art.17.1 of the same law, according to which 'will be considered null and without effects the rules of regulations, collective agreements, individual pacts and decisions by the entrepreneur which give rise with regards to employment, payments, working time and other working conditions, to situations of direct or indirect discrimination on the grounds of (...) religion or beliefs'. The phrasing of both articles was modified by virtue of the Law 62/2003 of 30 December, which implemented into the internal legal system the Directive 2000/78/CE, of 27 November, on the general framework for equality treatment in work and occupation.

But the conflicts with regards to religious aspects can have other sources different from discriminations on religious grounds. In a way, the right to non-discrimination is just a *minimum* with regards to constitutional rights. Certain conflicts may arise, also and specially, if that *minimum* is overflowed, which is usually more related to equality than to freedom. It is obvious that those conflicts might arise more often in cases the worker has a certain religious affiliation than in cases in which he is indifferent towards religiosity. But it should also be kept in mind that also the enterprise or organization for which the worker performs her or his services can have a religious affiliation. In the case of enterprises which are neutral *vis-à-vis* religion the worker has expectations towards the organization which can range from the mere abstention to the active facilitation of fulfilment of his or her religious duties. In the case of enterprises with a certain religious orientation, it can be said that it is the organization the one that expects certain behaviour from the worker, which can range from the total religious adhesion to the mere respect for the religious beliefs to which the organization adheres.

The great majority of enterprises do not have a religious orientation: they are neutral. And, in general, in Spain, it is not common that collective agreements about

labour relations or individual pacts in contracts refer to aspects related to the potential commitment by the enterprise to facilitate the fulfilment of the religious duties of the workers. In this way, religious freedom has in the working arena solemnly guaranteed –as has been already suggested elsewhere- its negative dimension: no one can be discriminated on religious grounds. As a pre-requisite of that non-discrimination there is the prohibition of trying to find out about the religious beliefs of the worker, which is directly guaranteed by the Constitution in Art.16.2 for all the citizens.

The right to not to participate in religious activities organized by the company, or those which in a way or another the company promotes or participates of, is also part of that negative dimension of the right to religious freedom. The Constitutional Court has issued protective decisions in constitutional complaints brought about by two complainants in relatively similar situations. In the ruling 177/1996 a member of the military refused participating in a ceremony of his unit in which tribute was paid to Virgin Mary. In the ruling 101/2004 the constitutional complaint was filled by a policeman who refused to participate in a procession of a brotherhood in which the Spanish Police had been nominated honorary member as '*hermano mayor*' (major brother). In both cases the peculiarity lies in the fact that the role of employer was performed by state organization (the army and the national police), on which there is a duty of religious neutrality, which reinforced the ground of the decisions when accepting the complaints.

However, we cannot find among the rulings issued by the Supreme or the Constitutional courts decisions protecting the exercise by the worker of the aspects integrated in his rights to religious freedom, such as the following the religious feasts, attendance to certain acts of worship in different moments of the week, practice of rituals and other religious rules that can have implications in terms of clothing, diet, etc. In the event of a clash between the exercise of any of those rights or others related to the right of religious freedom and the right of the entrepreneur to organize the activity of the enterprise in the way he or she finds more adequate for the productive ends seek, the scarce rulings existing generally have given primacy to this later right, on the grounds that the worker, in signing his or her contract, was aware of the conditions in which the activity would be carried out.

Additionally, it is not admitted that the change in the religious beliefs of the worker can have any implications in the way to fulfil religious duties. The Constitutional Court, in its ruling 19/1985 of 13 February, approached the case of a worker who, after joining her company in 1971, was baptized in 1982 in the Adventist Church of the Seventh Day, whose practices include the duty to abstain from working from the dawn on Friday to the dawn on Saturday. After asking to the enterprise to accommodate her weekly break to those conditions, petition that was refused, the worker stopped attending work on Saturdays. Such behaviour gave rise to her dismissal, which the labour courts considered to be legal. The Spanish Constitutional Court refused her constitutional complaint on the grounds that 'the underlying idea to the

whole argumentation of the complainant is that a *de facto* change (in her ideas or religious beliefs), as it is a dimension of a freedom guaranteed by the Constitution, provokes the modification of the contracts she subscribed, whose fulfilment can only be required to the extent that it is not incompatible with the duties imposed by her new religious affiliation, thus taking (doubtlessly, in good faith and probably motivated by her deep religiosity) the principle of subjection of all to the Constitution (Art.9.1) to an unacceptable interpretation, as it would be contrary to other constitutionally protected principles, such as legal certainty, which are also guaranteed by the Constitution (Art.9.3)” (1<sup>st</sup> Legal Fundament of the ruling, hereinafter “LF”).

In this very issue of the weekly break, the Spanish Constitutional Court has stated in this ruling the doctrine that even if the initial use of Sunday for the weekly break has an evident Christian origin, currently, ‘weekly break is a secular and labour institution, which usually takes place on Sunday just because this day of the week is the traditional one’ (LF 4<sup>th</sup>). As a proof of such secularization it is indicated that labour legislation permits, following a pact included in the collective agreement or individual work contract, that weekly break takes place other days of the week (LF 4<sup>th</sup>).

Spanish labour legislation, in addition to a weekly break of one day and a half, foresees the existence of holidays. More specifically, the Statute of Workers states in Art.37.2 that:

‘2. Working holidays, which will be paid and non-recoverable, will never be more than fourteen per year, of which two will be local ones. In any case, it will be respected as nation-wide holidays the Nativity of the Lord, New Year, 1<sup>st</sup> May as workers day and 12<sup>th</sup> October as Spanish National Day. Respecting the former, the Government will be able to establish Monday for all nation-wide holidays taking place during week-time, being in any case transferred to Monday after the weekly work rest all the holidays which should have been on Sunday.

Autonomous Communities, within the yearly limit of fourteen days of holidays, will be allowed to designate those days which correspond to their tradition, substituting in order to do so those national ones which are established in regulations and, in any case, those which have been transferred to Monday. Likewise, they will be able to transfer these days to Monday, in the same vein as in the former paragraph. If some Autonomous Community could not establish one of its traditional holidays because of lack of sufficient national days on Sunday, it will be able to add in that year one more holiday, with a recoverable character, up to a maximum of fourteen’.

This provision complied with the Agreement on Legal Affairs subscribed with the Holy See in 1979, whose Art.III states that ‘the State will recognize as holidays all Sundays. By way of agreement it will be determined which other religious feasts will be recognized as holidays’.

This agreement was applied in the Royal Decree 2001/1983 of 28<sup>th</sup> July, which gave indications for the yearly creation of the work calendar by the Government. This is not in fact an unproblematic question, as in addition to power of Autonomous

Communities to set holidays we must add the local ones. The holidays set ‘in order to comply with Art.III of the Agreement with the Holy See of 3<sup>rd</sup> January 1979’, according to Art.45 of the Royal Decree (in the phrasing given to it after the amendment 1346/1989 of 13<sup>th</sup> November) are divided in two groups: group ‘c’ (Assumption of the Virgin, All Saints, Immaculate Conception and Holly Friday) and group ‘d’ (Holly Thursday, Epiphany and Saint Joseph or Santiago Apostle). Those in group ‘c’ cannot be replaced and take place in the whole territory of the Spanish State. Those in group ‘d’, however, can be replaced by other ones of regional scope, according to the traditions of each Autonomous Community.

Regarding religious minorities, the ruling of the Constitutional Court 19/1985, of 13<sup>th</sup> February established the criteria to be followed in the Agreements reached, in 1992, by the Spanish State and entities representing Protestants, Jewish and Muslims (approved by laws 24, 25 and 26, November 10, 1992). In Article 12.1 of the Agreement with Federation of Evangelical Religious Entities of Spain it is stated that ‘Weekly break, for all the members of the Union of Adventist of the Seventh Day Churches and other Evangelical Churches belonging to the Federation of Religious Evangelical Entities of Spain, whose mandatory day is Saturday, can correspond after agreement between the parties Friday afternoon and the whole day of Saturday, substituting the day established as a general rule by Art.37.1 of the Statute of Workers’. Obviously, the reference to the ‘agreement between the parties’ is extremely important and implies *de facto* giving the entrepreneur the final choice on the modification of the days assigned to the weekly break. A similar meaning can be interpreted in the provision stating ‘unless there is justified cause impeding it’ which is contained in paragraph 3 of Art.12, which suggests that in the context to access employment in the Public Administration, an alternative day will have to be fixed for Evangelical Churches, whose religious day is from dawn on Friday to dawn on Saturday.

In the agreements with the other religious entities which group a high share of the Muslims (Islamic Commission of Spain) and Jewish (Jewish Communities Federation) living in Spain, similar provisions can be found. Additionally, the specific feasts of these denominations are listed in number 2 of Art.12 of each agreement, in which the possibility that these days replace others established as the general rule by the Statute of Workers is foreseen, even if in this case, again, previous agreement between the employer and the Jewish and Muslim workers is a requirement<sup>1</sup>.

<sup>1</sup> The Agreement with the Jewish Federation states: ‘days which are listed below, which according to the Jewish Law and tradition have the character of religious feasts, can replace those established as a general rule by Art.37.2 of the Labour Statute, with the same character of paid non-recoverable holidays, if requested by the individuals listed in the previous number, and in the terms therein foreseen.

— New Year (Rosh Hashaná), 1<sup>st</sup> and 2<sup>nd</sup> days.

— Expiation Day (Yon Kippur).

— Succoth, 1<sup>st</sup>, 2<sup>nd</sup>, 7<sup>th</sup>, 8<sup>th</sup> days.

In general, Spanish courts have followed the agreements of the work contract, without arguments that the different aspects of the fundamental right to religious freedom should go beyond contracts having been accepted. Currently, the doctrine of reasonable accommodation which, originally created by Canadian case-law, was timidly adopted by some rulings of the European Court of Human Rights (see *Eweida and other v. United Kingdom*, [n. 48420/10, 59842/10, 51671/10 and 36516/10] of 15<sup>th</sup> January 2013) cannot be said to have been echoed by the Spanish Constitutional and Supreme courts. The reason for this might be the fact that the Spanish legal system has a strong regulatory character, and its norms are usually rules rather than principles. Judicial organs, as a consequence, understand their own function as one of ‘application of law to the concrete case’, with a very narrow margin for the search for fair solutions beyond the frame of the rules. In this scenario, an adjusted balancing of interests at stake according to some criteria of fairness is rather uncommon, differently from other legal systems in which judges and courts are entrusted a role closer to the creation of fair solutions, unlike Spanish courts whose task mainly consists in looking for adequate legal criteria.

## II. MINISTERS OF RELIGION

A specific type of problems are those put forward by working relations in which the role of worker (or alike actor) is carried out by a minister of religion, especially if that function is typical of his or her role as such, because in principle if the minister carries out a work unrelated to her or his function, as any other citizen would, he or she is not entitled to a treatment different from that foreseen for the rest of cases by the labour legislation.

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— Pesai, 1<sup>st</sup>, 2<sup>nd</sup>, 7<sup>th</sup> and 8<sup>th</sup> days.

— Shavout, 1<sup>st</sup> and 2<sup>nd</sup> days’.

In addition, the Agreement with the Islamic Commission of Spain states: ‘the days and commemorations listed below, which according to the Muslim Law have the character of religious feasts, can replace, after an agreement between the parties, those established with a general character by the Labour State in Art.37.2, with the same character of paid non-recoverable holidays, at the request of the members of the Islamic Communities belonging to the Islamic Community of Spain.

— AL HIYRA, corresponding with 1st of Muharram, first day of Islamic New Year.

— ACHURA, tenth day of Muharram.

— IDU AL-MAULID, corresponding to 12th of Rabiul Awwal, nativity of the Prophet.

— AL ISRA WA AL-MI’RAY, corresponding to 27th of Rayab, date of the Night of Determining and the Prophet Ascension.

— IDU AL-FITR, corresponding to 1st, 2nd and 3rd days of Shawwal, which celebrates the culmination of the Ramadan fast.

— IDU AL-ADHA, corresponding to days 10th, 11th and 12th of Du Al-Hyyah and celebrates the sacrifice carried out by Prophet Abraham’.

However, before entering into other distinctions that can also be adequate, it is important to provide for a definition, at least a general, of what is a minister of religion in Spanish law. It must be taken into account that this category has a doctrinal rather than legal character because a definition of this concept is not provided by the Spanish legal system, even if the very concept is used sometimes by certain rules.

Two reasons explain this lack of a proper definition, one of them being practical and the other one being more theoretical in nature. In the practical side, the extraordinary diversity among different religious denominations is mirrored by their ministers. There are denominations in which the liturgy and worship have a core role, while in others the doctrinal dimension is more relevant, and yet some others understand themselves just as a means of spiritual or moral improvement of its members, without the later having to adhere to a thoroughly specified system of truths. As a correlation, the minister can be considered as a priest, as a master of the doctrine or as a guide or companion in the personal improvement of the members of such religions. But he or she can be all the former things at the same time, or none of them. The role as minister of religion can be obtained in different ways, specifics of the different denominations. This may take place through a formal procedure taking place in specific academic institutions, but in some denominations this condition is obtained without a regulated system of training and instead in a more charismatic or democratic way, in which personal attitude and the consensus in the community interact in the selection and designation of ministers.

In the theoretical side, the most relevant difficulty is the one rooted in the principle of religious neutrality which implies the non-intervention of the State in substantively religious aspects, as doubtlessly is the determination of who is a minister of religion. Because of it, the State is compelled to give to itself a number of rules that assign certain consequences to the fact that an individual is a minister of religion. These consequences are different in nature, ranging from residence permit in the territory of the State, social security issues, marriage, etc. But at the same time, the State is precluded from defining who will be the object of those rules: only religious denominations are allowed to define who their ministers are and which requirements should they comply with.

