



RELIGION AND DISCRIMINATION LAW IN THE EUROPEAN UNION

LA DISCRIMINATION EN
MATIÈRE RELIGIEUSE DANS
L'UNION EUROPÉENNE

Edited by

MARK HILL QC

This book is dedicated to the memory of

*Professor Charalambos Papastathis
of Aristotle University, Thessaloniki
1940 – 2012*

*A devoted and gifted teacher, a loyal and treasured friend, and a
distinguished scholar of law and religion in Europe, whose
publications on the Greek Orthodox Church will be a lasting legacy*

*He was elected to the European Consortium for Church
and State Research in 1990 and became an emeritus member in 2011*

Requiescat in Pace



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PREFACE

Liberal democracies are undergirded by the twin principles of equality of treatment and individual autonomy. These are of particular importance where religion is concerned. The state is charged with securing freedom of belief for its citizens and with eliminating all forms of discrimination between believers. But these are vague and illusory concepts. Translating such laudable aspirations into jurisprudential reality is not easy. This study explores and explains the many and varied ways in which Member States of the European Union have sought to give practical effect to these principles.

A word about methodology. As is customary with the work of the European Consortium for Church and State Research, a two-stage approach was adopted. The first was evidence gathering. This took the form of eliciting reports from participants in most, though regrettably not all, Member States of the European Union. These reports comprised responses to a *grille thématique* outlining a series of particular aspects of the subject upon which detailed information was sought. For ease of exposition and to avoid unnecessary repetition in each of the national reports, this *grille* is reproduced as an annex to this volume. Two additional papers were sought: one on the contribution to this subject by the European Court of Human Rights in Strasbourg and the other on the legislative work of the European Parliament, particularly the Council Directives on discrimination.

Armed with these informative background papers, the second phase of the work of the Consortium, undertaken at its meeting in Oxford, was to discuss in plenary session the three distinct themes identified in the *grille*: the historical, cultural and social background; the prohibition of discrimination; and the exemptions to the general prohibition. These sessions were each preceded by an introductory paper identifying and analysing the pan-European issues raised. The text of these presentations is grouped together at the beginning of this volume, followed by the national reports in alphabetical order of country and then the two pan-European reports. The collection closes with some personal reflections and conclusions from Professor Norman Doe, building on the substance of the dialogue in the three plenary sessions. Most of the papers were revised following the Consortium meeting, and additional reports, which had not been avail-

able at the time, were provided in respect of Belgium, Denmark and Ireland. Not every European Union country is embraced in this study but the few omissions are insufficient to compromise the utility of the work overall. The Consortium is bilingual and, in consequence, certain of the papers are reproduced in French, the language in which they were written. While efforts have been made to achieve a homogeneous style and format for these proceedings, referencing has been left to the discretion of each author in accordance with their national practices, and each author takes responsibility for the accuracy of his or her citations.

On the eve of the Congress, a public lecture was delivered by the United Kingdom judge in the European Court of Human Rights, Sir Nicolas Bratza, now President of the Court. His insightful overview of Article 9 jurisprudence in the Strasbourg court provided meaningful context for the subsequent discussions on religion and discrimination law in the European Union, and many of the issues that he identified and explored featured in the plenary sessions. The full text of Judge Bratza's address is accordingly reproduced at the front of this volume.

I am pleased to record my gratitude to the many friends and colleagues who have contributed to the production of these proceedings, foremost among whom is Professor Norman Doe, whose collaboration in the organisation of the Conference has been immense. I am also grateful to Dr Hester Higton, Chancellor David McClean, Holly and Denise Westbury-Haines, and Professor Gerhard Robbers and his colleagues at the University of Trier. A list of all those whose generous donations and practical support contributed to the success of the Oxford Congress appears in the Acknowledgments towards the end of the book. I am enormously grateful to them all, since without their assistance we would have been denied the pleasure of an animated and lively conference, and the achievement of the many scholars who participated would not have reached the wider audience that this publication now permits.

London, Feast of All Saints, 2011

Mark Hill QC

THE ‘PRECIOUS ASSET’: FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

SIR NICOLAS BRATZA

President, European Court of Human Rights¹

INTRODUCTION

It is a curiosity that, despite the fundamental importance of the right to freedom of religion and belief, as underlined by the passionate debate that led up to its inclusion in the European Convention on Human Rights (ECHR),² and despite the fact that the rights under what became Article 9 of the ECHR figured relatively frequently in the jurisprudence of the European Commission on Human Rights (the Commission) in the 1970s and 1980s, it was not until 1993 that an issue under Article 9 was first addressed directly by the European Court of Human Rights (the Court). This was in the *Kokkinakis* case against Greece, which established the oft-repeated principle that Article 9 protects both religious and non-religious belief. The Court stated that Article 9 is ‘in its religious dimension one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned’.³

The Court’s case law relating not merely to Article 9 itself but more generally to questions touching on religion or religious belief has, in the past 20 years, grown apace. The Court has been called upon to address the scope and content of Article 9 in a wide variety of key cases, involving matters as diverse as proselytism, the grant

1 Please note that the views expressed here are personal to the author and are not binding on the European Court of Human Rights.

2 The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4 November 1950. The European Commission on Human Rights ceased to exist following a remodelling of the Strasbourg institutions and the creation of the newly constituted Court in 1998. For an exhaustive discussion of the operation of the Court, see J Martínez-Torrón, ‘Religious liberty in European jurisprudence’ in M Hill (ed), *Religious Liberty and Human Rights* (Cardiff, 2002).

3 *Kokkinakis v Greece*, 25 May 1993, para 31, Series A no 260-A.

and refusal of registration of religious bodies, the refusal of authorisations for places of worship and prohibitions on the wearing of religious dress or symbols in public places. It is case law in which the Court has reiterated the central importance played by religious and philosophical belief in European society. But it is also case law that has not been without its critics, some complaining that the Court has interpreted Article 9 too narrowly and has given too little weight to the freedom guaranteed by that Article to manifest one's religion in teaching, practice and observance, whether by the wearing of religious dress, by engaging in evangelism, by practising conscientious objection or by observing religious practices in the course of employment. Others, in contrast, have criticised what they see as the excessive weight given to religion when in conflict with other ECHR rights, notably that of freedom of expression, and of a failure on the part of the Court to pay sufficient regard to the principle of denominational neutrality, particularly in the context of education. Still others have charged the Court with failing to interpret Article 9 in such a way as to realise its full potential by not engaging with what is meant by the word 'religion' (falling back instead on the easier word 'belief') or by avoiding an examination of a complaint under Article 9 altogether, where it can more conveniently be dealt with under another Article of the ECHR, whether Article 8 or Article 11.

In this article I will touch on, if not answer, some of these criticisms, certain of which seem to me to have some merit. Before doing so, it is worth emphasising that there have always been two challenges for the Court in protecting the rights guaranteed by Article 9, which will not necessarily be felt by national courts charged with the same task. First, it is readily apparent that the 47 Contracting States have very different religious and cultural backgrounds, and the ECHR seeks to ensure that, as far as possible, all such traditions are respected. Second, the ECHR does not endorse or indeed require any particular model of church-state relations. The Court must therefore strike a balance between, on the one hand, the effective protection of individual rights and, on the other, the need to respect very different constitutional traditions among the Contracting States.

It is, of course, impossible for the Court to provide an all-encompassing answer to these challenges or to predict how it will respond to these challenges in its future case law. Instead, it is perhaps more useful to ask how the Court, in its case law to date, has

tried to secure proper respect for a variety of faiths and beliefs in a religiously diverse continent, before focusing on what seem to me to be the more interesting and controversial developments in that case law.

ARTICLE 9: FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

The obvious starting-point is the text of Article 9 itself, which, in common with Articles 8, 10 and 11, sets out in the first paragraph the right guaranteed and, in the second, the circumstances in which interferences with that right may be justified. The right guaranteed is one of ‘freedom of thought, conscience and religion’, and that right is expressed to include both freedom ‘to change’ one’s religion or belief and also freedom, either alone or in community with others and in public or private, ‘to manifest’ one’s religion or belief ‘in worship, teaching, practice and observance’.

It is the right ‘to manifest’ one’s religion or beliefs that alone can be subject to ‘limitations’ under paragraph 2 of the Article, provided such limitations are ‘prescribed by law’ and are ‘necessary in a democratic society’ to achieve one of the legitimate aims – these being the interests of public safety, the protection of public order, health or morals or the protection of the rights and freedoms of others.

What then is meant by religion in Article 9? The Commission and Court, in common with the Human Rights Committee under the International Covenant on Civil and Political Rights, have conspicuously avoided any definition of the term, for obvious reasons. The difficulties of achieving a definition that is flexible enough to embrace the immense range of world faiths but, at the same time, precise enough to be capable of practical application would almost certainly prove insuperable. Fortunately, in practice, the lack of a definition has not been problematic. This is largely because, as I have stated, Article 9 protects both ‘religion’ and ‘belief’. This wide protection has enabled the Court to find no difficulty in holding the Article to be applicable not merely to traditional and long-established religions – Hinduism, Christianity, Islam, Judaism, Buddhism, Sikhism, all of which have given rise to issues under the Article – but to other forms of religious movement, including druidism and the

Church of Scientology, as well as to a wide range of philosophical beliefs, notably pacifism, atheism and veganism.

However, even the word ‘beliefs’ has not been treated as unlimited in scope, the Court requiring that, in order to enjoy protection under the ECHR, a belief must ‘attain a certain level of cogency, seriousness, cohesion and importance’ and further be such as to be compatible with human dignity. In harmony with this approach, while the philosophy of pacifism has been held to be sufficiently coherent to amount to a protected belief or conviction, an opinion, even a sincerely held one, on assisted suicide was held in the famous *Pretty* case not to have the necessary degree of coherence to constitute a belief protected by the Article.⁴

If the scope of the right guaranteed by Article 9 has not in general proved problematic, the distinction between the holding of a religious belief and its manifestation has proved more elusive. The distinction is of some importance, particularly as regards the degree of protection afforded by the ECHR. In contrast to the manifestation of a religion or belief, what has been described as the internal dimension (the *forum internum*) of the right guaranteed – which was defined by the Commission as one ‘largely exercised inside an individual’s heart and mind’ – is inviolate and permits of no restriction, limitation or control by the state. In practical terms, this not only prohibits persecution of a person on the grounds of his or her belief but forbids the use of physical threats or sanctions applied by the state to compel a person to deny, adhere to or change a particular religion or belief. It also prohibits other forms of coercion sufficiently strong as to amount to indoctrination by the state.

However, this internal dimension has been held to go further and to include a guarantee against a requirement to act in a manner contrary to one’s religious beliefs or even to manifest or disclose the nature of those beliefs. For instance, in *Buscarini and Others v San Marino* the applicants were required to swear on oath on the Christian Gospels in order to take up their seats in the San Marino Parliament.⁵ The Court held that to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs

⁴ *Pretty v The United Kingdom*, no 2346/02, ECHR 2002–III, paras 82 and 83.

⁵ No 24645/94, ECHR 1999–I, Grand Chamber.

was essentially incompatible with the pluralistic ethos of Article 9 and the ECHR as a whole.⁶

More recently, in the case of *Sinan İşik v Turkey*, the applicant’s complaint related to the reference to religion in his identity card, a public document that was frequently in use in daily life.⁷ In the view of the Court, it was no answer to the complaint that the space for religion in identity cards could be left blank, since persons with identity cards not containing information about religion would be distinguished against their wishes and on the basis of interference by the public authorities from those whose identity cards contained such an entry. A request for such information not to be included was held by the Court to be closely bound up with an individual’s most deeply held and private conviction.

Turning now to the ‘external’ dimension of the right – the manifestation of religion or belief – the meaning of the word ‘manifestation’ was examined in the early Commission case of *Arrowsmith v the United Kingdom*.⁸ Mrs Arrowsmith, a committed pacifist, had been convicted for handing out leaflets to soldiers encouraging them to refuse to serve in Northern Ireland. In rejecting her claim, the Commission drew a distinction between an act or practice that manifested a religion or belief and one that was merely motivated by such a belief. While any public declaration that proclaimed the idea of pacifism would be considered as a ‘normal and required manifestation of pacifist belief’, the leaflets in question had expressed not the applicant’s own pacifist values but rather her critical observations of government policy. As such, they could not qualify as a manifestation of a belief under Article 9. While this approach may have the advantage of excluding from the protection of Article 9 beliefs that may be regarded as artificial or trivial, it has the disadvantage, as one commentator has put it, of bringing the Court ‘dangerously close to adjudication on whether a particular practice is formally required by

6 Ibid, para 39. See also *Alexandridis v Greece*, no 19516/06, 21 February 2008, concerning the fact that the applicant was forced to reveal whether he was Orthodox or not when taking the oath of office required to practise as a lawyer before the Athens Court of First Instance.

7 *Sinan İşik v Turkey*, no 21924/05, ECHR 2010. See also *Wasmuth v Germany*, no 12884/03, 17 February 2011.

8 No 7050/75, Commission’s report of 12 October 1978, Decisions and Reports (DR) 19, p 5.

a religion – a task which its judges, given the relevant theological issues, appear ill-equipped to handle'.⁹

In the new Court, it is perhaps possible to detect a shift in approach and a greater reluctance to enter into the question of whether a particular practice is an indispensable element of a religion or system of belief. Thus, in the case of *Leyla Şahin*, to which I will return a little later, the Court refused to adjudicate on the strongly contested question as to whether, in wearing an Islamic headscarf, the applicant was fulfilling a religious duty and thereby manifesting her faith.¹⁰ The Court proceeded on the assumption that regulations prohibiting the wearing of a headscarf interfered with the applicant's right to manifest her religion, without ruling on whether the decision to wear the headscarf was in every case taken to fulfil a religious duty.¹¹

A related area in which the decisions of the Court and Commission have attracted criticism is that of employment and the wish of an employee to practise, share or display his or her religion or belief in the workplace. It is an area where Article 9 rights appear to have been particularly restricted – and perhaps inevitably so, having regard to the conflicting interests of the employer. The ECHR organs have traditionally taken the view that there is no interference with the manifestation of religion or belief when a person voluntarily accepts a position where curbs are placed on the free exercise of religious beliefs and where an employee is free to leave his or her employment so as to continue to follow whatever religious observances he or she wishes.

The Court has been reluctant to recognise any positive obligation on the part of employers to take steps to facilitate the manifestation of belief: for example, by allowing an individual to worship at a particular time during working hours or in a particular manner. In such a case, even where the employee has substantiated the genuineness of his or her claim to belong to the religion,¹² the ECHR organs have frequently invoked the freedom to resign from employment as

9 D Harris, M O'Boyle and E Bates, *Law of the European Convention on Human Rights* (second edition, Oxford, 2009), p 433.

10 *Leyla Şahin v Turkey*, no 44774/98, ECHR 2005–XI, Grand Chamber.

11 Ibid, para 78.

12 *Kosteski v 'the former Yugoslav Republic of Macedonia'*, no 55170/00, 13 April 2006.

an answer to the complaint.¹³ The assumption that, in the modern employment market, such a choice is a real one has been questioned, and there are perhaps indications in the more recent case law that the freedom to resign from employment will no longer be seen as ‘the ultimate guarantee of … freedom of religion’.¹⁴

I have focused thus far on individual rights of freedom of religion and belief, to the exclusion of the collective aspect of Article 9 and the recognition by the Commission and Court not merely that worship with others is the most obvious form of collective manifestation of belief but that a church or other religious organisation is itself capable of exercising rights under the Article. In an oft-repeated statement in the case of *Hasan and Chaush v Bulgaria*, the Court observed that, where the organisation of religious communities is at issue, Article 9 must be interpreted in the light of Article 11 of the ECHR, which protects freedom of assembly and association.¹⁵ The Court went on to say this:

Seen in that perspective, the believers’ right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.¹⁶

Cases reflecting this vital element of autonomy have tended to relate to state interference in one of three key areas: the internal organisation of the religious community, including the selection of its leaders; the grant or refusal of official recognition to certain faiths in national law; and the regulation by the state of places of worship. In each area the Court has consistently stressed the need for state neutrality.

As to the first of these areas, the Court’s case law has frequently involved the intervention by the state in internal disputes within a

13 See, for example, *Stedman v the United Kingdom*, no 29107/95, Commission decision of 9 April 1997, unreported.

14 See *Konttinen v Finland*, no 24949/94, Commission decision of 3 December 1996, Decisions and Reports (DR) 87-A, p 68; *Karlsson v Sweden*, no 12356/86, Commission decision of 8 September 1988, unreported; *Knudsen v Norway*, no 11045/84, Commission decision of 8 March 1985, Decisions and Reports (DR) 42, p 247. Compare *Ivanova v Bulgaria*, no 52435/99, 12 April 2007.

15 No 30985/96, ECHR 2000-XI, Grand Chamber, para 62.

16 *Ibid.*

religious community. In the *Hasan and Chaush* case itself, following a dispute within the Bulgarian Muslim community as to who should be its national leader, the Government's intervention effectively to replace the applicant who had been elected to the office with another previous holder of the post was held to be in violation of Article 9, the intervention being found to have been arbitrary and based on legal provisions that allowed an unfettered discretion to the executive.¹⁷ Violations have been found even where the aim of the intervention was one of avoiding intra-faith conflict, the Court emphasising that the existence of tensions within a divided religious community is one of the 'unavoidable consequences of pluralism' and that the role of the authorities in such circumstances is not to intervene to remove the cause of tension by eliminating pluralism but to ensure that the competing groups tolerate each other¹⁸ – something, I am afraid, that experience has sometimes shown to be easier said than done.

Similarly, the grant of official recognition, including the requirement of registration of religious communities, has been a source of much case law. The Court has emphasised that, while the imposition of a requirement of state registration is not in itself incompatible with freedom of religion, despite the risk of the discriminatory treatment of minority faiths, the state must remain neutral and impartial and must not appear to be assessing the comparative legitimacy of different beliefs.¹⁹

Similar care has been exercised by the Court to ensure that the regulation of places of worship, on planning grounds or otherwise, is not used for ulterior purposes and, in particular, that such powers are not exercised arbitrarily or with the aim of penalising minority groups. In the leading case of *Manoussakis v Greece*, the Court found on the evidence that the possibilities afforded by domestic law to impose rigid and even prohibitive conditions on the practice of religious beliefs by certain non-Orthodox movements was incompatible with Article 9, not least because the applicants had been wait-

17 See, in particular, *Hasan and Chaush*, paras 86 and 87.

18 See *Serif v Greece*, no 38178/97, ECHR 1999-IX, para 53. See also *Agga v Greece* (no 2), nos 50776/99 and 52912/99, 17 October 2002; *Supreme Holy Council of the Muslim Community v Bulgaria*, no 39023/97, 16 December 2004.

19 *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, ECHR 2001-XII, paras 116 and 117.

ing over a decade for such permission to be granted and because such authorisation could only be granted with the approval of a local Orthodox bishop.²⁰

To my mind, three issues have become areas of special interest as a result of more recent case law of the Court, and the remainder of this article focuses on each of them in turn. The areas are conscientious objection, the wearing of religious dress or symbols and the conflict of rights.

CONSCIENTIOUS OBJECTION

As early as 1964, in the *Grandrath* case, the Commission examined a complaint by a Jehovah’s Witness who alleged a violation of his Article 9 rights on the ground that the authorities had imposed on him a service that was contrary to his conscience and religion and had punished him for his refusal to perform such service.²¹ In rejecting his claim the Commission observed that, while Article 9 guaranteed the right to freedom of thought, conscience and religion in general, Article 4 of the ECHR (the prohibition of slavery and forced labour) contained a provision that expressly dealt with the question of compulsory service, exacted in the place of military service, in the case of conscientious objectors. The conclusion that Article 4 left a choice to Member States whether or not to recognise conscientious objectors and that Article 9 could not accordingly be interpreted as guaranteeing a right to conscientious objection was upheld in several subsequent decisions of the Commission and came to be regarded as established case law.

In more recent times, and in order to escape from their self-imposed straitjacket, the ECHR organs have had recourse to Articles other than Article 9 in order to provide some measure of protection to conscientious objectors. Thus in *Ülke v Turkey*, and again in *Taştan v Turkey*, the prohibition against ill-treatment in Article 3 of the ECHR was invoked by the Court, which found that the repeated use of prosecution and imprisonment for a refusal to serve in the armed

20 *Manoussakis and Others v Greece*, 26 September 1996, Reports of Judgments and Decisions ECHR 1996–IV.

21 *Grandrath v Germany*, no 2299/64, Commission report of 12 December 1966, Yearbook 10, p 626.

forces and the requirement that a 78-year-old man should perform such service amounted to degrading treatment.²²

Just as importantly, recourse was had to the prohibition on non-discrimination – contained in Article 14 of the ECHR – in *Thlimmenos v Greece*.²³ The applicant had been convicted for his refusal on religious grounds to wear a military uniform. He was then excluded from exercising the profession of a chartered accountant on the basis that he had a criminal conviction. The Court interpreted Article 14 as prohibiting not merely the *different* treatment of persons in analogous situations, but the *like* treatment of persons who were *not* analogous. With some ingenuity, the Court held that the applicant’s conviction on conscientious grounds differed from other serious and morally reprehensible offences that might render a person unsuitable to enter the profession. In the Court’s view, there were no objective and reasonable justifications for treating the applicant in the same way as other persons convicted of felonies. The failure of Greece to introduce exceptions to the blanket restriction on entry to the profession accordingly violated Article 14.

It was not until July 2011 that the Court finally grappled with the question of whether the *Grandrath* principle and reasoning could still be maintained. In *Bayatyan v Armenia*, the applicant – once again, a committed Jehovah’s Witness – was summoned to appear for military service.²⁴ He indicated that, while he was fully prepared to perform alternative civilian service – which did not in fact at that time exist in Armenia – he was not willing to serve in the military. He was charged and convicted of draft evasion and sentenced to 30 months’ imprisonment.

By a majority of 16 to 1, the Grand Chamber finally overruled *Grandrath*. The Court noted that almost all states that still had compulsory military service recognised the right to conscientious objection. The right could also be claimed on the basis not only of religious belief but of a relatively broad range of personal beliefs of a non-religious nature. The Court further found that the earlier interpretation of Article 4 did not reflect its true purpose or meaning, which was merely to elucidate the notion of ‘forced or compulsory

22 *Ülke v Turkey*, No 39437/98, 24 January 2006; *Taştan v Turkey*, No 63748/00, 4 March 2008.

23 No 34369/97, ECHR 2000–IV, Grand Chamber.

24 *Bayatyan v Armenia*, No 23459/03, 7 July 2011, Grand Chamber.

labour’. The Article neither recognised nor excluded a right of conscientious objection and had no diluting effect on the rights guaranteed by Article 9. Those guarantees had been violated by the treatment of the applicant, who, to stay faithful to his convictions, risked criminal sanctions. A system that did not introduce alternatives to compulsory military service failed to strike a fair balance between the interests of the society as a whole and the sincere beliefs of the applicant as a member of a minority religious group.

RELIGIOUS DRESS AND SYMBOLS

The issue of prohibitions or restrictions on the wearing of religious dress or symbols has had a relatively long history. It arose first in the case of *Karaduman v Turkey* in 1993, which concerned the withholding by Ankara University of a degree certificate because the applicant, a devout Muslim had refused to supply an identity photograph showing herself bare-headed.²⁵ The Commission’s rejection of her Article 9 complaint turned on the question of whether the requirements complained of constituted an interference with the exercise of her freedom of religion. In holding that it did not, the Commission laid emphasis essentially on the matter of consent; by choosing to pursue her higher education in a secular university, a student submitted to the university rules and, according to those rules, students were required to forbear from wearing headscarves. What is of some interest in the case is the Commission’s observation, which we find echoed in later cases, of the necessity to ensure harmonious coexistence between students of different beliefs, the Commission noting that, especially in countries where the great majority of the population owe allegiance to one particular religion, manifestations of the symbols of that religion may constitute pressure on students who do not practise that religion or who adhere to another faith.

Eight years later in 2001, in the case of *Dahlab v Switzerland*, the new Court was faced with a refusal to allow a teacher of a class of small children to wear the Islamic headscarf.²⁶ Once again, the complaint was rejected. This time, any interference with the appli-

25 No 16278/90, Commission decision of 3 May 1993, DR 74, p 93.

26 (Dec), no 42393/98, ECHR 2001-V.

cant's Article 9 rights was held to be justified. The Court here laid emphasis on the 'powerful external symbol' that the wearing of the headscarf represented. Not only could it be seen, in the Court's view, as having some kind of proselytising effect – since it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality – but 'it could not easily be reconciled with the message of tolerance, respect for others and equality and non-discrimination that all teachers in a democratic society should convey to their pupils'.

It was in the case of *Leyla Şahin v Turkey* that the Grand Chamber first directly and controversially addressed the question of the clash between the individual right to manifest one's religion through dress and the demands of secularism and gender equality. The applicant, a practising Muslim and a fifth-year medical student at Istanbul University, was refused access to a written examination because she was wearing an Islamic headscarf, contrary to a circular issued by the Vice-Chancellor of the University. She was also refused permission on the same grounds to enrol in a course and to attend various lectures. She complained under Article 2 of Protocol No 1 that the prohibition was an unjustified interference with her right to education and, under Article 9, that it obliged her to choose between her religion and her education.

Under Article 9 the Court once again proceeded on the basis that there had been an interference with her ECHR rights and accepted that the interference was both lawful and that it pursued the legitimate aim of protecting the rights and freedoms of others. The crucial question was thus whether the interference had been 'necessary in a democratic society'. The majority found that it had. They noted that the interference was based in particular on two legitimate aims – the principles of secularism and equality, which were at the heart of the Turkish Constitution. Secularism was seen as the guarantor of democratic values in the state. It prevented state authorities from manifesting a preference for a particular religion or belief by ensuring its role as one of impartial arbiter; and it also helped to protect individuals from external pressures exerted by extremist movements in a country where religious symbols had taken on political significance. However, the Court was also influenced by the emphasis on the protection of women in the Turkish constitutional system, a value con-

sistent with the key principle of gender equality underlying the ECHR. The Court held that, in the context of Turkey

where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including ... the Islamic headscarf, to be worn.²⁷

The judgment evoked a single but powerful dissent from Judge Tulkens. It was her view that the applicant had never had any intention of calling into question the principle of secularism and that there was no evidence to indicate that she had contravened that principle or that her wearing of the headscarf had led to any disruption within the university. While the need to prevent Islamism was not disputed, in her view the mere wearing of a headscarf could not be associated with fundamentalism. But Judge Tulkens was particularly critical of the reasoning of the majority on gender equality, finding that it was not the Court’s role to make general pronouncements about a religion or religious practice, a practice that, in the case of the applicant, she must (in the absence of proof to the contrary) be taken to have freely adopted. ‘Paternalism’ of this sort, she said, ran counter to the case law of the Court, which had developed a real right to personal autonomy.

Judge Tulkens was not alone in her criticism of the judgment. A scathing critique by one commentator claimed it to be flawed in numerous respects:

inadequate application of the margin of appreciation doctrine; narrow interpretation of the freedom of religion; imposition of fundamental secularism; adverse implications on a Muslim woman’s right to education; and promotion of the image of Islam as a threat to democracy.²⁸

Whether all or any of these criticisms are justified, I prefer to leave to others to judge. Whatever one’s views as to the correctness of the *Leyla Şahin* judgment, the principles established in the case – in

27 *Leyla Şahin*, para 116.

28 A Vakulenko, ‘Islamic headscarves and the European Convention on Human Rights: an intersectional perspective’ (2007) 16 *Social & Legal Studies* 190, with further references therein.

particular the importance of secularism in state educational institutions – have continued to be applied to reject claims relating to the disciplining or expulsion of pupils from schools in Turkey and France for refusing to remove headscarves.²⁹ In a recent case against Turkey, however, in which the members of a religious group had assembled in the streets of Ankara dressed in their traditional black garb of a turban, *salvar* and tunic, their prosecution and conviction was found by the Court to have violated their rights under Article 9.³⁰ The Court distinguished this case from the earlier ones on the grounds that the applicants were ordinary citizens and had no public functions, that they posed no threat to public order and that their presence alone could not be said to put pressure on passers-by or to amount to improper proselytism. As I shall indicate, this may be far from the Court's last word on the question of the wearing of religious dress or symbols.

CONFLICT OF RIGHTS

Critics of the Court's judgments have argued that too much weight has been given to religious belief and too little weight has been given to other rights, such as freedom of expression and the right to education. Three cases deserve special mention – the related cases under Article 10 of *Otto-Preminger-Institut v Austria* and *Wingrove v the United Kingdom*, and the controversial judgment of the Court in *Lautsi v Italy*.³¹

In the first case, the Salzburg authorities, at the prompting of the Catholic diocese, ordered the seizure and forfeiture of a film portraying God, Christ and the Virgin in a highly satirical manner. In rejecting the applicant association's complaint of a breach of its right to freedom of expression, the Court emphasised the protection of religious beliefs and the responsibility of the state to ensure the peaceful enjoyment of those rights under Article 9. It found that the measure pursued the legitimate aim of protecting others from being insulted

²⁹ *Köse and Others v Turkey* (dec), no 26625/02, ECHR 2006-II; *Dogru v France*, no 27058/05, 4 December 2008; *Kervancı v France*, no 31645/04, 4 December 2008.

³⁰ *Ahmet Arslan and Others v Turkey*, no 41135/98, 23 February 2010.

³¹ *Otto-Preminger-Institut v Austria*, 20 September 1994, Series A no 295-A; *Wingrove v the United Kingdom*, 25 November 1996, *Reports of Judgments and Decisions* 1996-V; *Lautsi v Italy*, no 30814/06, 18 March 2011, Grand Chamber.

in their religious feelings, observing that ‘in the context of religious opinions and beliefs, there may legitimately be included an obligation to avoid as far as possible expressions which are gratuitously offensive to others’.³² Moreover, the seizure was found to be necessary, since there was a very high proportion of Catholics in the Austrian Tyrol and since there had been sufficient publicity about the film for the public to have an idea of its subject matter, so that the proposed screening was ‘public’ enough to cause offence. In the view of the Court, the measures taken to ensure religious peace in the region and to protect persons who might feel under attack were within the margin of appreciation of the authorities. This subordination to the freedom of majority religious beliefs has been strongly criticised as being at odds with the emphasis that the Court has frequently placed on pluralism and religious tolerance and as introducing the new and unacceptable concept of the right to the peaceful enjoyment of religion free from offensive criticism.

If the *Otto-Preminger* case can itself be explained on its own facts as being a decision influenced by the risk of public outrage and the preserving of religious peace in a particularly sensitive region, the same cannot be said of the *Wingrove* case. The case concerned a refusal to award a certificate permitting the distribution of a short video depicting Saint Teresa’s erotic visions of Christ on the Cross. The certificate had been refused not on the grounds of obscenity but on grounds of blasphemy. Here there was no risk of public outrage being caused to Christians by a video that was likely, in any event, to have a very limited market, whatever its artistic merits. The Court nevertheless upheld the decision to refuse a certificate on the grounds that it served the legitimate aim of protecting the rights of others not to be gratuitously offended in their religious beliefs. The questions may be asked whether the Court struck a fair balance between the conflicting ECHR rights and, in particular, whether the distinction drawn between expressions critical of or hostile to a religion or its members for which no exemption can reasonably be expected and those that are ‘gratuitously offensive’ to the religion concerned constitutes a sound basis for the Court’s resolution of the conflict.

32 *Otto-Preminger-Institut*, para 49.

The *Lautsi* case is very different. The case concerned a complaint by the applicants – a mother and her two children who were non-believers – about the fixing of crucifixes to the wall in the classrooms of the state school in Italy attended by the children. They complained that this infringed their right to education and teaching in conformity with the religious and philosophical convictions of the parents under Article 2 of Protocol No 1, as well as their right to freedom of thought, conscience and religion under Article 9.

The judgment of the Chamber of the Court, which upheld the applicants' complaint, caused shockwaves throughout Europe.³³ The Chamber held that the state had an obligation to refrain from imposing beliefs, even indirectly, in places where persons were dependent on it or in places where they were particularly vulnerable, including state schools. The compulsory and highly visible presence in classrooms of crucifixes, whose meaning was predominantly religious, not only clashed with the secular convictions of the mother but was also capable of being emotionally disturbing for non-Christian pupils and those without religious belief. In the view of the Chamber, the state had a duty to uphold confessional neutrality in compulsory public education, which had to seek to inculcate in pupils the habit of critical thought. Further, the display of crucifixes could not serve the educational pluralism that was essential for the preservation of 'democratic society' and was incompatible with the state's duty to respect neutrality.

The Italian Government's referral of the case to the Grand Chamber attracted an unprecedented number of interventions by some 10 states, as well as 33 Parliamentarians and 6 non-governmental organisations, some strongly critical of the judgment, others strongly supporting it. The Grand Chamber accepted that the decision whether crucifixes should be present in state school classrooms formed part of the functions assumed by the state in relation to education and teaching and that the crucifix was, above all, a religious symbol. It also accepted that the reference to the historical traditions within a state could not relieve the state of its obligation to respect the rights and freedoms prescribed by the ECHR. However, the preponderant visibility given to the majority religion in the school environment could not be seen, in the view of the majority of

³³ *Lautsi v Italy*, no 30814/06, 3 November 2009.

the Court, as a process of indoctrination. A crucifix on a wall was an essentially passive symbol and could not be deemed to have an influence on pupils comparable to indoctrination or participation in religious activities. On this ground, it was distinguished from the powerful external symbol in the *Dahlab* case. Moreover, the greater visibility that the presence of the crucifix gave to Christianity in schools had to be seen in a context where the school environment in Italy was opened up to other religions and beliefs, where religious education was optional and where the presence of crucifixes was not alleged to have encouraged the development of teaching practices with a proselytising tendency. The Grand Chamber accordingly found that there had been no violation of Article 9. This judgment has also not been without its strong critics, many complaining that the Court failed adequately to protect the very principles of secularism, pluralism and neutrality that, in other contexts, it had held to be paramount requirements in the area of religion.

CONCLUDING REMARKS

This brings me back to my initial question: how has the Court responded to the challenges that it has faced in securing proper respect for a variety of faiths and beliefs in a religiously diverse continent? In general, I believe that the balance sheet is positive – strong and bold in the protection of collective rights against state interference; less bold, perhaps, in securing individual religious rights, particularly where these are in conflict with other rights and public interests.

Two cases against the United Kingdom are currently pending in the Court, which will further test the Court’s response to the challenges presented under Article 9. They have the common thread of a conflict between the requirements of religious belief and obligations imposed by the law or by the requirements of employment. In one (*Eweida* and *Chaplin*) the two applicants are practising Christians and believe that the visible wearing of a cross is an important part of the manifestation of their faith.³⁴ The first was employed by British

34 Nos 48420/10 and 59842/10, lodged on 10 August and 29 September 2010. Statement of facts and questions to the parties are available from the Court’s communicated cases collection at <<http://www.echr.coe.int/echr/en/hudoc/>> accessed 5 December 2011.

Airways on a check-in desk; the second was employed as a nurse on a geriatric ward in a state hospital. Both were refused permission by their employers to wear a crucifix, albeit on different grounds, and when they protested were moved to different employment positions. Both unsuccessfully complained in the Employment Tribunal of indirect discrimination on religious grounds.

In the second case (*Ladele and McFarlane*) the two applicants, who are also practising Christians, refused to carry out certain duties in the course of their employment that they felt would condone homosexuality.³⁵ The former had been employed by a London Borough as a Registrar and had the function of conducting civil marriage ceremonies and registering such marriages. She was dismissed for refusing to conduct civil partnership ceremonies, being unable to reconcile her Christian beliefs with taking a direct and active part in enabling same-sex unions to be given formal legal recognition. The second applicant worked as a counsellor for Relate, a national organisation that provides a confidential sex-therapy and relationship-counselling service. He was dismissed for refusing to provide sexual counselling to same-sex couples on the basis of a deep and genuine belief that homosexual activity was sinful and that he should do nothing that directly endorsed such activities.

The cases are not only factually and legally interesting and difficult. They have also provoked a strong public reaction within the United Kingdom, the Court having been flooded by an exceptional number of requests to intervene in the proceedings from both individuals and non-governmental organisations. Whether I will still be a judge on the Court when the cases come to be decided I am not sure. What I am sure of is that, whatever the result, the Court's decisions will provide ample material for another article in the future. In the meantime, one hopes that Article 9 will continue to be a precious asset, whether for believers, non-believers or, as it was put in *Kokkinakis*, the unconcerned.

³⁵ Nos 51671/10 and 36516/10, lodged on 27 August 2010 and 24 June 2010.

HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

LISBET CHRISTOFFERSEN

The chapters in this volume include sections on the historical, social and cultural background for relations between religion and discrimination laws. Reading those parts of the papers is both touching and moving. It reminds one how much the path of history determines our thinking, even to the extent of vocabulary. The questions that these papers raise are also about language, about the conceptualisation of topics including:

- i. Freedom of religion and equality among religions;
- ii. Freedom for churches to practice their understanding of differences, subordinations and so forth;
- iii. Freedom for a civic citizenship that does not set boundaries regarding religious requirements for the individual – that is, individual religious and moral freedom of the individual towards the Church;
- iv. Women's liberation and equality without any distinction on basis of gender or sexuality, with application within religious communities as well as society as a whole;
- v. Individual freedom of religion of the individual towards the state – that is, the right of the individual to perform religious act and not to be discriminated against when so doing;
- vi. Secular societies discriminating against religious individuals and organisations; and
- vii. Freedom of religion and equality among religions.

The answers to the question 'what is this all about' very much depend on the historical background in a particular country. Thus the answers are path-dependent and these paths explain what is considered normal for a particular country, the background against which we reflect on anti-discrimination laws from international and European law.

It may be helpful to identify (at least) three parties to rulings on discrimination on grounds of religion: the individual, the religious group and the state. It may also be helpful to note that the individual can fall into one of three possible categories: a religious indi-

vidual who wishes to practice the tenets of his or her religion even though these are contrary to the state's view; a secular individual who wishes the state to support the position that it is possible to be a citizen without being subject to church views; and, perhaps the most European stance, someone who wishes to combine the religious and secular dimensions in his or her own way without the intervention of either the state or the Church.

Moreover, it may be helpful to note that the state can play different roles, too. On the one hand, it could support the self-determination of the church or religious denomination without wishing to intervene internally (that is, no discrimination on grounds of the religious belief of particular religious communities). On the other hand, the state could support a line where there is no distinction on grounds of religion (that is, religion is not an acceptable argument for not following the general laws, including those prohibiting any different treatment of genders, sexualities and other groups on the basis of religion (which would certainly be seen as intervening in the internal affairs of churches)). The state may also support the individual in his or her views.

Finally, the religious communities can also have different positions. Some would argue that different treatment on basis of gender, sexuality, race and the like is not discrimination but that it is to follow nature or how God has created us. Other religious denominations would argue that they are supportive of gender, sex and race neutrality since the Gospel itself turns all old normative structures upside-down.

Reading the articles in this book, it also becomes clear that our own understandings are path-dependent. Each author has his or her own understanding of the historical, cultural and social background for the two EU Directives on prohibition of discrimination on grounds of race and ethnicity (as well as the older ones on equal treatment among men and women) and the general framework Directive on equal treatment in employment and occupation (on all grounds, including religion). Some of these readings could be formulated as follows.

First, it is worth mentioning that the two EU Directives are the simple results of a market-oriented approach. We are talking about labour forces all contributing to and taking part in the labour market. They have the same kind of work and are therefore paid equally. But, since pregnancy is only a physical burden for one gender, women must be afforded differential treatment in order to obtain equality.

The socio-historical background for the Directives is thus straightforwardly warfare and welfare. Women proved during the Second World War that they were able to run countries and contribute to the home front while the men were abroad. After the war, they were not prepared to leave their jobs for the sake of the returning men. The European Union is to a very large extent a market established on the idea that all adult people can and shall take part in production, and this has become the normative view. Therefore, many view the European Union as a positive normative power. The breadwinner model is decreasing while an approach based on equality, where all play a part in the employment market, has been increasing. This is also true beyond the European perspective. The first directives and the first national legislation on equality between men and women, at least in Denmark, were formulated on the basis of treaties passed by the International Labour Organisation. What is the relevance of all this for religion? The answer is that if all labour forces should be treated equally, regarding gender as no ground for discrimination, then should not the same be true within religious communities and churches? The Netherlands report thus mentions the question of women's liberation as one of the normative foundations for these two Directives.

Second, the striving towards equality on the labour market actually started very much earlier – as far back as the late nineteenth century. The Estonian report highlights the promotion of equality of all religions from 1925, and the Italian report also mentions this early striving, which led to female university students (in theology as well as other subjects), and eventually female ministry within the protestant churches.

Third, the Directives also have their origin in the International Convention on Civil and Political Rights and in the other conventions on race discrimination, women's rights and so forth, as well as in the American and Dutch human rights movements after the Second World War. In 1968, the World Council of Churches held their general assembly in Uppsala, discussing *inter alia* the politics of race segregation in South Africa. At the time segregational politics were still viewed by very many reformed churches and believers as being not only legitimized in scripture but also compulsory: had God meant all people to be equal, then he would have created them equal (the same argument was used for the relationship between men and

women, not to mention that regarding homosexuality). It was a change in interpretation of the Bible that formed one of the central lines of argumentation behind human rights as a tool for changing people's lives. For many in the liberal protestant churches this has been the story. There are, however, fewer liberals now, and churches are heading back towards fundamentalist views, with the concomitant problem of how this will influence religious understanding of equality and non-discrimination.

Fourth, the campaign for equality between religious people has a much longer history, one that has both religious and secular roots, which sometimes result in the same outcome, but which produce very different argumentation when determining difficult cases. The German report explains the historical roots for equal and positive treatment of people and religious communities without religious confession being permitted as a ground for discrimination, and dates this approach to the Reformation. The French report likewise explains the historical roots for equal and positive treatment of people and religious communities regardless of their religious confession, placing them in the French Revolution. The difference – because there is a difference – relates to whether equality includes or excludes the religious dimension. Let me, as a parallel, mention the Danish Constitution of 1849, which states (in Article 70), that nobody may be deprived of access to the full enjoyment of civil and political rights or evade the fulfilment of any general civic duty on the grounds of his or her profession of faith or descent. When that article was decided, some old-school lawyers reacted because it would allow Jews to become members of the Supreme Court. So be it, was the answer. Yet, 160 years later, legislation prohibiting the wearing of religious attire in court was backed by advertisements showing Muslim women on the bench; and here Denmark is not alone. Is European legislation changing from an old-school German to an old-school French perspective?

My fifth observation is that communist societies had – and have – a different approach to freedom of religion, advocating freedom from religion, and to equality and non-discrimination based on religious identity (and other minority identities), seeing them as problems in societies that wished for equality. The Romanian, Polish and other reports show that most clearly. Does this mean that the very concepts of equality and prohibition of discrimination have become

problematic to the degree that it is new religious fundamentalist understandings of difference that helps us forward?

The need for a new politics of difference leads me to my sixth point, namely that this need also supports the rise of neo-nationalism in many Member States. For example, the Romanian report indicates that religious, ethnic, sexual and national minorities are again seen as problematic in the quest for national identity in a globalised world. This reaction is common in many European countries.

Seventh, it is not possible to take a vaguely religious façade as proof of commitment within, which leads religious communities to require now what they did not need to ask for before: insight, knowledge, but most of all loyalty. How much loyalty, however, should we expect to give our employer when it comes to individual or internal religious faith and which types of workplace can require such loyalties? This is not an easy question to answer, except, perhaps, in the case of church ministers.

Finally, the question of discrimination against individuals in the labour market (including religious organisations) and society as a whole on the basis of their religious identity and practice also has to do with the general context of equality or different treatment of religious communities in relation to the state. The Finnish, Estonian, Greek and Czech reports (among others) emphasise that approach strongly. And I am aware that a different treatment of religious communities in relation to the state allows for both discrimination of individuals by the state (the vertical function) and ill-effects on the horizontal relations between religious and non-religious persons. I also believe that general anti-discrimination clauses – such as Article 14 of the European Convention on Human Rights and the suggested 12th Protocol – could have an impact in favour of more equal treatment on the part of the state towards religions. This is, in fact, why Denmark has hesitated until now over ratifying and implementing that protocol. Yet to what extent do these Directives affect Church-state relations? This is difficult to assess, unless your experience is that, for example, Jehovah's Witnesses are more likely to be discriminated against in the labour market because their faith is seen as more awkward than 'normal' Christianity.

Is it therefore possible to conclude, with the Polish report, that freedom and tolerance is old, while non-discrimination is new? What, however, is the difference between freedom/toleration and

equal treatment/anti-discrimination? Let me mention a historical example. Visiting Vienna for an extended period some years ago, I realised what it felt like to be the minority; what a Catholic must feel in Copenhagen. There are certainly many churches in Vienna, but the majority of them are Catholic; in Copenhagen, the opposite is true. What is more, when I finally found the protestant communities, they had each been allowed to build their own church (one Lutheran, one Reformed), but on the same piece of land, just within the city wall, and originally with no entrance to the street – which is the case for Muslims in Copenhagen now. Historically, that was seen as tolerance and freedom. But is it equality or is it discrimination?

Are we thus dealing with an ‘imposed rhetoric of equality’ or with an awareness of minorities or with a turn towards favouring what is perceived to be ‘normal’ (as in Romania)? Do we adhere to the unconscious belief that, as the Italian report put it, equality is homemade, (anti)-discrimination is imported? Or are we, as the Spanish report indicates (and as can be drawn from Nordic history), dealing with an anti-clerical dimension, supported by socialist parties, with conservative parties trusting to natural differences?

And where do the churches themselves stand? Paul is said to have written to the Galatians that ‘There is neither Jew nor Greek, there is neither slave nor free, there is no male or female for you are all one in Christ Jesus’ (English Standard Version, 2001). Peter, similarly, is said to have written to the early Christians that ‘you are a chosen people, a royal priesthood, a holy nation, God’s special possession, that you may declare the praises of him who called you out of darkness into his wonderful light’ (ESV). In the Lutheran Reformation the latter quotation was referred to as ‘the priesthood of all believers’; the left wing of the Reformation understood it to mean that peasants also had the right to equality and good treatment. However, Luther taught the princes otherwise. The quotation from Galatians has been a solid foundation for claims of equality within churches, at least in the Scandinavian countries. Is the tide turning so that women, slaves and Jews (or Greeks) will have to learn otherwise once more?

The most important question is thus whether or not it is or has been possible to reach a common understanding on equality and non-discrimination in Europe. That is the goal established for us and let me here refer to the foundation value of the European Union as it

was laid down in the common provisions to the treaty of the European Union, Articles 2–3:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. The Union ... shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child ... It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

The question of non-discrimination is further outlined and detailed in the treaty on the functioning of the European Union, Part 2. Only here, and only based on the competences referred to the Union, do we find the Article promising union citizens that steps are taken to combat discrimination on grounds of sex and sexuality, race, age, disability, religion, among others. Furthermore, the Union does not have any competence with regard to the status under national law of religious communities. That remains the responsibility of the Member States, even though churches, philosophical institutions and the like are provided with their own direct gateway to participate in European democracy.

Thus the normative background for the Directives on which this publication is focusing is much more blurred than the Directives themselves seem to show. There is no doubt that the right not to be discriminated against, even when combined with the right to support of the mainstream, was on its way to becoming one of the central fundamental rights following the combination of national citizenship and EU citizenship established through the changes of the last twenty years. However, these rights were prevented from becoming too solid a part of the normative dimension of the EU by, among others, the churches who did not wish to have their doctrines and norms on differences between genders, between sexual practices and between lay and clergy to be altered by EU law.

As a result, legal integration in the matter has ground to a halt just as legal integration in general in the EU with regard to understanding different cultures has been stopped by the Member States.

Voices that, in Scandinavia and the Netherlands at least, argued the combined case of human rights in the name of religion have now been changed to loud demands for human rights as a sort of secular religion, combating differences shaped by God, differences between men and women, between race and colour and between nationalities. These voices are becoming stronger, in conflict with the very idea of a union striving to outlaw differences. In all this, the churches have taken sides. Perhaps, in some cases, this has always been true, and the polarities have simply been brought to the surface again. The changed agenda has also become an agenda of religion versus secularity, human rights, feminism, anti-racism and other dimensions of equality being placed on the side of secularity. Is that fair? It is difficult to tell. What I do see is that religious individuals and religious groups all over Europe now get the impression that they are the ones who are discriminated against. Concrete cases bear witness to that.

Our historical pathways, as I have said, are very different and the role of equality both among religions and among religious people in different Member States is therefore also different, dependent upon particular pathways. Moreover, there are many different answers to the more fundamental question: does equality mean excluding any sort of special identity or does equality mean including all sorts of differences? The great years for human rights have tried to establish a common ground to give common solutions to these questions in the EU as if the Union was a common market with common citizenship. That has been achieved with the help of European law and court decisions from the European Court of Justice in Luxembourg. Now, the European Court of Human Rights seems to be called to help protect the differences rather than the common ground, re-establishing historical pathways dependent, *inter alia*, on religious differences.

I cannot say whether, in a time of globalisation, it is possible to re-establish national citizenship and national religion governed by national identity. It does not seem possible (or preferable) to re-establish nationally argued differences regarding genders, sexes and races, even though they might be argued for on religious grounds. The historical, cultural and religious context of these legal norms are not designed to preserve distinct identity, nor do secular norms necessarily exist to promote uniformity. The real conflict is over how to understand our shared and distinctively different identities and to strike the balance between commonality and differences in a global world.

THE DUTY NOT TO DISCRIMINATE: THE NATURE AND EXTENT OF THE PROHIBITION

LARS FRIEDNER

An important element of religious liberty is the duty not to discriminate. For EU Member States a common basis for discussions is provided by the two EU Directives that address the question of discrimination (2000/43/EC and 2000/78/EC). As only Directive 78 targets the matter of religious discrimination, that will be the main focus of this article. I will also touch upon Article 14 of the European Convention on Human Rights (ECHR), which also deals with discrimination on the ground of religion. That said it is obvious that the EU Member States have mixed the two Directives when applying them. This means that the broader scope of the first Directive (Directive 43) has also been applied to discrimination on religious grounds, which is covered only by the second Directive (Directive 78), which has a narrower field. The Member States have thus gone further than they have been obliged to do and religious discrimination in the Member States is ‘more strongly forbidden’ than it would have been, had the Member States only applied the Directives exactly as they were laid down.

Directive 78 is clear regarding the duty not to discriminate: Member States are not allowed to discriminate because of, for example, religion. Nor does the ECHR give the states that have ratified the Convention the right to anything else but to have a duty not to discriminate. There are, of course, some exceptions. However, I leave these to one side for now and focus on the fact that international law places an obligation on the European states not to discriminate on religious grounds.

The areas of discrimination covered by the Directive are placed in two different sections. One section focuses on the form of discrimination, the other on the areas of society that are covered. (There is, in addition, a third section – that referring to different grounds for discrimination – but as I have chosen only to mention religious discrimination, this third section will not be considered here.)

The different forms of discrimination are direct discrimination, indirect discrimination and harassment. Some countries appear to

have gone further and have also included victimisation, instruction to discriminate and incitement to discriminate (for example, the Czech Republic). In France even *discrimination par association* is prohibited. It could be, however, that some of these different expressions only show a different interpretation – or issues with translation – of the Directive.

The areas that are covered by Directive 78 are working life, business and professional competence, membership in trade unions, associations for employers and professional associations. As I have already mentioned, however, most Member States seem to have enlarged the scope for discrimination on religious grounds to cover provision of goods, services and housing, health care and social services, social security, unemployment security, financial aid for studies, military service and other corresponding education within the armed forces and other forms of acting against the public interest when the agent is a public employee. Sweden, my own country, has even included all forms of education.

DISCRIMINATION AUTHORITIES

Directive 43 obliges the Member States to appoint authorities (one or several) having the purpose of promoting the equal treatment of all persons, without regard to their race or ethnic origin. Some Member States have included equal treatment on religious grounds in the task of the authority, others have simply followed the obligation of the Directive. Some Member States have given the power enshrined in the Directive to a body already in existence, while others have created something new. Some states have thus given a wider power to the authorities than that prescribed in the Directive.

In some countries, the Equal Treatment Agency has the power of a court; in others the Agency has to bring the matter of equal treatment to an ordinary court. Germany appears to have no special authority that is responsible for non-discrimination, which is therefore addressed in all instances through the courts.

KEY SOURCES OF LAW

As the ECHR is technically regarded as a part of the *aquis communautaire* of the EU, the Convention is one of the cornerstones of the non-discrimination legislation of all Member States. Most states also have a prohibition against religious discrimination in their respective constitutions. As a tool for implementation of the two Directives, the majority of Member States have created non-discrimination acts of parliament. Some states already had such acts, but they have been amended or renewed according to the provisions of the Directives. The UK, however, has a different system for implementing EU Directives (which has been used in this instance), with the Government normally responsible for implementing EU Directives.

CASE LAW

Leaving Strasbourg and Luxemburg case law aside for the time being, I will consider the case law of the different Member States. Looking first at Finland, there are two cases of interest. While their focus was not on religious discrimination but discrimination against women and against homosexuals, they have had significant effects on the religious life of the country. The courts have perhaps judged harshly because the cases related to the majority Church.

In Cyprus, *Minister of the Interior v The Jehovah's Witnesses Congregation (Cyprus) Ltd* raised the issue of whether Jehovah's Witnesses could be given the same authority to register marriages as the other religious communities, including the Orthodox Church. I find it a little unexpected that the courts gave this small religious minority such strong support. I am not sure that this would have happened in other EU Member States. A similar case could be considered to be that of a Jewish school in the Netherlands, which was granted permission to deny admission to non-Jewish pupils.

There seems to be consensus about how to handle persons who, because of their faith, cannot work (or go to school) on Saturdays or must wear particular garments or jewellery – to some extent this is permitted, but not when it interferes with other important interests. In my opinion the judgments in UK cases where women working as airline check-in staff or nurses were not allowed to wear crosses

around their necks were quite harsh, again against the majority religion. The same remark could be made in the Romanian case ruling that religious symbols are not allowed in schools, particularly in the light of later conclusions from Strasbourg.

Judgments in other cases seem to me clear. Examples include the French case where it was prohibited to ask a candidate for employment in the police about his religious convictions; Greek cases where a language teacher not belonging to the Orthodox Church or other religious communities must be given the same opportunities as a member of the Orthodox Church; the Italian case where a man was not allowed to punish his wife; the Romanian case where the Government was not allowed to have links to one Church alone on its website; and the Slovenian case that ruled that religious activities could not be prohibited in schools, provided that they were not financed by the state.

Another dimension is raised in the case of Slovenia, where a referendum regarding city planning was prohibited because it aimed to hinder the erection of a mosque. Here the question of religious freedom interfered in an interesting way with the question of local democracy. One could raise the question of whether a ‘misled majority’ should be fought through the courts or through open debate. In a similar vein was the French case where a landlord was not allowed to lay down a rule that his tenant should not wear a headscarf in public. This case could be seen as a matter of indirect discrimination – the landlord did not want to rent his house to a Muslim, and he therefore instituted this rule.

Yet another dimension comes to the surface in the Netherlands and UK cases where a registrar for marriages was obliged to register same-sex partnerships as well as marriages, which was not regarded by the courts as discrimination. These cases raise the same question as the oft-discussed matter of doctors and nurses who do not want to assist with abortions, but there is no case law in this area.

The Slovenian case where restoration of land was postponed regarding the owner of larger areas probably demonstrates an example of indirect discrimination. It could be read between the lines that the decision was aimed specifically at the Roman Catholic Church.

CONCLUSIONS

As one would expect, Member States have loyally implemented the Directives regarding non-discrimination and many of the states have chosen to go far beyond what is prescribed by the Directives. The main focus for discussion must be how the implemented Directives are handled in the different states in practice. Unfortunately, only a few cases exist. However, those that have been reported are interesting ones, although some of them are from the time prior to the implementation of the Directives. Nevertheless, it does not seem that any contradictions have appeared between the Member States, with the same matter being handled in opposite ways in different countries.

THE RIGHT TO DISCRIMINATE: EXCEPTIONS TO THE GENERAL PROHIBITION

AGUSTÍN MOTILLA

INTRODUCTION

The aim of this article is to analyse cases in which European Union and national legislation permit differences of treatment due to religion or beliefs in order to safeguard certain legal interests or rights. Strictly speaking, they comprise exceptions to cases of discrimination, rather than a hypothetical right to discriminate, as defined by national and international texts.

Discrimination can occur in any number of areas. Here we will concentrate on what, judging from the national reports, is the most sensitive area of discrimination: labour relations. This is what the main European Union Directive refers to in its prohibition against discrimination based on religious beliefs or ideologies: Council Directive 2000/78/EC, 27 November 2000, which establishes a general framework for equal treatment in employment and occupation. We will refer mainly to this Directive as, to a greater or lesser extent, states have directly adopted the Directive in their respective laws.

However, before beginning the analysis of the Directive and the national report, I must confess to a certain feeling of insecurity when it comes to tackling and establishing conclusions regarding the subject at hand. There are two reasons for this. The first is the marked variability of the factors influencing the subject, which also give rise to multiple and plural solutions; such solutions depend on elements such as conflict of interests, the nature of the organisation (public or private, and, within this, whether or not it receives public funding) and the relationship with other types of discrimination (such as gender, sexual orientation, marital status, race, and so forth). The second arises from the frequent use in laws regulating this matter of concepts that, by virtue of their diffuseness, permit a wide range of valid interpretations – such as objective justification, legitimate ends, proportionality between ends and means, and the like. The integration of these concepts, a task that generally lies with courts of justice, often

falls short of the underlying intentions in many countries, owing mainly, as acknowledged in the national reports, to the non-existence of legal cases concerning discrimination on the basis of religion or belief.

In general terms, and as the first exception to the prohibition of discrimination, indirect discrimination – that is, where ‘an apparently neutral provision, criterion or practice would put persons having a particular religion or belief at a particular disadvantage’ – can be legitimate if it can be objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. Preventing harm, protecting the sphere of privacy, and personal safety are some of the motives that justify differences of treatment. With respect to religious beliefs, in countries such as France or the United Kingdom the courts have employed reasons of hygiene or workplace safety to justify the adoption by certain organisations of workplace dress code measures that are incompatible with practices regarding garments used for religious or cultural reasons – in particular, the Islamic veil.

Notwithstanding this, and within the specific area of discrimination against persons based on religion or beliefs, the European Union Directive establishes three exceptions, concerning both direct and indirect discrimination, for which a difference of treatment is considered to be lawful.

FIRST EXCEPTION: POSITIVE ACTION

According to Article 7 of Directive 2000/78/EC, Member States may include the adoption of positive action in their legislation in favour of persons of certain beliefs or religions in occupational training or in employment conditions when this may reasonably compensate for disadvantages resulting from discrimination against these groups in the past. These actions are deemed necessary to prevent the perpetuation of traditional discriminatory attitudes against determined collectives and to favour equal opportunity. In this and other areas, positive action represents a manifestation of the obligations of public authorities to intervene in society to ensure that rights and liberties are real and effective, thus eliminating the obstacles that, for certain persons and collectives, intervene between a proclamation of rights and putting them into practice.

Especially significant in this area are the measures adopted in countries such as Romania for the social integration and assimilation into working life of the Roma people. Another specific example of the application of these positive actions in favour of certain beliefs or convictions is specifically mentioned in the European Union Directive. According to Article 15, in the case of Northern Ireland it is not considered direct discrimination to show differences of treatment in recruitment in favour of persons of the Catholic faith in two professions (the police service and teaching) where, as it is expressly stated, they have been historically under-represented, in so far as preferential hiring in these fields is expressly authorised by national legislation. In the report from the United Kingdom, the national measures that have been adopted in this sphere are explained in detail.

The variability and breadth of these measures, as well as their direct impact on the policies of the Member States in their fight against discrimination in other spheres (especially that of sex discrimination), justify our not spending more time on this exception. We will now look at the other two exceptions, where the religious element plays a dominant role.

SECOND EXCEPTION: OCCUPATIONAL ACTIVITIES RELATED TO THE TRANSMISSION OF IDEOLOGIES OR RELIGIONS

Article 4 of Directive 2000/78/EC allows Member States to accept and regulate differences of treatment based on religion or convictions when

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.

The exception to discrimination revolves around occupations or employment in which religion or belief is a genuine requirement of the activity, given the nature of the occupation and the context in which it is carried out. Two requirements are necessary: first, that one of

the genuine and determining characteristics of the job be of a religious nature (for example, activities involved in teaching religion or religious assistance in an institution or community), and second, that the requirements of the occupation that relate to religion be proportionate, in relation with a legitimate objective and necessary in order to achieve certain objectives (for example, one must be Muslim in order to teach the Qur'an in a mosque, but the person who cleans that mosque need not be). This point brings us to another conclusion: the discrepancy between religion and ideology, externally manifested, can lead to the lawful dismissal of a person from an occupation of a religious nature.

Case law from the European Court of Human Rights offers several rulings related to this area. In the case of *Knudsen v Norway*, 8 March 1985, the European Commission for Human Rights (the Commission) acknowledged that the dismissal of a minister of religion, a parish vicar, from the Norwegian State Church, for refusing to undertake certain functions required of him in protest against the state legislation permitting abortion, was lawful and did not violate Article 9 of the European Convention on Human Rights (ECHR). This Article does not protect the right to hold a religious office in a state Church; the failure to perform his functions is a reason for dismissal. His right to freedom of religion and conscience were guaranteed, as he was free to relinquish his office as a clergyman of the state Church.

In the case of *Karlsson v Sweden*, 8 September 1988,¹ a clergyman of the Swedish State Church was disqualified as a candidate for a position within the parish owing to his antagonism towards the ordination of women in the Church. His refusal to co-operate with a female member of the clergy was, in the opinion of the Church authorities, reason to deny him the position. According to the Commission, religious freedom as contemplated in Article 9 of the ECHR does not protect the right of a member of the clergy to defend a particular conception different from that held by the Church in which he or she is working.

A similar argument was followed in the case of *X v Denmark*, 8 March 1976, in which a minister in the State Church of Denmark was dismissed for refusing to baptise children unless the parents

¹ European Commission Decision, No 12356/86.

underwent a series of five religious lessons, despite repeated requests by the Danish Church to refrain from imposing this condition.²

Nevertheless, two questions can be posed in this regard. First, what types of occupation would protect the difference of treatment of employees for ideological or religious reasons? Naturally, those directly related with the transmission of doctrine and the practice of worship, but there are also others in which the objectives, despite their commercial nature, are related to religion or beliefs. For example, a travel agency that organises religious pilgrimages for Christians or Muslims may lawfully hire representatives or guides of the Christian or Islamic faith. Second, who defines the religious nature of the activity? As Schanda points out, the principle of neutrality of the state prohibits it from doing so; but leaving it to the churches and faiths could authorise a complete exception, a field open to discrimination.

If the occupation is carried out within a particular faith, or institutions belonging to it, the religious qualification required of an employee is strengthened, given that this exception would be added to the one that we will discuss in the following section.

THIRD EXCEPTION: ACTIVITY CARRIED OUT IN ORGANISATIONS WITH A RELIGIOUS ETHOS

The 24th recital of Directive 2000/78/EC reiterates that this institution, according to the Treaty of Amsterdam, respects and shall not prejudice the status of the churches and faiths within the Member States and, as a result, ‘Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for exercising an occupational activity’. Article 4(2) permits Member States to

maintain national legislation in force at the date of the adoption of this Directive or provide for future legislation incorporating national practices existing at the date of the 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

² For related cases concerning non-state churches, see *X v the Federal Republic of Germany*, 8 May 1985, Commission Decision no 10901/84. In the Finnish report, we find accounts of analogous cases resolved by the Finnish courts.

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 other grounds.

The provisions of the Directive should be understood as not prejudicing the right of churches or organisations based on an ethos to demand, as a result, that the persons employed by them possess an attitude of good faith and loyalty towards the ethos of the organisation.

Exercising the right to ideological and religious freedom of the employee is to a certain degree conditioned by whether his or her activity is carried out in what are known as organisations with a religious ethos. These are characterised by ethical or moral, ideological or religious ideals that pervade all their objectives and activities, and that assume the adhesion on the part of the employee to this inspired concept of the world called 'ethos'. Among these are organisations such as political parties, unions, publishing houses and religious faiths, as well as institutions established by these organisations to achieve their aims. For an organisation to be awarded this status it must comply with a basic requisite: that it is a means or mechanism for the propagation of this ideal or ideology; it can also serve to produce goods or services, but this activity shall always be subordinate to the principle of the expression and propagation of a determined set of ideas or concepts.

Regarding these organisations, the Commission maintained that in ecclesiastical functions and in organisations with a religious ethos, ministers of religion and personnel shall, by behaviour and words, express their adhesion to the institution which employs them. Any significant discordance, or that which is reputed to be so, between the objectives of the institution and the convictions of those persons,³ is a reason for dismissal, without violating the European Convention.

³ J Duffar, 'Religion et travail dans la jurisprudence de la Cour de Justice des Communautés européennes et des organes de la Convention européenne des droits de l'Homme', in *Churches and Labour Law in the EC Countries: Proceedings of the*

This conclusion is applicable to all organisations or institutions inspired by a specific ethos. In the case of *Van der Heijden v The Netherlands*, 8 March 1985,⁴ an employee who held a position of responsibility in a foundation for immigrants was, at the same time, a leading member of a political party hostile towards the presence of immigrant workers in his country. His dismissal for refusing to leave the party limits the right to free political association. However, the Commission upheld the decision that the dismissal was necessary in a democratic society, in so far as that right ran counter to the development and credibility of the foundation's activities.

The fact that religious faiths, or the institutions that 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 the full autonomy granted to those recognised by the state. Nevertheless, while the activity of institutions created by religions may also include manufacturing or exchange of goods and services, in order for them to be considered organisations with a religious ethos it must be evident that this activity is subordinate to and instrumental in the main objective – the propagation of the religious message.

We confirm, in substance, that both national and international legislation authorise an exception to the difference of treatment of employees for ideological or religious questions in organisations with a religious ethos so long as these comply with certain cumulative requirements: that the imposition of religious requirements or demands are necessary to preserve the organisation's ethos; and that of proportionality – that is, that there is an existing relationship between the ethos of the organisation and the type of work carried out within that organisation, according to the objectives it pursues.

There must be a balancing process between the obligation of non-discrimination against the employee for his or her religion or beliefs and the right to religious or ideological freedom of the organisation with a religious ethos. The exception to non-discriminatory laws in favour of religious faiths must fall between two extremes. On the one hand, a broad exception may require per-

European Consortium for Church and State Research Meeting in Madrid, 27–28 November 1992 (Madrid/Milan, 1993), para 48, p 33.

4 European Commission, No 11002/84.

sons to share the beliefs of a certain religion in order to qualify for employment. This may create loopholes in the right to non-discrimination that can seriously hinder access to a post (for example, in a country such as Ireland in which most education is private and provided by Catholic schools, an atheist teacher would find it quite difficult to find employment in education). Furthermore, this shall not extend to discrimination in other areas with no direct relation to religion (the main issue here being sexual orientation: Catholic schools prohibiting the hiring of homosexuals; or the case, recounted in the French report, in which the courts found unjustified the dismissal of a sacristan's assistant for being homosexual when this caused no problems within the church community). On the other hand, a highly restrictive exception (for example, only applicable in occupations with a strictly religious content) may require religious faiths or organisations to hire persons who do not share their beliefs, thus endangering the ethos of the institution.

Nevertheless, a key element concerns the determination of the compatibility that exists between the legislation in certain European Union countries (for example, Austria, Germany, Holland, Ireland, Italy and Lithuania) in which the principle of autonomy of the Churches subjects all of their organisation and workings to religious law, thus excluding state jurisdiction. (In Germany there is even talk of the large Churches having their own Labour Law, creating a third channel in addition to that of public employees and that applied to employees in private firms.⁵) The consequence of this concept is that *all* activity carried out within churches and religious institutions is considered to fall outside the protection of Labour Law – considering that, by virtue of the autonomy that these institutions enjoy, it is an internal matter – and that of the European Union Directive. The exception extends to work of a religious nature (assistance and worship), or related to the religious aims of the institution (in a religious teaching order, a nun who works as a teacher in the order's school), as well as to other non-religious activities that benefit the diocese or religious orders (a priest who works in the Curia, or a nun in charge of the hostel in a contemplative convent). Additionally, this is justified by the presumption that the activity is carried out in compliance with the duties assumed by religious oaths or ministerial ordination.

⁵ G Robbers, *State and Church in the European Union* (Baden-Baden, 2005), p 88.

Certain doubts concerning compatibility should be pointed out regarding these laws and EC law. One of these effects is that ministers in traditional Churches are left unprotected, as are, in the case of the Catholic Church, members of religious orders and congregations. Another point to note is that the EU Directive does not admit one absolute exception; rather it shall be justified by objective, though religious, reasons and by the proportionality between the solicited requirements and the desired aims. The interpretation of these questions must be submitted to judicial control, and was thus affirmed by the Commission. In the decision as to the admissibility of the case of *Rommelfanger v The Federal Republic of Germany*, 6 September 1989, the Commission found that the proceedings regarding the reasons for the dismissal of a hospital employee in a Catholic hospital who spoke out against the doctrine of the Catholic Church fall under the control of the courts.

Another point worthy of mention is that the European Community Court of Justice does not exclude the possibility that the services of a member of a religious community performed as part of commercial activities for the community may be considered as work. In the Decision of *Steymann v Staatssecretaris van Justitie*, of 5 October 1988, a German citizen was working in Holland for the Bhagwan religious community. He was employed as a plumber, and also performed various household duties for which, in exchange, the community provided for his material needs. His request for a Netherlands residence permit in order to pursue activity as an employed person was dismissed by the Dutch authorities on the grounds that he was not performing remunerated activities. The European Court of Justice (ECJ), however, accepted the possibility that activities can be those that consist of participating in a community based on religion or philosophical beliefs and, moreover, that these activities of mutual benefit can be construed as being of an economic nature – that is, remunerated occupational activities or services – if the following conditions, as considered in this case, occur: the activities are performed within the framework of the organisation's commercial activities and guarantee its economic independence; the work is genuine and effective and contributes to the material subsistence of the community; and, for this work, the community provides for the material needs of the member: 'the services which the community pro-

vides to its members – the Court concludes – may be regarded as the indirect *quid pro quo* for genuine and effective work’.

In the balance between the beliefs of employees and the objectives of the institution, the private morality of the employee, which reflects the level of commitment and compliance with the ethos of the institution are relevant aspects. Their significance will depend on the bond established with the group’s doctrine and the notoriety, publicity and social implications of the private conduct.

With respect to proportionality between the requirements demanded of the employment and the aims of the institution, again the variable nature of the concept ‘proportionate’ shall be noted and, as a result, subject to the interpretation of the courts. Nevertheless, if an objective element is introduced in the deliberation of conflicts of interests, it must be proved that these requirements are related and are necessary for the fulfilment of the institution’s aims.

Religious demands and the autonomy of the worker are also subject to possible factors that cause the solutions to hypothetical conflicts that might arise to vary, and that make the criteria of the resolutions of the cases a subject dominated by casuistry. Two of these factors are noteworthy as examples. First, if the ideological organisation receives public funding it is logical that it should approximate the standards of pluralism and non-discrimination of the state and its institutions. In these cases, the incidence of the discriminatory factors must be justified by reasons of greater weight. Second, the demands for employee loyalty with respect to the ideology or ethos of the organisation will also be categorised according to the relationship that exists between the type of activity carried out and the objectives of the organisation for the propagation of its religious doctrine. From this point of view, occupations with a religious content (related to the religion or transmission of its doctrine), activities motivated solely by religion and not directly an expression of religious practices, or occupations that are totally neutral and have no relationship with the objectives of the institutions shall be distinguished. We will now look at each of these cases.

Employment related to the objectives or ends of the institution; employment of a religious content

In these cases, and as has been stated above, the rights of freedom and non-discrimination of employees are limited when the activity they carry out is linked to ideological or religious characteristics that constitute a decisive professional condition for the occupation. The special nature of such occupational activity in organisations with a religious ethos is manifested at three different moments.

The moment of hiring

At the time of hiring, in institutions classified as being constituted for the expansion of a determined ideology or religion, the employer (unlike those in neutral organisations) may question the prospective employee about his or her moral or religious convictions, so long as these beliefs have a direct or indirect relationship with the activity to be undertaken. Enquiries by the prospective employer, which are excluded from the general prohibition contained in the legislation of European Member States to require a person to declare his or her beliefs, can only relate to the convictions or personal life of the applicant that are relevant to the occupation being offered, and linked to aims of the organisation's ethos. In English law, the criterion regarding whether a person fulfils the religious requirements to qualify for the position is left to the religion or employer. However, there must exist a reasonable motive (naturally those of a religious nature are included), overseen by the courts.

In line with this, the prospective employee must be clearly informed regarding the ideological directives of the organisation, and these, as they relate to the work to be performed, must be defined in the clauses of the labour contract.

Occupational performance

With regard to carrying out the occupational activity, legislation considers it lawful to require the employee to respect the ideology of the organisation with a religious ethos for which he or she works, and to adapt his or her conduct, both at work and outside the organisation, to the ideology that defines the organisation. His or her right to freedom of beliefs is partially subordinate to achieving the ideals and objectives advocated by the employing organisation.

In this sense, and as mentioned above, aspects of an employee's private life that have public significance and run counter to the doctrine of the organisation for which he or she works (for example, if the person is divorced and living with someone, or was married in a civil ceremony) may be relevant as a sign of complying with the 'loyalty and good faith of the worker' that the EU Directive requires.

Terminating the contract

Both the legal theory and case law regarding termination of a contract consider the conduct of an employee who does not respect the ideology or objectives of the organisation to be cause for lawful dismissal in organisations with a religious ethos. Behaviour that runs counter to the organisation's ethos shall be considered serious, intentional and evident when it is publicly manifested, whether this occurs internally or outside the organisation. In these cases, termination of the contract due to dismissal for just cause is legally justified, owing to the supervening incompetence or unsuitability of the worker or to a contractual breach of good faith. The employer must prove that the measure is adopted as the result of acts or behaviour that seriously endanger the ideology of the organisation, which is necessary in order for it to achieve its objectives and whereby the intention of the employee violates the loyalty to the organisation's commitments and affects the work carried out by that employee (Article 10 of Directive 2000/78/EC).

Occupations with no ideological or religious content (neutral jobs)

What is the attitude, and what are the possible limits to the conduct of employees who carry out neutral activities within the organisation: that is, those that are neither directly nor indirectly linked to the propagation of the ideology or religion that constitutes the main objective of an organisation with a religious ethos? In general, for example, the work of caretakers, gardeners or cooks employed in religious schools is less limited, *ratione materiae*, by the school's ideology than that of the teachers. Unlike the teachers, total adhesion to the organisation's ideology cannot be required of employees in these positions. Nevertheless, are there conditioning factors in their work based on the type of centre that employs them? Would dismissal for ideological reasons be justified? The legitimacy of the dismissal in

such cases rests on a double presumption: that these employees carry out actions or express opinions that run counter to those of the organisation, thus affecting the total fulfilment of the ideological aims of the organisation that employs them, and that this attitude is public and evident. Naturally, this refers to the conduct of the employee within the organisation, although in certain cases, it can originate from outside as well, when the attitude is intentionally contrary to the ethos of the employing organisation and acquires a certain level of social repercussion.

Thus, in general terms, Article 4(2) of Directive 2000/78/EC upholds the right of churches or organisations created by the same to achieve their aims (schools, hospitals, bookshops and so forth) to require of individuals employed by them loyalty and good faith with regard to the organisation's ethos or ideology.

Particular cases

In European law, conflicts between ideological or religious freedom of the employee and the guardianship of the aims or mission carried out by organisations with a religious ethos belonging to religions or institutions affiliated to them have had noticeable social and case-law repercussions in two different areas: educational centres and charitable organisations belonging to the religions.

Educational centres

Regarding an educational centre founded on an ideology – that is, one with an educational project or line that pervades all of its teaching – the conflict of interests analysed in case law rests between safeguarding the ideology (the right of the founder as acknowledged in educational laws) and the academic freedom of the teacher. In weighing the rights and interests in conflict, in general terms European case law holds that the ideology does not require the teacher to be an apologist of this ideology, nor is he or she required to find inspiration for academic explanations in minimal scientific grounds. Nonetheless, teachers in an ideologically based centre cannot make open or veiled attacks against that centre; they shall carry out their activity in the terms that they judge most appropriate and that, according to a serious and objective criterion, does not run contrary to the interests of the ideology of the centre. As far as the private life of the teacher is concerned, his or

her conduct may possibly be considered a violation of the obligation to respect the ideology if, owing to its public nature or intentionality, it affects the educational work for which the teacher has been hired. The director of the centre could thus break the contractual relationship between the teacher and the centre.

Naturally the loyalty of the teacher to the ideology intensifies when the subject that he or she teaches is directly related to the teachings of the doctrine on which the ideology is based. A clear example of this is that of teaching the subject of religion in a religious school. In Spain, for example, the ruling of the Spanish Constitutional Court 38/2007 of 15 February 2007 justifies the control by the ecclesiastical authority over the personal conduct of a teacher of the Catholic religion in state schools (which are state-funded) and the hypothetical decision to relieve a teacher of this duty, to the extent to which personal testimony constitutes a defining component of the religious community's creed. Personal conduct, the Constitutional Court affirmed, is decisive in the aptitude or qualifications for teaching, as ultimately understood, and especially as a channel or instrument for the transmission of certain values.

Medical centres and charitable organisations

Charitable work has been and continues to be one of the traditional aims of the principal religions, which, in secular terms, has given rise to a vast number of institutions created by public or private entities in order to fulfil a religious message.

Charitable or welfare organisations created for the propagation of religious principles through social work may be considered organisations with a religious ethos so long as the religious ends constitute the main objective. This distinction must be applied, in general, to hospitals founded by religious institutions in order to provide health care to the sick.

Health-related institutions created by the principal Christian churches in Europe have a great impact owing to their numbers and scope. This aim has thus been recognised in case law from the Court of Strasburg. In the Decision by the ECtHR, the case of *Rommelfanger v The Federal Republic of Germany*, 6 September 1989, analyses the dismissal of a physician who worked in a hospital belonging to a foundation run by the Roman Catholic Church. He was accused of publicly declaring – by means of a letter published in the press and an

appearance on a television programme – his position in favour of the German law of 1976 permitting abortion in certain circumstances. The Commission qualified the employer, the hospital, as

an organisation based on certain convictions and value judgements which it considers as essential for the performance of its functions in society, it is in fact in line with the requirements of the Convention to give appropriate scope also to the freedom of expression of the employees. As regards employers such as the Catholic foundation which employed the applicant in its hospital, the law in any event ensures that there is a reasonable relationship between the measures affecting freedom of expression and the nature of the employment as well as the importance of the issue for the employer ... An employer of this kind cannot exercise its freedom [the freedom of expression on religious subjects] if it does not impose certain obligations of loyalty on its employees. With respect to organisations such as the Catholic foundation which hired the applicant in the hospital, the Law must ensure at all times that there is a reasonable and proportionate relationship between the measures affecting the freedom of expression and the nature of the employment.

In this case, the Commission upheld the interpretation of the German courts whereby the applicant violated his contractual obligations, to which he agreed by accepting employment with an institution, of loyalty, under the legitimate autonomy of the Foundation and in order to preserve the achievement of the objectives that it pursues. Thus, the gross breach of contract by expressing views opposed to an essential aspect of Catholic Church doctrine was sufficient reason to consider the dismissal lawful. As a result, the Commission rejected the applicant's complaint.

A diametrically opposed solution, and one that in my opinion is not in accordance with European case law and legislation, is found in the ruling of the Spanish Constitutional Court 106/1996 of 12 June 1996. In this, the Court denied the status of an organisation with a religious ethos to San Rafael Hospital, which belongs to an order of the Catholic Church, la Orden Hospitalaria de San Juan de Dios (the Hospital Order of Saint John of God), as it held that the principal aim of the organisation was health care. Under this premise, the Court ruled in favour of the plaintiff, a nurse at the hospital, who was dismissed for making critical comments out loud one Sunday when the Chaplain was offering communion to the patients. Her remarks included phrases such as 'I don't know why you are not ashamed',

‘this looks like a picnic’, ‘these are the humanitarians’ and ‘if my mother were here she would sue you’. According to the Constitutional Court, the nurse was exercising her freedom of expression and that right should not be limited by the ideology of the hospital or by her status as a nurse since that position was neutral and unrelated to any ideological content; nor did her statements cause any moral or material harm to the employer. Thus, the Court concluded, the dismissal was unfair as it was founded on the exercise of a constitutional right that was not limited by her contractual obligations.

The limits of discrimination on non-religious grounds

One of the limits to the imposition of requirements of an ideological or religious nature concerning the occupational activity carried out in religious organisations, or those inspired by a dominant ethos, is that the differences of treatment cannot justify discrimination based on other motives (Article 4(2) *in fine* of Directive 2000/78/EC). Does the prohibition of discrimination always prevail in other areas? No: only when it does not constitute a need imposed by the religious doctrine. What thus emerges from this is one of the areas where religious discrimination may be most frequent: sex discrimination. In Directive 2004/113/CE of 13 December 2004, regarding sex discrimination in access to goods and services, the difference of treatment is permitted when it is justified by a legitimate objective and the means by which this objective is achieved are adequate and necessary (Article 4(5)). In this sense, and as has been expressed in their respective reports, Estonia, Finland and the United Kingdom expressly incorporate into their non-discrimination laws an exception regarding sex discrimination in favour of religions whose doctrines only permit males priests.

However, the reason for a veto on other types of discrimination is to prevent religions from becoming ‘islands of exclusivity’ in which generalised situations of discrimination would be justified. Justification for discrimination in situations other than those related to ideology or religion would depend exclusively on two factors: the objective or religious content of the occupation; NS that the discrimination is essential according to the doctrine of the religion under which the organisation with a religious ethos operates.

We can distinguish here between two cases that admit another type of discrimination and cases in which it is inadmissible. Admissible cases are those where the act of worship in a certain religion can only be performed by men (for example, male priests in the Catholic Church, Church doctrine), which is therefore to be respected over conduct that constitutes sex discrimination. Its justification lies in the autonomy of the religions and their rights derived from this to choose their representatives. Also admissible are cases where the transmission of the doctrine can only be performed by men (such as teaching the Qur'an), according to the dogma and principles of the religion. Cases where discrimination is inadmissible include occupational functions that can be fulfilled by any person, regardless of religion (for example, a caretaker), and occupations not directly related to the transmission of the religion or acts of worship, where persons may not be excluded for sexual orientation or marital status (for example, in a Catholic clinic, the employer may not exclude applicants for being homosexual or divorced when hiring medical personnel).

The scope and content of the measures adopted must also be taken into account. An illustrative case is that of *O'Neill v Governors of Saint Thomas More*, 1996.⁶ In a Catholic organisation, an employee became pregnant as a result of her relationship with a priest who was also employed by the institution. The school governors adopted the decision to dismiss only the female worker. This dismissal was considered sex discrimination since no similar action was taken against the priest. What would be valid, and non-discriminatory, the Court added, would be the dismissal of both employees, justified on the basis of religion, as their actions ran counter to an essential aspect of Catholic morality and they were thus disloyal to their religious obligations.

POINTS OF CONFLICT

Overall, it can be stated that a general exception in favour of religious institutions in which neither the state nor the courts can enter

⁶ Discussed in L Vickers, *Religious Freedom, Religious Discrimination, and the Workplace* (Oxford, 2008), pp 165 ff.

into an assessment of the fulfilment of the requirements that justify difference of treatment for ideological or religious motives raises serious doubts as to the compliance with the regulation of EU Directive 2000/78/EC. As a result of an unlimited – and unbalanced – consideration of the principle of autonomy, in addition to the possible lack of protection of the employee, in the fight against discrimination ‘gaps’ or ‘islands’ may arise that could hinder access to employment. We have used the case of agnostic or atheist teachers trying to find employment in Ireland, where primary and secondary education is dominated by schools run by Catholic religious orders. Significant doubts arise concerning the definition and scope of the ‘religious nature of the activity’ that justifies, according to Community law and national legislation, the difference of treatment. What actions are considered ‘religiously oriented’? Who – the denomination or the state – can decide what are and what are not religious activities?

One of the key points in the admissibility of exceptions to non-discrimination on religious grounds concerns what constitutes proportionality, which is understood as the balance that shall exist between the right of the employee to express his or her religion in the workplace and the right of the employer to fulfil the objectives of the organisation.

That being said, the following considerations can be offered.⁷ First, the basic principle of proportionality permits interpretations that are flexible and adapted to the context in which cases of discrimination may arise. Nonetheless, this overlooks the different perspectives concerning the concept of discrimination and how to regulate conflicts between them (for example, whether gender takes priority over religion or vice versa). Second, it is difficult, if not impossible, to determine a universal and valid *erga omnes* concept of proportionality. In reality we find ourselves with a vague and uncertain criterion, subject to multiple interpretations, depending on the cases and contexts, provided by the courts of justice. This in turn, raises the threshold of uncertainty for employees and employers concerning this question. Thus, in short, the submission of the interpretation of proportionality that results from the deliberation of the judge may cause us to think that, in reality, what prevails is the subjective and

⁷ Following the conclusions of ibid, pp 227 ff.

personal opinion of the judge. Nevertheless, it should be noted that proportionality always imposes elements of subjectivity that must be alleged and proved by the employer before the court in order to exclude the assumption of discrimination on the basis of belief – for example, the different elements in conflict and the reason for protecting the religious objectives, or the work, of the institution.

AUSTRIA

RICHARD POTZ AND BRIGITTE SCHINKELE

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

Historical approach to religious discrimination

Whereas the equal treatment of women and men in matters of employment was established by the Law on Equal Treatment of 1979 and the Federal Law on Equal Treatment of 1993, and special Acts have been enacted with regard to disability,¹ religious discrimination was largely considered as an issue in the context of the labour relations law (*ArbVG*, section 4, § 132), the so-called *Tendenzschutz*.