Traditionally, Spanish law has been familiarized with the categories of canon law, which state the condition and status of Catholic clerks, as well as that of members of religious houses. Unlike the different categories of clerks (deacons, presbyters and members religious houses) the later are not ministers of religions, but like them they are still a special type of members of the Church, different from lay members of the denomination, whose status can sometimes have an impact on secular law. In the Agreements between the Holy See and the Spanish State of 3<sup>rd</sup> January 1979 there is not contained a definition of Catholic ministers of religion, but there is a tacit remission to the categories of canon law. On the other hand, some concepts of canon law have been used since the 19<sup>th</sup> Century by the most important rules of civil, criminal or

procedural law, without clarification of what is meant by chaplain, confessor, priest, parish priest, ordinary, etc.

Oppositely, the 1992 Agreements did take into consideration the need to provide for definitions. In the Agreement with the Jewish Communities Federation, in Art.3.1, it is said: 'For all legal matters, Worship Ministers of the Communities belonging to the Federation of Israelite Communities of Spain will be those individuals that, having the title of Rabbi, fulfil their religious functions in a stable and permanent manner and can show the fulfilment of these requirements, through certification issues by the Community to which they belong, with the stamp of the FCI. This certification by the FCI can be incorporated into the Registry of Religious Entities'. In similar terms, *mutatis mutandis*, the same is expressed in the respective Arts.3.1 of the other two agreements (with Protestants and Muslims).

The foundational elements for the conceptualization of ministers of religion in the 1992 Agreements are the stable, non-sporadic or occasional, character of the fulfilment of the functions as minister and, from a formal viewpoint, the existence of certification of the condition of minister issued by the denomination. With the second element, the neutrality of the State in this field is guaranteed, as well as its complementary duty of non-intervention is an issue which should be regulated exclusively by the denominations.

These two elements, the stable character of the condition of minister and the certification, even if they are not contained in any unilateral Spanish general norm, must be present for the State to recognize that an individual is a minister of any denomination with which no agreement has been subscribed, regardless whether or not it is inscribed in the Registry of Religious Entities.

The ministers of religion can perform their functions within the very denominations, or in entities created or promoted by such denominations, as it is the case for those in chaplaincies of State health, military and prison institutions.

The traditional position in the case law of the Supreme Court for the cases in which the Catholic ministers perform their duties in the very ecclesial ambit has been the denial that in these cases the relations between the ministers –usually a presbyter– and the ecclesial entity in which he acts as a minister has a labour character. These relations are not deemed to be equivalent to those regulated by a work contract.

The same position has been followed when analyzing the nature of the relation between non-Catholic ministers of religion with their own religious denominations. Especially meaningful is the decision of the Supreme Court of 14<sup>th</sup> May 2001. The relevance of this ruling lies in that it approaches the issue from a general viewpoint, as the case at stake was about an administrative appeal against the Royal Decree 369/1999 of 5<sup>th</sup> May which regulated the inclusion of ministers of the Federation of Evangelic Religious Entities of Spain in the general regime of social security. The representatives of such Federation disagreed with the fact that the contested Royal Decree defined the relation between the ministers and the Churches included in the

Federation as a non-contractual one, because they considered that, in considering it impossible to create a work contract between the minister and the religious entity, the rule was assuming that ministers must relate in a specific way with their denominations, which contravened the principle of religious autonomy according to which each denomination sets that relation in the way they prefer. The answer given by the Supreme Court was neither convincing nor solid. The Supreme Court gave a tautological response in stating that the relation of a minister of religion and his or her denomination cannot be of a labour nature since... it cannot be set as of that nature: 'the capacity recognized by the Organic Law of Religious Freedom to religious denominations to determine the regulation of their staff does not relieve them from subjection to the requirements established in the legal system to opt for one or the other type of relation, depending of their legal nature'.

'The legal relation established between the ministers of religion and the diverse churches and denominations cannot be set, as long as it is limited to religious and worship assistance and other inherent to their religious commitments, as a labour one. Similar approach has been taken by the courts of justice, as acknowledge by the Constitutional Court on its ruling 63/1994, of 28<sup>th</sup> February 1994' (LF 3<sup>rd</sup>).

The ruling is scarcely solid not so much because of the argument of authority used, the ruling 63/1994 of the Spanish Constitutional Court, but because of the fact that such ruling does not assesses, despite what the Supreme Court said, any situation related to a minister of religion, but to a woman (nun) who was member of a religious house. The later is a different canon category, even if a certain, remote analogy could be established between the relation of a religious woman with her congregation and that of a minister with his church or denomination.

Better argument is provided in the ruling 128/2001 of the Constitutional Court in which a constitutional complaint by a church member of the Federation of Religious Evangelical Entities of Spain was denied, and in which the problem at stake was also the question whether the Administration violated religious autonomy in defining or not a relation as a labour one. The case was about potentially unlawful contributions to the social security (taxes) paid by that church with regards to a kitchen potter, as those contributions had been paid as if the kitchen potter was a minister, in which case the amount to pay is lower. In the words used by the ruling, 'it is said, in summary, that in qualifying as a labour one the relation between Miss Alejos Casado with the complaining entity, the right to organizational autonomy of the religious denomination is violated, as it corresponds only to the later the definition who are their minister of religion, having Miss Alejos Casado the status of authorized missionary' (LF 2). To this, the ruling replies by saying that 'the definition as a labour one of the activity of Miss Alejos Casado has been made without violating the autonomy recognized by Art.2.2 of the Organic Law 7/1980 of 5<sup>th</sup> July of Religious Freedom, according to which religious entities can choose and train their ministers, as it has been done after consideration of the work effectively carried out and only with regards to the type

of contribution to the Social Security which is of application. Finally, the fact that the State, in complying with the mandate of cooperation with the diverse religious denominations, establishes a specific type of contributions to the Social Security for ministers of religion and takes into account the work carried out in such regulation does not overflow the ambit of ordinary legality and lacks any impact over the alleged constitutional right' (LF 3). However, in this occasion, there is also some argumentative incoherence, as it is said that qualifying as one of labour such relation does not affect the organizative autonomy of religious entities to choose and train their ministers. But it happens that what is at stake is the potential weaken of the autonomy of the denomination implied by the fact that the relation with its ministers must be considered as a non labour one. The fact is that nothing should impede, at least at the level of principles, that a denomination considers that the work carried out by its ministers is not really a work by which they are paid as other employees when carrying out theirs. It is true that the feature of alienity can be blurred, but not to the point that it must be considered that there is not otherness between the minister and the denomination to which it belongs.

The autonomy of denominations with regards to staff working for them or for institutions depending on them is especially safeguarded by the Organic Law of Religious Freedom, which sets in Art. 6.1 as the only limit the respect for constitutional rights: 'The churches, denominations and religious communities inscribed shall have full autonomy and shall establish their own roles of organization, internal regime and staff regime. In such rules, as well as those which regulate the institutions they create for the prosecution of their ends, they will be able to include a clause of safeguard their religious identity and specific character, as well as the due respect for their beliefs, with respect of the rights and freedoms recognized by the Constitution and especially those of freedom, equality and non-discrimination'. It cannot be held, taking into account the literal wording of this rule, that religious denominations cannot set the relations with their own ministers as labour ones if they so wished, as such approach does not go against the constitutional rights that Art.6.1 tries to protect.

Additionally, and with regards to the protection of the right to non-discrimination, some years ago Rodríguez Blanco noted that the Directive 2000/78 of the Council of 27<sup>th</sup> November, aimed at the establishment of a general framework for equality of treatment and work, is also aimed at safeguarding such religious autonomy, and this is done by considering that the relations established by religious denominations with individuals fulfilling their functions within them have a labour character (which is precisely why the rule refers to them). This is so even if for the nature of the functions they perform or because of the especial characteristics of those very individuals, these are especial relations, to the point that different treatments based on those especial characteristics of the individuals or functions performed do not constitute discrimination. Obviously, the Directive admits that

the relations established by the ministers and the denominations when the former perform their functions within them can be considered as labour ones, as no distinction is made between the different individuals working within the denominations.

Regarding the fulfilling of services of ministers of religion outside the structures of their own denominations, as it has been suggested, if they carry out a professional task which is unrelated to the functions of their ministry, their personal religious condition do not interfere at all with their relations with the employer, from whom they must receive the same treatment as the rest of employees, any difference on treatment on those grounds being not allowed. When, on the contrary, their professional work consist, precisely, in the performance of the functions of their role, Spanish courts generally admit that such relation is of a labour character, without the specific nature of the functions performed being an obstacle.

### III. AUTONOMY OF RELIGIOUS DENOMINATIONS AND THE RIGHTS OF WORKERS

Above I already mentioned the last issue to be approached in this paper, which refers to the autonomy of religious denominations and the impact of such autonomy for the rights of the workers that work for such denominations or their dependent entities.

In Spanish Law, the right to autonomy of religious denominations is understood as a consequence of the right to religious freedom in its collective dimension, and also of the principle of non-establishment or neutrality which ensures the non-intervention of State public powers in the internal life of religious denominations. From this viewpoint, any attempt to give patterns to make homogenous the organization of religious denominations –as was the case in the pre-constitutional regime in which, with the exception of the Catholic Church, denominations had to organize as religious associations in order to have legal personality- goes against both that autonomy and the principle of non-establishment.

As it was transcribed above, Art.6 of the Organic Law of Religious Freedom cares also explicitly, when safeguarding the autonomy of confessions and when regulating staff issues, of safeguarding not only fundamental rights but also more extensively ‘the rights and freedoms recognized in the Constitution, and especially those of freedom, equality and non-discrimination’, so that this is not at all a field of law lacking anti-discrimination provisions.

Spanish courts have had to approach the question of the limits to religious autonomy and the prohibition of discriminatory practices quite often, in relation to the cessation or finalization of contracts of Catholic religion teachers in public schools. This litigation has been caused, fundamentally, by the fact that these teachers, on the one hand, are quite abundant in Spain (there at least some thousands of them) and on the other hand, because together with the academic qualification necessary to teach the subject, these teachers are required certain personal requisites consisting

in that their behaviour is not contrary to the religious doctrine they teach, as it is understood that such congruence between the doctrine taught and the personal life of the teacher is essential to correctly transmit the basic contents of the subject. The loss, according to the religious authority, of such aptitude, becomes the reason for the termination of the requested teaching services, and thus also of the labour relation. Such dismissals, which are neither frequent nor inexistent, have also the peculiarity that they are not executed by the religious authorities themselves, as these are not the ones that hire the teacher. Instead the employers are the public administrations with competences in education, which however are not empowered to choose the religion teachers as a consequence of the principle of non-establishment.

The system foreseen in the Agreement between the Spanish State and the Holy See in teaching and cultural issues establishes, in Art.III, a model of designation of religion teachers in public institutions consisting in that ‘the religious teaching will be carried out by persons which, for each school year, are designated by the academic authority among those proposed by the diocesan ordinary. With sufficient time in advance, the diocesan ordinary shall communicate the names of the teachers and people he considered qualified for such teaching’. The application of that provision implied, until the entry into force of the current regulation which foresees a hiring for indefinite time (Royal Decree 696/2007, of 1<sup>st</sup> June), that contracts of Catholic religion teachers had a yearly duration, which implied they were hired each academic year.

In the cases in which the religious authority considered that a certain teacher had lost, because of certain facts or behaviour, the personal qualities required, instead of terminating the contract it simply was not renewed, so that technically this was not a dismissal. The religious authority in that case was not expected to formally motivate the decision of not nominating the teacher again as his or her services were not requested anymore.

The ruling 38/2007 of 15<sup>th</sup> February of the Constitutional Court solved a question of unconstitutionality posed by the Supreme Court of Justice of the Canary Islands. Such ruling questioned the provisions of the Organic Law of General Regulation of the Educative System with regards to the model in force at the time for the appointment of teachers of religion, as well as Arts. III, VI, and VII of the Agreement on Teaching and Cultural Affairs. Despite the fact that the ruling declared the contested provisions to be constitutional, it marked a turning point in the treatment of this subject that had as a consequence even the regulatory change carried out some months later through the abovementioned Royal Decree 696/2007.

The Constitutional Court stated in the ruling, in the first place, that ‘The right to religious freedom and the principle of religious neutrality involve that the teaching of religion undertaken by the State in the framework of its duty of cooperation with religious denominations is carried out by persons considered by such denominations as qualified for that function, and with the dogmatic content decided by such de-

nominations. However, despite the duty to respect the freedom of the denominations to establish the contents of the religious subjects and to set the criteria according to which they establish the qualification necessary for the hiring of a person as a teacher of their doctrine, such freedom is not actually unlimited, neither are so the rights contained in Art.16 or any other provision of the Constitution, since the inexcusable requirements of indemnity of the constitutional order of values and principles safeguarded in the clause of constitutional public order must always be respected. As a consequence, neither the contested legal rules exclude the competence of State judicial organs nor such exclusion would be possible' (LF 7).

Such competence of State courts would imply, in the first place, making sure whether the proposal by the ecclesial authority 'is subject to criteria of a religious or moral character which determine the inadequacy of the person to give the religious teaching, criteria whose definition corresponds to the religious authorities as a result of the right of religious freedom and the duty of religious neutrality of the State, or if, on the contrary, it is based on other reasons different from the constitutional right to religious freedom and not covered by such right. Once guaranteed the strictly 'religious' motivation of the decision, the judicial organ shall balance the potential constitutional rights in clash, in order to determine which must be the modulation that the right of religious freedom exercised through teaching of religion in school centres might have upon the constitutional rights of workers in their work relation'. As a consequence, the decisions of ecclesial authorities not to propose for the next academic year certain teachers, according to the regulation in force at that time, are not outside the scope of judicial control, except for what refers to the strictly religious motivation of such decision and, in all cases, courts must balance the safeguarding of the collective right to religious freedom of the denomination and the protection of the constitutional rights of the teacher which might be affected by that decision. Such doctrine has been maintained by the Constitutional Court in subsequent rulings when deciding on constitutional complaints, and has had a strong influence on the case law of the Supreme Court and the lower courts, which facing the assessment of the yearly contract of religion teachers tended to consider these issues as ones of ordinary legality, without an impact on constitutional rights issues.

The Constitutional Court has not had the occasion to make a pronouncement on cases in which the ecclesial decision to terminate a work contract is taken within the very ecclesial structure which would act, therefore, as an employer. But it must be maintained that the doctrine contained in the ruling 38/2007, to which I just referred, *a fortiori*, would be applicable by courts eventually assessing such a type of termination. Courts in those cases would have to verify that the termination is grounded on reasons of a religious character and subsequently carry out a balance between the right to collective religious freedom of which the employer entity is a holder and the constitutional rights of the worker which might potentially be affected. To balance means not just to verify (although the role of court is limited to

this with regards to the existence of a religious motivation) that certain rights have been affected (it is difficult to think about the termination of a contract that does not affect the rights of the employee), but also to consider the potential damage for the right to religious freedom of the entity (in case the worker continued in her or his job) and that which the constitutional rights of the employee might suffer.

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# LAW AND RELIGION IN THE WORKPLACE – SWEDEN

LARS FRIEDNER

## RELIGIOUS FREEDOM AT WORK

In Sweden, religious freedom at work is not an issue of its own. Nevertheless, Sweden – of course – promotes religious freedom in general. The primary key source for this is the Form of Government<sup>1</sup>, which is one of the country's constitutional laws and among those the most important, although the Form of Government just states the relation between the individual and the public sphere. The Form of Government states that 'no one may by the public authorities be obliged to reveal his or her opinion of religion'. Further, 'no one may by the public authorities be obliged to join a religious community'<sup>2</sup>. As Sweden also adheres to the European Convention on Protection of the Human Rights and the Basic Freedoms, the Convention's provisions on religious freedom are, as well, valid in the country<sup>3</sup>. Contrary to the Form of Government, the provisions of the European Convention even cover relations outside the public sphere. As is well known, the Convention protects the right to religious freedom, including the freedom, alone or together with others, publicly or privately, confess a religion or a creed through divine services, education, traditions, and rites<sup>4</sup>.

Beside those two sources of the constitutional kind, the Swedish Discrimination Act (2008:567)<sup>5</sup> also aims at discrimination on religious grounds<sup>6</sup>. The Act is valid

<sup>1</sup> Sw. Regeringsformen.

<sup>2</sup> 2:2 Form of Government.

<sup>3</sup> Act (1994:1219) on the European Convention regarding Protection of the Human Rights and Basic Freedoms (Sw. lag om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna).

<sup>4</sup> Art. 9; however, the Convention as well give the states some possibilities to restrain the religious freedom, due to e.g. public safety.

<sup>5</sup> Sw. Diskrimineringslagen.

<sup>6</sup> 1:4.

for e.g. the working life<sup>7</sup> and is founded on common legislation for the European Union<sup>8</sup>. The Act forbids that anyone is treated worse than anyone else is treated, has been treated or should have been treated in a similar situation, if the discrimination is related to religion<sup>9</sup>. It also forbids practices which seem to be neutral but in fact may discriminate persons of a specific religion<sup>10</sup>.

'Religion' is not defined in the legal acts mentioned. The Swedish legal system, however, knows a definition of a religious community, which would probably be used, if the matter comes into question. This definition is stated in the Act on Religious Communities (1998:1593)<sup>11</sup>, which says that 'a religious community is a community for religious activities, in which is included the arranging of religious services'<sup>12</sup>. As is obvious, non-religious beliefs are not included in this definition. On the other hand, the preparatory works of the Discrimination Act presents as well e.g. agnosticism and atheism as religion<sup>13</sup>.

As follows from the provisions mentioned, the religious freedom in general is protected, and this is true as well in working life. Regarding working life specifically, there are no manifestations of religion that are – or are not – protected. A manifestation of religion may be out of protection only if it is a threat to e.g. public safety.

The Swedish position is, as mentioned, to a great extent founded in the international conventions which Sweden adheres. It is, though, difficult to point out a strict rationale for the position. Looking to the Swedish public debate however, the rationale would be a care for religious freedom.

The case-law of the European Court of Human Rights does not seem to have influenced the Swedish situation.

There are, however, a few Swedish law suits, where religious freedom interacts with working life. One such case concerned two ladies of Muslim origin, who worked as front desk clerks at a gym. They wore head-scarfs at work, and the owner of the gym found this an advantage, as the gym had many Muslim customers. The ladies worked for a probation period of some months but finished the job after that period, claiming that they had been discriminated. It was proved that some of their colleagues at the gym, during coffee-breaks, had made remarks to their religion. I.e. had one of them said, when eating a ham sandwich, that it was ham from 'a *halla* pig'. The Labour Court concluded that the ladies had not been discriminated<sup>14</sup>.

<sup>7</sup> 2:1.

<sup>8</sup> I.e. art. 13 European Union Treaty.

<sup>9</sup> 1:4 item 1 Act on Discrimination.

<sup>10</sup> 1:4 item 2.

<sup>11</sup> Sw. Lag om trossamfund.

<sup>12</sup> 2 §.

<sup>13</sup> Prop. 2008/08:95 p. 121.

<sup>14</sup> AD 2010:21.

Another case concerned a member of Jehova's Witnesses, who was unemployed and wanted to receive unemployment remuneration from the State. A provision for such remuneration is that the applicant is ready to accept an offer of employment from the authorities. In this case, the applicant was offered a position as salesman for a lottery company. He argued that it was against his religious conviction to offer lottery to the public, and that he thus had a reason for not accepting the job. His right to remuneration was denied, and the decision was upheld by the Administrative Court of Appeal<sup>15</sup>.

Yet another case is also about a member of Jehova's Witnesses, who was employed at a home for elderly. One of her tasks was to assist older people in their activities at the home but she denied to assist at what she regarded as heathen rites, i.e. traditional Midsummer Eve celebrations. She was dismissed and made claims to the Labour Court. But the court upheld the decision<sup>16</sup>.

A further case is described below.

## RELIGIOUS MINISTERS AND LABOUR LAW

The religious ministers do not have a special position in Swedish labour law. From a legal point of view, they are regarded as employed with the same rights and obligations as other employees. As a result of this legal view, there are no differences between ministers working within their religious communities and ministers working elsewhere in the society. Neither are there any differences between ministers from different religious communities. As a result, no legal definition of a religious minister is needed.

During the decades, there have been several cases on labour law, regarding priests of the *Church of Sweden*, the former State church and also the largest religious community in the country. Before the year 2000, when the church – state relations in Sweden were changed, the *Church of Sweden* was a State church, and the priests thus were to regard as State employees. At this time, a disciplinary matter against a priest normally started as a labour law case, at last judged by the Labour Court. It was at first when the labour law case was settled and the priest was fired, but the priest still claimed his or her right to remain as an ordained priest that the Church organs decided on the latter.

This system was changed through the changing of relations between the State and the *Church of Sweden*. Nowadays, a misconduct of a *Church of Sweden* priest primarily is handled by the Church itself<sup>17</sup>. If a priest through a decision of a Church organ

<sup>15</sup> Administrative Court of Appeal in Gothenburg decision April 22, 2015, case no. 4254-14.

<sup>16</sup> AD 2005:21.

<sup>17</sup> 34:8 Church Ordinance for the Church of Sweden; jfr Edqvist&al, *Kyrkoordning för Svenska kyrkan 2014 med kommentarer och angränsande lagstiftning* p. 440.

loses his or her right to be an ordained priest, the priest is still employed but can no longer perform the tasks of a priest. In theory the former priest in this situation may be given other tasks to perform, which do not need ordination. In fact, though, the former priest in such a case normally prefers to leave his employment in the Church.

There is a case, however, where a *Church of Sweden* priest accepted to be consecrated as a bishop in a new established synod, which was not recognized by the Church. The leaders of the synod claimed it to be an organization within the *Church of Sweden*, but – as the synod consecrated their own bishops beside the provisions of the Church – the Church regarded the synod as a different religious community. The priest in case thus lost his ordination as a priest in the *Church of Sweden*. The parish, in which he worked, tried – according to the labour law provisions – to find other tasks for him to perform, but ended up by dismissing him, because the parish had no need for him any longer.

The former priest brought the matter to the local District Court, claiming that he had been dismissed to unjust reasons, and the court, in a preliminary decision, gave him the job back. The parish appealed to the Labour Court, which – in the preliminary question – concluded that the former priest, through the consecration in the synod, had been unfair to his employer and thus had no right to get his job back. In this situation, the former priest withdrew his claim, and the case never came to a final solution.

### **AUTONOMY OF CHURCHES AND HUMAN RIGHTS OF THE WORKERS**

As mentioned, the Swedish constitution does not expressively protect the autonomy of churches. In Sweden, this autonomy instead is founded on the European Convention on Protection of the Human Rights and the Basic Freedoms and its provision on the right for every citizen to confess a religion or a creed together with others.

Churches and other religious communities are not exempted from the general norms concerning anti-discrimination. However, in connection with the general provisions in the Discrimination Act<sup>18</sup>, the preparatory works of the act mention that a religious community may require from those who will work in functions that affect the direct exercise of religion or will represent the activities against the public or the members that they profess the creed or religion which is exercised; the church shall not be put in the dilemma that it for such activities must employ a person who confesses another creed or no creed at all<sup>19</sup>.

The question of anti-discrimination and religious communities has also been discussed from another angle. In this case it regards whether a religious community may discriminate women, when it comes to employment of priests. The preparatory

<sup>18</sup> 2:2.

<sup>19</sup> Prop. 2007/08:95 p. 160.

works regarding the former Act (1991:433) on Equality between Women and Men in Working Life, etc<sup>20</sup>, now replaced by the Discrimination Act, mention this question. In connection to the act's provision on when an employer, despite the obligation not to discriminate due to gender, anyway may choose a person of a specific gender<sup>21</sup>, the preparatory works say that the consideration of the religious freedom ought not to lead to an obligation for a religious community to have women priests. However it is also stated that this exemption is not valid for the *Church of Sweden*<sup>22</sup>. The specific mentioning of the *Church of Sweden* refers probably to the fact that, within the Church at that time, there was a hard discussion to which extent women should be allowed as priests, although the formal decision on the matter was made more than 20 years earlier<sup>23</sup>. The political powers beyond the Act on Equality between Women and Men in Working Life did not want to give the opponents against women priests any new arguments. And the *Church of Sweden* was then still a State church. On the other hand, it was not the purpose to change the position in e.g. the Roman Catholic Church, the Orthodox churches, or the Muslim communities.

As mentioned, the Act on Equality between Women and Men in Working Life is since 2009 replaced by the new, and broader, Discrimination Act. No public statements regarding the balance between, on one hand, religious freedom and, on the other hand, equality between women and men were made during the preparation of the new act. The current legal situation in Sweden may thus be discussed. Probably, though, the 1979 statements are still valid.

No published case-law has appeared in the matter. An influence of the European Union is hard to find, beside the fact that the Discrimination Act mainly is based on European Union legislation<sup>24</sup>.

<sup>20</sup> Sw. lagen om jämställdhet mellan kvinnor och män i arbetslivet, m.m.

<sup>21</sup> 3 §.

<sup>22</sup> Prop. 1978/79:175 p. 126; SOU 1978:38 p. 103 ff.

<sup>23</sup> Act (1958:514) on Women's Competence for Priestly Duty, Sw. *lag om kvinnas behörighet till prästerlig tjänst*.

<sup>24</sup> Prop. 2007/08:95 p. 56 ff.



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# LAW AND RELIGION IN THE WORKPLACE: THE UNITED KINGDOM

NORMAN DOE

What follows examines the civil law in the United Kingdom as it applies to: religious freedom at work; ministers of religion and labour law; and the autonomy of churches and the human rights of workers. The study deals with legislation, cases and commentary<sup>1</sup>.

## I. RELIGIOUS FREEDOM AT WORK

In recent years discrimination law has been extended by statute to cover religion or belief; previously only some religious groups were protected under racial discrimination legislation<sup>2</sup>. However, specific exceptions from general prohibitions are afforded to religious groups (see below Section III). EU Directive 2000/78/EC led to new laws prohibiting discrimination in relation to employment on grounds of *inter alia* religion or belief<sup>3</sup>. Subsequent domestic legislation extended protection to cover the provision of goods and services and related matters<sup>4</sup>. Thus, discrimination on grounds of religion or belief has been expressly forbidden since 2003 in relation to employment and since 2006 in relation to goods and services<sup>5</sup>. The law is now to be found in the Equality Act 2010, which also protects gender reassignment, marriage and civil partnership, and pregnancy and maternity as ‘protected characteristics’.

<sup>1</sup> What follows is derived in the main from: M. HILL, R. SANDBERG and N. DOE, *Religion and Law in the United Kingdom* (2<sup>nd</sup>. Ed., Wolters Kluwer, 2014) 69-80, 117-126, and 142-160.

<sup>2</sup> *Mandla v. Dowell Lee* [1983] 2 AC 548; *Seide v. Gillette Industries Limited* [1980] IRLR 427; *J H Walker Limited v. Hussain and Others* [1996] ICR 291; *Crown Suppliers (PSA) Limited v. Dawkins* [1993] ICR 517.

<sup>3</sup> Employment Equality (Religion or Belief) Regulations 2003.

<sup>4</sup> Equality Act 2006, Equality Act (Sexual Orientation) Regulations 2007.

<sup>5</sup> Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660.; Equality Act 2006 Part 2.

## 1. Definitions of ‘Religion or Belief’

A contentious aspect of the new law has been the question of the definition of religion. Although the original EU Framework Directive gave no further definition of the terms ‘religion or belief’, the 2003 Regulations originally defined ‘religion or belief’ as any ‘religion, religious belief, or similar philosophical belief’;<sup>6</sup>; early employment tribunal decisions suggested that the Regulations took a broad conception of ‘religion’ and a narrow conception of ‘belief’<sup>7</sup>. However, the Equality Act 2006 changed the definition explicitly to include lack of religion or belief and to remove the requirement that philosophical beliefs needed to be ‘similar’ to religious ones in order to be protected (ss. 44, 77). The definition in the Equality Act 2010 (s. 10) is in substance the same as this as that in the 2006 Act.