The rationale for this approach was primarily, the rationale for this approach was that religious freedom in its corporate dimension only covered the legally recognized churches and religious societies (*Tendenzschutz*). The regulation mentioned above is to be seen as a realization of the fundamental guarantee of self-determination (*StGG*, Article 15) at the level of statute law (*einfaches Gesetz*) in the field of employment law. Accordingly, the provisions governing industrial relations are not applicable to businesses and enterprises that serve the denominational purposes of a recognized church or religious society insofar as these regulations are in conflict with the specific nature of the business or enterprise emanating from the true mandate of the community concerned. On this basis, loyalties owed by employees to ecclesiastical employers are graded according to their self-understanding. With regard to the relevant Supreme Court's decisions, the right to self-determination has been constructed in a fairly broad sense.

There has been no political debate worthy of mention on this topic. Debate in the field of religious discrimination has focused almost exclusively on the differentiation between legally recognised churches and religious societies on the one hand, and other religious communities on the other.

¹ *Behinderteneinstellungsgesetz*, BGBI 1973/329 as amended, and *Bundes-Behinderten-gleichstellungsgesetz*, BGBI I 2005/82 as amended, implementing the European Directive 2000/78/EC.

The effect of international instruments on national law

As far as international instruments are concerned, the ECHR had an enormous impact on the legal system in Austria in general. Essentially, this has been driven by the fact that the Convention is incorporated into the Constitution (with retroactive force since 1958), with significant consequences for the understanding of fundamental rights also. Article 14 of the ECHR should be read in conjunction with the general principle of equality enshrined in the Constitution, especially Article 7 B-VG, which explicitly excludes positive discrimination on the basis of confession (among others). However, the legislation of 1979 was only beginning for the realisation of constitutional prohibitions against discrimination under the *einfaches Gesetz*. Since then, that process has intensified year on year, mainly as the result of the influence of European law.

EU Directives 2000/43/EC and 2000/78/EC

Prior to the implementation of the European Directives, most of the relevant debate took place within the European Union, with the involvement of churches and religious communities; to a great extent this anticipated the debate in the national legislature. This structuring of the debate as predominantly occurring at European level might also be reflected in the fact that the national laws in large parts take up the Directives almost word for word. It should be mentioned, however, that there has been intense debate in the scholarly literature, with various different and often opposing positions being taken.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

The Equal Treatment Commission

The Federal Law on the Equal Treatment Commission and the Ombudsman for Equal Treatment, BGBI 1979/108, as amended in BGBI I 2004/66 and BGBI I 2011/7, has established the Equal Treatment Commission and the Ombudsman for Equal Treatment.

The Equal Treatment Commission at the Federal Chancellery consists of three senates, dealing with

- i. Equal treatment of women and men as regards employment and occupation;
- ii. Equal treatment without distinction on the grounds of ethnic origin, religion or belief, age, or sexual orientation as regards employment and occupation;
- iii. Equal treatment without distinction on the grounds of ethnic origin or gender regarding other areas of the law.

The Equal Treatment Commission also sits alongside the labour and social courts and the civil courts. The senates have to deal with all questions concerning discrimination on the grounds of their respective areas of responsibility in general and in individual cases. Essentially, the proceedings are intended to mediate between employers and employees in advance of legal proceedings. At the request of the Ombudsman for Equal Treatment or of one of the interest groups represented in a senate or through its own initiative, the responsible senate must give an expert opinion on questions concerning the violation of the principle of equal treatment.

Members of the Federal staff are entrusted with the chairmanship by the Federal Chancellor. Other members are delegated by the trade unions and other interest groups, or are appointed by Federal ministers, depending on the responsibility of the particular senate. There are no representatives of the churches and religious communities.

The main task of the Ombudsman for Equal Treatment is to advise and support persons who feel discriminated against under equal treatment law. The office of the Ombudsman can carry out surveys on discrimination independently and publish reports and recommendations. Representatives of the Ombudsman participate in the sessions of the Equal Treatment Commission, in a non-voting capacity.

The Federal Equal Treatment Commission at the Federal Chancellery is a special Federal administrative facility. Any matter concerning discrimination in connection with Federal employment can be brought before this Commission.

Key instruments of the law on religious discrimination

The enactments concerning the new anti-discrimination law – the Equal Treatment Act (*GIBG*) and the Federal Equal Treatment Act

(*B-GlBG*)² – were respectively rendered and amended in 2004, implementing the European Directives 2000/43/EC and 2000/78/EC of 27 November 2000. Since then, both Acts have been amended several times, among other reasons to implement the European Directive 2004/113/EC.³ In compliance with the Directives, the scope of protection differs depending on the ground for discrimination.

The obligation of equal treatment according to the *GlBG* includes all forms of employment that are based on a civil contract, while the *B-GlBG* applies to employment within the public sphere at the Federal level (*Bund*), under both public and private law. The Federal States of the Republic (*Bundesländer*) have either issued separate anti-discrimination laws for their jurisdiction or implemented provisions prohibiting discrimination in their Equal Treatment Acts.

The equal treatment laws in large part take up the European Directives verbatim, especially with regard to the legal definitions of direct and indirect discrimination, and the regulations providing for admissible exceptions pursuant to *GlBG*, § 20, in far-reaching compliance with Articles 2 and 4 of EU Directive 2000/78/EC. Those passages of the Article 4 that have not been implemented into the *GlBG*⁴ are of significance for ensuring interpretation that is compliant with the Directive. Likewise, the opening clause in Article 2, section 5 of the Council Directive constitutes an important indication for interpretation. Accordingly, the Directive should be applied without prejudice to measures laid down by national law, in the interest of objects of legal protection similar to the reservation clause embodied in Article 9, section 2 of the ECHR.

On the whole, the *GlBG* propounds the principle of equal treatment to a high degree, thus going beyond the essential content as it

2 Bundesgesetz über die Gleichbehandlung – Gleichbehandlungsgesetz (*GlBG*), BGBl I 2004/66 (*GlBG*); Bundesgesetz über die Gleichbehandlung im Bereich des Bundes (*B-GlBG*), BGBl I 2004/65, as amended.

3 BGBl I 2005/82; BGBl I 2008/98; BGBl I 2011/7.

4 It is held that a difference of treatment shall take into account the Member States' constitutional provisions 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 not therefore 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.

has been developed by the case law regarding employment law. As a result, it amounts to a remarkable reduction of private autonomy on the part of employers. This may be justified with regard to the protection of employees, which forms an important foundation of employment law. However, some experts argue that the allowable restriction of private autonomy has been exceeded.

The European Directives themselves, as well as the Austrian Equal Treatment Acts, give rise to numerous awkward legal questions. This situation has already been reflected in significantly divergent points of view.

A civil liability has been introduced concerning special burdens of proof. A person who brings a case of discrimination has to substantiate the alleged discrimination by *prima facie* evidence (*Glaubhaftmachung*⁵). After weighing up all the facts and merits of the case, the respondent has to prove that it is more likely that there is a credible and decisive alternative reason for the unequal treatment, or that the unequal treatment can be legally justified (*GIBG*, section 12, § 26).

There is no obligation to enter into a contract regarding damages, but a claim for compensatory damages may be made for property loss as well as compensation for encroachment of personal liberties. The claim for damages is at least two months' salary if the employment relationship cannot be established. Appropriate measures are taken with regard to other forms of discrimination. In the case of discrimination that occurs in more than one form, this aspect has to be taken into account in calculating the appropriate compensation.

Advertising a job in a discriminatory manner is punishable by a fine of €3,000, imposed by the district administrative body.

The definition of religion

There is no explicit legal definition of religion, but the Explanatory Notes to the Equal Treatment Acts describe belief as follows: ‘The term belief serves as a collective name for all religious, ideological, political and other conceptions of life and the world as a meaningful entirety, being the basis for constructing the personal and communal

⁵ It has to be emphasized that there are some differences regarding the law of evidence in English and German terminology.

position for the individual idea of life'.⁶ Furthermore, the Explanatory Notes refer to 'world views, conception of humanity, and attitudes to morality'.

The inclusion of political opinion in this definition is surprising in that it is not necessarily linked to religious conviction, though there are occasions when that might be the case. Overall, no reasonable ground can be found for neglecting this aspect or, on the part of the national legislator, for failing to provide clarification of this outstanding question. The issue is viewed differently in the scholarly literature, though one can make out a certain tendency to include political opinions within the scope of application. However, attention should be paid to the fact that such a broad understanding of the term 'belief' implies a certain risk of losing the distinctiveness of this fundamental right in its substance.⁷

The Supreme Court has discussed this problem in one case; however, on the basis of the evidence no need was felt for make a fundamental ruling. The Court merely stated that critical views on the asylum legislation and the case law of the Asylum Senate are not covered by the term 'belief' (*Weltanschauung*) (OGH, 24 February 2009, 9 ObA 122/07t).

Areas of operation of the prohibition against discrimination

As regards equal treatment irrespective of ethnic origin⁸ (implementing the Anti-racism Directive) as well as of gender (implementing the European Directive 2004/113/EC), the scope of the law's application extends beyond employment law to other areas, comprising mainly social and educational matters as well as the supply of goods and other services such as housing accommodation (*GIBG*, §§ 30 ff).⁹

6 RV 307 BlgNR 22. GP; AB 499 BlgNR 22. GP, 61.

7 See R Potz and B Schinkele, *Religionsrecht im Überblick* (second edition, Vienna, 2007), p 95 s.

8 In the course of the parliamentary proceedings the notion of 'race' was taken out of the text and replaced by the term *ethnische Zugehörigkeit*, representing both 'race' and 'ethnic origin' in the Directives' text. This should not imply a limitation of the scope; rather it is the result of the sensitivity regarding the notion 'race' in the German language (AB 499 BlgNR XXII.GP).

9 In the anti-discrimination legislation of the *Bundesländer*, the scope of protection was extended to all grounds regarding their competences in the fields of social benefits, health, education, goods and services that are available to the public.

For that reason complex questions may arise if more than one criterion of discrimination coincide inseparably with the facts of a single case, a so-called ‘multiple or intersectional discrimination’. One has to take into consideration that it is particularly likely that a religious ground for discrimination might happen to coincide with an ethnic ground, (for example in the case of Jews, Muslims or Sikh). A clear delimitation between an ethnic and a religious discrimination cannot always be drawn.

Pursuant to § 41 section 1 of the *B-GIBG*, the law also applies to the members of a university as well as to applicants for employment within that university, to any other legal relationship with the university, and to the registration of students (regardless of any exceptions). A rule governing both direct and indirect discrimination covers students and university applicants. Consequences that might derive with regard to theological faculties cannot be dealt with in this contribution.¹⁰

Extent of the prohibition

Pursuant to § 17 of the *GIBG*, any direct or indirect discrimination on the grounds of ethnic origin, religion or belief, age or sexual orientation in the context of employment is prohibited. The legal definitions of direct and indirect discrimination, the concept of discrimination (§ 19) and the exemption clauses or occupational requirements (§ 20) all strictly adhere to the European Council Directives in their essential parts.

Discrimination against a particular person is covered by § 19 section 3 of the *GIBG*. Moreover, the protection against discrimination includes discriminatory behaviour against a person because of a close relationship with another person, based on their ethnic origin, religion or belief, age or sexual orientation (*GIBG*, section 4, § 19). Discrimination shall also be considered to have occurred when a person is subject to harassment by the employer or any other person (*GIBG*, § 21).

The decisive criterion in judging whether discrimination has occurred is the effect of a provision and not the discriminatory intent.

¹⁰ See, further, R Potz and J Wallner, ‘Antidiskriminierung und theologische Lehranstalten’, (2008) 55 *Österreichisches Archiv für Recht und Religion* 304–326.

The potential discrimination has to be examined by objective criteria. However, the prohibition of discrimination is not supposed to amount to a rule concerning preferential treatment.

If a senate of the Equal Treatment Commission comes to the conclusion that the principle of equal treatment has been violated, it must issue a written proposal to the employer or to the person responsible for the non-employment-related discrimination on how the obligation under the Act can be fulfilled. The senate must call upon the person responsible to end the discrimination. In the event that the addressee does not follow the instructions of the Commission, the institutions represented in the senate or the office of the Ombudsman for Equal Treatment can file a civil action for a declaratory judgment concerning the violation of the right to equal treatment. The Commission has the right to request a written report from the alleged discriminator concerning the alleged discrimination.¹¹

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

All exemption clauses or occupational requirements (*GIBG*, § 20) strictly adhere to the European Council Directives in their essential parts.

However, a difference in treatment that is based on a characteristic related to ethnic origin, religion or belief, age or sexual orientation shall not constitute discrimination where, by reason of the nature of the particular occupational activity or of the context in which it is carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate (*GIBG*, section 1, § 20). According to *GIBG*, section 2, § 20), in the case of occupational activities within churches and other public or private organisations the ethos of which is based on a person's 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

¹¹ See the summary by D Schindlauer, *Report on Austria*, <<http://www.non-discrimination.net/en/home>>, accessed 8 November 2011.

religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.

One can assume that the present special concept of grading loyalties owed by employees to ecclesiastical employers according to their self-understanding will endure with its essential features – primarily with regard to church activities within the inner core of 'internal affairs' such as pastoral care. As far as charity and social welfare activities are concerned – likewise covered by the specific ecclesiastical *proprium* – the new anti-discrimination law could involve certain modifications. Depending on the particular facts and circumstances of the case, there will be a need for a more thorough weighing of the legal merits and for more detailed reasons to be given for any decision taken.

The main points of conflict expected to arise will be homosexual orientation and membership or withdrawal from church membership, both of which are already reflected in the scholarly discourse.¹² As far as practising homosexuality is concerned, the doctrinal issue arises when the church employer demands a certain attitude corresponding to the religious and moral doctrine – be it with regard to a refusal of an application or a dismissal – while simultaneously referring to another explicitly mentioned anti-discrimination criterion. However, the application of the exemption clause according to *GIBG*, section 2, § 20 (*lex specialis*) seems to be restricted to the criteria of religion and belief. Therefore, in cases related to sexual orientation, the *lex generalis* included in section 1, § 20 should be applied. This might be the means by which the Council Directive's requirement that 'its provisions are otherwise complied with' is met.¹³ Though the *lex generalis* provides for a different evaluation standard regarding justification of unequal treatment in comparison with section 2, § 20, implying a more thorough weighing of the legal and factual merits of the case, possible inconsistencies seem to be avoided by following such an approach.

Another matter of dispute may emerge in the case of a church employee engaged with tasks not exclusively reserved for members of the church concerned deciding to leave the church membership.

¹² For more see B Schinkele, 'Religionsfreiheit und Antidiskriminierungsrecht: einige grundsätzliche Überlegungen', (2003) 50 *Österreichisches Archiv für Recht und Religion* 179–211.

¹³ See above, n 4.

The question then arises whether a dismissal on the ground of withdrawal from church membership can be justified as a reason for dismissal in any case, if membership as a pre-condition for being employed is only required for persons with pastoral, catechetical and educational tasks, and in certain cases for persons in leadership. Questions of that kind will apply particularly to the fields of social welfare activities, for instance the staff in a hospital with a denominational affiliation.

The case law governing exceptions

So far, very little case law has been developed in any of the courts. A few conflicts, especially ones concerning the wearing of the Islamic headscarf (eg as apprentice in a shop, physician in a sanatorium with a conservative clientele) have been resolved by recommendations of the Equal Treatment Commission or compensation payments. A rejection of a Muslim woman's application to work as a seamstress, arguing that her headscarf might become entangled with the machine, is pending before the court.

The exclusion of a Sikh participating in a training course for long-term unemployed for security reasons because he was wearing a *kirpan* (a 20-cm-long dagger) was considered to be justified by the Equal Treatment Commission, despite the impending loss of benefits. Likewise, another Sikh had to relinquish his *kirpan* when entering a courthouse.

According to established case law regarding an occupational disability pension, insufficient knowledge of the German language does not prevent application to another job within the Austrian labour market. This adjudication has been endorsed by a Supreme Court decision after the enactment of the new equal treatment law (OGH, 25 April 2006, 10 ObS 34/06g).

BELGIUM

RIK TORFS

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

The Belgian Constitution of 1831 contained four articles concerning religious freedom and church and state relationships. The current Article 19 deals with freedom of worship and its free and public practice. The negative counterpart of this article is contained in Article 20: no person may be forced to participate in any way in the acts of worship or rites of any religion or to respect its days of rest. Article 21 stresses that the state has no right to interfere with the appointment or induction of the ministers of any religion, or to forbid them to correspond with their church authorities or to publish the latter's acts, subject to the ordinary rules of liability concerning the use of the press and publications. The article is generally interpreted as an affirmation of the freedom of internal ecclesiastical organisation. At the same time, it contains an exception to this principle by providing that civil marriage must always precede the religious marriage ceremony, except in specific cases established by law.

These three articles do not cause problems from a non-discrimination perspective as they are equally applied to all religious groups operating in the country. More problematic is the fourth and last article concerning religion, namely Article 181, which stipulates that the salaries and pensions of ministers of religion should be borne by the state budget. Indeed, although Belgian law recognises a theoretical equality between all religions,¹ one cannot deny that a difference in treatment remains. Several religions have obtained official recognition by, or by virtue of, a law. The main basis for recognition is the social value of the religion as a service to the population.² Cur-

1 C De Brouckère and F Tielemans, *Répertoire de l'administration et du droit administratif*, vol V (Brussels, 1838), p 485 (Culte).

2 For the concrete criteria with regard to the recognition, see *Questions and Answers*, Chamber, 1999–2000, 4 September 2000, 5120 (Question no 44, Borginon); *Questions and Answers*, Chamber, 1996–1997, 4 July 1997, 12970 (Question no 631, Borginon). The religious group should be (a) large; (b) well structured; (c) of several decades' standing in the country; (d) socially important; (e) free of any action threatening social order.

rently, six religions or Christian denominations enjoy this status: Roman Catholicism, Protestantism, Judaism, Anglicanism (Law of 4 March 1870 on the Organisation of the Temporal Needs of Religions),³ Islam (Law of 19 July 1974 amending the Law of 1870) and the (Greek and Russian) Orthodox Church (Law of 17 April 1985 amending the same Law of 1870). An amendment to the Constitution on 5 June 1993⁴ meant that groups of non-believing humanists⁵ also receive state financial support.⁶ Currently the recognition of Buddhism is pending.

The conditions for recognition have not so far been prescribed by legislation. However, administrative practice focuses on criteria such as the number of adherents, the historical position of the religion, its compliance with legal norms, its acceptance of democratic society and its social utility. The Magits–Christians report issued at the beginning of 2011 envisages a reform of the current system, although the overall idea of the recognition of religions is to be retained. However, the report suggests more formal criteria, legally stipulated, for such recognition. It goes without saying that equality is a major concern in this proposal for a more transparent policy. As yet it is unclear whether the new proposition will be accepted or even whether the discussion with regard to the future of law and religion relationships will take place along the lines suggested by the report.⁷

Traditionally, equality in religious matters was not seen as problematic. Recently, however, as a result of American influence, including the idea that equality is part of religious freedom, transparency in recognition has become an issue. Currently there is a political debate underway regarding the possibility of discontinuing the *de*

³ This Law is not the only source. The recognition of Catholicism is a direct result of the Concordat of 1801, confirmed by the law of 18 Germinal X (8 April 1802). Protestantism also obtained recognition as a result of the law of 18 Germinal X, whereas Judaism found its recognition through the decrees of 17 March 1808. Finally, Anglicanism obtained recognition through the decrees of 18 and 24 April 1835. All this was confirmed by the Law of 4 March 1870.

⁴ For an overview of the developments leading to the amendment of the Constitution, see J-P Martin, ‘La Belgique: de l'affrontement laïques-confessionnels au pluralisme institutionnel’, in J Bauberot (ed), *Religions et laïcité dans l'Europe des Douze* (Paris, 1994), 29–39.

⁵ Their representative bodies are the Centrale Vrijzinnige Raad/Conseil Central Laïque.

⁶ For an overview of all the financial consequences, see P De Pooter, *De rechtspositie van erkende erediensten en levensbeschouwingen in Staat en maatschappij* (Brussels, 2003), 207–214.

⁷ See <http://www.just.fgov.be/index_fr.htm>, accessed 10 November 2011.

facto privileged position of the Roman Catholic Church. The preferences and needs of the population will probably be taken into account as key elements in arriving at a new legal framework for recognised religions in Belgium. The discussion remains problematic for a number of reasons. First, how can the number of adherents of a religious group be determined without asking the citizens questions about their religious belief, given the fact that negative religious freedom means that nobody can be forced or even asked to reveal his or her religious belief? Second, should membership as a criterion be abandoned in favour of concrete social needs, measuring the latter is not straightforward. Indeed, what criterion should be used? Baptism? The number of religious funerals? The number of people attending Mass or other religious services? The circulation of church publications? No obvious solution seems to be available.

UN instruments on religious discrimination, Article 14 ECHR and the EU Directives

The general effects of the ECHR are of utmost importance. However, although the norms of the ECHR are directly applicable in Belgium, they were not often invoked in legal procedures before 1980. Today, an increasing number of lawyers and judges refer directly to the ECHR in their conclusions and decisions. This is also true for Article 14: its influence is strong and growing.

No direct debate on the drafts of EU Directives 2000/43/EC and 2000/78/EC took place in the national legislature. Religions tended to be more concerned about maintaining or establishing their own legal and financial position than about equality among religious groups.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

Article 2 of the Law of 10 May 2010 provides that the Centre for Equal Opportunities and Opposition to Racism (Centrum voor Gelijkheid van Kansen en Racismebestrijding, established in 1993) is competent for combating any form of distinction, exclusion, limitations or preference based on grounds of age, sexual orientation,

handicap, belief or conception of life, civil state, birth, wealth, political opinion, trade union opinion, current or future health condition, physical or genetic condition, or social origin. Often, the victim of discrimination will contact the Centre. If the Centre considers that discrimination has occurred, it will seek to achieve an amicable settlement, by making sure that adequate measures are taken in order to avoid future forms of discrimination. If no solution is found, the Centre will, with the consent of the victim and never against his or her will, file proceedings against the perpetrator of the discrimination. The independence of the Centre is guaranteed by law; religious representatives play no part in it.

Articles 10 and 11 of the Constitution prohibit discrimination. The European Directive of 2000 has been implemented by the Law of 10 May 2007 prohibiting discrimination on the grounds already listed.⁸ The new Law replaced, as from 9 June 2007, the former discrimination Law of 25 February 2003. Two other relevant Acts were also adopted on 10 May 2007. One amended the Act of 30 July 1981 criminalising certain aspects of racism and xenophobia. The other concerns all possible forms of discrimination related to gender and sex. Apart from the federal legislator, regions and communities also took initiatives, and they have endeavoured to harmonise their content with the federal legislation.

The prescribed sanctions are both criminal and civil. Federal procedures shift the burden of proof, except for criminal cases: for example, if statistical data and recurrence tests are presented to the judge, he or she may presume the existence of discrimination.

No definition of religion is offered. Non-religious beliefs are also protected.

The area of application of the Law of 10 May 2007 includes all aspects of public life. An important element is labour and employment in both the public and private sectors. Also covered are the supply of goods and services, including hotel and restaurant services, trade, rent and insurance. Other relevant issues are health care and social security, as well as participation in economic, social, cultural and political activities open to the public. This Law is a federal law and so is not concerned with matters under the competence of the

⁸ For more details see <<http://www.diverseit.be/?action=onderdeel&onderdeel=63&titel=De+antidi>>, accessed 10 November 2011.

communities and regions. As mentioned above, the latter took separate initiatives in order to comply with the European Directive.

Direct or indirect discrimination

Both direct and indirect discrimination are issues here. Direct discrimination takes place when distinction is made based upon a criterion protected by the law and resulting in a more negative treatment of some in comparison to others. Two examples can illustrate this. A person with a handicap is denied access to a restaurant because she uses a wheelchair. A homosexual person is not accepted for a job because of his sexual orientation. Belgian anti-discrimination law has an open system prohibiting discrimination unless it is based on an objective and reasonable justification. Such a justification is accepted when two elements are combined: the goal of the measure must be legitimate; and the means to achieve it must be suitable and necessary. Determining the acceptable character of the distinction is not easy and can only be done by taking into account all relevant factors. In employment relationships no direct distinction is accepted if it is based on age, sexual orientation, handicap or religious or philosophical opinion, unless the nature of the professional activity or the context in which it is exercised appears absolutely essential and determining. Moreover, the goal must be legitimate, and the requirement must be in proportion to that goal. Two examples may illustrate this point. A modelling agency can require a minimum age of 50 years for models if they have to work for the cover of a periodical aimed at readers over 50. An actor for a film role representing Martin Luther King will be male and black.

Also enforced, if less stringently, is any distinction made in an employment relationship based upon civil status, birth, wealth, political opinion, current or future health condition, physical or genetic condition or social origin. Discrimination is prohibited unless it can be justified objectively.

Indirect discrimination concerns seemingly neutral measures including statutes and company culture leading to negative treatment of certain categories of people. If negative treatment cannot be justified we are confronted with indirect discrimination. For instance, a cancer patient wearing a bandana is denied access to a disco because head coverage is not allowed. Obstacles that confront handicapped

people in the public domain are often the consequence of non-adapted infrastructure. Modifying that situation by taking concrete measures could discontinue such a hindrance. Therefore, the law stipulates that the absence of reasonable accommodation for people with a handicap can be seen as an indirect form of discrimination: for instance, a blind person with a guide dog being denied access to a shop because of a general prohibition of animals.

Case law

Most of the time, discrimination on religious grounds is only (very) indirectly at stake. For instance, the refusal to let student accommodation to people of Arab origin was addressed by case law. The fact that these people were Muslims only played a part indirectly.

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

This has already been discussed above in general terms. However, religion enjoys an exceptional position, not so much as the victim but as the perpetrator of discrimination. Religious freedom has to be balanced with non-discrimination legislation, and the latter will often have to give way to the former. The closer one comes to the heart of religious belief and practices, the larger the margin of appreciation that religious groups will enjoy. A religious group can refuse homosexuals as religious ministers and dismiss them for that reason. However, with regard to administrative employees or car drivers, a similar outcome is unlikely, since these activities are only remotely linked to the essence of the religious message.

The case law has not fully developed. Avoiding the violation of religious doctrine remains a shaky criterion. Indeed, two problems are hard to solve. First, a secular judge is often unaware of the exact limits and content of religious doctrine. Second, religious doctrine can be changed to provide a theological basis for discrimination. On 20 May 1994, Pope John Paul II explicitly affirmed for the first time that ordaining women to the priesthood would be against the divine constitution of the Church of Rome. Many asked themselves the question whether the apostolic letter was a strategic move aimed at

avoiding anti-discrimination legislation, or a truly theological statement.

Public opinion in Belgium, and probably more so in Flanders than in Wallonia, has become rather hostile to religion. There is no backing for allowing exceptions in favour of religious groups. In fact, the opposite may well be the case. On 28 April 2011, Belgium adopted a Federal Act prohibiting the wearing of the *burqa* and the *niqab* in the public sphere. No real protest was heard.

CYPRUS

ACHILLES EMILIANIDES

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

Article 28 § 2 of the 1960 Constitution, implementing Article 14 of the European Convention of Human Rights (ECHR), ordains that every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his or her community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class or on any ground whatsoever, unless there is express provision to the contrary in the Constitution. It should be noted, however, that Article 28 is autonomous and its application is not dependent upon a violation of another article of the Constitution, contrary to Article 14 of the ECHR.¹ The general and autonomous prohibition of discrimination provided for in Article 28 of the Constitution is therefore similar to the novel provision of Article 1 of Protocol 12 of the ECHR, which has been ratified by the Republic of Cyprus.

What is more, Article 18 § 3 provides that all religions are equal before the law and that 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 that represent religious minorities. The leading case with respect to discrimination between religions is that of *The Jehovah's Witnesses Congregation (Cyprus) Ltd*.² The Minister of the Interior had decided to omit marriage officers of the Jehovah's Witnesses Congregation from the annual list of officers authorised to conclude marriages, on the ground that such officers had ceased to be considered as such following the enactment

1 C Tornaritis, 'The right of equality of treatment and absence of discrimination' (1973) 3–4 *Cyprus Law Tribune* 5–6; G Pikis, 'Equality of citizens before the law as a requirement of safeguarding rule of law', in *Aspects of Cypriot Law*, vol 2 (Nicosia, 1982), pp 217–239.

2 *Minister of the Interior v The Jehovah's Witnesses Congregation (Cyprus) Ltd* [1995] 3 CLR 78 (in Greek).

of the Civil Marriage Law 21/90. The Supreme Court held that, according to Article 18 of the Constitution, freedom of religion should not be violated, either directly or indirectly, and that all religions whose rites are known are equal before the law. It further held that Law 21/90 should not have been interpreted as the Minister of the Interior had done. Thus it was held that the marriage officers of the Jehovah's Witnesses Congregation should not have been omitted from the relevant list of officers authorised to conclude marriages.

The issue of religious discrimination has not been part of political debate in Cyprus and has therefore been considered within the wider framework of non-discrimination.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

A difference in treatment is considered to be discriminatory if it has no objective and reasonable justification. Thus the courts will conclude that a law or an act is discriminatory if a difference in treatment does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the means employed and the aim to be realised. Where the difference in treatment is based on grounds of religion, very weighty reasons are required in order to justify such differential treatment. The Republic of Cyprus has further enacted legislation in harmony with European Community law that prohibits discrimination. The Equal Treatment (Racial or Ethnic Origin) Law 59(I)/2004 brought Cypriot law into line with Council Directive 2000/43/EC on the implementation of the principle of equal treatment irrespective of racial or ethnic origin in both public and private sectors, in matters of social protection, health treatment, social services, education and access to goods and services. Further, the Equal Treatment in Employment and Occupation Law 58(I)/2004 aligned Cypriot law with Council Directive 2000/78/EC and prohibits discrimination, specifically in the spheres of employment and occupation.

A violation of fundamental rights is actionable, and thus an aggrieved person may file an action in civil courts against those perpetrating the violation, with the aim of recovering just and reasonable compensation for any pecuniary or non-pecuniary damage that such

person has suffered because of the discrimination; such discrimination may be either direct or indirect. The person may further demand that the Court hold that any discrimination inflicted upon him or her, on the basis of a law or an administrative act, is illegal and thus should be declared invalid. According to Article 35 of the Constitution, the executive, legislative and judicial authorities of the Republic are all bound to secure the efficient application of Part II of the Constitution, including Article 28, which safeguards the right to non-discrimination.

In addition to the right to have access to the courts, the Combating of Racism and Other Discrimination (Commissioner) Law 42(I)/2004 vests authority in the Ombudsman, who is an independent officer of the Republic with special competencies, duties and powers for combating and eliminating discrimination in both public and private sectors. Any person or group of persons may lodge a complaint with the Ombudsman for having been subjected to discrimination prohibited by any law of the Republic, including legal instruments of European Community origin, as well as the ECHR, the Framework Convention for the Protection of National Minorities, the International Convention for the Elimination of All Forms of Racial Discrimination, the Covenant for Civil and Political Rights, the Convention against Torture and Inhuman and Degrading Treatment or Punishment and the European Charter for Regional or Minority Languages, as well as any other international or religious human rights instrument ratified by the Republic.³

The Ombudsman is therefore authorised to supervise the implementation of the human rights instruments that the Republic has ratified. Discriminatory provisions or terms found in contracts of employment, collective agreements, articles of association of legal persons, bodies or institutions, and contracts for the supply of goods and services, as well as terms of membership of organisations, including professional ones, may be declared by the Ombudsman to be discriminatory. In the event of finding an incident of discrimination, the Ombudsman is empowered to order the person or authority responsible for such discrimination to take specific practical measures for ending and not repeating such discriminatory conduct or treat-

³ See Second Report submitted by Cyprus pursuant to Article 25, para 1 of the Framework Convention for the Protection of National Minorities, 27 October 2006, para 22.

ment, not only with respect to the complainant but also with respect to other persons who may find themselves in a similar situation in the future. The Ombudsman may also carry out investigations *ex proprio motu* into incidents of discrimination and may prepare codes of practice concerning specific public authorities or persons in the private sector, obliging them to follow practical measures aimed at promoting non-discrimination and equality of treatment, irrespective of, *inter alia*, religion.

Difference in treatment between religions might be justified when there are objective and reasonable grounds on the basis of which the difference is based. The extent to which the exception to the principle of non-discrimination is applied has not been sufficiently developed by courts. It is expected, however, that the courts would apply the general case-law principles concerning such an exception; the criterion is solely whether the difference in treatment is based upon an objective and reasonable justification.

An interesting case that might illustrate the reluctance of Cypriot authorities to recognise exceptions in the principle of non-discrimination between religions is a 2006 Opinion of the Cypriot Ombudsman, who held that the decision of the Council of Ministers to exclude the members of three religious groups of the Republic – namely the Maronites, the Roman Catholics and the Armenians – from the obligation to serve in the National Guard violated the principle of equal treatment and constituted discrimination on grounds of religion. Following the Ombudsman’s decision, the Council of Ministers decided that members of the three religious groups now have an obligation to serve in the National Guard.⁴

The transposition of equal treatment in the Employment and Occupation Directive

The European Directive establishing a general framework for equal treatment in employment and occupation (Council Directive 2000/78/EC) has been implemented into Cypriot law through Law 58(I)/2004 concerning equal treatment in employment and occupa-

⁴ Council of Ministers, Decision 65.732 of 19 June 2007.

tion.⁵ 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 may be effected. Section 4 of Law 58(I)/2004 provides that the scope of the law extends to all public and private sector bodies, including public authorities, local administration authorities and public and private organisations.

Thus the scope of Law 58(I)/04 also extends to churches and other religious organisations. Indeed section 2 of Law 58(I)/2004 clarifies that the term ‘employer’ covers, for the purposes of this law, the Government of the Republic of Cyprus and local administration authorities, as well as every natural or legal person in the public or private sector, or any other activity that entails occupying or having occupied employees. For the purposes of Law 58(I)/2004 an ‘employee’ is defined as any person who is employed or apprenticed, either full-time or part-time, for a defined or undefined period of time, continuously or not, irrespective of the place where such person is occupied and including persons who work at home. However, the notion of an ‘employee’ does not include self-employed persons.

Discrimination on 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 and advanced vocational training and retraining. The law covers practical work experience, employment and working conditions, including dismissals and pay, 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 by such organisations.

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. The assessment as to whether a less favourable treatment exists must be based on a

⁵ See A Emilianides, ‘Cyprus’, in N ten Bokum et al, *Age Discrimination Law in Europe* (The Hague, 2009), pp 55–63.

comparator; hence, the notion of a ‘comparable situation’ is quite important. It should be proved that the claimant is treated less favourably than another person performing the same or essentially similar or comparable work as the claimant. In order to conclude whether the claimant is treated less favourably, an overall comparison of all types of work to be performed under the contract should be undertaken. The mere fact that the claimant is treated less favourably with respect to one aspect of the contract will thus not suffice if the claimant is treated more favourably with respect to other aspects; it is rather the overall assessment and comparison of the contract that is important. In the absence of a current comparator, comparators formerly employed have to be used for the comparison, before an assessment can be made.

Section 6 of Law 58(I)/2004 further prohibits indirect discrimination on grounds of religion. Section 2 of the same law 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 that an apparently neutral provision that theoretically applies to everybody in essence constitutes a disguised discriminatory provision that discriminates between the claimant and other persons.

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

The aforementioned provisions are subject to certain exceptions with respect to religious organisations. Section 7 of Law 58(I)/2004 provides that, in the case of occupational activities within churches and other public or private organisations whose ethos is based on religion or belief, a difference of treatment arising from 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

organisation. Hence section 7 allows for a requirement that a person should be of a particular religion or belief in order to be employed in churches or other religious organisations. The application of the principle of non-discrimination with respect to employment eases in favour of the application of the principle of organisational religious freedom.⁶

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 well be argued that section 5 covers cases where a Church refuses to employ women as members of the clergy. Here 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, and the principle of organisational religious freedom is therefore appropriately applied. However, whether the exemption could also apply with respect to other employees of the religious organisation besides religious ministers is debatable. The Church or the religious organisation in question would have to prove that hiring a female layperson in order to perform certain duties might be problematic: for instance, owing to the fact that this might scandalise 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 doubtful.

6 See in general R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford, 2005), pp 305 ff.

CZECH REPUBLIC

JIŘÍ RAJMUND TRETERA AND ZÁBOJ HORÁK

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

Many human rights were ignored in the former Czechoslovakia during the communist dictatorship of 1948–1989. Public life was subordinated to the interests of the ruling Marxist-Leninist ideology and religions were only partially tolerated. They were understood to be an ‘instrument’ of the so-called ‘exploitative class society’ and destined for extinction. Religious discrimination in favour of an atheistic worldview affected all religions. On 17 November 1989, the fiftieth anniversary of the closure of all Czech universities by the Nazis, the communist police brutally disrupted the students’ commemorative procession in Prague. This sparked further demonstrations, gradually expanding to cover all Czechoslovakia, in a movement that later became known as ‘the Velvet Revolution’. After several weeks the revolution resulted in removal of the totalitarian communist regime: on 28 November 1989 the Federal Assembly of Czechoslovakia abolished the constitutional article that protected the position of the Communist Party of Czechoslovakia.

10 December 1989 was an extraordinary day. On that day, the last communist president appointed a non-communist government. The following day he resigned. The new government voted for a policy of legal continuity between the new and old regimes but of discontinuity in terms of values. It opened the door to the renewal of democracy and the real introduction of human rights into the Czechoslovak legal order.

The process of the implementation of human rights, including prohibition of religious discrimination, was influenced by the United Nations Universal Declaration of Human Rights from 10 December 1948 (UDHR), and its international covenants of 16 December 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Socialist Czechoslovakia ratified both of these covenants on 23 December 1975. At that time the covenants had no constitu-

tionally guaranteed precedence over Czech national laws. Their ratification was merely a propagandist gesture designed for consumption by the international community. After the ‘Velvet Revolution’, however, they were incorporated meaningfully into the national legal order.

The most important source of the new constitutional law in the Czech and Slovak Federal Republic (CSFR) was the Charter of Fundamental Rights and Freedoms from 9 January 1991, published as an enclosure to the Federal Constitutional Act No 23/1991 Coll. The Act provided for precedence of the international agreements on human rights and basic freedoms ratified by Czechoslovakia over national laws. The Charter of Fundamental Rights and Freedoms uses almost exactly the same words as the UDHR, and of the ICCPR and ICESCR. It was influenced by the European Convention on Human Rights (ECHR) of 1950, which was signed by CSFR only a few weeks later (on 21 February 1991) and ratified in 1992.

During the period of the peaceful dissolution of Czechoslovakia, which was completed on 1 January 1993, the Charter was accepted, under the Constitution of the Czech Republic, Act No 1/1993 Coll, as a part of the Czech constitutional order. The official text of the Charter was republished under No 2/1993 Coll. Section 1 of Article 3 of the Charter declares that:

Everyone is guaranteed the enjoyment of his/her fundamental rights and freedoms 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.

It is clear that this article follows Article 14 ECHR, but it is a little more detailed. It prohibits discrimination on grounds of ‘faith and religion’.

In summary, protection against discrimination in the former Czechoslovakia and in the Czech Republic was founded on constitutional provisions of the Charter of Fundamental Rights and Freedoms, which themselves were built on the UN covenants and the ECHR. This happened before the incorporation of the ECHR into Czechoslovak law and the entry of the Czech Republic into the European Community. The protection included ‘equality’ and ‘religious freedom’. There were no specific political debates on inclusion of

religious freedom in the law. An understanding of the unity of human rights and freedoms was supported by an effort to negate the lack of freedoms in the preceding communist regime and the need to accept quickly the provisions of international documents on human rights. All religions agreed to this process.

The Government's view of the EU Directives 2000/43/EC and 2000/78/EC when they were in draft form

The Czech Republic joined the EU on 1 May 2004. As a result it had no direct influence on the shape of the EU Directives of 2000. However, some of the provisions of the Directive affected the Czech legislature even before 2004. Anti-discrimination provisions (sometimes enumerative, sometimes open-ended) can be found in various ordinary laws governing employment and labour relations. During the period 2003–2004, the definitions of discrimination required by the Racial Equality and Employment Equality Directives were inserted into various laws, namely the Law on Employment no 435/2004 Coll, and the Law on Service by Members of the Security Services no 361/2003 Coll.¹ This was refined by Anti-discrimination Act No 198/2009 Coll, which came into effect on 1 September 2009. The debate on the Anti-discrimination Bill was provided at the level of parliamentary discussions. As far as the authors of this national report are aware, the religions did not participate in these discussions.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

The authority charged with oversight of religious discrimination

The Anti-discrimination Act assigned the role of an anti-discrimination body to the Public Defender of Rights (the Czech ombudsman) in Article 13, which came into force on 1 December

¹ See P Boučková, *Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC*, Country Report 2009, Czech Republic, European Network of Legal Experts in the Non-discrimination Field, p 5, available at <<http://www.non-discrimination.net/countries/czech-republic>>, accessed 30 July 2011.

2009. Indeed, the office of the Public Defender of Rights had already been constituted by Act No 349/1999 Coll, which came into force on 28 February 2000. The Public Defender of Rights, acting as the Czech Republic's anti-discrimination body, has responsibility to combat discrimination on all the grounds covered by the Equality Directives, including religious discrimination. The office has already been vested with competence in this regard to supervise fairness in state administration, places of detention and places of institutional care.

The Public Defender of Rights is elected by the Chamber of Deputies of the Czech Parliament for a period of six years, and is responsible to this Chamber. Candidates are proposed by the Czech president and the Senate. The body is funded from the state budget, through its own independent budget line. The Public Defender of Rights should provide independent assistance to victims of discrimination, undertake research, publish independent reports and exchange information with anti-discrimination bodies in other EU Member States.² The office is an independent institution, accountable directly to the Chamber of Deputies of the Parliament.³ Religions have no role in its work.

The key instruments or sources of law on religious discrimination

Constitutional

The Charter of Fundamental Rights and Freedoms, Article 3(1)

Civil, labour and administrative law

Act No 200/1990 Coll, Misdemeanours Act, Articles 32, 49

Act No 634/1992 Coll, on Consumer Protection, Article 6

Act No 221/1999 Coll, on Service by Members of the Armed Forces, Article 2(3)

Act No 3/2002 Coll, on Churches and Religious Societies, Article 2(5)

Act No 218/2002 Coll, on Service by State Administration Officials and on Remuneration of these Officials and other Employees, Article 80(2)

2 Act No 349/1999 Coll, on Public Defender of Rights, Art 21b; Anti-discrimination Act No 198/2009 Coll, Art 13.

3 See Boučková, *Report on Measures to Combat Discrimination*, pp 82–83.

Act No 361/2003 Coll, on Service by Members of the Security Services, Article 77(2)

Act No 435/2004 Coll, on Employment, Article 4(2)

Act No 561/2004 Coll, School Act, Article 2(1)

Act No 262/2006 Coll, Labour Code, Article 16(1)

Act No 198/2009 Coll, Anti-discrimination Act, Article 2(3)

All of these acts contain grounds for non-discrimination. Almost all of them provide explicitly for the protection of all inhabitants of the Republic and they make special mention of faith or religion. The Labour Code contains general equality provisions: the right to equal treatment and the prohibition of discrimination applies to all employees.

Criminal law

Act No 40/2009 Coll, the Criminal Code, especially its provisions as to offences of Restriction of Freedom of Religion (Article 176), Incitement of Hatred against a Group of Persons or Restriction of their Rights and Liberties (Article 356), Genocide (Article 400), Assault against Humanity (Article 401), Apartheid and Discrimination of a Group of People (Article 402), Founding, Support and Propagation of a Movement Aiming at Oppressing Human Rights and Liberties (Article 403), Expression of Affection for a Movement Aiming at Oppressing of Human Rights and Liberties (Article 404), Denial, Casting Doubts on, Conniving and Justifying Genocide (Article 405) and Persecution of Inhabitants (Article 413).

The term ‘religion’ is not defined in the Czech legal system. However, the term ‘religions’ (Churches and Religious Societies) is defined in the Act No 3/2002 Coll, on Churches and Religious Societies: ‘a Church or Religious Society is a voluntary association of persons with its own structure, bodies, internal regulations, religious rituals, and manifestations of faith, founded with aim to confess certain religious faith, public or private, and especially by means of assembly, worship, teaching, and spiritual service’. According to the Charter of Fundamental Rights and Freedoms, non-affiliated agnosticism, atheism or secularism (which comprise the beliefs of the majority of the population) are on a par with religion and have the same protection as a religious belief.

The fields in which the prohibition is operative

As explained on the website of the European Network of Legal Experts in the Non-discrimination Field,

The Czech anti-discrimination provisions implementing the directives cover labour relations, including employment and working conditions, dismissals and pay, [and] membership and involvement in an organization of workers or employers, in both the public and private sectors. They also cover access to employment (job recruitment, re-qualification etc.), on all grounds included in the EU anti-discrimination directives – sex, race and ethnicity, religion, disability (state of health), age and sexual orientation.

The Anti-discrimination Law also covers labour relations to which Labour Law does not apply, such as those of judges, state attorneys, parliament deputies and others. Other areas covered by the Anti-discrimination Law include membership of organizations whose members carry on a particular profession, self-employment, vocational training, and education at all levels. The Anti-discrimination Law also provides protection with respect to access to health, housing, social security, social advantages and access to goods and services.⁴

Areas covered by the prohibition

The Czech Anti-Discrimination Act defines direct and indirect discrimination, harassment, sexual harassment, victimisation, instruction to discriminate and incitement to discriminate. The legal system provides for civil, criminal and administrative enforcement. The victim can obtain financial compensation for non-material damages in civil disputes. Criminal prosecution is used only in extreme cases of discrimination. Administrative enforcement consists of sanctioning misdemeanours and administrative offences.

⁴ European Network of Legal Experts in the Non-discrimination Field, ‘Czech Republic, Material Scope’, available at <<http://www.non-discrimination.net/content/material-scope-14>>, accessed 30 July 2011.

Case law concerning the discrimination on the grounds of religion or faith

As far as the authors of this article are aware, no cases have as yet been decided concerning discrimination on grounds of religion or faith.

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

The Anti-discrimination Act permits different treatment on grounds of age (for example, minimum age, professional experience or seniority in service for access to employment), different ages for the retirement of men and women, different treatment of women on the basis of their pregnancy and motherhood. Under specific conditions there is also differential treatment in the case of those employers who are churches and religious societies.

Article 6(4) of the Anti-discrimination Act contains the following provision:

A different treatment is [or may be] applied in cases of the right to employment, access to employment or vocation in cases of dependent work in churches or religious societies, where from the character of such work or the circumstances in which it is carried out, the religious belief, faith or worldview constitutes substantial, justified and legitimate occupational requirement with respect to the ethics of the church or religious assembly.

Employers have no duty to respect non-discrimination provisions on the ground of gender in the case of individual contracts with self-employed people. Case law in the area of these exceptions has not yet been developed.

DENMARK

LISBET CHRISTOFFERSEN

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

In 885, when the French were already a civilised people with a stable hierarchy of governance, the Danes were still Vikings, some of whom sailed up the Seine and laid siege to Paris. When the people of the city began to run short of supplies, they asked their archbishop to negotiate with the Vikings for access to food and water. He walked down to the bank of the Seine and let his eyes search among all the ships but did not find what he was looking for. He therefore raised his voice, asking loudly to speak to the Viking leader. In response, the air was filled with the sound of thousands upon thousands of voices: ‘Here, all of us are leaders ...’.¹

In the following century, King Harald Bluetooth erected a stone for his father, Gorm, and his mother, Thyra, bearing witness that he, Harald, was the king who brought Christianity to Denmark and thus established order in the country. In the ensuing half-century Denmark was divided into two jurisdictions, both of which wanted charge of the souls of the people, and holding the belief that only true hierarchy establishes leaders.²

The farmer’s son and Danish reformer Hans Tausen (bishop of Ribe from 1542)³ gave a Danish slant to the doctrine of the priest-

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- 1 The narrative of the Danish Vikings laying siege to Paris was told in the *Gesta Danorum* of the Danish historian Saxo Grammaticus, a work written in Latin around 1200, putting down all that Saxo knew of Danish history. The original manuscript is lost but Christiern Pedersen, who was the first to translate the Bible into Danish, published Saxo’s history in Paris in 1514 and that version is still in Danish libraries.
 - 2 The two Jelling Stones are dated to the period between 960 and 985. They are the official mark of the transition to Christianity as the official religion of Denmark. One of the Jelling Stones has a crucifix on it, which has appeared on the inner cover of all Danish passports since the mid-1990s. The Danish millennium celebration of 2000 was held in Jelling, to mark the interlinking of kingdom, Christianity and country.
 - 3 Hans Tausen studied theology at Wittenberg, among other places. He contributed to the formulation of the *Kirkeordnansen* (in Latin 1537, Danish version 1539), the law given by the king that established the Danish Evangelical Lutheran Church after the Reformation. In 1843, BS Ingemann, who wrote historic novels and folk hymns, set a song about Hans Tausen to a popular folk tune. This song, which was included in

hood of all believers, although this equality within the Church disappeared with the loss of the king's role in German lands⁴ and the cession of one-third of the country to Sweden. Thereafter, a hierarchical structure was re-established for Danish religions: Lutheranism became the state religion, with the king as the governor of all religion in the country. Other religions were only accepted on the basis of direct consent of the king. In 1683, Danish law established this new hierarchical order. In the same year the king recognised Jews, Calvinists and others as foreign believers and allowed them to settle in certain places in the kingdom.

After the French Revolution, the Danes formed an alliance with the French against the British. This resulted in British bombardment of Copenhagen (1807), bankruptcy (1813), the loss of Norway (1814) and subsequent riots in Copenhagen against Jews, who were made scapegoats for the various disasters. This time, a wise king, Frederick VI, made the right decision. He offered the Jewish community Danish citizenship on equal footing with all other citizens but on the condition that they gave up Jewish laws and followed Danish law. The Jewish community was only allowed to uphold Jewish norms and rules concerning festivals, rites and rituals. This, together with a new acceptance of Catholics in the country and of the impossibility of trying to force Baptist parents to baptise their children, was the basis for those parts of the 1849 Constitution governing relations between the state and the Churches and tolerance of religious identity.⁵

Constitutional background

The Constitution of 1849 is still in force, carrying the same wordings and paragraphs concerning religion that established freedom of religion but not equality among religions. The state is obliged to support

popular Danish song books for schoolchildren until the late twentieth century, taught that reformations could be led by the sons of the people.

- 4 Christian IV withdrew from the European wars of religion and lost power to the Swedish kings, who eventually besieged Denmark. At the Peace of Roskilde in 1658, Christian ceded to Sweden the regions now forming the southern part of Sweden (Skåne, Halland and Blekinge). This loss led to the introduction of absolute rule in 1660.
- 5 On the influence of Lutheranism, see articles in L Christoffersen, KÅ Modéer and S Andersen (eds), *Law & Religion in the 21st Century: Nordic Perspectives* (Copenhagen, 2010).

the People's Church (the Evangelical-Lutheran Church of Denmark) of which the king must also be a member. The internal structure of the People's Church is decided by law; the Church is understood to be a branch of state institutions, ruled by law and administered by state departments. Other religious communities in Denmark have full freedom, but no equality is established between them and the People's Church.⁶

Denmark ratified the European Convention on Human Rights (ECHR) in 1953. It was a clear precondition of the ratification that Article 14 in combination with Article 9 would not constitute a challenge to the constitutional lack of equality between the People's Church and other religious communities. This was also part of the background for the original Danish opposition to including anti-discrimination clauses with regard to religion in the Treaty of Amsterdam.

In 2007, a group of individual Catholics (supported by members of the Baptist church, but not officially by the Roman Catholic Church in Denmark) tried to get the Supreme Court to change the general Danish position that the ECHR has not changed the Danish Constitution to accept equality among religions. The Danish People's Church functions as a public authority with regard to birth registration and registration of burials for all Danes, no matter what their religion. The applicants in this case argued that this obligation to register in the People's Church denied their freedom of religion, as well as contravening the requirement in Article 14 of the ECHR to equality in religious matters. The Supreme Court found that civil registration had nothing to do with religion and that the People's Church simply performed a function for the state.⁷

6 For more detailed analysis of the current situation, see eg L Christoffersen, 'State, Church and religion in Denmark', in Christoffersen, Modéer and Andersen, *Law & Religion in the 21st Century*, pp 145–161. For a comparative evaluation of the current situation in the Nordic Countries, see L Christoffersen, 'Not even believing in belonging: states and Churches in five north-European (post)-Lutheran countries', in S Ferrari and R Christofori (eds), *Law & Religion in the 21st Century: Relations Between States and Religious Communities* (Farnham, 2010), pp 187–198. For a discussion of how this structural inequality is regarded in relation to Muslim communities, see L Christoffersen, 'Religion and state: recognition of Islam and related legislation', in J Nielsen (ed), *Islam in Denmark: The Challenge of Diversity* (Lanham, MD, 2011).

7 U 2008.342H.

Outside the scope of Church–state relations, the Constitution of 1849 took a very strong standpoint, rejecting any form of religious discrimination. Article 70 of the Constitution (which has been in force since 1849, though differently numbered) thus makes clear that ‘Nobody may be deprived of access to the full enjoyment of civil and political rights or evade the fulfilment of any general civil duty on the grounds of his or her profession of faith or descent’.⁸

The rulings on religion in the Constitution resulted in a discussion in 1848 between the religious leader NFS Grundtvig and a leading jurist of the time, Anders Sandøe Ørsted. Regarding Article 70, Ørsted remarked that the result would be ‘Jewish members of the Supreme Court’, which he saw as a problem because he felt that they would not be able to judge on the basis of Danish law, tending rather to base their judgments on Rabbinic law. ‘But of course’, was the answer from Grundtvig, ‘in court all judges are equal with no ground for discrimination on basis of their religion; that is precisely the goal, so of course this paragraph opens the way for Jewish members of the Supreme Court.’

This discussion is central to the understanding of Danish law’s attitude towards discrimination on the basis of religion: within a rather narrowly interpreted field of religion, discrimination is allowed, not only by the state but also within religious communities. In society as a whole, including areas governed by family law, religion is in general not seen as a relevant criterion. Discrimination is not allowed. If religious norms and practices can be kept discrete, the individual can of course follow them. Outside the sphere of religion, however, Danish society regards itself as secular and equal.

To set this constitutional understanding within the legislative framework has inevitably taken a long time, though all discrimination based on religious arguments in relation to civil servants, teachers in public schools, professors at universities and so forth were eliminated from the law by the middle of the twentieth century. The last distinction within the labour market based on a religious understanding was that between men and women with regard to the right to serve as a church minister within the Danish People’s Church; the

⁸ Quotation from an English version of the Constitution, available at <http://www.ft.dk/English/-/media/Pdf_materiale/Pdf_publikationer/English/My%20Constitutional%20Act_with_explanations%20pdf.ashx>, last accessed 17 November 2011.

prohibition on women ministers was abolished in 1948. However, it was still possible in the second half of the century to see advertisements for workers in the manual labour market (for example, for farmworkers) with the comment, ‘a member of the YMCA is preferred’.

Further steps towards equality in the labour market, with religious exemptions

The first International Labour Organisation (ILO) convention No 111 on discrimination in the labour market was ratified by Denmark in 1960. In itself, however, this convention did not lead to any legislation but was dealt with by the parties in the labour market following what has been called ‘the Danish model’. The labour market introduced the principle of equal pay for equal work in an important agreement based on a suggestion from the official mediator in 1973. Shortly afterwards, the EC introduced the same principle in a Directive of 10 February 1975, followed by the principle of equal treatment between men and women in the labour market (including access and vocational training) in a Directive of 9 February 1976.⁹ Both directives were soon implemented in Danish law.⁹

For the first time in recent history, these implementations gave the opportunity for a discussion in Parliament on religious exemptions. It became clear that not all members of Danish society were prepared to accept equality between men and women, protection of pregnant women in the labour market and so forth. The small but influential Christian People’s Party, established at the beginning of the 1970s as a reaction against legal abortion and inspired by American evangelicalism, argued strongly against the law as such, based on an understanding of the difference between men and women as created by God. This understanding is still present in Danish society, not only in the now much broader groups inspired by evangelicalism but also in classic Lutheran groups related to the Danish People’s Party.

The law on equal treatment of men and women with regard to work included in § 11 a general exemption very similar to those in

⁹ Lov nr 161 af 12. april 1978 om ligebehandling af mænd og kvinder med hensyn til beskæftigelse, lovforslag fremsat af arbejdsministeren 10. januar 1978.

current legislation: ‘if, with regard to specific forms of jobs and concomitant training, it is compulsory that the employee is of a specific sex, the minister is allowed to give dispensation from the general rule on equality’. The Government suggested, with reference to freedom of religion based in the Constitution, that this paragraph should automatically exempt certain religious communities from any legal obligation to hire religious leaders who were not of their own faith. The Jewish community and the Roman Catholic Church were specifically mentioned during the negotiations. On the other hand, the Government underlined in the first proposal that the People’s Church would of course be covered by the law, since here equality between men and women had been introduced with regard to church ministers in 1948.¹⁰ However, this was changed during the parliamentary negotiations. At that point the Government informed the Parliament that ministry positions within the People’s Church would also be exempted from the scope of the law.¹¹ The argument was that the congregation councils should still be allowed to choose a man on religious grounds. The Minister for Ecclesiastical Affairs thus issued a regulation exempting positions as a church minister or equivalent functions in other religious communities from the general law on equal treatment of men and women in the labour market.¹² This regulation is still in force.

Within the People’s Church, the discussion since that time has concerned whether the exemption also allows male church ministers to discriminate against their female colleagues (not shaking hands, not sharing services, not standing before the altar together, etc). In the 1980s, the Danish organisation for church ministers formulated general guidelines in order to avoid problems, but with an increasing number of conservative male church ministers the church has encountered a rising number of conflicts. After a heated debate, the bishops have recently underlined that the exemption does not allow for lack of cooperation. However, nobody is prepared to make this a matter of conflict and nobody is forced to serve in the same ritual if they do not wish to.

10 Lovforslaget, bemærkninger til § 11, Folketingstidende A s 3096.

11 Betænkning over lovforslaget, Folketingstidende B s 577.

12 Bekendtgørelse nr 350 af 10. juli 1978.

Nevertheless, the exemptions of religious communities – including the People's Church – were directly related to those holding positions as religious leaders/church ministers. As a general rule the law should thus also cover these communities. Religious communities were not as such exempted from the law.

Further implementation of international conventions

In 1971 Denmark passed a general law prohibiting discrimination and furthering equality with regard to race, colour, national or ethnic origin, religion and sexual orientation. This law was the first attempt to implement the International Convention on the Elimination of All Forms of Racial Discrimination and it covered all public and private areas of society. At the same time the criminal code was changed, widening the existing prohibition against hate speech grounded on race and religion (established in 1938) to cover all relevant grounds, including sexuality.

The law regarding equality on the ground of race did not, however, include any regulations concerning the labour market. This was meant to be negotiated between the interested parties, but those negotiations were not fully successful. Thus in 1996, the legislature decided to pass an Act parallel to the Prohibition of Discrimination in the Labour Market.¹³ This Act further implemented both the International Convention on the Elimination of All Forms of Racial Discrimination and ILO convention no 111. With this Act the general prohibition against direct or indirect discrimination on grounds of race, colour, faith, political understanding, sexual orientation or national, social or ethnic origin was also introduced in the labour market.

The Act included a general exemption of employers whose specific goal was to propound a specific political or religious standpoint, unless the exemption was in conflict with EU law. It also included a right to exemptions for particular occupational activities or training where it might be essential for an employee to be of a specific race or religion. The interpretation of these exemptions has been debated since then and I discuss these questions in relation to current legislation below.

13 Lov nr 459 om forbud mod forskelsbehandling på arbejdsmarkedet af 12. juni 1996.

Implementation of EU Directives 2000/43/EC and 2000/78/EC

In 2004 the 1996 Act on the prohibition of discrimination in the labour market became the framework for implementing in the labour market the relevant aspects of the two EU Directives – directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, and directive 2000/43/EC, which prohibits discrimination on grounds of race. I discuss the implications for and interpretations of religious exemptions in general below.

Directive 43/2000 had further implications, however, and the Danish Government was insecure as to how to implement it. In 2001 the Government therefore appointed a commission of 16 persons, among whom was a bishop from the People's Church, Kjeld Holm, at that time also Chairman of the Board for Ethnic Equality in Danish Society. In its report,¹⁴ this commission discussed, *inter alia*, whether they would recommend that the general prohibition of discrimination in society as a whole should be widened to include not only faith (which had been covered since 1971) but also religion or belief. The question had already been raised several times in Denmark more generally¹⁵ but was, for example, excluded from the general discussions at an official conference held by Parliament in 1999 as part of the celebrations for the 150-year anniversary of the Constitution.

The commission first underlined the extant prohibitions of discrimination in Denmark on the basis of religion or belief (Article 70 of the Constitution and the abovementioned law from 1996 (2004) prohibiting religious discrimination in the labour market). It also acknowledged that discrimination on grounds of race and of religion or belief can be intertwined and include indirect discrimination grounds.

The commission was divided in its recommendations. A minority, including Bishop Holm, argued that religion and belief should be among the criteria for grounds of discrimination in society as a whole. Their argument was that much of the most widespread difference of treatment in Danish society is related to religion and belief,

14 Betænkning nr 1422/2002.

15 Thus, for example, in a book published by the Board for Ethnic Equality as a celebration of the 150-year anniversary of the Constitution: L Christoffersen and JB Simonsen (eds), *Visioner for religionsfrihed, demokrati og etnisk ligestilling* (Copenhagen, 1999).

and that new legislation would signal respect and tolerance towards other religions in a society with a single, dominating faith community. At the same time they acknowledged that the introduction of religion or belief as a criterion for prohibition of discrimination would include a right to difference of treatment, based on requirements from individual faith communities. This should be accepted, and if problems with regard to this showed up the courts would have to deal with them.

The majority, however, representing ‘official Denmark’ (government and labour market representatives, etc), recommended that the grounds of discrimination as a whole should not be widened to cover religion or belief. Their argument was that prohibition of discrimination on grounds of religion and belief in the labour market was already covered, and would be so even more extensively with the implementation of Directive 2000/78/EC. They underlined that different treatment on grounds of religion or belief can be legitimate, and they envisaged that such an inclusion of religion and belief among the general criteria regarding discrimination would ‘give rise to a series of independent problems, the solutions to which are outside the framework of this commission’.¹⁶

There were a number of issues that the commission did not wish to address: the constitutional inequality between the Evangelical-Lutheran People’s Church and the other religious communities (including possible differences of treatment between old and new faith communities); and the definition of what religion ‘is’ and thus where the borderlines are between religious communities with a right to discriminate on the basis of religion and secular society, where religion is not a ground for discrimination. Perhaps even more centrally they did not discuss the issue of a possible conflict between a collective right for religions to discriminate on grounds of religion and an individual right for members of religions not to be discriminated against on other grounds than religion. Thus the issue that the majority of the commissioners wished to avoid could be reformulated as relating to problems of double discrimination of members of or employees in religious communities.

The two directives were consequently implemented in two different laws: one on prohibition of discrimination in the labour mar-

16 Betænkning nr 1422/2002, p 189.

ket, and one on equal treatment on grounds of ethnicity. Questions regarding relations between gender equality in the labour market and religious grounds for discrimination between the sexes are still dealt with under the separate law on equal treatment of men and women in the labour market. Thus, the Danish rapporteur on non-discrimination is right in calling the Danish legislation in this field ‘a web of civil and criminal legislation ranging from the Constitution to specific acts covering areas outside and inside the labour market, making it a challenge to explain and for the public to understand’.¹⁷

My explanation in the following section on Danish rules regarding religious discrimination will thus be based mainly on these three laws, not referring to the rules in criminal law and hoping that the constitutional framework has been clearly explained in the introduction. Let me also add, before I deal with the normative questions, that problems regarding religious discrimination are among the areas of competence for the Board of Equal Treatment, established as a result of the implementation of the Directives.¹⁸ Furthermore, the Danish Institute for Human Rights¹⁹ holds among its areas of competence the obligation to promote equal treatment in general, as well as with regard to religion.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

Prohibition against religious discrimination outside the labour market: current norms and practice

The Constitution gives full freedom of religion, which means that religious communities have full freedom. The prohibition of discrimination on grounds of religion in the labour market is also old, based in the Constitution and implemented in law in many different ways (see below). However, when it comes to protection against religious discrimination outside the labour market, an individual would have to argue a case based on the ECHR or on the law prohib-

17 See <<http://www.non-discrimination.net>>, accessed 17 November 2011.

18 See <<http://www.ligebehandlingsnaevnet.dk/artikler/default.aspx?page=1175>>, accessed 17 November 2011.

19 See <<http://humanrights.dk/home>>, accessed 17 November 2011.

iting discrimination on grounds of race, that is, indirect discrimination. Consequently, a Muslim or Christian of Danish racial origin wishing to argue a case of discrimination with regard to housing or similar on the basis of his or her religion would have to rely on the constitutional prohibition of depriving access to full civil or political rights or evading the fulfilment of a general duty on the grounds of his or her profession of faith.

It is my impression that the constitutional prohibition of religious discrimination is interpreted very broadly and thus has led to an avoidance of discrimination on this basis, at least from public authorities. For example, a suggested general prohibition of wearing the burqa in public (in the street, on buses, etc) was turned down by the Ministry of Justice as being unconstitutional. Other examples are acceptance of public prayer for Muslims in the biggest public park in Copenhagen, and the festival of Eid being celebrated not only in one of the biggest sport halls in the country but also in Parliament.²⁰

Consequently, the prohibition has also given rise to huge debate when religious groups arrange meetings in public where they distinguish between the sexes on the basis of their religious understanding. The general understanding among the public is that such distinctions may be allowed within the walls of a religious community but that meetings accessible to the general public should not be allowed to promote religious exemptions as discrimination on the basis of gender, sexual orientation, race and the like. None of these public debates has yet, however, given rise to court cases or decisions by administrative boards.

Prohibition against religious discrimination in the labour market: current norms and practice

EU norms (and norms from other international and national bodies) on prohibition of discrimination in the labour market on grounds of religion are now established law, not only in the Constitution but also in the two abovementioned Acts – on Different Treatment in the Labour Market and on Equal Treatment of Men and Women in the

20 The celebration of Eid at Christiansborg has given rise to political debate, but there is no doubt that freedom of religion and prohibition of discrimination on grounds of religion makes it difficult to exclude Muslim groups from using the same public buildings as other organisations.

Labour Market. The only relevant exemption with regard to equal treatment of men and women in the labour market is the right to exempt the positions of church ministers and religious leaders from the law. That means that other types of religious argument for a differential treatment between the sexes in the labour market may be seen as illegitimate, unless they can be accepted on the basis of the law on the general prohibition of discrimination. In the ordinary labour market no right to religious discrimination exists. It is not permissible within the ordinary labour market to hire or fire on the basis of the religious identity of the individual.

In 2000, the Western High Court found that a leader of a music school run by the municipality had been unlawfully dismissed. He was a member of the Jehovah's Witnesses and thus did not want to be involved in the traditional collaboration between the public music school and the local church choir for a Christmas concert. The municipality wished the collaboration to be upheld but was overruled by the court.²¹

A recent example of a judgment from the Eastern High Court dealt with a Muslim person employed as a temporary worker in a kindergarten. During Ramadan, the worker had been fasting. The institution argued that it was necessary for the nurture of the children that the employees had lunch with them, so the work contract was subsequently terminated. The court found direct discrimination on the basis of religion; thus the termination was unlawful.²²

A series of cases has tackled the issue of the possibility of accommodation of the religious needs of individuals in the ordinary (secular) labour market. In general, the courts do not support claims of the need for religious accommodation, though it appears that the labour market itself, to a much higher degree than has been argued in court, actually allows for various forms of religious accommodation. In the prominent case *Føtex-sagen*²³ the Supreme Court accepted that a supermarket could lawfully prohibit employees who had direct contact with customers from wearing religious clothing (in this case, the veil). In an earlier case, the High Court supported a young woman wearing the veil in her argument that she had been unlaw-

21 U 2001.207V.

22 U 2008.1028Ø.

23 U2005.1265H.

fully dismissed from a store selling clothes. The argument was that the store had no general directives on clothing.²⁴ In contrast, a rather strong (some would argue secularist or at least non-accommodative) line has been followed by the High Court in the case of a Jehovah's Witness who was required by his employer to take part in a reception at his workplace celebrating a birthday; the court found for the employer.²⁵ Finally mention should be made of a case regarding a group of Muslim workers on a work-related course who wanted to pray in the course premises according to the Muslim practice. The facts in the case are unclear, but what is not unclear is that the attempts on the part of the school to regulate where the prayer could take place – and thus not in the canteen – was not seen as unlawful discrimination on grounds of religion.²⁶

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

Danish law only permits different treatment on grounds of political persuasion or of religion or belief. Both exemptions can take the form of a characteristic related to religion/belief or politics 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 proportional.²⁷ The law also includes a more general exemption for employees whose clear role is to further a specific political or religious goal or a specific faith and where the political understanding or religious faith or belonging to a religious community must be seen as relevant for the employer.²⁸

The Danish translation of Article 4 in Directive 2000/78/EC is rather complicated and gives rise to a considerable number of instances. There is no doubt that if the characteristic related to the occupation constitutes a genuine and determining occupational re-

24 *Magasin-sagen*, U 2000.2350Ø.

25 Dom af 3.1.2008 i sag nr. B-821-07.

26 U2001.83H.

27 Forskelsbehandlingslovens § 6, stk 2.

28 Ibid.

quirement, with legitimate objective and proportionate function, then the relevant minister must grant a dispensation. For example, a general dispensation has been given to a slaughterhouse producing *halal* meat.

The Board of Equal Treatment has in 2011 dealt with three cases, two concerning the same organisation. This organisation, whose goal it is to offer pastoral care for poor and homeless people on a Christian foundation, has as a general requirement in its basic rules that employees must belong to the Danish People's Church. The argument for the requirement originally was that the organisation wanted to present itself on a broad (liberal, not pietistic) Christian basis, including all in Danish society belonging to the national Church. The Board of Equal Treatment however found that such a general requirement is unlawful. The Board instead requires the organisation to judge each individual situation on its own merits. To require membership of the Church with regard to a leading position as consultant was seen as lawful, whereas the same requirement could not be made regarding a position as cleaner.

The third relevant case from 2011 from the Board of Equal Treatment concerned a secretary in a small organisation, dealing with psychotherapeutic supervision on an evangelical Christian basis. Here the Board supported requirements that the secretary was a Christian and a member of a Christian congregation as lawful.

Before the establishment of the Board of Equal Treatment many of these cases were dealt with in the newspapers and in questions raised in Parliament. The general understanding in Parliament has been that it is lawful for religious organisations to secure their ethos through requirements of their employees, but it is still very unclear how far this acceptance goes when it comes to the difficult cases.

Equality before the law in Denmark?

To conclude, it could be argued that the existing inequality between the religious communities and the legal acceptance of inequality between the sexes on the grounds of religious argument themselves makes it hard to analyse, discuss and find solid solutions to the question of the role of religion in relation to equality.

It has become standard in Danish public debate on these issues to distinguish between a clearly secular labour market and a clearly

religious labour market (consisting of church ministers, etc). Most people also accept specific religious requirements concerning, for example, membership with regard to school leaders and teachers of a specific religion in private religious schools, whereas religiously based moral requirements would meet with more scepticism.

The majority of problems arise with regard to secular functions in the clearly religious labour market: that is, which requirements are acceptable with regard to the sexton in the churchyard, the cleaner in the church or the bookkeeper of the missionary organisation. Problems also arise with regard to general requirements of loyalty towards the ethos of a religious organisation or institution dealing with secular issues (kindergartens, homes for the elderly, hospitals, pastoral work, etc). We have not seen the last of these cases.

ESTONIA

MERILIN KIVIORG

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

The independent Republic of Estonia was born in the aftermath of the First World War, when it broke away from the Russian empire, declaring independence on 24 February 1918. Estonia became part of the USSR in 1940 (apart from a three-year interruption during the Nazi occupation from 1941 to 1944) and had little legislative independence during that time. Independence was regained in 1991.

Soviet law dictated the laws on freedom of religion for the entire period of occupation by the USSR. This report will not cover the law on religious discrimination or surrounding debates during that time; nor will it include laws on religious discrimination passed before Estonia became an independent state in 1918. The main focus will be on laws adopted after Estonia regained independence in 1991.

The first Estonian Constitution (ratified in June 1920) was influenced by the liberal thinking prevalent in Europe after the First World War. It therefore emphasised the principle of a state based on the rule of law. One of its essential components was the acknowledgement of the fundamental rights of the person, including the rights to equality and non-discrimination. The 1920 Constitution was especially remarkable as it also contained explicit provisions for the protection of minorities, guaranteeing the right of minorities to establish autonomous institutions for national, cultural and social welfare purposes.¹ The main exemplars for drafting the 1920 Constitution were the 1874 Constitution of Switzerland and the 1919 Constitution of Germany. However the religious freedom clause also contained ideas adopted in the USA.² The Constitution was followed by the 1925 Religious Societies and their Associations Act, which re-

1 K Merusk, 'Estonian Constitutional System of Government' (1998) 3 *Juridica International* 2.

2 E Maddison, 'Usutühingute ja nende liitude õiguslik iseloom (The legal character of religious societies and their associations)' (1926) 11 (221) *Eesti Politseileht* 161–162.

affirmed the principle of equal treatment of all religious organisations, and the separation of state and religion.³

The 1930s saw significant political changes in Estonian society, which were characterised by the centralisation of state administration, the concentration of power, a decline of democracy and the expansion of state control. This period is commonly called ‘the era of silence’ and it lasted from 1934 to 1939. In 1934 the Churches and Religious Societies Act was enacted, not by Parliament but by decree of the State Elder (President).⁴ This Act established different legal treatment for churches and for other religious societies, and it set out special provisions for churches. Churches were given additional rights, but also restrictions; the government of all churches was subjected to control by the state. The 1934 Act also appeared to impose the idea of ‘one creed, one religious association’. For example, several protestant congregations that had become independent under the 1925 Act had to join the Estonian Evangelical Lutheran Church (EELC). According to section 84(1)(b) of the 1938 Constitution, the leaders of the two largest churches (the EELC and the Estonian Apostolic Orthodox Church (EAOC)) gained *ex officio* membership of the Riiginõukogu (the Upper House of Parliament).⁵

There is no recorded evidence of religious persecution or discrimination in the 1920s. In 1934, mirroring attitudes in some other European countries at the time, the Estonian government prohibited the activities of Jehovah’s Witnesses as being a threat to Estonia’s internal and foreign policy/security. They continued their activities ‘underground’ and were only able to register their organisation as a legal entity after the end of the Soviet occupation in 1991. There is no evidence of equivalent discrimination against other religious communities during the first independence period. Besides multitude of Christian communities, Jewish and Muslim communities had established their organisations between 1918 and 1940. Majority churches (namely EELC and EAOC) enjoyed certain privileges. Although decline in church membership was already in progress,

³ RT 1925, 183/184, 96. The principle of the separation of Church and state was not interpreted as a strict separation in the case of legislative practice after the adoption of the 1920 Constitution, especially in the fields of religious education and registration of marriages.

⁴ RT 1934, 107, 840.

⁵ RT 1937, 71, 590.

during the first independence period Estonia was more or less religiously homogenous. Most of the population (approximately 78%) belonged to the EELC.⁶

When the Estonian Constitutional Assembly held heated discussions over each provision and meaning of the draft Constitution of the Republic of Estonia at the beginning of 1990, there was no real debate about the provisions relating to freedom of religion or belief, Church–state relationships or religious discrimination. In the process of rebuilding the Estonian Republic immediately after the collapse of the Soviet Union there were more urgent issues to address. The Estonian Constitution was adopted by the referendum of 28 June 1992. Estonia started to rebuild its legal order on the principle of restitution, while at the same time acknowledging the changes over time in the European and international legal order and thinking, including developments in anti-discrimination legislation. The Constitution is, in a number of ways, a compilation of aspects of previous constitutions (from 1918 to 1940). It has continued the democratic spirit of the 1920 Constitution and its commitment to non-discrimination and the principle of equal treatment of all religious organisations/religions or beliefs.⁷

In drafting the 1992 Constitution, great attention was paid to fundamental rights. International treaties, the European Convention on Human Rights (ECHR) and constitutions of other democratic states (specifically German Basic Law) were taken as models. The ECHR became binding for Estonia in 1996 (see also below), while the country joined the European Union on 1 May 2004.⁸ Before membership in the EU was finalised, Estonia assumed the obligation of bringing Estonian law into line with European Community legislation, and was also making decisions of the European Court of Justice an important consideration.⁹

⁶ According to the national census of 1934, there were 874,026 Evangelical Lutherans in Estonia out of a total population of 1,126,413. See Estonian Institute, 2 February 2000, <<http://www.einst.ee/society/Soreligion.htm>>, accessed 17 November 2011. See also Statistical Office of Estonia, *2000 population and housing census: education; religion* (Tallinn, 2002), p 17.

⁷ RT 1925, 183/184, 96.

⁸ Treaty of Accession, RT II 2004, 3, 8.

⁹ The decisions of the European Court of Justice were considered persuasive (but not binding) authority and a source of legal values.

The general right to equality was and is one of the general principles of Estonian law. These general principles stem from the preamble and Article 10 of the 1992 Constitution (enshrining principles of human dignity, a state based on social justice, and democracy). The preamble of the Constitution proclaims that the state is founded on liberty, justice and law. The principle of equality is explicitly set forth in the first sentence of the first paragraph of Article 12 of the Constitution, which states that all persons shall be equal before the law. The second paragraph of Article 12 lays out the principle of non-discrimination, prohibiting discrimination, *inter alia*, on the basis of religion or belief.

The rationale of the law dealing with religious discrimination is based both on the principle of equality and on freedom of religion or belief (Article 40 of the Constitution). This is reflected in the understanding that the Article has to be interpreted in conjunction with the other articles of the Constitution. It is also reflected in the understanding that the equality principle should provide not just formal but also substantive equality. Additionally, the understanding of direct and indirect discrimination in Estonia has been influenced by and has evolved alongside its development in European Union law¹⁰ and in the case law of the ECHR.¹¹ The exact application of the equality principle in relation to religion has not been tested in Estonian courts.

Although freedom of religion or religious discrimination was not debated during the writing of the 1992 Constitution, subsequently the role of the major churches (especially the EELC) in Estonia, equal treatment of religions and religious education have all been topics for political and public debate. There have been visible tensions in the triangle of Christian communities, non-Christian communities and the state, but also within the triangle of Christian churches (primarily the EELC), state and the secular community (especially regarding religious education in public schools). Non-Christian religious communities have several times voiced their concern about equal treat-

¹⁰ Eg Council Directive 2000/78/EC on Employment Equality [2000] OJ L 195/16; Council Directive 2000/43/EC on Racial Equality [2000] OJ L 180/22.

¹¹ *Thlimmenos v Greece* (App no 34369/97) (2001) 31 EHRR 411; *DH and Others v the Czech Republic* (App no 57325/00) (2008) 47 EHRR 16. The concept of indirect discrimination is related to the substantive equality approach.

ment and discrimination. None of the above debates were expressly linked to debates relating to joining the EU or the ECHR.

At the beginning of the 1990s there was an influx and increase in the activity of so-called new religious movements (NRMs).¹² It is probably right to say that there was a phobia against these movements in society and correspondingly in politics (similar to attitudes in other European states at the time). To a large degree this phobia against NRMs was over by 2002, and there is almost no case law indicating discrimination of NRMs. Despite the phobia, it needs to be emphasised that Estonia has so far never been a place of serious anti-cult movements.

The opening of the borders and the fact of Estonia joining the European Union in 2004 have fuelled debates about the possible influx of immigrants from a primarily Islamic background with different cultures and religions. In contrast to western European countries (where the debate over these minority religions has been vibrant for many years), the discussion in Estonia is just beginning. However, many aspects of the debate are the same – national identity, level of tolerance and readiness to accept the otherness to comply with international human rights standards including non-discrimination.

Article 3 of the 1992 Constitution stipulates that universally recognised principles and norms of international law shall be an inseparable part of the Estonian legal system. The prevailing view among scholars is that this Article adopts the universally recognised principles and norms of international law into the Estonian legal system and makes them both superior in force to national legislation and binding on the exercise of legislative, administrative and judicial powers.¹³ Thus, according to the 1992 Constitution, universally recognised principles and norms of international law have a special place in Estonian legal order. International treaties ratified by parliament are incorporated into the Estonian legal system by Article 123(2) of the Constitution. Article 123(2) also establishes the

¹² The expression ‘new religious movements’ here does not necessarily mean absolute or world novelty, but rather novelty in Estonia or Europe. In this sense it includes, for example, nineteenth-century communities such as Jehovah’s Witnesses or the Bahá’í. It is not used as a pejorative term.

¹³ K Merusk and R Narits, *Eesti konstitutsiooniõigusest* (Estonian Constitutional Law) (Tallinn, 1998).

hierarchy of these treaties, stating that if Estonian acts or other legal instruments contradict foreign treaties ratified by the Riigikogu (Parliament), the provisions of the foreign treaty shall apply. This rule of superiority of foreign treaty law over domestic legislation also applies to internal laws enacted after the ratification of the treaty.

Estonia has ratified key conventions protecting freedom of religion or belief. For example, the International Covenant on Civil and Political Rights (ICCPR) became binding for Estonia on 21 January 1992.¹⁴ The ECHR was ratified by the Estonian Parliament on 13 March 1996,¹⁵ the letters of ratification being deposited on 16 April 1996. The Convention became legally binding for Estonia from that date. Both the ICCPR and the ECHR are part of the Estonian legal system and directly applicable.

Prior to ratification of the ECHR, the courts had already used it and its practices for interpretation of domestic legislation or even in *obiter dictum*.¹⁶ The ECHR is the international treaty most frequently referred to in Estonian courts. In the Supreme Court, references to the ECHR constitute approximately 60% of the total references in the court's decisions on international treaties. However, in freedom of religion cases Article 9 or related articles and Article 14 of the Convention have not been directly invoked. There have been only a few cases directly or indirectly involving freedom of religion or belief. In addition to international treaties, the human rights documents of international organisations have also been referred to in court cases.¹⁷ None of these references have involved freedom of religion or belief. However, there have been a couple of criminal cases involving freedom of expression and incitement to racial and religious hatred and discrimination. In one of these cases, which concerned incitement to discriminate against Jews,¹⁸ the Criminal Chamber of the Supreme Court noted relevant provisions in the ICCPR (but without any discussion).

¹⁴ RT II 1993, 10/11, 11.

¹⁵ RT II 1996, 11/12, 34.

¹⁶ H Vallikivi, ‘Euroopa inimõiguste konventsiooni kasutamine Riigikohtu praktikas (Use of the European Convention on Human Rights in the practice of the Supreme Court)’ (2001) 4 *Juridica* 401.

¹⁷ See eg Constitutional Review Chamber of the Supreme Court of Estonia, case no III-4/A-5/94, 30 September 1994, <<http://www.nc.ee/?lang=en>>, accessed 17 November 2011.

¹⁸ RKKrKo 14.12.1999, case no 3-1-1-113-99; RT III 2000, 3, 29.

There was no significant debate prior to the ratification of the ECHR or the ICCPR. There was some discussion over the death penalty during the ratification of Optional Protocol 6 of the ECHR (1998) and of the relevant facultative protocol of the ICCPR (2003). There was some reference to religion in the parliament during the debates over Protocol 6,¹⁹ but these references have very little relevance for the current report.

There is no available information as to the government's views on the EU Directives 2000/43/EC and 2000/78/EC. This is probably related to the fact that Estonia only joined the EU on 1 May 2004, after the adoption of the Directives. There was no real public debate concerning anti-discrimination laws and their effect on religion and religious organisations before or after the implementation of the Directives. There were debates over some procedural issues, but these are irrelevant to the current report.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

The post of Gender Equality and Equal Treatment Commissioner was established to monitor compliance with the requirements of the Gender Equality Act (GEA) and the Equal Treatment Act (ETA). From 2004 to 2009 the Commissioner only monitored cases relating to gender discrimination. Since 2009 the Commissioner has accepted applications from persons and provided opinions concerning possible cases of discrimination on other grounds, including religion. The Commissioner is also responsible for:

- i. Analysing the effect of legal acts on the situation of women and men, as well as minorities in society;
- ii. Making proposals to the Government of the Republic, government agencies, local governments and their agencies for amendments to legislation;
- iii. Advising and informing the Government of the Republic, government agencies and local government agencies on issues relating to the implementation of the GEA and the ETA;

¹⁹ VIII Riigikogu Stenogramm, VI Istungjäärk, 15. oktoober 1997, <<http://www.riigikogu.ee>>, accessed 11 July 2011.

iv. Taking measures to promote gender equality and equal treatment.

The Commissioner is an independent and impartial expert. His or her activities are supported by the Office for Gender Equality and Equal Treatment. The Commissioner is appointed by the Minister of Social Affairs for five years and the office of Commissioner is financed from the state budget. The new Commissioner (appointed in 2010) has highlighted that there are some discrepancies as to the office's institutional independence which prevent it from fulfilling its obligations set forth in law. It is a relatively new institution, which needs to be built up to become a fully functioning body. According to law and in practice so far religions and religious organisations have not had any direct role in its work.

Another non-judicial body charged with oversight of discrimination cases is the Office of the Chancellor of Justice. Among other duties, the Chancellor conducts conciliation proceedings in disputes involving discrimination between private individuals. Everyone has the right of recourse to the Chancellor of Justice for conciliation proceedings if they find that an individual or a legal person in private law has discriminated against them on the basis of sex, race, nationality (ethnic origin), colour, language, origin, religion or religious beliefs, political or other opinion, property or social status, age, disability, sexual orientation or on other grounds specified by law. The Chancellor of Justice cannot initiate conciliation proceedings on his or her own initiative. Petitions concerning the activities of individuals or legal persons in private law do not fall within the competence of the Chancellor of Justice if they concern the profession and practice of faith in religious organisations or employment as a minister of religion.²⁰

For settlement of a labour dispute (including disputes over alleged discrimination) parties have the right of recourse to a Labour Dispute Committee. The Labour Dispute Committees consist of three members, whose decision is binding on the parties. If the parties do not agree with the decision of a Labour Dispute Committee, they have recourse to court for a hearing of the same labour dispute.

²⁰ Art 35, s 5 of The Chancellor of Justice Act (Öiguskantsleri seadus) RT I 1999, 29, 406; RT I, 09 March 2011, 1 (most recent amendment).