In *Grainger PLC v. Nicholson*, the Employment Appeal Tribunal concluded that an asserted belief in man-made climate change, together with the alleged moral imperatives arising from it, was capable of constituting a ‘philosophical belief’ for the purpose of the 2003 Regulations if (1) it was genuinely held; (2) it was a belief and not merely an opinion or viewpoint based on the present state of information available; (3) it was a belief as to a weighty and substantial aspect of human life and behaviour; (4) it attained a certain level of cogency, seriousness, cohesion and importance; and (5) it was worthy of respect in a democratic society, compatible with human dignity, and did not conflict with the fundamental rights of others. Burton J held that ECHR jurisprudence was directly relevant.<sup>8</sup>

Employment Tribunal Chairs have considered the *Grainger v. Nicholson* tests to be met in cases concerning, e.g. beliefs in spiritualism and psychic powers;<sup>9</sup>; anti-fox hunting beliefs;<sup>10</sup>; and humanist beliefs<sup>11</sup>. But, the tests have not been met in cases concerning e.g. beliefs in conspiracy theories regarding 9/11;<sup>12</sup>; a belief that a Poppy should be worn in the week prior to Remembrance Sunday;<sup>13</sup>; and Marxist/Trotskyite beliefs held by trade union members<sup>14</sup>.

In the context of a case under the Places of Worship Registration Act 1855, Lord Toulson recently stated in the Supreme Court: ‘I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims

<sup>6</sup> Employment Equality (Religion or Belief) Regulations 2003 reg 2(1).

<sup>7</sup> See e.g. *Hussain v. Bhuller Bros* ET, Case no: 1806638/2004 (5 Jul. 2005).

<sup>8</sup> [2009] UKEAT 0219/09/ZT (3 Nov. 2009).

<sup>9</sup> *Greater Manchester Police Authority v. Power* [2009] EAT 0434/09/DA (12 Nov. 2009).

<sup>10</sup> *Hashman v. Milton Park (Dorset) Ltd* [2011] ET 3105555/2009 (31 Jan. 2011).

<sup>11</sup> *Streatfield v. London Philharmonic Orchestra Ltd* [2012] 2390772/2011 (22 May 2012).

<sup>12</sup> *Farrell v. South Yorkshire Police Authority* [2011] ET 2803805/2010 (24 May 2011).

<sup>13</sup> *Lisk v. Shield Guardian Co Ltd & Others* [2011] ET 3300873/2011 (14 Sep. 2011).

<sup>14</sup> *Kelly v. Unison* [2009] ET 2203854/08 (22 Dec. 2009).

to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word "supernatural" to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science'<sup>15</sup>.

## 2. Direct Discrimination

The law forbids direct discrimination on grounds of religion or belief, i.e. where A treats B less favourably (because of religion or belief) than they would treat others in circumstances materially the same;<sup>16</sup>; e.g. if A refuses to offer the job to B because B is a Hindu, if A sacks B because B's wife is an atheist or if A refuses to teach B because he thinks B is a Muslim. A can discriminate against B, even if A and B are of the same religion, provided that A discriminates on the grounds of B's religion or belief and not A's own religion or belief<sup>17</sup>.

There is no defence of justification to direct discriminations<sup>18</sup>. The claimant must prove facts from which the Tribunal may conclude that unlawful discrimination has occurred. If the claimant makes such a *prima facie* case, the burden of proof passes to the respondent. The respondent can prove that there was no discrimination but cannot justify discrimination<sup>19</sup>.

Direct discrimination claims have seldom been successful. However, *Bodi v. Teletext* is an exception. Bodi claimed that he had not been short-listed for the job of Duty Editor for Teletext on grounds of his Asian race or Muslim religion; he compared his treatment with that of the short-listed candidates with equivalent or lesser experience. The Employment Tribunal held he had been directly discriminated against on grounds of race and/or religion<sup>20</sup>.

<sup>15</sup> *Hodkin* [2013] UKSC 77.

<sup>16</sup> Equality Act 2010 s. 13.

<sup>17</sup> This is not explicitly stated in the Equality Act 2010 due to the breadth of the new definition of direct discrimination: Equality Act 2010 Explanatory Notes para. 59. Under the former law, this was explicit: Employment Equality (Religion or Belief) Regulations 2003 regulation 3(1) (a); Equality Act 2006 s. 45(1).

<sup>18</sup> However, the Supreme Court has held that direct discrimination can be justified in relation to the protected characteristic of disability: *Seldon v. Clarkson Wright and Jones* [2012] UKSC 16.

<sup>19</sup> The court or tribunal must be satisfied that the explanation for the less favourable treatment was discriminatory: see *Ladele v. London Borough of Islington* [2009] EWCA (Civ) 1357 at para. 30.

<sup>20</sup> ET, Case no: 3300497/2005 (13–14 Oct. 2005).

Most other direct discrimination cases fail because (unlike *Bodi*) the claimant is unable to make the *prima facie* case. The Employment Appeal Tribunal has found, for example, that: if the employer's objection is to an employee inappropriately promoting his religion (rather than to the employee's religion *per se*) then there is no direct discrimination;<sup>21</sup> to establish that there has been discrimination on grounds of religion or belief, the prohibited ground must be one of the 'significant' reasons for the treatment, i.e. more than trivial;<sup>22</sup> the acts of alleged discrimination must be 'motivated' by the claimant's religious beliefs<sup>23</sup>. A failure to accommodate religious difference rather than a complaint that the claimant had been discriminated against because of that difference will not amount to direct discrimination. Treating people in precisely the same way cannot constitute direct discrimination<sup>24</sup>. In one case the claimant argued that he had been rejected for a job at the Home Office due to his sympathy for underprivileged asylum seekers. He claimed that he had been discriminated on grounds of religion or belief since his care for disadvantaged people was a demonstration of the Christian virtue of charity. The Tribunal found his claim to be 'far too vague and ill-defined'<sup>25</sup>. Similarly, in *McClintock v. Department of Constitutional Affairs*, concerning a Justice of the Peace who resigned since he could not in conscience agree to place children with same-sex couples, both the Employment Tribunal and the Employment Appeal Tribunal held that there had been no direct discrimination since McClintock had never made it plain that his objection was underscored by conscientious or religious objection.<sup>26</sup>

### 3. Indirect Discrimination

Indirect discrimination occurs where A applies or would apply a provision, criterion or practice (a PCP) equally: (1) which puts, or would put, persons of B's religion or belief at a particular disadvantage compared with others; (2) which puts, or would put, B at that disadvantage; and (3) which A cannot show to be a proportionate means of achieving a legitimate aim<sup>27</sup>. For example, A applies 'no headwear' policy

<sup>21</sup> *Chondol v. Liverpool City Council* [2009] UKEAT/0298/08 (11 Feb. 2009). See also *Monaghan v. Leicester Young Men's Christian Association* [2004] Employment Tribunal Case no. 1901839/2004 (26 Nov. 2004).

<sup>22</sup> *Ladele v. London Borough of Islington* [2008] EAT Case no. UKEAT/0453/08/RN (10 Dec. 2008).

<sup>23</sup> *Ladele v. London Borough of Islington* [2009] EWCA (Civ) 1357; at para. 36.

<sup>24</sup> In *Eweida and Others v. United Kingdom* (2013) 57 EHRR 8, the Court held that the direct discrimination claim brought by Ladele was inadmissible since the applicant had failed to exhaust domestic remedies.

<sup>25</sup> *Devine v. Home Office* ET Case no. 2302061/2004 (9 Aug. 2004).

<sup>26</sup> [2007] UKEAT/0223/07/CEA (31 Oct. 2007).

<sup>27</sup> Equality Act 2010, s. 19.

to staff. B, an employee, is a Sikh. The PCP here disadvantages Sikhs in general and B in particular.

An example of a successful claim of indirect discrimination in relation to religious dress and symbols is the Employment Tribunal's decision in *Noah v. Sarah Desrosiers (Wedge)*. The claimant, applied for a job as an assistant stylist at the respondent's hairdressing salon. When she attended the interview wearing a headscarf, the interview was terminated on the basis that the hair salon was known for 'ultra-modern' hair styles which staff were supposed to display to clients. No other person was ultimately appointed to the job. The Tribunal held that the PCP that an employee would be required to display their hair at work for at least some of the time put persons of the same religion as the claimant at a particular disadvantage and disadvantaged the claimant notwithstanding the fact that she would not in fact have been offered a job given that no assistant stylist was ever appointed. This indirect discrimination was not justified. Although it was reasonable for the respondent to consider that the issue posed a significant risk to her business, too much weight was accorded to that concern<sup>28</sup>.

The law on indirect discrimination has had a significant impact on work on a Holy day;<sup>29</sup>; e.g. in *Fugler v. MacMillan-London Hairstudios Limited*, a new 'no Saturdays off work' rule at a hairdressers was held to constitute indirect discrimination since this put Jews at a disadvantage and actually put the Jewish claimant at a disadvantage on a particular Saturday. Although serving clients on a Saturday was a legitimate aim, the employers should have considered how or if they could re-arrange Fugler's duties and customers for that Saturday<sup>30</sup>.

However, many indirect discrimination claims fail because the respondent can justify the discrimination; e.g. in *Azmi v. Kirklees Metropolitan Council* a teaching assistant was suspended for insisting on wearing a full-face veil when male members of staff were present; this was contrary to a school instruction not to wear the full-face veil when teaching children. Both the Employment Tribunal and the Employment Appeal Tribunal held that the indirect discrimination was justified. Although the 'no face-veil when teaching rule' put Muslims at a disadvantage and actually put Azmi at a disadvantage, it could be justified as a proportionate means of achieving the legitimate aim of children being taught properly<sup>31</sup>.

In *Ladele v. London Borough of Islington* a registrar refused on grounds of conscience to register civil partnership ceremonies; the policy of the Council was to

<sup>28</sup> [2008] ET, Case no. 2201867/07 (29 May 2008).

<sup>29</sup> However, see the litigation culminating in *Mba v. Mayor and Burgess of the London Borough of Merton* [2013] EWCA Civ 1562, discussed below at para. 290.

<sup>30</sup> ET, Case no. 2205090/2004 (21–23 Jun. 2005).

<sup>31</sup> ET, Case no. 1801450/06 (6 Oct. 2006); [2007] UKEAT 0009 07 30003 (30 Mar. 2007).

designate all registrars as civil partnership registrars. The Court of Appeal held that the policy did put a person like Ladele at a disadvantage; but, the policy was justified. The ‘only way’ in which the Council could have achieved their aim of promoting equal opportunities and requiring its employees to act in a non-discriminatory way was to require all registrars to conduct civil partnerships. For Dyson LJ, the aim of the Council’s equality policy ‘was of general, indeed overarching, policy significance [having] fundamental human rights, equality and diversity implications, whereas the effect on Ms Ladele of implementing the policy did not impinge on her religious beliefs: she remained free to hold those beliefs, and free to worship as she wished’<sup>32</sup>.

*Ladele* was followed in *McFarlane v. Relate*, concerning a counsellor who refused on grounds of his Christian beliefs to counsel same-sex couples on sexual matters. He originally worked in couples counselling but volunteered to undertake a diploma course in psycho-sexual therapy. When he asked to be exempt from advising same-sex couples on sexual matters, he was told that he had to comply with Relate’s equal opportunities policy and was later dismissed. In terms of indirect discrimination, the Court of Appeal found *Ladele* to be definitive on this point. It was held that, although McFarlane had been disadvantaged, the employer’s actions had had a legitimate aim (the provision of counselling services to all sections of the community regardless of their sexual orientation) and was proportionate<sup>33</sup>.

The decisions in *Ladele* and *McFarlane* were both appealed to the European Court of Human Rights in *Eweida and Others v. UK* contending that the United Kingdom had breached Article 9 because domestic law had failed adequately to protect their right to manifest their religion. As to *Ladele*, the Strasbourg Court held that any discrimination on grounds of religion had been justified. The Council’s actions had a legitimate aim and the means pursued was proportionate. It was noted that the Court ‘generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights’. This wide margin of appreciation had not been exceeded in this case. In respect of *McFarlane*, the Strasbourg Court held that there had been an interference with the applicant’s Article 9 rights but that this was justified due to the margin of appreciation<sup>34</sup>.

Other indirect discrimination claims, however, have failed on the interference point rather than the justification point; e.g. in *Eweida v. British Airways*, a member of check-in staff wore a silver cross in breach of BA’s uniform policy which prohibited

<sup>32</sup> [2009] EWCA (Civ) 1357.

<sup>33</sup> [2010] EWCA Civ 880. Interestingly, the case was supported by a witness statement by the former Archbishop of Canterbury, Lord Carey of Clifton, in which he argued for ‘a specially constituted Court of Appeal of five Lords Justices who have a proven sensibility to religious issues’. See further R. Sandberg, *Laws and Religion: Unravelling McFarlane v. Relate Avon Ltd*, 12(3) Ecclesiastical L. J. 361 (2010).

<sup>34</sup> (2013) 57 EHRR 8, see particularly paras. 105-106, 109.

visible religious symbols, unless their wearing was mandatory. The tribunal held that there was no indirect discrimination: although there was a provision that personal jewellery should be concealed by the uniform unless otherwise expressly permitted, which was applied equally, it did not put Christians at a particular disadvantage and did not disadvantage the claimant. There was no evidence that practising Christians considered the display of the cross as a requirement of Christianity and nor that the provision was a barrier to Christians employed at BA.<sup>35</sup>

*Eweida* was followed in *Chaplin v. Royal Devon & Exeter NHS Foundation Trust*. A nurse who was asked on grounds of health and safety to remove the crucifix she wore around her neck at work. Although Chaplin had been a nurse for thirty years and had always worn the crucifix, a change to a V-necked uniform had now made the crucifix visible and the concern was that there was a risk of injury when handling patients. When she refused to remove her crucifix, she was redeployed to a non-clinical role where the hospital had no objections to her wearing the crucifix when undertaking those duties. The Employment Tribunal dismissed her claims of direct and indirect discrimination. As to indirect discrimination, the Employment Tribunal held that the uniform policy did not ‘place “persons” at a particular disadvantage’. Despite evidence that another nurse, Mrs Babcock, had been asked to remove her cross and chain, the Employment Tribunal held that Mrs Babcock had not been put at a particular disadvantage since the word ‘particular’ meant that the disadvantage suffered needed to be ‘noteworthy, peculiar or singular’ and this criteria had not been met since Mrs Babcock’s religious views were not so strong as to lead her to refuse to comply with the policy. The Employment Tribunal added that if they had needed to decide whether the disadvantage was justified they would have held that it was since health and safety concerns provided a legitimate aim and the actions by the respondent were proportionate<sup>36</sup>.

*Eweida* and *Chaplin* were considered by the European Court of Human Rights in *Eweida and Others v. UK*. As to *Eweida*, Strasbourg held that her wish to wear a crucifix ‘was a manifestation of her religious belief, in the form of worship, practice and observance, and as such attracted the protection of Article 9. Moreover, BA’s refusal for her to remain in post whilst visibly wearing the cross ‘amounted to an interference with her right to manifest her religion’. The question was whether this interference was justified under Article 9(2). The Court concluded that a fair balance had not been struck. Although the national courts were afforded a margin of appreciation, they had given too much weight to the employer’s wish to project a certain corporate image and not enough to the applicant’s desire to manifest her religious belief. This meant

<sup>35</sup> [2010] EWCA (Civ) 880.

<sup>36</sup> [2010] ET Case no: 17288862009 (6 Apr. 2010).

that the State had ‘failed sufficiently to protect the first applicant’s right to manifest her religion, in breach of the positive obligation under Article 9’.

As to Chaplin, the Court held that her wearing of her crucifix at work was a manifestation of her religious belief and the refusal of the health authority to allow it constituted a manifestation. However, there was no violation of Article 9 since this interference was justified. The reason for asking her to remove the crucifix and neck-chain was the protecting health and safety on a hospital ward and this ‘was inherently of a greater magnitude than that which applied in respect of Ms Eweida’. A ‘wide margin of appreciation’ was allowed since the ‘hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence’<sup>37</sup>.

Finally, *In Mba v. Mayor and Burgesses of the London Borough of Merton* the Court of Appeal considered the impact of *Eweida v. UK* on the domestic law of indirect discrimination. The claim concerned whether Sunday working constituted indirect discrimination on grounds of the claimant’s Christian beliefs. The Employment Tribunal had dismissed the claim and had taken into account how the claimant’s ‘belief that Sunday should be a day of rest and worship upon which no paid employment was undertaken, whilst deeply held, is not a core component of the Christian faith’. The Court of Appeal dismissed the appeal: although there had been errors of law in the Employment Tribunal’s decision, their conclusion that the disadvantage had been proportionate was plainly and unarguably right<sup>38</sup>.

#### 4. **Victimization**

This is where A subjects B to a detriment, B does a ‘protected act’ or A believes that B has done or may do a ‘protected act’<sup>39</sup>. A ‘protected act’ is defined as bringing proceedings under the Equality Act 2010, giving evidence or information in connection with proceedings under the Act, doing any other thing for the purposes of or in connection with the Act or making an allegation (express/implied) that A or another person has contravened the Act; e.g. B is denied promotion by A because A regards B as a ‘troublemaker’ after B gave evidence in support of a claim of religious discrimination by C. A does not need to be the intended target of the proceedings or allegations in which B is involved. It is not victimization where B is making or intending to make a false allegation, unless that allegation, though incorrect, was made in good faith (s. 27(3)). B must establish a causal link between his act and A’s alleged victimization of him. The claim of victimization was the only successful claim

<sup>37</sup> (2013) 57 EHRR 8; see particularly, paras. 89, 91, 94, 95, 97 and 99.

<sup>38</sup> [2013] EWCA Civ 1562.

<sup>39</sup> Equality Act 2010, s. 27.

in *Azmi*<sup>40</sup>. Prior to the Equality Act 2010, there was a pre-condition that A treated B less favourably than others for a claim to succeed. Now, however, there is no longer any need for a comparator. Victimization is no longer a form of discrimination.

## 5. Harassment

Harassment occurs where A subjects B to unwanted conduct on the grounds of religion or belief that has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment;<sup>41</sup>; e.g. A constantly teases B about his partner's religious convictions. For the Employment Appeal Tribunal this applies not only where an employee is harassed on the grounds of his or her own religious beliefs, but also where he or she suffers harassment because of the religious beliefs of another person<sup>42</sup>.

Conduct is harassment only if having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect<sup>43</sup>. As to employment, harassment covers employees and those who have applied for employment<sup>44</sup>. Employers are no longer liable for harassment of employees by third parties<sup>45</sup>. Cases to date reveal that most harassment claims fail since they are not borne out by the evidence<sup>46</sup>. In *Azmi*,<sup>47</sup> for instance,<sup>48</sup> the tribunal found that the claimant had not established that the school had become an intimidating, hostile, degrading, humiliating or offensive environment for her on the grounds of her religion or belief. The Tribunal noted that none of the remarks came within the category of 'comments or abuse' at which the Regulations are aimed such as sectarian jokes, verbal abuse name-calling, teasing or tormenting. Similarly the use of bad language in a newsroom whilst asking about the progress of a news story concerning the Pope was held to be merely an expression of ill-temper which was not intended to express hostility to the Pope or to Roman Catholicism and did not constitute harassment<sup>49</sup>.

<sup>40</sup> ET, Case no. 1801450/06 (6 Oct. 2006); [2007] UKEAT 0009 07 30003 (30 Mar. 2007).

<sup>41</sup> Equality Act 2010, s. 26(1).

<sup>42</sup> *Saini v. All Saints Haque Centre & Ors* [2008] UKEAT/00227/08 (24 Oct. 2008).

<sup>43</sup> Equality Act 2010 s. 26(4).

<sup>44</sup> Section 40(1).

<sup>45</sup> Sections 40(2)-(4) were repealed in 2013 on the basis that they placed an unfair risk on the employer and there were already legal remedies for the employee in such scenarios.

<sup>46</sup> This was true of the case of *Reaney v. Hereford Diocesan Board of Finance* [2007] Employment Tribunal, Case no. 1602844/2006 (17 Jul. 2007), discussed below.

<sup>47</sup> ET, Case no. 1801450/06 (6 Oct. 2006); [2007] UKEAT 0009 07 30003 (30 Mar. 2007).

<sup>48</sup> See also *McClintock v. Department of Constitutional Affairs* [2007] UKEAT/0223/07/CEA (31 Oct. 2007).

<sup>49</sup> *Heafield v. Times Newspaper Ltd* [2013] UKEAT 1305 12 1701 (17 Jan. 2013).

## II. MINISTERS OF RELIGION AND LABOUR LAW

Employees enjoy a number of legal rights; e.g. not to be dismissed unfairly or unlawfully; to be given reasons for dismissal; to be given an opportunity to put a case against dismissal; together with provision for financial redress. An employee is a person who works under a contract of employment or under any other contract to ‘do or perform personally any work or services for another party’<sup>50</sup>. A distinction can be made between employees with a contract of employment (also known as a contract of service) and those with a contract for services<sup>51</sup>.

If there is a contract, the courts decide whether it is a contract of employment on the basis of tests,<sup>52</sup> such as the control test (when the employer may exercise control in the selection of and over the work done by the employee), the organization or integration test (if the employee is ‘part and parcel’ of the business) and the economic reality test (if the agreement provides for remuneration). While none of these tests ‘has won universal approval’,<sup>53</sup> the current preferred test is the ‘Economic Reality/Multiple Test’;<sup>54</sup> ‘all the relevant facts need to be looked at in the aggregate’;<sup>55</sup> and: ‘the object of the exercise is to paint a picture from the accumulation of detail’ and the ‘details may also vary in importance from one situation to another’<sup>56</sup>. Historically, office holders have not been considered to be employees: an office is ‘a subsisting, permanent, substantive position which has its existence independently from the person who filled it, which went on and was filled in succession by successive holders’<sup>57</sup>.

### 1. The Classical Doctrine

**General Rule:** Historically, ministers of religion have not been regarded as employees because they do not exercise ministry under a contract of employment. The classical doctrine proposed a fundamental incompatibility between, on the one hand, vocation and the spiritual nature of ministerial functions and, on the other hand, the existence of a contract<sup>58</sup>. There is generally no ministerial right to remuneration;<sup>59</sup> instead ‘as [the minister] gives himself, leaving no time or energy to provide for

<sup>50</sup> Employment Rights Act 1996, s. 230.

<sup>51</sup> The term worker is defined under S230(3).

<sup>52</sup> See, e.g., *Ready Mixed Concrete v. Ministry of Pensions* (1968) 2 QB 497.

<sup>53</sup> *Quashie v. Stringfellow Restaurant Limited* [2012] EWCA Civ 1735 at para. 6.

<sup>54</sup> [1968] 2 QB 497 at 515.

<sup>55</sup> *Warner Holidays Ltd v. Secretary of State for Social Services* [1983] ICR 440 at 453, 455.

<sup>56</sup> *Hall (Inspector of Taxes) v. Lorimer* [1992] 1 WLR 939 at 944.

<sup>57</sup> *Great Western Railway Company v. Bater* [1920] 3 KB 256.

<sup>58</sup> See N. Doe, *Ministers of Religion and Employment Law in the United Kingdom: Recent Judicial Developments*, 349–355 *Anuario de Derecho Eclesiástico del Estado* (1997).

<sup>59</sup> *Daly v. CIR* [1934] SC 444: ‘The Church is under no obligation to pay him anything’; ‘He has, indeed, no personal or independent right to maintenance.’

the material needs of himself and his family, the Church undertakes the burden of their support and provides for each...according to his requirements. There is a basic stipend...committed to his own stewardship'<sup>60</sup>. This is regarded as a gift from God through the Church: a stipend is paid by the Church as from God, to enable the cleric to live and to give him some measure of freedom for his service<sup>61</sup>.

As such, ministerial functions arise by way of a religious act (e.g., ordination), treated as a spiritual event not a contractual transaction; e.g. in *Rogers v. Booth* the Court of Appeal held that an officer in the Salvation Army is not an employee. The relationship between the officer and the Salvation Army superior (the general) was spiritual not contractual. The Court consulted the Salvation Army's Orders and Regulations which provided: 'Every officer becomes such upon the distinct understanding that no salary or allowance is guaranteed to him'; '[t]he officer is pledged to his duty, with or without pay; he works from love to God and souls, whether he receives little or much'; and 'The army does not recognise the payment of salary in the ordinary sense; that is, the Army neither aims at paying nor professes to pay its officers an amount equal to the value of their work; but rather to supply them with sufficient for their actual needs, in view of the fact that, having devoted themselves to full-time Salvation service, they are thereby prevented from otherwise earning a livelihood'<sup>62</sup>.

Ministers, especially clergy of the established Church of England,<sup>63</sup> have been treated legally as office holders: their functions are not allotted or governed by contract but by ecclesiastical law. In *Re Employment of Church of England Curates* the curate (an ordained cleric) was appointed by the bishop on the nomination of the incumbent of a parish to assist that incumbent. The curate was licensed by the bishop to what was described as an office (the office of curate). The High Court held the curate was not an employee; the curate's functions and control over him were regulated by ecclesiastical jurisdiction not by a contract<sup>64</sup>. In short, when ministerial appointments are made the parties do not intend to enter a contract of the type recognized in civil law - there is no intention to create legal relations<sup>65</sup>.

**The Possibility of a Contract:** Cases last century challenged the classical doctrine to suggest that a contract was possible and that it might amount to a contract of employment. In *Barthorpe v. Exeter Diocesan Board of Finance* it was held that a stipendiary reader in the Church of England (who was not ordained but a lay

<sup>60</sup> *Methodist Conference v. Parfitt* [1984] QB 368.

<sup>61</sup> *Chalcroft v. Bishop of Norwich* (1995) 32040/95.

<sup>62</sup> [1937] 2 All ER 751.

<sup>63</sup> *Coker v. Diocese of Southwark* [1998] ICR 140: the 'legal framework for the work of a Church of England priest ... is unlike that of any secular employee'.

<sup>64</sup> [1912] 2 Ch. 563.

<sup>65</sup> *Balfour v. Balfour* [1919] 2 KB 571; *J Evans & Son (Portsmouth) Ltd v. Andrea Merzario* [1976] 2 All ER 930.

person licensed to minister) was an office-holder. However, it was also held that it was possible that a reader potentially could also hold a contract of employment. An office and a contract could coexist. Barthorpe had been given 'Terms of Reference for Employment' and was subject to regulations of the bishop. The case was remitted to the Industrial Tribunal but settled before determination<sup>66</sup>. Similarly in *Methodist Conference v. Parfitt*, the Court of Appeal held that a minister was not an employee: no wage was paid; a minister cannot unilaterally resign from ministry; the minister was in a spiritual relationship with the Church; there was no intention to create legal relations; and at point of ordination, a minister does not undertake by contract to serve the Church as a minister. However, Dillon J noted that undertaking to perform spiritual work did not necessarily preclude the existence of a contract: a contract could be drafted setting out remuneration, holidays and functions, but this would be unusual<sup>67</sup>. Dillon's *obiter* comment proved influential. In *Davies v. Presbyterian Church of Wales*, the House of Lords held there was no contract, repeating the principle that the spiritual nature of ministerial functions was incompatible with the existence of a contract, but Lord Templeman admitted that in law it was possible for a contract to be made, but there was no evidence of one here<sup>68</sup>.

**The Presumption against a Contract:** In *Santokh Singh v. Guru Nanak Gurdwara* there was no contract between a Sikh priest and his temple, even though the constitution of the temple called the priest an 'employee of the temple'<sup>69</sup>. In *Guru Nanak Temple s. Sharry* the document which passed between the priest and the temple was entitled a 'contract'. The Tribunal held that there was sufficient evidence of intent to create legal relations but this was overturned by the Employment Appeal Tribunal: the parties had carelessly used language and there was no contractual intent<sup>70</sup>. And in *Birmingham Mosque Trust v. Alavi* the Tribunal held there was a contract between a khaleeb and the trust company running the mosque (since there was certainty of terms, agreed salary, hours of work and duties) but the Employment Appeal Tribunal reversed this: it was 'desirable that the same broad brush approach should be taken by all those faced with this issue ... where religious factors are introduced'<sup>71</sup>.