Resolution of a labour dispute at a Labour Dispute Committee is regulated by the Individual Labour Dispute Resolution Act.²¹

Additionally, there is a Gender Equality Council within the Ministry of Social Affairs. It is an advisory body that approves the general objectives of gender equality policy and performs the duties prescribed in the GEA, advises the government in matters relating to the promotion of gender equality, and presents its opinion to the government concerning compliance with the GEA of national programmes presented by the ministries. The Government of the Republic approves the composition of the Council.

The key instruments or sources of law on religious discrimination are:

- i. Provisions set forth in national law (most importantly the Constitution, the Equal Treatment Act, the Gender Equality Act and the Penal Code);
- ii. Provisions set forth in EU law and international law; and
- iii. The interpretation of fundamental freedoms and rights in the administration of justice (including decisions of the European Court of Human Rights and the European Court of Justice).

As stated above, the principle of equality is anchored in the first sentence of the first paragraph of Article 12 of the Constitution, which states that all persons shall be equal before the law. The second paragraph sets forth the principle of non-discrimination, prohibiting discrimination, *inter alia*, on the basis of religion or belief. As the Constitution protects both individual and collective freedom of religion, these principles have to be applied to religious communities as well. The Constitution is generally interpreted as prohibiting both direct and indirect discrimination.²² The concept of substantive equality has been endorsed by the Estonian Supreme Court;²³ this means that Estonian constitutional practice is not blind to difference and accepts the fact that formal equality or equality as consistency may not be sufficient and in some cases may lead to injustice and discrimination.

²¹ Individuaalse töövaidluse lahendamise seadus, RT I 1996, 3, 57; RT I 2010, 22, 108 (most recent amendment).

²² Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (*Commentaries on the Estonian Constitution*) (Tallinn, 2002), p 121.

²³ See eg RT III 2002, 11, 108; PSJV Ko 21.01.2004 case no 3-4-1-7-03, RT III 2004, 5, 45.

The Gender Equality Act (Soolise võrdõiguslikkuse seadus) entered into force on 1 May 2004.²⁴ The Equal Treatment Act (Võrdse kohtlemise seadus) entered into force on 1 Jan 2009.²⁵ The GEA does not apply to the profession and practice of faith or employment as a minister of religion in a registered religious association (§ 2(2)). The ETA has general application; regarding racial and ethnic discrimination it is not restricted to employment situations. Discrimination of persons on the grounds of religion or other beliefs, age, disability or sexual orientation is prohibited in relation to:

- i. Conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- ii. Entry into employment contracts or contracts for the provision of services, appointment or election to office, establishment of working conditions, giving instructions, remuneration, termination of employment contracts or contracts for the provision of services, release from office;
- iii. Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; and
- iv. Membership of, and involvement in, an organisation of employees or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

The chapter of the Penal Code (Karistusseadustik) on ‘Offences against political and civil rights’ has a specific division dealing with offences against equality. Article 152 of the Penal Code²⁶ provides the penalty for the violation of the principle of equality:

Unlawful restriction of the rights of a person or granting of unlawful preferences to a person on the basis of his or her nationality, race, colour, sex, language, origin, religion, sexual orientation, and political opinion, financial or social status is punishable by a fine or by detention.

²⁴ Soolise võrdõiguslikkuse seadus, RT I 2004, 27, 181; RT I 2009, 48, 323 (most recent amendment).

²⁵ Võrdse kohtlemise seadus, RT I 2009, 11, 67; RT I 2009, 48, 323 (most recent amendment).

²⁶ RT I 2001, 61, 364; RT I 2010, 29, 151 (most recent amendment).

The same act, if committed at least twice, or if significant damage is caused to the rights or interests of another person protected by law or to public interests, is punishable by a pecuniary punishment or up to one year's imprisonment. Incitement to hatred, violence or discrimination on the basis of race, religion, nationality or sexual orientation, political ideas or economical or social status is forbidden by § 151 of the Penal Code if the incitement has caused risk to a person's life, health or property. Thus, the prohibitions are both civil and criminal. Religion is not defined, but the protection of general anti-discrimination laws extends to other beliefs and political ideas.

As stated above the ETA has general application and is not restricted to employment situations only. However, social protection (including social security, healthcare and social advantages), education and access to and supply of goods and services (which are available to the public, including housing) are not listed as situations where religious discrimination or discrimination on grounds of sexual orientation is prohibited.

The prohibition of discrimination covers both direct and indirect discrimination, harassment and incitement to discriminate. Discrimination disputes are resolved by a court, a Labour Dispute Committee or the Chancellor of Justice by way of conciliation proceedings. If the rights of a person are violated as the result of discrimination, he or she may demand from the person committing the violation termination of the discrimination and compensation for the damage caused by the violation. In addition, a person whose rights are violated as the result of discrimination may demand that a reasonable amount of money be paid to them as compensation for non-patrimonial damage caused by the violation.

The application of a person addressing a court, a Labour Dispute Committee or the Chancellor of Justice needs to set out the facts on the basis of which it can be presumed that discrimination has occurred. In the course of proceedings, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. If the person refuses to provide proof, such refusal is deemed to be equal to acknowledgement of discrimination by them. The shared burden of proof does not apply in administrative or criminal proceedings.

The opinions expressed by the Equality Commissioner are not binding. The purpose of the Chancellor of Justice in discrimination

cases is to conduct conciliatory proceedings based on petitions filed by persons who find that they have been discriminated against. Performance of an agreement approved by the Chancellor of Justice is mandatory to the parties to conciliation proceedings. If an agreement is not performed within the term specified the petitioner or respondent may submit the agreement approved by the Chancellor of Justice to a bailiff for enforcement pursuant to the procedure provided by the Code of Enforcement Procedure.

Labour Dispute Committees' decisions are binding on the parties. However, as mentioned above, if the parties do not agree with a decision they have the right of recourse to court for a hearing of the same dispute.

There is very little case law involving discrimination on grounds of religion apart from a couple of criminal cases in courts involving freedom of expression and prohibition of incitement to religious hatred.²⁷

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

Religious communities are allowed certain exemptions from the ETA. In the case of occupational activities within religious organisations and other public or private organisations 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 constitute a genuine, legitimate and justified occupational requirement, because directly related to the organisation's ethos (§ 10(2)). Moreover, the law does not prejudice the right of these organisations to require individuals working for them to act in good faith and with loyalty to the organisation's ethos (§ 10(3)).²⁸ These exceptions are based on EU anti-discrimination directives.

At the second reading of the ETA in the Parliament, the head of the Constitutional Law Commission pointed out that the exemptions

27 Eg RKKrKo 10.04.2006 case no 3-1-1-117-05, RT III 2006, 13, 124; RKKrKo 14.12.1999 case no 3-1-1-113-99, RT III 2000, 3, 29.

28 ETA, RT I 2008, 56, 315; RT I 2009, 48, 323 (most recent amendment).

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.²⁹ It thus appears that the ETA is applicable when the occupational requirements are not directly related to the manifestation of religion or belief.

The GEA does not apply to the profession and practice of faith or to employment as a minister of religion in a registered religious association (§ 2(2)). However, commentaries to the GTA (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.³⁰

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 no 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.

29 XI Riigikogu stenogramm, IV Istungjäärk, 21 October 2008, Võrdse kohtlemise seaduse eelnõu 262 SE teine lugemine, <<http://www.riigikogu.ee>>, accessed 1 May 2010.

30 K Albi et al, *Soolise võrdõiguslikkuse seadus, Kommenteeritud väljaanne* (Tallinn, 2010), p 23.

FINLAND

JOHANNES HEIKKONEN AND PAMELA SLOTTE

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

Historical aspects of religious discrimination in Finland

In the Nordic context, the ties between the Evangelical Lutheran Church and the state run deep. Lutheran thinking has influenced Nordic and Finnish culture in multiple ways, including the manner in which Church–state relationships have been conceptualised in law.¹ Of course, it can be argued that modern Nordic countries have attempted ‘to separate state and church’.² It is a fact, however, that the system historically put in place in Finland, while separating the spiritual and temporal realms in one sense, has simultaneously in and of itself reinforced an understanding of how to divide powers that is shared by both the state and the dominant Church. Church and state have agreed on how to rule, and the system affirms the status of the Evangelical Lutheran Church.

The fact that Finland has historically had a state Church that has left its mark on both the institutional culture and societal structures must therefore be kept in mind when attempting to understand the present-day realities and how Finnish national law deals with issues of religious freedom and religious discrimination. First, it explains why the legal status of churches and religious communities has been regulated in a twofold way in Finland both before and after entry into the European Community and the ratification and incorporation of the European Convention on Human Rights (ECHR). Second, it helps explain why certain issues of religious discrimination are likely to arise in the Finnish context, of which we give examples in this report.

1 For a new comprehensive study of historical and present-day Church–state relationships in the Nordic countries, see L Christoffersen, KÅ Modéer and S Andersen (eds), *Law & Religion in the 21st Century: Nordic Perspectives* (Copenhagen, 2010).

2 T Kurtén and V Päivänsalo, ‘Legitimacy, trust and religion in a Nordic perspective’, in L Hertzberg and T Kurtén (eds), *Legitimacy: The treasure of politics* (Peter Lang Verlag, 2011).

Juha Seppo wrote that ‘One of the peculiar characteristics of Finland’s ecclesio-political situation is the fact that two churches, Lutheran and Orthodox, have a legal and economic status which differs from that of the other churches and religious communities in Finland.’³ The special status of these two churches has not been considered to be contrary to freedom of religion and conscience, insofar as the rights of the individuals have been sufficiently guaranteed.⁴ The legal status of the Evangelical Lutheran Church and the Orthodox Church are regulated in separate laws, the Church Act (*kirkkolaki* (1054/1993)) and Order of the Church (*kirkkojärjestys* (1055/1993)) for the former and the Orthodox Church Act (*laki ortodoksisesta kirkosta* (985/2006)) for the latter, and also in parts one and three of the Freedom of Religion Act (*uskonnonvapauslaki* (453/2003)). The special legal status of the Evangelical Lutheran Church is referred to in Section 76 of the Finnish Constitution (*perustuslaki* (731/1999)).⁵ Other religious communities are afforded protection under the Act of Freedom of Religion if they duly register in the manner prescribed in the Act.

Moreover, before the reform of the basic rights and liberties enshrined in the Constitution Act in 1995, the Constitution Act of 1919 (*Suomen hallitusmuoto* (94/1919)) of the newly independent Finnish state (1917) enshrined the principle of religious freedom in Section 11. Freedom was guaranteed as long as it was practised within the boundaries of the law and of accepted mores (*hyväät tavat*). In practice this limitation was interpreted as requiring that the exercise of religious freedom could not infringe on the religious freedom of others. In addition, Section 9 of the Act stated that all citizens, independent of their religious affiliation, enjoyed equally the rights laid down in the Act. Although this section was not a straightforward

3 J Seppo, ‘Finland’s policy on church and religion’ in Christoffersen, Modéer and Andersen, *Law & Religion in the 21st Century*, p 90.

4 M Scheinin ‘Uskonnonvapaus’, in P Hallberg, H Karapuu and T Ojanen (eds), *Perusoikeudet* (Juva, 1999), p 374.

5 During the process to reform the Finnish Constitution at the end of the twentieth century, the working group ‘Constitution 2000’ (*Perustuslaki 2000–työryhmä*) proposed that any references to the status of churches and other religious communities should be omitted from the Constitution. The Evangelical Lutheran Church opposed the suggested omission, suggesting instead that other churches and religious communities should be mentioned in the Constitution Act alongside it. J Seppo, ‘Die Religionsfreiheit im Spiegel des Staat-Kirche-Verhältnisses in Finnland’, (2003) 1 *Studia Theologica 25*.

prohibition of discrimination, it granted formal equality to all Finnish citizens regarding freedom of religion and of conscience.

The Finnish legal approach could therefore be interpreted as expressing both the idea of equality and the idea of religious freedom of individuals and groups. Section 9 of the Constitutional Act granted formal equality and Section 11 freedom of religion and conscience to all citizens, while the Freedom of Religion Act (*uskonnonvapauslaki* (226/1922)) expressed the idea of religious freedom and equality for religious communities. However, the understanding of precisely what freedom and equality mean in practice have evolved and broadened over time.⁶

Generally speaking, revisions concerning religious protection have been the result of a change in consciousness influenced by socio-political transformations. Finnish law has historically protected religious minorities by way of acknowledging a religious group's sense of being detrimentally affected by the majority culture as an issue of religious freedom and additionally by providing for exceptions in general law, for example in law on education. Hence, minority groups have been granted freedoms: freedom 'to' religion, such as freedom to worship in one's own home, and freedom 'from' religion, such as the freedom not to take part in majority religious instruction in state schools. This has naturally been dependent on public recognition of such a group as a religious community. Such recognition has become more inclusive over time. Historically, it was first afforded to other Protestant communities, then to other Christian churches and to the Jews, and so forth. The position of being non-religious was also acknowledged in law as a legitimate position.⁷ Issues of registration are, however, still a concern today.

As stated, the particular nature of Finnish Church-state relationships helps to explain why certain issues of religious discrimination are likely to arise in the Finnish context. The Church Act of 1869

6 In line with this, the new Freedom of Religion Act (*uskonnonvapauslaki* (453/2003)) also emphasises freedom *from* religion (the freedom to neither confess religion nor be subjected to another faith) and the duty to not violate the freedom of religion or belief of others. However, it also puts more emphasis on the positive freedom *to* religion. This can possibly be read as signalling a change in terms of greater efforts to facilitate diversity.

7 P Slotte, 'A little church, a little state, and a little commonwealth at once: towards a Nordic model of religious instruction in public schools?', in Christoffersen, Modéer and Andersen, *Law & Religion in the 21st Century*, p 256.

afforded the Evangelical Lutheran Church of the Grand Duchy of Finland considerable freedom to regulate its own internal matters. This is often taken as one of the signs of modern-day Finland having no state church in a strict sense.⁸ However, given the historically close affinity between the Evangelical Lutheran Church and the Finnish state and the modes of co-existence and co-operation that this has given rise to and that still exist in some forms in different areas today, many of the issues that emerge with regards to religious discrimination concern situations where the ‘state church’ forms part of public policies and action.

In addition, issues arise that pertain to the fact that the continuing ties between the dominant Church and society and the Finnish state may be problematic from a minority perspective. Secularised Protestantism, present in law and public institutions in ‘a secularised or symbolic form’, can become confused with neutrality. From a minority perspective, however, we are dealing with ‘religion’ rather than merely ‘culture’.⁹ Moreover, the status of the Evangelical Lutheran Church has remained a recurring theme of debate. Does it enjoy unwarranted privileges, such as with regard to tax revenues, and does its preferential status negatively affect the status of other religious communities as well as the lives of the ‘religiously unconcerned’? Issues of presumed discrimination are therefore often framed in terms of majority–minority issues.

Thus it is not surprising that changes to the Church–state relationship were the object of both larger societal debate and political efforts throughout the twentieth century. A noteworthy report is that from 1977 by the Parliamentary Committee on Church and State (*Kirkko ja valtione -komitean mietintö* (KM 1977:21)). However, the report’s recommendations on how to increase the internal autonomy of the Evangelical Lutheran Church, for example, were never implemented. At various later stages such ideas were nevertheless appropriated at governmental level by the Ministry of Education, and within the Evangelical Lutheran Church.¹⁰ The Church Act was re-

⁸ However, given that a large majority of the Finnish population still belongs to the Evangelical Lutheran Church, it is fitting to call it a ‘church of the people’. Seppo, ‘Finland’s policy on church and religion’, p 91.

⁹ Slotte, ‘A little church’, p 253, citing M Scheinin, ‘Secular human rights perspectives: as a challenge to Nordic law and religion solutions’, in Christoffersen, Modéer and Andersen, *Law & Religion in the 21st Century*, p 548.

¹⁰ Seppo, ‘Finland’s policy on church and religion’, pp 97–98.

newed at this time and came into effect in 1994. It affirmed and in various ways strengthened the internal autonomy of the Evangelical Lutheran Church. Among other things, several administrative tasks formerly carried out by state authorities were now transferred to it. The old Church Act's stipulation that the state have final authority over the Church was dropped, and the highest authority came to rest with the administrative bodies of the Evangelical Lutheran Church itself.¹¹

Finally, it is worth noting that the central role of the question of the relationship between the state and the majority Church in the debate on freedom of religion and conscience has to a certain extent had problematic effects for the rights of individuals. As Malcolm Evans has convincingly shown in the context of ECHR, the emphasis of the role of the state as a 'neutral and impartial organizer of religious life' can have very problematic consequences for the rights of individuals, if priority in concrete situations is given to the interests of the state in this 'neutral and impartial' role at the expense of the interests of the individual.¹²

Effects of the international human rights treaties

Of the UN instruments relevant to religious discrimination, Finland ratified the International Covenant on Civil and Political Rights (ICCPR) in 1976 (SopS 7-8/1976), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1970 (SopS 37/1970) and the Convention on Discrimination in Education in 1971 (SopS 59/1971). Also relevant, of course, is the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, as proclaimed by General Assembly resolution 36/55 of 25 November 1981. The ratification of the UN instruments has not aroused major political debate in Finland. For instance, in the Government bill on the ratification of the ICCPR, no specific attention was paid to the implications that

11 Ibid, pp 92–93.

12 M Evans, 'Freedom of religion and the ECHR', in P Cane, C Evans and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge, 2008), pp 291–315.

freedom of religion as prescribed in Article 18 of the Convention might have for the traditional Finnish Church-state arrangement.¹³

Finland adopted the ECHR in May 1989 and the Convention became binding in May 1990. Adoption of the ECHR marked a significant shift in Finnish human rights law and was a major reason for the revision of the basic rights and liberties enshrined in the Finnish Constitution in 1995. There was a political debate about the ECHR, but it focused on national sovereignty and only marginally considered the possible implications that the actual rights enshrined in the Convention might have on Finnish legislation. This is clearly demonstrated by the fact that the preamble of the Government bill on the ratification of the Convention, despite the various conflicts between national law and the Convention's requirements, consisted of only 12 pages.¹⁴

The ruling of the European Commission of Human Rights in the case of *Konttinen v Finland* (24949/94) remains an important precedent in relation to religious discrimination in the workplace. In its judgment, the Commission confirmed that, while Article 9 did restrict the rights of the public authorities to dismiss an employee for refusal to discharge certain duties on the ground of conscience, it did not grant the plaintiff a right to absent himself without permission on religious grounds. The ultimate guarantee to freedom of religion of the plaintiff was the right of resignation from the employment.

Drafting and implementation of the EU anti-discrimination Directives

The Government was mostly supportive of Directives 2000/43/EC and 2000/78/EC and found them to be a valuable addition in combatting discrimination. However, some hesitation was evident in the Government's views on the proposed shared burden of proof.¹⁵ Concerns about the implications that the Directives might have on the

13 M Scheinin, *Ihmisoikeudet Suomen oikeudessa* (Helsinki, 1991), p 157.

14 Ibid, p 165.

15 Government brief to Parliament on the proposal for the council directive on the general framework for equal treatment in employment and occupation (U 4/2000vp, *valtioneuvoston kirjelmä eduskunnalle ehdotuksesta neuvoston direktiiviksi yhtäläistää kohtelua työssä ja ammatissa koskevista yleisistä puitteista (työsyrjintädirektiivi)*), available in Finnish at <<http://www.eduskunta.fi/valtiopaivaasiat/U+4/2000>>, accessed 11 May 2011.

ability of the Evangelical Lutheran Church to require membership of its employees were also voiced by the government.¹⁶ It supported the amendments that were made to Article 4(2) during the drafting process of Directive 2000/78/EC to improve the Article's clarity. However, it voiced concern regarding the Directive's potentially adverse effects on religious communities that do not accept female priests.¹⁷

The Evangelical Lutheran Church voiced its support in principle for Directive 2000/78/EC, stating that it was of utmost importance to fight all forms of discrimination.¹⁸ Of special concern to the Church, however, was Article 4(2) of the draft directive.¹⁹ The Church issued official statements to the *EU-työoikeusjaosto nro. 28* (EU Labour Law Unit no 28) of the Ministry of Labour (*Työministeriö*²⁰) and the parliamentary Committee on Work and Equality (*työ- ja tasa-arvoasiain valiokunta*²¹), co-operated extensively with governmental bodies and ministries, and made its views known in the months leading up to the adoption of the Directive.²² In addition, the Evangelical Lutheran Church and the Finnish Orthodox Church consulted with each other on the matter. The Evangelical Lutheran Church also actively participated in the work of the Conference of European Churches/Church and Society Commission (CEC/CSC) and co-operated with the Evangelical Lutheran Church of Germany (EKD) with regard to Directive 2000/78/EC.²³ In contrast, Directive

16 Ibid.

17 *EU-perusmuistio/ohje*, Työministeriö, 12.10.2000, on file with the authors.

18 *Kirkkohallituksen hallinto-osaston lausunto ehdotuksesta työsyrjintädirektiiviksi*, Työministeriön EU-työoikeusjaostolle nro 28, 14.2.2000, 1.

19 The Evangelical Lutheran Church found the original formulation of draft Article 4(2) to be too narrow in scope. The Church held the view that it should be possible to demand Church membership as a precondition for positions within the Church other than those only involving spiritual work, without this being viewed as discriminatory. Ibid, pp 1–4.

20 On 1 January 2008 the former Ministry of Labour became part of the new Ministry of Employment and the Economy (*Työ- ja elinkeinoministeriö*).

21 On 1 March 2003 the name of the committee was changed to the Employment and Equality Committee (*Työelämä- ja tasa-arvovaliokunta*).

22 *PM työsyrjintädirektiivi* 28.6.2000, on file with the authors; e-mail correspondence with Pauliina Hirsimäki, Labour market representative (*Työmarkkina-asiamies*), Labour Market Institution of the Church/Labour Market Unit of the Church Council (*Kirkon työmarkkinatalous/Kirkkohallituksen työmarkkinaosasto*) of the Evangelical Lutheran Church of Finland, on file with the authors.

23 E-mail correspondence with Lena Kumlin, Legal Adviser on EU Affairs, at the Church Council of the Evangelical Lutheran Church of Finland, on file with the authors; *Kirkkohallituksen hallinto-osaston lausunto ehdotuksesta työsyrjintädirektiiviksi*, Työministeriön EU-työoikeusjaostolle nro 28, 14.2.2000, p 2.

2000/43/EC did not give rise to any debate or explicit activity within the Evangelical Lutheran Church of Finland.²⁴

The interpretation and implications of Article 4(2) caused some debate in Parliament prior to the implementation of the directives. MPs from the Green League (*Vihreä liitto*) and Left Alliance (*Vasemmistoliitto*) parties criticised the interpretation of the scope of Article 4(2) adopted in the Government bill, fearing that it might enable religious communities to set religious or conscientious requirements that would go beyond mere membership in employment situations.²⁵ This eventually also led to these parties voting against the Non-discrimination Act (*yhdenvertaisuuslaki* (21/2004)), which implemented the Directives into Finnish law.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

Discrimination authorities

Finland has two watchdog authorities that deal with discrimination: the Ombudsman for Minorities (*vähemmistövaltuutettu*) and the National Discrimination Tribunal (*syrjintälautakunta*).²⁶ Although their explicit area of focus is discrimination based on ethnicity, in practice their work can also be considered to encompass religious discrimination, especially concerning religious minorities.

The basic task of the Ombudsman for Minorities is to advance the status and legal protection of minorities and foreigners, as well as to promote equality, non-discrimination and good ethnic relations in

²⁴ E-mail correspondence with Lena Kumlin, on file with the authors.

²⁵ Objection of MP Heidi Hautala to the Memorandum of the Parliamentary Committee on Work and Equality on the Government Bill for an Act to Ensure Equality and to Ito it (*Vastalause työ- ja tasa-arvolautakunnan mietintöön hallituksen esityksestä 44/2003 vp laaksi yhdenvertaisuuden turvaamisesta ja eräiden siihen liittyvien lakien muuttamisesta*), available in Finnish at <<http://www.eduskunta.fi/valtiopaivaasiakirjat/tyvm+7/2003>>, accessed 11 May 2011.

²⁶ Finnish legality control as practised by the Chancellor of Justice (*valtioneuvoston oikeuskansleri*) and the Parliamentary Ombudsman (*eduskunnan oikeusasiames*) also plays a key role in the prohibition of religious discrimination. Although the two entities cannot be seen as discrimination authorities in a narrow sense, their efforts to ensure that public authorities and officials observe the law and fulfil their duties are important with respect to the prohibition of religious discrimination in the exercise of public powers.

Finland. The Council of State appoints the head of the authority, the Ombudsman. The office of the Ombudsman for Minorities works as an independent organ under the Ministry of the Interior and consists of several officials appointed by the Ombudsman. The Ombudsman has no actual judicial powers, and therefore does more work in areas such as counselling and monitoring.

The National Discrimination Tribunal of Finland is an independent organ promoting legal protection in the areas covered by the Non-discrimination Act. The tribunal may examine cases of discrimination based on ethnic origin, except those involving supervision of the prohibition of discrimination in employment and public service. The tribunal is appointed by the Council of State and, as with the Ombudsman for Minorities, works as an independent organ under the Ministry of the Interior. A decision by the National Discrimination Tribunal of Finland has the same legal effect as a judgment by a general court of law. Religions have no specific role in the work of either the National Discrimination Tribunal or the Ombudsman for Minorities.

Anti-discrimination legislation

Current anti-discrimination legislation in Finland can be characterised by a certain dualism, as well as inconsistency and fragmentation caused by the many amendments to this legislation over an extended period of time. The older parts of the legislation, in particular the Constitution and Criminal Code (*rikoslaki* (39/1889)), prohibit discrimination in rather general terms and explicitly cover a large number of grounds of discrimination, in addition to which the respective lists of grounds are open-ended. The more recent parts of the legislation, in particular the Non-discrimination Act and the Equality Between Women and Men Act (*laki naisten ja miesten tasa-arvosta* (609/1986)), contain more detailed provisions with regard to the definition of discrimination, for instance.

Freedom of religion and conscience and the prohibition of religious discrimination are enshrined in Sections 6 and 11 of the Finnish Constitution. According to Section 6, everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from others on the basis of sex, age, ethnic origin, language, religion, conviction, opinion, health, disability or any other reason

that concerns one's person. The list of grounds is not exhaustive, and covers others of broadly similar nature also.²⁷ Section 11 complements the requirements of Section 6 from the point of view of discrimination on the grounds of religion or conscience, as it protects the equal right of everyone to freedom of religion and conscience.

The Non-discrimination Act puts the requirements set in the Constitution into more specific terms. Under Section 6 of the Act nobody may be discriminated against on the basis of age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability, sexual orientation or other personal characteristics.²⁸ The prohibition provided in the Non-discrimination Act is civil in nature, and prescribes that a party that commits an infringement of the prohibition is to pay the injured party compensation for the suffering caused by an act of discrimination or victimisation.²⁹ As prescribed by EU Directives 2000/43/EC and 2000/78/EC, Section 17 of the Non-discrimination Act contains a provision on the shared burden of proof between parties involved.

In addition to the civil prohibitions of discrimination, the Criminal Code of Finland includes criminal prohibitions of discrimination. The Criminal Code features two main criminalisations in this sense, namely a general prohibition of discrimination (*syrjintää*) in Section 11 of Chapter 11 and a prohibition of discrimination at work (*työsyrjintää*) in Section 3 of Chapter 47. Both explicitly include religion as one of the prohibited grounds for discrimination. The punitive scale for both offences extends from a fine to imprisonment for up to six months.

Although religion and belief are specifically mentioned as prohibited grounds for differential treatment, Finnish law does not contain specific definitions of either religion or belief.³⁰ However, the

²⁷ All three main anti-discrimination provisions (the Constitution, the Non-discrimination Act and the Criminal Code) feature an open-ended list of prohibited grounds of discrimination.

²⁸ The prohibition of discrimination based on gender is covered by the provisions of the Equality Between Women and Men Act (609/1986).

²⁹ This compensation shall not exceed 15,000€, depending on the severity of the infringement. The payment of compensation under the Non-discrimination Act does not preclude an injured party from claiming damages under the Tort Liability Act (*vahingonkorvauslaki* (412/1974)) or other legislation.

³⁰ ‘Belief’ is not defined through legislation, preparatory works or case law. In the light of legal writings, it is clear that belief as used, for example, in the Constitution (*omatunto*) covers not only religious beliefs but other convictions as well.

Freedom of Religion Act defines a ‘religious community’ (*uskon-nollinen yhteisö*) for the purposes of that Act.³¹ The concept of religious community can in some cases be of relevance when assessing whether something could be considered as religion under Finnish law. As it is not a requirement of Finnish law, not all communities that could be considered religious have registered. Some Pentecostal congregations, for example, have registered themselves as associations instead. Nor has registration been granted to all communities that have applied for it (Scientology and Wicca, for example, have both been denied).³²

Operative fields of the legislation

The general prohibition against religious discrimination as enshrined in the Constitution is applicable to all use of public powers. Furthermore the constitutional prohibition may have a bearing on relationships between private parties in some situations.

The scope of application of the Non-discrimination Act corresponds to the scope of application prescribed in Directives 2000/43/EC and 2000/78/EC. According to Section 2 of the Act, it applies to all natural and legal persons carrying out both public and private activities, with respect to

- i. ‘conditions for access to self-employment or means of livelihood, and support for business activities’;
- ii. ‘recruitment conditions, employment and working conditions, personnel training and promotion’;
- iii. ‘access to training, including advanced training and retraining, and vocational guidance’; and

31 According to Section 2 of the Freedom of Religion Act, the term ‘religious community’ refers to the Evangelical Lutheran Church, the Orthodox Church and communities registered under the Act. Section 7 of the Act lays down the criteria for religious communities eligible to be registered as follows: the purpose of a religious community shall be to support and arrange individual, communal and public activities related to the practice or other expression of religion, and these activities must be based on holy scriptures or other established sources regarded as holy; a religious community must respect human rights and fundamental freedoms in all its activities; the purpose of a religious community shall not be to accrue financial gains, and its activities shall not be primarily of an economic nature; if a community does not meet all of the above-mentioned criteria it cannot be registered as a religious community.

32 These cases were decided under the old Freedom of Religion Act (*uskonnonva-pauslaki* (226/1922)), which nevertheless set requirements similar to the current Act.

- iv. ‘membership and involvement in an organisation of workers or employers or other organisations whose members carry out a particular profession, including the benefits provided by such organisations’.

The scope of application of the general prohibition against discrimination in Section 11 of Chapter 11 of the Criminal Code differs somewhat from the scope of the Non-discrimination Act. The Criminal Code prohibition is operative in:

- i. Professions;
- ii. Service to the general public;
- iii. Exercise of official authority or other public function; and
- iv. The arrangement of a public amusement or meeting.

The prohibition is not applicable to contractual relations between private persons. Neither does it cover the arrangement of amusements or meetings that are made public only to a limited group of people, such as members of an association.³³ The prohibition of work discrimination is applicable to ‘employers or representatives thereof when advertising for a vacancy or selecting an employee or during employment’. The provision covers all aspects of working life from the advertising of a vacancy to the termination of an employment contract.³⁴

Scope of the prohibition, justifications and remedies

The prohibition of discrimination in Section 6(2) of the Constitution is fairly general in scope: it prohibits both direct and indirect discrimination and its field of application is not limited in any way. The provision does not use the concept of discrimination as such but

³³ The *travaux préparatoires* mentions meetings organised by religious communities as one of the examples of such meetings. Government Bill for an Act to Ensure Equality and to Amend Certain Acts Relating to It (*HE 44/2003 vp laiksi yhdenvertaisuuden turvaamisesta ja eräiden siihen liittyvien lakien muuttamisesta*), available in Finnish at <<http://www.eduskunta.fi/valtiopainavaasiat/HE+44/2003>>, accessed 10 May 2011.

³⁴ Finnish labour law also includes provisions on the prohibition of discrimination. According to Section 2 of Chapter 2 of the Employment Contracts Act (*työsuopimuslaki* (55/2001)) an employer shall not unjustifiably discriminate against employees on the basis of age, health, disability, national or ethnic origin, nationality, sexual orientation, language, religion, opinion, belief, family ties, trade union activity, political activity or other comparable circumstance. The employer must also observe this prohibition when recruiting employees. To define discrimination, prohibition of sanctions and burden of proof, the Act refers to the Non-discrimination Act.

speaks instead of differential treatment without an acceptable reason. A reason is acceptable if it serves an objectively justifiable end that is in accordance with the objectives of the fundamental rights system, and if the means used are proportionate to the ends. If an acceptable reason for differential treatment exists, the differential treatment of persons can be justified.

The Non-discrimination Act provides more precise definitions of the prohibited forms of discrimination. Section 6 prohibits four different forms of discrimination:

- i. Direct discrimination (treating a person less favourably than another is treated, has been treated or would be treated in a comparable situation);
- ii. Indirect discrimination (an apparently neutral provision, criterion or practice that puts a person at a particular disadvantage compared with other persons);
- iii. Harassment (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); and
- iv. Incitement to discriminate (an instruction or order to discriminate).

In addition, section 8 of the Act prohibits victimisation (someone being placed in an unfavourable position or treated in such a way that they suffer adverse consequences because of having complained or taken action to maintain equality).

Section 7 of the Non-discrimination Act prescribes two justifications for discrimination relevant from the point of view of religious discrimination.³⁵ First, discriminatory practice can be justified if it is based on an equality plan (*yhdenvertaisuussuunnitelma*), and this practice is intended to implement the intention of the Act in practice. Second, the Act permits justified differential treatment, in due proportion, that is founded on a genuine and determining requirement relating to a specific type of occupational activity and the performance of that activity. Also justifiable under Section 7 of the Act are specific measures aimed at achieving genuine equality in order to

³⁵ The Non-discrimination Act also prescribes a third justification, concerning age-based discrimination, which is not discussed in this context.

prevent or reduce negative consequences of discrimination (positive discrimination).

The forms of prohibited discrimination as prescribed in the Criminal Code differ somewhat from the forms prescribed in the Non-discrimination Act. They are:

- i. refusing someone service in accordance with the generally applicable conditions;
- ii. refusing someone entry to an amusement or meeting or ejecting him or her; and
- iii. placing someone in an unequal or an essentially inferior position. The prohibition of work discrimination prohibits putting an applicant for a job or an employee in an inferior position.

These prohibitions do not entail specific justifications for discrimination. The general prohibition provides that the discriminatory action must have taken place without a justified reason (*hyväksyttävä syy*). Therefore practices that entail justified reasons are not punishable under the prohibition. According to the *travaux préparatoires* such reasons that cannot be exhaustively listed could be based on Finnish law or the established concept of justice held by citizens.³⁶ The prohibition of work discrimination provides an even higher standard, prescribing that differential treatment is justifiable only if an important and justifiable reason is given. This provision implies a strengthened need for protection in this area. In most cases, such an important and justifiable reason must be somehow related to the occupation in question.³⁷

The available remedies depend on the nature of the case. Civil and criminal cases (such as those concerning discrimination under the Criminal Code and the Non-discrimination Act) are tried before the District Courts (*käräjäoikeus*), with the exception of cases concerning ethnic discrimination under the Non-discrimination Act, which can also be tried before the National Discrimination Tribunal. The decisions of the District Courts can be appealed in the general Courts of Appeal (*hovioikeus*) and further in the Supreme Court

36 Government Bill for the Amendment of the Criminal Code and Certain Acts Relating to it Covering the Second Phase of the Overall Reform of the Criminal Legislation (*HE 94/1993 laaksi rikoslainsäädännön kokonaisuudistuksen toisen käsittävaksi rikoslain ja eräiden muiden lakiens muutoksiksi*), available in Finnish at <<http://www.eduskunta.fi/valtiopaivaasiat/HE+94/1993>>, accessed 10 May 2011.

37 In the *travaux préparatoires* the requirement of membership for recruitment by religious communities is mentioned as an example of such a justifiable reason. *Ibid.*

(*korkein oikeus*). Administrative actions of public officials can be contested in the Administrative Courts (*hallinto-oikeus*). Decisions made by the National Discrimination Tribunal of Finland, as well as some actions of the Evangelical Lutheran Church, can also be appealed/contested in the Administrative Courts. The Supreme Administrative Court (*korkein hallinto-oikeus*) forms the final appellate level in these cases.

Case law concerning religious discrimination

Case law under the new equality legislation has recently begun to emerge. However, there are as yet only a few judgments available from the Supreme Courts with regard to discrimination based on religion or belief. This means that it is hard to draw general conclusions concerning case law here.

In a published Supreme Court decision of 22 October 2010 (KKO:2010:74) the court found both a priest who was visiting a Lutheran congregation and the head of a local branch of the Lutheran Evangelical Association of Finland (which operates within the Evangelical Lutheran Church of Finland) guilty of discrimination under the Criminal Code, because they had refused to conduct a service together with a woman priest of that congregation. The court ruled that the actions of the accused could not be considered justified from the point of view of freedom of religion and conscience, as they had agreed to conduct the service in a congregation of the Evangelical Lutheran Church, which as a church had accepted female priesthood as an official part of its creed. Therefore the accused could not merely discriminate against someone at a service conducted in the church in question by appealing to their own conscience.

The Vaasa Administrative Court in its decision of 27 August 2004 (Ref. No. 04/0253/3) annulled the decision of the Cathedral Chapter of the Evangelical Lutheran Church that an applicant was not eligible to be appointed as a chaplain (assistant vicar) because she was publicly living in a same-sex relationship and had announced that she would officially register the said relationship. The decision was found to be against the law because of its discriminatory nature. The decision of the Cathedral Chapter might have been justified had there been an applicable legal basis for it in the form of an exception to the applicability of non-discrimination norms. How-

ever, no such exception was provided by the Order of the Church (which lays down rules for appointing vicars and chaplains) or by the Church Act.

Although decisions made by the National Discrimination Tribunal of Finland have the same binding effect as decisions made by the general courts, the decisions of this authority have not been of significant importance.

III. THE RIGHT TO DISTINGUISH OR DISCRIMINATE: EXCEPTIONS TO THE GENERAL PROHIBITION

Justified differential treatment

Probably the most important exception to the general prohibition against discrimination from the point of view of religions in Finnish law is to be found in the Section 7 paragraph 2 of the Non-discrimination Act. This provision prescribes that justified differential treatment, in due proportion, that is founded on a genuine and determining requirement and a justifiable objective relating to a specific type of occupational activity and the performance of that activity is not to be considered discrimination. In accordance with Article 4(2) of Directive 2000/78/EC, it grants religious communities the right to require that an employee or office-holder who is engaged in practising or teaching a religion, or whose duties include representing a religious community in society as a whole, hold the particular religious beliefs of that community.³⁸

The legal status and the duties of the Evangelical Lutheran Church mean that some of its employees hold offices as functionaries comparable to state officials. This requires that the conditions for an appointment to such an office be prescribed in law. However, because of the obvious religious nature of the Evangelical Lutheran Church, membership requirements can be set for its employees that under different circumstances could be considered discriminatory. Section 1 of Chapter 6 of the Church Act prescribes that a person employed by the Evangelical Lutheran Church whose regular duties

38 Government Bill for an Act to Ensure Equality.

include teaching, pastoral work or involvement in worship and church services must be a member of the church.³⁹

The scope of application of the Equality Between Women and Men Act also forms an exception to the prohibition of discrimination as prescribed in the Act. Section 2 prescribes that the Act is not applicable to the religious activities of the Evangelical Lutheran and Orthodox churches or to other registered religious communities. This provision, however, only concerns the scope of application of the said Act, and does not as such make discrimination between the sexes justifiable within religious communities. Such practices may still be punishable under the criminal prohibitions of discrimination prescribed in the Criminal Code.

Conditions for justifiable exceptions

As stated in the *travaux préparatoires* for the Non-discrimination Act, the exception to the prohibition of discrimination prescribed in Section 7 paragraph 2 applies to religious communities.⁴⁰ The concept of religious community in Finnish law usually refers to the use of this concept in the Freedom of Religion Act. However, as the procedure of registration prescribed in that Act is not compulsory for religious communities, it remains unclear whether Section 7(2) of the Non-discrimination Act could be interpreted as applying to religious communities not registered under the Freedom of Religion Act.

The exception prescribed in Section 7(2) pertains to employment situations where, if the occupational activity genuinely and decisively so requires, differential treatment can be justified. According to the *travaux préparatoires*, attention must be paid to freedom of religion and conscience, and to the autonomy of religious communities that this implies, when assessing these requirements.⁴¹ Therefore, and as established in case law, the importance of the occupation for fulfilment of freedom of religion and conscience is an important factor when evaluating whether these requirements can be interpreted as being fulfilled. By contrast, occupations that are not central

39 Section 108 of Chapter 11 of the Orthodox Church Act contains a similar provision.

40 Government Bill for an Act to Ensure Equality.

41 Ibid.

to the religious functions of the community are not as likely to fulfil these requirements.

Case law concerning exceptions

In a published Supreme Court decision of 19 January 2001 (KKO:2001:9) the Supreme Court evaluated the applicability of Section 2 of the Equality Between Women and Men Act in a situation concerning the employment of a chaplain of the Evangelical Lutheran Church. The question here was whether the office of chaplain (assistant vicar) could be considered to belong to the kinds of religious activity that fall within the meaning of Section 2. The court found that the work carried out in the office of chaplain could not be considered a religious activity of the Church in the narrow sense of this concept. The court also justified its stance by the fact that, after the Equality Between Women and Men Act had been passed, the Church had opened the priesthood to women. Therefore the court found that the application of the Act in this context could not constitute a violation of freedom of religion.

In a published Supreme Administrative Court decision of 8 February 2008 (KHO:2008:8) the court ruled that, under the Order of the Church, a candidate for the office of vicar was not eligible for this position because he had publicly stated that he would not conduct a service with a woman priest. As the conducting of services was part of the duties of a vicar, the applicant could be ruled out as not capable of performing these duties under the Order of the Church.

To conclude, in 2007 the Ministry of Justice assigned a committee the task of renewing Finnish non-discrimination legislation to make it comply better with the equality and non-discrimination requirements laid down in the Constitution. In December 2009 the committee delivered its report (*mietintö*) for a new Non-discrimination Act, as well as proposals for accompanying revisions of the legislation. The report proposed that the Act's scope of application be expanded to make it applicable to all public and private activities, and that all discriminatory grounds be made subject to the same legal remedies. Further, more specific provisions on exceptions to the scope of application were proposed for inclusion in the Act. Several statements expressing dissenting views accompanied the report. In 2010 various bodies, the Evangelical Lutheran Church

among them, commented on the proposal.⁴² However, this process has now come to a standstill and it is difficult to predict when and how it will proceed under the new Government.

42 *Lausunto Yhdenvertaisuuuslain säädännön uudistamista koskevan toimikunnan mietintöstä* (Oikeusministeriön komiteamietintö 2009:4), Asianumero 2008-00301, 15 April 2010.

FRANCE

FRANÇOISE CURTIT

ÉGALITÉ VS NON-DISCRIMINATION

Primaute du principe d'égalité en droit français

C'est dans la loi n° 72-546 du 1^{er} juillet 1972 relative à la lutte contre le racisme, adoptée en application de la Convention de l'ONU sur l'élimination de toutes les formes de discrimination raciale,¹ que le terme ‘discrimination’ apparaît pour la première fois en droit français,² et donc antérieurement à la ratification par la France de la Convention européenne des droits de l’homme (1974). Dans cette loi, la religion fait partie, parmi d’autres, des motifs de ‘discrimination raciale’.

Auparavant, la Déclaration des droits de l’homme et du citoyen du 26 août 1789,³ puis les constitutions du 27 octobre 1946⁴ et du 4 octobre 1958⁵ avaient énoncé un principe d’égalité devant la loi – sans distinction de traitement entre les personnes sur la base notamment de la religion ou des croyances – qui est devenu un pilier du régime juridique français. La loi, expression de la volonté générale, doit être la même pour tous, ce qui induit une égalité de traitement

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- 1 Adoptée par l’Assemblée générale des Nations unies le 21 décembre 1965 et entrée en vigueur en France le 28 juillet 1971.
 - 2 Art 1: répression de la provocation ‘à la discrimination, à la haine ou à la violence à l’égard d’une personne ou d’un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée’.
 - 3 Art 1: ‘Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l’utilité commune.’
Art 6: ‘... Tous les citoyens étant égaux à ses yeux, sont également admissibles à toutes dignités, places et emplois publics, selon leur capacité, et sans autre distinction que celle de leurs vertus et de leurs talents.’
Art 10: ‘Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l’ordre public établi par la Loi.’
 - 4 Préambule: ‘... le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénables et sacrés ... Nul ne peut être lésé, dans son travail ou son emploi, en raison de ses origines, de ses opinions ou de ses croyances.’
 - 5 Art 1: ‘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.’

des personnes se trouvant dans des positions identiques. Plutôt que d'analyser des situations sous le prisme d'un désavantage qui s'imposerait à un individu ou à un groupe donné, les juridictions privilégièrent une approche vérifiant qu'il y a bien application d'une règle commune. Elles considèrent d'ailleurs qu'il n'y a pas forcément méconnaissance du principe d'égalité si, dans certaines matières, des personnes qui se trouvent dans des situations différentes sont traitées de manière identique. En vertu de ce principe, 'la France rejette le concept de minorités et se montre très réticente à reconnaître des catégories particulières bénéficiant de droits spécifiques'.⁶ C'est ainsi, par ailleurs, que des traitements statistiques ne sauraient prendre en compte l'origine ethnique ou la race sans méconnaître le principe d'égalité énoncé par l'article 1^{er} de la Constitution.⁷

Influence du droit communautaire dans la prise en compte de la notion de discrimination

La législation française en matière de discrimination se développe à la fin des années 1990, très largement par transposition du droit communautaire en droit interne. La prise en compte progressive de la notion de discrimination par les juridictions s'inspire elle aussi de la législation communautaire (CE ass, 30 octobre 2009, n° 298348) et, dans une moindre mesure, de l'article 14 de la CEDH (CE ass, 30 novembre 2001, n° 212179). La France n'a pas signé le Protocole n° 12 à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales qui réaffirme un principe d'interdiction générale de la discrimination, arguant ne pas vouloir aggraver l'encombrement de la Cour européenne des droits de l'homme.⁸

La transposition des directives communautaires en droit français n'a pas suscité de débat public. Les lois votées sont des textes pragmatiques, la dernière d'entre elles (loi n° 2008-496 du 27 mai 2008) ayant été adoptée en urgence, suite à deux mises en demeure et à un avis motivé adressés à la France par la Commission européenne pour ne pas avoir transposé correctement trois directives. Lors des débats parlementaires, quelques réticences se sont cependant exprimées,

6 J-M Woehrling, 'Le droit français de la lutte contre les discriminations à la lumière du droit comparé', (2008) 148 *Informations sociales* 63.

7 Conseil constitutionnel, Décision n° 2007-557 DC du 15 novembre 2007, pt 29.

8 Réponse ministérielle n° 15396: *JO Sénat*, 16 décembre 2010, p 3250.

d'une part à propos de la notion de discrimination indirecte, telle que définie par les directives communautaires, qui permettrait une marge d'appréciation porteuse d'insécurité juridique (et on retrouve ici l'empreinte du principe d'égalité) et, d'autre part, vis-à-vis d'une conception 'communautariste' de la société qui serait véhiculée par ces directives, lesquelles différencieraient des catégories de personnes bénéficiant de droits distincts.⁹ Le statut de l'agence pour l'égalité (HALDE) a donné lieu également à quelques discussions, notamment à propos des limites de ses pouvoirs par rapport au système juridictionnel classique.

UNE HAUTE AUTORITÉ DE LUTTE CONTRE LES DISCRIMINATIONS ET POUR L'ÉGALITÉ QUI AVAIT FAIT SES PREUVES

Désignation et attributions

Les attributions de la Haute autorité de lutte contre les discriminations et pour l'égalité (HALDE),¹⁰ en fonction depuis 2005, ont été transférées en mai 2011 au Défenseur des droits, nouvelle autorité constitutionnelle indépendante qui regroupe des missions assumées jusque-là par quatre entités différentes (HALDE, Médiateur de la République, Défenseur des enfants et Commission nationale de déontologie de la sécurité).¹¹

Le Défenseur des droits est nommé par décret en Conseil des ministres pour un mandat de six ans non renouvelable et, sur sa proposition, le Premier ministre nomme ses adjoints, dont 'un adjoint, vice-président du collège chargé de la lutte contre les discriminations et de la promotion de l'égalité, choisi pour ses connaissances ou son expérience dans ce domaine' (loi n° 2011-333, art 11). Lorsqu'il intervient en matière de lutte contre les discriminations et de promotion de l'égalité, le Défenseur des droits consulte un collège qu'il préside et qui comprend, outre son adjoint, huit personnalités quali-

9 Voir Sénat, Rapport n° 253 (2007–2008) de Mme Muguette Dini, fait au nom de la commission des affaires sociales, déposé le 2 avril 2008, pp 9 et 40.

10 Loi n° 2004-1486 du 30 décembre 2004 portant création de la haute autorité de lutte contre les discriminations et pour l'égalité: *JO*, 31 décembre 2004, p 22567.

11 Loi organique n° 2011-333 du 29 mars 2011 relative au Défenseur des droits: *JO*, 30 mars 2011, p 5497.

fiées désignées par les présidents du Sénat et de l'Assemblée nationale, le vice-président du Conseil d'État et le premier président de la Cour de cassation en raison de leurs connaissances ou de leur expérience dans le domaine de la lutte contre les discriminations et de la promotion de l'égalité (loi n° 2011-333, art 15).

Le Défenseur des droits est chargé notamment ‘de lutter contre les discriminations, directes ou indirectes, prohibées par la loi ou par un engagement international régulièrement ratifié ou approuvé par la France ainsi que de promouvoir l'égalité’ (loi n° 2011-333, art 4) et peut être saisi par toute personne physique ou morale s'estimant victime d'une discrimination, ou par toute association déclarée depuis au moins cinq ans luttant contre la discrimination (loi n° 2011-333, art 5). Le Défenseur des droits peut également émettre des avis et recommandations, procéder à des recueils d'informations et vérifications sur place, assurer la résolution amiable des différends, aider à la constitution d'un dossier, proposer un protocole transactionnel, ou encore saisir l'autorité investie du pouvoir d'engager les poursuites disciplinaires (loi n° 2011-333, art 20 et seq).

Impact

Pendant ses six années d'exercice, la HALDE a rendu plusieurs délibérations relatives au port des signes religieux, à l'expression de la liberté religieuse au travail, au refus opposé aux détenus demandant à recevoir l'assistance spirituelle d'un ministre du culte, etc. Les saisines fondées sur le critère des convictions religieuses ont représenté, selon les années, entre 1% et 3% de l'ensemble des réclamations enregistrées, mais ce critère apparaît en 2010 dans 7% des 12 467 délibérations de la haute autorité.¹² Ses délibérations ou recommandations ne lient pas les pouvoirs publics ou les tribunaux, mais la médiatisation de certaines d'entre elles et la bonne notoriété de la HALDE ont cependant permis à cette dernière de nourrir le débat public sur la question des discriminations. On peut se demander si l'action en matière de lutte contre la discrimination aura dorénavant autant d'impact, auprès de l'opinion publique notamment, sous la

12 Source: Rapport annuel de la HALDE 2010, <<http://www.halde.fr>>, consulté le 6 octobre 2011.

houlette d'un Défenseur des droits chargé également d'autres domaines d'action.

UN TRAITEMENT ESSENTIELLEMENT PÉNAL DE LA DISCRIMINATION

Une approche par la répression et par le droit du travail

Les dispositions essentielles en matière de lutte contre la discrimination ont été introduites par transposition du droit communautaire par une loi du 16 novembre 2001, complétée par les lois du 17 janvier 2002 et 27 mai 2008.¹³

Le droit français a une approche essentiellement répressive de la discrimination, la sanction pénale n'excluant pas une procédure civile. Constitue une discrimination ‘toute distinction opérée entre les personnes [physiques ou morales] à raison ... de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée’ (C pén, art 225-1 et seq). Tout acte commis pour un motif discriminatoire n'est néanmoins pas pénalement punissable. La discrimination doit en effet concerner l'un des *agissements* (et non pas de simples *tentatives*) énumérés par l'article 225-2 du Code pénal. La liste qu'il prévoit est limitative: refus ou offre conditionnelle d'un bien ou d'un service; entrave à l'exercice d'une activité économique; refus d'embauche, sanction ou licenciement; offre conditionnelle d'emploi, stage ou formation. L'infraction requiert par ailleurs une *volonté* discriminatoire, distinguée des mobiles ou convictions personnelles.

Dans le Code du travail, le principe de non-discrimination religieuse est inscrit parmi les dispositions préliminaires et tout acte discriminatoire en lien avec la relation de travail est sanctionné (C trav, art L1131-1 et seq). En droit administratif, ce principe figure à l'article 6 de la loi n° 83-634 du 13 juillet 1983 portant droits et

13 Loi n° 2001-1066 du 16 novembre 2001 relative à la lutte contre les discriminations: *JO*, 17 novembre 2001, p 18311; loi n° 2002-73 du 17 janvier 2002 de modernisation sociale: *JO*, 18 janvier 2002, p 1008; loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations: *JO*, 28 mai 2008, p 8801.

obligations des fonctionnaires.¹⁴ L'article 432-7 du Code pénal évoque par ailleurs la sanction d'une discrimination commise

par une personne dépositaire de l'autorité publique ou chargée d'une mission de service public, dans l'exercice ou à l'occasion de l'exercice de ses fonctions ou de sa mission ... lorsqu'elle consiste:
1° À refuser le bénéfice d'un droit accordé par la loi; 2° À entraver l'exercice normal d'une activité économique quelconque.

Signalons enfin qu'"aucune personne ne peut faire l'objet de discriminations dans l'accès à la prévention ou aux soins" (C santé publ, art L1110-3).

En droit pénal, la charge de la preuve incombe à l'accusation qui devra démontrer l'existence du caractère discriminatoire. Le recours aux tests de discrimination (*testing*) en tant qu'élément de preuve est accepté (Cass crim, 11 juin 2002, n° 01-85.559; C pén, art 225-3-1). En droit du travail, la charge de la preuve est déplacée sur le prévenu, le requérant devant seulement présenter des faits qui laissent supposer l'existence d'une discrimination (C trav, art. L1134-1).

Discrimination et autres incriminations

Est interdite la discrimination directe et indirecte (C trav, art L1132-1; loi n° 2008-496, art 2) et est assimilé à une discrimination "tout agissement à connotation sexuelle, [subi] par une personne et ayant pour objet ou pour effet de porter atteinte à sa dignité ou de créer un environnement hostile, dégradant, humiliant ou offensant" (loi n° 2008-496, art 1). Le droit pénal réprime par ailleurs la provocation à la haine ou à la violence, les diffamations et injures publiques ainsi que les diffamations et injures non publiques et la provocation à la discrimination (Loi sur la liberté de la presse, 29 juillet 1881; C pén, art R624-3 et seq et R625-7 et seq).

La "victimisation" est reconnue en droit français par l'article 3 de la loi n° 2008-496 qui précise qu'"aucune personne ayant témoigné de bonne foi d'un agissement discriminatoire ou l'ayant relaté ne peut être traitée défavorablement de ce fait. Aucune décision défavo-

14 JO, 14 juillet 1983, p 2174. Art 6: "... Aucune distinction, directe ou indirecte, ne peut être faite entre les fonctionnaires en raison de leurs opinions politiques, syndicales, philosophiques ou religieuses, ... de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie ou une race ...".

rable à une personne ne peut être fondée sur sa soumission ou son refus de se soumettre à une discrimination prohibée par l'article 2'.

L’interdiction de la ‘discrimination par association’ n’est pas inscrite dans la législation, mais elle a fait l’objet d’une recommandation de la HALDE (délib n° 2007-75 du 26 mars 2007) et a été consacrée pour la première fois dans une décision judiciaire le 28 novembre 2008 par le Conseil de prud’hommes de Caen (en l’espèce, discrimination fondée sur la situation de famille, s’agissant du licenciement de la concubine d’un délégué syndical).

Recours et sanctions

Tout particulier ou toute personne morale, sans restriction aucune, peut être l’auteur d’une discrimination. La constitution de partie civile est ouverte à toute victime, personne physique ou personne morale à raison de ses membres, ainsi qu’à toute association déclarée depuis au moins cinq ans ayant pour objet de combattre les discriminations. L’article 225-2 du Code pénal sanctionne la discrimination de la part d’une personne physique d’une peine de trois ans d’emprisonnement et 45 000 euros d’amende et de 225 000 euros d’amende pour une personne morale, ou 375 000 euros en cas de circonstance aggravante (C pén, art 225-4). Lorsque la discrimination consistant à refuser la fourniture d’un bien ou d’un service a été commise dans un lieu accueillant du public ou aux fins d’en interdire l’accès, les peines sont portées à cinq ans d’emprisonnement et à 75 000 d’amende. À cela s’ajoutent des peines complémentaires (interdiction d’exercer directement ou indirectement une ou plusieurs activités professionnelles ou sociales, placement sous surveillance judiciaire, fermeture d’établissements, exclusion des marchés publics, affichage ou diffusion de la décision prononcée, stage de citoyenneté, etc. C pén, art 225-4 et 225-19).

En droit du travail, les agissements discriminatoires peuvent donner lieu également à des sanctions civiles. Le législateur a par ailleurs prévu la nullité de la mesure discriminatoire, quelle qu’elle soit (C trav art L1132-4). Celle-ci a pour effet d’attribuer au salarié l’avantage ou la situation qui aurait dû lui revenir, par exemple de réintégrer dans son emploi la victime licenciée.

UNE JURISPRUDENCE QUI RECOURT PEU À LA NOTION DE DISCRIMINATION RELIGIEUSE

Une jurisprudence peu nombreuse

En matière de discrimination, les dispositions juridiques font mention de l’‘appartenance ou non-appartenance vraie ou supposée ... à une religion déterminée’ (C pén) ou des ‘convictions religieuses’ (C trav) et les croyances non religieuses ne sont pas explicitement mentionnées. Il n’existe pas de véritable définition de la religion en droit français, hormis des tentatives entreprises dans le cadre de décisions de jurisprudence qui ne concernent pas la discrimination (V CA Lyon, 28 juillet 1997, *Min public c Veau*).

Les décisions judiciaires sont assez peu nombreuses en matière de discrimination de façon générale, et de discrimination religieuse en particulier, du fait notamment de la difficulté pour la victime à faire la preuve de la discrimination alléguée. On peut néanmoins citer à titre d’illustration quelques décisions clés en la matière:

- i. N’est pas jugé discriminatoire le licenciement d’une vendeuse refusant d’ôter son voile, dès lors qu’il est fondé sur une cause objective liée à l’intérêt de l’entreprise, justifié par la nature de la tâche à accomplir (vendeuse au contact des clients au sein d’un centre commercial destiné à un large public) et proportionné au but recherché dès lors que l’employeur avait accepté le port discret d’un bonnet conforme aux exigences rituelles (CA Paris, 16 mars 2001, n° 99/31302);
- ii. Sont reconnus coupables de discrimination à raison de la religion les propriétaires d’un gîte rural qui voulaient en subordonner la location à l’enlèvement du foulard dans les parties communes (TGI Épinal, 9 octobre 2007);
- iii. Un jury de concours d’officier de la police nationale ne peut interroger un candidat sur ses pratiques confessionnelles ainsi que sur celles de son épouse, ces questions étant constitutives de l’une des distinctions directes ou indirectes prohibées par l’article 6 de la loi du 13 juillet 1983 et révélant une méconnaissance du principe d’égal accès aux emplois publics (CE, 10 avril 2009, n° 311888);

- iv. Est condamné pour discrimination un centre de formation (CFA) qui avait exclu une de ses élèves parce qu'elle portait le voile (CA Paris, 8 juin 2010, n° 08/08286).

Pas d'exception prévue par les textes sur le motif des convictions religieuses, mais une jurisprudence sur les 'entreprises de tendance'

Des exceptions au principe de non-discrimination sont prévues sur la base de l'état de santé ou du handicap, du sexe, de l'âge, de l'apparence physique et de la nationalité (C pén, art 225-3; C trav art L1133-2 et seq). En transposant les directives, les lois françaises n'ont cependant pas retenu d'exception fondée sur les convictions ou la religion et la question n'a d'ailleurs pas été débattue.

En droit du travail, des différences de traitement sont néanmoins possibles, 'lorsqu'elles répondent à une exigence professionnelle essentielle et déterminante et pour autant que l'objectif soit légitime et l'exigence proportionnée' (C trav, art L1133-1; V *supra* CA Paris, 16 mars 2001, n° 99/31302), et cela pour tous les critères discriminatoires envisagés à l'article L 1132-1 du Code du travail. Il reviendra à la jurisprudence de définir plus précisément ces notions et de délimiter l'étendue des exceptions possibles.

La jurisprudence a reconnu par ailleurs à plusieurs reprises que l'entreprise de tendance confessionnelle ne discrimine pas en revendiquant le droit de choisir son personnel sur le fondement d'un critère de conformité religieuse (Cass ass, 19 mai 1978, *Dame Roy*). Ainsi,

l'article L122-45¹⁵ du Code du travail ... n'est pas applicable lorsque le salarié qui a été engagé pour accomplir une tâche impliquant qu'il soit en communion de pensée et de foi avec son employeur méconnaît les obligations résultant de cet engagement.¹⁶

Est cependant injustifié le licenciement d'un aide-sacristain au motif qu'il était homosexuel, dès lors que les faits reprochés concernaient des agissements hors de l'entreprise constitutifs de l'exercice des libertés individuelles et bien qu'ils aient pu provoquer un trouble au sein de la collectivité, motif de licenciement jugé insuffisant (Cass soc, 17 avril 1991, *Painsec*, n° 90-42.636).

15 Aujourd'hui, art L1132-1.

16 Cass soc, 20 novembre 1986, *Fischer*, n° 84-43.243.

Dans les affaires mettant en cause les convictions religieuses, les juridictions recourent plus volontiers au principe de liberté de religion, de protection de la vie privée ou de neutralité du service public qu'à celui de discrimination. Par ailleurs, l'application du principe d'égalité prime aujourd'hui encore dans la jurisprudence sur celui de discrimination¹⁷ et ne facilite pas l'appréhension des concepts de 'discrimination indirecte', d'«action positive», voire d'«accommodements raisonnables», notions discutées par la doctrine mais encore très peu présentes en droit français.¹⁸

17 L Cluzel-Metayer et M Mercat-Brun, *Discriminations dans l'emploi: analyse comparative de la jurisprudence du Conseil d'Etat et de la Cour de cassation* (Paris, 2011), p 15 et seq.

18 Voir notamment A Levade, 'Discrimination positive et principe d'égalité en droit français', (2004) 111 *Pouvoirs* 55–71.

GERMANY

GERHARD ROBBERS

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND¹

The Protestant Reformation that began in 1517 resulted in the permanent existence – and in fact co-existence – of two equally strong and often hostile religious denominations in Germany, the Catholic and the Protestant churches. Taken together with the special status of the Jews in Germany this amounts to the basic features of a pluralistic system of religious co-existence. For centuries, Germans have experienced a situation in which different denominations have lived together in close proximity.

The first nucleus of a partially hidden but powerful freedom (and equality) of religion in a German constitutional document was created as early as 1555. In the Religious Peace of Augsburg of 25 September 1555, the Lutheran and Catholic confessions were recognised at the level of the Holy Roman Empire as essentially equal. Germany was split into those territories adhering to the Catholic faith and those territories following Lutheran teaching. The 1555 Peace of Augsburg conferred on princes and monarchs the power to decide for all their subjects in their territories which confession to follow (*cuius regio, eius religio*). There were two important exceptions to this rule: in the free and imperial cities (*Freie und Reichsstädte*), which had all turned to the new Lutheran Church, the status quo for the minorities that had remained Roman Catholic was guaranteed in respect of the practice of their religion and in respect of church property. Full freedom to follow their own Catholic or Lutheran belief was thus granted to the inhabitants of the free and imperial cities, that is, cities directly subject to the emperor such as Nuremberg, Augsburg and many others. The second exception was that Roman Catholic-governed territories directly subordinate to the empire had to remain Catholic (*reservatum ecclesiasticum*). This applied especially to the spiritual prince-electorships of Trier, Co-

¹ The following is largely taken from Gerhard Robbers, *Religion and Law in Germany* (Alphen aan den Rijn, 2010), pp 38 ff, which provides a fuller account.

logne and Mainz, and to the territories governed by prince-bishops. Those prince-elector bishops and prince-bishops who turned to the Protestant faith thus lost not only their Church office but also their territory, since the people in those territories had to remain Catholic.

One of the most important achievements of the 1555 Peace of Augsburg was that those subjects who disagreed with the Catholic or Lutheran confession established by their lords were granted the right to emigrate (*ius emigrandi*). This right was explicitly limited to the Catholic and Lutheran faiths, while Jewish minorities retained their special status. Other denominations were excluded from this right to emigrate, and it was certainly only a very first step in granting freedom of religion. However, this right to emigrate for religious reasons opened the door to the idea that no-one could be forced against his or her will to follow or not follow a particular religion. The Peace of Augsburg also laid the ground for religious neutrality of the state in that two competing confessions were accommodated in the empire and equal treatment at the level of the empire was granted to them in the end.

The 1648 Peace of Westphalia reaffirmed and developed the Peace of Augsburg. It explicitly mentioned and guaranteed *conscientie libertate*, freedom of conscience. It was again essentially limited to Catholics and Lutherans, Jews and others being tolerated to various extents. The denominational status of the territories as either Roman Catholic or Protestant was fixed according to the status that they had held on 1 January 1624, the so-called *Normaljahr* ('Normal Year'). This in fact brought an end to the principle of *cuius regio, eius religio* and limited the *ius reformati* of the princes. The followers of either creed who lived in the territory of the other creed were allowed to exercise their religion in private. The principle of the *Normaljahr* was not, however, extended to the Habsburg Austrian territories and the Upper Palatinate area of Bavaria, which were subsequently brought back to or remained within the Roman Catholic denomination. Freedom of religion was also extended to the 'reformed' denomination – that is, essentially, Calvinists.

While state supremacy over church affairs grew, individual religious freedom also grew. An important step in widening the range of religious freedom was taken by the Edict of Potsdam of 1685, by which the monarch of Prussia, Prince Elector Frederick William,

invited Huguenots (a form of Calvinist) from France to settle in Prussia, granting them full religious freedom.

The Common Law of the Land for the Prussian States (*Allgemeines Landrecht für die Preußischen Staaten*) of 1794 provided that the ideas of any inhabitant of the state concerning God and godly issues, their beliefs and internal religious conviction could not be governed by laws of compulsion. Each inhabitant of the state must be granted complete freedom of belief and conscience. Limitations were obvious: the religious service of any creed could be installed at home by the ‘house father’. Any group could form a church association, as long as they taught reverence to God, obedience to the law and loyalty to the state, besides keeping good morals. The law distinguished between publicly accepted church organisations and tolerated church organisations.

The declarations of fundamental rights in the early constitutions of the German *Länder* (1818 Constitution of Bavaria, 1818 Constitution of Baden, 1819 Constitution of Württemberg), which were now forming a loose Union in the *Deutscher Bund* (German Confederation), granted religious freedom in a rather elaborate way. The same was true for ensuing constitutions throughout the nineteenth century. In general, these constitutions guaranteed equal rights to the three major Christian denominations (the Catholic, Lutheran and Reformed churches) and their followers. In Bavaria this was extended to the Greek Orthodox Church. Members of other religious communities were granted rights in specific laws and regulations. It is noteworthy that all inhabitants were granted full freedom of conscience. This means that, in general, everybody was allowed to have a simple service at home regardless of the religion to which he or she belonged. However, religious services in public were restricted to privileged religious communities. The 1812 Emancipation Edict concerning the Jews in Prussia granted the same civil rights and freedoms for Prussian Jews as were enjoyed by Prussians of Christian faith.

The revolutionary German Constitution of 1848–1849 provided in its Articles 144 and 145 full freedoms of belief and conscience. Every German was free to perform religious rites at home and in public. Article 147 provided that each religious association should regulate and administer its affairs independently, but remain subject to the general laws of the state. No religious community should have any privileges, and there was no state Church. New religious com-

munities could be freely established, and no recognition of their faith by the Government was needed. The revolution failed, however, and the German Constitution was formally repealed in 1851.

The autonomy of the Roman Catholic Church in Germany was finally strengthened as a result of the *Kulturkampf* ('Cultural Struggle'). This conflict between the newly founded German Empire of 1870–1871 and the Catholic Church was in part an attempt by the mainly Protestant Prussia in the north to dominate the predominantly Catholic south. It also aimed at suppressing Polish national sentiments in the eastern part of the empire. Under Chancellor Bismarck, a number of laws were passed with the aim of reducing the influence of the Catholic Church. Among them was the introduction of a paragraph 130a into the German Criminal Code (*Strafgesetzbuch*), which threatened clergy who discussed politics from the pulpit with two years' imprisonment. In 1872 the Jesuits were banned (and remained banned until 1917). Three years later, religious orders were abolished, state subsidies to the Catholic Church were stopped and religious protections were removed from the Prussian Constitution. Catholic resistance against this suppression was so great, however, that Bismarck finally sought a peaceful settlement of the issues; the laws were repealed or voluntarily accepted by the Vatican in the concordats to come.

The 1918 revolution following the First World War put an end to the remaining state supremacy over the churches. Article 135 of the 1919 Constitution of the Weimar Republic (WRV) guaranteed full freedom of religion or belief and declared that, nevertheless, the general laws of the state remained unaffected. The institutional guarantees of Articles 136–141 WRV provided religious freedom and freedom of manifestation of religion or belief for all individuals, as well as for every religious and non-confessional philosophical community. Their self-determination was only limited by the 'laws valid for all'. It was soon argued that the term 'laws valid for all' means only those laws that are indispensable for the nation's very existence and well-being.

It was the complete moral and legal breakdown under National Socialism that brought an end to freedom and to the very physical existence of millions of Jews and other people. The Nazi rulers also tried to take control of the churches. The struggle that arose from this is known as the *Kirchenkampf* ('Church Struggle'). Within the Prot-

estant Church of Germany a Nazi bishop was appointed. Here, it was the small yet important minority named the *Bekennende Kirche* ('Confessing Church') that maintained resistance against Nazi rule over the Protestant Church. In many areas the Roman Catholic Church openly opposed the Nazi regime. Jewish resistance against the Nazi murderers was important, as was shown in the revolt in the Warsaw ghetto in 1943. Resistance was also important among other religious groups such as Jehovah's Witnesses or the Seventh-day Adventists.

After the liberation at the end of the Second World War in 1945, religious freedom and equal treatment took a foremost place in the new constitutional order of the Federal Republic of Germany. While Articles 41–48 of the 1949 Constitution and Article 39 of the 1968–1974 Constitution of the German Democratic Republic promised freedom of religion, the state was explicitly atheist, discriminated against religion and often persecuted individual believers. Nevertheless, the communist state accepted the existence of religious communities, thus allowing opposition to the regime to gather under the umbrella of the churches.

It is probably not realistic to separate out religious freedom and religious equality, since the two relate to each other indistinguishably in substance. From the perspective of the two major churches the issue was equality between them; in areas where one of them was in the minority it was freedom of religion that mattered. Freedom and equality of the major religions has been a predominant issue in public debate throughout the centuries in Germany.

Initially, UN instruments on religious discrimination and Article 14 ECHR had little effect, because it was generally held that German legal instruments provided a more thorough protection of equality and freedom than the international instruments. However, political debate, including opinions expressed by the churches, welcomed those instruments. The German Government was in favour of EU Directives 2000/43/EC and 2000/78/EC and it supported the churches' position that a special provision was needed to safeguard the needs of religious freedom. The churches – both Protestant and Roman Catholic – worked intensively to that end at both national and EU levels.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

Germany has a Federal Anti-Discrimination Agency, and several of the federal *Länder* and larger cities have their own anti-discrimination agencies. Non-discrimination is further guaranteed by the law and through the courts. Prohibitions are found in constitutional law (and in consequence administrative law also) and civil law, but less so in criminal law.

Constitutional guarantees in general

Religious equality is made explicit in several special provisions of the *Grundgesetz* (GG, Basic Law). While the general equality clause in Article 3, section 1 GG also covers matters that relate to religion, further special equal treatment provisions focus explicitly on questions of religion. The general non-discrimination norm of Article 3, section 3 stipulates that no person shall be favoured or disfavoured because of faith or religious opinions. Article 33, section 3 is a specific non-discrimination norm and provides that neither the enjoyment of civil and political rights, nor eligibility for public office, nor rights acquired through public service shall be dependent upon religious affiliation. The norm further states that no one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed. This is reiterated in Article 136, section 1 and 2 WRV in conjunction with Article 140 GG: '(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.' Basic structures regarding equal treatment are laid out by Article 137, sections 1 and 3 WRV in conjunction with Article 140 GG in providing that there is no state Church and that all religious communities govern their affairs independently.

This forms part of the more general principle of 'parity' that governs the equal treatment of religious communities and equivalent bodies. Similar equal treatment guarantees are included in the consti-

tutions of the *Länder*. These equal treatment clauses form part of the general principle of state neutrality in religious matters.

Institutional equality

Equality of religious communities follows from Article 137, section 1 WRV prohibiting any kind of state Church and from Article 137, section 3 WRV protecting the self-determination of all religious communities. It is reaffirmed in Article 3, section 3 GG, according to which no person shall be favoured or disfavoured because of faith or religious opinions. This is further elaborated in Article 33, section 3 GG. Equal treatment of religious communities as well as of philosophical communities requires equal treatment of what is equal and unequal treatment of what is unequal according to the degree of their differences. Equal treatment in legal practice and doctrine is not identical treatment but, more sophisticatedly, a treatment in accordance with the specificities of the issues at stake. This is a general rule throughout the legal system and solely related to religious communities and religion. Any unequal treatment must be legitimised by appropriate reasons. The treatment must be proportionate to the differences between the issues concerned and to the aims pursued by the treatment.

A special expression of the rule of equal treatment in religious matters is the principle of parity. This principle evolved historically as a response to the existence of two equally strong Christian denominations within the Holy Roman Empire. It can be seen as a former group right for these two denominations that guaranteed equal representation, for example in the supreme court of the empire, the *Reichskammergericht*. Today, parity has developed into a general right of equal treatment for all religions.

It is generally accepted that the difference in status between religious communities that have the status of corporations under public law and those religious communities with a normal civil law status does not contradict the right to equal treatment. In any case, the two categories of status are directly and explicitly part of constitutional law. As such they determine what is required by equal treatment according to the Constitution, because all provisions of the Constitution have the same rank and the Constitution must be seen as one entity. The difference in status draws its legitimacy from the social

impact and relevance that the various religions and denominations have; it also meets differences in approach and self-understanding of those religions and denominations. Rights that are attached to each status match duties that follow from the status. Either status can be obtained when the individual religious community meets minimum requirements.

Equal treatment of non-religious, philosophical communities

Non-religious, philosophical communities (*Weltanschauungsgemeinschaften*, ‘belief communities’) have the same status in law as religious communities. This is made explicit in Article 137, section 7 WRV in conjunction with Article 140 GG: ‘Associations whose purpose is to foster a philosophical creed shall have the same status as religious societies.’ This applies, for example, to humanist organisations. Equal status was assigned to these communities in the 1919 German Constitution as a result of developments at the end of the nineteenth century and the beginning of the twentieth, when socialist and atheist groups emerged. Non-religious, philosophical communities have the same status as religious communities.

Ordinary law

In implementing European Union directives, Germany has introduced the General Equal Treatment Act (AGG), on a level below constitutional law. According to §§ 1 and 2 AGG, no one may be discriminated against on grounds of race, ethnicity, gender, religion or belief, disability, age or sexual orientation in the field of profession and employment, social security or education, or access to social benefits, health services or goods and services open to the public, including housing facilities.

Prohibition of discrimination is generally operative in all areas of law. It is important to note that, in German legal terminology, the term ‘discrimination’ implies unfair treatment, making distinctions without valid reasons. Non-discrimination guarantees in the federal Constitution cover all areas in which state authorities are active. In civil law, these provisions apply to the extent of horizontal application of fundamental rights. One may note that unequal treatment is not prohibited in a variety of areas in civil law, such as the right

freely to choose one's spouse or to decide on buying goods from someone one likes.

There is a vast amount of case law on religious discrimination. A case still pending before the Federal Labour Court relates to a Muslim woman who was not hired in a church programme for integration of immigrants because she did not belong to one of the relevant churches.

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

There is no discrimination when the requirements of § 9 AGG are met. A different treatment because of religion or belief is allowed in the case of employment by a religious community regardless of its legal form, by an organisation attached to it or by an association that has as its objective the common declaration of a religion or a belief if a specific religion or belief is a justified professional requirement for the employee, in view of the organisation's right to self-determination or the kind of activity, while respecting the self-understanding of the community. The prohibition of unequal treatment because of religion or belief does not prejudice the right of these communities and organisations to demand from their employees a loyal and honest behaviour in the sense of their respective self-understanding. This provision is based on Article 4 of Council Directive 2000/78/EC, which established a general framework for equal treatment in employment and occupation. Pursuant to this provision, Member States may provide that a difference of treatment that is based on a characteristic related to any of the grounds referred to in Article 1 of the Directive 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. Member States may maintain national legislation in force at the date of adoption of the Directive or provide for future legislation incorporating national practices existing at the date of adoption of the 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 constitutes 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, the Directive shall thus not prejudice the right of religious organisations, 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.

There are no such general (secular law) conditions to be met where legitimate differentiation is to be upheld. Until now, the courts have accepted the autonomous decision of the relevant religious community. The rules of the great churches vary considerably. In general, and for general employment, they require membership of specific Christian churches. Leaving those churches is a reason for dismissal. There are a variety of internal rules on proximity of an employee's belief to the mission of the church. In general, courts respect the autonomous right of religious communities to require their employees to belong to a defined religious community and to respect loyalty obligations.

GREECE

KONSTANTINOS PAPAGEORGIOU

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

The general principle of equality, in accordance with the teachings of Greek Constitutional law, derives directly from the equally important concepts of freedom and democracy, which constitute the common foundation of any modern and democratic rule of law. The right to equality has been entrenched in all Greek Constitutions following the liberation of the country from the Ottoman Empire, namely from the first revolutionary Constitution of Epidaurus (1822) to the currently applicable Constitution (1975). Equality is presently protected as regards both its general form (Article 4 § 1 of the Constitution) and its multiple individual expressions, one of which is religious equality.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

The constitutional protection of religious equality

Pursuant to Article 13, paragraph 1(b) of the Greek Constitution on the fundamental right to religious equality, ‘The enjoyment of individual and political rights does not depend on the individual’s religious beliefs.’ Furthermore, the legislature, the administration and the courts apply the provisions of the European Convention on Human Rights (ECHR) in relation to the protection of that same right.

Religious equality exists in a society whose members enjoy various individual, political, civil, tax or other rights under the relevant law, irrespective of their religious beliefs or inclusion in a particular religious community.¹ In other words, the effective and full estab-

¹ From the rich literature, see in particular (in Greek): C Papastathis, *Religious Freedom and Prevailing Religion* (Thessaloniki, 2000); idem, *Ecclesiastical Law, vol A* (Thessaloniki, 2003), pp 83–97; S Troianos and G Poulis, *Ecclesiastical Law* (second edition, Athens, 2003), pp 79–185; S Troianos and K Papageorgiou, *Religious Law* (Athens, 2009), pp 8ff; K Beys (ed), *Religious Freedom: Theory and Practice in Greek Society and the Greek Legal System* (Athens, 1997); D Salahas, *The legal position of*

lishment of religious equality under the Greek Constitution and other law does not allow the enjoyment of any individual rights to be subject to or affected (whether manifestly or not) by criteria of religious inclusion of citizens, which might result in their unequal treatment by the state and the state's bodies and institutions, contrary to the principles of the modern rule of law.

In this sense, religious equality is a constitutionally protected right for everyone, whether a national or not, who lives in the Greek territory, whether legally or illegally.² In addition to individuals, holders of this right may also be legal entities, provided that this is consistent with both the nature of the right and that of the entity in question, as well as any unincorporated organisations.

The effective protection of religious equality is very important for the coherence and balance of contemporary Greek society, which has now acquired a multi-religious and multicultural character. The difficulties in implementation of religious equality, however, are numerous, a fact that leads to the conclusion that this right is an exceptionally vigorous expression of religious freedom in terms of its actual implementation. The reality of the fundamental commitment to religious equality (not merely a nominal commitment, as is often the case) strengthens the full and effective enjoyment of all other manifestations of religious freedom within the country.

Law 3304/2005 and the Greek Ombudsman

The enactment of Law 3304/2005 on ‘the implementation of the principle of equal treatment irrespective of racial or ethnic origin, religion or belief’ constituted a critical point for the promotion of the principle of equality and the protection of human rights in Greece. This Law incorporated the EU Directives 2000/43/EC and 2000/78/EC into Greek law. The provisions of Law 3304/2005 seek

the Catholic Church in Greek territory (Athens, 1978); K Papageorgiou, ‘Freedom of religion: a case of discrepancy between the Greek and the European legal order, before the European Court of Human Rights’, in *Jurisdiction in Europe: Towards a Common Legal Method* (Münster, 1997).

2 Since the Constitution does not make a relevant distinction, the subjects or holders of the individual right of religious equality are not only Greek citizens but any person within Greek territory, be they a national or a foreigner, irrespective of whether such a foreign national is found in Greece legally or illegally, voluntarily or against their will.

to combat the effects of both direct and indirect discrimination (Articles 3 and 7) while organising a complex network of mechanisms for the protection of individuals that far exceeds the traditional model of sanctions. New administrative and penal sanctions are provided for (Articles 16 and 17), the emphasis being on the actions to be taken by specific public bodies so as to promote equal treatment and take positive measures.

This Act is primarily implemented by the Greek Ombudsman, whose role is strengthened and enhanced by the addition of new functions and competences, which contribute to the effective fulfilment of its mission. The Ombudsman, as shown by his office's annual reports, has already devoted part of his time to investigating citizens' complaints regarding unequal treatment on the part of state bodies. Since Law 3304/2005 entered into force on 27 January 2005, the Ombudsman has received complaints from citizens of unfair discrimination, which, according to the Ombudsman, had been perpetrated against those citizens by the administration, by reason of their religious beliefs.

III. THE RIGHT TO DISTINGUISH OR DISCRIMINATE: EXCEPTIONS TO THE GENERAL PROHIBITION

Case law regarding protection of religious equality

With regard to case law, we should mention two very important judgments. First, judgment No 1700/1983 of the Athens Administrative Court of Appeals annulled the rejection for appointment of a secondary-school language teacher on the grounds that she was not a member of the Orthodox Church. According to the Court, the enjoyment of individual and political rights, such as the provision of education at schools, may not be affected by the religious beliefs of the individual, while the freedom of religious conscience is protected at all times.

The second decision, issued by the Thessaloniki Administrative Court of First Instance (No 1064/1983), interpreted the constitutional principles of religious and tax equality. According to this judgment, the exemption from Property Tax (Article 24 § 7 Law 2130/1993) must apply, for reasons pertaining to religious equality, to any property owned by any 'known religion' (as per Greek law, in which 'known

religion' is deemed to be any religion that does not involve secret doctrines and secret worship). The foregoing applies even if the property is used for educational purposes in addition to worship, given that similar restrictions do not apply for the prevailing religion. The same judgment stated that tax relief may not pertain exclusively to the Orthodox Church. Unless there are substantial and justified grounds for the preferential treatment of the Orthodox Church, the tax-exempt provisions must be interpreted in favour of all known religions within the territory of the state. This should particularly be enforced when the economic factor predominates in this context, in the sense that such preferential treatment is not associated with the spiritual role of the Orthodox Church but relates primarily to its status as a legal entity and holder of rights (and also obligations) in the Greek state.

Concluding remarks

Realistically, we must acknowledge that the absolute achievement of the goal of religious equality of citizens is impossible. It is inevitable that at least some minor cases shall be neglected, and it is required that the justice and administrative bodies should undertake the task and initiative, respectively, of minimising the number of those cases. However, it is entirely feasible if there is a continual willingness to adapt, improve and specialise the legislative and administrative measures and institutions that are related to the effective implementation of religious equality. The responsibility lies with the legislature, administration and justice system, the last of which is required to apply the relevant regulations fairly through case law in order for the fight against religious inequalities to be an unceasing pursuit. The need to follow this course is deemed imperative, especially now, when the revival of the social phenomenon of religion has resulted in religion's emergence as a principal factor in modern life and the behaviour of large social strata in Greece and elsewhere.³

3 See the comparative data cited by the Centre for European Social Research, dated 2003, in M Drettakis, 'The religiousness of Greeks', *The Kathimerini* (Sunday edition), 11 April 2004, p 15, where, on a scale from 0 to 10, averages of religiousness were given as the following: Greece – 7.68, Italy – 6.14, Ireland – 5.78, Portugal – 5.71, Finland – 5.57, the Netherlands – 5.06, Belgium – 4.96, Spain – 4.40, Denmark – 4.36, United Kingdom – 4.30, Germany – 4.24, Luxembourg – 3.96, Sweden – 3.70. See also the similarly high rates contained in the survey conducted by GFK-Market Analysis and published in *The Eleftherotypia*, 17 January 2005, p 62.

HUNGARY

BALÁZS SCHANDA

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

Hungary promulgated the ECHR in 1993, and joined the European Union in 2004. Constitutional provisions relating to religious discrimination were not changed. The Constitution has provided for religious freedom and for non-discrimination on grounds of religion since the collapse of the communist system in 1989. Generally public attitudes to religious diversity have been characterised by a tolerant tradition accommodating different denominations. However, it should be noted that Hungary is still not strongly affected by migration and consequently non-traditional minorities are hardly visible.

Issues of equality have not only arisen at the level of the individual but have been on the agenda regarding the legal status of religious organisations since 1848, when all public offices were opened to the members of any denomination.

As a clear consequence of the historical legacy of the twentieth century, religious affiliation is often considered a private matter. No data on religious belief can appear on public records (Jews suffered serious discrimination from 1938 and three-quarters of the Hungarian Jewry were deported and killed in 1944) and the right not to manifest beliefs is expressly protected by the Constitution (reflecting experiences of the communist regime).¹ That regime (lasting from 1949 to 1989) systematically discriminated against members of all faith groups. Although oppression diminished in the 1970s and '80s it was still practised until the collapse of the regime.