The Court of Appeal decision in *Coker v. Diocese of Southwark* reinforced the classical doctrine. The case concerned a curate of the Church of England. The Industrial Tribunal held that letters exchanged between the curate and bishop clearly indi-

<sup>66</sup> (1979) ICR 900.

<sup>67</sup> (1983) 3 All ER 747.

<sup>68</sup> [1986] ICR 280.

<sup>69</sup> (1990) ICR 309.

<sup>70</sup> (1990) EAT (145/90).

<sup>71</sup> (1992) ICR 435.

cated a contract<sup>72</sup>. This was overturned by the Employment Appeal Tribunal whose decision was upheld by the Court of Appeal. For Mummery LJ, there was no contract between the Church and the minister by dint of lack of intention to create legal relations; the legal effect of ordination is call to an office regulated by law and it is not necessary to enter a contract for the creation, definition, execution or enforcement of clerical functions. Mummery LJ held that the curate's spiritual functions were matters for ecclesiastical jurisdiction and that his relationship with the bishop was regulated by canonical obedience, under 'the law of an established church which is part of the public law of England and not by a negotiated, contractual arrangement'<sup>73</sup>.

## 2. Recent Developments in Case-Law

There have been three recent cases which have impacted on the classical doctrine. *Percy v. Church of Scotland Board of National Mission* concerned a sex discrimination claim brought against the Church of Scotland by a former minister of the Church<sup>74</sup>. The two main issues were whether Percy's relationship with the Church constituted employment for the purposes of the Sex Discrimination Act 1975 and whether the claim constituted a 'spiritual matter' under the Church of Scotland Act 1921 meaning that it was within the exclusive cognizance of the Church of Scotland and its own courts. Percy did not pursue her claim for wrongful dismissal at this level, accepting that she had not entered into a contract of service. Also, she had demitted status as a minister rather than being tried before her presbytery, so the matter had never come before a Church court. Her case was that she was employed under a contract personally to execute certain work, i.e. a contract for services not a contract of service.

The House of Lords allowed Percy's appeal: her relationship with the Church constituted employment for the purposes of the Sex Discrimination Act 1975 and was not a spiritual matter. Lord Nicholls held that 'holding an office and being an employee are not inconsistent'; the fact that Percy's status might readily be described as an ecclesiastical office led nowhere; although there were 'many arrangements...in church matters where, viewed objectively on ordinary principles, the parties cannot be taken to have intended to enter into a legally-binding contract', this principle should

<sup>72</sup> It was held that the curate was an employee because there was evidence of service, control and organization; the bishop was a likely contracting party (along with the Diocesan Board of Finance, which paid the curate); there was no incompatibility between office and contract; the Church had chosen to use secular models and a visible organization and therefore could not escape secular standards; and for the industrial tribunal there was a presumption in favour of a contract and this must be rebutted to oust the jurisdiction of the Court.

<sup>73</sup> [1998] ICR 140.

<sup>74</sup> [2005] UKHL 73.

not be carried too far: ‘It cannot be carried into arrangements which on their face are to be expected to give rise to legally-binding obligations. The offer and acceptance of a church post for a specific period, with specific provision for the appointee’s duties and remuneration and travelling expenses and holidays and accommodation, seems to me to fall firmly within this latter category’. It was ‘time to recognize that employment arrangements between a church and its ministers should not lightly be taken as intended to have no legal effect’. On the facts, the documents on their face showed that Percy entered into a contract with the Board to provide services to the Church on the agreed terms and conditions. The House had been shown and told nothing to displace this prima facie impression. The decision clearly does not mean that ministers of religion now have employment rights. It does however seem to show that the presumption against a contract is rebuttable; the comments of their lordships as to intention to create legal relations suggest that the presumption has been removed. The Court of Appeal judgment in *New Testament Church of God v. Stewart* is important in indicating how *Percy* is to be interpreted.

*New Testament Church of God v. Stewart* concerned a minister of religion whose pastorate had been terminated. The tribunal held that the claimant was an employee for the purposes of section 230 of the Employment Rights Act 1996. The Church appealed citing their rights under Article 9 ECHR. The claimant submitted that the decision of the House of Lords in *Percy* involved a fundamental change and resolved the issue in his favour. The Court of Appeal dismissed the appeal but considered both the importance of *Percy* and the Article 9 argument. Pill LJ held that *Percy* did not overrule the earlier cases. Instead, it established that ‘the fact-finding tribunal is no longer required to approach its consideration of the nature of the relationship between a minister and his church with the presumption that there was no intention to create legal relations’. *Percy* leaves it open to employment tribunals to find, ‘provided of course a careful and conscientious scrutiny of the evidence justifies such a finding,’ that there is an intention to create legal relations between a church and a minister<sup>75</sup>.

Pill LJ held that the statement in *Parfitt* that the spiritual nature of the work is a relevant consideration remained a principle of the law of England and Wales and reflected the principles stated in Article 9 ECHR. This requires that respect be given to the faith and doctrine of the particular church, which may run counter to there being a relationship enforceable at law between the minister and the Church. The law should not readily impose a legal relationship on members of a religious community which would be contrary to their religious beliefs. Employment tribunals should carefully analyse the particular facts, which will vary from church to church, and probably

<sup>75</sup> [2007] EWCA Civ 1004. See also *MacDonald vs. Free Presbyterian Church of Scotland* [2010] UKEAT S/0034/09/B1 (10 Feb. 2010) and *Maga vs. Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256.

from religion to religion, before reaching a conclusion. For Arden LJ, Article 9 was engaged in the present case since one aspect of freedom of religion is the freedom of a religious organization to be allowed to function peacefully and free from arbitrary State intervention. A religious organization may, as one of its beliefs, consider that ministers should not have contracts of employment or that the State should not interfere in the way they conduct their organization. Interference with that belief might be a violation of Article 9, though the interference will not constitute a violation of Article 9 if the conditions in Article 9(2) are satisfied. Arden LJ rejected the submission that for Article 9 to be engaged it had to be an express tenet of the religion that no contract is formed between the minister and the religious body or some part of it. He held that it was sufficient that the beliefs are found to be inconsistent with the implication of any contract or alternatively any contract of employment. Arden LJ held that the fact that in an employment dispute one party to the litigation is a religious body or that the other party is a minister of religion does not of itself engage Article 9. The implication of a contract of employment is not automatically an interference with religious beliefs. Rather, it is within the fact-finding function of the court or tribunal. On the facts of this case, the tribunal came to a different conclusion looking at the evidence as a whole and was entitled so to do.

*President of the Methodist Conference v. Preston* concerned a minister in the Methodist Church who wished to pursue a claim against the Church in an employment tribunal for unfair dismissal<sup>76</sup>. The original Employment Tribunal in *Preston*<sup>77</sup> had held that a minister of the Methodist Church could not be an employee because it was bound by the Court of Appeal's decision in *The President of the Methodist Conference vs. Parfitt*<sup>78</sup>. This was reversed by the Employment Appeal Tribunal<sup>79</sup> whose decision was upheld by Court of Appeal<sup>80</sup> which had both held that Preston had served under a contract of employment. The Supreme Court reversed the Court of Appeal decision and declared that the claimant was not an employee. However, although the Supreme Court ultimately agreed with the Employment Tribunal that Preston was not an employee, it was also made clear that *Parfitt* was no longer good law. For Lord Sumption, much of the earlier case law was 'influenced by relatively inflexible tests borne of social instincts which came more readily to judges of an earlier generation than they do in the more secular and regulated context of today.' He held that the earlier cases had erred in treating ministers of religion as an 'abstract categorisation'; the 'correct approach is to examine the rules and practices of the particular church and any special arrangements

<sup>76</sup> [2013] UKSC 29.

<sup>77</sup> The claimant's surname was Moore when proceedings began. She subsequently married.

<sup>78</sup> (1983) 3 All ER 747.

<sup>79</sup> [2010] UKEAT 0219101503.

<sup>80</sup> [2011] EWCA Civ 1581.

made with the particular minister'. The decision of the House of Lords in *Percy* meant 'the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular'. There was now no presumption 'against the contractual character of the services of ministers'. Instead, the 'primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service', a task which like 'all exercises in contractual construction' needs to construe the parties' intentions 'against their factual background'. *Percy* confirmed that 'this factual background included the spiritual character of a minister's calling', but that this 'could not be conclusive.' The Supreme Court reversed the decision of the Court of Appeal which had held that Preston had served under a contract of employment on the basis that the judgment paid insufficient attention to the facts, the Deed of Union and Standing Orders 'which were the foundation of Ms Preston's relationship with the Methodist Church.' Their broad approach 'would mean that almost any arrangements for the service of a minister of religion would be contractual'. This underscores how such cases will be fact specific.

In *Sharpe v. Worcester Diocesan Board of Finance Ltd* (2013) the Employment Tribunal held that an ordained minister in the Church of England was neither an employee nor a worker. However, the Employment Appeal Tribunal reversed the decision: *Preston* had clarified the law; it was 'now unnecessary to refer to all of the earlier cases'; it was 'abundantly clear that cases concerning the employment status of a minister of religion cannot be determined simply by asking whether the minister is an office holder or in employment'; and 'there is no presumption against ordained ministers being engaged under contracts'. Instead, 'each case will always be fact specific, and probably Church specific'. This meant the Employment Tribunal had failed 'to carry out the full analysis that *Preston* now establishes'. The Employment Appeal Tribunal held: the focus should have been on whether there was a contract between the Claimant and the Bishop, having regard to the Church's rules and practices and particular arrangements made with the Claimant; the judge should have conducted a careful analysis of these rules and practices, the manner in which the Claimant was engaged, and the particular arrangements made with him, as revealed by all the relevant documentation, to decide whether they were characteristic of a contract and, if so, whether it was a contract of employment<sup>81</sup>.

The Employment Appeal Tribunal decision in *Sharpe* was appealed successfully to the Court of Appeal,<sup>82</sup> which reinstated the Employment Tribunal decision that Sharpe was not an employee. Arden LJ held that 'the conclusion of the employment judge that there was no contract, or no contract of employment, between the parties

<sup>81</sup> [2013] UKEAT 0243 12 2811.

<sup>82</sup> [2015] EWCA Civ 399.

was the result of a detailed examination of the facts and the law'. In so doing, Arden LJ explored the recent appellate cases. Her account is entirely in line with that presented in the cases following *Percy*. She states that, historically, ministers were not seen as employees, and then explains that many of the reasons no longer apply:

'Not long ago, no one entertained the idea that, at least in a church where individual churches are subject to an overarching organisation, a minister of religion could be an employee of the religious organisation for which he worked. Several reasons were given for this: that the duties of office were spiritual or that the minister held an office (and that holding of an office was exclusive of employment) or that there was a presumption that the parties did not intend to create legal relations or that the duties were prescribed by the special institutional framework of religious law. Slowly but surely...some of these reasons have been displaced. The law has developed and changed because it was difficult to justify the exclusion of ministers of religion from the benefit of modern employment protection legislation'.

Moreover, Arden LJ accepted that: (1) there are now no special rules on the employment status of ministers: 'there is now no rule which applies only to ministers which does not also apply to other persons who claim to be employees, although of course the facts to which the law has to be applied are very different. It is the same principles which have to be applied'; (2) 'the question of employment status cannot be answered simply by discerning whether a minister is an office holder or in employment'; (3) there is no presumption against contractual intent; on this, *Coker* is no longer good law; (4) 'the spiritual nature of a ministry does not in any way prevent a contract of employment arising'; (5) minister cases will be fact specific: 'The facts must be looked at in the individual case and in the round'; (6) it is not determinative that ministers have a spiritual function, are office-holders or are governed by ecclesiastical law; 'the fact that a person is an office holder does not mean that he cannot be an employee'; (7) 'it would be wrong...to suggest that canon law might preclude or prevent an employment contract' but that this could be considered as being 'contra-indicative of an employment contract'; and (8) the whole issue is important for the autonomy of the Church and its ministers; Arden LJ cited the first clause of *Magna Carta* (that the English Church be free) and states: 'The value placed on freedom by the institution is obvious. That would, I think, include freedom of thought and conscience for individual incumbents, free from interference by parishioners or the Church's hierarchy'. The Court of Appeal found no reason to set aside finding of the Employment Tribunal that 'as a matter of fact that there was no contract, express or implied, between Reverend Sharpe and the Bishop'. It affirmed earlier tests on the nature of a contract of employment<sup>83</sup>.

<sup>83</sup> Namely, those in the *Ready Mixed Concrete* case: see above n. 4.

### 3. Vicarious Liability and Ministers of Religion

The question of the employment status of ministers has been further affected by a series of recent cases concerning the vicarious liability of religious groups for torts committed by those who work for them. While in some cases it has been conceded that ministers of religion should be treated as if they were employees for the purpose of vicarious liability,<sup>84</sup> in other cases it has been contended that the religious organization could not be vicariously liable for the actions of ministers of religion since ministers were not employees. This argument has not found favour with the courts. In *JGE v. The Trustees of Portsmouth Roman Catholic Diocesan Trust*, Ward LJ held that, although he was ‘completely satisfied that there was no contract’ between the Priest and the Bishop, the Church remained nevertheless vicariously liable for the Priest’s actions. He felt that there was ‘a need to adapt to current demands’ and to consider whether a Bishop could be vicariously liable on the basis that the relationship was akin to employment. He concluded that ‘the time has come emphatically to announce that the law of vicarious liability has moved beyond the confines of a contract of service’<sup>85</sup>.

This judgment was later approved by the Supreme Court in *The Catholic Child Welfare Society v. Various Claimants*. Lord Phillips affirmed the principle that the ‘relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment’. However, vicarious liability could also arise where the relationship between the defendant and the tortfeasor is akin to that between an employer and an employee. The Supreme Court was clear that the technicalities of whether ministers of religion are employees would not inhibit the finding of vicarious liability. There would be vicarious liability if the organization had ‘facilitated the commission of the abuse by placing the abusers in a position where they enjoyed both physical proximity to their victims and the influence of authority over them both as teachers and as men of god’<sup>86</sup>.