There has been no significant political debate on religious discrimination issues in Hungary. The only incident that has drawn significant public attention occurred when members of the Government voiced sharp critique against Károli Gáspár Reformed University, which expelled a student claiming to be homosexual from its School of Theology in 2003. The courts dismissed claims of a link to

¹ Constitution, Art 60 (2) (from 1 January 2012, Basic Law, Art 7(1)).

gay rights activists, judging that the university had violated the equal treatment law. In another instance, the Supreme Court regarded it as reasonable that a church does not train pastors who do not agree with the moral doctrines of the church. Those doctrines cannot be subject to scrutiny in a court procedure.

Parliament passed a general law to fight discrimination and ensure equal treatment (the Equal Treatment Act, ETA) in December 2003,² a few months before Hungary joined the EU, with the aim of ensuring that Hungarian law was compatible with the directives on the implementation of equal treatment in the Union.³ The law focused on employment, social security and health care, housing, training and education, and trade and services. The main target of the law was ethnic discrimination (the integration of the Gipsy/Roma minority) and gender discrimination (especially in relation to employment).

While the law is not applicable to religious communities,⁴ it does apply to church-run institutions such as schools, hospitals, institutions of social care and so forth. It is also noteworthy that state authorities (the courts, in the final instance) have the duty to determine what qualifies as being ‘directly linked to the religious life’ of a church. Probably the most sensitive field is employment. In this regard Article 22(1) of the Act states that:

The principle of equal treatment shall not be considered violated if

- a) the discrimination is proportional, justified by the characteristics or nature of the work and is based on all relevant and legitimate terms and conditions considered during the hiring, or
- b) the discrimination arises directly from a religious or other ideological conviction or national or ethnic origin funda-

² Act 125/2003 on Equal Treatment and the Promotion of Equal Opportunities.

³ Ibid, Art 65. This Act contains regulation in harmony with the provisions concerning the approximation of the law under the Europe Agreement establishing an association between the European Communities and their Member States on the one part and the Republic of Hungary on the other, signed in Brussels on 16 December 1991 and promulgated by Act I of 1994, compatible with the various EC Directives on equality.

⁴ Article 6 (1): The scope of this Act does not extend to
a) family law relationships;
b) relationships between relatives;
c) relationships of ecclesiastical entities directly connected with the activities of the religious life of churches; (...)

mentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.

This means that the nature of the organisation itself is not sufficient for the exemption, but the very nature of the employment activity must be scrutinised. Hungary apparently did not make use of the widest possible exemption from equal treatment in the field of employment that was provided in the relevant EU norms.

Mainstream religious communities (the Roman Catholic Church, the Reformed Church, the Lutheran Church and the Alliance of Jewish Communities) filed an unprecedented joint initiative to the Constitutional Court in 2004 claiming that the ETA was unconstitutional. Religious communities considered church autonomy to be endangered by the new law, especially where it concerned employment, as religious affiliation could only be taken into consideration for those employed in genuine religious ministry (to be determined by the state authorities). The case is still pending and it is not likely that the Constitutional Court will decide on it by the end of 2011 when the present Constitution will be replaced by the new Basic Law of Hungary and pending petitions will be struck from the list. At the same date, however, the new Religion Law⁵ will enter into force, providing a wide-scale autonomy for church-run institutions.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

The Equal Treatment Authority

The ETA provided for an Equal Treatment Authority as a means of recourse in cases regarding equal treatment. 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 that institution to change its policies. Decisions of the Equal Treatment Authority can be challenged at the Municipal Court of Budapest.

The Authority began its work on 1 February 2005. It is an independent organisation, established by the Hungarian Government to

⁵ Act C/2011.

receive and deal with individual and public complaints about unequal treatment and to implement the principles of equality and non-discrimination. The Authority works under the direction of the competent member of Government; however, neither the Government nor the relevant Ministry may instruct the Authority when it performs its duties under the Equal Treatment Act. This provision is intended to guarantee the Authority's independence from the Government. The Authority is led by the President, who is appointed by the Prime Minister.

The Equal Treatment Authority is assisted by an Advisory Board on issues of strategic importance. The Board consists of six experts with outstanding experience in asserting the right of equal treatment. It was appointed by the Prime Minister after an extensive consultation process, in the course of which NGOs nominated the 24 candidates. The Board has co-decision powers with the Authority on the adoption of proposals for Government decisions and draft legislation relating to equal treatment and on reporting in general (producing national reports for international bodies). At present no member of the Advisory Board could be regarded as an expert on religious issues (expertise focus on labour law, social security and the rights of homosexuals).

The Equal Treatment Authority reviews the complaints it receives to see whether the principle of equal treatment has been violated on the grounds of sex, racial origin, colour, nationality, national or ethnic origin, mother tongue, disability, state of health, religious or ideological conviction, political or other opinion, family status, motherhood (pregnancy) or fatherhood, sexual orientation, sexual identity, age, social origin, financial status, the part-time nature or finite term of an employment relationship or other relationship related to employment, membership of an organisation representing employees' interests or any other status, attribute or characteristic. The Authority also reviews the complaints it receives to see if those budgetary organs and legal entities in state majority ownership employing more than 50 employees that are obliged to adopt an equal opportunities plan have done so.

The Authority deals with direct discrimination based on the abovementioned grounds (when one person or a group is treated less favourably than another is, has been or would be treated in a comparable situation). It also handles cases of indirect discrimination

(when provisions that are not considered direct negative discrimination (and so apparently comply with the principle of equal treatment) put or would put any persons or groups having the characteristics mentioned above at a considerably larger disadvantage compared with other people or groups in a similar situation), harassment (conduct violating human dignity related to the relevant person's characteristic defined above with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around a particular person), unlawful segregation (conduct that separates individuals or groups of individuals from others on the basis of the abovementioned grounds without the explicit permission of a legal act), sexual harassment (offensive verbal or physical conduct of a sexual nature, towards a person with whom there are work, business or other relations of subordination) and retribution (conduct that causes infringement, is aimed at infringement, or threatens infringement against the person making a complaint or initiating procedures because of a breach of the principle of equal treatment, or against a person assisting in such a procedure, in relation to the Equal Treatment Act).⁶

As mentioned above, the ETA does not apply to family and private life and relationships directly connected with the activities of the religious life of the churches, to relationships of parties except regarding political or other opinion, to relationships between the members of legal entities and organisations without a legal entity or to relationships related to membership, except for the establishment of membership.

Sources of law on religious discrimination

It is the Constitution that expressly prohibits discrimination based on religious affiliation or equally on the basis of any other opinion or conviction. Discriminative acts could lead to a criminal procedure but they are more likely to end up either as a labour dispute (as this is the area most sensitive to discrimination issues) or in an administrative procedure of the Equal Treatment Authority. Eventually damages caused by discrimination could be invoked in a civil procedure.

⁶ A description of the Equal Treatment Authority is available on its website: <<http://www.egyenlobanasm.hu>>, accessed 18 November 2011.

Areas in which the prohibition of discrimination is operative

Prohibition of discrimination applies to public authorities (in all respects) and to employment (the most sensitive area), the provision of goods and services.

The scope of the prohibition, defences or other justifications

As mentioned above, prohibition covers both direct and indirect discrimination, incitement to discriminate, victimisation and harassment. Positive discrimination supporting equal opportunities is permissible. If the ETA does not provide otherwise, the principle of equal treatment is not violated by such conduct, measure, condition, omission, instruction or practice ‘which limits a basic right of the entity brought into a disadvantageous position in order to enforce another basic right in an unavoidable situation, assuming that such a limitation is suitable for this purpose and is also in proportion to it’, or ‘which is found by objective consideration to have a reasonable explanation’ (Article 7).

Decisions of the Equal Treatment Authority can be challenged at the Municipal Court of Budapest.

The case law of the Equal Treatment Authority

The Equal Treatment Authority has handled over 800 cases since its establishment, but only a few concerning discrimination based on religion. Some of these cases are of interest, however, particularly those where the Authority rejected complaints.

In one case a religious mission was challenged by a person who was rejected for a position as webmaster. The job description did not mention that any kind of religiosity was required, nor did the nature of the work to be done require any such form of commitment. Prior to the oral interview, the applicant was asked to make a statement about his religious affiliation in his CV. After stating that he was not religious, he was called for interview: 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 or 4

had had no religious affiliation when they were hired. For the position of the webmaster there were eight candidates, but the position as eventually left unfilled for financial reasons. The mission stated that an understanding of religious issues had been useful for the job, but not inevitable. The Authority accepted the defence of the mission because the connection between the (lack of religious) conviction and the treatment could not be established. Religious affiliation was only taken into account by the mission insofar as this was necessary for the nature of the job – the sphere where the requirement of equal treatment does not apply. The interview was carried out notwithstanding the agnosticism of the applicant, indicating that the mission provided him with a chance to demonstrate his abilities. The Authority also considered the fact that in the event no-one was hired, and therefore there was no-one to be discriminated against.⁷

In the case of an employee dismissed from a Catholic-based foundation providing assistance to the mentally ill, the complainant stated that the reason for her dismissal was the fact of her motherhood as well as her (lack of) religious conviction. The foundation provided evidence for the fact that its activities were partly based on religious grounds, which meant that employees had to have some kind of knowledge about religion but did not have to be religious themselves. The Authority 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 for the dismissal.⁸

In another employment case a person not hired as a social worker by an NGO complained, claiming that he was ridiculed and finally turned down at the job interview because of being vegetarian and because he did not belong to any denomination. The Authority could not establish a violation in the case as the circumstances of the case suggested that the applicant did not really want to get the position (the employment agency had sent him to the interview) and that he showed improper behaviour in a number of ways.⁹

7 Case 213/2007.

8 Case 1434/2008.

9 Case 324/2009.

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

Different treatment permitted

The ETA expressly provides for the possibility of running denominational schools (Article 28(1)). The principle of equal treatment is not violated if, in state education, at the initiation and by the voluntary choice of the parents (by the students' voluntary participation in institutions of higher education), education is based on religious or other ideological conviction whose objective or programme justifies the creation of segregated classes or groups. This must not result in any disadvantage for those receiving such an education, and the education must comply with the requirements approved, laid down and subsidised by the state.

Religious organisations and individuals versus equal treatment

The ETA is binding on all public authorities and institutions, but in the private sector it only applies to labour relations and any form of contract where the offer to conclude a contract was available to the general public (as at a shop or a pub). As mentioned above, the ETA does not apply to legal relations between relatives or to the religious activities of church entities.

The new law on religious freedom and churches that entered into force on 1 January 2012 seems to resolve the dispute on the scope of the ETA because it states that church-run institutions are based on an ideology, and that consequently they may set conditions to safeguard their identity with regard to admission to these institutions, as well as with regard to hiring, maintaining and dismissing persons working for them.¹⁰ This position could be tested if it is claimed that the legislature has not remained within the limits set by Directive 2000/78/EC. The demand of the Church for wider autonomy is partly based on historic reasons: at one time all schools, hospitals and so forth were run by Church organisations and these institutions still express the beliefs of a community. Having a variety of service providers today does not mean that church-run institutions should be the same as (or very similar to)

10 Act C/2011 § 11(2).

public ones. Work is carried out by a human person and even the simplest job can be an expression of a belief. The new law seems to acknowledge that a church-run institution can legitimately prefer a work-force that is in line with its identity.

Conditions for exemptions

According to the ETA the exemption of churches only applies to legal relations that are directly linked to the churches' religious activities. A tender to renovate a church building would not fall within the exemption. In contrast, any religious service (baptism, confirmation, wedding, funeral) would definitely be classed as part of the core religious activities where equal treatment could become an issue. The delicate issue (not yet tested) would be the question of how the 'religious' character of an activity could be defined, and who would have the right to do so. For any state body this would raise the question of the separation of Church and state, whereas leaving the issue for the religious communities would permit them to make a full exemption.

Case law in the area of exceptions

Employment, including the employment of clergy, is a sensitive area for discrimination. In 2003, the Constitutional Court brought to a close a remarkable dispute between a professor of theology in the service of the Reformed Church and both his Church and his university. The professor – a pastor of the Reformed Church – was persuaded to take early retirement by the university's Faculty of Theology. He later challenged this decision and first initiated an internal Church procedure. After having lost his case within the Church, he sued the Church as well as the University for compensation at a labour court. Courts in various instances remained uncertain whether they had jurisdiction over a dispute between a church and its pastor, as section 15(2) of the Act IV/1990 on the Freedom of Conscience and Religion and the Churches states, 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.' The applicant considered this refusal of the courts as insufficient response in his case, which he considered to be

an employment law case between an employer and a dismissed employee. The Constitutional Court – while dismissing the application – stated, that the separation of Church and state cannot be interpreted in way that leaves those entering a legal relationship with a church without recourse. Any judgments in favour of the individual, however, can only consider those 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 in the state legal system.¹¹

As mentioned above, employment law uses the term ‘ecclesiastical persons’ who have a special ‘ecclesiastical working relationship’ with their church. Discrimination on the basis of religion was prohibited by the Labour Code¹² even before the ETA was passed. Distinctions arising from the requirements of a particular job are not considered discriminatory but these exemptions arise from the nature of work and not that of the employer. This indicates that different standards should, for example, be applied to teachers of church schools than to the schools’ cleaners. As yet there is no case law to indicate how far ecclesiastical employers can go in requiring belief, membership or loyalty in the selection of their employees.

Work for churches can be carried out under four different legal regimes:

- i. Members of the clergy 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 or her according to another legal regime.
- ii. Employees of church institutions in genuinely religious offices would usually be lay persons in positions such as cantor or catechist. Such employees have a standard employment relationship with a church as legal entity; in their case the requirement of special loyalty is out of the question.
- iii. Employees of church institutions in secular offices constitute a third category. This is the category that in theory and in practice raises challenges. The intention of the legislation was

¹¹ Decision 32/2003 (VI. 4.) AB.

¹² Act No 22 of the year 1992, § 5.

- probably not to grant exemption from the principle of equal treatment for employees such as teachers of secular subjects at church-run schools or staff of church-run institutions of social care, to give two examples. The position of churches on the one hand and of public authorities and equal rights advocates on the other seem to be miles apart in this regard. In this situation it is essential to form a better understanding based on the true ethos of the institutions in question. 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 look at the origin of these institutions it becomes obvious that originally there were no secular institutions at all. Originally it was the religious orders of Europe that established activities and institutions such as schools, hospitals and universities. For them it was obvious that the institution itself expressed the commitment of the community, from the doormen to the abbot. Although the vast majority of employees in such institutions are lay people today, we cannot forget the origins of those 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 point when the institution is compelled to employ persons who do not share that institution's commitment, the very identity and reason for existence of the institution are at stake. Church jobs are usually not especially well paid – which prevents many conflicts – but churches have become quite careful in formulating the terms of employment in their contracts. A statement on loyalty – that is, respect towards the identity of the employer – is generally required in the contract.
- iv. Other types of contract may also engage people in the service of religious organisations. These are mainly contracts under civil law. For example, at a construction or reconstruction project a contractor employs 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 might insist on respect for its special character, declaring that the use of swear words or blasphemous behaviour, for example, cannot be tolerated.

CONCLUSION

Church autonomy is a constitutionally protected foundation and consequence of religious freedom in Hungary. However, the extent of that autonomy has hardly been tested so far. As the attitude of society as a whole is characterised (despite good will) by a lack of understanding of the reality of religion and religious communities, churches do not regard the challenge of broad interpretation of equal treatment as a merely theoretical threat to religious autonomy but have begun to take steps to defend their identity. Having a vivid recent experience of the lack of religious freedom, churches are particularly sensitive to new threats endangering their autonomy. While the emphasis on equal treatment seems to come from ‘outside’ (EU institutions), there is slightly more concern about church autonomy than about discrimination based on religion.

IRELAND

RONAN MCCREA

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

Church-state relations in Ireland have been through a major upheaval in recent times. The Catholic Church exercised an enormous degree of influence over law and society for the first 70 years of the Irish state. Legislation in Ireland enforced Catholic teachings in relation to matters such as divorce (legalised in 1997), homosexuality (legalised in 1993) and contraception (partially legalised in 1974, made generally available in 1993) far later than most European countries. Pressure from the Strasbourg Court and EU institutions played a significant role in the liberalisation of many of these laws.

While the vast majority of the population remains Roman Catholic, religious influence over law and society has declined markedly. The revelation of widespread physical and sexual abuse of children by clerics and the failure of the Catholic hierarchy to deal appropriately with child abusers within their ranks has severely damaged the prestige and influence of the Catholic Church and has soured relations between the Government and the Vatican.¹

At the same time religion retains an important role in the state. The vast majority of the population remain at least nominally religious, while religious organisations control a very large part of the educational sector (apart from universities) and very many healthcare institutions.

Constitutional law

The issue of the relationship between religion and anti-discrimination law is dealt with against the background of a constitution marked by significant religious influences. The 1937 Constitution is

¹ ‘Enda Kenny’s attack on the Vatican represents ferocious public anger’, *Catholic Herald*, 21 July 2011, available at <<http://www.catholicherald.co.uk/commentandblogs/2011/07/21/enda-kenny's-attack-on-the-vatican-reflects-ferocious-public-anger/>>, accessed 28 November 2011.

noticeably religious in rhetorical terms; its preamble begins with the words

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We the people of Eire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ ...²

This preamble has been held to influence the substantive articles of the Constitution, for example in *Norris v Attorney General*, where it was relied upon by the Supreme Court to counter an argument that laws criminalising male homosexual activity could be unconstitutional.³

Oaths of office for the President⁴ and Chief Justice⁵ of the Supreme Court are set down by the Constitution and are religious in nature, with no secular alternatives being provided, a situation that has been criticised by the UN Human Rights Committee.⁶

The Constitution provides a general equality guarantee in Article 40(1)⁷ along with more a specific commitment in Article 44(2)(3) that ‘The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status’, as well as providing in the context of free association rights that ‘Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.’⁸

This equality guarantee has been very narrowly interpreted. In *Quinn’s Supermarket v Attorney General*, it was made clear that it applied only to individuals as ‘human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they engage in or follow’.⁹ The same case made it clear that an exemption of kosher butchers from laws regulating Sunday trad-

2 Bunreacht na h-Eireann, Preamble.

3 *Norris v Attorney General* [1984] IR 36.

4 Bunreacht na h-Eireann, Art 12(8).

5 Ibid, Art 34(5)(1).

6 See M O’Flaherty and L Heffernan, *International Covenant on Civil and Political Rights: International Human Rights in Ireland* (Dublin, 1995), p 74.

7 This article states that ‘All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.’ It has been narrowly interpreted (see *Quinns Supermarket v Attorney General* [1972] IR 1).

8 Article 40.6 2.

9 [1972] IR 1.

ing did not violate equality guarantees, indicating that some degree of positive discrimination may be permitted when necessary to facilitate religious practice.

The Constitution also includes several provisions relevant to the issue of religion and discrimination in the educational sector that predate EU legislation in this area. Article 42 enshrines the right of parents to control the education of their children, stating that:

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.
3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.
2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.
4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.
5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

Article 44 provides significant protection to religious institutions. It states that:

1. The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.

1° Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

2° The State guarantees not to endow any religion.

3° The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.

4° Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

5° Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.

6° The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

It is notable that these provisions also include some secularist principles such as the ban on endowment (44(2)(3)) and the protection of the rights of non-religious pupils in (44(2)(4)). Nevertheless, the Constitution clearly reflects Catholic social teaching in its according of primacy to parental choice in matters of education and its view of the secondary nature of state involvement. Another area of the Constitution relevant to issues of discrimination is Article 41, which stresses the rights of the (heterosexual)¹⁰ marriage-based family and speaks of the duty of the state to ensure that women do not ‘neglect ... their duties’ by working outside the home.¹¹ Amendments have removed the prohibition on divorce and the recognition of the special place of the Roman Catholic Church.

The Constitution provides that blasphemy is a criminal offence.¹² However, the Supreme Court ruled in 1999 that this offence was unenforceable in the absence of more specific definition by the legis-

10 *Gilligan and Zappone v Revenue Commissioners* [2008] IR 417.

11 Bunreacht na h-Eireann, Art 41(2)(1).

12 *Ibid*, Art 40(6)(1)(i).

lature.¹³ The 2009 Defamation Act criminalised the publication or utterance of ‘blasphemous matter’, which is defined as

matter that is grossly abusive or insulting in relation to matters held sacred by any religion thereby causing outrage among a substantial number of the adherents of that religion, and, he or she intends by the publication or utterance of the matter concerned to cause such outrage.¹⁴

Following significant criticism of this proposal, an amendment was added during its progress through the legislature providing that ‘it shall be a defence to proceedings for an offence under this section for the defendant to prove that a reasonable person would find genuine literary, artistic, political, scientific or academic value in the matter to which the offence relates’. Section 36(4) also provided that ‘religion’ was not to be understood as covering any ‘organization or cult, the principle object of which is the making of profit, or that employs oppressive psychological manipulation of its followers or for the purposes of gaining new followers’.¹⁵ The courts have yet to pronounce on the meaning of these complex provisions.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

Anti-discrimination legislation

Irish law has provided relatively wide-ranging protection against religious discrimination in both employment (Employment Equality Acts 1998, 2004 and 2007) and the provision of goods and services by both state and private actors (Equal Status Acts 2000 and 2004). This legislation prohibits direct discrimination, indirect discrimination, victimisation, harassment, instructions to discriminate and the procurement of discrimination on the protected grounds. These measures were adopted as part of a general move towards the liberalisation of what had been, until the mid-1990s, a very religious and conservative society. Both acts provided protection from discrimination on a range of grounds in addition to religion (gender, disability,

13 *Corway v Independent Newspapers* [1999] IR 485.

14 Defamation Act 2009, s 36.

15 Ibid.

age, sexual orientation, marital status, family status and racial or ethnic origin). This list included, for the first time and following on from the decriminalisation of homosexuality in 1993, a prohibition of discrimination on grounds of sexual orientation.

Equality and anti-discrimination agencies

The state also established two institutions to enforce equality legislation, the Equality Authority and the Equality Tribunal (which serve as the specialised bodies required by the EU Race Directive). The Equality Authority is an independent statutory body. It has a broad remit to promote equality, including through taking cases to the Equality Tribunal, a quasi-judicial body that adjudicates on complaints of breaches of equality legislation brought by individuals.

In the wake of the economic crisis, the budget of the Equality Authority was significantly reduced, leading to the resignation of its Chief Executive in late 2008. In September 2011 the Government announced that the Equality Authority would be merged with the Irish Human Rights Commission into a joint Human Rights and Equality Commission.¹⁶

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

Religious employers in healthcare and education

A right of religious public servants to opt out of duties on grounds of conscience has not been recognised and was specifically rejected in debate on the 2010 Act that established civil unions for same-sex couples. Similarly, the Equal Status Act does not provide for an exemption on grounds of religious conscience to service providers in the private sector. There was relatively broad political support for these measures. The major source of disagreement was the extent of the exemptions granted to religious employers in the healthcare and education sectors.

¹⁶ ‘Coalition to merge human rights and equality authority’, *Irish Times*, 9 September 2011, available at <<http://www.irishtimes.com/newspaper/ireland/2011/0909/1224303758897.html>>, accessed 28 November 2011.

The position of religious employers in these areas was key in shaping the Irish Government's approach to EU Directives 2000/43/EC and 2000/78/EC. The Government lobbied strongly to ensure that exemptions for religious employers would be present in the final text in as extensive a manner as possible.¹⁷ Religious bodies played a significant role in this debate, though their campaign in favour of maximal exemptions was opposed by the Trade Union movement, especially the teachers' unions.¹⁸ EU legislation was not otherwise controversial, as the EU measures did not go beyond the laws already enacted by domestic authorities.

Religious institutions have been granted significant exemptions from the duties imposed by the Employment Equality Act. Section 37(1) of the 1998 Act provides that:

A religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person [in contravention of the Act] if—

- (a) it gives more favourable treatment, on the religion ground, to an employee or prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or
- (b) it takes action which is reasonably necessary to prevent an employee or prospective employee from undermining the religious ethos of the institution.

Although these provisions have been severely criticised by teachers' unions, there has not been significant jurisprudence in relation to them. The legislation does not define what kind of actions may constitute 'undermining the religious ethos' and does not specify whether they include alienation of followers or violation of religious doctrine. In *Flynn v Power*,¹⁹ which predates equality legislation, the dismissal of a teacher on the grounds that she was pregnant by a man

¹⁷ 'Religious ethos stand raises EU hackles', *The Examiner*, 19 October 2000, available at <http://archives.tcm.ie/irishexaminer/2000/10/19/current/ipage_2.htm>, accessed 28 November 2011.

¹⁸ See letter of the Irish Congress of Trades Unions to the Minister for Community, Equality and Gaeltacht Affairs on the issue, available at <http://www.ictu.ie/download/pdf/mary_white_letter.pdf>, accessed 28 November 2011.

¹⁹ [1985] IR 648.

who was not her husband was upheld on the basis that the employee's behaviour was inconsistent with the ethos of the school. Though it is not entirely clear, the courts may well interpret the notion of 'undermining the religious ethos' as covering behaviour such as open homosexuality or living one's personal life in a manner that openly violates the religious teachings of an employer.

The European Commission threatened to sue the Irish Government on the grounds that the exemptions provided to religious bodies were excessively wide and contravened Directive 2000/78/EC.²⁰ This threat was withdrawn during the referendum campaign on the ratification of the Lisbon Treaty.²¹ It should be noted that the Irish education system is overwhelmingly denominational in character: though largely state-funded, over 90% of primary schools, for example, are controlled by religious patrons. Though the number of 'multi-denominational' schools is growing, this means that employment opportunities for teachers whose beliefs or identity may conflict with Catholic teaching are severely limited.

In recent times the issue of religious control of schools has become prominent. Church authorities have agreed to hand over control of some of their schools in areas where the religious make-up of the population means that a religious monopoly on educational provision is no longer appropriate. The Minister for Education has suggested that up to 50% of religious schools should be handed over to state control. Religious authorities have argued for a much lower figure.²²

Controversy has also been stirred by arguments that the requirement that teachers complete a certificate in religious education discriminates against non-religious teachers or teachers from minority faiths. In 2010 the Equality Tribunal awarded €12,000 to a teacher who was denied a job based on her failure to produce a Catholic religious studies certificate, judging that she had been discriminated

20 'Ireland's protection for religious institutions "too broad": EU', *CI News*, 22 February 2008, available at <<http://www.cinews.ie/article.php?artid=4485>>, accessed 28 November 2011.

21 'Church-run schools can keep atheists off their staff', *Irish Independent*, 20 April 2008, available at <<http://www.independent.ie/national-news/churchrun-schools-can-keep-atheists-off-their-staff-1353365.html>>, accessed 28 November 2011.

22 'School patronage issue overstated says churchman', *Irish Times*, 11 October 2011, available at <<http://www.irishtimes.com/newspaper/ireland/2011/1011/1224305578073.html>>, accessed 28 November 2011.

against on grounds of her religion.²³ The denominational nature of the education system may also have an impact on the rights of religious minorities. There has as yet been no legislation on the wearing of the headscarf in schools, with the authorities being content for individual schools to deal with this issue as they see fit.

Conclusion

Relations between religion and the state in Ireland are in a state of flux. There are a number of factors that are likely to push significant change in current arrangements in the near future. The influence of the Roman Catholic Church is at an all-time low and this may have an impact in the future on its ability to maintain its influential role in the education and healthcare systems. Catholic influence on constitutional law may also come under pressure. The Labour Party, which is part of the ruling coalition, has proposed a wide-ranging constitutional review. A new constitution would be very likely to be significantly less religious in tone than the existing document. However, it is as yet unclear if such a wide-ranging overhaul will take place. The presence of immigrant communities is a relatively recent phenomenon, which has brought about an increase in religious diversity. It has not yet occasioned major legislative change, but it may give existing anti-discrimination law greater impact than it has had to date.

23 ‘Inspectors say religion too prominent on teacher course’, *Irish Times*, 12 January 2011, <<http://www.irishtimes.com/newspaper/ireland/2011/0112/1224287329438.html>>, accessed 28 November 2011.

ITALY

MARCO VENTURA

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

Over the centuries, discrimination (and often persecution) of Jewish communities and non-Catholic Christians has shaped the monolithically Catholic religious landscape of the various pre-unification Italian states (including the Pontifical states). Since the unification of Italy 150 years ago, religious discrimination has been an issue tightly linked to the social, political and legal dominance of Roman Catholicism. Under the political ideology of liberalism, which inspired both the struggle for independence and unity ('Risorgimento') and the post-unification policies until the Fascist takeover in 1922, the issue was tackled in two ways. First, the role of the Roman Catholic Church in the public sphere was narrowed in the name of the separatist principle of 'a free Church in a free state'; thus the concept of a modern citizenship regardless of the religious affiliation of the individual was established in the fields of family law (for example, through the introduction of civil marriage in 1865), public education and the welfare system. Second, the legal status of non-Catholic denominations and citizens was improved. An 1848 general act of the kingdom of Sardinia-Piedmont, the '*legge Sineo*', which was enforced in Italy after the unification of 1861, represented the main achievement of the new dispensation. The Act stated that 'difference in religious membership does not justify any exception to the enjoyment of political and civil rights and to admission to civil and military offices'.¹ Such measure can be considered the starting point of anti-discrimination law in Italy.

Article 3 of the 1948 Constitution solemnly proclaimed the principle of equality.² This Article has traditionally been interpreted as providing for formal equality in the first paragraph ('All citizens have equal social dignity and are equal before the law, without dis-

1 The translation from Italian is the author's.

2 For an English translation of the 1948 Constitution, see <http://www.quirinale.it/qrnw/statico/costituzione/pdf/costituzione_inglese_01.pdf>, accessed 15 June 2011.

tinction of sex, race, language, religion, political opinion, personal and social conditions') and for substantive equality in the second ('It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country'). This interpretation, according to Chiara Favilli,

has been applied also by the constitutional court which has issued a large number of decisions based upon art. 3, potentially applicable in any case. In particular through art. 3 the Court addresses all the disparate treatments not based upon a reasonable differentiation case by case, in respect of the principles embedded in the Constitution ... Every law can be subjected to the constitutional court review in order to assess if the choice made by the legislator is reasonable or not.³

The 1948 Constitution included three fundamental rules concerning equality and religion. First, in the attempt to compensate for the difference enshrined in Article 7 of the Constitution between the Catholic Church (a sovereign entity whose relationships with Italy are framed by a Concordat)⁴ and the other denominations, Article 8 paragraph 1 declared that 'all religious denominations are equally free before the law'. Second, Article 19 granted protection of individual and collective religious freedom to 'anyone'. Third, Article 20 provided for an implicit prohibition against discrimination between religious organisations: 'No special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organisation on the ground of its religious nature or its religious or confessional aims'.

The constitutional principle of equality, especially of substantive equality, encapsulated the predominantly Catholic and Marxist vision of a socially interventionist state devoted to building a welfare system. This vision prevailed in the Constituent Assembly and in the

³ C Favilli, 'Antidiscrimination law in Italy', unpublished working paper (2010). See also C Favilli, *La non discriminazione nell'Unione Europea* (Bologna, 2009).

⁴ Properly speaking, it is the Holy See and not the Roman Catholic Church that is a sovereign entity. See G Barberini, 'Ancora Qualche Riflessione sull'Art. 7.1 della Costituzione Italiana per Fare un Po' di Chiarezza', <http://www.statoechiese.it/index.php?option=com_content&task=view&id=285&Itemid=41>, accessed 15 June 2011.

political experience of the so-called First Republic (1948–1992). Against this background, Italian law has developed a rich domestic doctrine on equality, while direct and indirect discrimination and the very notion of a non-discrimination law are categories imported from abroad, mainly as the effect of compliance with international law and of the process of European integration. Favilli clarifies that anti-discrimination law

has its origin in the equal opportunity theory originated in the USA through the case law of the Supreme Court and aiming to fight social exclusion in order to reach a closer society and a more efficient market. Its inclusion in the Italian legal order has taken place through the implementation of international conventions and EU law.⁵

A fundamental debate on equality in the field of religion took place in the late nineteenth century, when the basics of modern *diritto ecclesiastico* were shaped. Two different positions emerged. While Francesco Scaduto pushed for the end of Catholic privileges in the name of rigorous formal equality and argued for the necessity of a strictly identical treatment of all denominations,⁶ Francesco Ruffini believed that true equality implied the different treatment of different subjects in different contexts.⁷ Based on a German doctrine (in particular of Kahl's elaboration in *Über Parität* of 1895), in 1901 Ruffini famously laid down his theory of a contextual (*relativa*), concrete and legal equality (*giusta parità*, 'just equality') as opposed to absolute, abstract, arithmetic equality (*falsa parità*, 'false equality'): 'To regulate different juridical relations in the same way is as unjust as regulating identical juridical relations in different ways'.⁸ Ruffini prevailed and shaped the whole Italian school of *diritto ecclesiastico*, eventually resulting in the reference of Article 8 of the 1948 Constitution to 'equal freedom' rather than 'equality'. The founding fathers of the Constitution did not frame collective religious freedom as implying strictly identical treatment of all religious

⁵ Favilli, 'Antidiscrimination law'.

⁶ IC Ibán, *En los orígenes del derecho eclesiástico* (Madrid, 2004). Scaduto famously declared that there was no reason not to treat the Roman Catholic Church the same way as an insurance company.

⁷ See F Ruffini, *La libertà religiosa: storia dell'idea* (Milan, 1991, first published 1901).

⁸ Ibid, p 15 (my translation). See D Quaglioni, 'Il problema storico-attuale della neutralità dello stato davanti ai conflitti religiosi', in GE Rusconi (ed), *Lo stato secolarizzato nell'età post-secolare* (Bologna, 2008), 140.

denominations. They simply prohibited any different treatment, which would affect equality in the enjoyment of collective freedom. Since then, a fundamental ambiguity has haunted Italian law and religion, with constitutional ‘equal freedom’ representing not only the foundation for a true struggle against inequalities and discrimination but also the pretext for the preservation of Catholic privileges. The adoption of the European Convention on Human Rights (ECHR) confirmed the constitutional framework (with ECHR Articles 14 and 9 corresponding to Articles 3 and 19 of the Constitution). At that point, the necessity of putting equality at the centre of Church and state relationships was raised in a seminal essay of 1958 by Francesco Finocchiaro⁹ and has never ceased to be at the heart of the law, religion, Church and state debate in Italy.

The debate on equality in Italy concerned individual as well as collective rights, mainly focusing on where to draw the line between legitimate and illegitimate distinctive treatment of the various religious denominations and thus on the discrimination of the individual by means of disadvantaged treatment of his or her religious denomination. Three main positions emerged in the First Republic. First, Italian Catholic Bishops and the Holy See defended the principle that identical treatment of the Catholic Church and the other religious denominations would amount to an abuse of the principle of equality;¹⁰ after the 1970s, they accepted that Italy was no longer a Catholic state, but never stopped claiming that Catholicism could not be considered and treated like any other denomination. Second, a part of public opinion believed that the Concordat system represented a discriminatory machine *per se*, and supported a move towards separation according to the American model or, more often, to the French

⁹ See F Finocchiaro, *Uguaglianza giuridica e fattore religioso* (Milan, 1958).

¹⁰ The Constitutional Court admitted in 1972 that obligations on the state deriving from the Concordat could imply ‘exceptions to the principle of equality’, though only in a limited way. C Cost 27 January 1972, n 12, (1972) *Giurisprudenza Costituzionale* 45, 65 [3]. The constitutional court had clarified in 1971 that exceptions were acceptable as far as they did not impinge on supreme principles; see C Cost 24 February 1971, n 31, (1971) *Giurisprudenza Costituzionale* 154, 155. The 1972 case concerned the different treatment of funds publicly collected on behalf of a workers’ association and for the Catholic Church, the former being forbidden and the latter allowed. The same ruling was given in a similar case three years later; see C Cost 20 February 1975, n 50, (1975) *Giurisprudenza Costituzionale* 197. Commenting on this ruling, the future Prime Minister Giuliano Amato blamed the court for lack of courage in pushing equality further (*ibid* 553). See G Amato, ‘La corte, le queste e il dissenso’, (1975) *Giurisprudenza Costituzionale* 553.

model of *laïcité*; this attitude was represented politically by minority parties such as the Liberals, the Republicans and the Socialists, with the Communist Party taking the pragmatic view that business with the Catholic Church and bilateral relationships granting the Church a privileged position were inevitable.

A third option gradually emerged, which pushed for a reform of Italian law, namely a revision of the 1929 Concordat in the direction of reducing the gap between Catholics and other believers.¹¹ During the 1980s, with an increasingly secularised Italian society, this third approach prevailed. The 1984 Concordat between the Holy See and Italy acknowledged that Italy was no longer a Catholic state. In 1988, the Constitutional Court recognised that the sociological fact that the majority of Italians were Catholics could not bear any legal consequence. According to the court, ‘any discrimination based on the fact that a majority or minority of people belong to a given denomination is unacceptable’.¹² In 1989, the Constitutional Court recognised *laicità* as a supreme principle deriving from the Constitution, in particular from the principles of equality, non-discrimination on grounds of religion and independence of the state from the Catholic Church. According to the court, the ‘supreme principle’ of *laicità* had to be considered as ‘one of the aspects of the form of State outlined by the Constitution’.¹³ Such a principle was ‘not synonymous with indifference towards the experience of religion’,¹⁴ but represented ‘the state’s guarantee that religious freedom will be safeguarded, in a framework of denominational and cultural pluralism’.¹⁵ *Laicità* was thus framed as a principle synonymous with equality and non-discrimination.¹⁶ In 1997, the Constitutional Court ruled that *laicità*

¹¹ It is worth noticing that Italian Protestants were split on whether to opt for the second or the third approach.

¹² C Cost 8 July 1988, 925, (1989) 1 *Quaderni di Diritto e Politica Ecclesiastica* 637, 640 [10] (my translation).

¹³ C Cost 11 April 1989, n 203, (1990) 1 *Quaderni di Diritto e Politica Ecclesiastica* 193 (translation from C Panara, ‘In the name of God: state and religion in contemporary Italy’, (2011) 6 *Religion and Human Rights* 75, 80).

¹⁴ Ibid (my translation).

¹⁵ Ibid (my translation). A different translation is provided in Panara, ‘In the name of God’: *laicità* (which Panara translates as ‘secularism’) ‘does not imply indifference to religions by the State ... on the contrary it is a guarantee of protection of religious freedom in a system based on confessional and cultural pluralism’.

¹⁶ See M Ventura, ‘The rise and contradictions of Italy as a secular state’ in P Cumper and T Lewis (eds), *Religion, Human Rights and Secular Society in Europe* (Cheltenham, forthcoming).

implied ‘the equidistance and the impartiality of the law with regard to all religious denominations’.¹⁷ Three years later it further refined the tie between *laicità* and equality through the following statement:

Under the fundamental principles of equality of all citizens before the law regardless of their religion (Article 3 of the Constitution) and equal freedom of all religious denominations before the law (Article 8 of the Constitution), the state’s approach to different religious denominations must be equidistant and impartial, with no regard for the greater or smaller membership of this or that religious denomination (Constitutional Court judgments 925 of 1988, 440 of 1995 and 329 of 1997) nor for the bigger or smaller social reaction to the violation of the rights of one denomination or the other (again Constitutional Court judgment 329 of 1997), it being imperative to protect the conscience of each believer regardless of the religious denomination professed (again Constitutional Court decision 440 of 1995) ...

Such a position of equidistance and impartiality reflects the principle of *laicità* that the Constitutional Court has deduced from the system of the constitutional norms, a principle that enjoys the status of ‘supreme principle’ (Constitutional Court judgments 203 of 1989, 259 of 1990, 195 of 1993 and 329 of 1997) and that ‘characterises as pluralist the form of our state within which different faiths, cultures and traditions have to coexist in equality of freedom’.¹⁸

The new dispensation also resulted in the improvement of the legal status of some non-Catholic denominations through *intese* (‘agreements’) signed between the Government and Protestant and Jewish denominations between 1984 and 1993. With the so-called Second Republic, after the electoral victory of Berlusconi in 1994, and the traumatic influx of immigrants, which transformed Italy into a multicultural country, debate on religious equality changed. Failure to push further the process of reduction of inequalities materialised in 2000 when Parliament ceased approving further agreements with non-Catholic denominations, and in 2007 when a general act on religious freedom providing for more equal conditions was dropped in 2007. When heard in Parliament, Catholic bishops stated that they accepted a religious freedom act but that they disapproved of the

¹⁷ C Cost 10 November 1997, n 329, (1997) *Quaderni di Diritto e Politica Ecclesiastica* 981, 983 [2] (my translation).

¹⁸ C Cost 20 November 2000, n 508, (2000) *Quaderni di Diritto e Politica Ecclesiastica* 1041–1042 [3] (my translation).

reference to *laicità* in the act, and they urged Parliament not to alter the imbalance between the privileged Catholic Church and the other denominations.¹⁹ In addition, the perspective of legal measures tailored for Islam (for example a ban on the burqa, the training of Italian imams) raised a political debate that resulted in a major split in popular opinion (in particular, of a deeply divided Catholic opinion). Catholics belonging to the populist Northern League blamed Cardinal Tettamanzi, the Archbishop of Milan, for his allegedly ‘multiculturalist’ views on immigrants and Muslims, and for his reluctance to join in the political exploitation of the crucifix: they ultimately stigmatised the cardinal as being the ‘Imam of Milan’. Racial, ethnic and religious discrimination became increasingly intermingled. Alessandro Simoni comments: ‘Racial and ethnic discrimination often overlaps with discrimination on the basis of religion and belief, mostly in the form of hostility towards “Arabs” and “Muslims” which occurs without distinction.’²⁰ After 2001, the new and problematic reference to ‘Christianity’ (that is, Roman Catholicism) to define the identity of the Italian state has encapsulated the division between those who believe that the use of religion to define the collective Italian identity is necessary for the inclusion of newcomers and those who believe that the transformation of the controversial and complex religious history of the country into a dull civil religion of Christianity is both blasphemous and discriminatory. The struggle over the crucifix in state school classrooms and the *Lautsi* case pointed at such a dilemma.

For a long time supranational instruments against discrimination have remained on the margins of an Italian debate on religious, racial and ethnic equality that has proved extremely autarchic. Favilli writes:

The (Italian) legislature has never adopted a specific law forbidding discrimination to implement the Constitutional principle of equality *per se*. Indeed the first acts adopted in this field and applying also within the private sphere were issued to implement international conventions (such as law 13 October 1975 n 654 on racial discrimina-

¹⁹ See the hearing before the House of Deputies of Monsignor Giuseppe Betori, Secretary General to the Catholic Bishop’s Conference, 16 July 2007.

²⁰ Alessandro Simoni, ‘Country context’, <<http://www.non-discrimination.net/content/country-context-12>>, accessed 15 June 2011.

tion) or European laws (such as law 9 December 1977 n 903 on sex discrimination).²¹

Prior to the development of a legislation deliberately aimed at fighting discrimination, the Italian Parliament took two momentous steps in the direction of a better implementation of the principle of equality. In 1970 employment law was reformed, and Article 15 of the relevant act also included measures against ‘religious discrimination’.²² In 1975 the reform of family law resulted in the enforcement of better protection of gender equality and religious equality also, since the introduction of divorce admitted no discrimination between those who had married under civil law and those who had married under the Concordat (the Holy See struggled in vain for the exclusion of those who had married under the Concordat from the application of civil divorce).²³ The first genuinely Italian act against racial, ethnic and religious discrimination was approved in 1993.²⁴ In 1998 another piece of anti-discrimination legislation was passed.²⁵ This was the first Italian act dealing with general immigration law, and, as Simoni put it, ‘lack of visibility of antidiscrimination provisions dispersed in a piece of legislation with another subject matter was indeed a problem’.²⁶ The Turco Napolitano Act took its name from two former members of the Italian Communist party and ministers in the first Prodi cabinet – Livia Turco (then Minister of Social Solidarity) and Giorgio Napolitano (then Minister of the Interior); the Act was the expression of an optimistic centre-left approach to immigration, emphasising inclusion and equality. Article 43 defined discrimination as ‘any conduct that, directly or indirectly, entails a distinction, exclusion, restriction or preference based on ... religious convictions or practices’.²⁷ Favilli underlined that Articles 43 and 44 for the first time

granted a specific civil action against discrimination based on race, colour, descent, national or ethnic origin and religious beliefs, in all

21 Favilli, ‘Antidiscrimination law’.

22 L 20 May 1970, n 300.

23 L 19 May 1975, n 151.

24 L 25 June 1993, n 205.

25 D lg 25 July 1998, n 286.

26 Alessandro Simoni, *Report on Measures to Combat Discrimination: Report on Italy 2009*, (2010), <<http://www.non-discrimination.net/countries/italy>>, accessed 15 June 2011.

27 My translation.

instances in which both a private subject or the public administration has caused discrimination ('the judge can order the interruption of the detrimental behaviour and adopt any other adequate measure').²⁸

In 2000 Francesco Margiotta Broglio analysed the latest developments in the context of European integration and linked them to the history of the Italian understanding of equality in Church and state relationships (going back to the 1938 anti-Jewish legislation). Thus he pointed to the crucial intermingling of racial and religious discrimination.²⁹

Article 14 of the ECHR has had little impact on Italian canon law. It is worth recalling the similarity between Article 14, in conjunction with Article 9, of the 1950 ECHR on the one hand and Article 3, in conjunction with Article 19, of the 1948 Italian Constitution on the other. Yet there was a fundamental difference: if the European definition of the rights was broader (in particular, the Italian Constitution did not mention freedom of conscience), the Italian Constitution was more liberal in framing legitimate grounds for restriction of religious rights, 'morals' being the only ground for restriction of religious freedom. But such a difference was not enough for Italian experts, lawyers and judges to interpret Article 14 of the ECHR as implying a departure from the domestic constitutional approach to religious inequalities. In the main Italian religion-related cases brought before the European Court of Human Rights, applicants have resorted instead to Article 6 (*Pellegrini* in 2001), Article 10 (*Lombardi Vallauri* in 2009) and Article 9 (*Lautsi* in 2009 and 2011). One exception can be found in the 2007 case of *Spampinato* against discrimination in the field of public funding of religions through a percentage of the income tax (*otto per mille*), when the applicant claimed Article 14 had been violated in conjunction with Article 9. The court declared the application inadmissible by defin-

28 Favilli, 'Antidiscrimination law'. Favilli also noticed that 'the wording of art. 43 reflects its international inspiration as discrimination is defined in terms which recall the definition used by the International Convention against discrimination'. See also G Casuscelli, 'Il diritto penale', in G Casuscelli (ed), *Nozioni di Diritto Ecclesiastico* (third edition, Turin, 2009), 267.

29 F Margiotta Broglio, 'Discriminazione razziale e discriminazione religiosa', (2000) *Quaderni di Diritto e Politica Ecclesiastica* 269.

ing legitimate different treatment in line with the traditional Italian understanding of ‘equal freedom’.³⁰

The EU Directives of 2000 were transposed through two Decrees enacted by the Berlusconi government in 2003 on the basis of the law-making powers delegated by the Parliament through the ‘omnibus act’ for implementation of EC law approved in 2002.³¹ The major religious issue during the negotiation process has been the protection of religious – namely Catholic – organisations. The Holy See pushed the Italian government to lobby in Brussels for the directives to safeguard the specificity of religious (i.e. Catholic) employment. In general, little if any debate took place among politicians and experts. Simoni has remarked:

The two Decrees simply followed each one the wording of one of the directives, and the discrepancies with these can easily go unnoticed by the layperson. They have been introduced without relevant preparatory work, and in the case of the decree implementing Directive 2000/78 the ‘omnibus act’ did not contain specific guidelines, while those referring to the transposition of Directive 2000/43 were however very poor.³²

No effort was made to harmonise the Italian law. Again Simoni comments:

The decrees did not abolish the pre-existing anti-discrimination rules contained in the 1998 Immigration Act, nor did [they] unify them, but just add a further legal regime, thus realising a complex situation which could bring into litigation many legalistic arguments about *jus superveniens*.³³

It is worth noting that, in 2002, the year before the adoption of the directives, the Berlusconi government had adopted the repressive Bossi Fini Immigration Act, named after the populist leader of the

³⁰ *Spampinato v Italy* App no 23123/04 (ECtHR, 29 March 2007): ‘Quant à l’article 14 de la Convention, la Cour rappelle que cette disposition n’interdit pas toute distinction de traitement dans l’exercice des droits et libertés reconnus, l’égalité de traitement n’étant violée que si la distinction manque de justification objective et raisonnable, c’est-à-dire en l’absence d’un but légitime et d’un rapport raisonnable de proportionnalité entre les moyens employés et le but visé’ (unreported case, official English text not available).

³¹ D lg 9 July 2003, n 215 and 216. For the religious implications see S Coglievina, ‘Diritto antidiiscriminatorio e interessi religiosi nell’Unione europea’ (PhD thesis, Università Cattolica del Sacro Cuore Milano, 2007/2008), p 100 and bibliography at n 6.

³² Simoni, ‘Country context’.

³³ Ibid.

Northern League Umberto Bossi (then Minister for Institutional Reforms and Devolution) and the leader of the Italian post-fascists Giancarlo Fini (then Deputy Prime Minister).³⁴

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

No authority such as an Equality Commission has been set up in Italy. The only equality body that has been created is that with regard to race and ethnic origin, the Ufficio Nazionale Antidiscriminazioni Razziali (UNAR).³⁵ As underlined by Simoni, this ‘is not an autonomous body, since it is established as a branch of the Department for Equal Opportunities of the Presidency of the Council of Ministers, previously dealing exclusively with gender discrimination’.³⁶

Governmental bodies presiding over religious freedom policies have a general competency, which can be considered as including non-discrimination issues as well. This is the case for the Direzione Centrale degli Affari dei Culti at the Ministry of the Interior, and also for the Commissione Consultiva per la Libertà Religiosa, created in 1997 at the Presidency of the Consiglio dei Ministri.³⁷ The case of the Comitato per l’Islam, an advisory body of the Ministry of Interior since 2010, is particularly problematic. First, a specific body addressing issues pertaining to one particular religion seems incoherent with a constitutional law that is usually interpreted as preventing the state from dealing with a specific religion without the agreement and co-operation with the relevant representatives (so far, in the exercise of his political discretion, the Minister of the Interior has excluded the Unione delle Comunità e Organizzazioni Islamiche in Italia (UCOII), the main organisation of Italian Muslims, from the Comitato per l’Islam). Second, the Comitato serves the Ministry as a legal advisory body. As far as the legal advice is aimed at the adaptation

³⁴ L 30 July 2002, n 189. Contrary to the Turco Napolitano Act, the Bossi Fini Act did not include any provision against discrimination of immigrants.

³⁵ See <<http://www.unar.it>>, accessed 15 June 2011.

³⁶ A Simoni, ‘Equality bodies’, <<http://www.non-discrimination.net/content/equality-bodies-12>>, accessed 15 June 2011.

³⁷ See <<http://www.governo.it/Presidenza/USRI/confessioni/commissioni.html#2>>, accessed 15 June 2011.

of general norms to Muslim communities, this seems totally compatible with the principle of equality as enshrined in the Constitution.³⁸ If, however, the activity of the Comitato and the Ministry is aimed at shaping regulations specific to Islam, this contradicts the general constitutional prohibition to dictate norms to a specific religious denomination without a previous agreement with the relevant representatives.

For the reasons given above, there is no such thing in Italian law as a systematic and comprehensive corpus of anti-discrimination law in the field of religion. Provisions must be found in a wide range of sources – specific or general, national or regional, providing for criminal prohibitions or for administrative or civil prohibitions. Case law of the Constitutional Court or of other courts can also be relevant. Key elements are a combination of constitutional principles – first of all *laicità* and equality as enshrined in Article 3 – and principles arising from the implementation of the 2000 Directives.

No legal definition of religion or religious denomination has been provided in the statutes. However, case law and legal doctrine have elaborated some parameters. In particular, in a decision of 1993, the Constitutional Court stated that a *confessione religiosa* ('religious denomination') is defined by two parameters: self-definition as a religious denomination, and an agreement with the state. Where an agreement with the state is absent, three additional parameters should be taken into account: previous *riconoscimenti pubblici* ('public recognitions'); the charter of the organisation; *comune considerazione* ('common opinion').³⁹ The Constitutional Court established such a broad definition of religious denomination in the context of its elaboration on equality in the field of collective religious rights: 'any discrimination against one religious faith is constitutionally inadmissible insofar as it contradicts the right to freedom and the principle of equality'.⁴⁰ The case of new religious

³⁸ This was the case of the 'Parere su Islam e formazione', a Comitato document addressing the issue of the application to imams of general norms for religious ministers. See Comitato per l'Islam Italiano, *Parere su Islam e formazione*, 31 May 2011.

³⁹ C Cost 27 April 1993, n 195, (1993) *Quaderni di Diritto e Politica Ecclesiastica* 693, 695 [5]. The court confirmed this ruling in 2002: C Cost 8 July 2002, n 346, (2002) *Quaderni di Diritto e Politica Ecclesiastica* 701. Simoni, *Report on Measures to Combat Discrimination*, p 19, pointed out that 'such criteria have never been tested in the context of antidiscrimination cases'.

⁴⁰ My translation.

movements has proved particularly problematic. A string of cases dealt with Scientology, which was eventually recognised as a religious denomination for purposes of tax law.⁴¹

As far as atheists are concerned, the debate started in 1948, when the Tribunal of Ferrara gave custody of a child to the mother, arguing that the father was an atheist and thus less fit to educate a child.⁴² After 30 years of discussions, the Constitutional Court ruled in 1979 that atheists should not be compelled to take an oath in courts, based on the principle that no difference should exist in the protection of 'the free deployment of both the religious faith and atheism'.⁴³

With regard to specific controversies, the main areas of contention are employment and education. Prohibition is also operative with regard to racist violence, wherever it occurs. As far as religion is specifically concerned, after the constitutional rulings of 1993 against the Region of Abruzzo and 2002 against the Region of Lombardia, the public funding of places of worship should also be an area where the prohibition is operative.⁴⁴ But the latest controversies on the building of mosques show that this is still a major issue. Family conflicts are likely to be a sensitive area in which prohibitions against discrimination are hardly given serious application. In a controversial 2009 decision, the Tribunal of Prato denied a Jehovah's Witness the custody of his child, not because of his religious affiliation as such but because the child's adoption of the Jehovah's Witnesses' lifestyle would have alienated him from the life he had before the father's conversion.⁴⁵ Immigration law and the granting of asylum are also increasingly sensitive areas, with a prohibition of discrimination on religious grounds in measures such as expulsions or extraditions clearly existing, but with problematic enforcement, especially when an alleged Muslim threat is at stake.⁴⁶

As for prohibited acts and conduct, besides the measures provided in the decrees implementing the 2000 Directives in the above

41 See generally M Ventura, 'Les nouveaux mouvements religieux: une catégorie invisible dans la soi-disant Italie Chrétienne', in N Luca (ed), *Quelles régulations pour les nouveaux mouvements religieux et les dérives sectaires dans l'Union Européenne* (Marseille, 2011).

42 Trib Ferrara 31 August 1948, (1949) *Diritto Ecclesiastico* 388.

43 C Cost 10 October 1979, n 117, (1979) *Giurisprudenza Costituzionale* 816, 822 [3].

44 See the 1993 and 2002 cases quoted at n 37.

45 Trib Prato, 11 February 2009, (2009) *Quaderni di Diritto e Politica Ecclesiastica* 878.

46 Casuscelli, 'Il diritto penale', p 268.

mentioned statutes, prohibitions depend on the interpretation of general principles such as equality.

Regarding justifications, especially in the field of employment, religious employers systematically resort to the argument that discrimination is needed in order to safeguard the religious ethos of the organisation.

Affirmative actions are justified because of the disadvantaged condition of the relevant categories; so far this has not applied to religion.

With Italy becoming a multi-ethnic society, and the debate exploding on the acceptability of cultural and religious grounds for an exception in the application of criminal law, most relevant defence cases have centred on cultural defence. In the absence of relevant statutory provisions, cultural defence was initially accepted by some judges, but courts are now much stricter in refusing such a defence.⁴⁷

Remedies depend on the legal nature of the prohibition (criminal, administrative or civil) as well as on the relevant field (employment, family, etc). Sanctions and the nullification of acts (such as the discriminatory termination of an employment) are the most common legal remedy to abuses. Compensation for damages, namely for moral damages, is also a crucial issue. In the transposition of the 2000 Directives, remedies have not been framed as to be easily accessible.⁴⁸ Little assessment has been provided regarding the availability and efficacy of these remedies, especially in the field of religion. In cases of convictions for crimes committed with the aim of discriminating against someone on ethnic, racial or religious grounds, aggravating circumstances may apply.

Regarding cultural defence, in a leading case a Muslim man was convicted for domestic violence against his wife. The Corte di Cassazione did not accept the man's claim that his religious and cultural world vision had pushed him to apply physical punishment to the

⁴⁷ See the overview in F Basile, *Immigrazione e reati culturalmente motivati: il diritto penale nelle società multiculturali* (second edition, Milan, 2010).

⁴⁸ Failure to frame a better-performing system of remedies in the decrees transposing the 2000 Directives is underlined in N Fiorita, 'Le direttive comunitarie in tema di lotta alla discriminazione, la loro tempestiva attuazione e l'eterogenesi dei fini', (2004) *Quaderni di Diritto e Politica Ecclesiastica* 376.

woman and that he was therefore entitled to an acquittal or at least to a milder sentence.⁴⁹

As for aggravating circumstances, in 2006 the Corte di Cassazione applied the aggravating circumstance to a man who had insulted a Muslim woman and torn her veil off. In this case the court interpreted the dominantly Catholic environment as an element leading to the definition of the act as a racist act against a different religious culture.⁵⁰ The court gave a similar ruling in 2010, again in a case concerning anti-Islamic hatred.⁵¹

The Tribunal of Brescia decided an interesting case of indirect discrimination in 2010. In order to prevent Muslims from settling in the area, the mayor of a small village in the Lombardy region had prohibited the use of languages other than Italian in outdoor public gatherings. The judges struck down the administrative measure as discriminatory.⁵²

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

The constitutional principle of equal freedom has been interpreted as providing for an extremely large differentiation in the legal status of religious denominations. Constitutional case law has elaborated the parameter of ‘reasonable and non-arbitrary differentiation’⁵³ as the rationale for drawing the line between legitimate and illegitimate grounds for differential treatment, having regard to the specific context of the case. The application of such parameters has led the Constitutional Court to deem illegitimate a regional act providing for the public funding of places of worship for some religious denominations only.⁵⁴ Blasphemy law has also been reformed through several

49 Cass 12 August 2009, n 32824, (2010) *Quaderni di Diritto e Politica Ecclesiastica* 1033.

50 Cass 4 April 2006, n 11919, (2006) *Quaderni di Diritto e Politica Ecclesiastica* 1052.

51 Cass 8 January 2010, n 286, (2010) *Quaderni di Diritto e Politica Ecclesiastica* 1033.

52 Trib Brescia 29 January 2010, <<http://olir.it/documenti/?documento=5249>>, accessed 15 June 2011. With comment by N Fiorita and L Iovane.

53 In general see C Cost 28 March 1996, n 89, (1996) *Giurisprudenza Costituzionale* 819.

54 See cases cited in n 37.

Constitutional Court decisions based on the application of equality.⁵⁵ A momentous application of the ‘reasonable and non-arbitrary differentiation’ parameter was the 2000 ruling of the Corte di Cassazione against the display of the crucifix in polling stations. A member of the polling staff claimed that the presence of the crucifix in the polling station violated his freedom of conscience with regard to the principle of equality and refused to perform his duties. He was first convicted for refusing to perform his public officer’s duties and then acquitted by the Appeal Court of Turin. Asked to judge on the appeal against the acquittal, the Corte di Cassazione confirmed the acquittal on the grounds that since the crucifix was the symbol of Catholicism as the religion of the state, its compulsory display was inconsistent with *laicità*, the secular character of the (no longer Catholic) Italian state and thus discriminated among the citizens on the basis of their differing religious opinions.⁵⁶

Acute problems have emerged with Islam, in particular regarding the state’s interference in the training of imams⁵⁷ and local authorities’ refusal (for administrative reasons) to allow Muslim communities to open adequate places of worship.⁵⁸

Differential treatment of a religious category as such can be admitted for the sake of religion. This is the case with the specific status of religious ministers, which is problematic only insofar as advantages apply to a specific denomination only. This was the case with the draft law providing for the right of the competent Catholic bishop to be informed in the case of judicial telephone tapping of a Catholic priest.⁵⁹

Gender discrimination was addressed through the acts of 2006 and 2007, which implemented directive 2004/113/CE.⁶⁰ In 2010 the

⁵⁵ Regarding blasphemy, the Constitutional Court ruled unconstitutional several norms of the Criminal Code of 1930 based on the preference for Catholicism as the state’s religion. See C Cost 18 October 1995, 440, (1995) *Quaderni di Diritto e Politica Ecclesiastica* 1047; C Cost 10 November 1997, 329, (1997) *Quaderni di Diritto e Politica Ecclesiastica* 981; C Cost 13 November 2000, 508, (2000) *Quaderni di Diritto e Politica Ecclesiastica* 1041; C Cost 9 July 2002, 327, (2002) *Quaderni di Diritto e Politica Ecclesiastica* 1051; C Cost 18 April 2005, 168, (2005) *Quaderni di Diritto e Politica Ecclesiastica* 1065.

⁵⁶ Cass 1 March 2000, n 439 (2000) *Quaderni di Diritto e Politica Ecclesiastica* 846.

⁵⁷ Comitato per l’Islam Italiano, *Parere su Islam e formazione*, 31 May 2011.

⁵⁸ See S Allievi, *La guerra delle moschee: l’Europa e la sfida del pluralismo religioso* (Venice, 2010).

⁵⁹ Disegno di legge n 1611, approved by the Senate on 10 June 2010, Art 25.

⁶⁰ D lgs 6 November 2007, n 196.

Constitutional Court argued that the principle of equality does not imply the right of a same-sex couple to a civil marriage and ruled legitimate the lower courts' interpretation that civil marriage is exclusively heterosexual in character.⁶¹ (It is worth remembering that Italy has not introduced civil partnerships to accommodate the needs of same-sex partners.) A draft bill under the Prodi government was actively opposed by the Catholic bishops and eventually dropped in 2007.

Religious employers in general are exempt if their status is recognised through the Concordat (or national para-concordat or regional agreements) for Catholics or through the agreements for the other denominations. The Church may also have an input into employment activities that are related to religious matters. For example, if the competent bishop is no longer happy with the teaching of the doctrine of Catholicism in a state school, the state is bound to move that teacher to another subject, even though teachers are state employees.

Catholic employers are largely free to discriminate as far as they are allowed to assume that the measure is necessary to safeguard the identity of the organisation. No distinction is made between personal/private/subjective and public/objective circumstances. Pregnancy of an unmarried Catholic employee or homosexuality is likely to count as public statements opposing the official teaching of the Church. Simoni writes:

a complete discretion, which can raise problems of compatibility with the Directives, of religious institutions in this sense clearly exists in Italy. Religious teachers in State schools must have a 'leave' from the bishop, which can be denied or cancelled if the person does not fully comply with the moral standards of a Catholic believer. In a 2003 case the *Corte di Cassazione* admitted the validity of the termination of the employment relationship following the pregnancy of an unmarried female teacher.⁶² The legal ground for such discretionary power lies in the Concordat of 1984 and its protocols, and in a law of 2003.⁶³

The same does not apply to other denominations.

61 C Cost 15 April 2010, n 138, (2010) *Quaderni di Diritto e Politica Ecclesiastica* 899.

62 Cass 24 February 2003, n 2803, (2003) *Quaderni di Diritto e Politica Ecclesiastica* 777.

63 Simoni, 'Country context'.

Case law has developed on the legitimacy of religious motives as grounds for granting an exception to the application of a general prohibition. In 2008 the Corte di Cassazione ruled that as far as certain voodoo practices implied slavery, criminal law applied regardless of the alleged religious motives of the convicted.⁶⁴ Also in 2008, the Corte di Cassazione recognised that a Rastafarian under trial for possession of cannabis was entitled to an exception from the application of the general anti-drug criminal law because of his constitutionally protected religious needs.⁶⁵ Two opposing decisions were given on the right of a Sikh man to be exempted from the general prohibition to carry knife-like weapons. In 2009 the Tribunal of Cremona ruled that it was legitimate to carry a *kirpan* and thus granted an exception on religious grounds;⁶⁶ in contrast in 2010 the Tribunal of Latina convicted a Sikh for carrying a *kirpan* because the judges did not recognise the conduct as worthy of an exception on religious grounds.⁶⁷

The Constitutional Court faced a problem of discrimination in the accommodation of worship needs in 2003 when a member of the Assemblies of God who had been placed under surveillance and assigned to compulsory residence was denied permission to leave the area and travel to another place where he could join a congregation of his faith. The court ruled that the absence of a congregation of the relevant faith in the area of the prison could not be deemed a valid reason to grant an exception to the general penitentiary law, but suggested that compulsory residence be moved to an area where a congregation was available.⁶⁸

⁶⁴ Cass 30 December 2008, n 48350, (2009) *Quaderni di Diritto e Politica Ecclesiastica* 1064. See GL Giordano, 'I riti vudù fra diritto di libertà religiosa e reato di riduzione in schiavitù', (2009) *Quaderni di Diritto e Politica Ecclesiastica* 1055.

⁶⁵ Cass 10 July 2008, n 28270, (2008) *Quaderni di Diritto e Politica Ecclesiastica* 1051.

⁶⁶ Trib Cremona 13 January 2009, (2009) *Quaderni di Diritto e Politica Ecclesiastica* 1037.

⁶⁷ Trib Latina 29 January 2010, (2010) *Quaderni di Diritto e Politica Ecclesiastica* 1038.

⁶⁸ C Cost 1 October 2003, n 309, (2003) *Quaderni di Diritto e Politica Ecclesiastica* 1041.

LATVIA

RINGOLDS BALODIS AND EDVĪNS DANOVSKIS

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

No discrimination authority (such as an Equality Commission) charged with oversight of religious discrimination exists in Latvia. From 2000 to 2008 the Board of Religious Affairs was responsible for making proposals on arrangements for the elimination of infringements of human rights. The main responsibility of the Board was to record religious organisations in public register, and to check the compliance of documents connected with the establishment and activity of religious organisations with laws, other normative acts and the actual situation. The Board of Religious Affairs had a duty on a constant basis and in co-operation with other state institutions to prepare and submit to the Minister of Justice information on infringements of Clause 99 of the Constitution, infringements of other normative acts regulating human rights and analysis of circumstances preceding the appropriate violations of law. The Head of the Board of Religious Affairs was appointed and dismissed by the Cabinet of Ministers. In accordance with the Amendments to the Law on Religious Organisations (ROL)¹ adopted by the Latvian Parliament on 18 December 2008 the Board of Religious Affairs has ceased to exist. From 1 January 2009, religious organisations and their institutions have been entered into the Register of Religious Organisations and Their Institutions by the Register of Enterprises of the Republic of Latvia, which maintains this Register. The Ministry of Justice has charge of handling relations between the state and religious organisations; within the competence set by laws and other normative acts it ensures elaboration, co-ordination and implementation of the state's policy on religious affairs, and it deals with issues connected with mutual relations between the state and religious organisations. However, neither the Register of Enterprise nor the Min-

¹ Religisko organizāciju likums (Law on Religious Organisations), *Latvijas Vēstnesis* (the official gazette), 26 September 1995, Nr 146.

istry of Justice has a special responsibility for oversight of religious discrimination.

In 1996 Article 85 of the *Satversme* (Constitution of the Republic of Latvia)² was revised by establishing the Constitutional Court,³ and therewith the Law of the Constitutional Court was adopted.⁴ Since 2000 the Constitutional Court has been obliged to examine not only the submissions of statutory bodies (the President, the Prime Minister and the Deputy of the Saeima (Parliament)) but also constitutional claims submitted by anyone who believes that legal provision has violated his or her fundamental rights or the right to freedom of religion. Only one judgment related to religion has been passed (in a case concerning keeping religious items by prisoners held in custody).⁵

The Ombudsman Law, which was adopted on 6 April 2006 and came into force on 1 January 2007, established the institution of the Ombudsman, who is an official elected by the Parliament with the main tasks of promotion of the protection of human rights and promotion of a legal and expedient state authority that observes the principle of good administration. The office of the Ombudsman is independent in its actions and is governed only by law. No persons or state or municipal institutions have the right to influence the performance of the Ombudsman's functions and tasks. The Ombudsman acts to protect the rights and legal interests of a person in situations when state and municipal authorities have breached the human rights defined by the Constitution and international human rights' documents. Some of the key human rights are the rights to a fair, free and timely trial, freedom of speech and expression, private life, housing, social security, employment, property, these and other rights related

2 Amendment to the Constitution of the Republic of Latvia, *Latvijas Vēstnesis*, 12 June 1996, Nr 100/101(585/586).

3 Article 85 of the Constitution: 'In Latvia, there shall be a Constitutional Court, which, within its jurisdiction as provided for by law, shall review cases concerning the compliance of laws with the Constitution, as well as other matters regarding which jurisdiction is conferred upon it by law. The Constitutional Court shall have the right to declare laws or other enactments or parts thereof invalid. The appointment of judges to the Constitutional Court shall be confirmed by the Saeima for the term provided for by law, by secret ballot with a majority of the votes of not less than fifty-one members of the Saeima.'

4 Law of the Constitutional Court, *Latvijas Vēstnesis*, 14 June 1996, Nr 103(588).

5 Judgment in case 2010-50-0 of the Constitutional Court, 18 March 2011, <http://www.satv.tiesa.gov.lv/upload/Judg_2010-50-0386ms.htm>, accessed 20 November 2011.

to the interests of children and the rights of persons with special needs.⁶

Latvia is a Member State of the European Union and has therefore implemented in its legal system the general principle of equality. The country proclaimed its independence in 1990 and immediately joined the UN International Declaration of Human Rights,⁷ whose Article 1 defines the general principle of equality ('All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'). Similarly, Latvia joined the UN International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both Covenants prohibit religious discrimination *expressis verbis*. Another significant step was the signing of the European Convention on Human Rights (the Convention became applicable in Latvia on 27 June 1997, and as of that date the decisions of the European Court of Human Rights became obligatory for Latvia). In 1998 the Constitution of Latvia was amended with the addition of Chapter 8 (Fundamental Human Rights), in which Article 91 defines human rights to legal equality and the principle of non-discrimination: 'All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind.' According to Article 89 of the Constitution the state shall recognise 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 wherever possible in accordance with the interpretation of international human rights law. On 12 November 2000 Latvia signed Supplementary Protocol 12 of the ECHR, which provides for the establishment of prohibition of discrimination as a separate right. According to the opinion of Egils Levits (a judge of the Court of Justice of the European Union and a prominent legal scholar), the second sentence of Article 91 must be interpreted as

⁶ See <<http://www.tiesibsargs.lv/eng/ombudsman/>>, accessed 20 November 2011.

⁷ Declaration of the Supreme Soviet of the Republic of Latvia on Adherence to Documents of International Law on Human Rights Issues, *Zījotājs*, 24 May 1990, Nr 21. The adherence to the International Declaration of Human Rights was unnecessary owing to the fact that the Declaration is not an international treaty. This fact was not considered by persons who drafted the Declaration of the Supreme Soviet.

‘classic’ non-discrimination (despite the ambiguous formulation of the Article). It prohibits different treatment based on particular – restricted – categories. Levits point out that, in its discussion on the rule of equality the parliamentary commission that prepared Chapter 8 discussed prohibited criteria such as ‘age’ and ‘sexual orientation’ but not ‘religion’. Although the commission decided not to specify any criteria, leaving them to be interpreted through practice, it is clear that the actual will of the legislature was to include the original twelve prohibited criteria of Article 91 (race, ethnicity, gender, age, language, party affiliation, political belief, religion, world belief, social status, financial status and employment status), and, citing ‘other similar circumstances’, to be open for future development.⁸

The Constitution only mentions religion/church in Article 99, where it is proclaimed that ‘Everyone has the right to freedom of thought, conscience and religion. The church shall be separate from the State.’ The Republic of Latvia guarantees the right to freedom of religion, including the freedom to adhere to a particular religion individually or in association with others or to have no religious affiliation, to change one’s religion or conviction freely, and to express one’s religious opinions freely in accordance with existing laws.⁹ Neither the Constitution nor the ROL provides an explanation of ‘religion’, but the legal content of the term is given in legal definitions of religious activity: religious activity is a devotion to religion or faith, to the practice of a particular denomination or to practising religious or ritual ceremonies and preaching (ROL, Article 1, clause 1). The term ‘religion’ is similarly interpreted in legal dictionaries.¹⁰ It should be emphasised that religious beliefs and doctrine and their content differ so greatly that a universal definition of religion would in any case be incomplete and one-sided. Moreover, international law does not provide an explanation of religion or belief. Most lawyers and theologians agree that the attempt to cover all

⁸ See E Levits, ‘Notes on Chapter 8 of the Constitution: human rights’, (1999) 9–12 *Cilvēktiesību Žurnāls* 28. This list corresponds to the commission’s previous version, for which there was unity, before the change to not mentioning any of the prohibited criteria.

⁹ R Balodis, ‘Church and state in Latvia’, in S Ferrari and WC Durham (eds), *Law and Religion in Post-Communist Europe* (Leuven, 2003), p 149.

¹⁰ Religious activities include worship services, worship ceremonies, rituals, meditation and missionary activities (evangelism). See *Likumdošanas aktu terminu vārdnīca* (*Dictionary of Legislative Terms*) (Riga, 1999), p 359.

religions, trying to find a commonly acceptable, comprehensive term for religion, will be unsuccessful; nor would it be an exhaustive list of all cases. Thus believers are left with the right to the final word in the definition of religion. World practice has shown that attempts to define religion by a legal definition have failed either because understanding of the term becomes too general, or because, in contrast, it becomes too limited, thus often resulting in discrimination against particular religions. Definitions by rules of law do not have the desired effect, since they are mostly still open to interpretation. Religion comes in 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 the Constitution lists three freedoms – of opinion, of conscience and of religious conviction – that provide common rights to persons with firm religious beliefs, as well as to people with a free-standing philosophical view of the world¹¹ or people with atheistic or agnostic beliefs. Protection provided by the Article can not be generalised to extend to the political expression of opinion, although depth of feeling and expression can in some cases be treated as religious (for example, Communist or National Socialist opinions).

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

Religion is one of the factors in the principle of equality. In many constitutions it appears as a sign of 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 Germany, Article 136 of the Weimar Constitution states that ‘public office is not dependent on religious belief’. In Latvia, the right to equal treatment regardless of religion is a protected right under Article 91 of the Constitution. Violation of the principle of

¹¹ Worldview or belief (in German *Weltanschauung* or *Weltansicht*) – any ideology, philosophy, theology, movement or religion that claims to provide a comprehensive picture of God, the world and the human relationship with God and the world. Specific worldviews provide a special perspective and guidance in the following disciplines: theology, philosophy, ethics, biology, psychology, sociology, law, politics, economy and history. Philosophical associations (*Weltanschaungvereine*) often have cropped worldviews, comparable to religious beliefs.

equality on the basis of religion is prohibited, and legal definitions in the ROL (Article 4, paragraph 1) state that direct or indirect limitation of the rights or advantages of residents, as well as emotional harassment or hatred because of their attitude to religion, is forbidden. For insulting a person's religious views or expressing hatred because of their attitude to religion or atheism, Article 150 of the Criminal Law provides sanction of up to two years' imprisonment or community service or a fine up to the value of 40 times the minimum monthly wage.¹² Scholars of religion hold the opinion that, instead of using the concept of 'religious feeling' a better approach would be to refer to 'hate speech' (orally or in writing, calls to violence, calls for an unjustified restriction of individuals and groups, and offensive or demeaning use of a word to incite hatred).¹³

Article 149(1) of the Criminal Law provides a fine equal to 30 times minimum monthly wage for violations of the ban against discrimination if such an offence has been committed more than once in a single year (the first time is classed as an administrative offence – Article 204(17) of the Code of Administrative Offences provides administrative liability for offences of prohibition of discrimination prescribed in normative acts). The section speaks of 'discrimination related to race or ethnicity'; it does not refer directly to religion. The key phrase in this section is this: 'or for the violation of discrimination prohibitions specified in other regulatory enactments'. Such enactments include the ROL, which states in Article 4 that 'any direct or indirect limitation on the rights of residents, direct or indirect creation of advantages for residents, offence against religious sensibilities or fomenting of hatred vis-à-vis the attitude toward religion of residents shall be banned'. This suggests that the

12 In comments on Article 150 of the Criminal Law it is noted that discrimination on the ground of religion is an active deed, which can be expressed as direct or indirect derogation of a person's rights, creation of advantages for a particular person, infringement of a person's religious views, or hatred. These activities are carried out in connection with the victim's attitude to religion or atheism. Religious feelings can be hurt by humiliating the person, by an unpleasant attitude, by derogating a person's attitude to religion or atheism, etc, which can be done orally, in writing or by action. Hate-raising means to distribute, either orally or in writing in the media or in other ways, ideas, theories and beliefs across a wide circle of people to encourage a hostile attitude towards representatives of other religions or atheists. (See U Krastiņš, V Liholaja and A Niedre, *Krimināllikuma zinātniski praktiskais komentārs (A Practical Commentary on the Criminal Law)*, vol 2 (Riga, 2007), pp 311–312.

13 S Krūmiņa-Koķkova and V Tēraudkalns, *Religiskā dažadība Latvijā (Religious Diversity in Latvia)* (Riga, 2007), p 89.

norms of Article 149(1) of the Criminal Law apply in this regard, too. Here we are dealing with general offences such as assault, coercion and the like. The Criminal Law does not speak specifically to attacks against someone's freedom of religion or conscience, but the fact is that, if an offence is sufficiently serious, such crimes can end up in court not because of their religious nature but because they represent a general offence against an individual's private rights. Article 149(1) sets the penalty as up to two years' imprisonment, mandatory community service or a fine equal to no more than 50 times the minimum monthly wage if the violation against the ban on discrimination has caused substantial harm, if it has involved violence, fraud or threats, if it has been committed by a group of individuals, if it has been committed by a government official or a senior representative of a company, enterprise or organisation, or if it has been committed with the aid of an automated data-processing system.¹⁴

Case law

There are very few reported cases regarding religious discrimination. The Ombudsman received submissions on only two issues regarding religious discrimination in 2007: a provision that obliges a person to take off his/her headdress when being photographed for a passport; and a newspaper caricature of Jesus portrayed as a fictional monster Chtulhu, possessing the ability to influence people's minds.

In the case regarding the passport photograph, the Ombudsman mainly analysed the relevant provision under Article 9 of the ECHR. However, the Ombudsman also noted that Article 91 of the Constitution¹⁵ was of relevance: freedom of religion protects diversity of religious beliefs and therefore in its essence requires differentiated approach within the limits of the law. Having analysed the practice of other states with regard to the relevant issue (Germany, Finland, the Netherlands and Denmark) the Ombudsman concluded that a

¹⁴ R Balodis, 'The constitutional and administrative aspects of state and church regulation in the Republic of Latvia: religion and the secular state', *Interim National Reports Issued for the Occasion of the XVIIIth International Congress on Comparative Law* (Washington, DC, 2010), p 488.

¹⁵ 'All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind.'

provision requiring the removal of a headdress irrespective of a person's religious beliefs was not proportionate to the legitimate aim of ensuring security. The Ombudsman requested the Cabinet of Ministers to provide an exception for persons whose religious beliefs do not allow the removal of their headdress. The Cabinet adopted the requested exception.¹⁶

The caricature of Jesus had the following context: a leader of the religious organisation *Jaunā paaudze* (Young Generation) had previously expressed his views on politics, stating that 'democracy is only a temporary solution' and that he had been 'chosen by God to humiliate all homosexuals and liberals'. Having regard to this context, the Ombudsman cited both Article 91 of the Constitution and Article 2 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, concluding that opinions criticising particular religious groups were an expression of the freedom of press. As stated by the Ombudsman, the 'publications did not encourage religious discrimination. They did not contradict [the UN Declaration] for they are not opposed to Christians nor any other religion and do not limit any rights based on religion.'¹⁷ Therefore, the Ombudsman established that there had been no form of religious discrimination.

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

There are only general grounds laid out for different treatment. For instance, Article 29(2) of the Labour 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

¹⁶ Opinion of the Ombudsman of 10 March 2008 regarding the right of a person to have his/her picture taken with headdress due to religious beliefs. Available at <http://www.tiesibsargs.lv/lat/petijumi_un_viedokli/viedokli/?doc=274>, accessed 20 November 2011 (Latvian only). See also *Ombudsman Report 2007*, <http://www.tiesibsargs.lv/files/downloads/Annual_report_2007.pdf>, accessed 20 November 2011, p 39.

¹⁷ Opinion of the Ombudsman of 7 May 2007 regarding eventual interference of religious beliefs in publications of the newspaper *Diena*, <http://www.tiesibsargs.lv/lat/petijumi_un_viedokli/viedokli/?doc=272>, accessed 20 November 2011 (Latvian only). See also *Ombudsman Report 2007*, p 39.

result, for the performance of the relevant work or for the relevant employment'.¹⁸ It must be noted that Article 29(9) of the same law specifies that differential treatment cannot be based on, *inter alia*, religious conviction. Article 29(10) specifies that

in a religious organisation differential treatment depending upon the religious conviction of a person is permitted in the event that a specific type of religious conviction is an objective and justified prerequisite of the relevant performance of work or the relevant employment and taking into account the ethos of the organisation.

For additional exceptions in respect of particular religious organisations, see below. The formula contained in Article 29(2) is the only exception with regard to religious conviction. A similar clause was included in Article 3(1)(2) of the Law on Consumer Protection, though this law only prohibits differential treatment in respect of gender, race, ethnic origin and disability.¹⁹

In 2010 amendments to the Education Law were adopted regulating both general prohibition of discrimination and exceptions.²⁰ Article 3(1)(1) prescribes that persons have the right to education irrespective of wealth, social status, race, nationality, ethnical identity, gender, religious and political convictions, health, employment or place of residence. Article 3(1)(2) provides an exception, stating that differential treatment due to the abovementioned criteria is permitted if it is justified with a legitimate aim and the intended measures for consummation of the aim are proportional. This section further specifies that an educational institution established by a religious organisation shall be entitled to expect the appropriate religious affiliation of the person and his or her preparedness and ability to act in good faith and with loyalty in respect of the congregation's religious doctrine and in respect of the entirety of moral and behavioural provisions, principles and ideals that form the foundations of that religious organisation. The law provides that exception to the general prohibition is addressed towards employers (in particular, religious

¹⁸ Labour Law: Law of the Republic of Latvia, *Latvijas Vēstnesis*, 6 July 2001, Nr 105(2492).

¹⁹ Consumer Rights Protection Law: Law of the Republic of Latvia, *Latvijas Vēstnesis*, 1 April 1999, Nr 104/105(1564/1565).

²⁰ Education Law: Law of the Republic of Latvia, *Latvijas Vēstnesis*, 17 November 1998, Nr 343/344(1404/1405).

organisations) and educational institutions. The state in general is prohibited from discrimination by Article 91 of the Constitution.²¹

Article 29 of the Labour Law provides different criteria for different employers. If the employer is a religious organisation, then differential treatment is justified provided that the relevant religious conviction is an objective and justified precondition of the work, taking into account the ethos of the organisation. The law has provided particular religious organisations with even broader discretion in this issue (see below). If the employer is not a religious organisation then differential treatment is justified provided that the religious conviction of the employee is an objective and justified precondition that is proportionate to the attainable legitimate aim. For instance, it has been considered that a religious educational institution may be entitled to employ teachers of the relevant religious affiliation but could differentiate between other staff (such as cleaners).²² There is no case law, nor have there been any scholarly discussions, regarding indirect discrimination such as the obligation to work on Fridays for employees of Muslim conviction. Similar criteria hold for educational institutions (see above).

Case law

There are very few judgments dealing with religious discrimination. All of them are related to employment of religious and non-religious personnel in religious organisations.

As mentioned above Article 14(1) of the ROL prescribes that religious organisations shall elect or appoint to office and remove from office the ministers thereof in accordance with the articles of association (whether constitution or by-law), but appoint and dismiss other employees in accordance with employment law. The Senate of the Supreme Court has therefore concluded that the position of the religious personnel of religious organisations can be held only in accordance with the internal provisions of a religious organisation and only by persons having particular qualifications and qualities of personality. These issues cannot be considered by the court. Conse-

21 See E Levits, ‘Par tiesiskās vienlīdzības principu (On the principle of legal equality)’, *Latvijas Vēstnesis*, 8 May 2003, Nr 68(2833).

22 Ibid.

quently, the Senate has ruled that the courts cannot reinstate religious personnel in office. It is irrelevant whether an employment agreement has been concluded with such an employee.²³

Notwithstanding the fact that the ROL prescribes that other employees shall be employed and dismissed in accordance with employment, there are seven laws regarding particular churches that contain a direct exception to the general prohibition. The Latvian Baptist Community Association Law, the Latvian Joint Methodist Church Law, the Law regarding the Riga Jewish Religious Community, the Law regarding the Latvian Association of Seventh-day Adventist Communities, Latvian the Old-Believers Pomor Church Law, the Law regarding the Evangelical Lutheran Church of Latvia and the Law regarding the Latvian Orthodox Church all contain similar articles.²⁴ In this context, the Senate had to decide a case regarding the termination of employment of a secretary of the Commission of Mission of the Evangelical Lutheran Church of Latvia. In 2006 (shortly after taking up employment) the employee joined another religious organisation of the same confession (not the Evangelical Lutheran Church of Latvia). The employer was aware of this fact but did not pose any objections. In 2009 the employer terminated the employment agreement. The termination notice contained reference to Article 101(1), point 3 of the Labour Law (an employer is entitled to terminate the employment agreement if the employee, when performing work, has acted contrary to moral principles and such action is incompatible with the continuation of employment legal relationships) and the provision of the Law regarding the Evangelical Lutheran Church of Latvia. The termination notice also mentioned that the employee had co-ordinated a website (www.ebaznica.lv) where articles undermining the authority of the Evangelical Lutheran Church of Latvia had been published. Both the court of first instance

²³ Judgment of the Department of Civil Cases of the Senate of the Supreme Court in case no SKC-531/2009.

²⁴ Law regarding the Latvian Association of Seventh-day Adventist Communities, *Latvijas Vēstnesis*, 12 June 2007, Nr 93; Latvian Baptist Community Association Law, *Latvijas Vēstnesis*, 30 June 2007, Nr 86; Latvian Joint Methodist Church Law, *Latvijas Vēstnesis*, 6 July 2007, Nr 91; Law regarding the Riga Jewish Religious Community, *Latvijas Vēstnesis*, 20 June 2007, Nr 98; Latvian Old-Believers Pomor Church Law, *Latvijas Vēstnesis*, 20 June 2007, Nr 98, Law regarding the Latvian Evangelical Lutheran Church, *Latvijas Vēstnesis*, 3 December 2008, Nr 188, Law regarding the Latvian Orthodox Church, *Latvijas Vēstnesis*, 3 December 2008, Nr 188.

and the appellate court were satisfied by the employee's claim for reinstatement in office. The Senate upheld the judgment of the appellate court by concluding that there was no doubt that the employer in the case was entitled to make reference to circumstances corresponding to the provision contained in the Law regarding the Evangelical Lutheran Church. Nevertheless, the employer was bound by provisions of the Labour Law providing rules for termination procedure, *inter alia* the period before termination of the employment to be no less than one month from the establishment of the circumstances requiring termination. Owing to the fact that the employer had not complied with the procedure of termination, the notice of termination had been correctly annulled and the employee reinstated in office.²⁵

It should be pointed out that Article 7(3) of the ROL contains a discriminating provision that restricts formation of more than one association under one denomination (for example, Lutherans can have only one association).²⁶ This restriction was established 15 years ago in order to limit the splitting of the churches and the formation of sects during the process of restitution of denationalised properties.²⁷ The principle 'One Church for One Denomination' does not comply with the principle of religious freedom²⁸ and this state restriction is not justified because it is not based on any threat to public order, state security, health or morals.²⁹ In 2003 the Board of Religious Affairs³⁰ drew up amendments in the ROL to excise section 3 of Article 7, considering its discriminative character. The amendments were not supported. The reason mentioned by the Min-

25 Judgment of the Department of Civil Cases of the Senate of the Supreme Court of 9 March 2011 in case no SKC-762/2011.

26 Congregations of the same denomination may establish only one religious association (Church) in the country.

27 Balodis, 'Church and state in Latvia', p 149.

28 R Balodis, 'State and church in Latvia', in *State and Church in the Baltic States* (Riga, 2001), p 25.

29 R Balodis, 'Church and state in Latvia', in *State and Church in the European Union* (Baden-Baden, 2005), p 266.

30 From 2000 to 2008 the Board of Religious Affairs dealt with issues of relations between the state and religious organisations, and it monitored the effectiveness of the state's regulation on practising religion. From 2008 the functions of registering religious organisations was separated between the Register of Enterprises, which registers religious organisations, and the Ministry of Justice, which prepares statement for the Register Office. According to the Amendments to the Law on Religious Organisations, the Ministry of Justice deals with issues concerning relations between the state and religious organisations.

istry of Justice was ‘public order security concerns’,³¹ but in the opinion of the report’s author this failed to withstand serious criticism. At the same time, the predecessor of the Latvian Ombudsman – the Latvian National Human Rights Office – asked the Parliament to change section 3 of Article 7, as well as section 4 of Article 8.³² The Office of the Ombudsman³³ pointed out that a situation where the state allows congregations of the same denomination to establish only one religious association in the country is contrary to the principle of separation of Church and state, included in Article 99 of the Constitution.³⁴ By determining that there may be only one religious association in the same denomination, the state is interfering in the affairs of the Church, because it has not considered that the establishment of several religious associations might conform to the canonical regulations of the denomination. In justification, responsible officials at the Ministry of Justice have concluded by interpreting the provision as having been created to avoid schism within religious associations. Although the aim of the ROL 1995 was to ensure the realisation of the freedom of believers’ associations, it was also necessary to preclude uncertainties regarding the recovery of property nationalised in 1940.³⁵

31 Letter No. 1-7.8/2116 of 16 May 2007 of M Bičevskis, Secretary of State of the Ministry of Justice of the Republic of Latvia to R Balodis, Head of the Constitutional Law Department, Faculty of Law, University of Latvia.

32 Section 4 of Article 8: ‘The congregations of those denominations and religions that begin functioning in the Republic of Latvia for the first time and that do not belong to the religious associations (Churches) already registered in the country shall re-register with the Board of Religious Affairs each year during the first ten years so that the Board may ascertain that these congregations are loyal to the State of Latvia and that their activities comply with legislative acts. Documents for re-registration of the religious organisation must be submitted to the Board of Religious Affairs one month prior to the date indicated in the decision on registration or re-registration of the religious organisation.’

33 Letter No. 3-2-2/1075 of 25 May 207 of R Apsītis, Ombudsman of the Republic of Latvia to R Balodis, Head of the Constitutional Law Department, Faculty of Law, University of Latvia.

34 R Balodis, ‘The application of the freedom of religion principles of the European Convention on Human Rights in Latvia’, in *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 19th Meeting of the European Consortium for Church and State Research, Nicosia (Cyprus), 15–18 November 2007* (Leuven, 2009), pp 232–233).

35 Ibid.

LUXEMBOURG

PHILIPPE POIRIER

I. LA TOILE DE FOND HISTORIQUE, CULTURELLE ET SOCIALE

Principales dispositions tirées des conventions internationales

Le Luxembourg a approuvé non seulement la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales mais tous les protocoles qui lui ont été ajoutés. À chaque fois le Luxembourg a été l'un des États du Conseil de l'Europe à le faire le plus rapidement. L'ensemble des articles et protocoles sont directement applicables en droit luxembourgeois.

- i. Protocole additionnel à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales;
- ii. Protocole n° 2 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales, attribuant à la Cour européenne des Droits de l'Homme la compétence de donner des avis consultatifs;
- iii. Protocole n° 3 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales, modifiant les articles 29, 30 et 34 de la Convention;
- iv. Protocole n° 4 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales, reconnaissant certains droits et libertés autres que ceux figurant déjà dans la Convention et dans le premier Protocole additionnel à la Convention;
- v. Protocole n° 5 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales, modifiant les articles 22 et 40 de la Convention;
- vi. Protocole n° 6 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales concernant l'abolition de la peine de mort;
- vii. Protocole n° 7 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales;

- viii. Protocole n° 8 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales;
- ix. Protocole n° 9 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales;
- x. Protocole n° 10 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales;
- xi. Protocole n° 11 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales, portant restructuration du mécanisme de contrôle établi par la Convention;
- xii. Protocole n° 12 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales;
- xiii. Protocole n° 13 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales, relatif à l'abolition de la peine de mort en toutes circonstances;
- xiv. Protocole n° 14 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales, amendant le système de contrôle de la Convention;
- xv. Protocole n° 14bis à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales.

D'autres instruments internationaux ont été signés par le Gouvernement luxembourgeois, mais n'ont aucun effet direct et ne peuvent donc pas être invoqués devant les tribunaux, autrement que conjointement avec des mesures issues de la législation nationale. Ces instruments comprennent la Déclaration universelle des droits de l'homme, les Pactes internationaux faits à New York, le 19 décembre 1966, relatifs l'un aux droits civils et politiques, l'autre aux droits économiques, sociaux et culturels, ainsi que la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, faite à New York le 7 mars 1966. Plus récemment encore, la Convention relative aux droits de l'enfant, adoptée par l'Assemblée générale des Nations Unies le 20 novembre 1989. En revanche le Luxembourg a ratifié en 2000 la Convention concernant la discrimination dans l'emploi de l'Organisation internationale du Travail qui est directement applicable en droit interne.

Par la loi du 1^{er} décembre 1977 le Luxembourg a approuvé la Convention internationale sur l'élimination de toutes les formes de discrimination raciale signée à New York le 7 mars 1966. Le but de cette convention est de donner effet aux principes énoncés dans la Déclaration des Nations Unies sur l'élimination de toutes les formes

de discrimination raciale et d'assurer le plus rapidement possible l'adoption de mesures pratiques à cette fin.

Afin d'œuvrer dans ce but l'alinéa 1 de l'article 14 de cette convention donne aux États signataires la possibilité de 'déclarer à tout moment qu'il reconnaît la compétence du Comité pour recevoir et examiner des communications émanant de personnes ou de groupes de personnes relevant de sa juridiction qui se plaignent d'être victimes d'une violation, par ledit État partie, de l'un quelconque des droits énoncés dans la présente Convention'. L'alinéa 2 du même article permet aux États-signataires de 'créer ou désigner un organisme dans le cadre de son ordre juridique national qui aura compétence pour recevoir et examiner les pétitions émanant de personnes ou de groupes de personnes relevant de la juridiction dudit État qui se plaignent d'être victimes d'une violation de l'un quelconque des droits énoncés dans la présente Convention et qui ont épuisé les autres recours locaux disponibles'.

Lors du vote de la loi visant à prendre certaines mesures d'exécution internes en application des articles 4 et 5 de la Convention internationale de New York du 7 mars 1966 sur l'élimination de toutes les formes de discrimination raciale, le Gouvernement du Luxembourg a affirmé que c'était en premier lieu un acte de solidarité internationale, mais il a jugé opportun de rappeler sa position prise sur le plan politique international selon laquelle le sionisme ne saurait être considéré comme constituant une forme de discrimination raciale ou religieuse.

Qui plus est, le Luxembourg n'a pas fait et n'a pas eu l'intention de faire de déclarations au sujet de l'article 14 alinéa 1 et alinéa 2 de la Convention internationale sur l'élimination de toutes les formes de discriminations raciales.

Le Gouvernement luxembourgeois a été d'avis que les moyens qui sont actuellement à disposition d'une personne qui s'estime être victime d'une violation de l'un des droits énoncés dans la Convention sont suffisants à savoir:

- i. Dépôt d'une plainte par un particulier qui s'estime victime d'un acte de discrimination raciale tel que incriminé par les articles 454 et suivants du Code pénal;
- ii. Droit pour toute association agréée d'exercer une action en justice au nom des victimes (article VI de la loi du 19 juillet 1997 complétant le Code pénal et modifiant l'incrimination du

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- iii. racisme et en portant incrimination du révisionnisme et d'autres agissements fondés sur des discriminations illégales);
- iv. Droit de saisir la commission consultative des droits de l'homme;
- iv. Droit de recours individuel prévu par la Convention européenne des Droits de l'Homme en cas de violation de droits de l'homme.

La loi du 9 août 1980, prise en exécution de la Convention internationale de New York du 7 mars 1966 sur l'élimination de toutes les formes de discrimination raciale, a complété le Code pénal par les articles 454 et 455, érigeant en infractions certains comportements discriminatoires, l'incitation à de telles discriminations, à la haine ou à la violence raciales, ainsi que l'appartenance à une organisation dont les objectifs ou les activités consistent à inciter à la discrimination, à la haine ou à la violence raciales.

Principales dispositions tirées de la législation nationale

Au niveau national, le principe d'égalité de traitement peut être trouvé dans le principe juridique général dans l'article 10 bis de la Constitution, selon lequel 'tous les Luxembourgeois sont égaux devant la loi'. Toutefois, ce principe ne s'applique que stricto sensu aux ressortissants luxembourgeois et non pas à des citoyens étrangers. Cela est également vrai pour l'article 111 de la Constitution, qui accorde une protection aux étrangers et à leurs biens, à moins que la loi prévoie une exception.

Une loi tendant à agir contre toute forme de racisme, de xénophobie ou d'antisémitisme avait été déposée à la Chambre des députés le 20 novembre 1991, en vue de renforcer, entre autres, le dispositif répressif législatif contre le racisme, la xénophobie et l'antisémitisme, par l'incrimination du refus d'embauche et du licenciement intervenus sur base de considérations à raison de la race, de la couleur, de l'ascendance ou de l'origine ethnique ou nationale.

Par la suite, le Gouvernement, en tenant compte de l'avis du Conseil d'État du 20 avril 1993 relatif à la susdite proposition de loi, a introduit dans le projet de loi concernant l'intégration des étrangers au Grand-Duché de Luxembourg ainsi que l'action sociale en faveur des étrangers, devenu la loi du 27 juillet 1993, un chapitre intitulé à renforcer les moyens d'action contre toutes les formes de discrimina-

tion raciale, ethnique ou religieuse particulièrement de laisser aux juges la possibilité de condamner les personnes reconnues coupables d'infractions aux articles 454 et 455 du Code pénal, à une interdiction des droits énumérés à l'article 11 nouveau du Code pénal, conformément à l'article 24 nouveau du Code pénal. Il n'a par contre pas été envisagé de réaménager les incriminations existantes.

Le législateur a complété ensuite le Code pénal en modifiant l'incrimination du racisme et en portant incrimination du révisionnisme et d'autres agissements fondés sur des discriminations illégales. En 1997, dans son rapport, la Commission juridique parlementaire pensait qu'à côté des discriminations pour cause d'appartenance ou de non-appartenance à une religion, des personnes pouvaient encore être discriminées à raison des opinions religieuses ou philosophiques qu'elles professent. Alors que le Conseil d'État marque son accord avec l'ajout de la notion 'd'opinions philosophiques', la Haute Corporation a été réticente en ce qui concerne la discrimination à raison des opinions religieuses, en soulignant notamment les difficultés d'application considérables et le problème des sectes. La Commission juridique s'est ralliée à cette dernière argumentation.

Les deux lois du 28 novembre (loi générale) et 29 novembre 2006 (fonction publique) ont renforcé la législation existante contre la discrimination directe et ont introduit de nouveaux outils pour lutter contre la discrimination directe, comme la discrimination indirecte, le harcèlement ou des instructions à discriminer et en créant notamment un Centre de traitement de l'égalité.

Le législateur est allé plus loin que les exigences strictes des directives européennes, en incluant la discrimination interdite fondée sur les motifs de religion ou de convictions, un handicap, l'âge et l'orientation sexuelle, ainsi que la race et l'origine ethnique pour toutes les zones incluses dans la portée des deux directives, interdisant ainsi toute discrimination dans toutes les relations entre les personnes.

Une nouvelle loi a été adoptée et publiée le 16 décembre 2008 sur l'accueil et l'intégration des étrangers au Grand-Duché de Luxembourg. La loi contient des dispositions générales visant à combattre la discrimination contre les étrangers. Une agence spéciale appelée 'Office luxembourgeois de l'accueil et de l'intégration', doit prendre la responsabilité d'offrir des chances égales et de lutter contre

la discrimination, l'intégration étant considérée comme l'accompagnement du processus d'accueil des étrangers dans le pays:

- i. Loi du 28 juillet 1969 portant approbation de la Convention concernant la lutte contre la discrimination dans le domaine de l'enseignement, adoptée par la Conférence Générale de l'Organisation des Nations Unies pour l'éducation, la science et la culture, à Paris, le 14 décembre 1960;
- ii. Loi du 1^{er} décembre 1977 portant approbation de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, en date à New York du 7 mars 1966;
- iii. Loi du 15 décembre 1988 portant approbation de la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, faite à New York, le 18 décembre 1979. Loi du 19 juillet 1997 complétant le Code pénal en modifiant l'incrimination du racisme et en portant incrimination du révisionnisme et d'autres agissements fondés sur des discriminations illégales;
- iv. Loi du 28 juin 2001 relative à la charge de la preuve dans les cas de discrimination fondée sur le sexe;
- v. La loi du 2 août 2002 sur la protection des données personnelles interdit entre autres les traitements qui révèlent l'origine raciale ou ethnique, les convictions religieuses ou philosophiques;
- vi. Loi du 15 mai 2003 portant approbation du Protocole facultatif à la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, adopté par l'Assemblée Générale de l'Organisation des Nations Unies, le 6 octobre 1999. Loi du 29 novembre 2006 modifiant (1) la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'État (2) la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux;
- vii. Loi du 28 novembre 2006 portant (1) transposition de la directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique; (2) transposition de la directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail; (3) modification du Code du travail et portant introduc-

- tion dans le Livre II d'un nouveau titre V relatif à l'égalité de traitement en matière d'emploi et de travail; (4) modification des articles 454 et 455 du Code pénal; (5) modification de la loi du 12 septembre 2003 relative aux personnes handicapées;
- viii. Loi du 29 novembre 2006 modifiant (1) la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'État (2) la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux;
 - ix. Loi du 16 décembre 2008 concernant l'accueil et l'intégration des étrangers au Grand-Duché de Luxembourg.

Les directives européennes 2003/43/CE et 2000/78/CE

Le Luxembourg a été condamné par la Cour de Justice des Communautés européennes pour la non transposition dans les temps impartis des directives 2000/43/CE, relative à la mise en œuvre du principe d'égalité de traitement entre les personnes sans distinction de 'race' ou d'origine ethnique, et 2000/78/CE portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail en 2003. Deux projets de loi ont été présentés et retirés suite notamment à l'avis très critique du Conseil d'État en 2004.

Plus précisément ce qui concerne la transposition de la directive 2000/43/CE relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique en droit national, le Conseil d'État a constaté que le projet de loi était des plus laconiques et omettait complètement de circonscrire le champ d'application de la future loi qui, pour transposer effectivement la directive, devra prévoir des dispositions applicables au-delà du domaine de l'emploi et du travail, aux domaines de la santé, de la protection sociale, de l'éducation et de l'accès aux biens et services, y compris le logement.¹

1 5249/04 projet de loi portant (1) transposition de la directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail; (2) modification des articles 3 et 7 de la loi modifiée du 12 novembre 1991 sur les travailleurs handicapés; (3) abrogation de l'article 6 de la loi modifiée du 12 mars 1973 portant réforme du salaire social minimum 5248/01; projet de loi portant transposition de la directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique; avis du Conseil d'État (7 décembre 2004).

En mai 2008, le groupe écologiste du parlement luxembourgeois suite au rapport Lynne sur la lutte contre la discrimination a souhaité savoir si le Luxembourg appuierait le projet de directive-cadre de la Commission européenne qui comblerait certainement à leurs yeux, les lacunes existantes en matière de discrimination de minorités. Pour les Verts, les directives européennes existantes se limitaient presque exclusivement à la lutte contre les discriminations au travail. Seules les directives contre les discriminations sur base de l'origine ethnique et du sexe concernent des aspects plus globaux de la société. Dès lors, certaines personnes, en occurrence les handicapées, les personnes âgées, les homosexuels ou encore les personnes ayant une confession religieuse déterminée, ne sont pas protégées en dehors du domaine du travail.

Le Gouvernement du Luxembourg a rappelé que la question de savoir si la Commission européenne devrait élaborer une proposition de directive visant à lutter pleinement contre les discriminations en vertu de l'article 13 du traité CE et de la proposer comme prévue en 2008 n'était plus à l'ordre du jour, dans la mesure où la Commission a adopté le 2 juillet 2008 une proposition de directive [COM(2008) 426 final] visant la mise en œuvre du principe de l'égalité de traitement entre les personnes, sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, en dehors du marché de travail.² Pour le Luxembourg, la Commission a défini ainsi un cadre général pour l'interdiction de toute discrimination fondée sur ces motifs et a établi un niveau de protection minimal uniforme à l'intérieur de l'espace européen pour les personnes victimes de telles discriminations et a complété ainsi le cadre juridique communautaire existant (directive 2000/43/CE du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique et la directive 2000/78/CE du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail). Le Luxembourg a appuyé la proposition de directive visée à la condition que les obligations qui en découlent y soient énoncées le plus clairement possible.

2 Réponse de Madame la ministre de la Famille et de l'Intégration Marie-Josée Jacobs à la question parlementaire n° 2558 du 22 mai 2008 de Monsieur le député Félix Braz.

Au printemps 2011, le groupe socialiste a constaté qu'au Luxembourg, plusieurs institutions et organismes publics en charge de la défense des droits fondamentaux des citoyens et de la lutte contre les discriminations coexistent. Ils rappelaient que tous ces organismes étaient composés et fonctionnaient de manière parfois très différente (nombre de membres, mode de nomination, etc.), que leur degré de compétences varie fortement, et que leurs moyens budgétaires sont très inégalement répartis. De surcroît, il s'est avéré que la mise en œuvre de certaines conventions internationales au Luxembourg a entraîné la création de compétences partagées.

Afin de mener une réflexion sur le rôle futur des différents organismes en question et leur interaction éventuelle, le groupe parlementaire socialiste a demandé la tenue d'un débat d'orientation sans rapport sur les missions, les compétences et les moyens légaux et financiers des différents organismes publics en charge de la défense des droits des citoyens et de lutte contre les discriminations.

II. LE DEVOIR DE NE PAS DISCRIMINER: LA PROHIBITION CONTRE LA DISCRIMINATION

Au Luxembourg, plusieurs institutions et organismes publics en charge de la défense des droits fondamentaux des citoyens et de la lutte contre les discriminations coexistent: le Médiateur, la Commission consultative des Droits de l'Homme, le Centre pour l'Égalité de Traitement, la Commission nationale pour la Protection des Données ou encore l'Ombuds-Comité fir d'Rechter vum Kand (droits de l'enfant), l'Office luxembourgeois d'accueil et d'intégration.

Seules la Commission consultative des Droits de l'Homme et le Centre pour l'Égalité de Traitement sont actives dans la lutte contre les discriminations religieuses ou philosophiques.

Le Centre pour l'égalité de traitement

Le Centre a été institué par la loi du 28 novembre 2006. Il a pour objet de promouvoir, d'analyser et de surveiller l'égalité de traitement entre toutes personnes sans discrimination fondée sur la race, l'origine ethnique, le sexe, l'orientation sexuelle, la religion ou les convictions, l'handicap et l'âge.

Le Centre est composé d'un collège de cinq membres dont un président. Le mandat du président et des membres du Centre a une durée de cinq ans. Ils sont nommés par le Grand-Duc sur proposition de la Chambre des Députés en fonction de leur compétence dans le domaine de la promotion de l'égalité de traitement. Les fonctions de membre du Centre sont incompatibles avec les mandats de député, de membre du Conseil d'État et de membre du Gouvernement.

Le Centre remplit ses fonctions par la publication de rapports, ainsi que des recommandations et la conduite des études; par l'apport d'une aide aux personnes qui s'estiment victimes d'une discrimination, par un service de conseil et d'orientation visant à informer les victimes sur leurs droits individuels, la législation, la jurisprudence et les moyens de faire valoir leurs droits.

Les membres du Centre exercent leurs fonctions sans intervenir dans les procédures judiciaires en cours. Les membres du Centre ont le droit de demander toute information, pièce ou document, à l'exception de ceux couverts par le secret médical ou par un autre secret professionnel, qui sont nécessaires à l'accomplissement de leur mission.

Dans son rapport annuel rendu en février 2011, le Centre est d'avis que l'État luxembourgeois devrait également faire le premier pas dans la promotion de politiques d'égalité de traitement pour chaque motif de discrimination. Cette politique doit se refléter aussi bien dans les travaux quotidiens des agents étatiques que dans les relations du personnel entre lui et du personnel avec le grand public. Dans un sondage commandité au printemps par le Centre 12% des personnes interrogées se disaient victimes de discriminations religieuses, loin derrière les discriminations basées sur l'âge, le sexe, l'orientation sexuelle ou bien encore sur la nationalité. En revanche, ce sondage soulignait que pour 24% des habitants du Grand-Duché, les discriminations religieuses augmentaient.

Pour le Centre, les discriminations religieuses concernent l'existence ou non d'un dieu ou de divinités mais aussi les convictions philosophiques telles que l'athéisme, l'agnosticisme ou la laïcité. Au printemps 2010, elle a organisé pour la première fois une conférence débat sur le thème spécifique de la discrimination religieuse.

La Commission consultative des Droits de l'Homme

La Commission consultative des Droits de l'Homme est un organe consultatif du Gouvernement, chargé d'assister par ses avis et études le Gouvernement sur toutes questions de portée générale qui concernent les droits de l'homme sur le territoire du Grand-Duché de Luxembourg créée par la loi du 21 novembre 2008. La Commission n'a pas compétence pour traiter des cas individuels.

La Commission se compose de vingt et un membres avec voix délibérative au plus, nommés par le Gouvernement pour des mandats renouvelables de cinq ans. En outre, le Gouvernement est représenté au sein de la Commission par un délégué qui assiste aux réunions avec voix consultative. Les membres de la Commission sont des personnes indépendantes représentatives issues de la société civile et choisies en raison de leurs compétences et de leur engagement en matière de droits de l'Homme ou, de façon plus générale, dans le domaine des questions de société.

Dans le cadre de son fonctionnement, la Commission:

- i. Examine librement toute question relevant de sa compétence qu'elle soit soumise par le gouvernement ou décidée par auto-saisine sur proposition de ses membres ou de toute personne ou de toute organisation;
- ii. Entend toute personne, reçoit le cas échéant toute information et tout document nécessaires à l'appréciation de situations relevant de sa compétence;
- iii. S'adresse directement à l'opinion publique ou par l'intermédiaire de tout organe de presse, particulièrement pour rendre publics ses avis et recommandations;
- iv. Entretient une concertation avec d'autres organes, juridictionnels ou non, ayant pour objet la promotion et la protection des droits de l'Homme.

La Commission n'a pas compétence pour traiter des cas individuels. Depuis sa création, aucun avis n'a porté sur les discriminations religieuses et/ou philosophiques. En novembre 2009, elle a co-organisé avec le Centre la première Journée de la diversité avec comme thème 'la discrimination est illégale' et qui visait: à attirer l'attention du grand public de manière divertissante sur les discriminations existantes, à l'informer sur ses droits, à promouvoir les bénéfices de la diversité pour le milieu du travail.

L'Office luxembourgeois de l'accueil et de l'intégration

Par la loi du 16 décembre 2008 concernant l'accueil et l'intégration des étrangers au Grand-Duché de Luxembourg a été créé l'Office luxembourgeois de l'accueil et de l'intégration. L'Office est une administration instituée auprès du ministère de la Famille et de l'Intégration.

L'Office se substitue au Commissariat du Gouvernement aux étrangers (CGE) institué par la loi modifiée du 27 juillet 1993 concernant l'intégration des étrangers au Grand-Duché de Luxembourg, ainsi que l'action sociale en faveur des étrangers.

La mise en place de cette nouvelle administration trouve sa source dans la déclaration gouvernementale du 4 août 2004 dans laquelle le Gouvernement a manifesté la volonté d'intégrer les non-luxembourgeois dans la société luxembourgeoise et d'éviter la naissance de sociétés parallèles.

Des compétences légales pour combattre toutes les formes de discriminations lui ont été attribuées et prévoit notamment la mise en place d'un plan d'action national d'intégration et de lutte contre les discriminations. Depuis 2002, l'OLAI mène un programme d'actions annuel d'information et de sensibilisation en matière de lutte contre les discriminations. Ce programme, soutenu par le programme communautaire PROGRESS, combat les discriminations au sens de l'article 19 du traité de Lisbonne à savoir les discriminations fondées sur la religion ou les convictions, le handicap, l'âge, l'orientation sexuelle ou la race ou l'origine ethnique.

Code du travail

Titre V – Égalité de traitement en matière d'emploi et de travail

Chapitre Premier – Principe de non-discrimination

Article L 251-1:

(1) Toute discrimination directe ou indirecte fondée sur la religion ou les convictions, l'handicap, l'âge, l'orientation sexuelle, l'appartenance ou non appartenance, vraie ou supposée, à une race ou ethnies est interdite.

(2) Aux fins du paragraphe (1):

a) 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, sur la base de l'un des motifs visés au paragraphe (1);

b) une discrimination indirecte 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, d'un handicap, d'un âge ou d'une orientation sexuelle, de l'appartenance ou la non appartenance, vraie ou supposée, à une race ou ethnies donnés, 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 soient appropriés et nécessaires.

(3) Sans préjudice des dispositions spécifiques relatives au harcèlement sexuel et au harcèlement moral sur les lieux de travail, le harcèlement est considéré comme une forme de discrimination au sens du paragraphe (1) lorsqu'un comportement indésirable lié à l'un des motifs y visés se manifeste, qui a pour objet ou pour effet de porter atteinte à la dignité d'une personne et de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant.

(4) Tout comportement consistant à enjoindre à quiconque de pratiquer une discrimination à l'encontre de personnes pour l'un des motifs visés au paragraphe (1) est considéré comme discrimination.

Article L 251-2:

Le présent titre s'applique à tous les salariés dont les relations de travail sont régies par le statut de salarié tel qu'il résulte notamment du Titre II du Livre premier du Code du travail, en qui concerne:

- a) les conditions d'accès à l'emploi, les activités non salariées ou le travail, y compris les critères de sélection et les conditions de recrutement, quelle que soit la branche d'activité et à tous les niveaux de la hiérarchie professionnelle, y compris en matière de promotion;
- b) l'accès à tous les types et à tous les niveaux d'orientation professionnelle, de formation professionnelle, de perfectionnement et de formation de reconversion, y compris l'acquisition d'une expérience pratique;
- c) les conditions d'emploi et de travail, y compris les conditions de licenciement et de salaire;
- d) l'affiliation à, et l'engagement dans, une organisation de salariés ou d'employeurs, ou toute organisation dont les membres exercent une profession donnée, y compris les avantages procurés par ce type d'organisations.

Code de la sécurité sociale

Article 1:

- 1) Pourront bénéficier de la présente loi en cas d'invalidité ou de décès précoces, L. 26.3.74 à la demande des intéressés, les Luxembourgeois qui pour une période d'au moins trois mois 2) justifient remplir l'une ou plusieurs des conditions prévues à l'article 14, lettres a, b, c, d et g de la loi du 25 février 1967 ayant pour objet diverses mesures en faveur de personnes devenues victimes d'actes illégaux de l'occupant, à savoir: 1) avoir été déportés, internés ou emprisonnés par l'occupant pour des raisons patriotiques, de race ou de religion; L. 14.7.81,1,2°
- 2) avoir été enrôlés de force dans le "Reichsarbeitsdienst", l'armée allemande ou autres services analogues ou s'y être soustraits par la fuite et qui remplissent les conditions prévues à l'article 4 de la loi du 25 février 1967 précitée;
- 3) avoir été déportés, internés ou emprisonnés pour des raisons patriotiques, de race ou L. 26.3.74 de religion dans un pays soumis à l'influence ennemie;
- 4) avoir été contraints pour des raisons patriotiques, de race ou de religion de vivre cachés pendant l'occupation du territoire national;
- 5) avoir quitté le Grand-Duché pour joindre les forces alliées ou pour se mettre à la disposition du Gouvernement luxembourgeois ou du Gouvernement d'une des puissances alliées au Grand-Duché; à moins que l'État par l'intermédiaire de l'office de l'État des dommages de guerre ne rapporte la preuve que l'invalidité ou le décès précoces sont imputables à des événements étrangers aux cas ci-dessus prévus.

L 25.2.67 ayant pour objet diverses mesures en faveur de personnes devenues victimes d'actes illégaux de l'occupant, article 14:

- (1) Les Luxembourgeois qui, au cours de l'occupation étrangère du pays
 - a) ont été déportés, internés ou emprisonnés par l'occupant pour des raisons patriotiques, de race ou de religion;
 - b) ont été enrôlés de force dans le "Reichsarbeitsdienst", l'armée allemande ou autres services analogues ou qui s'y sont soustraits par la fuite;

- c) ont été déportés, internés ou emprisonnés pour des raisons patriotiques, de race ou de religion dans un pays soumis à l'influence ennemie;
- d) ont été contraints pour des raisons patriotiques, de race ou de religion de vivre cachés pendant l'occupation du territoire national;
- e) ont été obligés à travailler hors du Grand-Duché en vertu d'une astreinte au travail de l'occupant;
- f) ont été pour des raisons patriotiques, de race ou de religion mis dans l'impossibilité d'exercer un emploi;
- g) ont quitté le Grand-Duché pour joindre les forces alliées ou pour se mettre à la disposition du Gouvernement luxembourgeois ou du Gouvernement d'une des puissances alliées au Grand-Duché.

Code de la santé – 17 Professions – A Médecins – II – Règlements d'exécution

La non-discrimination des patients selon leur condition, article 9:

Le médecin doit écouter, examiner avec correction et attention, conseiller ou soigner avec la même conscience toute personne, quels que soient le sexe, la race, la couleur, les origines ethniques ou sociales, les caractéristiques génétiques, la langue, la religion ou les convictions, les opinions politiques ou toute autre opinion, la nationalité, l'appartenance à une minorité nationale, la fortune, la naissance, un handicap, l'âge ou l'orientation sexuelle.

Recueil des lois spéciales – Médias électroniques

6. Contenu des programmes:

(1) Les programmes radiodiffusés luxembourgeois doivent respecter dans leur contenu les principes suivants:

- a) ils doivent être de qualité, avoir une vocation de culture, d'information et de divertissement et respecter les sensibilités intellectuelles et morales du public;
- b) ils ne peuvent ni mettre en péril la sécurité nationale ou l'ordre public, ni constituer une offense à l'égard d'un État étranger;

- c) ils doivent se conformer aux bonnes mœurs ainsi qu'aux lois luxembourgeoises et aux conventions internationales en vigueur au Grand-Duché; et
- d) ils ne peuvent contenir aucune incitation à la haine pour des raisons de race, de sexe, d'opinion, de religion ou de national.

Discrimination directe

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, sur la base de l'un des motifs.

Discrimination indirecte

Une discrimination indirecte se produit lorsqu'une disposition, un critère ou une pratique apparemment neutre est susceptible d'entraîner un désavantage particulier pour des personnes d'une appartenance ou d'une non appartenance, vraie ou supposée, à une race ou ethnies données, d'un sexe, d'une orientation sexuelle, d'une religion ou de convictions, d'un handicap ou d'un âge, par rapport à d'autres personnes, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifié et que les moyens de réaliser cet objectif soient appropriés et nécessaires.

Harcèlement

Sans préjudice des dispositions spécifiques relatives au harcèlement sexuel et au harcèlement moral sur les lieux de travail, le harcèlement est considéré comme une forme de discrimination fondée sur les motifs cités en haut, lorsqu'un comportement indésirable lié à l'un des motifs visés se manifeste, qui a pour objet ou pour effet de porter atteinte à la dignité d'une personne et de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant.

Autres dispositions

Tout comportement consistant à enjoindre à quiconque de pratiquer une discrimination à l'encontre de personnes pour l'un des motifs cités en haut est considéré comme discrimination.

Aucune personne ne peut faire l'objet de représailles ni en raison des protestations ou refus opposés à un acte ou un comportement contraire au principe de l'égalité de traitement défini par la loi du 28 novembre 2006 sur l'égalité de traitement, ni en réaction à une plainte ou à une action en justice visant à faire respecter le principe de l'égalité de traitement. De même, personne ne peut faire l'objet de représailles pour avoir témoigné les agissements ou pour les avoir relatés.

Toute disposition ou tout acte contraire aux dispositions contenues dans la loi, et notamment tout licenciement en violation de ces dispositions, est nul de plein droit et l'article L 253-1 du Code du travail s'applique.

Lorsqu'une personne s'estime lésée par le non-respect à son égard du principe de l'égalité de traitement et établit directement ou par l'intermédiaire d'une association sans but lucratif ayant compétence pour ce faire conformément à la loi du 28 novembre 2006 ou par l'intermédiaire d'un syndicat ayant compétence pour ce faire conformément et dans les limites de l'article L 253-5 paragraphe (2) du Code du travail, ou dans le cadre d'une actionnée de la convention collective de travail ou de l'accord conclu en application de l'article L 165-1 du Code du travail conformément et dans les limites de l'article L 253-5, paragraphe (1) du Code du travail, devant la juridiction civile ou administrative, des faits qui permettent de présumer l'existence d'une discrimination directe ou indirecte, il incombe à la partie défenderesse de prouver qu'il n'y a pas eu violation du principe de l'égalité de traitement. Ce paragraphe ne s'applique pas aux procédures pénales.

Est à considérer comme nulle et non avenue toute disposition figurant notamment dans un contrat, une convention individuelle ou collective ou un règlement intérieur d'entreprise, ainsi que dans les règles régissant les associations à but lucratif ou non lucratif, les professions indépendantes et les organisations de travailleurs et d'employeurs contraire au principe de l'égalité de traitement au sens de la loi du 28 novembre 2006.

Dispositions prévues par le Code pénal du Luxembourg

Chapitre VI – Du racisme, du révisionnisme et d'autres discriminations (L 19 juillet 1997), article 454 (L 28 novembre 2006)

Constitue une discrimination toute distinction opérée entre les personnes physiques à raison de leur origine, de leur couleur de peau, de leur sexe, de leur orientation sexuelle, de leur situation de famille, de leur âge, de leur état de santé, de leur handicap, de leurs mœurs, de leurs opinions politiques ou philosophiques, de leurs activités syndicales, de leur appartenance ou de leur non appartenance, vrai ou supposée, à une ethnie, une nation, une race ou une religion déterminée.

Constitue également une discrimination toute distinction opérée entre les personnes morales, les groupes ou communautés de personnes, à raison de l'origine, de la couleur de peau, du sexe, de l'orientation sexuelle, de la situation de famille, de leur âge, de l'état de santé, du handicap, des mœurs, des opinions politiques ou philosophiques, des activités syndicales, de l'appartenance ou de la non-appartenance, vraie ou supposée, à une ethnie, une nation, une race, ou une religion déterminée, des membres ou de certains membres de ces personnes morales, groupes ou communautés.

Article 455 (L 19 juillet 1997):

Une discrimination visée à l'article 454, commise à l'égard d'une personne physique ou morale, d'un groupe ou d'une communauté de personnes, est punie d'un emprisonnement de huit jours à deux ans et d'une amende de 251 euros à 25.000 euros ou de l'une de ces peines seulement, lorsqu'elle consiste:

- 1) (L. 21 décembre 2007) à refuser la fourniture ou la jouissance d'un bien et/ou l'accès à un bien;
- 2) (L. 21 décembre 2007) à refuser la fourniture d'un service et/ou l'accès à un service;
- 3) (L. 21 décembre 2007) à subordonner la fourniture d'un bien ou d'un service et/ou l'accès à un bien ou à un service à une condition fondée sur l'un des éléments visés à l'article 454 ou à faire toute autre discrimination lors de cette fourniture, en se fondant sur l'un des éléments visés à l'article 454;
- 4) à indiquer dans une publicité l'intention de refuser un bien ou un service ou de pratiquer une discrimination lors de la fourniture d'un bien ou d'un service, en se fondant sur l'un des éléments visés à l'article 454;
- 5) à entraver l'exercice normal d'une activité économique quelconque;
- 6) à refuser d'embaucher, à sanctionner ou à licencier une personne;

7) (L. 28 novembre 2006) à subordonner l'accès au travail, tous les types de formation professionnelle, ainsi que les conditions de travail, l'affiliation et l'engagement dans une organisation de travailleurs ou d'employeurs à l'un des éléments visés à l'article 454 du Code pénal.

Article 456 (L 19 juillet 1997):

Une discrimination visée à l'article 454, commise à l'égard d'une personne physique ou morale, d'un groupe ou d'une communauté de personnes par une personne dépositaire de l'autorité publique ou chargée d'une mission de service public, dans l'exercice ou à l'occasion de l'exercice de ses fonctions ou de sa mission, est punie d'un emprisonnement d'un mois à trois ans et d'une amende de 251 euros à 37.500 euros ou de l'une de ces peines seulement, lorsqu'elle consiste:

- 1) à refuser le bénéfice d'un droit accordé par la loi;
- 2) à entraver l'exercice normal d'une activité économique quelconque.

Article 457-1 (L 19 juillet 1997)

Est puni d'un emprisonnement de huit jours à deux ans et d'une amende de 251 euros à 25.000 euros ou de l'une de ces peines seulement:

- 1) quiconque, soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication audiovisuelle, incite aux actes prévus à l'article 455, à la haine ou à la violence à l'égard d'une personne, physique ou morale, d'un groupe ou d'une communauté en se fondant sur l'un des éléments visés à l'article 454;
- 2) quiconque appartient à une organisation dont les objectifs ou les activités consistent à commettre l'un des actes prévus au paragraphe 1) du présent article;
- 3) quiconque imprime ou fait imprimer, fabrique, détient, transporte, importe, exporte, fait fabriquer, importer, exporter ou transporter, met en circulation sur le territoire luxembourgeois, envoie à partir du territoire luxembourgeois, remet à la poste ou à un autre professionnel chargé de la distribution du courrier sur le territoire luxembourgeois, fait transiter par le territoire luxembourgeois, des écrits, imprimés,

dessins, gravures, peintures, affiches, photographies, films cinématographiques, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image, de nature à inciter aux actes prévus à l'article 455, à la haine ou à la violence à l'égard d'une personne, physique ou morale, d'un groupe ou d'une communauté, en se fondant sur l'un des éléments visés à l'article 454. La confiscation des objets énumérés ci-dessous sera prononcée dans tous les cas.

Article 457-2 (L 19 juillet 1997):

Lorsque les infractions définies à l'article 453 ont été commises à raison de l'appartenance ou de la non-appartenance, vraie ou supposée, des personnes décédées à une ethnie, une nation, une race ou une religion déterminées, les peines sont de six mois à trois ans et d'une amende de 251 euros à 37.500 euros ou de l'une de ces peines seulement.

b) Loi portant transposition de la directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique.

Chapitre 2 – Dispositions civiles. Article 3 – Charge de la preuve:

1. Dès qu'une personne qui s'estime lésée par le non-respect à son égard du principe de l'égalité de traitement ou qu'une association sans but lucratif visée à l'article 4 établit devant les juridictions civiles des faits qui permettent de prétendre à l'existence d'une discrimination directe ou indirecte, il incombe à la partie défenderesse de prouver qu'il n'y a pas eu violation du principe de l'égalité de traitement au sens de la présente loi.

2. L'article 3 ne s'applique pas aux procédures pénales.

Article 4 – Défense des droits:

Toute association sans but lucratif d'importance nationale dont l'activité statutaire consiste à combattre la discrimination au sens de l'article 1^{er}, qui jouit de la personnalité juridique depuis au moins cinq ans à la date des faits et qui a été préalablement agréée par le ministre de la Justice, peut exercer devant les juridictions civiles les droits reconnus à la victime d'une discrimination en ce qui concerne des faits constituant une violation de l'article 1^{er} et portant un préjudice direct ou indirect aux intérêts collectifs qu'elles ont pour objet de défendre en vertu de leur objet statutaire, même si elles ne justifient pas d'un intérêt matériel ou moral.

Toutefois quand les faits auront été commis envers des personnes considérées individuellement, l'association sans but lucratif ne pourra exercer par voie principale les droits reconnus à la victime d'une discrimination qu'à la condition que ces personnes déclarent expressément et par écrit ne pas s'y opposer.

Pour le moment, les associations sans but lucratif suivantes ont un agrément:

Association de soutien aux travailleurs immigrés (ASTI), Centre de liaison, d'information et d'aide pour les associations des projets au Luxembourg (CLAE) et Action Luxembourg Ouvert et Solidaire-Ligue des droits de l'homme (ALOS-LDH) au titre de la loi du 19 juillet 1997 (motif 'race/origine ethnique'); Association de soutien aux travailleurs immigrés (ASTI), Info-Handicap (Conseil national des personnes handicapées), Chiens guides d'aveugles au Luxembourg, Action Luxembourg Ouvert et Solidaire-Ligue des droits de l'homme (ALOS-LDH) et CARITAS au titre de la loi du 28 novembre 2006; et Conseil national des femmes du Luxembourg (CNFL) au titre des lois du 21 décembre 2007 et 13 mai 2008.

En 2011, il n'y avait pas d'association spécifiquement active dans le domaine de la lutte contre les discriminations religieuses à l'exception du SESOPI-Centre Intercommunautaire asbl (1990) qui développent surtout des études sur le sujet.

Article 5 – Effets: Sont à considérer comme nulles et non avérées les dispositions figurant dans un contrat, une convention collective ou un règlement intérieur des entreprises, ainsi que dans les règles régissant les associations à but lucratif ou non lucratif, les professions indépendantes et les organisations de travailleurs et d'employeurs contraires au principe de l'égalité de traitement au sens de la présente loi.

Aucune jurisprudence n'a encore permis d'évaluer l'impact des lois anti-discrimination dans le domaine religieux ou philosophique.

III. LE DROIT DE DISTINGUER OU DIFFÉRENCIER: LES EXCEPTIONS À LA PROHIBITION GÉNÉRALE

Code civil du Luxembourg

Article 302 (L 27 juillet 1997): Le tribunal statuant sur le divorce confiera la garde des enfants, suivant ce qu'exigera l'intérêt des enfants, soit à l'un ou à l'autre des époux, soit à une tierce personne, parente ou non, l'autorité parentale étant exercée conformément aux articles 378 et 389. En cas de divorce prononcé sur base des articles 229, 230, 231 et en cas de divorce par consentement mutuel, le tribunal de la jeunesse pourra toujours, dans la suite, déterminer, modifier ou compléter le droit de garde pour le plus grand avantage de l'enfant. Un droit de visite et d'hébergement ne pourra être refusé que pour des motifs graves à celui des père et mère qui n'a pas obtenu la garde des enfants. Dans l'intérêt des enfants mineurs, le juge peut tenir compte des sentiments exprimés par eux dans les conditions de l'article 388-1.

Pour apprécier l'attribution de la garde d'un enfant à l'un des parents divorcés, il n'appartient pas au juge de peser ou de comparer les mérites ou les dangers d'une religion par rapport à une autre ou à une secte, seules les activités des parents au sein d'une secte ou d'une église devant être appréciées en fonction de ce qu'elles présentent des avantages ou des inconvénients au regard de l'intérêt des enfants. Si aucun autre élément soumis à la juridiction ne permet de dire que l'enfant subit un danger physique ou psychique auprès d'un des parents du fait d'une éducation conforme à ses conceptions religieuses, il y a lieu d'examiner le mode de vie concret des parents par rapport à l'intérêt de l'enfant dès lors que, lorsque les parents se disputent l'administration de la personne de l'enfant, l'intérêt de l'enfant est le seul critère à prendre en considération. L'intérêt de l'enfant impose de lui assurer la plus grande stabilité possible dans une période de sa vie où il doit déjà subir la séparation de ses parents. Cour 17 décembre 1997, 30, 311.

Loi portant transposition de la directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique

Article 2 – Champ d’application:

1. Ne constitue pas une discrimination au sens de la présente loi une différence de traitement fondée sur une caractéristique liée à la race ou à l'origine ethnique lorsqu'en raison de la nature professionnelle ou des conditions de son exercice, la caractéristique en cause constitue une exigence professionnelle essentielle et déterminante, pour autant que l'objectif soit légitime et que l'exigence soit proportionnée.
2. La présente loi ne vise pas les différences de traitement fondées sur la nationalité et s'entend sans préjudice des dispositions et conditions relatives à l'entrée et au séjour des ressortissants de pays tiers et des personnes apatrides sur le territoire des États membres et de tout traitement lié au statut juridique des ressortissants de pays tiers et personnes apatrides concernés.
3. Le principe de l'égalité de traitement n'empêche pas le maintien ou l'adoption de mesures spécifiques destinées à prévenir ou à compenser des désavantages liés à la race ou l'origine ethnique.

Code d'instruction criminelle

Les conceptions religieuses ne sauraient libérer les citoyens des obligations que leur impose la loi, alors que le respect de celle-ci doit avoir le pas sur les impératifs de la religion. Il en est ainsi spécialement des obligations militaires.

Article 663 (L 1^{er} août 2007):

- 1) L'exequatur de la décision étrangère est refusé:
 - si les faits à l'origine de la demande sont susceptibles d'être qualifiés par la loi luxembourgeoise d'infraction(s) politique(s) ou d'infraction(s) connexe(s) à une (des) infraction(s) politique(s);
 - s'il existe des raisons sérieuses de croire que la demande est fondée sur des considérations de race, de religion, de nationalité ou d'opinion politique; ...

Code du travail

Chapitre II – Exceptions au principe de non-discrimination, article L 252-1:

- (1) Par exception au principe d'égalité de traitement une différence de traitement fondée sur une caractéristique liée à l'un des motifs visés à l'article L. 251-1 paragraphe (1) ne constitue pas une discrimination lorsque, en raison de la nature d'une activité professionnelle ou des conditions de son exercice, la caractéristique en cause constitue une exigence professionnelle essentielle et déterminante, pour autant que l'objectif soit légitime et que l'exigence soit proportionnée.
- (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.

Critères d'appréciation de l'égalité devant la loi

1. Égalité devant la loi – Égalité devant les charges publiques – Application particulière du principe d'égalité devant la loi – Constitution, article 10 bis (1). *L'égalité devant les charges publiques est une application particulière du principe d'égalité devant la loi formulé à l'article 10 bis (1) de la Constitution.* (Cour constitutionnelle, Arrêt 9/00 du 5 mai 2000, Mém A-40 du 30 mai 2000, p 948.)
2. Égalité devant la loi – Violation – Condition – Discrimination – Catégories de personnes victimes d'une discrimination se trouvant dans une situation comparable – Constitution, article 10 bis (1) – *La mise en œuvre de la règle constitutionnelle d'égalité suppose que les catégories de personnes entre lesquelles une discrimination est alléguée se trouvent dans une situation comparable au regard de la mesure critiquée.* (Cour constitutionnelle, Arrêt 9/00 du 5 mai 2000, Mém A-40 du 30 mai 2000, p 948.)

THE NETHERLANDS

SOPHIE VAN BIJSTERVELD

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

The relationship between the right to freedom of religion and the rights to non-discrimination and equal treatment is a hotly debated topic in the Netherlands, with views and positions differing widely. Concrete issues arise in both ‘vertical relationships’ (that is, relationships between public authorities and private individuals and groups or organisations) and ‘horizontal relationships’ (relationships between private individuals and groups or organisations). Issues may arise under civil law (for instance, in employment relationships or in the provision of goods and services), criminal law (for instance, criminal defamation) or administrative law (for instance, subsidy issues).

The modern debate on the relationship between religion and discrimination goes back to the last quarter of the twentieth century. The first legislative proposals for the general revision of the Constitution were introduced in the parliamentary year 1976–1977, and in 1983 a thoroughly revised version of the Constitution of the Netherlands was issued. A general guarantee of equal treatment and non-discrimination (Article 1) was introduced into, and the chapter ‘On Religion’ was replaced by a newly formulated Article on the freedom of religion. In the same Article, freedom of non-religious belief was also explicitly guaranteed for the first time. The concepts of religion or belief were not defined in the process of the constitutional revision, nor have they been defined since by ordinary legislation or court rulings.

In 1994, the Equal Treatment Act (*Algemene wet gelijke behandeling*) entered into force after a long legislative process. A first consultative draft was published in the year 1981 (before the revised Constitution entered into force, but at a time when that process was at an advanced stage). It was a time in which fundamental rights and their doctrinal dimensions received much attention, both in the political process of revising the Constitution and in the academic world.

Current doctrines of fundamental rights date from those years, such as that of the horizontal dimension of fundamental rights, thus giving many concrete issues in the relationship between private individuals a fundamental rights dimension. It was also established that the Constitution contained no hierarchy of fundamental rights. Prior to the revision of the Constitution and the enactment of the Equal Treatment Act, issues concerning the relationship between religion on the one hand and non-discrimination and equal treatment on the other did arise. However, generally speaking, these were dealt with in a more pragmatic way. It was not yet common to formulate those issues as clashes between fundamental rights.

In the course of the second half of the nineteenth century, a way of dealing with religious diversity had developed in society and law that became characteristic for the Netherlands, a system that is often referred to as ‘pillarisation’. Society was organised along confessional and political lines: schools, hospitals, welfare organisations, newspapers, broadcasting companies, employers’ and employees’ organisations, sport clubs and so on were established, each serving their own specific group. Diversity was therefore primarily managed on a level of civil society organisations. This system was in place until well into the 1960s. Indeed, it still is, but the general societal context has changed radically since then and the function and place of such organisations has also changed. Furthermore, trends of depolarisation, secularisation and individualisation have transformed its original significance. At the same time, movements for gay rights and women’s rights, and changes in dominant public opinion on a range of moral issues, put pressure on and challenged institutional liberty for confessional organisations in terms of personnel policies, acceptance policies and their policies on substantive issues.¹

As the relationship between national and international law in the Netherlands is monistic,² the European Convention on Human Rights (ECHR) is part and parcel of Dutch law. It takes precedence over Dutch law (even over the Constitution) and can be directly invoked in Dutch court procedures. Thus the ECHR and its substantive Proto-

¹ For a more specific analysis of the ambiguous relationship between religion and non-discrimination and between religion and freedom of speech in Dutch law, see S van Bijsterveld, *Overheid en godsdienst: Herijking van een onderlinge relatie* (second edition, Nijmegen, 2009), esp chs 6 and 8.

² Articles 93 and 94 of the Constitution.

cols have played a role in court cases. An example is a ruling by the Netherlands Supreme Court (Hoge Raad) in which Article 2, Protocol I, ECHR (the right to education) was held to provide the private individual with rights vis-à-vis the state but not vis-à-vis private institutions (confessional schools). On the basis of this conclusion, as well as the applicable Dutch law, an orthodox Jewish secondary school was not obliged to admit a pupil who was not Jewish according to the strict (Halacha) criteria of the school.³

Article 14 ECHR does not contain an independent right to equal treatment but guarantees equal treatment with respect to the (other) fundamental rights contained in the ECHR. Its independent significance is therefore limited. A highly controversial Dutch case is currently pending for the European Court of Human Rights (ECtHR), concerning the right of an orthodox reformed political party, the Staatkundig Gereformeerde Partij (SGP), not to allow women to be elected through their party list (see below).

The number of Dutch cases concerning religion and non-discrimination or equality brought before the ECHR is not high, but they raise fundamental questions. In ruling on the case of the SGP, the Netherlands Supreme Court and the Council of State (in separate proceedings) came to contrary conclusions. The interpretation of the UN Convention on the Eradication of Discrimination of Women played a crucial role in these proceedings.

UN instruments have also affected national legislation, especially criminal defamation law. In order to give effect to the UN International Convention on the Elimination of All Forms of Racial Discrimination (1965, entry into force 1969), a number of speech crimes were included in the Dutch Criminal Code (Articles 137c–e). They were subsequently extended and the penalties for them have been increased. Currently, criminal defamation law as a restriction of ‘free speech’ has become controversial, especially in relation to religion.

As to the EU, Article 19 TFEU (ex Article 13 EU), originating from the Treaty of Amsterdam, must be mentioned. On the basis of this Article, EU Directive 2000/78/EC was enacted, which contains a special provision (Article 4(2)) concerning occupational requirements within churches and other public or private organisations the

³ HR 22 January 1988, AB 1988, 96 (Maimonides).

ethos of which is based on religion or belief.⁴ The Dutch Government favoured the incorporation of this clause, which is generally in line with the provisions of the Dutch Equal Treatment Act. A Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation is currently pending, and it may have implications for national legislation concerning religion and non-discrimination.⁵ Unfortunately, the Proposal suffers from lack of clarity.

At the time of writing, a parliamentary initiative Bill is pending in the Lower House of the Dutch Parliament, which is aimed at changing the delicate balance that the 1994 Equal Treatment Act carved out with regard to confessional organisations between religion on the one hand and non-discrimination or equal treatment on the other.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

The Equal Treatment Act and its enforcement mechanism⁶

The Equal Treatment Act plays a key role in the law relating to religion and non-discrimination. It was first enacted in 1994 after a period of preparation and debate lasting more than ten years. Public, academic and parliamentary debates on this topic were marked by

4 The provision thus gave effect to Declaration 11 on the Status of Churches and Non-confessional Organisations contained in the Final Act to the Treaty of Amsterdam (1998). The provision is now incorporated in the Lisbon Treaty.

5 COM (2008)0426 final, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:NOT>>, accessed 15 August 2011.

6 For a presentation of the Act and the work of the Equal Treatment Commission by the Commission itself, see ‘Equality law and the work of the Dutch Equal Treatment Commission’, available at <<http://www.cgb.nl/english/publications/brochures>>, accessed 15 August 2011. See also <<http://www.non-discrimination.net/>>, accessed 15 August 2011, the site of the European Network of Experts in the Non-discrimination Field. For the section on the Netherlands, see <<http://www.non-discrimination.net/countries/netherlands>>, accessed 15 August 2011. The site includes annual country reports, the latest currently being a report for the year 2009, <http://www.non-discrimination.net/content/media/2009-NL-Country%20Report%20LN_final.pdf>, accessed 15 August 2011; see pp 21ff for a brief overview of cases on religion and non-discrimination in the reported year.

strong controversy. The Act has been amended several times, notably in order to implement subsequent EU legislation in this area.

Unlike European Union regulations or other international instruments, the Dutch wording of the Equal Treatment Act does not command ‘equal treatment’ or prohibit ‘discrimination’, but rather prohibits ‘distinction’.⁷ The relevant grounds are ‘religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status’ (section 1(b) of the Act). Sections 1 and 1(a) define the key concepts of the Act, and introduce the distinction between ‘direct’ and ‘indirect’ distinction, the latter of which may be justified under certain conditions. Indirect distinction is distinction on anything other than the specified grounds, but resulting in distinction on such grounds. Harassment is included in the prohibition of making distinctions.⁸ It is defined as ‘conduct related to the characteristics or behaviour’ related to the aforementioned grounds ‘which has the purpose or effect of undermining the dignity of a person and creating a threatening, hostile, degrading, humiliating or offensive environment’.

It is important to note the overall structure of the Act. In a wide variety of socially relevant areas, making distinctions – broadly defined – by both private and public entities and persons is prohibited. The balance with other fundamental values and interests is achieved only through delimitation of the scope of application of the Act and through specifically formulated exceptions. Therefore, if the making of a distinction falls within the scope of application, and no specific exception is provided, the action is unlawful. This creates a preference for equal treatment. This preference is underlined by Article 10, which deals with the burden of proof: once there is a presumption of discrimination based on the facts of the case, the other party carries the burden of proof.

In terms of protection, Article 9 declares that ‘All contractual provisions which conflict with this Act are null and void.’ Furthermore, persons who invoke the Act or employees whose contract of

⁷ In the official English translation, the word ‘discrimination’ is used in its neutral sense of ‘discrimination’. However, the word ‘discrimination’ sounds more pejorative than ‘distinction’. An Act of Parliament, which aims at aligning the definitions of the Dutch Act with the European Regulation, is about to be enacted and to come into force (*Kamerstukken* 31832). This Act, which leaves the central concept ‘distinction’ intact, is a response to an opinion of the European Commission. See also below, n 10.

⁸ But not with respect to all areas covered by the Act: see Art 1(a)(4).

employment is terminated in contravention of the relevant provisions of the Act are given special protection (see Articles 8, 8(a) and 9).

Articles 2 and 3 contain general exceptions to the Act (see below). Articles 4–7(a) contain the actual prohibition against making distinctions and define the fields in which this prohibition is operative.⁹ Thus they form the core of the Act. In various instances, their scope is narrowed by specific exceptions to the general rule (see below).

Enforcement: the Equal Treatment Commission

The Equal Treatment Commission is the specialised enforcement body set up under Article 11 of the Equal Treatment Act. It is an independent body, whose members are appointed by the Minister of Justice in consultation with the Ministers of Social Affairs and Employment, of Education and Science and of Welfare, Health and Cultural Affairs (Article 16(3)), for a maximum, renewable, period of six years. The Commission is composed of nine members; its chair and assistant chairs must fulfil the requirements of eligibility for appointment as officers of the court (Article 16(2)).

The Commission's statutory role is threefold. First, it may 'in response to a request in writing, conduct an investigation to determine whether discrimination as referred to in this Act [and a number of other specified Acts] has taken or is taking place, and may publish its findings' (Article 12(1)). Second, it may 'conduct an investigation on its own initiative to determine whether such discrimination is systematically taking place and publish its findings' (Article 12(1)). Third, it 'may bring a legal action with a view to obtaining a ruling that conduct contrary to this Act [and a number of other specified Acts] is unlawful, requesting that such conduct be prohibited or that the court order the consequences of such conduct to be rectified' (Article 15).

From this it follows that the 'findings' of the Commission are not legally binding, unlike a court ruling. However, these findings ('Opinions' in the wording of the Commission) have some authority, although they are regularly contested. A complainant may choose not to address the Commission but may opt for a court procedure in-

⁹ These are contained in Arts 5(1), 6, 6(a)(1), 7(1) and 7(a).

stead. Another possibility is that a court may be addressed by one of the parties following the delivery of an opinion by the Commission. Article 15 provides that the Commission itself may address the court. Article 12(2) specifies who may address the Commission for an opinion and under what circumstances this may happen, but the low-threshold procedure makes it easy to bring a matter before the Commission. The findings of the Commission result in a decision on the lawfulness or unlawfulness of a given act under the Equal Treatment Act. Only courts can award damages.

It is worthwhile mentioning that it is the right of the Commission and its staff to ‘demand all the information and documents which may reasonably be considered necessary for the performance of its duties’ and there is a corollary duty of ‘everyone’ to provide such information, unless under the obligation of official or professional confidentiality or because of a risk of self-incrimination or incrimination of specified relatives of ‘conviction for a serious offence’ (Article 19). The commission issues an annual report of its activities; and every five years it reports on ‘its findings on the operation of this Act’ (Article 20). A Bill intended to restructure the Equal Treatment Commission to function as a National Institute on Human Rights as well is currently pending before the Upper House of Parliament.¹⁰

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

Given the structure of the Equal Treatment Act, allowances made with respect to religious freedom need to take the shape of delimitation of the scope of application of the Act or of exceptions. Article 3 delimits the scope and specifies that the Act does not apply to:

- i. Legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature;
- ii. The office of minister of religion.

Fundamental norms of reasonableness must be complied with even if they fall outside the scope of the Act. Regardless of whether religious institutions are more ‘liberal’ in their policies or more ‘ortho-

¹⁰ Kamerstukken II and I, 32 467 (Wetsvoorstel College rechten van de mens).

dox', it is necessary that they have a policy to be able to relate the Act to the confessional status of the institution, and to be able to apply the policy consistently.

Allowances are also made for relationships with a more private character (for example, an employment relationship) or, with regard to political opinion, appointments to administrative or advisory bodies or to confidential posts. Although religion is not mentioned with regard to public posts, it can play an indirect role through the exception with regard to political opinion.

Furthermore, the Act contains three similarly formulated but not identical specific exceptions that are particularly relevant to institutions founded on religious or ideological principles. The formulation of these exceptions has been and still forms the most contested part of the Act as far as the relationship between religion and equality is concerned. At the time of writing, they are the subject of a debate between the Dutch Government and the European Commission. A controversial Bill aims at restricting the existing room for manoeuvre of religious institutions.¹¹

The form that these exceptions take is to allow an institution founded on religious or ideological principles the liberty, under certain conditions, to make distinctions within the meaning of the Act. For example, Article 5(1)(a) states that the prohibition to make distinctions in the relevant social fields does not apply to

the freedom of an institution founded on religious or ideological principles to impose requirements which, having regard to the institution's purpose, are necessary for the fulfilment of the duties attached to a post; such requirements may not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status.

The formulation under paragraph (c) deals with educational establishments and is formulated slightly differently, in order to guarantee a slightly higher degree of liberty for the establishment. Article 6(a)(1) deals with distinctions 'with regard to membership of or involvement in an employers' organisation or trade union, or a professional association, or with regard to the benefits which arise from

¹¹ *Kamerstukken II*, 32 476 ('initiatiefvoorstel tot wijziging van de Algemene wet gelijke behandeling in verband met het annuleren van de enkele-feitconstructie in artikel 5, tweede lid, artikel 6a, tweede lid, en artikel 7, tweede lid, van de Algemene wet gelijke behandeling').

such membership involvement'. In view of this formulation, the exception in paragraph 2, is, again, formulated in a slightly different manner. The formulation of the exceptions, generally known as the 'sole grounds' formulation, was a comprise between opposing views on the extent to which institutions founded on principles of religion or belief should be granted the liberty to shape their institutional identity, including the terms of their personnel policy.

Case law

At the ideological level, but not so much in practice, the tension between religion and non-discrimination has particularly concerned the issue of homosexuality in religious educational establishments. The current debate on the pending Bill also focuses on this issue.¹² Again, this is not as pressing in practice as the debate would suggest. In terms of interpretation of the 'sole grounds' formulation, questions have arisen as to whether distinctions on the grounds of the practice of homosexuality or cohabitation are or can be seen as falling within this formulation.

In terms of practice, issues of wearing headscarves, burkas or niqabs, or the refusal of personnel to shake hands with a person of the other sex in state (non-religious) schools and other workplaces have led to much case law. The distinctions often take the shape of indirect distinctions, thereby raising the question as to whether there was a justification for the distinction. This requires a weighing of interests on both sides where the circumstances of the case play a dominant role, and this process of weighing is not at all value-neutral. It is fascinating to see that, once in a while, the exact same case leads to a different result in the Equal Treatment Commission and in the court.¹³

The Equal Treatment Commission uses a three-pronged test to determine whether an indirect distinction can be justified. In standard wording, this is that the

aim must be legitimate, in the sense of sufficiently important or meeting a real need. A legitimate aim further requires that there is no dis-

¹² See n 10.

¹³ Compare, for instance, CGB Opinion 2006-202 and Rb Rotterdam, 6 August 2008, LJN BD9643.

criminating purpose. The means of achieving that aim must be appropriate and necessary. A means is appropriate if it is fit to achieve the goal. If the goal cannot be reached with a means that does not lead to discrimination, a means is necessary that is the least problematic response, and that is in appropriate relationship to the aim.¹⁴

All these criteria must be met for the distinction to be lawful.

Returning to another currently controversial issue, it should be noted that the liberty of confessional educational establishments to adopt an admissions policy on grounds of religion is under attack. Again, in practice this is not an important issue, but from an ideological perspective it is. The issue has surfaced in the context of a broader discussion on ‘white’ and ‘black’ schools. The presumption is that confessional schools can maintain ‘white’ schools through their admissions policy on religious grounds. This is an issue in the broader context of integration. In practice, however, there are only a few schools that have a strict admissions policy, and they tend to have a rather outspoken religious confession. In practice, many confessional schools are attractive for Muslim pupils because their parents favour them above secular state schools. However, this debate comes at a point when the positions of the dual school system, with state schools and publicly financed private (namely confessional) schools, are occasionally attacked, and at a time when issues concerning Muslim confessional schools are in the news. The fact that a number of different threads of argument contribute to this debate makes it both complex and heated.

A current topic of controversy is the right of (candidate) civil registrars to refuse to perform same-sex marriages. The Equal Treatment Commission is of the view that the Equal Treatment Act is not violated if municipal authorities reject a candidate civil registrar who conscientiously objects to performing such marriages.¹⁵

14 CGB Opinion 2011-88, recital 3.10 (unofficial translation). The case concerned the Academic Medical Centre in Amsterdam, which refused to allow a Muslim doctor’s assistant to wear a long skirt in the outpatients’ clinic.

15 See eg CGB Opinion 2008-40 (the candidate applied only for the job of civil registrar). In an advisory report, the Commission came to the general conclusion that no room for conscientious objections against performing same-sex marriages should be allowed for persons solely employed for the purpose of performing marriages; limited room could be allowed if such persons were employed by municipal authorities for other purposes as well: Equal Treatment Commission, 2008/04, ‘Advies inzake gewenstenswaarde ambtenaren van de burgerlijke stand: “Trouwen? Geen bezwaar!”’, available at <http://www.cgb.nl/publicaties/publicatie/221135/2008_04_advies_inzake>

OTHER LEGISLATION ON RELIGION AND NON-DISCRIMINATION

Although the Equal Treatment Act plays a dominant role in theory and practice in the relationship between religion and non-discrimination, other legislation deserves mention as well. First of all, the general provision in the Netherlands Civil Code can play a role in the absence of specific legislation – for instance, in cases of defamation. As the threshold for defamation in civil law is lower than in criminal law, civil law plays a complementary role. An example of the use of civil law can be found in a case in which a former church member sued the church minister for the words he used in a prayer during a church service in which he expressed his opinion on the fact that the complainant had left the church.¹⁶

The Criminal Code contains a number of provisions with respect to defamation. Over the last few years, a number of high-profile cases have been decided. In their final stages, none of these cases has, so far, led to a conviction. The scope of this report does not allow a detailed analysis of these cases. To give an impression of the issues that have recently arisen, the cases may be mentioned of a former parliamentarian who was prosecuted for an interview in which he expressed his moral objection to homosexuality, of an imam who did the same and of a current politician for his objection to Islam.¹⁷

Questions have been raised for some time about the religious conviction and actual practice of the Dutch political party SGP not to allow women to be elected on its list.¹⁸ Until June 2006, it did not

¹⁶ [gewetensbezwaarde_ambtenaren_van_de_burgerlijke_stand_trouwen_geen_bezaaard](http://www.rechtspraak.nl/jurisprudentie/gewetensbezwaarde_ambtenaren_van_de_burgerlijke_stand_trouwen_geen_bezaaard) > accessed 28 November 2011.

¹⁷ Rb Arnhem, 24 February 1989, KG 1989, 114 (unlawful prayer).

¹⁷ Hof 's-Gravenhage, 9 June 1999, AB 1999, 328 (Van Dijke); Hof 's-Gravenhage, 18 November 2002 (see <http://www.rechtspraak.nl>) (El Moumni); and Rb Amsterdam, 23 June 2011 (see <http://www.rechtspraak.nl>) (Geert Wilders). For an English briefing on the last case, see <<http://www.non-discrimination.net/content/media/NL-49-Flash%20Report%20NL%202011-11%20Acquittal%20in%20Wilders%27%20case.pdf>>, accessed 28 November 2011.

¹⁸ This orthodox reformed party is represented in both Houses of Parliament. It is the only party that has held seats without interruption in the directly elected House since 1922 (currently 2 out of 150). Officially, the SGP is a theocratic party, but it there is no doubt that it works within the context of Dutch parliamentary democracy. On this issue, see RJB Schutgens and JJJ Sillen, 'De SGP, het rechterlijk bevel en het kiesrecht', (2010) NJB 1114–1117; M de Blois, 'Een mijlpaal op weg naar maatschappel-

admit women as members of the party. In 2005, a claim was brought against the Dutch state by, among others, a women's interest organisation for breach of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by allowing the SGP to exclude women. The Court of first instance, the Court of Appeal and the Supreme Court all came to the conclusion that the Dutch state was in violation of the Convention.¹⁹ In its ruling, the Court of first instance made the observation that

it is not unimaginable that in the (near) future other parties will also be formed that – for religious reasons – attribute women another political and/or societal role than men, as a result of which the danger of discrimination creeps in. In this respect, the state can exercise a steering role.²⁰

In order to give effect to the ruling of the Court of first instance, the state refused the party subsidy based on the Political Party Subsidy Act (*Wet Subsidiëring Politieke Partijen*), a decision against which the SGP lodged an administrative appeal. The highest administrative court, a special division of the Council of State, ruled that the subsidy could not be withheld, as the grounds on which the state had done so were not within the Act. The Council of State also made it clear that, in its view, the state had not acted unlawfully by allowing the SGP to exclude women. This ruling was published prior to the ruling by the Court of Appeal in the civil cases, which ruling was upheld by the Dutch Supreme Court. The Dutch Government has stated that it will take no action to comply with the ruling of the Supreme Court until the ECtHR has ruled on the case. It is clear that this case touches on fundamental issues of democracy and the relationship between different fundamental rights.

EVALUATION

This report only covers the main pieces of legislation relating to religion and non-discrimination, and it can only point out a few of

ijke uitsluiting: over het SGP-arrest van de Hoge Raad van 9 april 2010', (2010) 3 *Tijdschrift voor Religie, Recht en Beleid* 61–69.

19 HR, 9 April 2010, LJN BK4549; ABRvS, 5 December 2007, AB 2008, 35 (administrative proceedings). The violation concerned Articles 7(a) and 7(c) of the Convention.

20 Rb 's-Gravenhage, 7 September 2005, LJN AU2088 (unofficial translation).

the cases and areas in which the issue of non-discrimination and religion plays a role. It is clear that these issues will be more pressing in a highly pluralist society in religious and ethical terms.²¹ One of the pressing questions is how pluralism is to be protected: at the level of the individual or also at the level of (confessional) organisations, giving these organisations room to manoeuvre in areas such as personnel policy? It is clear that such questions cannot be answered solely within the framework of fundamental rights as such; they require a broader argumentation and perspective. Another question concerns how far public authorities themselves can accommodate conscientious objection on grounds of religion and belief. Finally, it will be important to decide what role the legislature must play and what role remains for the courts; in other words, will a more general, doctrinal approach be dominant or will there be room for a step-by-step development based on individual cases?

21 On this topic, see S van Bijsterveld, *The Empty Throne: Democracy and the Rule of Law in Transition* (Utrecht, 2002), esp ch 6, ‘The normative frame: the return of natural law’.

POLAND

MICHAŁ RYNKOWSKI

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

The concept of religious freedom and non-discrimination

For centuries, religious freedom has been one of the fundamental principles of Polish law. In 1573, the Warsaw Confederation of the Polish gentry agreed that there should be no wars between persons of different denominations and acknowledged the principle of '*cuius regio eius religio*' for every nobleman regarding his peasants.¹ The preamble to the 1921 Constitution began with the words: 'In the name of the Almighty God' (mentioning neither the Trinity nor Jesus Christ), which was acceptable to all three monotheistic religions, as a sign of the tolerance of a newly reborn republic. While religious tolerance has been well established for centuries, however, it was only at the beginning of the twenty-first century that the terms and concept of equal treatment and non-discrimination came into use, accompanying Poland's accession to the EU. Nevertheless, non-discrimination was (and probably still is) understood by a vast majority as being identical with religious freedom and religious tolerance.

The impact of the United Nations' Covenants and the European Convention on Human Rights

Between 1945 and 1989, Poland was under the rule of the communist regime, which promoted freedom *from* religion rather than freedom *of* religion. While pro-Christian opinions were represented by a very small group in Parliament (usually between 6 and 11 out of 460 deputies, forming a parliamentary club 'Znak' – 'Sign'),² persons publicly admitting their faith faced a number of problems, particularly in the 1950s, although the situation improved in the 1960s and

1 S Plaza, *Wielkie bezkrólewia* (Krakow, 1988), p 8.

2 W Roszkowski, *Historia Polski 1914–1990* (Warsaw, 1991), p 244.

1970s. Discrimination was meted out in equal measure against persons practising any form of faith, regardless of denomination (whether Catholic, Orthodox, Lutheran or other). Nevertheless, in contrast to the situation in some other countries of the Eastern block, Poles did not stop attending religious services. The situation returned to normal in 1989/1990, when the Statute on the Guarantees of Freedom of Conscience and Religion was adopted (19 May 1989), and the communist regime was replaced with a democratic one following the election of 4 June 1989. The statute of 1989 is still in force, with minor amendments.³

Poland ratified the European Convention on Human Rights (ECHR) on 19 January 1993, the day on which the Convention entered into force for Poland.⁴ The ratification was perceived as a (well-deserved) return to the fold of the European family, as it was only four years after Poland's release from communist rule. There was no in-depth discussion. The Roman Catholic Church, the main player on behalf of churches and religious communities, was mainly involved in questions relating to the Concordat (signed in 1993, but only ratified in 1998) and struggling with issues concerning abortion, which had remained legal under communist rule (having been legalised during the Second World War); after 1989 the Church tried to prohibit abortion or at least to limit the grounds for abortion.

Both UN Covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) were signed by the People's Republic of Poland on 2 March 1967 and ratified on 18 March 1977,⁵ but they did not have any impact on the legal system. Their ratification was used by the communist regime as a sort of smokescreen for its activities.

Transposition of the EU Directives 2000/43/EC and 2000/78/EC

The deadline for transposition of the EU directives 2000/43/EC and 2000/78/EC was 1 May 2004, namely the day of Poland's accession to the EU. They were transposed by the Polish Parliament in 2003, as a part of the *acquis communautaire*, and they were not subject to

3 Cons text published in Dz.U.2005, No 231, item 1965.

4 Polish OJ 1993, No 61, item 284.

5 Polish OJ 1977, No 38, items 167 and 169 respectively.

major interest or discussions. The 2000/78 directive was transposed in a number of amendments to the Labour Code, passed between 14 November 2003 and 3 December 2010.

The Catholic Church did not intervene directly in discussions related to discrimination based on religion and the transposition of directives. By contrast, it was very active during discussion of the Charter of Fundamental Rights and of the Constitutional Treaty, underlining the lack of reference to God and criticising what it saw as the overly broad wording concerning non-discrimination, which could eventually lead to a recognition of same-sex marriages in Poland (this issue reappeared in the summer of 2010 – see below).

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

The Office of the Plenipotentiary for Equal Treatment of Women and Men

The Office of the Plenipotentiary of the Government for Equal Treatment of Women and Men was created by the Prime Minister in 2001. From 2005 it also dealt with discrimination other than that based on gender. The Plenipotentiary was a secretary of state in the Prime Minister's Chancellery. The office was abolished in November 2005, following remarks by the Plenipotentiary (Magdalena Środa), that Catholicism contributed to violence in the home. The Prime Minister at the time, Kazimierz Marcinkiewicz (of the Party of Law and Justice), did not deny the link between this statement and abolishment of the office. The Office of Plenipotentiary was re-established in March 2008, under the Prime Minister Donald Tusk, and Elżbieta Radziszewska was appointed to the position. The amendment to the Labour Code of 3 December 2010 on transposing certain EU provisions in the area of equal treatment (OJ 2010 No 254, item 1700) created (Article 18) an office of the 'Plenipotentiary of the Government for Equal Treatment', thus no longer mentioning women and men in its name. The plenipotentiary is appointed and dismissed by the Prime Minister and has the rank of secretary of state within the Chancellery of the Prime Minister. A special unit (currently 20 persons) within the Chancellery provides administra-

tive, technical and legal support. The tasks of the Plenipotentiary include monitoring and evaluation of drafts submitted by various ministries, co-operation with social organisations and trade unions, and raising awareness. The Office of the Plenipotentiary has no real power vis-à-vis entities violating the principle of non-discrimination – it may merely send a letter pointing out the findings. The Plenipotentiary presents a yearly report to the Sejm (the lower chamber of Parliament), describing the way in which discrimination is being combated in Poland. The most recent report (for 2009, document 2395) consists of 160 pages and relates only and exclusively to discrimination based on gender. The Plenipotentiary can call on nine advisory teams, dealing with different aspects of discrimination, but none of them relates to discrimination based on religion.⁶

A rare example of the Plenipotentiary acting with regard to religion occurred when she intervened in the city of Szczecin, where new members of the city guard were required, after taking the oath, to participate in a Mass. In October 2009, the Office of the Plenipotentiary expressly asked the City Council to separate the oath-taking ceremony and participation in the Mass. Ms Radziszewska is often criticised *ad personam* for not fulfilling her tasks correctly, a criticism that was also the subject of Parliamentary questions (interpelacja 13247).

Another body dealing with non-discrimination is the Ombudsman (or rather Ombudsperson, since the office is currently held by Professor Irena Lipowicz), which has existed in the Polish legal system since 1987. This office is usually held by highly respected lawyers and has several regional offices in Poland, which contribute to its efficiency and high esteem. The above-mentioned amendment to the labour code of 3 December 2010 added to the Ombudsperson's tasks the monitoring of non-discrimination and the right 'to take up action, if he is informed about the violation of human rights and freedoms, including the principle of equal treatment'. The statute introducing these new areas of responsibility does not mention EU Directive 2000/78/EC, but it explicitly mentions Directives 2000/43, 2004/113 and 2006/54. The powers of the Ombudsperson are de-

⁶ The website presenting various activities of the Plenipotentiary (<<http://www.rownetraktowanie.gov.pl/en>>, accessed 21 November 2011) has a special link to her speeches and presentations.

scribed more precisely: in case of a violation of the principle of non-discrimination by an organ of public authority, he or she may take action; if this principle is violated by a private entity, the Ombuds-person may suggest a survey to be carried out by the State Labour Inspection. Recently, Professor Lipowicz addressed the Minister of Justice to ask whether the Ministry gathers or intends to gather statistics concerning crimes relating to the violation of the non-discrimination principle.

In September 2009, the parliamentary party of the Alliance of the Democratic Left submitted a draft statute to the Sejm proposing the creation of an Ombudsman for Combating Discrimination.⁷ This office was intended to deal with various areas of discrimination, including private life, and referred to discrimination based on a variety of grounds, including religion. The Government gave a negative verdict on the project, which was prepared by the Office of the Plenipotentiary for Equal Treatment, suggesting that many provisions concerning scope and *modus operandi* were unclear. Furthermore, the Bishops' Conference of the Catholic Church got involved, with a letter sent by the Deputy Secretary General to the Government in the summer of 2010 being leaked to the Press. The letter did not challenge any particular legal aspect of the act, but it stated that there was no need to create a special office. The bill was rejected at the first reading in the Sejm on 26 November 2010. It was not clear from the draft whether the new Ombudsman for Combating Discrimination was supposed to replace the current Plenipotentiary for Equal Treatment, as the bill did not refer to this question, neither in regard to abolishment of the latter nor to terms of co-operation between the two.

To sum up, the Plenipotentiary for Equal Treatment is currently a one-person body with limited competence, and so far there is no advisory body dealing with religious discrimination. The Ombuds-person is a second institution in charge of non-discrimination, with fewer tasks, but those tasks more precisely defined.

⁷ Document 2808, <<http://orka.sejm.gov.pl>>, accessed 21 November 2011.

Sources of law

The preamble to the current 1997 Constitution of the Republic alludes to religious tolerance and non-discrimination: ‘We, the Polish Nation – all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources, equal in rights and obligations towards the common good – Poland’.⁸ The general prohibition against discrimination is in Article 32, paragraph 1: ‘All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities’; the individual freedom of religion is anchored in Article 53.

The statute on non-discrimination was passed on 3 December 2010 (Polish OJ 2010, No 254, item 1700) and it amended the relevant chapter of the Labour Code.⁹ The prohibition of discrimination in the workplace was introduced for the first time in a statute amending the Labour Code in 2001 (Polish OJ 2001, No 128, item 1405). At the time it referred merely to ‘equal treatment of men and women’, the title of chapter 2a that was added in 2001. In 2003, shortly before Polish accession to the EU, the title was changed to ‘Equal treatment in employment’ (Polish OJ 2003, No 213, item 2081). This 2003 amendment included the exemption for churches and religious communities, allowing differentiation in treatment. The current wording – including all organisations based on belief (the Polish term *światopogląd* corresponds with German *Weltanschauung*) – was established by the statute adopted on 3 December 2010.

The notion of religion is not itself defined in the Polish legal system. The Minister of the Interior, who is responsible for the registration of churches and religious communities, has in a very few cases (between 1995 and 2002 there were 3 negative decisions out of a total of 48) denied registration on the basis that there is no religious element in the application. According to the procedures laid down in the 1989 statute, the unsuccessful applicant may address the Chief

⁸ Official translation by the Chancellery of the Sejm.

⁹ L Florek, *Prawo pracy* (Warsaw, 2011), p 158.

Administrative Court, which confirmed in these cases that the applications lacked a ‘features of religion’.¹⁰

As Article 4 of the statute of 3 December 2010 states, the prohibition of discrimination based on religion relates to professional training, economic or professional activities, joining and functioning within trade unions, access to unemployment agencies and their services, social security, health care, education and higher education, and access to housing, goods and energy, if offered publicly. This means that it covers all elements included in Directive 2000/78/EC.

Protection through criminal law

The Criminal Code, although relatively recent (1997) represents the traditional approach to religious freedom, and it does not refer in any way to discrimination. The Code states in chapter XXIV (crimes against freedom of conscience and religion) that anyone ‘who limits human rights of another person due to their religious or non-religious affiliation, shall be punished by limitation of freedom or imprisonment for up to two years’ (Article 194). Moreover, Article 119 states that violence based on nationality, ethnic or racial background or on political, religious or non-religious views shall be punished by a prison term ranging from three months to five years. In case of murder or significant injury arising from discrimination on grounds of religious or philosophical convictions, the offender shall be imprisoned for not less than 12 years, 25 years or life imprisonment as appropriate (Article 118, paragraph 1). Intention to commit such a crime shall be punished by imprisonment for no less than three years. Finally according to Article 257, defamation of a person or a group on the basis of nationality, ethnic background, race, religion or lack of religion shall be punished by imprisonment for up to three years.

Data provided by the Ministry of Justice relate to the Articles of the Criminal Code. However, as Article 257 penalises offence based on nationality, ethnic, racial or religious affiliation, it is difficult to determine on what ground any specific crime has been judged.¹¹

10 M Rynkowski, ‘Religious entities as legal persons: Poland’, in L Friedner (ed), *Churches and Other Religious Organisations as Legal Persons* (Leuven, 2007), p 180.

11 N Kłączyńska, *Dyskryminacja religijna a prawnokarna ochrona wolności sumienia i wyznania* (Wrocław, 2005), p 230.

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

The amendment to the Labour Code passed in 2003 (Polish OJ 2003, No 213, item 2081) included an exemption for churches and religious communities, according to which unequal treatment would not constitute discrimination:

Differentiation of employees based on their religion or denomination does not violate the principle of equal treatment in employment, if in connection with the character of activities carried out within churches and other religious communities or organisations the aim of whose activity remains in close connection with religion or denomination, the religion or denomination of the employee constitutes an essential, legitimate and justified professional requirement.

The wording is peculiar: in the original it refers to *religia* (religion) and *wyznanie* (denomination). While the first notion is overarching (for example, Christianity, Buddhism, Islam), *wyznanie* is understood as a group within a religion (such as Catholic, Protestant or Orthodox). The new statute, adopted on 3 December 2010 (see above) confirms this principle, slightly changing the scope of the provision by adding to churches and religious communities organisations whose ethics are based on philosophical beliefs:

There is no violation of the principle of equal treatment in the case of a limitation by churches and religious communities, and also organisations, the ethics of which are based on religion, denomination or belief, of the access to employment, due to religion, denomination and belief if the kind of activities carried out by churches and religious communities and also other organisations causes that religion, denomination or belief to constitute a real and decisive professional requirement, proportionate for achievement of a legitimate aim of differentiation of a such person. The employees must act in good faith and loyally towards the ethics of the church, religious community or organisation, the ethics of which are based on religion, denomination or belief.