### 4. Political Developments: Church of England

A Department of Trade and Industry (DTI) Consultation Paper 2002 dealt with atypical workers (e.g. agency workers, casual workers and clergy) with a view to giving churches the option for clergy to have rights under the Employment Relations Act 1999, section 23. In 2004 the Department DTI set up a Clergy Working Group,

<sup>84</sup> *Maga v. Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 25 See H. Hall, *Maga and Direct Liability for Negligence*, 167 L. & Justice 11 (2011) and F. Cranmer, *Maga and Vicarious Liability for Sexual Abuse*, 167 L. & Justice 20 (2011).

<sup>85</sup> [2012] EWCA Civ 938.

<sup>86</sup> [2012] UKSC 56.

including representatives from trades unions and faith-groups, to look at the broad issues of clergy employment. The Group developed a statement of standards as to terms and conditions of work, resolving disputes, development and personnel support and information and consultation. As a first step, the DTI asked faith-groups to assess the current position in relation to the standards in the statement and stated that it would revisit the issue two years later – but it did not rule out legislative action. Its successor, the Department for Business, Innovation and Skills, returned to the matter in 2009 and asked faith-groups for an update on their situations.

In response, the Church of England set up a Working Group which suggested giving certain clergy employment rights as if they were employees<sup>87</sup>. As a result, the Ecclesiastical Offices (Terms of Service) Measure 2009 and Ecclesiastical Offices (Terms of Service) Regulations 2009 came into force in 2011<sup>88</sup>. This legislation gives clerics on common tenure the right not to be unfairly dismissed from office on the grounds of capability and for this to be enforceable in Employment Tribunals. However, the Measure and Regulations state in terms that such clergy are not employees: they confer rights under the 1996 Act *as if* such clergy were employed, not *because* they are employed. Section 9(6) of the Measure makes it explicit: ‘Nothing in this Measure shall be taken as creating a relationship of employer and employee between an office holder and any other person or body.’ Therefore, although clergy with common tenure have employment rights under the relevant legislation, they are not employees but office-holders<sup>89</sup>.

### III. AUTONOMY OF RELIGIOUS ORGANISATIONS AND WORKERS’ RIGHTS

The law recognizes and regulates collective religious freedom in a number of ways. The general position to protect the autonomy of religious organisations is afforded under the Human Rights Act 1998. Section 13 states: ‘If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right’; in this section ‘court’ includes a tribunal. Section 13 was the result of lobbying by religious groups during the passage of the Human Rights Bill through Parliament<sup>90</sup>. Section 13 was added as ‘an attempt to reassure the Churches’ about

<sup>87</sup> Church of England, Review of Clergy Terms of Service (2004).

<sup>88</sup> Thus, the employment position of Church of England ministers has been superseded by ecclesiastical law; as Arden LJ accepted, the facts of *Sharpe* occurred before the Measure came into force.

<sup>89</sup> HMRC’s guidance, *PAYE70230 – PAYE Operation: Specific Employments: Clergy and Ministers of Religion* states not entirely accurately that ‘Ministers of the Church of England are office holders’.

<sup>90</sup> P. CUMPER, Religious Organisations and the Human Rights Act 1998, in *Law and Religion in Contemporary Society* 72 (P.W. Edge & G. Harvey eds., Ashgate 2000).

the impact of the Act;<sup>91</sup>; the Government contended that religious groups would not generally be ‘public authorities’ (and so susceptible to claims under the Act) unless they stood in the place of the State providing a public service<sup>92</sup>. In practice, it seems that the section is a dead letter; it hardly features in higher court judgments on freedom of religion<sup>93</sup>. Commentators seem agreed that s. 13 is ‘rather mild’,<sup>94</sup> largely symbolic,<sup>95</sup> and ‘at best an articulation and codification’ of the pre-Human Rights Act position<sup>96</sup>. In any event, as Article 9 makes clear, the right to manifest religion or belief may be exercised ‘either alone or in community with others and in public or private’. Thus, religious groups are protected by the Human Rights Act and may bring claims under it<sup>97</sup>.

### 1. The Autonomy of Religious Communities

The autonomy of religious organizations in the UK is achieved actively, through the express grant/recognition and preservation of rights of self-determination, self-governance and self-regulation; and passively, through non-interference on the part of organs of State<sup>98</sup>. The courts are reticent about adjudicating disputes within churches, a reticence which may be elevated to a principle of non-interference: ‘the attitude of the English legislator to racing is much more akin to his attitude to religion ... it is something to be encouraged but not the business of government’<sup>99</sup>. Similarly, courts are ‘hardly in a position to regulate’ religious functions but ‘must inevitably be wary of entering so self-evidently sensitive area, straying across the well-recognised divide between church and state’<sup>100</sup>. In other words, there is a ‘well-known principle of English law to the effect that the courts will not attempt to rule upon doctrinal issues or intervene in the regulation or governance of religious groups’<sup>101</sup>.

<sup>91</sup> Jack Straw, then Home Secretary, Commons Hansard 20 May 1998: Column 1021.

<sup>92</sup> *Ibid.* Column 1017.

<sup>93</sup> M. HILL, *Ecclesiastical Law* para. 1.47 (3rd ed., Oxford University Press 2007).

<sup>94</sup> R. Ahdar & I. Leigh, *Religious Freedom in the Liberal State* 359 (Oxford University Press 2005).

<sup>95</sup> P. Cumper, *The Protection of Religious Rights under Section 13 of the Human Rights Act 1998*, PL 265 [2000]; J. Wadham & H. Mountfield, *Blackstone’s Guide to the Human Rights Act 1998* 55 (Blackstone 1998).

<sup>96</sup> M. HILL, *Judicial Approaches to Religious Disputes*, in *Law and Religion* 419 (R. O’DAIR & A. LEWIS eds., Oxford University Press 2001).

<sup>97</sup> M. HILL, R. SANDBERG, and N. DOE, *Religion and Law in the United Kingdom* (2<sup>nd</sup> ed., 2014), pars. 96-105.

<sup>98</sup> See M. HILL, *Church Autonomy in the United Kingdom*, in *Church Autonomy: A Comparative Study* 267 (G. Robbers ed., Frankfurt am Main: Peter Lang 2001).

<sup>99</sup> *R v. Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1 WLR 909 at 932.

<sup>100</sup> *R v. Chief Rabbi, ex parte Wachmann* [1992] 1 WLR 1036 at 1043.

<sup>101</sup> In *HH Sant Baba Jeet Singh Ji Maharaj v. Eastern Media Group Limited and Hardeep Singh* [2010] EWHC (QB) 1294. See also *Blake v. Associated Newspapers* [2003] EWHC 1960.

This position may have to be revisited in the light of *Khaira v. Shergill* (2014): the Supreme Court held that while courts cannot adjudicate on the doctrine of religious belief, they do have the jurisdiction to determine disputes over ownership, possession and control of property held on trust for religious purposes. Non-justiciable cases fall into two categories. (1) Cases where an issue is beyond the constitutional competence of the court - the court may not decide the issue even if it is necessary to decide some other issue which is justiciable; (2) Cases where the issue would be non-justiciable if decided by the court in abstract, but may be resolved if this is necessary to decide some other issue which is justiciable. Where the court was asked to enforce private rights which depend on a religious issue, it may determine such religious issues that are capable of objective assessment. The trust deed in question was such an issue, creating interests which the civil law may and will protect<sup>102</sup>. The issue is, of course, related to religious freedom under the Human Rights Act 1998 and ECHR Article 9.

Although the rules and structures of religious groups are generally not imposed by the State, they may be enforced by courts in certain circumstances, by means of private or public law.

**Private Law:** Although generally a religious group is regarded as being a ‘private and voluntary religious society resting only upon a consensual basis’, courts are nevertheless ‘still bound, when due complaint is made that a member of the society has been injured as to his rights, in any matter of a mixed spiritual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury’<sup>103</sup>. This will occur where action is required ‘to protect some civil right or interest which is said to be infringed by their operation’. This practice means that courts will not ‘enter into questions of disputed doctrine, when not necessary to do so in reference to civil interests’. Therefore, a court may intervene in two circumstances. First, it may do so where there is a financial interest: ‘If funds are settled to be disposed of amongst members of a voluntary association according to their rules and regulations, the Court must necessarily take cognizance of those rules and regulations for the purpose of satisfying itself as to who is entitled to the funds’. Second, courts will intervene with regard to the disposal and administration of property; a court ‘must necessarily take cognizance of ... the rules of a religious association [which] prescribe who shall be entitled to occupy a house, or to have the use of a chapel or other building’<sup>104</sup>.

**Public Law:** As a matter of public law in England and Wales, while decisions of the courts of the Church of England are subject to judicial review (as it is established

<sup>102</sup> [2014] UKSC 33.

<sup>103</sup> Sir Robert Phillimore, *Brown v. Curé of Montréal* (1874) LR 6 PC 157.

<sup>104</sup> Lord Colonsay *Forbes v. Eden* (1867) LR 1 Sc & Div 568.

by law), the courts and tribunals of all other religious communities are not subject to review by State courts. In *R v. Chief Rabbi, ex parte Wachmann* the claimant sought judicial review on grounds of procedural unfairness of a decision by the Chief Rabbi, following a commission of enquiry, that Wachmann was no longer morally and religiously fit to hold rabbinical office. Simon Brown J refused leave on the grounds that there was no 'governmental interest in the decision-making power in question', that the Chief Rabbi's 'functions are essentially intimate spiritual and religious functions which the government could not and would not seek to discharge in his place were he to abdicate his regulatory responsibility'<sup>105</sup>.

Although this reasoning seems suspect on several counts, not least since the test for judicial review is the presence of 'public' functions not 'governmental',<sup>106</sup> the general principle that the decisions of such religious communities are not subject to judicial review has been followed in relation to decisions made, for instance, by an Imam,<sup>107</sup> a Jewish Beth Din,<sup>108</sup> and the Provincial Court of the Church in Wales<sup>109</sup>. This does not mean, however, that there may not be a different outcome in a case where the necessary public element was present.

The position in Scotland is quite different. Since the Court of Session does not require a contested decision to contain any public law element in order for it to be reviewable,<sup>110</sup> it does not hesitate to review decisions by the tribunals of voluntary bodies where a patrimonial interest is involved. In *Brentnall v. Free Presbyterian Church of Scotland*, for example, the Inner House was prepared to reduce the decision of the Free Presbyterian Synod to suspend Mr Brentnall from the exercise of his ministry and to grant reparation, on the grounds that the proceedings before the Synod had been contrary to the rules of natural justice<sup>111</sup>.

**Contractual Religious Freedom:** Religious bodies other than the Church of England and their internal laws are generally regulated by private rather than by public law. However, there are exceptions - the rules of certain churches have received statutory recognition; e.g. the Baptist and Congregational Trusts Act 1951 recognizes the 'constitution' in the Baptist 'handbook' while the Methodist Church Act 1976 gave statutory recognition to and made further provision for the internal 'constitution' of the Methodist Church and its deed of union and model trust deeds. Generally, how-

<sup>105</sup> [1992] 1 WLR 1036.

<sup>106</sup> *O'Reilly v. Mackman* [1983] 2 AC 237. See, however, *Clark v. University of Lincolnshire and Humberside* [2002] 1 WLR 1988.

<sup>107</sup> *R v. Imam of Bury Park, ex parte Sulaiman Ali* [1994] COD 142.

<sup>108</sup> *R v. London Beth Din ex parte Bloom* [1998] COD 131.

<sup>109</sup> *R v. Provincial Court of the Church in Wales, ex parte Clifford Williams*, 5 Ecclesiastical L. J. 129 (1999).

<sup>110</sup> See *West v. Secretary of State for Scotland* 1992 SC 385.

<sup>111</sup> 1986 SLT 470.

ever, the laws of other religious groups are regarded as forming a contractual bond between members in much the same way as the contractual religious freedom imposed upon the Church in Wales by the Welsh Church Act 1914.

The rules of voluntary associations are binding on assenting members. In *Long v. Bishop of Capetown*, it was held that members ‘may adopt rules for enforcing discipline within their body which will be binding on those who, expressly or by implication, have assented to them.’ These rules and structures are also binding on the association itself<sup>112</sup>. Thus, for example: ‘The law imposes on the church a duty not to deprive a pastor of his office which carries a stipend, save in accordance with the procedures set forth in the book of rules’<sup>113</sup>. This contractual bond may be styled the doctrine of consensual compact<sup>114</sup>.

These principles of contractual religious freedom also apply to the courts and tribunals of religious bodies<sup>115</sup>. The Arbitration Act 1996 provides that ‘parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest’ (s. 1). The Act enables parties to choose for disputes to be decided ‘in accordance with other considerations’ rather than ‘in accordance with law’ (s. 45)<sup>116</sup>. This allows parties to choose systems of religious law, such as sharia law, since the definition of law for these purposes has generally been understood to mean the law of a State. However, the outcome reached by applying such considerations would be overridden by the public interest<sup>117</sup>. The laws prohibiting discrimination on grounds of religion or belief do not apply to the selection, engagement or appointment of an arbitrator<sup>118</sup>. Thus, parties to a dispute may take it to a religious court (for Jews, for example, the *Beth Din*) and to enter into a contract to be bound by that court’s decision. Once the parties had contracted to be so bound, the secular courts would then enforce the decision of the religious court under the secular law of contract<sup>119</sup>.

<sup>112</sup> (1863) 1 Moore NS Cases 461.

<sup>113</sup> Lord Templeman, *Davies v. Presbyterian Church of Wales* [1986] 1 WLR 323.

<sup>114</sup> See the Australian case of *Scandrett v. Dowling* [1992] 27 NSWLR 483.

<sup>115</sup> See further Cardiff University’s ‘Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts’ Research Project funded by the AHRC/ESRC Religion and Society Programme. See the Project Report (available at <<http://www.law.cf.ac.uk/clr/research/cohesion.html>>) and publications listed on that website.