According to this text, churches, religious communities or organisations whose ethics are based on a religion, denomination or belief may differentiate between employees. The text of the Labour Code as amended on 3 December 2010 (so in current force) does not refer

to an individual as an employer who could discriminate or differentiate between employees.

The Polish legal databases, although usually comprehensive and detailed, do not list any case law relating to religious non-discrimination or to the right of churches to differentiate.

CONCLUSIONS

Since 1945 the population of Poland has been one of the most homogenous in Europe, in terms of both national and religious minorities. There are over 150 registered churches and religious communities, but one has to bear in mind that religious minorities (Orthodox, Lutherans, even the majority of Muslim residents) have lived in Poland for centuries. According to the Constitution, public authorities may not ask citizens questions concerning individual religion or belief (Article 53, paragraph 7). Discrimination based on religion may occur when the person in question reveals their denomination: for example by asking for a day off on a religious holiday that is not a state (Catholic) holiday. The statutes on relations with churches and religious communities (for example, the Orthodox Church) do provide for such exemptions as taking day off for a religious holiday, and following such a request of an interested person an (unlawful) discrimination could take place.

According to the 2007 Eurobarometer report concerning ‘Discrimination in the European Union’, Poles referred mainly to physical disability, homosexuality and age, with discrimination based on religion rarely mentioned.¹² In the rare instances where cases have arisen, they have concerned the choice of religion in schools or, exceptionally, classes in ethics. Among the few cases in this area, one reached the European Court for Human Rights in Strasbourg (*Grzelak v Poland*, case 7710/02). There are no significant cases concerning discrimination based on religion in the working environment.

¹² See <http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_sum_en.pdf>, accessed 21 November 2011.

Other cases based on Article 14 of the ECHR that were considered in Strasbourg related to other aspects of discrimination.¹³

13 *Kozak v Poland* (application no 13102/02), succession to tenancy of a flat denied to a homosexual after his partner's death, in breach of the Convention; *Bączkowski and others v Poland* (application no 1543/06), freedom of assembly, Foundation for Equality (march for support of the rights of various minorities); *Luczak v Poland* (no 77782/01), a French national who was denied access to the farmers' pensions scheme because he was not Polish.

PORUGAL

JOSÉ DE SOUSA E BRITO

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

Portugal was a constitutional monarchy from 1822 to 1911, with Roman Catholicism as the state religion. During most of this period the Constitutional Charter of 1826 was in force, according to which ‘no one may be persecuted on grounds of religion, provided they respect that of the state and do not offend public morality’ (Article 145, § 4). The same formula, excepting the reference to public morality, is to be found in the short-lived Constitution of 1838 (Article 11). The republican Constitution of 1911 repeated the last wording, almost unaltered, but reinforced by the prohibitions of being obliged to declare one’s religion to a public body (Article 3, no 6) and of being deprived of any right or exempt from any civil duty on the grounds of religion (Article 3, no 7). The undemocratic Constitution of 1933 repeated the same words (Article 8, no 3). In fact, the First Portuguese Republic persecuted the Catholic Church, while the dictatorship from 1926 to 1974 discriminated in favour of Catholicism (particularly after the Concordat of 1940), which was declared to be ‘the traditional religion of the Portuguese Nation’ in 1971 (Article 46 of the Constitution of 1933, version of Law 3/71).

The principle of equality has been solemnly declared by all constitutions (‘the law is equal for all’ in 1822, 1826, 1838 and 1911; ‘all citizens are equal before the law’ in 1933 and 1976), but Article 13, no 2 of the Constitution of 1976 added a non-discrimination clause, inspired by Article 2 of the Universal Declaration of Human Rights:

No one shall be privileged or favoured, or discriminated against, or deprived of any right or exempted from any duty, by reason of his or her ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation or social circumstances.

The principle is repeated with regard to religion in Article 41, no 2, concerning ‘Freedom of conscience, religion and worship’: ‘No one

shall be persecuted or deprived of rights or exempted from civil responsibilities or duties by reason of his or her convictions or religious observance.' These dispositions were taken by the Constituent Assembly by unanimous vote. They should be interpreted in accordance with Article 16, also unanimously approved:

1. The fundamental rights contained in this Constitution shall not exclude any other fundamental rights provided for in the laws or resulting from applicable rules of international law.
2. The provisions of this Constitution and of laws relating to fundamental rights shall be construed and interpreted in harmony with the Universal Declaration of Human Rights.

Among the applicable rules of international law are those of the European Convention of Human Rights (ECHR, in force since 1978).

Article 2 of Law no 16/2001 (the Religious Freedom Law) recognises a principle of equality regarding religion:

1. No one can be privileged, benefited, aggrieved, persecuted, deprived of any right or exempt from any duty on account of his or her convictions or religious practice.
2. The State shall not discriminate any church or religious community in relation to others.

When EU Directive 2000/43/EC was adopted, the Portuguese Parliament had just approved Law no 134/1999 prohibiting discrimination in the exercise of rights on grounds of race, colour, nationality or ethnic origin. This Law was in some respects larger than the EU Directive, covering for example grounds of nationality, not mentioned in the later. It was not therefore abrogated by Law no 18/2004, which transposes Directive 2000/43/CE into national law.

In the field of labour relations, Law 7/2009 adopted the Labour Code, which implements *inter alia* Directive 2000/43/EC and Directive 2000/78/EC (abrogating the earlier Labour Code – Law 99/2003 – which first implemented the Directives). Article 25 of the Code forbids the practice of any direct or indirect discrimination, based on the grounds referred to in Article 24: 'ancestry, age, sex, sexual orientation, civil status, family situation, economic situation, education, origin or social condition, genetic inheritance, impaired work capa-

city, disability, chronic disease, nationality, ethnic origin, language, religion, political or ideological belief and membership of a trade union'. Discrimination on the grounds of disability as regards employment and occupation has also been prohibited in a more general framework by Law 46/2006, which prohibits and punishes discrimination based on disability and on the grounds that a person has a pre-existing aggravated health risk. This law was made the subject of detailed regulations by Decree-Law 34/2007. Religions were not mentioned and played no part in the debate about such legislation.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

Authorities

The prohibition of religious discrimination is governed by various sets of rules that are to be applied by diverse authorities. There are two authorities that are charged with general oversight of discrimination (including religious discrimination), thereby being concerned with the implementation of Directives 2000/43/EC and 2000/78/EC. The Comissão para a Igualdade e contra a Discriminação Racial (Commission for Equality and Against Racial Discrimination, CICDC), which was created by Law no 134/1999 to deal with discrimination on grounds of race, colour, nationality or ethnic origin and to which the implementation of Directive 2000/43/EC referred, was integrated by Decree-Law 167/2007 into the new Alto Comissariado para a Imigração e Diálogo Intercultural, IP (High Commission for Immigration and Intercultural Dialogue, ACIDI), formerly the High Commission for Immigration and Ethnic Minorities. One of the functions of ACIDI is 'to combat every kind of discrimination based on race, colour, nationality, ethnic origin or religion by means of positive actions towards conscientiousness, education and formation, and by initiating procedures relative to minor offences [transgressões] described in the law'. In the field of employment, Directive 2000/78/EC is implemented by the Labour Code (Law 7/2009).

Competence to combat all violations of employment law, including the prohibitions against discrimination, belongs to the Autoridade para as Condições de Trabalho (Authority for Labour Conditions,

ACT), regulated by Decree-Law 326-B/2007 and by Decree-Law 267/2007.

In the field of religion, the ACIDI is not only charged to combat discrimination but also ‘to promote interculturality by means of intercultural and inter-religious dialogue based on the Constitution, on the laws, and also by valuing cultural diversity in a milieu of mutual respect’, and ‘to promote dialogue with religions by means of the knowledge of the diverse cultures and religions and by building an attitude of mutual respect and love of diversity both within the national frontiers and in the relation of Portugal with the world’ (Decree-Law 167/2007, Article 3(e), (m)). Law 134/99 created minor offences (*contra-ordenações*), which were constituted by any act of discrimination based on race, colour, nationality or ethnic origin by individuals or legal persons (Articles 9–12). The ACIDI is empowered to initiate proceedings and to impose penalties for such offences, but no new minor offences were created with regard to religious discrimination. The ACIDI is a large administrative body that directs most of the state action toward immigrants; its president, the High Commissioner for Immigration and Intercultural Dialogue, has the status of an undersecretary of state.¹

The ACT is directed by the general inspector of Labour, who has general powers of inspection in the field of labour, including labour health, and is empowered to investigate and to punish minor offences against labour legislation.

Remedies

There are various types of remedy that can be applied by the corresponding branches of the judicial system in cases of religious discrimination. The labour courts are the appeal courts for fines applied by the ACT for minor offences of religious discrimination. Articles 24(5) and 551(4) of the Labour Code consider any violation of its prohibitions against discrimination as a very serious minor offence (*contra-ordenação*), to be punished by a fine ranging from

¹ Most cases of discrimination dealt with by the ACIDI concern Roma and African immigrants: see M Malheiros and A Rosado, ‘Country report: Portugal’ (2009) for the European Network of Legal Experts in the Non-discrimination Field, available at <<http://www.non-discrimination.net/en/home>>, accessed 5 December 2011, where all types of discrimination, including practical aspects, are treated.

€2,040 (negligence on the part of a small employer) to €61,200 (intentional discrimination by a large employer). The administrative courts may declare the nullity of or revoke any acts of the administration that are deemed to be of a discriminatory character.

Acts of prohibited discrimination are civil torts that originate in civil responsibility; the duty to compensate for moral and patrimonial damages lies with the civil courts. Article 28 of the Labour Code recognises that compensation is not excluded by but is cumulative to other sanctions. It says that ‘the practice of a discriminatory act that causes damage gives the employee or job applicant concerned the right to be compensated for pecuniary or non-pecuniary damages in accordance with the general provisions of law’.

Finally, there are crimes of discrimination dealt with by the criminal courts. Following the adoption of the Council of the European Union’s Joint Action of 15 July 1996, concerning action to combat racism and xenophobia (96/443/JHA), Article 240 of the Penal Code, in the version of Law 59/2007, created crimes of racial or religious discrimination:

1. A person:
 - a) Who founds or constitutes an organisation or develops activities of organised propaganda that incite to racial or religious discrimination, hate or violence against a person, or a group of persons, on grounds of his or her, or their, race, colour, ethic or national origin, religion, sex or sexual orientation, or encourage them;
 - b) Who participates in the organisation or the activities referred to in a) or gives them assistance, including finance for them;

shall be punished with imprisonment from 1 to 8 years.
2. A person who in a public meeting, by writing destined to publication or by any mean of social communication:
 - a) Provokes acts of violence against a person, or group of persons, on grounds of his or her, or their race, colour, ethic or national origin, religion, sex or sexual orientation; ...
 - b) Menaces a person, or a group of persons, on grounds of his or her, or their, race, colour, ethic or national origin, religion, sex or sexual orientation;

intending to incite to racial or religious discrimination or to encourage it, shall be punished with imprisonment from 6 months to 5 years.

The law on minor offences (*contra-ordenações*) establishes that ‘if the same fact constitutes simultaneously a crime and a minor offence, the agent will be punished only on the ground of the crime, notwithstanding the application of the accessory sanctions prescribed for the minor offence’ (Law 244/95, Article 20).

The prohibition of religious discrimination is extended by the Constitution to other convictions (Article 41(2)), especially political and ideological convictions (Article 13(2)). There is no legal definition of religion. The Religious Freedom Law defines ‘churches or religious communities’ as ‘organised and enduring social communities, in which believers can fulfil all the religious ends that are proposed by the respective denomination’ (Article 20); ‘religious objectives’ are defined as ‘those of exerting the cult or the rites, religious assistance, training of ministers of religion, missionary work and dissemination of the professed denomination and religious education’, in terms that do not apply to non-religious associations (Article 21). The Labour Code equates ‘religion, political or ideological belief’ in its prohibition of discrimination (Article 24).

Specific rights and sanctions

The prohibition of religious discrimination is universal, but the remedies or sanctions against it may be specific to particular fields. Thus the legal sanctions of the Labour Code (for example, fines for minor offences) protect the ‘right to equality in the access to employment and in labour’ that is so defined in Article 24(1): ‘the employee or candidate for employment has the right to equal opportunities and treatment in access to employment, professional training, promotion and working conditions’ and ‘cannot be privileged, benefited, deprived of any right or exempt of any duty’ on the grounds of discrimination exemplified in the same Article and transcribed above. The field covered by such specific rights to equality is further specified in Article 24(2) as regarding namely:

- a) selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy;

- b) access to all types and to all levels of vocational guidance, vocational training and retraining, including practical work experience;
- c) pay and other pecuniary payments, promotions at all hierarchical levels and the criteria used in the selection of employees to be dismissed;
- d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by it.

Definitions of discrimination and harassment

A general definition of direct and indirect discrimination – almost identical with that of Directive 2000/43/EC, but with a larger scope – can be found in the Labour Code. Its Article 23(1) declares that

- a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the basis of a ground of discrimination;
- b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put a person on the basis of a ground of discrimination 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

and stipulates in (2) that ‘the simple order or instruction that purports to damage someone on the basis of a ground of discrimination constitutes a discrimination’.

The prohibition of harassment comprehends harassment and sexual harassment. Article 29(1) defines harassment as

unwanted conduct, namely such based on a ground of discrimination, taking place in the context of an application for a job or in the context of actual employment, occupation or professional training, with the purpose or the effect of perturbing or coercing a person, of affecting his or her dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment to him or her.

Article 29(2) establishes that ‘unwanted verbal, non-verbal or physical conduct of a sexual nature, with the purpose or the effect described in the previous section, constitutes sexual harassment’. Harassment of any kind is considered as a very serious minor offence, to

be punished by the same fine as that for discrimination (Articles 29(4) and 551(4)). Sexual harassment may constitute a crime (Articles 170 and 177(1)(b) of the Penal Code).

Case law

There is no specific case law addressing religious discrimination, since the courts have dealt with such offences as offences against religious liberty.²

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

The Labour Code

Article 4 of Directive 2000/43/EC and Article 4(1) of Directive 2000/78/EC are the sources of Article 25, section 2 of the Labour Code, which extends the disposition to every possible ground of discrimination by stating that

conduct based on a ground of discrimination does not constitute discrimination where, by reason of the nature of the occupational activity or of the context in which it is carried out, such conduct constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

The Labour Code regulates some of these cases of non-discrimination. Thus section 3 of the same Article says, referring to section 2, that ‘namely differences of treatment on the ground of age are permitted if they are necessary and appropriate to the realisation of a legitimate aim, such as policy of employment, market of work or occupational training’.

Articles 66–83 of the Labour Code contain a detailed set of rules protecting younger employees. They are exempt from overtime (Article 73) and there are minimum and maximum age requirements for access to employment and retirement, and so forth. Similarly, the

² See J de Sousa e Brito, ‘L’application des dispositions de la Convention européenne des Droits de l’Homme protégeant la liberté de religion et de conviction au Portugal’, in A Emilianides (ed), *Religious Freedom in the European Union* (Leuven, 2011), pp 293–316.

provisions concerning the special protection of genetic inheritance, parents, adoption and other situations relative to the reconciliation of occupation with family life do not contravene the prohibition of discrimination (Article 24(3b)). Employees with disabilities are entitled to special protection (Articles 85–88). Temporary statutory measures of positive action to prevent or compensate for disadvantages linked to a ground of discrimination are not deemed to be discrimination (Article 27).

The Labour Code does not include a disposition corresponding to Article 4(2) of EU Directive 2000/78/EC, which provides:

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.

The European provision is, however, ‘applicable in Portuguese internal law in accordance with Union law’ (Article 8(4) of the Constitution) and is in accordance with the constitutional principle that ‘Churches and religious communities shall be independent of the state and are free to determine their own organisation and to perform their own ceremonies and worship’ (Article 41(4) of the Constitution). These precepts have been further developed in the field of religious education.

Education

Both the Concordat of 2004 for the Catholic Church (Article 19(3), (4)) and the Religious Freedom Law (Article 24(4)) for the other churches and religious communities ensure that teachers in charge of religious education will be appointed or hired, transferred and excluded from teaching the subject by the state, in compliance with the representatives of the churches, communities or representative organisations. In no such case will a person who is not considered suitable by the respective representatives be permitted to teach that subject.

Religious ministers

The autonomy of churches and religious communities in matters of internal organisation implies that the selection, rights and duties of their ministers are not subject to the rules of the contract of employment, including the prohibition of discrimination. In a decision of 16 June 2004 (case 04S276), the Supremo Tribunal de Justiça (Supreme Court) dismissed the claim of a cult minister for payment of salary based on a contract of employment on the ground that the relationship between the minister and the religious community could not be qualified as a contract of employment, so that the remuneration received resulted from the status of the minister as defined by the religious community.

ROMANIA

EMANUEL TĂVALĂ

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

National law and discrimination

The concept of discrimination as we understand it today only appeared very recently in the history of Romania, even though the country passed some of the earliest laws and directives against discrimination against religious communities and churches. Looking historically at the distinct regions and provinces, we see that such laws were characteristic of Transylvania, which was variously under the control of the Turks, the Habsburgs and the Hungarians before 1918. Until the fourteenth century, Orthodox Romanians were not obliged to pay taxes to the Roman Catholic Church,¹ but at that point the Catholic hierarchy began to collect taxes from the Orthodox citizens as well. Various policies of persecution of the Orthodox population of Transylvania were introduced, even though Orthodox citizens were in the majority. With the appearance of Protestantism at the beginning of the sixteenth century, the power of Catholicism diminished. Together with Catholicism, the new Protestant confessions were officially recognised in 1568, but the majority Orthodox population was considered schismatic, and was merely tolerated. The evangelisation of the Orthodox population was encouraged through the publication of books propounding the teachings of Martin Luther.

In order to maintain better control over the Romanian Orthodox population, at the end of the seventeenth century the Habsburgs decided to create the Union with Rome of a part of the Orthodox Church in Transylvania. Those who accepted the union were promised different benefits, some of which were respected thereafter, while others were not. Even if the Orthodox citizens constituted the majority they were not permitted to have their own Romanian hierar-

¹ This is the conclusion of a letter of the Pope, sent from Avignon, to the bishops from Hungary, where he wrote that the Romanians who converted to the Catholic Church gave it up because they had to pay taxes which they did not have to pay before as Orthodox.

chy for decades and, when this was granted, the bishops were of Serbian origin. The Orthodox Metropolis of Transylvania was only recreated in 1864 because of the good relations of the bishop Andrei Saguna with the Viennese emperor.

In the other parts of Romania there were fewer problems, because the rulers of these parts were always seen as fighters for the Orthodox faith against the Islamic danger, as represented by the Ottoman Empire. After the First World War, the Romanian provinces were united into a single state, and the Orthodox Church flourished. However, this ended with the Communist period when relations between state and religious communities were tense and some communities were not even recognised as such by the new laws.

Recent Romanian history is marked by three periods that have had a major impact on the assimilation of European values, particularly the principle of equality.² The first of these was the half-century during which Romania was a part of the Communist block, an experience defined by an imposed rhetoric of equality that was *de facto* contradicted by aggressive policies targeting minorities and ‘otherness’ in general. Following the collapse of Communist rule in 1989, there was a long period of transition, which was supposed to end once Romania joined the European Union on 1 January 2007. This period can be defined as one of increased awareness of the situation of minorities in general (ethnic, national, religious, sexual, vulnerable groups and so forth), combined with a gradual process of asserting the rights of these groups and the principles of equality and non-discrimination. The final period, following accession to the EU, has been one of revival of nationalistic and extremist discourse and a deterioration in conduct towards vulnerable groups, particularly the Roma and sexual and religious minorities. This stage of regression in relation to supporting and affirming the principles of equality and non-discrimination has been most obvious in the last few years.³

The increased visibility of the different minorities, the fact that diversity has been brought into the public forum, the calls seeking the recognition of the needs of the different groups and the incorporation of these needs in public policies, as well as the Italian or

2 Romanita Iordache, *Country Report on Measures to Combat Discrimination*, <http://www.non-discrimination.net/content/media/2009%20-%20FR%20-%20RO%20Country%20Report%20Summary_final.pdf>, accessed 10 November 2011.

3 Ibid.

French crisis (which was perceived as a deterioration of the image of Romanians abroad for which the Roma minority was depicted as the scapegoat)⁴, all triggered a backlash. The adoption of a new Civil Code and a new Criminal Code in the summer of 2009 was also the opportunity for conservative groups to assert their strong homophobic beliefs, leading to the incorporation of a general prohibition of the recognition of same-sex marriages or same-sex or heterosexual civil partnerships (even if entered into abroad or if contracted between foreign citizens). The revival of an extreme nationalist discourse characteristic of the pogroms of the early 1990s permeated the public sphere, particularly in the context of incidents in north-western Romania in Sâncicolau and Sânmartin in the Mureş region, where Roma villagers were expelled from their houses and forced to agree to a ‘protocol of cohabitation’.⁵

Beginning in 2008, incidents of trouble with Romanians in Italy stirred the already racist and xenophobic media and generated an outpouring of discriminatory and offensive statements in relation to the Roma minority without any effective reaction on the part of the authorities.

Anti-discrimination legislation was adopted in 2000 as delegated legislation and amended in 2006 (the 2000 Anti-discrimination Act). This legislative process was the result of the determination of a single minister concerned with human rights and minority rights to establish legislation tackling highly sensitive issues for Romania at that time: discrimination against Roma was rampant; sexual minorities were under siege, with consensual homosexual activities still criminalised; the voices of persons living with disabilities were practically absent from public debate; religious minorities were unable to gain recognition under the law and had to function as non-profit organisations. Parallel discussions regarding the two European Directives also influenced the phrasing and the spirit of the law.

4 In fact, such a crisis was evident in other European countries, too, including the UK, Scandinavian countries, Spain and Switzerland.

5 On 12 April 2011 there was a ‘local revolution’ in the village of Racoş (in the Braşov region), when four Roma attacked a member of the Hungarian minority from the village. Together, Romanians and Hungarians attacked the part of the village where the Roma lived. In 2009, in the village of Tărlungeni (again in Braşov), the mayor decided to build a three-metre-high wall between the part of the village where the Roma live and the part where Romanians and Hungarians live, to prevent the former from stealing the property of the latter.

Ten years after adopting the 2000 Anti-discrimination Law, Romania remains tainted by discrimination. The Roma minority (the largest in Europe, constituting between 500,000 and 1,500,000 (the official statistics are contested)) faces discrimination in access to employment, health care, services and goods. Most of the Roma cases brought before the National Council for Combating Discrimination (NCCD, *Consiliul Național pentru Combaterea Discriminării*) also mention infringements of the right to dignity, though reports on cases of segregation in education are rare and a large number of initiatives have been developed to improve the situation of the Roma.

Though expressly protected by the 2000 Anti-discrimination Law, sexual minorities remain the most attacked group, with legislative drafts aimed at restricting their rights and acts of aggression every year during the diversity marches failing to be investigated. The new Civil Code, adopted in July 2009, includes a specific prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages legally registered in other countries. Transgender persons cannot invoke any legal protection because Romanian legislation does not provide for clear and predictable procedures and standards applicable in their situation.

Specific programmes and positive actions targeting persons with disabilities or people living with HIV/AIDS are scarce and still do not cover the large array of problems that these groups encounter. NCCD and some of the ministries contribute to a genuine process of dialogue and consultation with the NGOs and social partners but the NCCD itself has been under siege, and from the summer of 2009 the institution has effectively been paralysed owing to the lack of appointments to its Steering Committee by the Parliament (a majority of five out of nine is required in order to issue decisions or make recommendations).

UN instruments

Opinion 176 of the Parliamentary Assembly of the Council of Europe, adopted before Romania joined the European Union, included recommendations in the area of discrimination. Romania has attempted to fulfil these recommendations as follows.

After the adoption of the new Penal Code, in 1996, Article 200 on same-sex relations was modified. In its new form, the article no longer punishes consensual same-sex relations between adults with jail terms. Paragraph 1 introduces a condition that same-sex relations should not cause public scandal, a provision that is readily open to abuse. Moreover, the age of consent is different for heterosexual and homosexual relations. What is even more important is that any association of homosexual persons with a view to expressing their identity is forbidden. Consequently, discrimination against homosexuals continues. In 2000, the Chamber of Deputies adopted a draft bill that proposed the repeal of Article 200. Several groups, including the Romanian Orthodox Church, have exerted pressure on the Senate, which has not yet voted on this draft law. The pressure exerted by such groups, who vocally argued against homosexuality in the autumn of 2000, could do even more harm, stiffening the resolve of the Senate to continue the treatment of homosexuals as an oppressed minority.

The return of property to churches has been only partially observed. Through government decisions, several of the old buildings that used to be owned by the Hungarian church and the Jewish community were returned. The Greek Catholic Church also reclaimed some of its former places of worship by means of court decisions. However, the essential problem relating to the former properties of churches has still not been generally solved in accordance with legal norms.

EU Directives

The material scope of the 2000 Anti-discrimination Act encompasses the areas protected by both Directive 2000/43/EC and Directive 2000/78/EC: employment and labour-related issues, including social benefits and social protection, access to goods and services, housing, education and access to health. The Act goes beyond these standards in also providing for protection in relation to freedom of movement and protection of the right to dignity. When defining discrimination, the Romanian legislature took a comprehensive approach, and the principle of equality and of exclusion of discrimination applies in relation to all fundamental freedoms. Both public and private sectors

are bound to observe the framework established by the 2000 Anti-discrimination Act.

Following the decisions issued by the Romanian Constitutional Court in 2008 and reconfirmed in 2009, the provisions of the Anti-discrimination Act are not enforceable in cases of discrimination triggered by discriminatory legislative norms (laws or delegated legislation), nor do the courts and the NCCD have the authority to nullify or to refuse the application of legal norms, even if they consider such norms to be discriminatory.

The 2000 Anti-discrimination Act introduces a broad, comprehensive definition of direct discrimination, going beyond the substance and the coverage of Directives 43/2000/EC and 78/2000/EC by prescribing sanctions against

any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.

Even though the list of protected grounds is very generous and includes grounds outside the five mentioned by the European Directives, the catch-all phrase ‘any other criterion’ creates the possibility for the courts or for the NCCD to apply the 2000 Act to other categories besides those expressly spelled out.

Since 2000, when the Governmental Ordinance 137/2000 was adopted, anti-discrimination legislation has been frequently amended, leading to the gradual incorporation of the European definitions, with the last amendment in 2006.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

The national equality body, the *Consiliul Național pentru Combaterea Discriminării* (National Council on Combating Discrimination, NCCD) was provided for by law in August 2000 but was effec-

tively established in the autumn of 2002. Regional offices began to appear in 2007.

The NCCD is an autonomous public authority under the control of Parliament. The appointment of the Steering Committee members by the six relevant parliamentary committees (intended as a guarantee of the Committee's independence from other institutions) has proved to be a hindrance, in practice, because politicisation of the nomination process has led to the paralysis of the NCCD since the summer of 2009.

The mandate of the NCCD encompasses: preventing discrimination through awareness raising and education campaigns and by conducting surveys and research; compilation of relevant data; mediating between parties; providing support for the victims of discrimination; investigating and condemning discrimination, including *ex officio* cases; and initiating the preparation of legislative bills to ensure harmonisation of legal provisions with the principle of equality. The Council is mandated to deal with all forms of discrimination based on race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, chronic disease, HIV-positive status, belonging to a disadvantaged group or any other criterion aiming to create or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural fields or in any other fields of public life. In practice, it is a quasi-judicial body, which can find that a certain deed amounted to discrimination and issue an administrative sanction (a warning or a fine). Victims can also initiate civil claims when seeking damages.

The visibility of the NCCD has increased considerably in recent years, following a series of cases involving key politicians – the Romanian President, the Prime Minister, the former Minister of Foreign Affairs – and the Romanian Orthodox Church. A good deal of media attention was focused on particular cases (for example, the decision on the presence of religious symbols in public classrooms) and on public positions taken against racist and populist conduct. The NCCD gradually became a proactive participant, engaged in a multitude of projects and established itself as a serious voice in the realm of combating discrimination in a very sensitive environment.

As a positive development, in 2008 the Romanian Constitutional Court seized the chance to clarify the legal status of the NCCD dur-

ing a case challenging the constitutionality of Articles 16 to 25 of the Anti-discrimination Act establishing the Council's mandate. The Court affirmed that

the NCCD is an administrative agency with jurisdictional mandate, which enjoys the required independence in order to carry out administrative-jurisdictional activities and complies with the constitutional provisions from Art. 124 on administration of justice and Art. 126 (5) prohibiting the establishment of extraordinary courts of law.⁶

The Romanian Constitution provides for equality and non-discrimination in broad terms. These provisions are implemented in practice by the specific anti-discrimination legislation mentioned above.⁷ The Governmental Ordinance 137/2000 was subsequently amended in 2002, 2003, 2004 and 2006 to enhance adoption of Directive 2000/43/EC and Directive 2000/78/EC.⁸

The scope of the Anti-discrimination Act was substantially diminished in 2008, following a series of decisions by the Romanian Constitutional Court that limited the mandate of both the NCCD and the civil courts in relation to cases of discrimination generated by legislative provisions.⁹

6 Romania, Curtea Constituțională, Decision 1096 (15 October 2008), <<http://www.ccr.ro/>>, accessed 10 November 2011. The Court maintained the constitutionality of Articles 16 to 25 of the Anti-discrimination Law Act the quasi-judicial nature of the NCCD.

7 Ordinance 137/2000 was adopted by the Government based on a constitutional procedure that allows the Parliament to delegate limited legislative powers to the Government during the parliamentary vacation according to Art 114 and Art 107(1), (3) of the Constitution. Ordinances (statutory orders) must be submitted to the Parliament for approval, though in the interval between their adoption by the Government and the moment of their adoption (or rejection, or amendment) by the Parliament, they are binding and generate legal consequences.

8 Romania, Governmental Ordinance 137/2000 Regarding the Prevention and the Punishment of All Forms of Discrimination, was published in *Monitorul Oficial al României* No 431 (September 2000). See also Romania, Law 48/2002 Concerning the Adoption of Government Ordinance 137/2000 Regarding the Prevention and the Punishment of All Forms of Discrimination (31 January 2002); Romania, Government Ordinance 77/2003 for the Amendment of Government Ordinance 137/2000 Regarding the Prevention and the Punishment of all Forms of Discrimination, (30 August 2003); Romania, Law 27/2004 Concerning the Adoption of Government Ordinance 77/2003 for the Amendment of the Government Ordinance 137/2000 Regarding the Prevention and the Punishment of All Forms of Discrimination (11 April 2004); Romania, Law 324/2006 for the Amendment of Government Ordinance 137/2000 Regarding the Prevention and the Punishment of All Forms of Discrimination.

9 Romania, Curtea Constituțională, Decisions 818, 819 and 820 from 3 July 2008, <<http://www.ccr.ro/>>, accessed 10 November 2011. In these three decisions, the Constitutional Court concluded that the dispositions of Art 1(2)(e) and of Art 27 of Governmental Ordinance 137/2000 are unconstitutional, to the extent that they are under-

The following specifications on the areas of discrimination are laid out in Romanian law:

- i. Equality in the workplace;
- ii. Non-discriminatory access to administrative and juridical public services, to public health services and to other services, goods and facilities;
- iii. Access to education;
- iv. The right to the free choice of residence and to free access to public places; and
- v. The right to personal dignity.

The Act covers 15 discrimination criteria, making it in one of the most comprehensive laws in this area in Europe.¹⁰ The criteria are:

- i. race
- ii. nationality
- iii. ethnic origin
- iv. language
- v. religion
- vi. social status
- vii. beliefs
- viii. gender
- ix. disabilities
- x. sexual orientation
- xi. age
- xii. HIV-positive status
- xiii. chronic non-infectious disease
- xiv. refugees
- xv. assailants.

stood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory. Based on the constitutional principle of separation of powers, the Constitutional Court emphasised the constitutionality of the Anti-discrimination Act but asserted that the enforcement of the Act by some courts is unconstitutional, owing to the fact that, during its application, some courts decided to quash particular legal provisions deemed as discriminatory and replaced them with other norms, thus ‘creating legal norms or substituting them with other norms of their choice.’

¹⁰ Article 2 of the Anti-discrimination Act defines discrimination as: ‘any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.’

According to a recent survey, the general public consider that religious minorities are the least discriminated against of all the entities or categories mentioned in the Act.¹¹

The most well-known case on religious discrimination in Romania occurred in 2006. On 12 August 2006 the philosophy teacher Emil Moise, whose daughter attended the Fine Arts High School in the city of Buzău, requested the NCCD to stop the act of discrimination allegedly constituted by the display of religious symbols in the aforementioned public school. Moise claimed that the displays in question discriminated against atheists, agnostics and persons belonging to minority faiths. He also referred to the symbols' negative effect on the development of children's personal and creative autonomy, particularly, he claimed, since Romanian Orthodox symbols also transmit 'values of subservience'.

In decision 323 of 21 November 2006 the NCCD found for the plaintiff in his central claim that the display of religious symbols in state schools constituted a form of discrimination against agnostics and minority faiths, and ordered that such displays should be present only during lessons in religious education.¹² The Council recommended that the Ministry of Education and Research should adopt, within a reasonable time-frame, regulations designed to safeguard the proper exercise of children's right to learn under fair conditions, as well as the right of parents to educate their children in conformity with their religious and philosophical worldviews and, further, to ensure the principle of state secularism and the autonomy of religious 'cults' (acknowledged religious denominations) and of children's religious freedom.

While the NCCD avoided some of the more sensitive issues raised by Moise – such as the question of the 'values of subservience' allegedly promoted in schools by some Orthodox practices – its decision was thoughtful, carefully crafted and of remarkable significance. That decision was greeted with a fiery debate involving parliamentarians, two ministries (the Ministry of Education and Research and the Ministry of Culture and Religious Affairs), religious

11 <<http://www.cncd.org.ro/files/file/Fenomenul%20discriminarii%202009.pdf>>, accessed 10 November 2011.

12 Gabriel Andreescu and Liviu Andreescu, 'The European Court of Human Rights' *Lautsi* decision: context, contents, consequences', (2010) 9.26 *Journal for the Study of Religions and Ideologies* 56.

groups, secularist NGOs, public intellectuals and militant journalists. The Orthodox Patriarchate's press office released a communiqué in which it called any decision to remove religious symbols a 'brutal, unjustified measure restricting religious freedom'.

Alone among the 'cults', the Seventh Day Adventist Church saluted the NCCD decision, noting that the state and its institutions, state schools among them, should not be 'involved in promoting and supporting the teachings and values of a particular religion or religious faith'. The Ministry of Education and Research and two NGOs friendly to the Romanian Orthodox Church appealed the NCCD's decision in two separate cases. After the lower court decisions, on 11 June 2008 the High Court of Cassation and Justice declared the appeals admissible and overturned point 2 of the NCCD decision recommending that the Ministry of Education elaborate and enforce regulations concerning the display of religious symbols in public institutions. Following the decision of the Romanian Court, Moise complained to the European Court of Human Rights and 2011 saw the final decision in the *Lautsi* case, which applied to Romania too.

Another case arose in 2010 when members of the Romanian Humanist Association asked the NCCD to decide whether the presence on the promotional website of the Romanian Ministry for Communications (www.e-romania.ro) of the Romanian Orthodox Church alone, with its dogmatic teaching and history, could be an act of discrimination against the 17 other 'cults' recognised by law in Romania. Moreover, the website was supported by public funding from the Ministry. Through its decision 340 of 23 November 2010, the NCCD decided that the site content discriminated against other 'cults' and against the neutrality of the public institutions towards religion in Romania, through mention, in the section www.e-biserica.ro (www.e-church.ro), of the Romanian Orthodox Church alone. As a consequence of the NCCD decision the site was altered to www.e-cults.ro and now contains now information about all 18 religions and denominations recognised in Romania.

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

The Anti-discrimination Act 2000 permits exceptions to the occupational requirements in the context of access to labour though the wording of Article 9, which is identical with the language of Article 4 of Directive 2000/43/EC, leaving the future jurisprudence of the NCCD and of the courts to ascertain whether the two concepts are fully compatible:

the provisions of Articles 5–8 (prohibition of discrimination in employment relations), cannot be interpreted as restricting the right of the employer to refuse hiring a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.

As the grounds covered by the Romanian Anti-discrimination Law are broader than the protected grounds of the two Directives, the differences of treatment in case of determining occupational requirements apply not only for the five grounds mentioned in the Directives but on all protected grounds.

The Anti-discrimination Act does not include specific provisions for an exemption for employers with an ethos based on religion or belief to comply with Article 4(2) of Directive 2000/78/EC, but the provisions of Article 9 on determining occupational requirements that are recognised as exemptions under a clear legitimacy and adequacy test can be interpreted as allowing for exceptions based on ethos or religion:

Article 9 – None of the provisions of articles 5–8 shall be interpreted as a restriction of the employer's right to refuse to hire a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.

Lacking relevant jurisprudence developed by either the courts or the NCCD in application of such exceptions for ethical or religious rea-

sons, it is still too early to assess the tests used in analysing the conditions under which these exceptions will be accepted.

The law on religious freedom and the general status of religious denominations includes provisions on labour relations taking place within state-recognised religious denominations – Act 489/2006 established a three-tier system consisting of traditional religious denominations granted the status of state-recognised religious denominations (*culte*) under very strict conditions, religious associations (*asociații religioase*) and religious groups (*grupuri religioase*) that do not meet the strict criteria established by the law or choose not to register as legal entities.

According to Articles 23–26 of the 2006 Act on religious freedom and the general status of religious denominations, state-recognised religious denominations have the right to select, appoint, hire and discipline their own employees, a practice already in force in 2000 when the Anti-discrimination Act was adopted. Issues of internal discipline are solved according to bylaws and internal provisions by the religious courts of each denomination. Theoretically, the legal regime established solely in relation to religious personnel of recognised denominations could be extended to religious personnel of other entities the ethos of which is based on religion or belief (such as registered religious associations), according to the legal principle that, where the reason behind a normative provision is the same, the norm applied should accordingly be the same. There is no case law in this area to date.

The Anti-discrimination Act does not include specific language mentioning that anti-discrimination measures should be taken without prejudice to measures laid down by national law that, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. Specific articles allow for exceptions when the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary in relation to employment, housing and access to goods and services (Articles 9, 10 and 11).

National defence institutions and public institutions dealing with public order and national security are exempt from the obligation for all authorities, public institutions and public or private legal entities with at least 50 employees to hire persons with disabilities to a total

of at least 4% of the total number of employees, according to Article 78(4) of Law 488/2006. No other exceptions are provided in the national law.¹³

Article 2(9) of Governmental Ordinance 137/2000 (the Anti-discrimination Act) defines positive action as an exemption from the prohibition against discrimination stated in Article 2 as:

Measures taken by public authorities or by legal entities under private law in favour of a person, a group of persons or a community, aiming to ensure their natural development and the effective achievement of their right to equal opportunities as opposed to other persons, groups of persons or communities, as well as positive measures aiming to protect disadvantaged groups, shall not be regarded as discrimination under the ordinance herein.

The definition of positive action in Romanian legislation is not limited to racial or ethnic origin, religion or belief, disability, age or sexual orientation, and covers all protected grounds.

¹³ Gabriel Andreescu, ‘Libertatea de exprimare si legislatia de combatere a discriminarii in Romania’, (2005) 1 *Noua revista de drepturile omului* 9.

SLOVENIA

BLAŽ IVANC

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

National law and discrimination

Systematic discrimination because of religion and belief was common during the period when the Republic of Slovenia was a part of the Socialist Federal Republic of Yugoslavia (1945–1991). One of the most important features of a new independent and democratic Slovenian state was the introduction of a new legal order that *inter alia* strove to enforce the constitutional principle of equality. However, severe cultural and social consequences of long-lasting discriminatory practice (such as persecution of priests and believers, various forms of discrimination at work and in education) and ideological persuasion (for example, obligatory promotion of an atheistic and materialistic world view in public schools) did not disappear easily. Some major violations (individual or mass killings, unlawful imprisonment, confiscation and nationalisation of property, and the like) had to be regulated by special bills in the area of redress of injustices.¹

The Republic of Slovenia became a member of the Council of Europe on 13 May 1993 and ratified the European Convention for the protection of Human Rights and Fundamental Freedoms (the ECHR) on 28 June 1994 with no reservations.² Slovenia also acceded to all the Protocols to the ECHR. Since 1 May 2004 Slovenia has been a Member State of the European Union. Implementation of the Principle of Equal Treatment Act (the ETA)³ entered into force six days after joining the EU and was supplemented in 2007. With the introduction of the ETA the following EC/EU Directives were transposed into national law: Directive 76/207/EEC, Directive

1 D Hančič, R Podbersič and B Ivanc, ‘Slovenia: from triple totalitarian occupation to freedom and independence’ in L Kühnhard and T Ludger (eds), *The Reunification of Europe: Anti-totalitarian Courage and Political Renewal* (Brussels, 2009), pp 370–411.

2 The ECHR was signed by the Republic of Slovenia on 14 May 1993.

3 Available at <http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO3908.html>, accessed 8 November 2011.

86/378/EEC, Directive 2000/43/EC, Directive 2000/78/EC, Directive 2002/73/EC, Directive 2004/113/EC and Directive 2006/54/EC.

The main reason for the introduction of the ETA was a need for harmonisation of Slovene laws with the *acquis communautaire* that relates to the equality issues. New legal regulation in the area of religious freedom was introduced as late as 2007 with the enactment of the Religious Freedom Act (the RFA).

The role of religion was a central point of a highly politicised debate about the draft RFA, and churches and religious communities were actively involved in the debate. Just the opposite was true of their involvement in discussions relating to issues of equality and the draft ETA, the latter debate being marked by the participation of other NGOs. It is obvious that a kind of a double-track public debate on both subjects took place in Slovenia. The debate on equality issues focused more on gender equality and resulted in the adoption of the Equal Opportunities for Women and Men Act (Zakon o enakih možnostih žensk in moških) in 2002.

Impact of UN instruments on religious discrimination and of Article 14 of the ECHR on Slovene law before and after their ratification and/or incorporation

After gaining independence, Slovenia as a Member State of the United Nations accepted the UN instruments on religious discrimination. The country has ratified the following instruments: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights with Facultative Protocols, the International Covenant on Economic, Social and Cultural Rights with Optional Protocol, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women with Optional Protocol, the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of Persons with Disabilities, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. In general, churches and religious communities in Slovenia were very

supportive of this transposition of international human rights standards into Slovene legal order.

Article 14 of the ECHR was of major importance for judicial review in a number of cases at the Constitutional Court (see case law below).

The government's position on the draft EU Directives 2000/43/EC and 2000/78/EC

In the period when the Directives 2000/43/EC and 2000/78/EC were under discussion the Republic of Slovenia was not a Member State of the EC. At that time religions did not play a noticeable role in the debates concerning the draft ETA. Only in 2000 did the Office for Religious Communities start to organise public conferences with churches and religious communities that tackled various important topics, such as the Council of Europe and the protection of human rights (2002), the EU and the protection of human rights (2003), hate speech and social responsibility (2008).

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

Discrimination authorities competent for the oversight of religious discrimination

The Advocate of the Principle of Equality has general authority to deal with cases involving discrimination (Article 11 of the ETA). However, the Government Office for religious communities also has a certain (though not well-defined) role overseeing matters of religious discrimination. Within the government the two relevant entities are the Council for the Implementation of the Principle of Equal Treatment (which acts as the expert and consultative body for implementation of the principle of equality) and the Office for Equal Opportunities, neither of which have even a relatively independent position but are fully incorporated into the body of the government in a narrow sense.

According to the Paris Principles, the Advocate of the Principle of Equality, which was enacted in 2007 in order to comply with the EU equality Directives, cannot be considered as a national human

rights institution, since it is not independent of the government. The Advocate has the power to examine petitions or complaints concerning alleged cases of discrimination (ETA, Article 11, paragraph 2) but can only issue non-binding opinions as to whether a person is being discriminated against in a certain situation (subject to unequal treatment because of personal circumstances). The opinion of the Advocate includes a recommendation to the offender of ways to eliminate the violation, its causes and its consequences. The Advocate is accessible to the general public since proceedings before the Advocate are cost-free and confidential.

Although the ETA stipulates that the Advocate operates independently of the Office for Equal Opportunities (Article 11b), the Advocate:

- i. Has a position of a public servant appointed by the government and can easily be removed;
- ii. Is fully subordinate to the Director of the Office for Equal Opportunities;
- iii. Has to conduct operations without its own personnel;
- iv. Does not have its own budget;
- v. Has very limited powers of investigation;
- vi. Is not in position to function in a regular and effective manner, either *de iure* or *de facto*.

The Advocate has not yet established a *modus cooperandi* with churches and religious communities as relevant NGOs.

The Constitution provides for two other institutions that comply with the standards for national human rights institutions: the Human Rights Ombudsman and the Constitutional Court. Both institutions have a special task to protect human rights. An individual may file a petition to the Human Rights Ombudsman or can file a constitutional complaint at the Constitutional Court and *inter alia* invoke a violation of the principle of non-discrimination in regard to religion or belief.

Key instruments or sources of law on religious discrimination in Slovenia

The basic constitutional principle of equality is enshrined in Article 14 of the Constitution of the Republic of Slovenia. The provision of this Article explicitly determines that in Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irre-

spective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance (paragraph 1). The Constitution also provides for special guarantees for freedom of conscience and belief in Article 41 (the right to religious freedom). According to Article 41 and in relation to Article 14, non-religious beliefs enjoy the same level of legal protection as is provided for religious beliefs. The principle of equality (Article 7, paragraph 2) is also relevant to relations between various religious communities. Article 63, paragraph 1 declares that any incitement to national, racial, religious or other discrimination, and the inflaming of national, racial, religious or other hatred and intolerance are unconstitutional. Article 3 of the RFA enshrines a special provision on prohibition of discrimination, incitement of religious hatred and intolerance, which states that: '(1) Any incitement to religious discrimination, incitement of religious hatred and intolerance shall be prohibited. (2) Any direct or indirect discrimination on the basis of religious belief, expression or exercise of such belief shall be prohibited.'

Provisions related to non-discrimination are also enshrined in the Employment Relationships Act (Article 6; Zakon o delovnih razmerjih) and the Criminal Code-1 (Kazenski zakonik-1). The Criminal Code-1 made the violation of equal status a crime,⁴ as also the stirring up of hatred, strife or intolerance based on violation of the principle of equality.⁵ Milder offences that represent discrimination are sanctioned by the ETA as administrative offences (Article 24).

⁴ Article 141 of the Criminal Code-1 reads: '(1) Whoever, due to differences in respect of nationality, race, colour of skin, religion, ethnic roots, gender, language, political or other beliefs, sexual orientation, material condition, birth status, education, social position or any other circumstance, deprives or restrains another person of any human right or liberty recognised by the international community or provided by the Constitution or the statute, or grants another person a special privilege or advantage on the basis of such difference, shall be punished by a fine or sentenced to imprisonment for not more than one year. (2) Whoever prosecutes an individual or an organisation due to his or its advocacy of the equality of people shall be punished under the provision of the preceding paragraph. (3) In the event of the offence under the first or the second paragraph of the present article being committed by an official through the abuse of office or of official authority, such an official shall be sentenced to imprisonment for not more than three years.'

⁵ Article 300 of the Criminal Code-1 determines that: '(1) Whoever provokes or stirs up ethnic, racial or religious hatred, strife or intolerance or disseminates ideas on the supremacy of one race over another or provides aid in any manner for racist activity or denies, diminishes the significance of, approves of or advocates genocide, shall be punished by imprisonment of up to two years. (2) If the offence under the preceding

Areas in which the prohibition is operative

The Advocate and the Office for Equal Opportunities are monitoring the areas of employment, goods and services, education, housing and public authorities with respect to discrimination cases, but it is noticeable that they do not have a particular agenda set up for religious discrimination. The competences of the Advocate, the Office for Equal Opportunities and the Office for Religious Communities are unclear and overlapping. The competences of various inspections in respect of discrimination cases are not well defined either. Article 6 of the Employment Relationships Act regulates prohibition of discrimination in the workplace. However, the Human Rights Ombudsman only has the authority to monitor public authorities.

According to the ETA, discriminatory acts shall be prohibited in every area of social life, and in particular in relation to:

- i. Conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- ii. Access to all types and to all levels of career orientation, vocational and professional education and training, advanced vocational training and retraining, including practical work experience;
- iii. Employment and working conditions, including dismissals and pay;
- iv. 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;
- v. Social protection, including social security and healthcare;
- vi. Social advantages;
- vii. Education; and

paragraph has been committed by coercion, maltreatment, endangering of security, desecration of national, ethnic or religious symbols, damage to the movable property of another, desecration of monuments or memorial stones or graves, the perpetrator shall be punished by imprisonment of up to five years. (3) Material and objects bearing messages from the first paragraph of this Article, and all devices intended for their manufacture, multiplication and distribution, shall be confiscated or their use disabled in an appropriate manner.'

viii. Access to and supply of goods and services that are available to the public, including housing.⁶

Types of prohibited discrimination

The ETA explicitly determined that the prohibition of religious discrimination should cover direct discrimination (Article 4, paragraph 2), indirect discrimination (Article 4, paragraph 3), incitement to discriminate (Article 4, paragraph 4), victimisation and harassment (Article 5). The ETA further provides for special measures (positive action, supportive measures) to cope with cases of discrimination (Article 6).

Case law on discrimination

At the present time, the Advocate's case law on religious discrimination is very modest and its recommendations are (still) not binding. However, there is a noticeable quantity of case law on religious discrimination from the Constitutional Court.⁷ The Court had to deal with frequent requests for the review of the constitutionality of the Denationalisation Act. As a rule issues of denationalisation are closely related to the respect for equality (Article 14 of the ECHR) and to the protection of property of persons and institutions, as determined by Article 1 of Protocol No 1. After the Denationalisation Act had already been in force for two years the Legislator introduced the Act on Partial Suspension of the Return of Property, which enforced a temporary suspension of property return for three years in all those cases where the return of more than 200 hectares of farmland and forests was required by an individual claimant. As a petitioner, the Roman Catholic Diocese of Maribor argued *inter alia* that the challenged statute was discriminatory and thus inconsistent with Article 14 of the ECHR. The Court established that there were no

6 N Kogovšek, 'Country report 2009 Slovenia', European Network of Legal Experts in the Non-Discrimination Field (2010), <http://www.non-discrimination.net/content/media/2009-SI-Country%20Report%20LN_final.pdf>, accessed 8 November 2011, p 16.

7 See B Ivanc, 'The case law of the Slovenian constitutional court in the area of freedom of religion and beliefs', in D Čepar and B Ivanc (eds), *Legal Aspects of Religious Freedom: International Conference, 15–18 September 2008: Conférence internationale, du 15 au 18 septembre 2008* (Ljubljana, 2008), pp 249–259.

justified grounds for temporarily suspending the implementation of the Denationalisation Act.⁸

In the case *Mihail Jarc et al* No U-I-68/98 (November 2001) the Court reviewed the question of whether the provisions of the Education Act (Article 72), which prohibit denominational activities in public schools, interfere with the positive aspect of the freedom of religion,⁹ the principle of equality,¹⁰ the right of parents¹¹ or the right to free education.¹² The Court first declared that the general prohibition of denominational activities in public schools¹³ is not inconsistent with the Constitution and with the right of parents as determined in Article 2 of the Protocol to the ECHR. The only inconsistency with the Constitution is the prohibition of denominational activities in licensed kindergartens and schools in regard to the denominational activities that take place outside the scope of the execution of a valid public programme financed from state funds.¹⁴

In the *Referendum on the location of a mosque* case (No U-I-111/04, July 2004) the Court decided not to permit a referendum on the implementation of the Ordinance concerning a site that was held to be a future location of a first mosque (a Muslim religious, cultural and educational centre) in Slovenia. Holding that Article 41, paragraph 1 of the Constitution ensures the free profession of religion in private and public life the Court stressed:

that freedom of religion ensures the individual that they may freely profess their religion by themselves or together with others, publicly or privately, through lessons, by the fulfilment of religious duties, through worship and the performance of religious rites, which is designated as the so-called positive aspect of freedom of religion.

⁸ See the *Denationalisation of Church Property* case No U-I-107/96, December 1996. As early as 1993 the Court had to clarify the legal status of religious communities, their institutions and orders, and it decided at that point that their status had to be evaluated and interpreted according to the state regulations. Accordingly, such institutions must be treated as domestic legal entities at the time of nationalisation of their property, as well as during the entire period until the adoption of the Denationalisation Act. See the *Denationalisation of Church Property* case No U-25/92 (March 1993).

⁹ Constitution, Art 41, para 1.

¹⁰ Ibid, Art 14.

¹¹ Ibid, Art 41, para 3; Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art 2.

¹² Constitution, Art 57.

¹³ Education Act, Art 72, para 4.

¹⁴ Ibid, Art 72, para 3.

Thereby the Constitution not only protects the individual but also the profession of religion in community.

One should also mention the Conscientious Objection case (No. U-I-48/94, May 1995) in which the Court interpreted the constitutional right to conscientious objection (Art. 46 of the Constitution): ‘Conscientious objection shall be permissible in cases provided by law where this does not limit the rights and freedoms of others’. The Court decided that the provision of Article 42 of the Act on Liability to Military Service is contrary to the Constitution insofar as it does not allow the exercise of conscientious objection subsequent to conscription, during the obligatory period of taking part in the defence of the state.

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

Grounds upon which different treatment is legally acceptable

The ETA was supplemented in 2007 in order to provide for exceptions. According to Article 2a, paragraph 2 (Indent 1), difference in treatment in the area of employment on the grounds of gender, ethnicity, race or ethnic origin, religion or belief, disability, age or sexual orientation is prohibited except in cases when, *inter alia*, 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, and therefore does not constitute discrimination. The difference in treatment in the area of employment on the grounds of religion or belief of the individual, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on 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, having regard to the

organisation's ethos (Article 2a, paragraph 2, Indent 2).¹⁵ Likewise, the Article 3, paragraph 3 of the RFA 3 determines 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.

Subjects entitled to discrimination

As mentioned above, the national law provides an exception to the general prohibition for employers with an ethos based on religion or belief. The International Agreement between the Republic of Slovenia and the Holy See on Legal Issues determines that the Roman Catholic Church has the authority to nominate and employ people in accordance with the provisions of canon law (Article 5).¹⁶ Slovene law provides for a general recognition of the Church's capacity to be an employer and it is intended for all employees of the Church (including teachers and priests).¹⁷ In the area of exceptions no relevant case law exists at present.

IV. CONCLUDING REMARKS

The state of affairs in the area of prevention of unlawful religious discrimination poses important concerns. First, a particular agenda for religious discrimination should be set up by competent authorities. It is evident that the Advocate does not meet the Paris Principles criteria for an independent human rights institution. Thus, a new legislative solution must be put in place by the legislature. There are two possibilities: either to establish a new and fully independent

15 Kogovšek, 'Country report 2009 Slovenia'.

16 See B 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', (2009) 21 *Revista general de derecho canónico y derecho eclesiástico del estado*, <http://www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=408365&d=1>, accessed 1 September 2010.

17 Ibid, p 55.

institution that is not attached to the government, or to establish a special Ombudsman (this was foreseen by the Constitution) that would operate within the Office of the Human Rights Ombudsman and would have additional powers to oversee the private sector in regard to violations based on discrimination. The quality of protection against religious discrimination depends on these necessary changes.

SPAIN

MIGUEL RODRÍGUEZ BLANCO

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

Constitutional framework and historical background

Article 14 of the Spanish Constitution of 1978 proclaims equality before the law and outlaws discrimination: ‘Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance.’ This constitutional Article contains two distinct but closely related notions: the principle of equality and the prohibition of discrimination. Thus its first part amounts to a general clause stating the equality of all Spaniards before the law; this general principle of equality has been configured as a subjective right of all citizens to receive equal treatment, a right that the public authorities are bound to respect and a right that requires that de facto equal circumstances are given identical treatment as far as their legal consequences may be concerned. Before any distinction is made between citizens, there must exist sufficient, solid and reasonable justification in accordance with generally accepted criteria and value judgements; furthermore, the consequences of making a distinction cannot be disproportionate.

The scope of Article 14 of the Constitution is not, however, limited to its general, opening expression of equality, for it goes on to proclaim the prohibition of a series of particular grounds or reasons for discrimination. This express reference to such grounds or reasons does not imply that its list of cases of discrimination is limited; nevertheless it does represent an explicit indictment of certain differences that go back a long way in history and that, thanks to the action of the public authorities and to social practice, have placed some sectors of the population in positions that are not only unfavourable but also contrary to the dignity of the individual as recognised in Article 10 of the Constitution. In this regard, in relation to the list of grounds or reasons for discrimination expressly forbidden by Article 14 of the Constitution, whether taken as a whole or in relation to

one or other of them in particular, the Constitutional Court has declared constitutionally illegitimate any differences in treatment that are based on those grounds or reasons.¹

Article 16 of the Constitution recognises the fundamental right of religious freedom and defines the model of church-state relations:

1. Freedom of ideology, religion and worship of individual and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.
2. Nobody may be compelled to make statements regarding his religion, beliefs or ideology.
3. There shall be no state religion. The public authorities shall take the religious beliefs of Spanish society into account and shall in consequence maintain appropriate co-operation with the Catholic Church and the other denominations.

From Articles 14 and 16 of the Constitution, the Constitutional Court has deduced four legal principles that inspire and shape all regulations concerning matters of religion: the principle of religious freedom, the principle of non-discrimination, the principle of neutrality and the principle of co-operation between public authorities and religious denominations.

The essential content attributed by the Constitutional Court to these four principles may be synthesised as follows:

- i. The principle of religious freedom guarantees the existence of an intimate repository of beliefs and, therefore, of an intellectually self-determined space regarding religion that is bound up with one's very personality and individual dignity. In addition to this internal dimension, the principle also makes room for an external dimension of *agere licere*, which enables citizens to act in accordance with their own convictions and to uphold them before third parties;²
- ii. The principle of non-discrimination assumes that it is impossible to establish any kind of discrimination or differential legal treatment of citizens on the basis of their ideologies or be-

1 Judgment of the Constitutional Court 200/2001, 4 October 2001, legal ground 4.

2 Judgment of Constitutional Court 154/2002, 18 July 2002, legal ground 6.

- liefs. At the same time, this principle demands the equal enjoyment of religious freedom for all citizens;³
- iii. The principle of neutrality has two aspects: on the one hand it implies that the state, having a view to the plurality of beliefs that exists in Spanish society and to the guarantee of religious freedom, is non-confessional; on the other, religious groups are unable to exceed the ends that are proper to them or to be legally equated to the state, since the Constitution prohibits any type of confusion between religious and state functions;⁴
 - iv. The principle of cooperation between public authorities and religious denominations means that the state should adopt a positive attitude towards manifestations of the right to religious freedom. The Constitution deems the religious component to be perceptible in Spanish society and instructs public authorities to maintain relations of co-operation with the Catholic Church and other religious denominations by introducing the concept of positive neutrality.⁵

The Constitution's recognition of these four principles was a radical innovation with respect not only to the immediately preceding legal regime of the Franco dictatorship (1939–1975) but also to Spain's constitutional history, which, with the exception of the Second Republic (1931–1939), has been marked by the Catholic affiliation of the state.

The state's affiliation to the Catholic Church has oscillated between two extremes: on the one hand, the total prohibition of non-Catholic religious manifestations, and, on the other, tolerance of non-Catholic worship. Article 12 of the 1812 Constitution expresses the first position: 'the religion of the Spanish nation is and will always be Catholic, Apostolic, Roman, single and true. The nation protects it with wise and just laws.' For its part, Article 11 of the 1876 Constitution espouses tolerance:

Nobody in Spanish territory will be challenged for his religious opinions or for the exercise of their corresponding faith, provided there is due respect for Christian morality. Nevertheless, no other public ceremonies or manifestations will be permitted than those of the religion of the state.

³ Judgment of Constitutional Court 24/1982, 13 May 1982, legal ground 1.

⁴ Judgment of Constitutional Court 340/1993, 16 November 1993, legal ground 4.

⁵ Judgment of Constitutional Court 46/2001, 15 February 2001, legal ground 4.

The Franco regime adopted a system that professed the Catholic faith but was tolerant of other confessions. Thus Article 6 of the *Fuero de los Españoles* (an Act of 1945) laid down that

The profession and practice of the Catholic religion, which is the religion of the Spanish State, will enjoy official protection. Nobody will be challenged for their religious beliefs or for the private exercise of their faith. No other ceremonies or outward manifestations than those of the Catholic religion will be permitted.

This tolerance underwent a profound evolution in the course of the regime. In the early years tolerance was almost non-existent and clearly discriminated against those who professed non-Catholic beliefs, while in the later years it became more open, admitting the exercise of religious freedom, though with some restrictions. The chief indication of this change was Act 44/1967, of 28 June 1967, which regulated the exercise of the civil right of freedom in religious matters. This Act applied to all confessions except the Catholic Church, which was run in line with the Concordat with the Holy See of 1953. The first section of the Act's first Article recognised the right to religious freedom. Nevertheless, section 3 of the same Article added that the exercise of the right to religious freedom, a right conceived in accordance with Catholic doctrine, had to be compatible in all cases with the recognition of the Catholic Church as the official church of the Spanish state as proclaimed in its Fundamental Laws. Article 3 of the Act gave express treatment to non-discrimination and stipulated that religious beliefs would provide no ground for inequality among Spaniards before the law. More particularly, Article 4 stated that all Spaniards, regardless of their religious beliefs, had the right to hold any job or activity and to carry out public office or functions in accordance with their merits and capacity, the only exceptions being those that were set out in the Fundamental Laws or in the legal agreements with the Catholic Church.

International law

Article 10(2) of the Spanish Constitution of 1978 establishes that regulations concerning the fundamental rights and freedoms that it recognises will be interpreted in compliance with the Universal Declaration of Human Rights and the relevant international treaties and

accords ratified by Spain. This means that the application and interpretation of the Constitution's Articles 14 (equality and non-discrimination) and 16 (religious freedom) must take into account international regulations and resolutions as interpretative canon for the application of fundamental rights.

As the Constitutional Court stated in its Judgment 236/2007, of 7 November 2007,

that decision on the part of the writers of the Constitution acknowledges our coincidence with the realm of values and interests protected by said instruments as well as our will as a nation to form part of an international legal order that advocated the defence and protection of human rights as the fundamental basis of the organisation of the state.⁶

When the Constitution came into force on 29 December 1978, Spain had already ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both were ratified on 13 April 1977 and came into force on 27 July 1977). For its part, the European Convention on Human Rights was ratified on 26 September 1979 (coming into force on 4 October 1979), and its 12th Protocol on 25 January 2008 (coming into force in Spain on 1 June 2008).

From the very beginning (1981), Spain's Constitutional Court has taken into account the content of international treaties and declarations when interpreting and applying the Constitution. Thus, Judgment 22/1981, of 7 July 1981, directly cites jurisprudence of the European Court of Human Rights (ECtHR) when interpreting Article 14 of the Constitution's principle of non-discrimination:

although it is true that the legal equality recognised in Article 14 of the Constitution is binding and is intended not only for the Administration and the Judiciary, but also for the Legislative powers, as may be deduced from Articles 9 and 53 of the same, that does not mean that the principle of equality contained in that article implies equal legal treatment in all cases and the removal of all differentiating elements of legal relevance. The European Court of Human Rights has pointed out, in relation to Article 14 of the Agreement for the Protection of Human Rights and Fundamental Freedoms, that not all inequalities necessarily amount to discrimination. Article 14 of the European Agreement – as the Court states in several of its Judgments

⁶ Legal ground 3.

- does not prohibit all differences of treatment in the exercise of rights and freedoms: equality is only violated if the inequality lacks any objective or reasonable justification, and the existence of any such justification must be appreciated in relation to the purpose and effects of the measure under consideration, with the means employed being in reasonable proportion to the end pursued.⁷

Implementation in Spanish law of EC Directives 2000/43/EC and 2000/78/EC

Neither the formulation nor the implementation of EC Directives 2000/43/EC and 2000/78/EC in Spanish law sparked political or social debate in the country. There was no formal consultation of religions, and they made no significant contribution or declarations. The implementation of the Directives in Spanish law was effected by means of Act 63/2003, of 30 December 2003, regarding fiscal, administrative and social measures. This Act complements the general state budget Act and covers a variety of matters. Thus, no specific legislation was introduced for implementing the directives.

Chapter III of the second title of Act 63/2003, which extends from Articles 27 to 43, includes various measures to avoid cases of discrimination, and to that end Spain's principal labour legislation has been reformed: the Workers' Statute (Royal Legislative Decree 1/1996, of 24 March 1996), the Labour Procedure Act (Royal Legislative Decree 2/1995, of 7 April 1995), and the Social Order Infringements and Sanctions Act (Royal Legislative Decree 5/2000, of 4 August 2000).

On 3 June 2011, the Government presented in Spain's lower chamber, the Congress of Deputies, a draft bill integrating equality of treatment and non-discrimination, which, following the parliamentary debate, has expired without coming into force. In its statement of aims it said:

One of the purposes of this act is to implement more adequately the goals and ends of EC Directives 2000/43/EC and 2000/78/EC, something that was only done in part in Act 62/2003, of 30 December, regarding fiscal, administrative and social measures and without sufficient public debate in a field that requires raising public awareness and making the issues more visible, the social and political airing of

⁷ Legal ground 3.

related discussions, and a meaningful process through parliament. At the same time, that implementation was subjected to criticism by the European Commission, social groupings, particularly human rights organisations, in a process from which a series of proposed improvements have emerged. Moreover, that implementation has proven to be insufficient and inadequate when it comes to dealing with problems concerning equality and non-discrimination in Spanish society, above all in the current context of economic crisis.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

Administrative bodies with the duty to combat discrimination

Article 33 of Act 62/2003 set up the Council for the Promotion of Equality and Non-discrimination of Persons on the Grounds of Racial or Ethnic Origin. The Council's remit covers education, health, social benefits and services, housing and, in general, the supply and access to any goods or services, as well as access to employment and self-employment, the carrying out of professional functions, membership of and participation in trade unions and management organisations, working conditions, promotion at work and professional and ongoing training. Its job is to check for compliance with the stipulations of EC Directive 2000/43/EC and it is attached to the Ministry of Work and Immigration. Its powers are:

- i. To assist victims of racial or ethnic discrimination in filing their complaints;
- ii. To carry out studies and publish reports on racial and ethnic discrimination; and
- iii. To promote measures that contribute to the elimination of racial and ethnic discrimination, making recommendations, where necessary, regarding any matter related to such discrimination.

All Ministries with powers in matters related to the Council's scope of activity have a seat on it, together with the autonomous regions (*Comunidades Autónomas*), local governments and the most representative union and employers' organisations, as well as other organisations with an interest in matters of race or ethnicity. At all times the Council must have respect for the powers of the Public

Ombudsman as laid down in Organic Law 3/1981, of 6 April 1981. The Public Ombudsman may set up mechanisms of co-operation and collaboration with the Council with a view to the promotion of equal treatment and non-discrimination of people on the grounds of racial or ethnic origin.

Another body with powers in this area is the advisory Committee on Religious Freedom, created by Article 8 of Organic Law 7/1980, of 5 July 1980, regarding religious freedom. This Committee is situated within the Ministry of Justice and is composed of equal numbers of representatives of the state administration, the churches and experts whose opinion is deemed to be of interest in relation to matters connected with religious freedom. The tasks of the Committee include studying, reporting on and proposing anything relating to the application of the Organic Law of Religious Freedom, Article 1(2) of which states that religious beliefs will not be considered a ground for inequality or discrimination before the law and that religious reasons may not be used to prevent anyone from carrying out any employment or activity or discharging public offices and functions.

Regulations regarding the prohibition of discrimination and fields covered by the prohibition

The principal regulation in this respect is Article 14 of the Spanish Constitution of 1978 (cited at the beginning of this report). The contents of this Article are interpreted, as mentioned earlier, by the Constitutional Court in accordance with the jurisprudence of the European Court of Human Rights. This prohibition of discrimination is applicable in public and private spheres. Its transverse nature embraces the whole of the legal framework, which means that it must be complied with in all areas of public administration (including the armed and security forces) and in the private sector. The prohibition is referred to in numerous regulatory dispositions, many of which stem from Act 62/2003, by means of which, as mentioned earlier, a series of legislative reforms was introduced with a view to making Spanish law compatible with the stipulations of EC Directives 2000/43/EC and 2000/78/EC.

Besides the reforms that it introduced into other legislation, Act 62/2003 itself refers to the prohibition of discrimination on the grounds of religion, in Chapter III of its second part, which deals

with measures for the application of the principle of equal treatment. Article 27 lays down that the objective of this chapter, which is to be applied in public and private sectors, is to establish measures for the real and effective application of the principle of equal treatment and non-discrimination, particularly on the grounds of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, in the terms set out in each of its sections.

Article 28 is taken up with definitions that shape the chapter's understanding of the principle of equality as the absence of any direct or indirect discrimination for reasons of a person's racial or ethnic origin, religion or convictions, disability, age or sexual orientation. Direct discrimination occurs when a person is treated less favourably than another in a similar situation for reasons of racial or ethnic origin, religion or convictions, disability, age or sexual orientation. Indirect discrimination occurs when a legal or regulatory provision, a conventional or contractual clause, an individual agreement or a unilateral decision, although apparently neutral, may occasion a particular disadvantage to one person in relation to others for reasons of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, whenever it is plain that those dispositions, clauses or decisions serve no legitimate end and that the means for achieving that end are not appropriate or necessary. Harassment is defined as any undesired conduct related to a person's racial or ethnic origin, religion or convictions, disability, age or sexual orientation, the aim or consequence of which is to demean that person's dignity and create an intimidating, humiliating or offensive environment.

The third section of Chapter III, second part, of Act 62/2003 (Articles 31 to 43) is concerned with measures to ensure equal treatment and non-discrimination in the work-place. Article 34 states that the aim of this section is to establish measures that enable the principle of equality and non-discrimination to be real and effective in access to employment, membership and participation in trades union and management organisations, working conditions, promotion at work and professional and ongoing training, as well as access to self-employment or carrying out a profession and membership and participation in any organisation whose members carry out a particular profession. To this end, the principle of equal treatment means the absence of any direct or indirect discrimination of any person on the

grounds of racial or ethnic origin, religion or convictions, disability, age or sexual orientation. Differences in treatment based on any characteristic related to any of the cases referred to in the previous paragraph will not amount to discrimination whenever, owing to the nature of the particular professional activity at stake or the context in which it is carried out, that characteristic constitutes an essential and intrinsic professional requirement, provided that the goal pursued is legitimate and the requirement proportional.

Article 35 addresses the possibility of adopting measures of positive action in order to give practical guarantees of full equality regardless of racial or ethnic origin, religion or convictions, disability, age or sexual orientation. In this connection, the principle of equal treatment does not rule out the maintenance or adoption of specific measures favouring certain groups, with a view to forestalling or redressing the disadvantages that affect them regarding the matters included within the scope of application of this section. Finally, Article 36 regulates the burden of proof. In civil and administrative law proceedings where it may be deduced from the allegations of the plaintiff that evidence exists of discrimination with respect to the matters included in the scope of application of this section on the grounds of the person's racial or ethnic origin, religion or convictions, disability, age or sexual orientation, the respondent will have to supply objective, reasonable and sufficiently proven justification of the measures taken and their proportionality.

In much the same way as the third section, the second section of Chapter III, second part, of Act 62/2003 (Articles 29 to 33) establishes measures to ensure equal treatment and non-discrimination for reasons of a person's racial or ethnic origin.

The prohibition of discrimination on religious grounds is dealt with in legal dispositions covering a great diversity of matters.⁸ As far as the civil service is concerned, Article 14 of Act 7/2007, of 12 April 207, regarding the basic statute of public employees, recognises the right of public employees to non-discrimination on the grounds of birth, racial or ethnic origin, gender, sex or sexual orientation, religion or convictions, opinion, disability, age or any other

⁸ As mentioned earlier, Article 1(2) of the Organic Law of Religious Freedom states that religious beliefs will not be considered ground for inequality or discrimination before the law, and that religious reasons may not be put forward to prevent anyone from carrying out any employment or activity or discharging public offices and functions.

personal or social condition or circumstance. The cluster of ethical principles that must be respected by public employees includes respect for fundamental rights and public freedoms, which means the avoidance of any action that might cause any discrimination on the grounds of birth, racial or ethnic origin, gender, sex or sexual orientation, religion or convictions, opinion, disability, age or any other personal or social condition or circumstance. Article 95 of that Statute regards as a very serious offence any action that entails either discrimination on the grounds of birth, racial or ethnic origin, religion or convictions, disability, age or sexual orientation, language, opinion, place of birth or residence, sex or any other personal or social condition or circumstance, or harassment on the grounds of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, or moral, sexual or gender harassment.

Labour relations are covered by the Workers' Statute itself, in its revised version approved by Royal Legislative Decree 1/1995, of 24 March 1995, several articles of which regulate the prohibition of discrimination on religious grounds. Article 4(2) establishes that, in working relationships, workers have the right not to be discriminated against, either directly or indirectly, when seeking employment or when employed on the grounds of sex, civil status, age within the limits set by the same piece of legislation, racial or ethnic origin, social condition, religion or convictions, political ideas, sexual orientation, membership or otherwise of a trade union, or language within the Spanish state. At the same time, they have the right to respect for their privacy and to due consideration for their dignity, which together comprise protection against harassment on the grounds of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, as well as against sexual or gender harassment. Article 16(2) requires that, within their sphere of action, placement agencies guarantee the principle of equality in employment access; it also outlaws all discrimination for reasons of origin, including racial or ethnic origin, sex, age, civil status, religion or convictions, political opinions, sexual orientation, membership of trades unions, social conditions, language within the state and disability, provided that the worker has the aptitude to carry out the work or employment in question. Article 17 is concerned explicitly with non-discrimination in labour relations, laying down that any regulatory precepts, clauses in collective agreements, individual accords or unilateral decisions

made by the employer that directly or indirectly contain negative discrimination on the grounds of age or disability, or positive or negative discrimination in the workplace in matters of pay, timetables or other conditions of work for reasons of sex, origin (including racial or ethnic origin), civil status, social condition, religion or convictions, political ideas, sexual orientation, membership or otherwise of trades unions or adhesion to agreements made by them, kinship with other workers in the company, or language within the Spanish state will be considered void and with no effect. Also considered void are any instructions to discriminate or any decisions made by the employer that entail detrimental treatment of workers in response to any complaint lodged with the company, or any administrative or legal proceeding intended to enforce the principle of equal treatment and non-discrimination. Finally, Article 54, which regulates disciplinary dismissals, treats as breach of contract the dismissal of any worker as the result of harassment for reasons of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, or the sexual or gender harassment of the employer or the employees who work in the company.

Article 96 of the revised Labour Procedure Act, passed by Royal Legislative Decree 2/1995, of 7 April 1995, which concerns the burden of proof, lays down that, in those processes where it may be deduced from the allegations of the plaintiff that evidence exists of discrimination with respect to the matters included in the scope of application of this section on the grounds of the person's racial or ethnic origin, religion or convictions, disability, age or sexual orientation, the respondent will have to supply objective, reasonable and sufficiently proven justification of the measures taken. Articles 8, 9 and 16 of Royal Legislative Decree 5/2000, of 4 August 2000, which gave approval to the revised act regarding infringements and sanctions in the social order, qualifies discrimination as a very serious infringement, both in labour relations and matters of employment.

As for foreigners, Article 23 of Organic Law 4/2000, of 11 January 2000, regarding the duties and freedoms of foreigners in Spain and their social integration, defines which acts are to be considered discriminatory. Such acts are all those that, directly or indirectly, lead to any distinction, exclusion, restriction or preference to the detriment of a foreigner on the grounds of race, colour, parentage, national or ethnic origin, or religious convictions and practices,

and whose end or effect is to undermine or impair the recognition or exercise on equal terms of human rights and fundamental freedoms on the political, economic, social or cultural planes. That said the following are discriminatory acts:

- i. Those performed by a public authority, civil servant or staff entrusted with a public service who, in carrying out their functions, by commission or omission carry out any discriminatory act prohibited by law against a foreign citizen merely because of his or her condition as such or because he or she belongs to a particular race, religion, ethnic group or nationality;
- ii. All those that impose more stringent conditions on foreigners than on Spanish citizens, or conditions that imply some resistance to furnishing the foreigner with goods or services offered to the public at large, on the mere ground of being a foreigner or of belonging to a particular race, religion, ethnic group or nationality;
- iii. All those that unlawfully impose more stringent conditions on the legally resident foreigner than on Spanish citizens, or restrict or limit access to employment, housing, education, professional training and the social and health services, as well as any other right recognised by the Act, on the mere ground of his or her condition as such or because he or she belongs to a particular race, religion, ethnic group or nationality;
- iv. All those that by omission or commission impede the exercise of any lawfully undertaken economic activity by a legally resident foreigner in Spain, on the mere ground of his or her condition as such or because he or she belongs to a particular race, religion, ethnic group or nationality;
- v. Any treatment deriving from the adoption of criteria that are prejudicial to workers on account of their condition as such or because they belong to a particular race, religion, ethnic group or nationality constitutes indirect discrimination.

Article 54 of the Act qualifies all the foregoing as very serious infringements in matters relating to foreign citizens.

Finally, the prohibition of discrimination is also protected in penal law. Various articles of the Penal Code, passed by Organic Law 10/1995, of 23 November 1995, deal with the prohibition of discrimination on the grounds of religion. Article 22 considers as aggravating circumstances the commission of a crime for racist or anti-

Semitic reasons, or for any other sort of discrimination related to the victim's ideology, religion or beliefs, the ethnic group, race or nationality he or she belongs to, his or her sex or sexual orientation or any illness or disability he or she may suffer. Article 324 defines discrimination in the field of work. Articles 510, 511 and 512 respectively regulate the crimes of provocation to discrimination, hatred or violence towards groups, of refusal to provide a public service and of refusal to provide a professional or commercial service. Lastly, Article 515 establishes that sanctions may be taken against illicit associations if they promote or incite discrimination, hatred or violence towards people, groups or associations for reasons of ideology, religion or beliefs, the ethnic group, race or nationality to which they belong, their sex or sexual orientation, or any illness or disability they may suffer.

Case law

Out of all constitutional jurisprudence, two cases concerning discrimination on the grounds of religion are worthy of particular mention here. The first is the case dealt with in Judgment 19/1985, of 13 February 1985, regarding a Seventh-day Adventist who was dismissed after refusing to work on a Saturday. The Constitutional Court came to the conclusion that the worker had not been discriminated against because he had been treated in the same way as the rest of his fellow-workers. In the Court's opinion, to have let the workers have Saturdays off would have amounted to an exception that, albeit reasonable, would mean the lawfulness of the granting of this dispensation of the general regime, but not its imperative imposition on the employer.⁹ The date of this judgment should be born in mind, since it came at a time when the notion of indirect discrimination had not yet entered Spanish law.

The second case was resolved by means of Judgment 166/1996, of 28 October 1996. The appellant, a Jehovah's Witness, declared that his right to religious freedom had been violated and that he had been the victim of discrimination when he was not guaranteed the right to receive medical and surgical attention from the public health service without the use of blood transfusions. In his plea before the

9 Legal ground 3.

Constitutional Court he alleged that, while he accepted that religious freedom did not of itself determine the health service's duty to provide treatment as required by one particular mandate of a particular religious confession, that duty did derive from Article 14 of the Constitution, which requires the public authorities to guarantee sufficient care and benefits for all with no discrimination. The Constitutional Court based its rejection of this alleged violation on the ground that Article 14 of the Constitution acknowledges the right not to be discriminated against, but not the hypothetical right to impose or demand different treatment. As the objective of the appeal was not to guarantee equal treatment – for the legally established regime for the provision of health care is already egalitarian – but the contrary (namely, to modify standard medical treatment for reasons of religious beliefs and thereby condition the professional activity of the medical staff), there was no discrimination.¹⁰

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION OF DISCRIMINATION

Cases where it is possible to make exceptions to the prohibition of discrimination

In the context of exceptions to the prohibition of discrimination, a distinction has to be made between two issues: on the one hand, the so-called measures of positive action set out in Article 5 of EC Directive 2000/43/EC and Article 7 of EC Directive 2000/78/EC, the aim of which is to prevent or compensate for the disadvantages affecting certain groups or people; on the other, differences in treatment that are justified because they constitute an essential and decisive professional requisite, either because of the nature of the activity or because of the context in which it is carried out, in accordance with Article 4 of EC Directive 2000/78/EC.

Spanish law recognises both exceptions. The first, otherwise known as positive discrimination, has been developed in such areas as disability or the constitutional dignity of women. The Constitu-

10 Legal ground 5.

tional Court acknowledges the constitutionality of these exceptions to Article 14 of the Constitution on the grounds of Article 9(2), according to which it is incumbent upon the public authorities to promote conditions that ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles that prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.

In this regard, the Constitutional Court has pointed out that the mandate issued to public authorities in Article 9(2) of the Constitution amounts to a variation of Article 14:

favourable treatment is not prohibited by the Constitution and is not discriminatory, but rather the contrary. Public authorities can use affirmative action, even if only on a short-term basis, to benefit certain groups, which were historically overlooked and marginalised, with a view to mitigating or redressing their situation of tangible inequality by means of special and more favourable treatment.¹¹

This positive discrimination is not applicable to religious affairs since it is at odds with the principle of neutrality laid down in Article 16(3) of the Constitution, which requires of public authorities a position of impartiality in regard to religious matters.

The second exception concerning differences in treatment that are justified because they constitute an essential and decisive professional requisite either because of the nature of the activity or because of the context in which it is carried out, is acknowledged in the case of so-called companies or bodies, the ethos of which is based on religion or belief, and, in particular, of those religious denominations to which Article 6 of Organic Law 7/1980, regarding religious freedom, grants full autonomy and the right to establish their own rules of organisation, internal regime and working regime. Those rules, as well as those regulating the organisations that they create for the pursuance of their objectives, may include clauses that are protective of their religious identity and singular character, as well as of the due respect for their beliefs, without implying any impairment of the respect for the rights and freedoms recognised by the Constitution, particularly those of freedom, equality and non-discrimination.

¹¹ Judgment of Constitutional Court 216/1991, 14 November 1991, legal ground 5.

It should also be clarified here that these considerations have nothing to say about the differences that exist in the legal positions of religious groups. In the Spanish system, and the constitutional principles of non-discrimination and neutrality notwithstanding, not all religious groups enjoy the same legal status. The religious confessions can be divided into five groups:

- i. The Roman Catholic church;
- ii. Those churches that have signed a co-operation agreement with the state in accordance with Article 7 of Organic Law 7/1980;
- iii. Churches that, thanks to their reach and number of believers, have obviously taken root in Spain (Article 7 of Organic Law 7/1980);
- iv. Churches entered in the register of religious organisations, regulated in Article 5 of Organic Law 7/1980; and
- v. Churches not entered in that register.

Each of these categories comes under a particular regulatory framework, which means that the members of different confessions have different rights.

Organisations that may lawfully establish differences of legal treatment for reasons of religion

The organisations that may lawfully establish differences of legal treatment for reasons of religion are those organisations the ethos of which is based on religion or belief. This includes the churches entered in the Ministry of Justice's register of religious organisations in accordance with Article 5 of Organic Law 7/1980. These are the religious denominations to which Article 6 of the Law confers full autonomy to establish their own rules of organisation, internal regime and working regime.

Conditions required for the establishment of differences based on religion

The principle of non-discrimination does not imply uniformity of legal treatment, which is why the differences are lawful. That said, as

the Constitutional Court has made clear,¹² regulatory differences are consistent with equality when their purpose is not in contradiction of the Constitution and when, moreover, the rules from which the difference stems form a coherent structure in terms of reasonable proportion to the end thereby pursued. As contrary to equality is one rule that diversifies because of a merely selective whim, as another rule that in pursuance of a legitimate end, is designated in evident disproportion to that end or with no regard for the necessary relationship of proportionality. Similarly contrary to equality is any rule whose legal consequences lack proportionality.

In order to permit different treatment of similar situations, a double guarantee must be in place. First, the measure must be reasonable, given that not all unequal legal treatment represents an infringement of Article 14 of the Constitution, any such infringement only arising when that inequality sets up a difference between situations that may be regarded as equal and when it lacks any objective and reasonable justification. Second, the measure must be proportional to its end, given that the principle of equality does not rule out the existence of all inequality, but only those inequalities in which there is no proportion between the means employed and the end pursued. For more is required for differentiation to be constitutionally licit than that the end pursued by it is lawful: rather it is also essential that the legal consequences that attach to such differentiation are in accordance with and in proportion to that end, so that the relationship between the measure adopted, the result produced and the end sought by the legislator might overcome any consideration of its proportionality in the Constitutional Court and thus avoid any particularly deleterious or disproportionate results.

An extra element needs to be added to these general postulates: the evaluation carried out in each case of difference of treatment must bear in mind the substantive legal regime of the ambit of relations in which it is produced, for the consideration of proportionality is not carried out in the abstract but in the light of the circumstances of a particular case. This means that the individual situations that are to be compared need to be homogeneous or comparable; that is to say, the point of the comparison cannot be arbitrary or capricious.

12 Judgment of Constitutional Court 96/2002, 25 April 2002, legal grounds 7 and 8.

Case law

The most important cases that have emerged regarding this question have to do with teachers of religion in state schools: Constitutional Court Judgments 38/2007 (of 15 February 2007), 128/2007 (of 4 June 2007) and 51/2011 (of 14 April 2007). These teachers are chosen by the religious authorities but their contracts are with the Public Administration, which bears the cost of and pays their remuneration. To be contracted as a teacher of religion, an individual is required by law to obtain a certificate of suitability from the relevant religious authority, while the loss of that certificate results in the termination of the contract with the Administration.

For the Constitutional Court, the requirement of the certificate of suitability as a necessary prerequisite is not a violation of the prohibition of discrimination since that requirement cannot be considered arbitrary or unreasonable, or at odds with the principles of merit and capacity, given that the employment contracts at issue are formulated solely and exclusively for the teaching of religion. To the Court's mind, the specific function to which workers contracted for this end devote themselves constitutes a distinction in fact that determines that the difference of treatment substantiated in the requirement of the certificate of suitability issued by the relevant religious authority may be objectively and reasonably justified, and is proportionate and suited to the ends pursued by the legislator. It cannot therefore be held to be discriminatory.¹³

13 These are the terms used by the Constitutional Court in legal ground 9 of Judgment 38/2007, 15 February 2007.

SWEDEN

LARS FRIEDNER

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

Sweden entered the European Community on 1 January 1995.¹ Although it had ratified the European Convention on Human Rights (ECHR) early on,² it was not until that same date that the Swedish Parliament passed an Act³ making the Convention directly applicable in the country.⁴

As a background to historical Swedish views on issues of discrimination and religion, it must be pointed out that Sweden at that time had an unchallenged church-state system.⁵ Thus, before 2000 there was no equality between the religious communities in Sweden, since the Lutheran Church of Sweden (Svenska kyrkan) was a part of the state. Having said that, religious freedom was upheld from 1952, when it became possible for a Swedish citizen to opt out of the Church of Sweden without declaring their membership of another church.⁶ (Until the middle of the nineteenth century, Swedish citizens were obliged to be members of the state church; thereafter, they were permitted to choose another recognised church.⁷)

The matter of discrimination for religious reasons had predominantly been discussed as a part of the overarching issue of religious freedom. It has been argued that this discussion had already started

1 Act (1994:1500) due to Sweden's Connection to the European Union (Sw *lag med anledning av Sveriges anslutning till den Europeiska unionen*); Ordinance (1994:2063) on Inauguration of the Act (1994:1500) due to Sweden's Connection to the European Union (Sw *förordning om ikraftträdande av lagen (1994:1500) med anledning av Sveriges anslutning till Europeiska Unionen*).

2 Prop 1951:165, bet 1951:UU11, rskr 1951:251.

3 Act (1994:1219) on the European Convention for the Protection of Human Rights and Fundamental Freedoms (Sw *lag om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*).

4 The general Swedish position was that an international convention has to be adopted by an Act of Parliament in order to be direct applicable in Sweden, although Swedish membership of the European Union has somewhat changed this position.

5 This was changed in the year 2000, by Act (1998:1592) on Inauguration of the Church of Sweden Act (1998:1591) (Sw *lag om införande av lagen om Svenska kyrkan*).

6 Act (1951:680) on Religious Freedom (Sw *religionsfrihetslagen*).

7 G Göransson, *Svensk kyrkorätt* (Stockholm, 1993), pp 38–39.

in the eighteenth century, during the Enlightenment period.⁸ The debate eventually hardened, leading to step-by-step reforms.⁹ The latest (but perhaps not the last) reform was the decisions of the late 1990s regarding disestablishment of the Church of Sweden.¹⁰ Along the way, several decisions were made that loosened the ties between the State and the Church of Sweden and that also had an impact on issues of discrimination. For instance, in the 1980s there was still a provision in Swedish law stating that no-one who was not a member of the Church of Sweden was allowed to handle matters regarding the Church of Sweden (as a civil servant or a member of government).¹¹

Over a long period, from the 1920s until the principal parliamentary decision in 1995,¹² there was an ongoing political debate concerning the church-state system. One of the main arguments in this debate was, of course, the matter of religious freedom. The debate grew in its own right, and it would be difficult to argue that it was affected by either the United Nations' or the ECHR's provisions regarding religious discrimination. The main focus of the debate was to give those citizens who were not members of the Church of Sweden real religious freedom, irrespective of whether they were affiliated with another religious community or were non-believers. Religious communities other than the Church of Sweden were active in their efforts to bring the system of a state church to an end.¹³ The debate was also heated within the Church of Sweden, with some groups in favour of changes and others against.¹⁴

As the position of the Swedish Government in relation to draft legislation of the European Union is secret, there is normally no public debate in Sweden before a decision in the Union.¹⁵ Regarding

8 I Brohed, *Stat – religion – kyrka: ett problemkomplex i svensk akademisk undervisning under 1700-talet* (Stockholm, 1973), pp 111 ff.

9 Examples of this discussion can be found in Göransson, *Svensk kyrkorätt*, pp 54–55.

10 The discussion of whether the decisions resulted in a true disestablishment or not is not considered here.

11 Göransson, *Svensk kyrkorätt*, p 87.

12 Prop 1995/96:80, bet 1995/96:KU12, rskr 1995/96:84.

13 See SOU 1994:42.

14 See 2KL 1995:1, ksks 1995:15.

15 Before the Government decides the position to be taken by Sweden, it has to take advice from the EU Committee of the Parliament. Regarding certain questions, the Committee has open meetings, where the public can follow the debate. In the matter of the discrimination directives there were no such open meetings.

the Directives 2000/43/EC and 2000/78/EC, there may have been some attempts, from different groups, to influence the Government's decisions, but there was no public debate. However, the implementation of the Directives caused some debate. Since Sweden already had legislation against religious discrimination of almost the same standard as is prescribed by the Directives¹⁶ in some areas, these parts of the implementation did not cause much debate.¹⁷ There was no special emphasis on the religious aspects.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

The main state actor within the field of discrimination in Sweden is the Equality Ombudsman (*Diskrimineringsombudsmannen*), whose principal task is to supervise the application of the Discrimination Act.¹⁸ The Ombudsman's first step, when taking measures against somebody, is to try to convince him or her to follow the provisions of the Act.¹⁹ If that does not happen, the person in question may be urged to fulfil his or her obligations by means of a penalty. The decisions are in some cases made by the Ombudsman,²⁰ and in others by the Committee against Discrimination.²¹ The Committee has no other task than that of setting penalties.²² Both the Ombudsman and the members of the Committee are (as with most national authorities in Sweden²³) appointed by the Government. The Committee has no representation from the religious communities. Other matters of discrimination are handled by the courts. Cases concerning employment and other working-life issues are treated in exactly the same way as other labour disputes.²⁴ Other cases are handled by the civil courts.²⁵

16 Act (1994:134) on Ethnic Discrimination (Sw *lag om etnisk diskriminering*).

17 Prop 2007/08:95.

18 SFS 2008:567; Sw *diskrimineringslagen*.

19 Discrimination Act, s 4(1).

20 Ibid, s 4(4).

21 Ibid, s 4(5).

22 Ibid, s 4(7).

23 There are a few exemptions, when the persons in charge of an authority are appointed by Parliament.

24 According to the Act (1974:371) on Law Suits Regarding Labour Disputes (Sw *lagen om rättegång i arbetsstrister*), such cases are handled by the Labour Court or, if the in-

The Discrimination Act defines direct discrimination as ‘somebody being disadvantaged through being treated worse than someone else, has been treated, or should have been treated in a comparable situation, if the disadvantage has connection with ... religion or other religious conviction’. Indirect discrimination is defined as

somebody being disadvantaged through applying a provision, a criterion or a way of acting that appears as neutral but that may especially disadvantage persons ... of a certain religion or other religious conviction ... unless the provision, criterion or way of acting has a justified aim and the measures that are used are appropriate and necessary for achieving the aim.

The Act defines harassment as ‘a behaviour that violates somebody’s dignity and has a connection with any of the bases for discrimination ... [including] religion or other religious conviction’.²⁶ The word ‘religion’ has not been defined.²⁷ The matter of non-religious beliefs has not been examined by the courts and was not commented on by either the Government or the Parliament when the Act was drafted and approved. As the wording of the Act deals with ‘religion or other religious conviction’, it is likely that non-religious beliefs are not included. The remedy, if discrimination is shown to have taken place, is remuneration from the person (physical or legal) who has discriminated against the victim.²⁸

According to the Discrimination Act, discrimination is prohibited within the fields of employment, education and private employment agencies, business and professional competence, membership of trade unions, associations for employers, professional associations, provision of goods, services and housing, healthcare and social services, social security, unemployment security and financial aid for studies, military service and other corresponding education within the armed forces, and other forms of action when the agent is a public employee.²⁹ The prohibition of discrimination covers direct discrimination, indirect discrimination, harassment, sexual harassment

volved person does not have the support of a trade union, by the local District Court in the first instance and the Labour Court in the second instance.

25 Discrimination Act, s 6(1).

26 Ibid, s 1(4).

27 The Government, however, discussed the matter of defining the word ‘religion’ but came to the conclusion that no definition was needed: see Prop 2007/08:95, p 120.

28 Discrimination Act, s 5(1).

29 Ibid, ss 2(1), 2(5), 2(9), 2(10), 2(11), 2(12), 2(13), 2(14), 2(15), 2(17).

and incitement to discriminate.³⁰ As already mentioned, indirect discrimination is not considered to have taken place if the discrimination has a justified aim and the measures that are used are appropriate and necessary for achieving that aim.³¹ Other possible justifications apply to the different fields of discrimination. For example, it is acceptable to discriminate against somebody on grounds of their age, because of the age limits for retirement.³²

There seems to be only one case in Sweden concerning religious discrimination. It concerned two Muslim women, originally from Lebanon but who had grown up in Sweden, who were employed as receptionists on an hour-by-hour basis in a fitness centre. Initially, it was regarded as an advantage by the employer that they were of Arab origin and wore headscarves, because the centre had many clients from abroad. Eventually, however, the two women felt discriminated against by the head of the centre. They choose to quit after about two months' employment and complained to the Ombudsman, who sued the centre. The Labour Court found evidence that questions relating to the Muslim faith, such as ways of living, lending and the handling of unfaithful women, had been discussed, for example during coffee breaks. The Court also considered it proven that the head of the centre had on one occasion mentioned that he ate ham, and added jokingly that the ham came from a 'halal pig'. However, none of these incidents could, according to the Court, be considered discrimination. The Ombudsman therefore lost the case.³³

There has also been a case, handled by the Ombudsman, that was never brought to the courts. It concerned a female student in an upper secondary school, who wore a niqab. The school refused to allow the student to wear the niqab during lessons, for pedagogic reasons. A solution was reached, where the student was offered to sit at the front of the class, with the male students behind her. In that position, the student was ready to take off her niqab. The Ombudsman concluded that she was not convinced that she could win a case against the school and dropped the matter.³⁴

30 Ibid, s 1(4).

31 Ibid.

32 Ibid, s 2(2).

33 AD 2010:21.

34 Case 2009/103.

The Ombudsman has also paid special attention to the Church of Sweden. As the Church has been independent of the state since 2000, it now has its own Church Ordinance, enacted by the Church Synod.³⁵ One of the provisions of the Church Ordinance state that persons who are employed by the Church are supposed to be members of the Church.³⁶ The Ombudsman criticised this statement, saying that this amounted to discrimination against persons of other religious beliefs. Negotiations were held between the Ombudsman and the Church. Finally, an agreement was reached whereby the Church was obliged to co-operate with the Ombudsman regarding information and education within the Church. The aim of these discussions is to make clear to leading Church actors what is necessary, according to the Discrimination Act, when following the Church Ordinance provisions.³⁷

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

The question of the right to distinguish or to differentiate is easy to answer from a Swedish perspective: it is not permitted according to Swedish law. From a Swedish legal perspective all subjects are supposed to follow the prohibition to discriminate. The problems raised by this standpoint, however, are illustrated by the aforementioned agreement between the Ombudsman and the Church of Sweden.³⁸

³⁵ See G Edqvist, L Friedner, M Lundqvist Norling and P Tibbling, *Kyrkoordning för Svenska kyrkan 2010 med angränsande lagstiftning och kommentarer* (Stockholm, 2010).

³⁶ As the Church of Sweden is responsible for the cemeteries for most Swedish inhabitants, the Church Ordinance has an exemption for those working at cemeteries.

³⁷ Ombudsmannen för etnisk diskriminering, dnr 216-2001.

³⁸ Ibid.

UNITED KINGDOM

DAVID McCLEAN

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

Historically, the idea that religious discrimination was undesirable came relatively late to the various parts of the United Kingdom. Even today, the courts still struggle to define its scope, the recent legislation giving limited guidance.

In England and Ireland the removal of papal jurisdiction led to discrimination against those who remained loyal to Rome and, to a much lesser extent, against Protestant dissenters from the Established Church. A series of Catholic Relief (or Catholic Emancipation) Acts were passed in the late eighteenth and early nineteenth centuries, an especially significant Act being that of 1829, removing most of the disabilities applying to Roman Catholics. A few remaining ones were removed by the Roman Catholic Relief Act 1926, and a special Act in 1974 allowed a Roman Catholic to be appointed to the office of Lord Chancellor.¹ Roman Catholics are still prohibited from succeeding to the throne or serving as Regent. Protestant dissenters were not targeted in the same way, but many public offices were at one stage restricted to members of the Church of England, and it was only in 1866 that others were able to graduate in the University of Oxford.

In Scotland the Reformation took a different form, and for several centuries there was a struggle between those who favoured episcopal or presbyterian forms of government; for much of the eighteenth century what is now the Scottish Episcopal Church (an Anglican church) was discriminated against through the Penal Laws, repealed in 1792. Northern Ireland, separated from the rest of Ireland in 1920 and remaining part of the United Kingdom, is a special case. Religious divisions between Catholics and Protestants (which in this context include the (Anglican) Church of Ireland) are reflected in political divisions between Nationalists (or Republicans) and Union-

¹ Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974.

ists and, as explained below, this has produced a different approach to anti-discrimination legislation.

Although the United Kingdom became a party to the various United Nations instruments and was among the first to ratify the European Convention on Human Rights (ECHR), for many years these had extraordinarily little impact on the law or on legal debate in the United Kingdom. That is only partly explained by the fact that, until the passage of the Human Rights Act 1998, the ECHR was not part of domestic law and proceedings under it had to be taken in Strasbourg.

One of the very few references to the international material is to be found in *Ahmad v Inner London Education Authority*,² where the Court of Appeal held that the dismissal of the appellant school teacher for absenting himself from school to attend Friday prayers in the local mosque was justified.³ Scarman LJ, dissenting, explained some of the reasons, referring to the governing legislation enacted in 1944.⁴ This had never previously been considered by the courts, for a number of reasons. The first was that education authorities had sought to comply with the section by not asking questions, the theory being that, if you did not know a person's religion, you could not discriminate against him or her on that ground. Second, there were until recently no substantial religious groupings in England that fell outside the broad categories of Christian and Jewish. So long as there was no discrimination between them, no problem was likely to arise. However, argued Scarman LJ, society had changed since 1944: religions such as Islam and Buddhism had substantial followings in England. The change in legal background was no less momentous. The United Kingdom had enacted a series of statutes after it had ratified the ECHR and in the light of its obligations under the Charter of the United Nations. It was necessary

to construe and apply the legislation not against the background of the law and society of 1944 but in a multi-racial society which has

² [1978] QB 36.

³ See also *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932. In this case, a Christian refused to work on Sundays; the result was the same.

⁴ Education Act 1944, s 30, which provided that 'no person shall be disqualified by reason of his religious opinions, or of his attending or omitting to attend religious worship, from being a teacher in a county school or in any voluntary school, or from being otherwise employed for the purposes of such a school'.

accepted international obligations and enacted statutes designed to eliminate discrimination on grounds of race, religion, colour or sex.⁵

The development of anti-discrimination legislation in Great Britain over the last three decades of the twentieth century seems to have been prompted, at least in its first phase, more by national issues than by the UN and European developments. That development can be traced through such enactments as the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995 and the Disability Rights Commission Act 1999. The implementation of the European Directive included several sets of Regulations,⁶ but most of the earlier legislation has been replaced by two more recent Acts, the Equality Act 2006 and the Equality Act 2010.

Despite the close relationship in practice between race and religion, the enactment of the Race Relations Act 1976 was not accompanied by any proposal to deal with religious discrimination. Lord Templeman, in a case that reached the House of Lords,⁷ made a cryptic comment:

By section 3 of the [1976] Act the racial groups against which discrimination may not be practised are groups ‘defined by reference to colour, race, nationality or ethnic or national origins ...’. Presumably Parliament considered that the protection of these groups against discrimination was the most necessary. The Act does not outlaw discrimination against a group of persons defined by reference to religion. Presumably Parliament considered that the amount of discrimination on religious grounds does not constitute a severe burden on members of religious groups.

That omission has now been made good.

⁵ *Ahmad v Inner London Education Authority*.

⁶ The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660); the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661; the Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467; the Employment Equality (Age) Regulations 2006, SI 2006/1031.

⁷ *Mandla (Sewa Singh) v Lee* [1983] 2 AC 548.

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

Institutional arrangements

The Equality Act 2006 established the Commission for Equality and Human Rights. This replaced three separate bodies (the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission) and it was given responsibilities for promoting equality and combating unlawful discrimination in three new areas, namely sexual orientation, age and religion or belief, and also more generally for promoting human rights.⁸

Under Schedule 1 to the 2006 Act,⁹ the Commission consists of between 10 and 15 individuals, appointed by the relevant Minister. At least one Commissioner must be, or have been, a disabled person; one, appointed in consultation with the Scottish Ministers, must be aware of conditions in Scotland; and one, appointed in consultation with the Welsh Ministers, must be aware of conditions in Wales. Commissioners hold office for a term of between two and five years and are eligible for reappointment. One Commissioner is appointed as Chairman, and the Commission itself appoints a Chief Executive. The Commission may appoint one or more ‘Investigating Commissioners’ to carry out inquiries and investigations under the Act. The Commission may also establish one or more advisory committees and must have a Disability Committee, a Scotland Committee and a Welsh Committee.

Discrimination on grounds of religion and belief

The Employment Equality (Religion or Belief) Regulations 2003 made unlawful discrimination on the grounds of sexual orientation and religion or belief in employment and vocational training. These Regulations implemented the UK’s obligations under the Directive 2000/78/EC. (It is important to note that, in the United Kingdom,

8 For the process leading up to the establishment of the Commission for Equality and Human Rights see the Government consultation paper *Equality and Diversity: Making it Happen*, published in October 2002, and the White Paper *Fairness for All: A New Commission for Equality and Human Rights* (Cm 6185), published in May 2004.

9 The Schedule has been amended on a number of occasions, but not so as to affect what is said in the text.

regulations to give effect to EU instruments do not require parliamentary approval but are made by ministerial order, subject to the possibility of a debate in either House of Parliament if, exceptionally, that is obtained.) More general provisions on this subject were first enacted in the Equality Act 2006 but they were repealed and replaced by the current provisions in the Equality Act 2010.

Meaning of ‘religion or belief’

Religion or belief is declared to be a ‘protected characteristic’ by the Act.¹⁰ ‘Religion’ is defined as ‘any religion’ (not a major clarification)¹¹ and a reference to religion includes a reference to a lack of religion;¹² ‘belief’ is defined as ‘any religious or philosophical belief’ and a reference to belief includes a reference to a lack of belief.¹³ There was discussion in the House of Lords as to the significance of the word ‘philosophical’: a proposal to omit the word was resisted by a member of the British Humanist Association and also by the Bishop of Chichester; the underlying issue was really about the ‘Church of Scientology’, and the Government indicated that there was no intention to include such a body.¹⁴

The matter was tested in the courts in *Grainger plc v Nicholson*.¹⁵ The claimant, Mr Nicholson, was employed by a property company. The company dismissed him, saying that this was on the ground of redundancy. He argued that he was in fact dismissed because of his strong philosophical belief in manmade climate change. Quite how this affected his work is not clear from the report of the case, which addressed the abstract question whether such a belief fell within the Employment Equality (Religion or Belief) Regulations 2003, the relevant language being the same as that in the 2010 Act.

The employer argued that the term ‘philosophical belief’ referred to a belief that was similar to a religious belief. It had to be a belief based on a philosophy of life, not a scientific or political belief or opinion, or a lifestyle choice. It had to be part of a system of beliefs.

¹⁰ Equality Act 2010, s 4.

¹¹ Ibid, s 10(1).

¹² Ibid.

¹³ Ibid, s 10(2).

¹⁴ *Parliamentary Debates (Lords)*, 13 January 2010.

¹⁵ [2010] IRLR 4.

The Employment Appeal Tribunal found in favour of Mr Nicholson. The case law relating to the ECHR was directly material¹⁶ and, accordingly, the following limitations to the term ‘philosophical belief’ apply:

- i. The belief must be genuinely held;
- ii. It must be a belief and not an opinion or viewpoint based on the present state of information available;
- iii. It must be a belief as to a weighty and substantial aspect of human life and behaviour;
- iv. It must attain a certain level of cogency, seriousness, cohesion and importance; and
- v. It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

It was necessary, in order for the belief to be protected, for it to have a similar status or cogency to a religious belief. However, even a religious belief was not required to be one shared by others. It was not therefore a bar to a philosophical belief being protected by the law that it was not shared by others; nor was it a bar that it was a ‘one-off belief’, namely a belief that did not govern the entirety of a person’s life. Pacificism and vegetarianism could both be described as one-off beliefs in that sense, but both would be philosophical beliefs. The philosophical belief in question did not need to constitute or allude to a fully fledged system of thought, provided that it otherwise satisfied the limitations set out in the paragraph above. A philosophical belief did not need to be an ‘-ism’. Although the support of a political party might not meet the description of a philosophical belief, a belief in a political philosophy, such as socialism, Marxism, communism or free-market capitalism, might qualify. If a person could establish that he or she held a philosophical belief that was based on science, as opposed, for example, to religion, then that would not be a reason to disqualify it from protection. For example, Darwinism must be plainly capable of being such a philosophical belief, albeit that it may be based entirely on scientific conclusions (not all of which may be uncontroversial).

¹⁶ The tribunal cited *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293 and the discussion in the English case of *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, HL.

Remedies and scope

The Equality Act 2010 creates some offences, but in the main any remedy is civil in nature. Claims in relation to alleged contraventions may be made to a county court¹⁷ or in certain cases to a tribunal dealing with the specialist area. The Act contains a limited provision allowing positive action in certain circumstances, for example to encourage more from an ethnic minority to take up certain opportunities.¹⁸

The Act covers both direct and indirect discrimination.¹⁹ It also deals with harassment and victimisation.²⁰ The contexts in which the Act applies are the provision of services, premises, employment (including business partnerships), the holding of offices (of especial relevance, as most clergy are office-holders rather than employees), pensions, schools, further and higher education (including universities) and associations. Related provisions deal with such matters as transport.

Case law

There has been a large body of case law and some of the decisions affecting Christians have attracted criticism not only from the Church press but also from the Equality and Human Rights Commission itself. A number of decisions may be mentioned, four of which are the subject of continuing proceedings in the European Court of Human Rights.²¹

In *London Borough of Islington v Ladele*,²² Ms Ladele worked as a registrar of marriages, which involved presiding at civil weddings. When same-sex ‘civil partnerships’ were introduced in England, the duties of a registrar were extended to include presiding at the registration of such partnerships. Ms Ladele refused to carry out that additional work, because to do so was inconsistent with her Christian religious beliefs. She was disciplined and alleged religious discrimi-

17 In Scotland, a Sheriff’s court.

18 Equality Act 2010, s 158.

19 Ibid, ss 13 (direct discrimination) and 19 (indirect discrimination).

20 Ibid, ss 26 and 27 respectively.

21 *Ladele v UK; McFarlane v UK* (App nos 51671/10 and 36516/10); *Eweida v UK; Chaplin v UK* (App nos 48420/10 and 59842/10).

22 [2009] EWCA Civ 1357.

nation. It was held that there was no direct discrimination as Ms Ladele had not been discriminated against or subjected to harassment on the basis of her religious beliefs but because she had failed to perform her duties. Any indirect discrimination was objectively justified as a proportionate measure designed to give effect to the principle of equality of treatment that public authorities were expected to respect.

In the subsequent Court of Appeal case of *McFarlane*, Laws LJ offered an analysis much quoted in later cases:

In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and art 9 of the [Convention] offer vigorous protection of the Christian's right and every other person's right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts ... The Judea-Christian [sic] tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of law-makers as to the objective merits of this or that social policy, and the liturgy and practice of the established church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion ... The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified; it is irrational, as preferring the subjective over the objective, but it is also divisive, capricious and arbitrary ... So it is that the law must firmly safeguard the right to hold and express religious beliefs. Equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime.²³

This has been interpreted as meaning that a distinction should be drawn between treatment on the grounds of a person's beliefs and

²³ *McFarlane v Relate (Avon) Limited* [2010] EWCA Civ 880, per Laws LJ, refusing permission to appeal at para 21.

treatment on the grounds of the manifestation of those beliefs.²⁴ That seems a very crude interpretation; the law is more subtle.

*McFarlane v Relate Avon Ltd*²⁵ concerned a counsellor working for Relate, a marriage guidance body, who was dismissed when he refused, on the grounds of his Christian beliefs, to counsel same-sex couples. The Employment Appeal Tribunal reached the same conclusion (and on similar grounds) to that in *Ladele*.

In *Eweida v British Airways plc*²⁶ the claimant was employed by British Airways as a member of its check-in staff. The airline allowed Muslim headscarves and Sikh turbans, but a cross worn around the neck was forbidden unless it could be concealed from view. The courts dismissed her claims of direct and indirect discrimination. Ms Eweida's complaint was held to arise from a personal objection that did not result from any doctrine of faith. There had been no interference with her ability to practise her faith. Indirect discrimination required some element of group disadvantage, which was found not to exist on the facts. *Chaplin v Royal Devon and Exeter NHS Foundation Trust* had essentially identical facts, the claimant being a nurse.

The Equality and Human Rights Commission has sought leave to intervene in the Strasbourg proceedings. It issued a statement in July 2011 saying:

Judges have interpreted the law too narrowly in religion or belief discrimination claims. If given leave to intervene, the Commission will argue that the way existing human rights and equality law has been interpreted by judges is insufficient to protect freedom of religion or belief. It will say that the courts have set the bar too high for someone to prove that they have been discriminated against because of their religion or belief; and that it is possible to accommodate expression of religion alongside the rights of people who are not religious and the needs of businesses.

The Commission is concerned that rulings already made by UK and European courts have created a body of confusing and contradictory case law. For example, some Christians wanting to display religious symbols in the workplace have lost their legal claim so are not al-

24 *Power v Greater Manchester Police Authority* (EAT, October 2010).

25 [2010] IRLR 196.

26 [2010] EWCA Civ 80, followed in *Chatwal v Wandsworth Borough Council* (EAT, 6 July 2011) (a Sikh employee refused to join the fridge-cleaning rota because he objected to handling meat).

lowed to wear a cross, while others have been allowed to after reaching a compromise with their employer. As a result, it is difficult for employers or service providers to know what they should be doing to protect people from religion or belief based discrimination. They may be being overly cautious in some cases and so are unnecessarily restricting people's rights. It is also difficult for employees who have no choice but to abide by their employer[']s decision.

The Commission thinks there is a need for clearer legal principles to help the courts consider what is and what is not justifiable in religion or belief cases, which will help to resolve differences without resorting to legal action. The Commission will propose the idea of 'reasonable accommodations' that will help employers and others manage how they allow people to manifest their religion or belief.²⁷

Finally, reference can also be made to *R (on the application of Johns) v Derby City Council*.²⁸ The applicants, who were Pentecostalists, wished to be approved as foster parents, but the social workers indicated that the applicants' view that sexual acts were only proper within marriage made it unlikely that they would be approved.²⁹ In a strongly worded judgment, the Divisional Court followed *Ladele* and held that if the Council's treatment of their case was the result of the claimants' expressed antipathy, objection to or disapproval of homosexuality and same-sex relationships it was clear that it would not be because of their religious belief.

27 EHRC Press Release, 11 July 2011, available at <<http://www.equalityhumanrights.com/news/2011/july/commission-proposes-reasonable-accommodation-for-religion-or-belief-is-needed/>> accessed 29 November 2011.

28 [2011] EWHC 375 (Admin).

29 The court cited the National Minimum Standards for Fostering Services, which emphasise the need to value diversity, to promote equality and to value, encourage and support children in a non-judgmental way, regardless of their sexual orientation or preference. That duty did not apply only to the child and the individual placement, but to the wider context, including the main foster carer, a child's parents and the wider family, any of whom might be homosexual. In those circumstances it was quite impossible to maintain that a local authority was not entitled to consider a prospective foster carer's views on sexuality, least of all when, as in the case at hand, it was apparent that the views held and expressed by the claimants might affect their behaviour as foster carers.

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

The seemingly comprehensive scheme of the Equality Act 2010 is subject to a very large number of exceptions and special provisions. So, *inter alia*,

- i. It is declared not to be a contravention of the Act for a charity to continue a practice it has followed since before 18 May 2005³⁰ of requiring members, or persons wishing to become members, to make a statement that asserts or implies membership or acceptance of a religion or belief, or of restricting access by members to a benefit, facility or service to those who make such a statement;³¹
- ii. So far as the provision of services is concerned there is an exemption relating to religious or belief-related discrimination, in connection with the curriculum of a school; admission to a school that has a religious ethos; acts of worship or other religious observance organised by or on behalf of a school (whether or not forming part of the curriculum); the responsible body of a school that has a religious ethos; transport to or from a school; and the establishment, alteration or closure of a school;³²
- iii. A general exemption for acts authorised under other statutes applies to the special rules in the Schools Standards and Framework Act 1998 as to the ability of schools to apply religious tests in appointing certain members of the teaching staff;³³
- iv. In respect of religious or belief-related discrimination, there are exceptions applying in certain immigration contexts³⁴ and to existing insurance policies;³⁵
- v. It is not a contravention of the sex discrimination provisions for a minister of religion to provide a service³⁶ only to persons

³⁰ The date is that of the introduction of the bill that became the Equality Act 2006.

³¹ Equality Act 2010, s 193(5)(6).

³² Ibid, Sch 3, para 11. There are further exemptions in Sch 11, para 5.

³³ Ibid, Sch 22.

³⁴ Ibid, Sch 3, para 18.

³⁵ Ibid, Sch 3, para 23.

³⁶ ‘Service’ is used here in the general sense and is not limited to services in the sense of religious rites or ceremonies.

- of one sex or separate services for persons of each sex, if the service is provided for the purposes of an organised religion, it is provided at a place that is (permanently or for the time being) occupied or used for those purposes, and the limited provision of the service is necessary in order to comply with the doctrines of the religion or is for the purpose of avoiding conflict with the strongly held religious convictions of a significant number of the religion's followers;³⁷
- vi. There are special provisions applying generally to 'organisations relating to religion or belief',³⁸ which require more extended treatment.

Religious organisations

A religious organisation is defined by reference to its purpose, which must be to practise the religion, to advance the religion, to teach the practice or principles of the religion, to enable persons of the religion to receive benefits or to engage in activities within the framework of that religion, or to foster or maintain good relations between persons of different religions. However, an organisation does not qualify if its sole or main purpose is commercial. The Equality Act 2010 provides that such an organisation (or a person or minister acting under its auspices) does not contravene Parts 3, 4 or 7 of the Act³⁹ in certain cases that would otherwise be discrimination on the ground of religion or belief or of sexual orientation. The actions that are allowed are restricting membership of the organisation; participation in activities undertaken by the organisation or on its behalf or under its auspices; the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices; or the use or disposal of premises owned or controlled by the organisation. There are further requirements, differently expressed in the two cases of religion or belief and of sexual orientation:

- i. A restriction relating to religion or belief may only be imposed (a) because of the purpose of the organisation, or (b) to

37 Ibid, Sch 3, para 29.

38 Ibid, Sch 23.

39 These Parts deal with services, premises and associations.

- avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief.
- ii. A restriction relating to sexual orientation may only be imposed (a) because it is necessary to comply with the doctrine of the organisation, or (b) to avoid conflict with the strongly held religious convictions of a significant number of the religion's followers.⁴⁰

There is some quite complicated history behind this provision. When the Sex Discrimination Act 1975 was being drafted, it was obvious that some provision was needed to deal with the position of those churches that do not ordain women. Section 17 of that Act provided:

- (1) Nothing in this Part applies to employment for purposes of an organised religion where the employment is limited to one sex so as to *comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers.*⁴¹

The italicised language is very vague and was much criticised. When the Employment Equality (Sexual Orientation) Regulations 2003⁴² were made, in implementation of Council Directive 2000/78/EC, a group of trade unions challenged the validity of a number of provisions,⁴³ including regulation 7(3), which provided an exemption

where –

- (a) the employment is for purposes of an organised religion;
- (b) the employer applies a requirement related to sexual orientation –
 - (i) so as to comply with the doctrines of the religion, or
 - (ii) because of the nature of the employment and the context in which it is carried out, so as to *avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers ...*⁴⁴

⁴⁰ Or in the case of a belief, the strongly held convictions relating to the belief of a significant number of the belief's followers. Equality Act 2010, Sch 23.

⁴¹ In the form in which it was enacted (emphasis added); a different formula was substituted by the Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467, reg 20(1).

⁴² SI 2003/1661.

⁴³ *R (on the application of Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin).

⁴⁴ SI 2003/1661, reg 7(3), emphasis added.

It will be seen that the formula used now spoke of a ‘conflict’ and not merely ‘offending’; and instead of ‘religious susceptibilities’ used the term ‘strongly held religious convictions’. The language is probably clearer, though how one determines whether a religious conviction is held ‘strongly’ is not at all obvious.

Regulation 7(3) was not included in the draft regulations originally published for the purposes of consultation. It was added as a result of representations from the churches, including in particular the Archbishops’ Council of the Church of England. The trade unions argued that the regulation was not a proper transposition of Article 4 of the Directive. Whether it was a correct transposition had also been doubted by the Parliamentary Joint Committee on Statutory Instruments,⁴⁵ and a debate was secured in the House of Lords on the draft regulations by Lord Lester of Herne Hill QC.⁴⁶ The Government minister, Lord Sainsbury of Turville, explained the Government’s intentions:

Article 4(1) of the European directive is quite clear that religious considerations can be taken into account. What we are debating this evening is exactly where that line is drawn ... We believe that Regulation 7(3) is lawful because it pursues a legitimate aim of preventing interference with a religion’s doctrine and teaching and it does so proportionately because of its narrow application to a small number of jobs and the strict criteria which it lays down ... This is no ‘blanket exception’. It is quite clear that Regulation 7(3) does not apply to all jobs in a particular type of organisation. On the contrary, employers must be prepared to justify any requirement relating to sexual orientation on a case by case basis. The rule only applies to employment which is for the purposes of ‘organised religion’, not religious organisations. There is a clear distinction in meaning between the two. A religious organisation could be any organisation with an ethos based on religion or belief. However, employment for the purposes of an organised religion clearly means a job, such as a minister of religion, involving work for a church, synagogue or mosque.

Counsel for the trade unions argued that the exemption would have a much wider scope. He gave examples:

- (a) a church is unwilling to engage a homosexual man as a cleaner in a building in which he is liable to handle religious artefacts, to avoid

45 Twenty-first Report (13 June 2003), paras 1.11–1.20.

46 See *Parliamentary Debates (Lords)* 17 June 2003.

offending the strongly held religious convictions of a significant number of adherents; (b) a school for girls managed by a Catholic Order dismisses a science teacher on learning that she has been in a lesbian relationship, reasoning that such a relationship is contrary to the doctrines of the Order; (c) a shop selling scriptural books and tracts on behalf of an organisation formed for the purpose of upholding and promoting a fundamentalist interpretation of the Bible is unwilling to employ a lesbian as a sales assistant since her sexual orientation conflicts with the strongly held religious convictions of a significant number of Christians and/or of that particular organisation; (d) an Islamic institute open to the general public but frequented in particular by Muslims is unwilling to employ as a librarian a man appearing to the employer to be homosexual, reasoning that his sexual orientation will conflict with the strongly held religious convictions of a significant number of Muslims.⁴⁷

Without commenting directly on these examples, Richards J held that the regulation was valid. He noted that the earlier formulation in the Sex Discrimination Act 1975 had never been criticised as not being a fair reflection of the European legislation.

A more recent Employment Tribunal case⁴⁸ interpreted Regulation 7(3) quite strictly. It upheld a complaint of discrimination where an Anglican diocese refused to appoint as a lay Diocesan Youth Officer a man of homosexual orientation. Although he had previously been in a same-sex relationship, he was now and promised to remain celibate. The Tribunal referred to the final part of Regulation 7(3): if a requirement is imposed to meet the convictions of the members of the church, then there will be discrimination unless either the person to whom that requirement is applied does not meet it, or the employer is not satisfied, and in all the circumstances it is reasonable for him or her not to be satisfied that that person meets it. Here the Tribunal found that, given the promise of celibacy, it was not reasonable of the bishop not to be satisfied.

Northern Ireland

It is necessary to give a separate account of the position in Northern Ireland. Council Directive 2000/78/EC itself recognises the special

47 *R (on the application of Amicus)*.

48 *Reaney v Hereford Diocesan Board of Finance* (July 2007), Cardiff Employment Tribunal, Application No 1602844/2006.

circumstances in Northern Ireland, Article 15 contains two special provisions:

- i. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation;⁴⁹
- ii. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.

The European Directives have been implemented in Northern Ireland by a series of regulations that are closely based on those applying in Great Britain; they call for no further treatment. But there is one distinct piece of legislation in Northern Ireland that is important in the present context: the Fair Employment and Treatment (Northern Ireland) Order 1998.⁵⁰ This is concerned with ‘discrimination on the ground of religious belief or political opinion’,⁵¹ extended in 2003 to ‘any religion or similar philosophical belief’.⁵² It is further provided that ‘references to a person’s religious belief or political opinion include references to (a) his supposed religious belief or political opinion; and (b) the absence or supposed absence of any, or any particular, religious belief or political opinion’,⁵³ and there is an

⁴⁹ The Police (Northern Ireland) Act 2000, s 46, provides that in making appointments on any occasion, the Chief Constable shall appoint from the pool of qualified applicants formed for that purpose an even number of persons of whom half shall be persons who are treated as Roman Catholic and half shall be persons who are not so treated. It survived a challenge based on Art 9 ECHR in *Re Parsons’ Application for Judicial Review*, NI CA, June 2003.

⁵⁰ SI 1998/3162 (NI 21).

⁵¹ Fair Employment and Treatment (Northern Ireland) Order 1998, Art 3(1)(a). In *McKay v Northern Ireland Public Service Alliance* [1994] NI 103 (NI CA), it was said that ‘the meaning of “political opinion” is obscure and incapable of precise definition’.

⁵² Fair Employment and Treatment (Northern Ireland) Order 1998, Art 2(2) as inserted by SR 2003/520.

⁵³ Ibid, Art 2(3).

exclusion that speaks volumes about the situation in Northern Ireland:

- (4) In this Order any reference to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.⁵⁴

So entrenched are religious and political divisions in Northern Ireland that the case law shows attempts to apply the concept of religious or political discrimination to matters as diverse as the flying of the Union flag, the grant of fishing licences, support for Gaelic football, the closure of a swimming pool on Sundays and rules forbidding prisoners to use the Irish language in craftwork.

Article 4 of the Order refers to 'affirmative action', defined as action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including (a) the adoption of practices encouraging such participation; and (b) the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.

⁵⁴ See *McConkey v The Simon Community* [2009] UKHL 24 (includes an opinion held in the past).

CONTRIBUTION DU SYSTÈME DE STRASBOURG À LA LUTTE CONTRE LA DISCRIMINATION RELIGIEUSE

JEAN DUFFAR

I. LA TOILE DE FOND HISTORIQUE, CULTURELLE ET SOCIALE: HISTOIRE, DROIT ET DÉFINITIONS DE LA DISCRIMINATION RELIGIEUSE

La discrimination en raison de la religion est un fléau, ancien, récurrent universel et actuel; l'Europe n'y échappe pas,¹ malgré l'affirmation par le droit de tous ses États membres de la liberté et de l'égalité des religions et de l'interdiction de la discrimination, affirmation et interdiction qui figurent déjà dans des instruments internationaux de protection des droits de l'homme, universels et régionaux auxquels tous les États européens sont parties.

Actualité du sujet sur le plan universel et dans les instruments universels de protection des droits de l'homme

Universalité et actualité du sujet: en témoigne la résolution 'Lutte contre l'intolérance, les stéréotypes négatifs, la stigmatisation, la discrimination, l'incitation à la violence et la violence visant cer-

¹ En témoigne la Déclaration commune à l'occasion de la Journée internationale pour l'élimination de la discrimination raciale, 21 mars 2010 du Bureau des institutions démocratiques et des droits de l'homme de l'OSCE (BIDDH), de la Commission européenne contre le racisme et l'intolérance du Conseil de l'Europe (ECRI) et de l'Agence des droits fondamentaux de l'Union européenne (FRA) qui ont fermement condamné les manifestations de racisme et de xénophobie, mettant particulièrement l'accent sur l'internet: les sites de réseaux sociaux sont désormais les principaux lieux de diffusion des idées racistes et xénophobes, notamment chez les jeunes. (V. Recommandation de politique générale n° 6 de l'ECRI sur la lutte contre la diffusion de matériels racistes, xénophobes et antisémites par Internet). Les signataires expriment aussi leur confiance dans le potentiel considérable de l'internet pour surmonter les idées reçues et les préjugés fondés sur des caractéristiques comme la race, la couleur de peau, la langue, la nationalité ou l'origine nationale, ou la religion. Ce potentiel devrait être pleinement utilisé. Suit une énumération de mesures préconisées pour lutter contre les crimes de haine motivés par des préjugés racistes, xénophobes, antisémites ou autres préjugés similaires sur l'internet tout en respectant la liberté d'expression.

taines personnes en raison de leur religion ou de leur conviction,² adoptée cette année même, le 24 mars 2011, par le Conseil des droits de l'homme de l'Organisation des Nations Unies (ONU). Toujours le même constat, peut être même aggravé: partout dans le monde, intolérance, discrimination, violence à l'égard des personnes, des institutions, des membres de minorités en raison de leur religion ou de leur conviction. À ces manifestations inacceptables s'ajoutent l'apologie de la haine religieuse, les stéréotypes désobligeants, les représentations et le profilage négatifs des adeptes de religions,³ la stigmatisation, les atteintes aux biens etc.

Permanence des maux, identité des remèdes: le Conseil réaffirme les obligations des États: interdire la discrimination fondée sur la religion ou la conviction; respecter l'article 18 du PIDCP (liberté de pensée, de conscience et de religion), l'article 19 en raison du rôle de la liberté d'opinion et d'expression dans le renforcement de la démocratie et la lutte contre l'intolérance religieuse.

Que promouvoir contre l'intolérance religieuse au niveau mondial? Le débat public d'idées,⁴ le dialogue interconfessionnel et interculturel, qui favorise une culture de la tolérance et de la paix fondée sur le respect des droits de l'homme et la diversité des religions et des convictions.⁵ Ces orientations sont partagées par les instances européennes.⁶

2 A/HRC/RES/16/18, 12 avril 2011. Elizabeth Odio Benito, Rapporteur spécial de la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités, dans son rapport de 1989, *Élimination de toutes les formes d'intolérance et de discrimination fondées sur la religion ou la conviction*, pp 45–83, donne des exemples de pays, dont certains européens, où la discrimination religieuse est manifeste malgré l'affirmation de la liberté de religion et de conviction.

3 Le profilage religieux ‘qui consiste en l'utilisation odieuse de la religion en tant que critère lors d'interrogatoires, de fouilles et d'autres procédés d'enquête de la police’ (§ 5(c)).

4 L'analyse de la Cour est ici encore ‘en phase’ avec le Conseil des droits de l'homme: ‘la liberté du débat politique constitue un aspect particulier de la liberté d'expression. En effet, le libre jeu du débat politique se trouve au cœur même de la notion de société démocratique (arrêt Lingens c Autriche du 8 juillet 1986, série A n° 103, p. 26, § 42)’ Cour, GC, *Rekvényi c Hongrie*, n° 25390/94, 20 mai 1999, 26.

5 Ces directions étaient déjà présentes dans la Résolution 6/37 du 14 décembre 2007: ‘Élimination de toutes les formes d'intolérance et de discrimination fondées sur la religion ou la conviction’. Le Conseil des droits de l'homme préconisait, déjà, ‘le dialogue des cultures et des civilisations notamment le dialogue des cultures sur la coopération interconfessionnelle et l’Alliance des civilisations’.

6 Les objectifs de dialogue correspondent à ceux exprimés par la Cour: ‘l'une des principales caractéristiques de la démocratie réside dans la possibilité qu'elle offre de résoudre par le dialogue et sans recours à la violence les problèmes que rencontre un

Comme d'ailleurs les recommandations aux États: interdire toute différence selon la religion ou la conviction des personnes, favoriser la liberté religieuse et le pluralisme; protéger contre le vandalisme et la destruction les lieux de culte, les sanctuaires, les cimetières etc.

Universel et actuel le fléau de la discrimination religieuse est ancien et européen même s'il a débordé ce continent. À partir de la Réforme, la préoccupation déclarée de protéger les minorités religieuses contre la discrimination a inspiré l'intervention d'États en faveur de certaines populations. Depuis le XVII^e siècle des traités entre États européens, certains textes fondateurs⁷ et constitutions contiennent des clauses de protection des minorités religieuses.⁸ Dans les pays musulmans, l'objet déclaré du régime dit *des capitulations* était de soustraire les sujets ou les étrangers non-musulmans au droit territorial fondé sur l'Islam. Le statut du *millet* accordait l'autonomie dans l'administration des affaires religieuses aux minorités non-musulmanes. Ces 'institutions' tendaient à mettre les étrangers à l'abri d'une éventuelle discrimination par le droit et le juge local.

Ces dispositions n'intéressaient qu'un nombre limité d'États. Un des projets du Président Woodrow Wilson était d'introduire dans le Pacte de la Société des Nations une disposition générale protégeant de la discrimination les personnes appartenant à des religions non-majoritaires. Les États se seraient déclarés d'accord 'de ne faire aucune loi interdisant le libre exercice des cultes ou y mettant entrave et de n'établir aucune distinction de droit ou de fait à l'égard des personnes qui pratiqueraient une religion spéciale ou une croyance ne portant pas atteinte à l'ordre public ou aux principes publics de

pays, et cela même quand ils dérangent. La démocratie se nourrit en effet de la liberté d'expression'. Cour, GC, n° 19392/92, *Parti communiste unifié de Turquie*, 30 janvier 1998, 57.

- 7 L'édit de tolérance de Nantes du 13 avril 1598 (révoqué par l'édit de Fontainebleau du 22 octobre 1685) reconnaît notamment la liberté de conscience et de culte et l'accès à tous les emplois aux protestants.
- 8 L'article 2 du Traité de Vienne du 31 mai 1815 qui conclut la réunion de la Belgique et de la Hollande énonce: 'Aucune modification ne sera apportée aux articles de la Constitution hollandaise qui assurent à tous les cultes une protection et une faveur égales et garantissent l'admission de tous les citoyens, quelle que soit leur croyance religieuse aux emplois et offices publics.' Voir F Capotorti, *Étude des droits des personnes appartenant aux minorités ethniques, religieuses et linguistiques* (Geneva, 1988), p 412; J Duffar, 'La protection internationale des droits des minorités religieuses', (1995) *Revue du droit public* 1497–1498.

morale'.⁹ Cette proposition portait déjà en elle l'affirmation universelle de la liberté des cultes et de la non-discrimination religieuse. Jugée trop ambitieuse, les États la rejetèrent à une forte majorité.¹⁰ La solution retenue fut celle de cinq traités spéciaux sur le modèle du traité conclu avec la Pologne.¹¹ On en retiendra la reconnaissance de la liberté d'exercice de toutes les religions dont la pratique n'est pas incompatible avec l'ordre public et les bonnes mœurs, au profit, en particulier, des ressortissants appartenant à des minorités religieuses. Le régime général ne protège pas les minorités en tant qu'entités collectives, mais les individus qui en font partie.¹²

Les Nations Unies succèdent aux horreurs du racisme, du fascisme et du nazisme. L'affirmation de la liberté de religion a montré ses limites, elle doit être complétée par celle de l'égalité des citoyens et des personnes et de l'interdiction de toute discrimination en raison notamment de la religion. Aussi, l'interdiction de la discrimination, figure-t-elle dans tous les textes fondamentaux de l'Organisation ou adoptés sous ses auspices. Ils constituent des instruments universels de protection contre la discrimination religieuse. Dans la Charte des Nations Unies¹³ (article 1) les États ont pris l'engagement de promouvoir et d'encourager le respect universel des droits de l'homme et des libertés fondamentales, sans distinction, notamment, de *religion ou de conviction*'.

La formulation est similaire dans tous les instruments universels ou régionaux de protection des droits de l'homme et en particulier dans la Déclaration universelle des droits de l'homme du 10 décembre 1948.¹⁴ Il faut s'arrêter sur certains de ses articles. Le principe de non-discrimination est la formulation inverse du principe

9 Cité par F Capotorti, *Étude des droits des personnes*, n° 90.

10 'Les auteurs des traités ... n'ont jamais considéré ni prétendu considérer la possibilité d'appliquer à tous les États du monde le principe général de la ... tolérance religieuse' (Protection des minorités de langue, de race et de religion par la Société des Nations, p 159).

11 Capotorti, *Étude des droits des personnes*, nos 93–97.

12 Ce régime de protection est résumé dans l'avis de la Cour Permanente de Justice (CPJI) du 6 avril 1935, sur la question des écoles minoritaires en Albanie (CPJI, A-B, n° 64: garantir la pleine égalité de toutes les personnes; assurer aux citoyens appartenant à des minorités la préservation de leur identité).

13 Citée notamment dans l'arrêt Cour, 35071/97, *Gunduz c Turquie*, 4 décembre 2003, 21.

14 Citée notamment dans ibid.

d'égalité¹⁵ affirmé par l'article 1: ‘Tous les êtres humains naissent libres et égaux en dignité et en droits’. L'article 2-1: ‘Chacun peut se prévaloir de toutes les libertés proclamées dans la présente déclaration sans distinction aucune, notamment ... de religion’; enfin l'article 7: ‘Tous sont égaux devant la loi et ont droit, sans distinction, à une égale protection de la loi. Tous ont droit à une protection égale contre toute discrimination qui violerait la présente Déclaration et contre toute provocation à une telle discrimination.’

L'importance de la Déclaration universelle est encore soulignée par la place qu'elle occupe dans le préambule de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950 (ci-après la Convention) qui s'y référé et se présente comme son prolongement les Gouvernements signataires, sont ‘Résolus ... à prendre les premières mesures propres à assurer la garantie collective de certains des droits énoncés dans la Déclaration universelle’.

L'article 2 des deux Pactes¹⁶ est dans le même registre. Les droits sont garantis sans distinction notamment de religion. L'article 26 du PIDCP affirme l'égalité de toutes les personnes devant la loi et leur droit, sans discrimination, à une égale protection de la loi. La loi doit interdire toute discrimination, notamment de ‘religion’. La discrimination fondée sur la religion et les convictions est une violation de l'article 18 qui proclame le droit de toute personne à la liberté de pensée, de conscience et de religion ainsi que les limites à la liberté de manifester sa religion ou ses convictions.

L'ensemble de ces dispositions est éclairé par *l'Observation générale n° 18 (1989) sur la non-discrimination*.¹⁷ Il appartient aux

15 Examen global de sujets précis relatifs à l'élimination de la discrimination RACIALE M Bossuyt, Rapporteur spécial en application de la résolution 1998/5 de la Sous-Commission. La notion d'action positive et son application pratique, Rapport préliminaire, E/CN4/SUB2/2000/11 19 juin 2000, 42 et seq.

16 Pacte international relatif aux droits civils et politiques (PIDCP) du 16 décembre 1966, cité notamment dans *Gunduz c Turquie*; GC, n° 27996/06, *Sejdic et Finci c Bosnie-Herzégovine*, 22 décembre 2009; et Pacte international relatif aux droits économiques sociaux et culturels (PIDESC) du 16 décembre 1966. Tous les États européens sont parties aux deux Pactes.

17 Le Comité des droits de l'homme a adopté des directives aux termes desquelles les rapports soumis par les États parties conformément à l'article 40 du PIDCP, devraient fournir notamment des données statistiques ventilées sur la mise en œuvre des dispositions découlant des articles 2 (par 1), 3 et 26. Ils devraient aussi donner des renseignements sur les cas de discrimination signalés; les mesures législatives, administratives et les décisions judiciaires récentes relatives à la protection contre la discrimina-

États de s'interdire toute discrimination, d'ériger ce comportement en infraction pénale et de veiller à ce qu'elle soit poursuivie dans les rapports des autorités publiques avec les personnes ainsi que dans les rapports entre les particuliers. La violation persistante de ces dispositions rend nécessaire leur rappel périodique.

C'est le lieu de citer la Déclaration sur l'élimination de toutes les formes d'intolérance et de discrimination fondée sur la religion ou la conviction (précitée) Résolution 36/55 du 25 novembre 1981.¹⁸ Essentiel pour notre sujet, l'article 2-1 énonce: 'Nul ne peut faire l'objet de discrimination de la part d'un État, d'une institution, d'un groupe ou d'un individu quelconque en raison de sa religion ou de sa conviction'. Le paragraphe 2-2 définit ensemble l'intolérance et la discrimination fondées sur la religion ou la conviction comme 'toute distinction, exclusion, restriction ou préférence fondées sur la religion ou la conviction et ayant pour objet ou pour effet de supprimer ou de limiter la reconnaissance, la jouissance ou l'exercice des droits de l'homme et des libertés fondamentales sur une base d'égalité'.¹⁹

tion de droit ou de fait dans tout domaine réglementé ou protégé par les pouvoirs publics fondée notamment sur la religion; sur la signification des motifs de discrimination figurant ou ne figurant pas dans la législation; sur les mesures d'action positive et sur la situation des étrangers au regard de la discrimination et de la nationalité. CCP/C/2009/1, 22 novembre 2010, pp 6–7.

- 18 Citée notamment par *Gunduz c Turquie*, 21; elle avait été précédée par la Déclaration sur la race et les préjugés raciaux adoptée et proclamée par la Conférence générale de l'UNESCO à Paris le 27 novembre 1978.
- 19 Quelques autres définitions de la discrimination dans certains d'instruments universels: article 1(a) de la Convention (n° 111) de l'OIT, du 25 juin 1958, concernant la discrimination en matière d'emploi et de profession dé: 'Toute distinction, exclusion ou préférence fondée sur ... la religion ... qui a pour effet de détruire ou d'altérer l'égalité de chances ou de traitement en matière d'emploi ou de profession'; article 1 de la Convention de l'UNESCO concernant la lutte contre la discrimination dans le domaine de l'enseignement du 22 mai 1962: 'toute distinction, exclusion, limitation ou préférence qui fondée sur ... la religion ... a pour objet de détruire ou d'altérer l'égalité de traitement en matière d'enseignement'; article 1 de la Convention internationale contre toutes les formes de discrimination raciale, du 21 décembre 1965: 'Dans la présente Convention, l'expression "discrimination raciale" vise toute distinction, exclusion, restriction ou préférence fondée sur la race, la couleur, l'ascendance ou l'origine nationale ou ethnique, qui a pour but ou pour effet de détruire ou compromettre la reconnaissance, la jouissance ou l'exercice, dans des conditions d'égalité, des droits de l'homme et des libertés fondamentales dans les domaines politique, économique, social et culturel ou dans tout autre domaine de la vie publique'. Citée notamment dans les arrêts suivants Cour, 35071/97, *Gunduz c Turquie*, 4 décembre 2003 (cette définition a pu inspirer l'article 1 de la Convention sur l'élimination de toutes les formes de discriminations à l'égard des femmes du 18 décembre 1979); *Sejdic et Finci*, 19. Dans l'observation générale n° 18 (1989), Non-Discrimination, 6–7, le Comité des droits de l'homme a proposé: 'Toute distinction, exclusion restriction ou pré-

L'article 3 place la discrimination entre les êtres humains pour des motifs de religion ou de conviction en perspective avec les textes qui l'ont précédée (voir supra) elle ‘constitue une offense à la dignité humaine’; elle est un ‘désaveu des principes de la Charte des Nations Unies’ et doit être condamnée comme une violation des droits de l’homme et des libertés fondamentales proclamés dans la Déclaration Universelle et énoncés en détail dans les Pactes.²⁰

Vingt ans plus tard, la discrimination, notamment religieuse, sévit toujours si elle ne s'est pas étendue: une pseudo-science est appelée à cautionner les théories de la pluralité²¹ et de l'inégalité des races.²² En témoignent les dispositions de la Déclaration et du Programme d'action de Durban adoptés lors de la Conférence mondiale contre le racisme, la discrimination, la xénophobie et l'intolérance qui y est associée, de Durban du 31 août au 8 septembre 2001.²³

Alarmée par l'apparition et la persistance de formes contemporaines plus subtiles de racisme, de discrimination raciale, de xénophobie et de l'intolérance qui y est associée, ainsi que d'autres idéologies et pratiques fondées sur la discrimination ou la supériorité raciale ou ethnique ... Rejetant vigoureusement les théories tendant à établir l'existence de prétendues races humaines distinctes ... Toute doctrine

férence fondée notamment sur ... la religion ... et ayant pour effet ou pour but de compromettre ou de détruire la reconnaissance, la jouissance ou l'exercice par tous, dans des conditions d'égalité de l'ensemble des droits de l'homme et des libertés fondamentales’ (l'article 26 du PIDCP et l'observation n° 18 sont cités sous la rubrique des textes pertinents des Nations Unies dans l'arrêt de la Cour, GC, n° 57325/00, *DH et autres c République Tchèque*, 13 novembre 2007, 92–93).

- 20 Malgré sa précision et son importance, quelques 25 ans plus tard, le Conseil des droits de l'homme: ‘exprime ses regrets devant la lenteur des progrès réalisés dans la mise en œuvre de la Déclaration sur l'élimination de toutes les formes d'intolérance et de discrimination fondées sur la religion ou la conviction’, Résolution 6/37 du 14 décembre 2007. Voir aussi Résolution n° 52/122 sur l'élimination de toutes les formes d'intolérance religieuse adoptée par l'Assemblée Générale des Nations Unies le 12 décembre 1997.
- 21 Ici encore le ‘discours’ de l’Europe se distingue par sa fermeté: ‘Tous les êtres humains appartenant à la même espèce, l’ECRI rejette les théories fondées sur l’existence de ‘races différentes’. Cependant, afin d’éviter de laisser sans protection juridique les personnes qui sont généralement et erronément perçues comme appartenant à une ‘autre race’, l’ECRI utilise ce terme dans sa recommandation n° 7 adoptée le 13 décembre 2002; cité in *Sejdic et Finci*, 23.
- 22 ‘Toute théorie faisant état de la supériorité ou de l’infériorité intrinsèque de groupes raciaux ou ethniques qui donnerait aux uns le droit de dominer ou d’éliminer les autres, inférieurs présumés, ou fondant des jugements de valeur sur une différence raciale, est sans fondement scientifique et contraire aux principes moraux et éthiques de l’humanité’ (art 2-1 de la Déclaration sur la race et les préjugés raciaux, 27).
- 23 A/CONF189/12 et Corr 1, chap I.

de supériorité raciale est scientifiquement fausse, moralement condamnable, socialement injuste et dangereuse et doit être rejetée, de même que les théories qui prétendent poser l'existence de races humaines distinctes ... Nous reconnaissions que le racisme, la discrimination raciale, la xénophobie et l'intolérance qui y est associée reposent sur des considérations de race, de couleur, d'ascendance ou d'origine nationale ou ethnique et que les victimes peuvent subir des formes multiples ou aggravées de discrimination fondées sur d'autres motifs connexes, dont une discrimination pour des raisons de sexe, de langue, de religion, d'opinions politiques ou autres, d'origine sociale, de fortune, de naissance ou de statut ... Nous reconnaissions que la religion, la spiritualité et la conviction jouent un rôle central pour des millions de femmes et d'hommes, tant dans leur propre mode de vie que dans la façon dont ils se comportent avec autrui. La religion, la spiritualité et la conviction peuvent, en principe et en fait, aider à promouvoir la dignité et la valeur intrinsèques des êtres humains et à éliminer le racisme, la discrimination raciale, la xénophobie et l'intolérance qui y est associée.

Actualité du sujet sur le plan européen et dans les instruments du Conseil de l'Europe

L'actualité du sujet sur le plan universel réagit sur le plan européen. Certains des instruments universels de protection contre la discrimination sont visés dans les arrêts de la Cour. La convergence n'efface pas les particularités de la discrimination religieuse en Europe. Et d'abord quelles sont les bases 'idéologiques' et juridiques du sujet dans le Statut du Conseil de l'Europe et dans la Convention.

Les bases idéologiques du sujet

Les textes du Conseil de l'Europe assignent un fondement spiritueliste et moral à toute société 'véritablement' démocratique. Dans le Préambule du Statut du Conseil de l'Europe du 5 mai 1949²⁴ les Gouvernements²⁵ se déclarent 'Inébranlablement attachés aux va-

24 Fondé le 5 mai 1949 par dix États, il en compte aujourd'hui près de cinquante qui ont tous ratifié la Convention européenne des droits de l'homme et qui regroupent environ 800 millions de ressortissants, mais davantage de justiciables – tous ceux qui relèvent de la juridiction d'un État contractant – (CEDH 1) qui fait de la Cour européenne des droits de l'homme la première juridiction du monde selon le précédent président de la Cour. Sa jurisprudence a en conséquence un assez grand retentissement.

25 Les 47 États membres du Conseil de l'Europe sont des 'États européens' (Statut art 4) – c'est à dire, selon l'Assemblée parlementaire du CE, 'des États dont le territoire national est situé en totalité ou en partie sur le continent européen et dont la culture est étroitement liée à la culture européenne'. 'L'Europe a intérêt à ce que ses valeurs fon-

leurs spirituelles et morales qui sont le patrimoine commun de leurs peuples et qui sont à l'origine des principes de liberté individuelle, de liberté politique et de prééminence du droit, sur lesquels se fonde toute démocratie véritable'. L'article 1(a) poursuit: 'Le but du Conseil de l'Europe est de réaliser une union plus étroite entre ses membres afin de sauvegarder et de promouvoir *les idéaux et les principes qui sont leur patrimoine commun* et de favoriser leur progrès économique et social'. Enfin, l'article 3, disposition cardinale:

Tout membre du Conseil de l'Europe reconnaît le principe de la prééminence du droit et le principe en vertu duquel toute personne placée sous sa juridiction doit jouir des droits de l'homme et des libertés fondamentales. Il s'engage à collaborer sincèrement et activement à la poursuite du but défini au chapitre I^r.

Ces idées sont reprises notamment dans le Préambule et l'article 1 de la Convention. Ce 'patrimoine commun'²⁶ fait de valeurs spirituelles et morales, d'idéaux et de principes, d'idéal et de traditions politiques est bien une particularité de l'Organisation inscrite dans ses textes fondateurs. Cette inspiration se prolonge dans le texte de la Convention et dans son interprétation par la Cour.

Les bases textuelles du sujet: religion et discrimination

L'article 9 de la Convention intitulé 'Liberté de pensée, de conscience et de religion' énonce:

1. Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté de changer de religion ou de conviction, ainsi que la liberté de manifester sa religion ou sa conviction individuellement ou collectivement, en public ou en privé, par le culte, l'enseignement, les pratiques et l'accomplissement des rites.
2. La liberté de manifester sa religion ou ses convictions ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi,

damentales et sa conception des droits de l'homme imprègnent des cultures voisines sans pour autant les remettre en question et encore moins les détruire' (Recommandation 1247 (1994) adoptée le 4 octobre 1994 de l'Assemblée relative à l'élargissement du Conseil de l'Europe).

²⁶ 'La Cour a vu dans ce patrimoine commun les valeurs sous-jacentes à la Convention ... La conception de la laïcité dans le système constitutionnel turc est "respectueuse des valeurs sous-jacentes à la Convention ... GC, *Leyla Sahin*"; à plusieurs reprises, elle a rappelé que celle-ci [la Convention] était destinée à sauvegarder et promouvoir les idéaux et valeurs d'une société démocratique' (Cour, n° 1448/04, *Hasan et Eylem Zengin c Turquie*, 09 octobre 2007, 55).

constituent des mesures nécessaires, dans une société démocratique, à la sécurité publique, à la protection de l'ordre, de la santé ou de la morale publiques, ou à la protection des droits et libertés d'autrui.

Dans la jurisprudence constante de la Cour la liberté de pensée, de conscience et de religion est *fondamentale*: elle cumule des aspects politiques, sociaux et individuels. Cette liberté à trois branches constitue

l'une des assises d'une "société démocratique" au sens de la Convention. Elle figure, dans sa dimension religieuse, parmi les éléments les plus essentiels de l'identité des croyants et de leur conception de la vie, mais elle est aussi un bien précieux pour les athées, les agnostiques, les sceptiques ou les indifférents.²⁷ Il y va du pluralisme – chèrement conquis au cours des siècles – consubstantiel à pareille société.

Le caractère fondamental des droits que garantit l'article 9 par 1 se traduit aussi par le mode de formulation de la clause relative à leur restriction. À la différence du second paragraphe des articles 8, 10 et 11 (article 8-2, article 10-2, article 11-2), qui englobe l'ensemble des droits mentionnés en leur premier paragraphe (article 8-1, article 10-1, article 11-1), celui de l'article 9 (article 9-1) ne vise que la

liberté de manifester sa religion ou ses convictions. Il constate de la sorte que dans une société démocratique, où plusieurs religions coexistent au sein d'une même population, il peut se révéler nécessaire d'assortir cette liberté de limitations propres à concilier les intérêts des divers groupes et à assurer le respect des convictions de chacun.²⁸

Quelques indices de la jurisprudence sur la notion de religion qui recouvrent sa dimension politique, sociale et individuelle: 'si l'on tient compte de l'existence de religions formant un ensemble dogmatique et moral très vaste qui a ou peut avoir des réponses à toute

27 'L'athéisme et l'agnosticisme, par exemple, sont habituellement considérés comme ayant droit à la même protection que les croyances religieuses. Nombreuses sont les législations qui ne protègent pas de manière adéquate (ou qui ne mentionnent même pas) les droits des non-croyants.' Lignes directrices visant l'examen des lois affectant la religion ou les convictions religieuses, adoptées par la Commission de Venise lors de sa 59^e session plénière (Venise, 18 et 19 juin 2004). La discrimination dont sont victimes les non croyants devrait être également réprimée.

28 Cour, *Kokkinakis c Grèce*, n° 14307/88, 25 mai 1993, 31 et 33.

question d'ordre philosophique, cosmologique ou éthique,²⁹ ou encore selon une Recommandation du Comité des Ministres: ‘La religion procure à l’individu une relation enrichissante avec lui-même et avec son Dieu ainsi qu’avec le monde extérieur et la société dans laquelle il vit’.³⁰

La multiplicité croissante de croyances et de confessions³¹ dans les sociétés démocratiques contemporaines est une manifestation, parmi d’autres du pluralisme, indissociable d’une société démocratique.³² C’est aussi une potentialité de discriminations. En général l’intolérance et la discrimination frappent davantage les religions ‘visibles’. Dans la pratique, une religion, qui est une structure sociale,³³ a vocation à répandre ses croyances. Elle peut difficilement passer inaperçue.³⁴ Une religion ‘faible’ s’expose éventuellement à la non-reconnaissance en tant que religion,³⁵ à la critique, à l’intolérance, à la discrimination, voire à la persécution. Pourtant dans une société démocratique, la coexistence pacifique de toutes les religions et convictions respectant l’ordre public est une nécessité sociale et politique évidente. Lorsque la Cour a constaté la violation de l’article 9 elle n’examine la violation éventuelle de l’article 9 combiné avec l’article 14 que dans des hypothèses particulières (voir infra).

L’interdiction de la discrimination procède de plusieurs articles de la Convention. D’abord l’article 1 ‘Obligation de respecter les

29 *Hasan et Eylem Zengin*, 51.

30 Recommandation 1202 (1993) relative à la tolérance religieuse dans une société démocratique. Bien que les recommandations n’ait pas force obligatoire à l’égard des États membres, la Cour, dans sa jurisprudence récente *Rivière c France* (11 juillet 2006), *Dybeku c Albanie* (18 décembre 2007) et *Slawomir Musial c Pologne* (20 janvier 2009) a souligné qu’il était important de les respecter.

31 Cour, *Murphy*, 10 juillet 2003, 67.

32 *Inter alia*, Cour n° 302/02, *Témoins de Jéhovah c Russie*, 10 juin 2010.

33 ‘Une Église est une communauté religieuse organisée, fondée sur une identité ou sur une substantielle similitude de convictions’ (Com Europ D 7374/76 *c Danemark*, 8 mars 1976, Décisions et Rapports (DR) 5/160; Cour n° 30273/03, *Perry c Lettonie*, 8 novembre 2007, 55).

34 L’article 9 comporte en principe le droit d’essayer de convaincre son prochain, par exemple au moyen d’un ‘enseignement’, ou, plus précisément, d’une prédication (voir Cour *Kokkinakis c Grèce*, 25 mai 1993, 31; *Larissis et autres c Grèce*, 24 février 1998, 45; Cour n° 45701/99, *Église métropolitaine de Bessarabie et autres c Moldova*, 114; *Perry c Lettonie*, 52).

35 Dans l’arrêt *Église moscovite de Scientologie c Russie*, n° 18147/02, 5 avril 2007, 64, l’arrêt relève que la nature religieuse de la requérante n’a pas été contestée au niveau national et qu’elle est reconnue comme une organisation religieuse depuis 1994.

droits de l'homme' met à la charge des États l'obligation positive de veiller à ce que 'toute personne relevant de leur juridiction' bénéficie des droits et libertés garantis et par conséquent de la liberté de pensée, de conscience et de religion inscrite à l'article 9 (ci-dessus). Toute personne doit être protégée contre toute inégalité et discrimination fondée sur la religion.

L'article 14, par son seul titre 'Interdiction de discrimination', indique assez son importance pour la discrimination religieuse. Par 'discrimination' il y a lieu d'entendre un traitement différencié, sans justification objective et raisonnable, de personnes placées dans des situations analogues:³⁶

La jouissance des droits et libertés reconnus dans la présente Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation.³⁷

L'article 14 complète les autres clauses normatives de la Convention et des Protocoles; sa méconnaissance ne présupposant pas la leur, il peut entrer en jeu de façon autonome. Il n'a pas d'existence indépendante puisqu'il vaut uniquement pour 'la jouissance des droits et libertés' qu'elles garantissent.³⁸ Dans l'arrêt *Van der Mussele*, la Cour ne constate aucun travail forcé ou obligatoire au sens de l'article 4. La matière du litige échappe-t-elle entièrement à l'empire de cet article et, par voie de conséquence, à celui de l'article 14? L'idée de normalité est un des critères de la notion de travail obligatoire. Un travail normal en soi peut se révéler anormal si la discrimination préside au choix des groupes ou individus tenus de le fournir, ce qu'affirme précisément l'intéressé. Il n'y a donc pas lieu d'écartier

³⁶ Voir Cour, n° 8919/80, *Van der Mussele*, 23 novembre 1983, 46. Pour appuyer le grief de discrimination qu'il allègue, le requérant, enseignant musulman, évoque la situation des enfants israélites, 'mais il n'a pas montré que d'autres enseignants, appartenant à des minorités religieuses, les enseignants israélites par exemple, aient été mieux traités que lui' (Com Europ D n° 8160/78, *X c Royaume-Uni*, 12 mars 1981, DR 22/50; *Sjedic et Finci*, 55).

³⁷ Retrait des droits parentaux d'une mère du fait de son appartenance aux témoins de Jéhovah – violation, Cour, *Hoffmann c Autriche*, 29 juin 1993.

³⁸ Cour, *Marckx c Belgique*, 13 juin 1979, 32.

en l'espèce l'applicabilité de l'article 14, du reste non contestée par le Gouvernement.³⁹

Complémentaire aux autres dispositions normatives de la Convention et des Protocoles, l'article 14 peut aussi s'appliquer de façon autonome: la constatation de la non-violation de l'article 9 n'empêche pas d'invoquer la violation de l'article 14 si la discrimination alléguée tombe dans la sphère des droits et libertés garantis par les autres dispositions normatives. Ainsi l'article 14 s'applique-t-il aux droits additionnels qui se rattachent à un article de la Convention qu'un État a volontairement décidé de protéger. L'interdiction de la discrimination dépasse donc la jouissance des droits et libertés que la Convention et ses Protocoles imposent à chaque État de garantir.⁴⁰

Autre exemple d'extension de l'article 14, la Cour a considéré que la communauté de foi religieuse est une composante de l'origine ethnique d'une personne, qui n'est pas mentionnée expressément dans l'article 14:

l'origine ethnique procède de l'idée que les groupes sociétaux sont marqués notamment par une communauté, ... de foi religieuse, de langue, d'origine culturelle et traditionnelle et de milieu de vie. La discrimination fondée sur l'origine ethnique d'une personne constitue une forme de discrimination raciale ... La discrimination raciale constitue une forme de discrimination particulièrement odieuse qui, compte tenu de la dangerosité de ses conséquences, exige une vigilance spéciale et une réaction vigoureuse de la part des autorités. Celles-ci doivent recourir à tous les moyens dont elles disposent pour combattre le racisme, renforçant ainsi la conception démocratique de la société, dans laquelle *la diversité est perçue non pas comme une menace, mais comme une richesse.*⁴¹

De plus, l'interdiction de toute discrimination fondée exclusivement ou dans une mesure déterminante sur l'origine ethnique d'une personne, et par voie de conséquence sur sa religion, est impérative: 'dans une société démocratique contemporaine basée sur les prin-

39 *Van Der Mussele*, 43.

40 Ibid, 39 et références; Cour, *Affaire 'relative à certains aspects du régime linguistique de l'enseignement en Belgique' c Belgaïque*, 23 juin 1968, 9; *Stec et autres c Royaume-Uni* (déc) [GC], nos 65731/01 et 65900/01, 40; et *EB c France* [GC], n° 43546/02, 48.

41 Voir *Natchova et autres c Bulgarie* [GC], nos 43577/98 et 43579/98, § 145, CEDH 2005-VII; et Cour, *Timichev c Russie*, nos 55762/00 et 55974/00, § 56.

cipes de pluralisme et de respect pour les différentes cultures'.⁴² La multiplication de croyances et de confessions⁴³ est une richesse des sociétés démocratiques contemporaines.

L'interprétation extensive de l'article 14, a seulement relâché son ancrage dans les droits garantis par la Convention, elle ne l'en a pas libéré totalement. En revanche, le Protocole n° 12 proclame dans son préambule le 'principe fondamental selon lequel toutes les personnes sont égales devant la loi'⁴⁴ et ont droit à une égale protection de la loi. L'article 1 du Protocole n° 12 introduit donc une interdiction générale de la discrimination:⁴⁵

1. La jouissance de tout droit prévu par la loi doit être assurée, sans discrimination aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation.
2. Nul ne peut faire l'objet d'une discrimination de la part d'une autorité publique quelle qu'elle soit fondée notamment sur les motifs mentionnés au paragraphe 1.

Employé dans l'article 14 ou dans l'article 1 du Protocole 12, le terme 'discrimination' conserve le même sens, soit un traitement différencié, sans justification objective et raisonnable, de personnes placées dans des situations analogues.⁴⁶ La Cour a déjà constaté que la différence de traitement entre les églises requérantes et les communautés qui avaient conclu un accord sur les vues d'intérêt commun s'analysait en une violation de l'article 14 combiné avec l'article 9. En dépit des différences de rédaction il arrive qu'après le constat de violation de l'article 14, la Cour ne juge pas nécessaire d'examiner la question sous l'angle de l'article P12-1.

⁴² *Sejdic et Finci*, 43–44.

⁴³ *Murphy*, 67.

⁴⁴ Voir le principe formulé dans Cour, *97 membres de la Congrégation des témoins de Jéhovah de Gldani et 4 autres c Géorgie*, n° 71156/01, 3 mai 2007, 140.

⁴⁵ *Sejdic et Finci*, 53.

⁴⁶ Ibid, 41, 53 et 55; Rapport explicatif du Protocole n° 12, § 18.

Interdiction de la discrimination religieuse: contrôle attentif de la procédure nationale

Dans sa recommandation n° 7, adoptée le 13 décembre 2002, la Commission européenne contre le racisme et l'intolérance (ECRI)⁴⁷ définit le racisme comme la croyance qu'un motif tel que notamment 'la religion, justifie le mépris envers une personne ou un groupe de personnes ou l'idée de supériorité d'une personne ou d'un groupe de personnes'. La discrimination religieuse se fonde sur les convictions religieuses réelles ou supposées, et sur la manifestation de ces convictions par l'aspect et le comportement des personnes. Elle se présente sous des figures diverses: préjugés, discours de haine,⁴⁸ harcèlement, violence physique à l'égard d'un individu ou de personnes membres d'une religion non majoritaire, profanation des lieux de culte et des cimetières, complicité passive ou active des forces de l'ordre, profilage religieux.⁴⁹ La discrimination religieuse n'affecte pas seulement l'exercice et la pratique de la religion, elle peut se répercuter sur la vie quotidienne des victimes: difficulté pour trouver un logement, un emploi (taux de chômage élevé et rémunérations inférieures), accéder à une école et plus généralement aux services publics notamment sociaux, mais aussi, aux biens et aux services

47 Organe du Conseil de l'Europe chargé de surveiller de manière indépendante le respect des droits de l'homme dans le domaine particulier de la lutte contre le racisme, la discrimination raciale, la xénophobie, l'antisémitisme et l'intolérance.

48 Résolution (68) 30 du Comité des Ministres du 31 octobre 1968 relative aux mesures à prendre contre l'incitation à la haine raciale, nationale et religieuse. Le discours de haine n'est pas seulement privé; pour certains partis il tient lieu de programme politique. Selon la législation pénale de la plupart des États européens, le 'discours' peut comporter des infractions pénales: diffamation, injure, provocation à la discrimination, à la haine ou à la violence commises envers une personne ou un groupe de personnes à raison de leur appartenance ou de leur non appartenance à une religion déterminée. La poursuite de ces infractions varie selon les Etats. Voir Réseau d'experts indépendants de l'Union européenne en matière de droits fondamentaux: 'La lutte contre le racisme et la xénophobie par la législation pénale' (Avis n° 5-2005, novembre 2005). Voir aussi Recommandation de l'Assemblée Parlementaire du Conseil de l'Europe du 29 juin 2007 sur 'le blasphème, les insultes religieuses et le discours haineux à l'égard de personnes pour le motif de leur religion'; les discours du père Basile in Cour, 97 membres de la Congrégation des témoins de Jéhovah de Gldani, 67: 'la négligence ... dont firent preuve la police et les autorités ... permit au père Basile de prôner la haine par moyen des médias'.

49 Le 'profilage' désigne toute pratique exercée par des autorités de police ou des organismes privés de sécurité qui tend à traiter comme suspecte toute personne qui appartient notamment à une religion. Il en résulte des contrôles renforcés exercés tant en raison de l'origine géographique (Moyen Orient) que de la religion (ENAR, Réseau européen contre le racisme, Fiche d'information n° 34, octobre 2007, 'La discrimination religieuse et la protection juridique dans l'Union européenne').

fournis par des agents économiques privés, etc.⁵⁰ Certaines formes de discrimination particulièrement intimidantes peuvent dissuader les adeptes d'une religion de la manifester et de la pratiquer. (Privation du droit à la liberté de pensée, de conscience et de religion (CEDH article 9) que les États reconnaissent à toute personne relevant de leur juridiction (CEDH article 1).⁵¹

La discrimination fondée sur la religion, est interdite notamment par les conventions de l'Organisation Internationale du Travail, et l'article 13 du Traité de la Communauté européenne.⁵² La discrimination en matière religieuse est une autre conséquence de l'existence de plusieurs religions dans une société démocratique et pluraliste et de l'absolue liberté des personnes et des institutions d'avoir ou de ne pas avoir une religion ou une conviction et de pouvoir, librement, en changer. Deux requérants, l'un d'origine Rom, l'autre de religion juive se plaignent de ne pouvoir accéder aux plus hautes fonctions électives de Bosnie-Herzégovine: la Constitution les réserve aux Bosniaques, aux Croates et aux Serbes.⁵³ Une règle lapidaire a déjà été posée par la Cour: ‘Nonobstant tout argument contraire possible,

⁵⁰ Ibid.

⁵¹ ‘Le but des agresseurs consistait à humilier et à rabaisser publiquement les requérants, de façon que le sentiment de terreur et d’infériorité s’installe chez eux et que, brisés moralement par cette violence physique et verbale, ils agissent contre leur volonté et leur conscience et ne tiennent plus de réunions religieuses conformément à leur foi jugée inacceptable par le père Basile et ses partisans’ (*97 membres de la Congrégation des témoins de Jéovah de Gldani*, 105).

⁵² Par cet article le Conseil est habilité à prendre les mesures nécessaires en vue de combattre toute discrimination fondée en particulier sur ‘la religion ou les convictions’. La directive 2000/78 du 17 novembre 2000 portant création d’un cadre général en faveur de l’égalité de traitement en matière d’emploi et de travail place en tête des discriminations à combattre ‘la religion ou les convictions’ (article 1). L’article 4 traite des emplois de tendance, ceux pour lesquels la considération de la croyance ou de la conviction constitue une exigence professionnelle: leur prise en compte par l’employeur ne constitue pas une discrimination. Voir J Duffar, ‘Les relations entre l’Union européenne et les Églises’, dans *Actes du Colloque de Tübingen, 18–21 novembre 2004* (Leuven, 2006), 269.

⁵³ Cour n° 27996/06 et 34836/06 *Sejdic et Finci c Bosnie-Herzégovine* (dessaisissement en faveur de la Grande Chambre): affaires communiquées sous l’angle de l’article 14, combiné avec l’article 3 du Protocole n° 1 et de l’article 1 du Protocole n° 12 en mars 2008. Note d’information sur la jurisprudence de la Cour, février 2009, n° 136, p 46. Voir J Duffar, ‘Le statut constitutionnel des cultes dans les pays de l’Union européenne’, dans *Congrès du Consortium Européen Rapports Religions-États, Université de Paris XI, 18–19 novembre 1994* (Paris, 1995), pp 21–22.

on ne saurait tolérer une distinction dictée pour l'essentiel par des considérations de religion'.⁵⁴

L'arrêt GC, *Refah*, développe et élargit cette idée: il reproduit les termes de l'arrêt de la Chambre qui examine le programme multi juridique du Parti Refah au regard de la Convention: 'un tel système enfreindrait indéniablement le principe de non-discrimination des individus dans leur jouissance des libertés publiques, qui constitue l'un des principes fondamentaux de la démocratie. En effet une différence de traitement entre les justiciables dans tous les domaines du droit public et privé *selon leur religion ou leur conviction* n'a manifestement aucune justification au regard de la Convention, et notamment au regard de son article 14 qui prohibe les discriminations. Pareille différence de traitement ne peut ménager un juste équilibre entre d'une part, les revendications de certains groupes religieux qui souhaitent être régis par leurs propres règles et, d'autre part, l'intérêt de la société toute entière, qui doit se fonder sur la paix et sur la tolérance entre les diverses religions ou convictions.'

44% des Européens estimeraient que la discrimination fondée sur les convictions religieuses ou non religieuses est actuellement répandue en Europe et 64% des Européens perçoivent la discrimination raciale comme un problème largement répandu parmi les Roms, les Sinti et les Gens du voyage; les ressortissants de pays tiers, les immigrants et demandeurs d'asile sans-papiers; la communauté juive et la communauté musulmane seraient particulièrement vulnérables à la discrimination raciale et religieuse.⁵⁵ Les personnes ou les groupes peuvent aussi être victimes de discriminations multiples:⁵⁶ les femmes appartenant à des minorités ethniques et religieuses peuvent être discriminées à la fois au titre de leur genre et de leur religion. En Europe la discrimination ethnique et religieuse n'est pas rare: certains groupes se caractérisent à la fois par une origine ethnique et une appartenance religieuse sans qu'il soit facile de démêler entre préju-

54 Hoffmann, 36. La requérante membre d'une communauté chrétienne persécutée 'Verbe de Vie' a subi une violation de sa liberté de religion en perdant son emploi dans un service d'État en raison de ses croyances religieuses. Cour *Ivanova c Bulgarie*, 12 avril 2007, 86.

55 Rapport de l'Eurobaromètre sur la discrimination, janvier 2007, rapportée in ENAR, Fiche d'information n° 34, note 8.

56 M Gkegka, 'Rapport de l'Agence des droits fondamentaux sur la "discrimination multiple" (2011).

gés religieux et racistes:⁵⁷ Roms, Gens du voyage, Immigrants, Communautés musulmanes et juives: cette dernière est victime de discrimination tout à la fois en raison de la religion et de caractéristiques prétendument ethniques.⁵⁸ La discrimination religieuse se développe dans les sociétés européennes. Dans un environnement fondé sur l'égalité des personnes, la victime de discrimination subit une humiliation c'est en quoi elle peut constituer, aussi, une atteinte à la dignité humaine.⁵⁹

Comme la plupart des États n'incluent pas la religion dans les questionnaires de recensement,⁶⁰ les statistiques fiables manquent sur le nombre des croyants des diverses religions. La question présente, pourtant, un réel intérêt dans les recherches sur la discrimination religieuse. On ne dispose que de résultats, nécessairement approximatifs, sondages et évaluations: 27% de la population totale se déclarerait athée ou agnostique. 73% de la population de l'UE se considérerait comme croyante: 66,4% de ceux-ci se disent catholiques; 21%, protestants; 6,6%, orthodoxes; 3%, adeptes d'autres confessions chrétiennes; 3% adeptes d'autres religions principalement judaïsme, islam et hindouisme. D'autres communautés religieuses sont aussi

57 ‘Nous reconnaissions que les membres de certains groupes ayant une identité culturelle distincte rencontrent des obstacles du fait du jeu complexe de facteurs ethniques, religieux et autres ainsi que de leurs traditions et de leurs coutumes, et demandons aux Etats de faire disparaître les obstacles que crée l’interaction de tous ces facteurs adoptant des mesures, des politiques et des programmes visant à éliminer le racisme, la discrimination raciale, la xénophobie et l’intolérance qui y est associée’ (Déclaration de la Conférence mondiale contre le racisme, la discrimination raciale, la xénophobie et l’intolérance qui y est associée Durban, 31 août–8 septembre 2001, n° 67).

58 Dans l'affaire *Chypre c Turquie*, la Commission a conclu que le traitement manifestement discriminatoire se fondait sur leur ‘origine ethnique, race et religion’ (Cour, GC, n° 25781/94, *Chypre c Turquie*, 304). Voir Fiche d’information n° 33. ENAR, Réseau européen contre le racisme, Les discriminations multiples, 1^{er} juillet 2007, cité in Fiche d’information n° 34, octobre 2007, ‘La discrimination religieuse et la protection juridique dans l’Union européenne’.