<sup>116</sup> See the discussion in *Sayed Mohammed Musawi v. R.E. International (UK) Ltd* [2007] EWHC 298.

<sup>117</sup> *KC & Anor v. City of Westminster Social & Community Services Dept* [2008] EWCA Civ 198.

<sup>118</sup> *Jivraj v. Hashwani* [2011] UKSC 40.

<sup>119</sup> See e.g. *Kohn v. Wagschal and Ors* [2007] EWCA Civ 1022; *AI v. mt* [2013] EWHC 100 (Fam) as to religious arbitration supervised by the Family courts and E. Butler-Sloss & M. Hill, *Family Law: Current Conflicts and their Resolution*, in *Islam and English Law* 108 (R. Griffith Jones ed., Oxford, 2013).

## 2. Autonomy and Employment Law

The law exceptionally permits discrimination on grounds of religion in certain limited and specified circumstances. These religious exceptions<sup>120</sup> exist in addition to those that apply where there is a general occupational requirement. The beneficiary and terms of the exception vary but a broad distinction can be made between exceptions that apply in relation to employment and those which apply in relation to goods and services. In all cases, the exceptions are narrowly drawn and apply only to ‘religious organisations, as opposed to individuals’<sup>121</sup>. As the Explanatory Memorandum on the new EU Directive makes plain, a ‘double test of a justified aim and proportionate means of reaching it ... is required’<sup>122</sup>.

**Religious Discrimination:** The law prohibiting discrimination does not apply where an employer has an ‘ethos based on religion or belief’ and, the following three criterion are met, having regard to that ethos and to the nature of the employment or the context in which it is carried out: (a) being of a particular religion or belief is a genuine occupational requirement for the job, (b) it is proportionate to apply that requirement in the particular case and (c) either the person to whom the requirement is directed is not of the particular religion or belief required or the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, and that he or she does satisfy the genuine occupational requirement. This exception can be seen simply as an extension of the general occupational requirement<sup>123</sup>. It has been held that the decision of *Prospects* (a charity, which provides housing and day-care for people with learning disabilities) that in principle all posts should be filled by Christians and their assumption that that was sufficient to comply with the 2003 Regulations was incorrect. Rather, a job evaluation should have been carried out for every vacant post<sup>124</sup>.

**Sexual Orientation and Sex Discrimination:** There is another exception for discrimination on grounds of sex, marriage and sexual orientation<sup>125</sup>. First, the employment must be for the purposes of an organized religion. In *R (Amicus MSF Section) v. Secretary of State for Trade and Industry*,<sup>126</sup> it was held that ‘organised religion’ is narrower than ‘religious organisation’, e.g. ‘employment as a teacher in

<sup>120</sup> The provisions are also sometimes referred to as ‘exemptions’ or ‘statutory defences’. The Equality Act 2010, however, uses the term ‘exception’ and so we follow that usage.

<sup>121</sup> *Bull v. Hall* [2013] UKSC 73 at para 8.

<sup>122</sup> Com (2008) 426 2008/0140, 8.

<sup>123</sup> Equality Act 2010 Sch. 19, par. 3.

<sup>124</sup> *Louise Hender v. Prospects; Mark Sheridan vs. Prospects* [2008] ET Cases nos. 2902090/2006 (Hender) & 2901366 (Sheridan) (13 May 2008).

<sup>125</sup> Equality Act 2010, Sech. 9, par. 2.

<sup>126</sup> [2004] EWHC 860.

a faith school is likely to be “for purposes of a religious organisation” but not “for purposes of an organised religion”<sup>127</sup>. The term ‘organised religion’ seems intended to limit the ambit of the exception; the Explanatory Notes state that this is ‘intended to cover a very narrow range of employment: ministers of religion and a small number of lay posts, including those that exist to promote and represent religion’<sup>128</sup>.

Second, the ‘compliance’ or ‘non-conflict’ principles must be engaged. The compliance principle is engaged where the discrimination seeks ‘to comply with the doctrines of the religion’<sup>129</sup>. The non-conflict principle is engaged where the discrimination is ‘to avoid conflicting with the strongly held convictions of a significant number of the religion’s followers’. In *R (Amicus MSF Section) v. Secretary of State for Trade and Industry*, for Richards J these requirements imposed ‘very real additional limitations’ and both tests were objective. To make use of the first, reference should not be made to the subjective ‘motivation of the employer’ but to ‘an objective test whereby it must be shown that employment of a person not meeting the requirement would be incompatible with the doctrines of the religion’. Richards J conceded that the second is wider, but it is ‘hemmed about by restrictive language’ and requires ‘an objective, not subjective, test’ which ‘is going to be a very far from easy test to satisfy in practice’. Deciding whether a ‘significant number’ of followers may be offended is by no means a straightforward task. Indeed, in the case of some faiths it is further complicated by the lack of a definition of membership<sup>130</sup>.

Third, the employer may discriminate either where the employee does not meet the requirement imposed or where the employer is not satisfied and it is reasonable for him not to be satisfied that that person meets it<sup>131</sup>. The importance of reasonableness was stressed in *Reaney vs. Hereford Diocesan Board of Finance*. The claimant had been denied the job of Diocesan Youth Officer in after the Bishop expressed concern that - since the claimant had been in a committed same-sex relationship and refused to accept his assurance - he would remain celibate. The Bishop concluded that the claimant could not promise not to have a same-sex relationship in future and therefore did not offer him the post. The Employment Tribunal found that the Bishop could not rely upon the exception. The employment as a Diocesan Youth Officer was for the purposes of an organized religion and the Bishop had been permitted to apply a requirement related to sexual orientation. However, the religious exception did not

<sup>127</sup> Paragraph 116.

<sup>128</sup> Equality Act 2010 Explanatory Notes para. 799.

<sup>129</sup> Equality Act 2010, Sch. 9 para. 2(5).

<sup>130</sup> [2004] EWHC 860 at para. 117.

<sup>131</sup> In relation to discrimination on grounds of marriage or civil partnership, the employer can only discriminate either where the employee does not meet the requirement imposed: Equality Act 2010, Sch. 9 para. 2(8).

apply because the claimant did satisfactorily meet the requirement imposed and it was not reasonable for the Bishop to conclude otherwise<sup>132</sup>.

There are also religious exceptions, beyond the labour context, for ‘organisations relating to religion or belief’ covering discrimination in relation to providing goods and services<sup>133</sup>.

<sup>132</sup> [2007] Employment Tribunal, judgment 17 Jul. 2007 (Case no: 1602844/2006).

<sup>133</sup> Equality Act 2010, Sch. 2, par. 2, Sch. 23, par. 2.

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## **SUMMARY AND CONCLUDING REFLECTIONS**



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## SOME CONCLUDING REFLECTIONS

MARK HILL QC

We live in turbulent times where religious identity – both individual and collective – seeks to find expression in the workplace. Society, labour relations, and the manifestation of belief are all in a state of flux. This XXVII gathering of the European Consortium for Church and State Research sought to grapple with these overlapping concerns. Professor Miguel Rodríguez Blanco, as convenor of the conference and editor of these proceedings is to be commended for his skill, industry and tenacity in collating national reports from across the European Union drilling down into the legal mechanics of the subject, as well as general reports – informed by these scientific surveys – which take over-arching and thematic approaches. Through this publication, this valuable research reaches a wider critical audience.

The subject is vast and complex. It embraces ideological world views as well as practical legal matters. There is a theology of employment: many individuals find spiritual fulfilment in employment and their personal identity is formed and informed by the choices they make in their working lives. The employment of clergy by churches can lead to tension between internal religious law and the law of the state. The self-governance of religious organisations can provide a conflict between principles of institutional autonomy on the one hand, and the individual rights and freedoms of members on the other. The European Court of Human Rights in Strasbourg faces the unenviable task of giving guidance of general application for use in factual situations which are infinitely variable. The interplay between anti-discrimination laws and fundamental freedoms remains a complex area for domestic courts and tribunals charged with applying the law in this field.

In essence, the multi-layered and multi-faceted issues concerning religion in the workplace are the agglomeration of several binary and oppositional comparisons, all of which much be held in tension. First there is the distinction between the public and the private, and in particular whether those employed as public servants by the state are in a different position from those working in the private sphere – be it a

small local firm or a vast global multi-national corporation. Secondly there is the distinction between religious freedom (under Article 9) and equal treatment provision under successive EU directives, whereby religion is merely one of a range of protected characteristics including, for example, sexual orientation. The third matter is the continuum between judicial determination at the one extreme and informal resolution at the other, which evidence the fourth conflict, namely detailed regulation set against pure pragmatism. Finally, although this list is not-exhaustive, there is the balance between freedom of contract, where employer and employee agree the terms upon which they will engage, and the minimum protections afforded by human rights documents from which contracting out is not possible.

There are various ways of categorising the nature of disputes concerning religion in the workplace so as to evaluate how the above factors play out in practice, but perhaps the most useful starting point is the classification of the nature of the relationship between employer and employee. To my mind, there are four broad categories, each of which gives rise to a sub-set of particular considerations.

#### **I. A PERSON OF FAITH EMPLOYED BY A PRIVATE COMPANY**

In cases of this type, a workforce drawn from an ethically and religiously diverse community will include some employees who have particular religious requirements for rest on holy days, prayer time (which might also involve use of a room or washing facilities), dietary requirements, religiously significant apparel. Experience dictates that these matters are subject to daily negotiated settlements. Practical solutions are reached in the vast majority of circumstances in the factory, school, shop or wherever. These disputes rarely reach the courts as goodwill and common sense prevail. The particular settlement depends upon the size of the workforce, the type of work undertaken and a constellation of specific circumstances applicable in the particular case. In many ways, the oft-cited case of Nadia Eweida who brought a claim in the European Court of Human Rights against the United Kingdom paints a false picture. She was not quite the Christian martyr as portrayed in her media profile, as British Airways had reviewed and revised its uniform policy within weeks of her complaint reversing the prohibition on wearing visible crosses whilst at work.

#### **II. A PERSON OF FAITH EMPLOYED BY THE STATE**

Here the position differs slightly from employment by private corporations because the staff member is a public servant and therefore an embodiment of the State him or herself. Those states whose polity is one of secularism or *laïcité* are entitled to ensure that those values are embodied in those who work for them. Hence, a prohibition on headscarves may be acceptable provided it is widely known and not operated in a capricious fashion. Conversely, a State which leans more towards religious pluralism would have little difficulty in tolerating the display of religiously

related attire and symbols in the workplace. In many ways, the issue here is not so much one of religious liberty but of equal treatment. The decision of the United Kingdom domestic courts in the case of Lillian Ladele (endorsed by the European Court of Human Rights) were predicated on the fact that a local authority cannot discriminate on the grounds of sexual orientation in the delivery of services to the public. It followed that Miss Ladele's religious convictions should be subservient because she was a public servant: regrettably, her case was not advanced on the basis of freedom of conscience nor did the court give sufficient weight to the fact the terms of employment were unilaterally varied when the law changed to permit same-sex couples entering civil partnerships. There is a growing tension between principles of equality on the one hand and principles of liberty (including religious liberty) on the other. Where precisely the balance is to be struck will generally be case-specific and not amenable to micro-management at the governmental level.

### III. EMPLOYMENT BY AN ORGANISATION WITH A RELIGIOUS ETHOS

Of all four classifications, this is the one where freedom of contract would seem to have the greatest bite. Potential employees ought to be aware of the particular characteristics of a future employer in much the same way as employees should inform future employers of their own religious characteristics. If one voluntarily agrees to become part of institution which has a religious tendency, this amounts to an express curtailment of one's personal freedom. In circumstances such as these, the employee is faced with three options:

- (a) To accept the polity of the employer and conform to it in their work life and private life;
- (b) To agitate for a change of polity from within whilst adhering to its terms;
- (c) To leave the job.

As with all generalisations, there may be some problematic issues on the margins such as whether religious employers can compel employees to waive or suspend their rights to due process.

### IV. MINISTERS OF RELIGION

It would not be unreasonable for a specific regime to apply in this relatively narrow band of cases, which amounts to a more refined version of the previous classification. The secular courts should avoid a detailed examination of religious practices and issues of doctrine in defining who is a minister of religion, and concentrate instead upon a clear legal definition of what amounts to a contract of employment for the purposes of securing labour protection. Equally, whilst it is correct to focus on the autonomy of churches, this is very different from independence. Churches are not entirely free: they would not claim to be so. Autonomy is a relational concept. Where church and state are concerned, the relationship is such that certain matters are

legitimately within the jurisdiction of the church whereas others are the concern of the state. Where the boundary lies will vary from case to case, but it should be remembered that the self-governance of religious organisations is never absolute. Similarly the competency of the State is not without limit: it is constrained by constitutional safeguards including human rights considerations.

The informed and vigorous discussions during the working sessions of the conference had both depth and breadth. They emphasised the importance of decisions in complex cases such as these being made at the right level depending on the subject matter: a form of juridical subsidiarity. As mentioned above, the vast majority should be resolved amicably on the factory floor or equivalent. More controversial matters should be determined by local labour courts or tribunals. Those which are exceptionally complex will find their way to domestic courts of first instance and at an appellate level. Only in very cases where matters of principle are involved should application be made to the European Court of Human Rights. Since each case will be fact specific, a supra-national court entrusted with securing compliance with international treaty obligations is singularly ill-equipped to come to an appropriately tailored solution. Even in the domestic courts there is sense of religious illiteracy amongst the judiciary which is a further argument for pragmatic amicable resolutions.

What is also clear is that we live in a rapidly changing world with courts struggling to keep pace with developments in society. Just as the workplace is changing, so is the importance of individual identity of which religion is a major part. These proceedings can do no more than illuminate a moving target, providing a snap shot at a particular point in time. Thanks to the efforts Professor Miguel Rodríguez Blanco, the picture which emerged at Alcalá de Henares is widely angled, sharply focussed, bright and vivid. The future, however, remains a somewhat blurred and indistinct image.

*15 November 2015  
Alcalá de Henares*