59 Dans l'affaire des *Asiatiques d'Afrique orientale, c Royaume-Uni*, la Commission a admis que, dans certaines circonstances, la discrimination raciale peut s'analyser en un traitement dégradant au sens de l'article 3. Rapport n° 4403/70, 14 décembre 1973, 208, DR78/62; dans *Chypre c Turquie*, la Cour estime que ‘pendant la période examinée, la discrimination a atteint un tel degré de gravité qu’elle constituait un traitement dégradant’ (*Chypre c Turquie* 310). En revanche, la différence de traitement incriminée dans *Sejdic et Finci* ne révèle aucun mépris ou manque de respect pour la personnalité des requérants et n'avait pour but et n'a eu pour conséquence de les humilier ou les avilir (58).

60 Sur 42 pays du Conseil de l'Europe 24 collecteraient des informations sur la religion dans les statistiques officielles voir P Simon, *Statistiques ‘ethniques’ et protection des données dans les pays du Conseil de l'Europe*, Rapport d'étude (2007), tableau, p 39.

présentes: bouddhistes, Sikhs, bahaïs, ainsi que des mouvements qui se considèrent comme des groupes religieux. Il n'existe en la matière aucune statistique fiable.⁶¹ La confession chrétienne majoritaire varie selon les pays: catholique en Autriche, Espagne, France, Italie et Portugal; orthodoxe en Bulgarie, Grèce et Roumanie; protestante en Allemagne, Danemark, Grande-Bretagne et Suède. Enfin, importance variable du nombre des musulmans: estimation de moins de 1% en Hongrie, Pologne, République tchèque et au Portugal; 4% en Allemagne; 5,7% aux Pays-Bas; enfin plus de 10% en Bulgarie et en France.⁶² L'islam apparaît comme la deuxième ou troisième religion, notamment, dans les pays suivants: Allemagne, Bulgarie, Danemark, France, Italie et Pays-Bas; il est aussi la principale religion de certains immigrés.⁶³ L'auto-définition est contrastée: en Grèce, à Malte, en Slovénie 95 à 98% de la population se dit croyante; en Hongrie, en Lettonie, aux Pays-Bas et en France 40 à 45% de la population se dit non-croyante. Face à une croyance religieuse souvent minoritaire et à une pratique religieuse très clairsemée certains croient pouvoir constater la sécularisation de l'Europe. Pourtant la diversité religieuse a réveillé l'expression de préjugés et de stéréotypes négatifs qui jouent un rôle dans les tensions et les conflits, parfois violents qui se produisent en Europe en raison notamment de la fonction fortement identitaire de la religion pour certains groupes. La solution de cette question de société est essentielle pour le présent et l'avenir; l'Europe devrait, dans les années à venir, accueillir davantage d'immigrants de religions diverses. Il est essentiel pour le maintien voire l'établissement de la cohésion sociale qu'il soit remédié à la discrimination religieuse existante qui n'est pas contestée.

Autorisation de la discrimination religieuse: contrôle attentif de la procédure nationale

La Cour a eu à connaître de plusieurs affaires relatives à des personnes employées par des Églises ou des groupes religieux: les arrêts *Schüth c Allemagne* n° 1620/03 du 23 septembre 2010 et *Obst c Allemagne* n° 425/03 du 23 septembre 2010 seront retenus.

61 Sources: ‘Étude des valeurs européennes’ et ‘EUMC-FRA Infobase’, citées in Fiche d’information n° 24; ‘La discrimination religieuse et la protection juridique dans l’Union européenne’, note 16.

62 ENAR, Fiche d’information n° 34.

63 Ibid, note 12; voir ‘Infobase de l’EUMC-FRA’ (Observatoire européen des phénomènes racistes et xénophobes).

M Schüth, anciennement organiste et chef de chœur dans une paroisse catholique, est licencié en 1998 pour violation des obligations de loyauté du règlement fondamental de l'Église catholique pour le service ecclésial: il s'est séparé de son épouse, mère de ses deux enfants et vit au domicile de sa compagne dont il attend un enfant. Il allègue qu'il a été licencié au seul motif de sa liaison extraconjugale et invoque la violation de l'article 8.

La Cour conclut à la violation de l'article 8 (droit au respect de la vie privée et familiale) au terme des éléments de raisonnement suivants. L'État était-il tenu, dans le cadre de ses obligations positives découlant de l'article 8, de reconnaître au requérant le droit au respect de sa vie privée contre le licenciement prononcé par l'Église catholique? Par l'examen de la mise en balance effectuée par les juridictions du travail allemandes entre ce droit du requérant et celui de l'Église catholique découlant des articles 9 et 11, la Cour appréciera si la protection offerte au requérant a atteint ou non un degré suffisant. L'existence de juridictions du travail et d'une juridiction constitutionnelle compétente est déjà un élément de respect des obligations positives. La Cour constate le caractère succinct du raisonnement des juridictions du travail sur les conséquences du comportement du requérant; il n'est fait aucune mention de sa vie de famille, protégée pourtant par l'article 8 et le point de vue de l'Église catholique a été déterminant. Aux yeux de la Cour, le fait qu'un employé licencié par un employeur ecclésial ait des possibilités limitées de trouver un nouvel emploi revêt une importance particulière. Cela est d'autant plus vrai lorsque l'employeur occupe de fait une position prédominante dans un secteur d'activités donné et qu'il bénéficie de certaines dérogations à la législation générale, comme c'est le cas des deux grandes Églises dans certaines régions en Allemagne, notamment dans le domaine social ou lorsque la formation de l'employé licencié revêt un caractère particulier tel qu'il lui est difficile, voire impossible, de trouver un nouveau poste en dehors de l'Église employeur, ce qui est le cas dans la présente affaire. La Cour considère que les juridictions du travail n'ont pas suffisamment exposé pourquoi, d'après les conclusions de la cour d'appel du travail, les intérêts de la paroisse l'emportaient de loin sur ceux du requérant, ni pourquoi elles n'ont pas mis en balance les droits du requérant et ceux de l'Église employeur d'une manière conforme à la Conven-

tion. L'État allemand n'a pas procuré au requérant la protection nécessaire (Violation de l'article 8).

La Cour parvient à un résultat opposé (non-violation de l'article 8) dans *Obst c Allemagne*, dont les faits ne diffèrent guère de ceux de l'arrêt Schüth. M Obst, anciennement directeur pour l'Europe du département des relations publiques de l'Église mormone, marié selon le rite mormon, fait connaître à ses autorités religieuses ses difficultés matrimoniales et la relation extraconjugale qu'il entretient. Licencié sans préavis, avant d'être excommunié; il invoque la violation de l'article 8.

Dans la partie 'le droit et la pratique internes et communautaires pertinents', l'arrêt reproduit les extraits suivants de la directive 78/2000/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail. Le considérant (24):

L'Union européenne a reconnu explicitement dans sa déclaration n° 11 relative au statut des Églises et des organisations non confessionnelles, annexé à l'acte final du traité d'Amsterdam, qu'elle respecte et ne préjuge pas le statut dont bénéficient, en vertu du droit national, les Églises et les associations ou communautés religieuses dans les États membres et qu'elle respecte également le statut des organisations philosophiques et non-confessionnelles. Dans cette perspective, les États membres peuvent maintenir ou prévoir des dispositions spécifiques sur les exigences professionnelles essentielles, légitimes et justifiées susceptibles d'être requises pour y exercer une activité professionnelle.

Article 4 Exigences professionnelles:

1. ... Les États membres peuvent prévoir qu'une différence de traitement fondée sur [la religion ou les convictions] ne constitue pas une discrimination lorsque, en raison de la nature d'une activité professionnelle ou des conditions de son exercice, la caractéristique en cause constitue une exigence professionnelle essentielle et déterminante, pour autant que l'objectif soit légitime et que l'exigence soit proportionnée.
2. Les États membres peuvent maintenir dans leur législation nationale en vigueur ... ou prévoir dans une législation future représentant 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 reli-

gion 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 ... 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.

À la différence de l'arrêt *Schüth* (ci-dessus), la Cour n'a pas conclu à la violation de l'article 8, estimant que les juridictions du travail s'étaient livrées à une mise en balance circonstanciée des intérêts en jeu. La Cour considère que le fait que le licenciement a été fondé sur un comportement relevant de la sphère privée du requérant, et ce en l'absence de médiatisation de l'affaire ou de répercussions publiques importantes du comportement en question, ne saurait être décisif en l'espèce. Elle note que la nature particulière des exigences professionnelles imposées au requérant résulte du fait qu'elles ont été établies par un employeur dont l'éthique est fondée sur la religion ou les convictions (voir, ci-dessus, l'article 4 de la directive 78/2000/CE; voir aussi *Lombardi Vallauri c Italie*, n° 39128/05, § 41, CEDH 2009 (extraits)). À cet égard, elle estime que les juridictions du travail ont suffisamment démontré que les obligations de loyauté imposées au requérant étaient acceptables en ce qu'elles avaient pour but de préserver la crédibilité de l'Église mormone. Elle relève par ailleurs que la cour d'appel du travail a clairement indiqué que ses conclusions ne devaient pas être comprises comme impliquant que tout adultère constituait en soi un motif justifiant le licenciement (sans préavis) d'un employé d'une Église, mais qu'elle y était parvenue en raison de la gravité de l'adultère aux yeux de l'Église mormone et de la position importante que le requérant y occupait et qui le soumettait à des obligations de loyauté accrues. L'article 8 de la Convention

n'imposait pas à l'État allemand d'offrir au requérant une protection supérieure (non-violation de l'article 8).⁶⁴

II. LA PRÉVENTION DE LA DISCRIMINATION RELIGIEUSE

Le secret des convictions religieuses individuelles

La discrimination religieuse aura moins de facilité à s'exercer si les convictions religieuses des personnes ne sont pas connues, s'il n'existe pas d'obligation légale de les révéler⁶⁵ enfin si la collecte et le traitement de ces ‘données sensibles’ sont interdites ou strictement réglementées. Ces acquis des droits internes ont été repris par la jurisprudence de la Cour: celle-ci tient fermement la main au respect de ce droit des personnes essentiel dans une société pluraliste comprenant des personnes de convictions religieuses différentes.

La suppression de la mention de la religion sur les cartes d'identité ne porte pas atteinte au droit des requérants de manifester leur religion. La carte d'identité doit contenir les seules informations permettant d'identifier les citoyens dans leurs rapports avec l'État. Les convictions religieuses n'en font pas partie.⁶⁶ Elles relèvent du *for intérieur* de chacun et n'ont pas nécessairement un caractère stable. Leur mention, dans un document, ‘risque aussi d'ouvrir la porte à des situations discriminatoires dans les relations avec l'administration ou même dans les rapports professionnels’. Absence

64 Voir aussi Cour, n° 18136/02, *Siebenhaar c Allemagne* 3 février 2011 (Licenciement: non-violation de l'article 9).

65 ‘For intérieur (forum internum). Les principaux instruments internationaux confirment que “Toute personne a droit à la liberté de pensée, de conscience et de religion”. Contrairement aux manifestations de la religion, le droit à la liberté de pensée, de conscience et de religion dans le *for intérieur* (forum internum) est absolu et ne saurait être soumis à la moindre limite. Ainsi, par exemple, il est inadmissible d'adopter une loi imposant la déclaration non volontaire des croyances religieuses’ (*Lignes directrices visant l'examen des lois affectant la religion ou les convictions religieuses*).

66 De même que l'origine ethnique. Dans plusieurs résolutions (Résolution 1383 (2004) du 23 juin 2004, § 3; Résolution 1513 (2006) du 29 juin 2006, § 20; et Résolution 1626 (2008) du 30 septembre 2008, § 8), l'Assemblée parlementaire du Conseil de l'Europe a invité la Bosnie-Herzégovine à adopter une nouvelle Constitution afin de ‘remplacer le dispositif de représentation ethnique par une représentation fondée sur le principe de citoyenneté, notamment en mettant un terme à la discrimination constitutionnelle envers les “autres”’ (*Sedjic et Finci*, 21).

d’atteinte au droit (article 9) pour les requérants de manifester leur religion.⁶⁷

L’obligation pour tout citoyen turc,⁶⁸ de porter une carte d’identité mentionnant sa religion risque d’ouvrir la porte à des situations discriminatoires dans les relations avec l’administration (*Sofianopoulos et autres*). Toute case réservée à l’inscription ou à la non-inscription de la religion est une ‘divulgation d’un des aspects les plus intimes de l’individu’ directement ou indirectement révélatrice de ses ‘convictions les plus profondes’ et contraire à l’article 9.⁶⁹

La liberté de manifester ses convictions religieuses comporte également un aspect négatif.⁷⁰ M Alexandridis doit révéler devant le tribunal (prestation de serment pour exercer certaines fonctions) qu’il n’est pas chrétien orthodoxe. Cette obligation porte atteinte à sa liberté de ne pas avoir à manifester ses convictions religieuses (violation de l’article 9).⁷¹ En revanche, un contribuable italien qui souscrit sa déclaration fiscale n’est pas contraint de révéler ses convictions religieuses puisque la loi l’autorise à ne pas exprimer de choix quant à la destination de la fraction des 8/1000^e de l’impôt sur le revenu. La même idée inspire certains textes constitutionnels.⁷²

Le droit au secret des convictions trouve sa limite lorsque le demandeur préfère y renoncer, pour obtenir une dispense ou un avantage particulier. Le requérant s’est absenté de son travail, sans autorisation, pour assister à une fête religieuse: il est condamné à une amende.⁷³ La liberté de religion comporte, sans doute, le droit au

67 Cour, Déc n° 1988/02, 1997/02 et 1977/02, *Sofianopoulos ... c Grèce*, 12 décembre 2002.

68 Cour, n° 21924/05, *Sinan Isik c Turquie*, 2 février 2010. Voir aussi n° 12884/03, *Wasmuth c Allemagne*, 17 février 2011, 64 (non-violation de l’article 9).

69 Voir, mutatis mutandis, risque pour les parents de devoir dévoiler des informations sur leurs convictions religieuses et philosophiques personnelles ‘aspects les plus intimes de la vie privée’: Cour, *Folgerø et autres c Norvège* [GC], n° 15472/02, 29 juin 2007, 98; *Hasan et Eylem Zengin*, 73.

70 Voir, en ce sens, *Kokkinakis c Grèce et Buscarini et autres c Saint-Marin*.

71 Cour n° 19516/06, *Alexandris c Grèce*, 21 février 2008, 38; *Dimitras et autres c Grèce*, 03 juin 2010, 81–89.

72 Voir, inter alia, les articles 16-2 de la Constitution espagnole du 27 décembre 1978: ‘Nadie podra ser obligado a declarar sobre su ideología, religión o creencias’ et 53-7 de la Constitution polonaise du 2 avril 1997: ‘Nul ne peut être engagé par les autorités de la puissance publique à révéler sa conception du monde, ses convictions religieuses ou sa confession’.

73 Cour, *Kosteski c Ex-République Yougoslave de Macédoine*, 13 avril 2006, 37–39, et jurisprudence de la Commission et de la Cour. J Duffar, ‘Religion et Travail dans la jurisprudence de la Cour de justice des Communautés européennes et des organes de

secret de ses croyances.⁷⁴ En même temps, exiger d'un salarié qu'il apporte une forme de justification de sa croyance pour l'autoriser à s'absenter un jour de fête religieuse, n'est pas contraire à la liberté de conscience (non-violation de l'article 9).

La finalité, notamment, non discriminatoire du secret des convictions se trouve confirmée par les instruments internationaux qui placent au nombre des données 'sensibles' celles qui révèlent les convictions religieuses des personnes. En principe, ces données ne peuvent faire l'objet d'un traitement automatisé sauf dans les cas prévus par les textes:⁷⁵ 'Les données à caractère personnel révélant l'origine raciale, les opinions politiques, les convictions religieuses ou autres convictions ... ne peuvent être traitées automatiquement à moins que le droit interne ne prévoie des garanties appropriées.'⁷⁶ Ces informations sensibles, et en particulier, 'les convictions religieuses, philosophiques ou autres' sont des 'données pouvant engendrer une discrimination illégitime ou arbitraire'.⁷⁷

Le risque de discrimination explique aussi le débat autour de la position de l'ECRI favorable à la collecte de données ethniques. La connaissance de celles-ci devrait constituer un instrument utile pour lutter contre la discrimination raciale et promouvoir l'égalité des chances des groupes minoritaires. Selon l'ECRI, la collecte de données ethniques est indispensable à la mise en œuvre et au suivi de ces programmes. Certes l'ECRI préconise un certain nombre de précautions: respect absolu des principes de confidentialité, de consentement éclairé et de l'auto identification volontaire par l'individu de son appartenance à un groupe déterminé. Malgré ces précautions, la collecte des données ethniques en fonction des catégories: nationali-

la Convention européenne des droits de l'homme', (1993) *Revue du droit public* 696–718.

74 'Les informations relatives aux convictions religieuses et philosophiques personnelles concernent certains des aspects les plus intimes de la vie privée' (*Xc RU*, DR 22/4). Le fait d'obliger les parents à communiquer à l'école des renseignements détaillés sur leurs convictions religieuses et philosophiques peut entraîner une violation de l'article 8 de la Convention: voir aussi de l'article 9, *Folgerø et autres*, 98; *Zengin*, 73–75.

75 Article 6 de la Convention du Conseil de l'Europe pour la protection des personnes à l'égard du traitement automatisé des données à caractère personnel.

76 Voir aussi l'article 8 de la directive 95/46/CE, 'Traitements portant sur des catégories particulières de données'.

77 Principes directeurs pour la réglementation des fichiers informatisés contenant des données à caractère personnel adoptés le 14 décembre 1990 par l'Assemblée générale des Nations Unies dans sa résolution 45/95, 5: Principe de non-discrimination.

té, origine nationale ou ethnique, langue et religion suscite de la part des opinions et des gouvernements des réticences fondées sur le risque de discrimination notamment raciale et religieuse.

La tolérance composante de la ‘société démocratique’: deuxième élément de prévention de la discrimination religieuse

Le rôle du secret des convictions est premier dans la protection contre la discrimination religieuse. Il n'est pas possible ni sans doute souhaitable de devoir dissimuler ses croyances; la société démocratique doit être ainsi aménagée qu'elle tolère toutes les convictions religieuses: la tolérance est bien le deuxième élément de prévention de la discrimination religieuse: la constatation résulte des textes des organisations universelles et du Conseil de l'Europe et de la jurisprudence de la Cour.

La tolérance: organisations universelles et le Conseil de l'Europe

La non-discrimination est très liée à la tolérance que les peuples des Nations Unies se sont engagés à pratiquer aux termes de la Charte. L'intolérance religieuse est la principale source de la discrimination. Depuis le XVI^e siècle, en droit public français, le mot ‘tolérance’ a souvent un contenu religieux: l'*Édit de Tolérance* accorde aux protestants le libre exercice de leur culte et implique la coexistence et l'égalité de deux religions différentes.⁷⁸ La même connotation est présente dans la définition du Conseil des droits de l'homme: la tolérance ‘consiste, pour la population, à accepter et à respecter sa diversité, notamment en ce qui concerne l'expression religieuse’.⁷⁹ Précedée par une déclaration du Comité des Ministres du Conseil de l'Europe (voir infra), la déclaration de l'UNESCO prend acte du développement et de l'ampleur ‘moderne’ du mot:

La tolérance est la clé de voûte des droits de l'homme, du pluralisme (y compris le pluralisme culturel), de la démocratie et de l'État de droit. Elle implique le rejet du dogmatisme et de l'absolutisme et con-

⁷⁸ Le Robert, *Dictionnaire historique de la langue française*, sv ‘tolérer’.

⁷⁹ Conseil des droits de l'homme, 6/37, Élimination de toutes les formes d'intolérance et de discrimination fondées sur la religion ou la conviction, 34^e séance, 14 décembre 2007.

forte les normes énoncées dans les instruments internationaux relatifs aux droits de l'homme. (1.3)⁸⁰

La jurisprudence de la Cour

Dès 1981,⁸¹ en liant tolérance et société démocratique, le Comité des Ministres du Conseil de l'Europe souligne le contenu politique et juridique de la tolérance. L'origine en est transparente: les célèbres formules de la Cour, d'abord dans l'arrêt *Handyside*: ‘Ainsi le veulent le pluralisme, la tolérance et l'esprit d'ouverture sans lesquels il n'est pas de “société démocratique”’;⁸² puis les prolongements politiques développés dans l'arrêt du 26 avril 1979: ‘il n'est pas de société démocratique sans que le pluralisme, la tolérance et l'esprit d'ouverture se traduisent effectivement et dans son régime institutionnel, que celui-ci soit soumis au principe de la prééminence du droit, qu'il comporte essentiellement un contrôle efficace de l'exécutif, exercé sans préjudice du contrôle parlementaire, par un pouvoir judiciaire indépendant et qu'il assure le respect de la personne humaine’. Plus récent, le § 51 de l'arrêt *Gündüz* énonce: ‘Il ne fait aucun doute qu'à l'égal de tout autre propos dirigé contre les valeurs qui sous-tendent la Convention, des expressions visant à propager, inciter à, ou justifier la haine fondée sur *l'intolérance, y compris l'intolérance religieuse*, ne bénéficient pas de la protection de l'article 10 de la Convention’.⁸³ En résumé, la tolérance liée au pluralisme a un prolongement politique précis dans la ‘société démocratique’: ni la Convention, ni la Cour n’acceptent ni ne protègent l’intolérance religieuse.

Les obligations positives de l'État gardien de la tolérance dans une société démocratique

L'État a l'obligation positive, aux termes notamment de l'article 1 de la Convention, de prévenir activement la discrimination religieuse en instaurant et en préservant la tolérance dans la société démocratique: la démocratie est l'unique modèle politique envisagé dans la Con-

80 Déclaration de principes sur la tolérance adoptée par la Conférence générale de l'UNESCO le 16 novembre 1995.

81 Déclaration sur l'intolérance: une menace pour la démocratie du 14 mai 1981.

82 Cour, *Handyside c RU*, 7 décembre 1976, 49.

83 Cour, n° 35071/97, *Müslüm Gündüz c Turquie*, 14 juin 2004, 51.

vention et, partant, le seul qui soit compatible avec elle⁸⁴. Aussi le maintien de la tolérance – entre les groupes et les personnes – fait-il partie des obligations positives de l’État. Dans son rôle d’organisateur neutre et impartial⁸⁵ de l’exercice des diverses religions, cultes et croyances, l’État contribue à assurer l’ordre public, la paix religieuse et *la tolérance* dans une société démocratique, car l’intérêt de la société tout entière, doit se fonder sur la paix et sur la *tolérance* entre les diverses religions ou convictions⁸⁶. Il y va du maintien du pluralisme et du bon fonctionnement de la démocratie, dont l’une des principales caractéristiques réside dans la possibilité qu’elle offre de résoudre par le dialogue et sans recours à la violence les problèmes que rencontre un pays et cela même quand ils dérangent.⁸⁷

À l’égard des groupes

Lorsque l’organisation de la communauté religieuse est en cause, l’article 9 doit s’interpréter à la lumière de l’article 11.⁸⁸ L’existence autonome des communautés religieuses est indispensable au pluralisme d’une société démocratique. Les communautés religieuses ont un droit à l’existence que des mesures discriminatoires peuvent mettre en danger. Plus particulièrement, le devoir de neutralité et d’impartialité de l’État, tel que défini dans la jurisprudence de la Cour, est incompatible avec un quelconque pouvoir d’appréciation par l’État de la légitimité des croyances religieuses,⁸⁹ et ce devoir impose à celui-ci de s’assurer que des groupes opposés l’un à l’autre, fussent-ils issus d’un même groupe, *se tolèrent*.⁹⁰

84 Cour, GC, *Refah Partisi c Turquie*, 13 février 2003, 86.

85 Cour *Informationsverein Lentia c Autriche*, 24 novembre 1993, 38.

86 *Refah Partisi*, 91, 119.

87 Cour, n° 45701/99, *Église métropolitaine de Bessarabie et autres c Moldova*, 13 décembre 2001, 116.

88 Liberté de réunion et d’association 1: ‘Toute personne a droit à la liberté de réunion pacifique et à la liberté d’association, y compris le droit de fonder avec d’autres des syndicats et de s’affilier à des syndicats pour la défense de ses intérêts.’

89 *Refah Partisi*, 91; *Église métropolitaine de Bessarabie*, 118 et 123; GC, *Hasan et Tchaouch c Bulgarie*, n° 30985/96, 78: introduit la réserve ‘sauf dans des cas très exceptionnels’; *Église de Scientologie de Moscou c Russie*, 72; *Témoins de Jéhovah de Moscou c Russie*, n° 302/02, 10 juin 2010, 99.

90 *Sinan Isik c Turquie*, 45. Voir, mutatis mutandis, ‘par leur inactivité, les autorités compétentes manquent à leur obligation de prendre des mesures nécessaires à assurer que le groupe d’extrémistes orthodoxes animé par le père Basile tolère l’existence de la communauté religieuse des requérants et permette à ceux-ci un exercice libre de leurs droits à la liberté de religion’ (Violation de l’article 9) (97 membres de la Con-

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Le refus des autorités compétentes d'accorder la personnalité juridique à une association de citoyens, religieuse ou autre, constitue une ingérence dans l'exercice du droit à la liberté d'association. Le même refus d'enregistrer un groupe ou la décision de le dissoudre affecte directement le groupe, ses présidents, fondateurs et membres.⁹¹ Lorsque l'organisation d'une communauté religieuse est en jeu, le refus de lui reconnaître la personnalité juridique constitue une ingérence dans l'exercice du droit de la communauté et de ses membres à la liberté de religion (article 9). Il en va de même lorsqu'une association existante est dissoute par une décision des autorités.⁹² La Cour relève que la dissolution prive la communauté religieuse des droits économiques et sociaux essentiels à l'exercice du droit de manifester sa religion: le droit d'être propriétaire ou locataire, d'avoir des comptes bancaires, d'engager des salariés, d'assurer la protection juridictionnelle de la communauté, de ses membres et de ses avoirs, sans compter les droits que la loi russe réserve aux seules organisations enregistrées (créer des lieux de culte, célébrer des services dans des lieux accessibles au public, recevoir, produire et distribuer de la littérature religieuse, créer des établissements d'éducation et entretenir des rapports internationaux).⁹³

À l'égard des personnes

Les personnes qui choisissent de manifester leur religion peuvent s'attendre à certaines critiques qu'inspire en particulier la liberté d'expression dans une société démocratique:

La responsabilité de l'État peut être engagée lorsque les croyances religieuses font l'objet d'une forme d'opposition ou de dénégation qui dissuade les personnes qui les ont d'exercer leur liberté de les avoir ou de les exprimer. En pareil cas, l'État peut être amené à assurer à

grégation des témoins de Jéhovah de Gldani, 134). Voir aussi Cour, *Manoussakis et autres c Grèce*, 26 septembre 1996, 47; *Église métropolitaine de Bessarabie*, 123.

91 Cour, *Association of Citizens Radko and Paunkovski v 'the former Yugoslav Republic of Macedonia'*, n° 74651/01, § 53, ECHR 2009 (extracts); *The United Macedonian Organisation Ilinden and Others v Bulgaria*, n° 59491/00, § 53, 19 janvier 2006; *Partidul Comunistilor (Nepuceristi) and Ungureanu v Romania*, n° 46626/99, § 27, 3 février 2005; and *APEH Üldözőtőinek Szövetsége and Others v Hungary (dec)*, n° 32367/96, 31 août 1999.

92 *Témoins de Jéhovah de Moscou*, 101 et références.

93 Ibid, 102.

ceux qui professent ces croyances la paisible jouissance du droit garantie par l'article 9.⁹⁴

III. LA RÉPRESSION DE LA DISCRIMINATION RELIGIEUSE

Le paragraphe 18 de la Recommandation n° 7 adoptée le 13 décembre 2002 par l'ECRI, sur les éléments devant figurer dans la législation nationale des États membres du Conseil de l'Europe pour lutter efficacement contre le racisme et la discrimination raciale: la loi doit ériger en infractions pénales poursuivies et éventuellement réprimées les comportements suivants s'ils sont intentionnels:

- a) l'incitation publique à la violence ou à la haine ou à la discrimination,
- b) les injures ou la diffamation publiques ou
- c) les menaces à l'égard d'une personne ou d'un ensemble de personnes, en raison de leur race, leur couleur, leur religion, leur nationalité ou leur origine nationale ou ethnique ...

Le paragraphe 23 énonce que les sanctions doivent être efficaces, proportionnées et dissuasives pour les infractions visées aux paragraphes 18, 19, 20 et 21: ‘La loi doit également prévoir des peines accessoires ou alternatives.’⁹⁵ Trois divisions pour illustrer ces orientations: la jurisprudence de la Cour; les ‘qualités’ de la loi; et exemples de répression pénale par la loi.

La jurisprudence de la Cour sur la répression de la discrimination religieuse

La résolution 59/199, du 20 décembre 2004,⁹⁶ Élimination de Toutes les Formes d'Intolérance Religieuse, vise dans son titre la seule intolérance religieuse même si dans le corps du texte elle l'associe souvent à la discrimination fondée sur la religion:

Réaffirme que la liberté de pensée, de conscience, de religion et de conviction est un droit de l'être humain qui découle de la dignité in-

94 Cour, *Ollinger c Autriche*, 29 juin 2006, 39.

95 Recommandation de politique générale n° 7 de l'ECRI contre le racisme et l'intolérance sur la législation nationale pour lutter contre le racisme et la discrimination raciale, cité in *Gündüz*, 24.

96 A/59/503/Add2.

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hérente à la personne humaine et *la discrimination fondée sur la religion est une atteinte à la dignité humaine et un désaveu des principes de la Charte qui est garanti à tous sans discrimination*; ainsi que la Résolution 36/55 du 25 novembre 1981.

L'article 14 de la Convention et l'article 1 du Protocole n° 12: interprétation jurisprudentielle extensive: 'notamment'; 'toute autre situation' ...

L'article 14 n'a pas d'existence autonome, mais joue un rôle important de complément des autres dispositions de la Convention et des Protocoles puisqu'il protège les individus, placés dans des situations analogues,⁹⁷ contre toute discrimination dans la jouissance des droits énoncés dans ces autres dispositions. Cette formule limite le champ d'application de l'article 14 aux seuls droits garantis par la Convention et les Protocoles.

L'article 14 interdit, dans le domaine des droits et libertés garantis, un traitement discriminatoire ayant pour base ou pour motif une caractéristique personnelle ('situation') par laquelle des personnes ou groupes de personnes se distinguent les uns des autres.⁹⁸ Ces caractéristiques se trouvent énumérées à l'article 14, mais comme l'indique l'adverbe 'notamment' cette énumération n'est pas limitative.⁹⁹ En outre, selon cette disposition, une discrimination prohibée peut se fonder aussi sur 'toute autre situation' (en anglais, 'other status'). Par exemple, la nature – civile ou religieuse – du mariage ne figure pas en tant que telle dans la liste des motifs possibles de discrimination visés à l'article 14, il faut donc rechercher si elle peut relever de 'toute autre situation'.¹⁰⁰ L'interdiction de la discrimination que consacre l'article 14 dépasse donc la jouissance des droits et libertés

97 Différence de situation entre le membre d'une communauté religieuse enregistrée et le membre d'une société religieuse reconnue: Cour, n° 33001/03, *Koppi c Autriche*, 10 décembre 2009, 35 (non-violation de 14 et 9).

98 Cour, *Kjeldsen, Busk Madsen et Pedersen c Danemark*, 7 décembre 1976, 56.

99 Cour, *Engel et autres c Pays-Bas*, 8 juin 1976, 72; *James et autres c Royaume-Uni*, 74; et *Luczak c Pologne*, n° 7782/01, 46.

100 Les enfants nés hors mariage sont victimes d'une discrimination par rapport aux enfants issus d'un mariage civil, la différence de traitement repose exclusivement sur la 'situation' d'enfants illégitimes des premiers voir, notamment, *Marckx; Mazurek c France*, n° 34406/97; et *Inze c Autriche*, 28 octobre 1987. Raisonnement similaire pour juger discriminatoire le refus d'accorder un droit de visite à l'égard d'un enfant au seul motif que celui-ci était né hors mariage: Cour, *Şahin c Allemagne* [GC], n° 30943/96, 87. L'absence de lien conjugal entre deux parents fait partie des 'situations' personnelles susceptibles d'être à l'origine d'une discrimination prohibée par l'article 14 (nature non civile du mariage: prestations différentes).

que la Convention et ses Protocoles imposent à chaque État de garantir. Elle s'applique également aux droits additionnels, pour autant qu'ils relèvent du champ d'application général de l'un des articles de la Convention, que l'État a volontairement décidé de protéger.¹⁰¹ Ce principe est profondément ancré dans la jurisprudence de la Cour.¹⁰²

Ainsi la Convention, non plus que son article 9, ne peut être interprétée comme imposant aux États de reconnaître au mariage religieux les mêmes effets qu'au mariage civil. De même le droit de manifester sa religion par l'enseignement garanti par l'article 9 § 1 ne va pas jusqu'à impliquer, aux yeux de la Cour, l'obligation pour les États d'autoriser l'éducation religieuse dans les écoles publiques (non-violation de l'article 9).

Pourtant la célébration d'un mariage religieux – observation d'un rite religieux – et l'enseignement représentent l'un et l'autre des manifestations de religion au sens de l'article 9 § 1. La Croatie autorise certaines communautés religieuses à dispenser une éducation religieuse dans des écoles et crèches publiques et reconnaît les mariages religieux qu'elles célèbrent. La prohibition de la discrimination s'applique aussi à ces droits additionnels qui entrent sous l'empire d'un article de la Convention et que l'État a voulu garantir. L'article 14 s'applique en combinaison avec l'article 9. La conclusion d'accords sur des sujets d'intérêt commun entre l'État et une communauté religieuse particulière, qui institue au profit de celle-ci un régime spécial, ne méconnaît pas les exigences combinées des articles 9 et 14 s'il existe une justification objective et raisonnable à cette différence de traitement et que d'autres communautés religieuses, qui le souhaiteraient, puissent conclure des accords similaires. Les Églises requérantes ont été traitées différemment des Communautés religieuses qui avaient déjà conclu un accord. Est-ce que cette différence a une justification ‘objective et raisonnable’? En

¹⁰¹ L'article 8 de la Convention ignore l'adoption par une personne adoptante célibataire; la législation française accorde ce droit et, à cette fin, établit une procédure d'agrément. Les circonstances de l'espèce tombent sous l'empire de l'article 8. Dans la mise en œuvre de ce droit qui va au delà de ses obligations conventionnelles, l'État ne peut prendre des mesures discriminatoires au sens de l'article 14: Cour, *EB c France*, 48–49. Voir aussi Cour, n° 7798/08, *Savez Crkava 'Rijec Zivota' et autres c Croatie*, 9 décembre 2010, 58.

¹⁰² Cour affaire ‘relative à certains aspects du régime linguistique de l'enseignement en Belgique’ c Belgique, 23 juillet 1968, 9; *Stec et autres c Royaume-Uni* (déc) [GC], nos 65731/01 et 65900/01, 40; *Sejdic et Finci*, 39.

d'autres termes, poursuit-elle un but légitime et existe-t-il une ‘relation raisonnable de proportionnalité’ entre les moyens employés et le but poursuivi?¹⁰³ Les requérants ne satisferaient pas aux critères cumulés historico-numériques (ancienneté et effectifs) pour conclure une convention d’intérêt commun. Mais, le Gouvernement a conclu des accords avec l’Église orthodoxe bulgare, l’Église Vieux catholiques de Croatie et l’Église orthodoxe macédonienne, qui tous ensemble ne comptaient que 522 adhérents, qui ont satisfait à un critère alternatif en tant que ‘communautés religieuses historiques du cercle culturel européen’; les requérants, sans qu’on leur en donne le motif, n’ont pas satisfait à ce critère. Les critères n’ont pas été appliqués à toutes les communautés sur une base d’égalité. À la différence des Églises requérantes, ces communautés religieuses, qui avaient déjà conclu des accords sur des sujets d’intérêt commun, étaient habilitées à dispenser une éducation religieuse dans les écoles publiques et les crèches, à célébrer des mariages religieux civilement reconnus. Cette différence de traitement constitue une violation de l’article 14 de la Convention combinée avec l’article 9.¹⁰⁴

Les États jouissent d'une certaine marge d'appréciation pour déterminer si des différences entre des situations analogues justifient des différences de traitement, mais sous le contrôle ultime de la Cour. Peu de motivations ont été fournies pour justifier, en droit français, la différence de traitement entre les associations cultuelles et les autres associations. Il n'y a, pour la Commission, aucune justification objective et raisonnable de maintenir un système qui défavore à un tel degré les associations non cultuelles. La requérante a pour objectif le regroupement de tous ceux qui considèrent Dieu comme un mythe. Elle admet que pareille attitude ne semble pas, de prime abord, de nature à la qualifier comme une association cultuelle. La requérante ne fait pourtant qu'exprimer une certaine conception métaphysique de l'homme, qui conditionne sa perception du monde et justifie son action. Ainsi, la teneur philosophique, certes fondamentalement différente dans l'un et l'autre cas, ne semble pas un argument suffisant pour distinguer l'athéisme d'un culte religieux

103 La Cour établit un parallèle avec la situation du premier requérant dans l'affaire *Religionsgemeinschaft der Zeugen Jehovas c Autriche*, n° 40825/98, 31 juillet 2008.

104 Savez Crkava ‘Rijec Zivota’, 85–93 et 94–95.

au sens classique et servir de fondement à un statut juridique aussi différent (Violation de l'article 14 combiné avec l'article 11).¹⁰⁵

La Cour n'examine pas systématiquement l'affaire sous l'angle de l'article 14. À titre d'exemples: 'l'inégalité de traitement dont les requérants se disaient victimes a été suffisamment prise en compte au titre des articles 9 et 11. Il n'y a pas lieu d'examiner séparément les mêmes faits du point de vue de l'article 14';¹⁰⁶ 'les allégations ayant trait à l'article 14 de la Convention s'analysent en une répétition de celles présentées sur le terrain de l'article 9 ... il n'y a pas lieu de les examiner séparément';¹⁰⁷ 'Eu égard à la conclusion à laquelle elle est parvenue sur le terrain de l'article 9 de la Convention, la Cour n'estime pas nécessaire d'examiner de surcroit le grief tiré de l'article 14'.¹⁰⁸

Il en va autrement si une nette inégalité de traitement dans la jouissance du droit en cause constitue un aspect fondamental du litige'.¹⁰⁹ La Cour a d'abord constaté la violation de l'article 6: l'action de l'Église catholique a été rejetée pour absence de personnalité juridique. L'Église requérante, propriétaire de son terrain et de ses bâtiments, s'est vue empêcher d'ester en justice pour les protéger alors que l'Église orthodoxe ou la communauté juive peuvent le faire pour protéger les leurs sans aucune formalité ou modalité: il y a eu de surcroit violation de l'article 14 combiné avec l'article 6-1. Aucune justification objective et raisonnable pour une telle différence de traitement n'a été avancée.¹¹⁰ S'agissant de la charge de la preuve en la matière,¹¹¹ la Cour a jugé que, quand un requérant a établi l'existence d'une différence de traitement, il incombe au Gouvernement de démontrer que cette différence de traitement était justifiée. L'inaction des autorités face aux attaques dont les témoins de Jéhovah ont été victimes constitue un manquement aux obligations positives de l'État au titre de l'article 3; les autorités ont manqué à leur

¹⁰⁵ Commission (plénière) Rapport (31), n° 14635/89 *Union des Athées c la France*, 6 juillet 1994, 78-79.

¹⁰⁶ Ibid, 188; *Église métropolitaine de Bessarabie*, 134.

¹⁰⁷ Cour, *Sidiropoulos c Grèce*, n° 57/1997/841/1047, 10 juillet 1998, 52.

¹⁰⁸ *Perry c Lettonie*, 70.

¹⁰⁹ *Témoins de Jéhovah de Moscou*, 187; GC, n° 25088/94, *Chassagnou et autres c France*, 29 avril 1999, 89 et les références; Cour, n° 6289/73, *Airey c Irlande*, 9 octobre 1979, 30; *Dudgeon c Royaume-Uni*, n° 7525/76, 22 octobre 1981, 67.

¹¹⁰ Cour, n° 25528/94, *Église catholique de la Canée c Grèce*, 16 décembre 1997, 42-47.

¹¹¹ *Timichev*, § 57; *Chassagnou et autres c France* [GC], nos 25088/94, 28331/95 et 28443/95, §§ 91-92.

obligation de s'assurer que le groupe extrémiste animé par le père Basile tolère les témoins de Jéhovah et leur permette l'exercice libre de leurs droits à la liberté de religion (Violation de l'article 9). Le refus de la police d'intervenir et son indifférence sont le corollaire des convictions religieuses des requérants et sont incompatibles avec le principe de l'égalité de tous devant la loi (Violation de l'article 14 combiné avec les articles 3 et 9 de la Convention).¹¹²

En Serbie, le requérant est membre dirigeant, d'une communauté religieuse 'vulnérable': Hare Krishhna. Entre 2001 et 2007 il est victime de plusieurs agressions non élucidées. Les blessures subies – nombreuses coupures combinées avec ses sentiments de peur et d'impuissance – sont suffisants pour relever de l'article 3 de la Convention. Plusieurs années après les faits, les auteurs ne sont toujours pas identifiés. La police a bien établi le lien entre les agressions subies par le requérant et la célébration d'une importante fête orthodoxe, sans qu'aucune mesure préventive n'ait été adoptée (vidéo ou autre surveillance): violation de l'article 3. Comme en matière d'agression raciste, les autorités internes ont l'obligation de moyen de rechercher si les agressions ont un motif religieux. La Cour considère inacceptable que les autorités averties de ce que les agressions étaient très probablement motivées par la haine religieuse, l'enquête puisse durer depuis des années sans identification des auteurs. Toutefois, la police se réfère elle-même aux croyances bien connues du requérant, à son 'étrange allure' et attache apparemment peu d'importance à la récurrence des agressions à l'approche d'une fête orthodoxe majeure. La Cour considère qu'il y a eu violation de l'article 14 combiné avec l'article 3 de la Convention.¹¹³ (Discrimination soulevée d'office par la Cour). En revanche, Me Van der Mussele a déclaré ne pas se plaindre d'une discrimination entre avocats stagiaires et avocats inscrits au tableau. Il n'a pas changé d'attitude devant la Cour; celle-ci ne croit pas devoir examiner la question d'office.¹¹⁴

Dans certaines circonstances, la Grande Chambre soulèvera d'office le grief de l'article 14. La chambre a examiné le grief de la requérante sous l'angle de l'article 8 de la Convention seulement; la

112 97 membres de la Congrégation des témoins de Jéhovah de Gldani, 133–135, 140–142.

113 Cour, n° 44614/07, Milanovic c Serbie, 14 décembre 2010.

114 Van Der Mussele, 44.

Grande Chambre a invité les parties à aborder également, dans leurs observations et plaidoiries devant elle, le point de savoir si l'article 14 de la Convention combiné avec l'article 1 du Protocole n° 1 avait été respecté en l'espèce.¹¹⁵

Exemples de discrimination religieuse: quelques exemples d'affaires de discrimination non-violation et violation des articles 9 puis 8, 11 combinés avec l'article 14 et 3

L'Église catholique est exonérée de la taxe foncière par le Concordat conclu avec l'Espagne. L'Église Baptiste n'a ni conclu ni demandé à conclure un Concordat avec l'Espagne.¹¹⁶ À l'égard d'Églises ou de groupes convictionnels minoritaires (article 14 et 11): sur la requête Union des Athées précitée, dans un rapport du 6 juillet 1994, la Commission européenne des droits de l'homme, a considéré qu'en réservant aux seules associations cultuelles ou assimilées la possibilité de recevoir à titre gratuit les legs et dons autres que les dons manuels, la législation française établissait une différence de traitement injustifiée en matière de libéralités entre les associations cultuelles et les autres associations. Par une décision en date du 7 juin 1995, le Comité des Ministres a conclu notamment qu'il y avait eu, dans cette affaire, violation de l'article 14 combiné avec l'article 11 de la Convention du fait de l'impossibilité juridique pour l'association requérante de percevoir un legs.¹¹⁷ Discrimination au détriment de l'Église catholique,¹¹⁸ des témoins de Jéhovah,¹¹⁹ traitement différent refusant la dispense du service militaire aux ministres de ce groupement religieux,¹²⁰ ou au contraire traitement identique pour tous les auteurs de crime alors que le refus de porter l'uniforme pour des motifs religieux n'est pas un crime comme un autre;¹²¹ opposition à la cons-

115 Cour, GC, n° 3976/05, 2 novembre 2010, *Serife yiğit c Turquie*, 51–53.

116 Cour, D (irrecevabilité), *Alujer Fernandez et Caballero Garcia c Espagne*, 24 novembre 1999; D (irrecevabilité) n° 23123/04, *Spampinato c Italie*, 29 mars 2007.

117 *Assoc les témoins de Jéhovah*, 30 juin 2011, 37.

118 ‘L'église requérante, propriétaire de son terrain et de ses bâtiments, s'est vue empêchée d'ester en justice pour les protéger alors que l'Église orthodoxe ou la communauté juive peuvent le faire pour protéger les leurs sans aucune formalité ou modalité [Violation de l'article 14 combiné avec l'article 6 § 1] car aucune justification objective et raisonnable n'a été avancée’ (*Église catholique de la Canée*, 47).

119 *Hoffmann*.

120 *Tsirlis et Kouloumpas c Grèce*.

121 Cour, *Thlimmenos c Grèce*, 6 avril 2000.

truction de lieux de prière et de rassemblements,¹²² fixation de la résidence des enfants chez le père, en raison de l'appartenance de la mère aux témoins de Jéhovah (Violation article 8 combiné avec l'article 14).¹²³

Les violations de la liberté de religion affectaient exclusivement les Chypriotes grecs vivant dans le nord de l'île et se fondaient sur leurs 'origine ethnique, race et religion'. Le traitement qu'ils ont subi ne peut s'expliquer que par ces caractéristiques, la discrimination a 'atteint un tel degré de gravité qu'elle constituait un traitement dégradant': violation de l'article 3.¹²⁴

Les 'qualités' de la loi

Les États sont tenus d'adopter des lois qui répriment pénalement et adéquatement la discrimination, notamment, religieuse. Ces lois doivent présenter les 'qualités' de clarté et de prévisibilité sur lesquelles la Cour exerce un contrôle, qui n'existe pas dans d'autres systèmes.

L'expression 'prévues par la loi' figurant à l'article 9 § 2 de la Convention non seulement exige que la mesure incriminée ait une base en droit interne, mais vise aussi la qualité de la loi en cause. Ainsi, celle-ci doit être suffisamment accessible et prévisible, c'est-à-dire énoncée avec assez de précision pour permettre à l'individu – en s'entourant au besoin de conseils éclairés – de régler sa conduite. Lorsqu'il s'agit de questions touchant aux droits fondamentaux, la loi irait à l'encontre de la prééminence du droit, l'un des principes fondamentaux d'une société démocratique consacrés par la Convention, si le pouvoir d'appréciation accordé à l'exécutif ne connaissait pas de limite. En conséquence, elle doit définir l'étendue et les modalités d'exercice d'un tel pouvoir avec une netteté suffisante (voir les arrêts précités *Hassan et Tchaouch*, § 84, et *Église métropolitaine de Bessarabie et autres*, § 109). Exemples: aucune disposition du droit letton en vigueur à l'époque des faits ne permettait à la Direction d'indiquer à un étranger bénéficiaire d'un permis de séjour ce

122 Cour, *Manoussakis c Grèce*, 26 septembre 1996; *Pentidis, Katharios, et Stagopoulos c Grèce*.

123 Cour, *Palau-Martinez c France*, 16 décembre 2003.

124 *Chypre c Turquie*, 304–311. *Revue européenne des relations Églises–État* (2001), p 10.

qu'il avait et ce qu'il n'avait pas le droit de faire sur le territoire letton. En l'absence d'autres explications de la part du Gouvernement, force est à la Cour de conclure que 'l'ingérence dans le droit du requérant à la liberté de religion n'était pas 'prévue par la loi'. Eu égard à ce constat, il n'y a pas lieu de poursuivre l'examen du grief pour rechercher si l'ingérence visait un 'but légitime' et était 'nécessaire dans une société démocratique'.¹²⁵ Il y a donc eu violation de l'article 9 de la Convention dans la présente affaire:

L'ingérence dans l'organisation interne de la communauté musulmane et dans la liberté de religion des requérants n'était pas 'prévue par la loi', en ce qu'elle était arbitraire et se fondait sur des dispositions légales, accordant à l'exécutif un pouvoir d'appréciation illimité et ne répondait pas aux exigences de précision et de prévisibilité.¹²⁶

Le rejet de la 11^e demande de réinscription est fondé sur l'absence de production d'un document attestant la présence de l'organisation à Moscou depuis au moins quinze ans: cette condition n'est pas prévue par la loi. Les motifs avancés par les autorités sont privés de base légale (Violation de l'article 11, lu à la lumière de l'article 9).¹²⁷

La répression pénale par la loi, exemples: la parole, le discours de haine, l'incitation à la discrimination

La question de la tolérance et de la non-discrimination se pose dans les sociétés de plus en plus pluriethniques et multiculturelles des États membres.¹²⁸ L'article 5 de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, adoptée sous les auspices des Nations unies le 21 décembre 1965, est ainsi libellé:

125 *Perry c Lettonie*, 2–66.

126 Cour, GC, *Hassan et Tchaouch*, n° 30985/96, 84; *Église métropolitaine de Bessarabie*, 109.

127 *Église moscovite de Scientologie*, 98. Voir aussi Cour, n° 412/03, 35677/04, *Saint Synode de l'Église orthodoxe bulgare (Métropolite Innocent et autres) c Bulgarie*, 22 janvier 2009, 159; n° 77185/01, *Boychev et autres c Bulgarie*, 27 janvier 2011, 51–52.

128 Recommandation n° R (97)21 du Comité des Ministres aux États membres sur les médias et la promotion d'une culture de tolérance (adoptée par le Comité des Ministres le 30 octobre 1997).

CONTRIBUTION DU SYSTÈME DE STRASBOURG À LA LUTTE CONTRE
LA DISCRIMINATION RELIGIEUSE

Conformément aux obligations fondamentales énoncées à l'article 2 de la présente Convention, les États parties s'engagent à interdire et à éliminer la discrimination raciale sous toutes ses formes et à garantir le droit de chacun à l'égalité devant la loi sans distinction de race, de couleur ou d'origine nationale ou ethnique ...¹²⁹

Dans les 47 États membres du Conseil de l'Europe, la discrimination est un délit. Vous pourriez être la prochaine victime ou le prochain témoin, alors 'Dites non à la discrimination!' C'est le grand message de la campagne du Conseil de l'Europe de 2010 destinée principalement aux professionnels des médias. La non-discrimination est un principe¹³⁰ et la distinction fondée sur la religion n'a pas de justification.¹³¹

L'article 20-1 du PIDCP énonce, dans une formulation embrassée, 'Tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence est interdit par la loi'. Cette interdiction a été adoptée dans la plupart des États qui ont adhéré au Pacte.

Recommandation n° R (97) 20 sur 'le discours de haine' adoptée le 30 octobre 1997 par le Comité des Ministres du Conseil de l'Europe: 'Volonté du Conseil de l'Europe d'agir contre le racisme et l'intolérance et, en particulier, contre toutes les formes d'expression qui propagent, incitent à, promeuvent ou justifient la haine raciale, la xénophobie, l'antisémitisme ou d'autres formes de haine nourries par l'intolérance.'¹³² Le texte propose, entre autres mesures, d'ajouter à l'éventail des sanctions pénales des mesures de remplacement consistant à réaliser des services d'intérêt collectif, à renforcer des réponses de droit civil, telles que l'octroi de dommages-intérêts aux victimes de discours de haine, ou à offrir aux victimes la possibilité d'exercer un droit de réponse ou d'obtenir une rétractation.

Exemples: 'Toutefois, le simple fait de défendre la Charia, sans en appeler à la violence pour l'établir, ne saurait passer pour un discours de haine' (Violation de l'article 10).¹³³ Un journaliste, dans

129 Cité in *Sejdic et Finci*, 19.

130 Inter alia Recommandation CM/Rec (2010)13 du Comité des Ministres aux États membres sur la protection des personnes à l'égard du traitement automatisé des données à caractère personnel dans le cadre du profilage adoptée par le Comité des Ministres 23 novembre 2010), 2.1: 'le respect ... du principe de non-discrimination'.

131 Hoffmann.

132 Citée notamment dans Gündüz, 22.

133 Ibid, 51.

plusieurs articles de journaux, présente le tremblement de terre du 17 août 1999 comme une punition divine.¹³⁴ Selon lui, diminuer le volume sonore des appels à la prière, fermer les écoles coraniques, renvoyer les étudiantes voilées, mettre à la retraite les officiers ‘intégristes’ etc., toutes ces mesures adoptées par les autorités – le processus du 28 février – sont à l’origine du séisme. Il est condamné pour avoir incité le peuple à la haine et à l’hostilité sur la base d’une distinction fondée sur la religion. Il a divisé la population entre croyants et pécheurs (article 312-2 du Code pénal):

La Cour ne saurait perdre de vue que quiconque exerce les droits et libertés consacrés au premier paragraphe de l’article 10 assume ‘des devoirs et des responsabilités’, parmi lesquels – dans le contexte des opinions et croyances religieuses – peut légitimement être comprise une obligation d’éviter autant que faire se peut des expressions qui sont gratuitement offensantes pour autrui et constituent donc une atteinte à ses droits et qui, dès lors, ne contribuent à aucune forme de débat public capable de favoriser le progrès dans les affaires du genre humain.¹³⁵

Pour autant, si en principe l’on peut juger nécessaire, dans les sociétés démocratiques, de sanctionner voire de prévenir toutes les formes d’expression qui propagent, incitent à, promeuvent ou justifient la haine fondée sur l’intolérance (y compris l’intolérance religieuse). La Cour conclut à la violation de l’article 10 au vu de la sévérité de la peine infligée après avoir relevé que dans un article ‘le requérant, pendant qu’il glorifie une partie de la population féminine, à savoir les femmes qui portent le voile, insuffle une haine¹³⁶ fondée sur l’intolérance religieuse¹³⁷ contre l’autre partie de cette même popula-

¹³⁴ Cour, *Mehmet Cevher İlhan c Turquie*, n° 15719/03, 13 janvier 2009. Voir aussi, n° 15615/07, *Feret c Belgique*, 16 juillet 2009.

¹³⁵ Cour *Giniewski c France*, n° 64016/00, 31 janvier 2006, 44; *Cour Otto-Preminger-Institut c Autriche*, 20 septembre 1994, 49; *Wingrove c RU*, 25 novembre 1996, 52 et *Gündüz*, 37.

¹³⁶ A contrario l’article rédigé par M. Giniewski ‘n’a aucun caractère gratuitement offensant, ni injurieux et il n’incite ni à l’irrespect, ni à la haine’: Cour, *Giniewski*, 52.

¹³⁷ À rapprocher de ‘les lettres litigieuses s’analysent en un appel à une vengeance sanglante car elles réveillent des instincts primaires et renforcent des préjugés déjà ancrés qui se sont exprimés au travers d’une violence meurtrière. Il convient en outre de noter la situation qui régnait en matière de sécurité dans le Sud-Est de la Turquie Dans ce contexte, force est de considérer que la teneur des lettres était susceptible de favoriser la violence dans la région en insufflant une haine profonde et irrationnelle envers ceux qui étaient présentés comme responsables des atrocités alléguées. De fait, le lecteur retire l’impression que le recours à la violence est une mesure d’autodéfense

tion, à savoir les femmes qui ne portent pas le voile et qui, selon lui, ‘s’exhibent piteusement’. La Cour observe que si, dans un climat social plus ordinaire, le contenu et le ton violents de ses propos auraient pu avoir un poids relatif, dans un contexte post-catastrophe, ‘leur connotation discriminatoire et menaçant la paix au sein de la société est difficilement contestable’.¹³⁸

Deux arrêts de la Cour pour terminer sinon conclure: GC Refah Partisi et Sejdic et Finci

Le Parti Refah entendait instaurer un système multi-juridique conduisant à une discrimination fondée sur les croyances religieuses. Pour la Cour ‘un tel système enfreindrait indéniablement le principe de non-discrimination des individus dans leur jouissance des libertés publiques, qui constitue l’un des principes fondamentaux de la Convention’. Une différence de traitement entre les justiciables dans tous les domaines du droit public et privé ‘selon leur religion ou leur conviction’ n’a manifestement aucune justification au regard de la Convention, et notamment au regard de son article 14, qui prohibe les discriminations. Pareille différence de traitement ne peut ménager un juste équilibre entre, d’une part, les revendications de certains groupes religieux qui souhaitent être régis par leurs propres règles et, d’autre part, l’intérêt de la société tout entière, qui doit se fonder sur la paix et sur la tolérance entre les diverses religions ou convictions.¹³⁹

Les requérants se plaignent de l'impossibilité qui leur est faite, et dans laquelle ils voient une discrimination raciale,¹⁴⁰ de se porter candidats aux élections à la Chambre des peuples et à la présidence de Bosnie-Herzégovine au motif qu'ils sont respectivement d'origine rom et juive. Ils invoquent l'article 14 de la Convention, l'article 3 du Protocole n° 1 et l'article 1 du Protocole n° 12.

nécessaire et justifiée face à l'agresseur.’ Cour, GC, n° 26682/95, *Sürek c Turquie*, 8 juillet 1999, 62.

138 Voir, mutatis mutandis, *Sürek* (n° 1), 62; a contrario, *Kutlular*.

139 Voir, mutatis mutandis, larrêt du 23 juillet 1968 en l'affaire ‘linguistique belge’, série A n° 6, pp 33–35, §§ 9–10, et l'arrêt *Abdulaziz, Cabales et Balkandali c Royaume-Uni*, 28 mai 1985, série A n° 94, pp 35–36, § 72.

140 La notion de discrimination raciale recouvre aussi, dans certains textes celle de discrimination fondée sur la religion; voir supra la Convention contre la discrimination raciale et la Recommandation de l'ECRI GC, *Sejdic et Finci*, 26.

La Cour marque la distinction entre l'origine ethnique et la race. La notion de race prend racine dans l'idée d'une classification biologique des êtres humains en sous-espèces sur la base de caractéristiques morphologiques, telles que la couleur de la peau ou les traits faciaux, l'origine ethnique procède de l'idée que les groupes socialement marqués notamment par une communauté de nationalité, de foi religieuse, de langue, d'origine culturelle et traditionnelle et de milieu de vie. La discrimination fondée sur l'origine ethnique d'une personne constitue une forme de discrimination raciale (voir la définition adoptée par la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, et celle adoptée par la Commission européenne contre le racisme et l'intolérance). La discrimination raciale constitue une forme de discrimination particulièrement odieuse qui, compte tenu de la dangerosité de ses conséquences, exige une vigilance spéciale et une réaction vigoureuse de la part des autorités. Celles-ci doivent recourir à tous les moyens dont elles disposent pour combattre le racisme, renforçant ainsi la conception démocratique de la société, dans laquelle 'la diversité est perçue non pas comme une menace, mais comme une richesse'.¹⁴¹

Dans ce contexte, lorsqu'une différence de traitement est fondée sur la race, la couleur ou l'origine ethnique, la notion de justification objective et raisonnable doit être interprétée de manière aussi stricte que possible (*DH et autres*, § 196). La Cour a par ailleurs considéré que 'dans une société démocratique contemporaine basée sur les principes de pluralisme et de respect pour les différentes cultures, aucune différence de traitement fondée exclusivement ou dans une mesure déterminante sur l'origine ethnique d'une personne ne peut être objectivement justifiée' (*ibid.*, § 176). Cela étant, l'article 14 de la Convention n'interdit pas aux parties contractantes de traiter des groupes de manière différenciée pour corriger des 'inégalités factuelles' entre eux; de fait, dans certaines circonstances, c'est l'absence d'un traitement différencié pour corriger une inégalité qui

¹⁴¹ Voir *Natchova et autres c Bulgarie* [GC], nos 43577/98 et 43579/98, § 145, CEDH 2005-VII, et Timichev, précité, § 56. Dans l'affaire *Chapman c RU*, GC, n° 27238/95, 96 la Cour a constaté qu'un consensus international tendait à reconnaître les besoins particuliers des minorités et l'obligation de protéger leur sécurité, leur identité et leur mode de vie non seulement dans l'intérêt des minorités mais aussi pour préserver la diversité culturelle qui est bénéfique à la société dans son ensemble, Cour, GC, 15766/03, *Orsus et autres c Croatie*, 17 juillet 2008, 148.

peut, en l'absence d'une justification objective et raisonnable, emporter violation de la disposition en cause.¹⁴²

La convergence entre la jurisprudence de la Cour¹⁴³ est la doctrine du Conseil de l'Europe¹⁴⁴ l'interculturel et de l'interreligieux doit être soulignée ici.¹⁴⁵ Quelques brèves notations: le dialogue est une conversation entre participants égaux, (individus, groupes, organisations) qui éprouvent une confiance mutuelle en informant et en s'informant de leurs particularités respectives. Le dialogue interreligieux repose sur le rapprochement entre représentants de religions différentes: bouddhistes, chrétiens, juifs, musulmans etc. qui échangent, notamment, sur leurs propres traditions religieuses.

L'importance singulière de ce dialogue tient au rôle attribué aux religions dans les conflits et à l'imbrication de la religion dans la culture. Une idée généralement admise est qu'il ne peut y avoir de paix, sans que la paix religieuse soit préalablement établie entre les États.¹⁴⁶

Cette contribution, même partielle, à l'exposé du système de Strasbourg contre la discrimination religieuse, se doit de mentionner, ne serait-ce qu'in fine le Conseil pontifical pour le dialogue interreligieux¹⁴⁷ qui a pour but de promouvoir le dialogue interreligieux, l'étude des religions et la formation des personnes en accord avec la déclaration *Nostra Aetate* du concile Vatican II. Il collabore avec la commission pour les relations avec les juifs et le conseil pontifical

142 *Affaire 'relative à certains aspects du régime linguistique de l'enseignement en Belgique'*, § 10; *Thlimmenos c Grece* [GC], n° 34369/97, § 44, CEDH 2000-IV; *DH et autres*, § 175.

143 La Court 'tient à souligner ... que dans les sociétés multiculturelles de l'Europe contemporaine l'éradication du racisme est devenue un objectif prioritaire pour tous les États contractants': Cour, *Paraskeva Todorova c Bulgarie*, n° 37193/07, 25 mars 2010, 45; *Sander c Royaume-Uni*, n° 34129/96, 9 mai 2000, 23.

144 Recommandation 170 (2005), du Congrès des pouvoirs locaux et régionaux, sur le dialogue interculturel et interreligieux: initiatives et responsabilités des autorités locales. Voir aussi H Skard et al, *Des dieux dans la ville: Le dialogue interculturel et interreligieux au niveau local* (Conseil d'Europe, 2008).

145 La constatation avait été déjà faite dans le rapport au Consortium, Religion dans l'éducation publique, Droit international et européen (Colloque de Trèves 12–14 novembre 2010): 'Les Conventions, Résolutions et Recommandations des organes du Conseil de l'Europe et du Parlement européen: religion et convictions dans l'éducation interculturelle', n° 46–60.

146 Voir la Déclaration finale de la Conférence européenne de 'La dimension religieuse du dialogue interculturel', Saint-Marin, 23 et 24 avril 2007.

147 Voir Message pour la fin du Ramadan (19 août 2011); Message envoyé aux bouddhistes pour la fête du Vesakh/Hanamatsuri (31 mars 2011); Message envoyé aux Hindous pour la festivité du Deepavali 2010 (28 octobre 2010).

pour la promotion de l'unité des chrétiens. Le dialogue interreligieux est présenté dans le texte ‘Dialogue et annonce: réflexions et orientations concernant le dialogue interreligieux et l'annonce de l'Évangile’ (19 mai 1991).¹⁴⁸ Le Cardinal Jean-Louis Tauran, Président du Conseil pontifical pour le dialogue interreligieux, a insisté sur l'appartenance de tous les hommes à la famille humaine.

148 ‘Service national pour les relations avec l'islam’, <<http://www.relations-catholiques-musulmans.cef.fr/documents>>; et ‘34 e CG-Décret: Notre mission et le dialogue interreligieux’, <<http://www.jesuites.com/documents/34cg/decret5.htm>>, consultés 30 novembre 2011.

THE BACKGROUND TO THE EUROPEAN UNION DIRECTIVE 2000/78/EC

MICHAŁ RYNKOWSKI

PRELIMINARY REMARKS

The main aim of this paper is to present the non-discrimination policy in European Union law from the perspective of the *travaux préparatoires* of Directive 2000/78/EC. It will explain the religious aspect of non-discrimination policy of the EU, with particular focus on Article 4(2) of the Directive, which allows churches and religious communities to justify difference in treatment of their employees if religion or belief constitutes a genuine occupational requirement. The legislative process at the EU level is described in detail. This paper does not cover jurisprudence of the European Court of Human Rights (ECtHR) in Strasbourg,¹ although cases decided by the European Court of Justice (ECJ) in Luxembourg that are related to religious non-discrimination are briefly presented. The planned accession of the EU to the European Convention on Human Rights is discussed in the final part.

HISTORICAL BACKGROUND: THE LEGISLATIVE WORK ON THE DIRECTIVE 2000/78/EC

A historical overview of non-discrimination policies

The non-discrimination policies of the EC/EU date back to 1976, when Directive 76/207 on the implementation of the principle of equal treatment for men and women with regard to access to employment, vocational training and promotion, and working conditions was adopted. Since then, the European institutions (in particular the ECJ) have developed a comprehensive anti-discrimination policy, covering a number of areas. Interestingly, among the rich jurisprudence of the

¹ For this see J Duffar, ‘Contribution du système de Strasbourg à la lutte contre la discrimination religieuse’, pp 349–391 of this volume.

ECJ, only two cases refer directly to religion (*Prais* and *van Duyn*, see below). Other judgments of the ECJ are of interest for churches as they refer to the principles proclaimed by churches or to the social teaching of a church, but not to churches or religions directly.

Article 19 of the Treaty on the functioning of the European Union (previously Article 13 of the Treaty establishing the European Community (TEC)) does not prohibit discrimination itself, but it authorises the Council to take action against such discrimination.² It lists a number of grounds for possible discrimination: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Unlike the article prohibiting discrimination based on nationality, which has been part of the Treaty since the foundation of the Community, this article was introduced by the Treaty of Amsterdam in 1997. Discrimination is explicitly prohibited in Article 21 of the Charter of Fundamental Rights (adopted for the first time in Nice in 2000 and part of the Lisbon Treaty as of 2008), where a number of grounds are listed,³ but one has to keep in mind that the field of application of the Charter is quite limited.⁴ The year 2000 seems indeed to have been a milestone. On 29 June the Council adopted Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and on 27 November Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation. These two Directives, although not adopted simultaneously, are linked in many ways, because religion overlaps frequently with race or ethnic origin.

The legislative process concerning directive 2000/78/EC, with particular focus on Article 4(2)

The European Commission

It was only in 1999 (after Declaration No 17 to the Amsterdam Treaty of 1997) that the Commission started work on new directives

2 J Łopatowska, ‘Discrimination based on religion’, (2009) 4 *Derecho y Religion* 71.

3 Article 21 of the Charter: ‘Non-discrimination. 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’

4 Article 51: ‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.’

dealing with non-discrimination. The Commission adopted the draft directive as COM (1999) 565 on 25 November 1999, bearing the title: 'Directive establishing a general framework for equal treatment in employment and occupation'. This draft directive was a common undertaking of Commissioner Diamantopoulou (Employment and Social Affairs) and Commissioner Vitorino (Justice and Home Affairs). The text was sent to the Council and to the European Parliament but, as the legislative process was based on Article 13 TEC, the latter was merely consulted.

Regarding Article 4(2), which provides special rules for churches and other public or private organisations the ethos of which is based on religion or belief, the Commission described its idea in an explanatory memorandum, in the following way:

Article 4

Genuine Occupational Qualifications

Article 4 allows justified differences of treatment when a characteristic constitutes a genuine occupational qualification for the job. The justification in these cases relates to the nature of the job concerned or the context in which it is carried out.

It is evident that in organisations which promote certain religious values, certain jobs or occupations need to be performed by employees who share the relevant religious opinion. Article 4(2) allows these organisations to require occupational qualifications which are necessary for the fulfilment of the duties attached to the relevant post.

The initial wording of Article 4(2) proposed by the Commission varied significantly from the text finally adopted, which was the result of the work of the Council and of the opinion of the European Parliament. The text became longer and two new sentences were added. Table 1 shows various stages in the legislative work: the original draft of the Commission, amendment No 37 of the European Parliament, the text adopted by the Employment and Social Policy Council as 'political agreement' on 17 October 2000 and, in the fourth column, the final text of Directive 2000/78/EC.

Table 1. Article 4(2) of Directive 2000/78/EC at various stages of the legislative process. Altered text in Amendment 37 is shown by bold italics. In the final column, added text is indicated by underlining, deleted text by strikethrough.

Original proposal of the Commission: COM (1999) 565	European Parliament, Amendment 37 (report of MEP Thomas Mann)	Adopted by the Council on 17.10.2000 as ‘political agreement’	Directive 2000/78/EC: comparison between COM (1999) 565 and the final text
Member States may provide that,	Member States <i>shall</i> provide that,	Member States may maintain national legislation or provide for future legislation incorporating existing national practices pursuant to which,	Member States may <u>maintain national legislation in force at the date of adoption of this directive</u> or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which that,
in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim,	in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the <i>educational, social, health care and related work they undertake</i> , and for the particular occupational activities within those organisations which are directly and essentially related to that aim,	in the case of churches or other public or private organisations the ethos of which is based on religion or belief, as regards the occupational activities within those organisations,	in the case of <u>occupational activities within churches and other</u> public or private organisations <u>the ethos of which is based on religion or belief, which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim</u> ,

<p>a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification.</p>	<p>a difference of treatment based <i>specifically upon the</i> nature of these activities, <i>the religion or beliefs in question constitute</i> a genuine occupational qualification.</p>	<p>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 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.</p>	<p>a difference of treatment based on a <u>person's relevant characteristic related to</u> religion or belief shall not constitute discrimination where, by reason of the nature of these activities <u>or the context in which they are carried out, a person's religion or belief the characteristic</u> constitutes a genuine, <u>legitimate and justified</u> occupational requirement, <u>having regard to the organisation's ethos.</u> qualification.</p>
	<p><i>This will not justify discrimination on any other grounds.</i></p>	<p>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.</p>	<p>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 <u>should not justify discrimination on another ground.</u></p>
		<p>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.</p>	<p>Provided that its provisions are otherwise <u>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.</u></p>

The table shows that the proposal of the Commission underwent major changes. As stated above, it was the Council that played the decisive role, the European Parliament being merely consulted. Owing to differences in the *modus operandi* of these two European institutions, it is possible to analyse statements of every single member of the European Parliament, but it is not possible to receive detailed minutes of the Council to learn more about discussions between the representatives of the Member States. Nevertheless, it is worth remembering that those in power at the time included the conservative British government of John Major, the socialist French government of Lionel Jospin and the social democratic and green German government of Chancellor Gerhard Schröder. The Netherlands was run by the Labour government of Wim Kok, Spain by a Christian democrat government under Jose Maria Aznar and Italy by the government of the communist Massimo D'Alema. As always, the composition of national governments had a clear influence on the work of the Council.

The European Parliament

The European Parliament worked on the draft directive (as on any other directive) in numerous committees. The main work was done in the Committee on Employment and Social Affairs, and the rapporteur was German MEP Thomas Mann (EPP-ED, European People's Party, Christian Democrats). The plenary discussion took place on 4 October 2000,⁵ two weeks before the meeting of the Council. Although there was a consensus concerning the general principles of this directive, a number of deputies intervened in the discussion,⁶ in particular in relation to Amendment 37, referring to Article 4(2). It is only this part of the debate that is of interest to us here.

Although the discussion on Article 4(2) was quite lively, taking account of the political lines of the deputies and their national background, there were no major surprises. The rapporteur, Thomas Mann, was clearly in favour of the exception provided by Article 4(2). In preliminary remarks he described Article 13 of the Treaty as a 'sleeping giant', to which the Commission tried to give life. Mr Mann referred to the US experience, which is built on the Anti-discrimination Act, showing that there is a long journey ahead

5 OJ of the European Communities, 2001 C 178/79, 22 June 2001.

6 See <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+2001004+ITEM-008+DOC+XML+V0//EN&language=EN>>, accessed 26 October 2011.

of the EU. He noticed that ‘Discrimination must be combated in the early stages, in cases of an intimidating, hostile or offensive environment ... Human resources can only be utilised to the full in a climate of peace at the workplace’. The rapporteur confirmed in his exposé that he was in favour of a situation where the Member States can allow different treatment when it comes to religion or belief: ‘These communities make vital contributions to society in terms of social facilities such as nurseries, hospitals and educational institutions. They see the danger of having to hire people who do not identify with their values and convictions.’ Finally, Mr Mann underlined that the ‘Committee on Employment and Social Affairs voted by a large majority in favour of the compromise under which different treatment does not represent discrimination in cases where religion and belief are major requirements for the performance of a job’.

Speaking on behalf of the Committee on Budgets, the Spanish deputy, Mr Naranjo Escobar (also EPP), endorsed the amendments to the directive, describing the report as reflecting ‘balance, moderation and legal expertise’. Deputy Ms Martens (EPP, NL), draftsperson of the Committee on Women’s Rights and Equal Opportunities, was in favour of Article 4(2), which she described as ‘a compromise, but one which enjoys wide support within Parliament’. Deputy Ms Ludford (ELDR, European Liberal Democrat and Reform Party) underlined that ‘discrimination on religious grounds should not be a pretext to discriminate against employees on other grounds, for example, because they are homosexual’. As she stressed,

I am sure that sensible and moderate religious organisations would not seek to do so to exploit this as a loophole. But we must not allow fundamentalists with prejudiced views of any religion to allow their views to prevail against the non-discrimination standards of secular society.

Ludford finished her intervention by stating that ‘there is a proper sphere for religion. The compromise in this report allows plenty of space to religious organisations and it must not be abused.’

A French deputy, Ms Gillig (ESP, European Socialist Party), returned to the issue of secularism, stating ‘I should like to express our reservations on this difficult issue and restate our commitment to the principle of secularism, especially in the context of the fight against discrimination.’ Another French deputy, Ms Y Boudjenah (GUE/

NGL, European United Left/Nordic Green Left), stated that she ‘consider[ed] the exemption of Article 4(2) to be very dangerous and perhaps even a legal cover for the most reactionary ideas’. Speaking on behalf of the Green Party (Verts/ALE), Ms Lambert emphasised that her group welcomed Amendment 37, but at the same time she noted that there were very few jobs where having a particular belief system was an essential qualification (she gave the example of the British monarchy). According to Ms Lambert, religion or belief is not relevant for driving the bus of a religious foundation. She stressed that she would be against a situation in which a religious organisation refused employment on the basis of the homosexuality of the (potential) employee.

Deputy Sbarbati referred to Italian experience, while the Greek deputy, Ms Karamanou (PSE), reminded the Committee that religious fanaticism might still be a burning issue, as the case of the Balkans then demonstrated. The Dutch deputy, Mr Blokland (EDD, Europe of Democracies and Diversities, a group that has ceased to exist), was concerned about the link between freedom of religion and belief and the right to respect for privacy. Only Deputy Ian Paisley, himself ordained, and a member of the group NI (Non-Inscrits), linked the freedom of religion with homosexuality.

One of the last speakers, Deputy Mr Purvis (EPP), emphasised in his rather emotional speech that Amendment 37 must be supported. He finished his speech by declaring that ‘a spiritual dimension is vital to Europe. We must avoid absurd tangles of red tape, which will only succeed in reducing Europe to a purely materialistic, politically correct but pointless entity.’ Finally, Deputy Mr Cadron (ESP) from France welcomed the report, but he found some of the exemptions ‘shocking’: he referred to possible derogation on terms of religion, which he, as a ‘confirmed secularist’, could not possibly endorse.

In conclusion, it is worth noticing that the main rapporteur and rapporteurs of the associated committees represented the EPP, namely Christian Democrats usually willing to co-operate with churches and religious communities. The discussion in the European Parliament could be described as ‘Europe in a nutshell’: while Christian Democrat deputies from various countries endorsed the amendment to Article 4(2), the French deputies underlined the secular aspect of this situation and warned against ‘fundamentalism’ and ‘reactionism’.

Following the discussion and vote in the European Parliament on 5 October 2000, a week later the European Commission introduced the amended proposal: COM (2000) 0652, in which Article 4(2) received a new wording,⁷ nevertheless, it appears that the Council worked on the original wording of COM (1999) 565 and modified its content.

The Council of the European Union

The text was discussed within the Employment and Social Policy Council on 17 October 2000. The Council added to the text *expressis verbis* ‘churches’ as employers that may differentiate (the original draft spoke merely of ‘public or private organisations’). From the very beginning of the legislative process both religion and belief were protected, which should not surprise us, as philosophical organisations had gained status similar to the status of churches and religious communities in Declaration No 17 to the Amsterdam Treaty. Concerning occupational requirements that might justify differentiation, the Council added the adjectives ‘legitimate and justified’. Finally, the Council added two sentences. The first emphasises that the implementation should take ‘account of Member States’ constitutional provisions and principles’, which is usually of particular importance for the Member States. The second provides for an obligation of employees not being members of a given religion or organisation to act in good faith and with loyalty to the organisation’s ethos. This sentence seems to be a response to the case of *Rommelfanger* (1989, case 12242/86): the European Commission of Human Rights confirmed the dismissal of a doctor from a Catholic hospital after the doctor disagreed in an interview with the prohibition of abortion.

⁷ ‘Notwithstanding paragraph 1, the Member States may provide that in the case of public or private organisations based on religion or belief, and for the particular occupational activities within those organisations which are directly and essentially related to 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 the context in which they are carried out, a person’s religion or belief constitute a genuine occupational requirement. This difference of treatment may not, however, give rise to any discrimination on the other grounds referred to in Article 13 of the EC Treaty.’

Transposition and implementation of Directive 2000/78/EC

Although Member States acting in the Council had significant influence on the final version of Directive 2000/78/EC, in the course of transposition they encountered a number of challenges. The Czech Republic, Estonia, France, Lithuania, Portugal, Finland and Sweden do not permit exceptions based on Article 4(2), although there may be special regulations governing some recruitment by religious institutions.⁸ On the other hand, Bulgaria, Hungary, Ireland, Luxembourg and Slovenia went further, by extending the prohibition based on religion and belief to all areas outside employment. The transposition and implementation of the 2000/78/EC Directive is the subject of the communication from the European Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, document COM (2008) 225 final/2 (version of 8 July 2008, replacing the version of 19 June 2008). The next communication of the Commission is due in 2013.

THE DUTY NOT TO DISCRIMINATE

A European equality authority?

Unlike the position in the Member States, there is no institution that could be described as a (pan-European) equality authority. Nevertheless, two bodies should be briefly mentioned. The Fundamental Rights Agency (FRA) was created in 2007 and it has its seat in Vienna.⁹ It was established by Council Regulation (EC) No 168/2007 of 15 February 2007 as the successor to the European Monitoring Centre on Racism and Xenophobia (EUMC). The FRA can be regarded to a certain extent as a European equality authority, as it prepares reports covering various discrimination issues in all EU Member States. Nevertheless, the verbs used in the Regulation confirm that the FRA is an observatory rather than an executive body; Article 4 lists its tasks as being to:

8 COM (2008) 225/2: ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: the application of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation’, p 4.

9 See <<http://fra.europa.eu>>, accessed 21 November 2011.

collect, record, analyse and disseminate relevant, objective, reliable and comparable information and data ..., develop methods and standards ..., carry out, cooperate with or encourage scientific research, and surveys, preparatory studies and feasibility studies ..., formulate and publish conclusions and opinions on specific thematic topics.

Interestingly, the *Handbook on European Non-discrimination Law* (2011),¹⁰ prepared together by the FRA and the ECtHR, refers only to cases decided by the ECtHR.

Complaints can also be addressed to the European Ombudsman.¹¹ He (currently Mr Nikiforos Diamandouros) is responsible for dealing with complaints concerning the activities of the European institutions only, which makes the scope of his activities quite limited. According to the annual reports, the majority of the very few discrimination cases related to linguistic discrimination (such as responses of institutions to a citizen in a language that he or she does not understand). The most visible case of religious discrimination was connected with the school calendar 2010/2011, published by the European Commission and disseminated among many secondary schools all across the EU.¹² In these school diaries the Commission published information concerning holidays of various of the world's religions but omitted Christian holidays such as Christmas and Easter. The complainant was frustrated by this omission and turned to the European Ombudsman. The Commission acknowledged the error and apologised for it. It also sent a corrigendum to all teachers who ordered the diary. The Ombudsman declared that the wish of the complainant to withdraw all copies of the diary and reprint them was not proportionate, in particular as the calendar was only supposed to be in use for a couple more months. The Ombudsman concluded that the reaction of the Commission was appropriate and closed the case.

10 Available online at <http://fra.europa.eu/fraWebsite/attachments/FRA-CASE-LAW-HANDBOOK_EN.pdf>, accessed 21 November 2011, with editions in English, French, German and Italian.

11 The office of the European Ombudsman was established by the Treaty of Maastricht (1992). For more information, see *The European Ombudsman: origins, establishment, evolution* (Luxembourg, 2005), also available at <<http://www.ombudsman.europa.eu/en/resources/historicaldocument.faces/en/10122/html.bookmark>>, accessed 21 November 2011.

12 Case 0260/2011/(NF)GG, opened on 14 February 2011, decision taken on 12 April 2011, <<http://www.ombudsman.europa.eu/cases/summary.faces/en/10709/html.bookmark>>, accessed 19 September 2011.

Jurisprudence of the European Court of Justice

As stated above, only one case decided by the ECJ refers directly to religious discrimination. A British citizen, Ms Prais, applied in response to a recruitment organised by the Council of the European Community, but the day of the written exam coincided with the Jewish holiday of Shavuot.¹³ Ms Prais notified the Council that, as a practising Jew, she could not sit the exam on that day and asked for another date. The Council answered that all candidates must write the exam on the same day, to guarantee the same rights, and rejected the proposal of Ms Prais. The ECJ agreed with the Council, thus giving priority to the principle of equal opportunities over the personal religious convictions of Ms Prais, who was actively discriminated against. The judgment is still controversial. When applying in February, Ms Prais could not have known that the exam would take place on 16 May, the first day of Shavuot. On the other hand, the Council was not allowed to ask the candidates to what religious group they belonged, as this would clearly violate their rights. In the UK, where the exam took place, there is no list of recognised churches and religious communities – *a fortiori*, it is impossible to know when the churches and religious communities have their festivities.

One year earlier, in 1973, a Dutch citizen, Ms Yvonne van Duyn, was refused entry to the UK, where she wanted to work as a secretary for the Church of Scientology, a legally functioning British organisation.¹⁴ The ECJ confirmed that the Home Office was allowed to refer to public order when refusing her right of entry. It seems that in such a case the ECJ would decide differently now, as it was demonstrated 20 years later in the case of *Donatella Calfa v Greece*.¹⁵ In this instance, referring to Directive 64/221, the ECJ stated that judgement must pass on the basis of the personal conduct of the individual concerned; in other words, neither a previous criminal record nor the mere fact of belonging to a certain group were sufficient.

In these two cases, the ECJ discriminated against the applicant on the ground of their religion. Interestingly, in the case of Reverend van Roosmalen the ECJ granted social security rights to a missionary

13 Case 130/75, ECR 1976, 1589.

14 Case 41/74, ECR 1974, 1337.

15 Case C-348/96, ECR 1999, I-11.

van Roosmalen the ECJ granted social security rights to a missionary who had spent his life in Africa.¹⁶ The court decided that Reverend van Roosmalen was ‘independent’ within the meaning of the EC Treaty, quite a courageous statement in the case of a member of a religious congregation. It would seem more logical to define a priest, and in particular the member of an order, as an employee (worker), even in some Member States (such as Denmark) where there is an established state Church, as an official. In this instance, the ECJ wished to help the priest and granted him the social security rights that it could not grant under other provisions. In the context of this paper it may also be worth noting that two women were discriminated against, while a man was granted a favourable outcome.

Finally, there are cases that remain of interest to churches and religious communities because they interfere with the doctrine or social teaching of some churches. Tadao Maruko was the protagonist in one of these judgments: the ECJ granted a survivor’s pension to Mr Maruko, whose male life partner died in 2005.¹⁷ Last but not least, one has to bear in mind that, according to the ECJ, ‘direct discrimination also occurs when no identifiable individual was discriminated against but potentially could have been’.¹⁸ In other words, there is no need to identify the victim of a discrimination and the perpetrator can be convicted on the basis of his or her statement, as was the case in *Feryn*.

THE ACCESSION OF THE EU TO THE ECHR AND CLOSING REMARKS

The accession of the EU to the European Convention on Human Rights (ECHR) became a legal obligation under the Treaty of Lisbon, which amended Article 6, paragraph 2 of the Treaty on European Union. This amendment was accompanied by Protocol 8 to the Treaty of Lisbon and Protocol 14 to the ECHR, which set further requirements on one side and allowed the accession of the EU to the ECHR on the other. The draft agreement on the accession, finalised

¹⁶ Case 300/84, ECJ 1986, 3097.

¹⁷ Case C-267/06, ECR 2008, I-1757.

¹⁸ Case C-54/07, *Centrum voor gelijkheid van kansen en vor racismebestrijding v Firma Feryn NV*, ECR 2008, I-5187.

on 19 July 2011,¹⁹ clarifies a number of important legal issues concerning cases where the EU is respondent or a co-respondent (alone or with all or some Member States), election of an EU judge and financial contribution to the budget of the Court. It also covers required linguistic changes, as for the first time an entity other than a state will become party to the Convention. The agreement will enter into force only after the European Union and all contracting parties to the Convention have expressed their consent according to their national rules.

Despite the lack of ECJ jurisprudence in the field of religious discrimination, there are a number of publications dealing with the issue. The main difficulties identified are linked to several points in addition to those already mentioned above. Unlike the case of race or disability, many issues depend on personal perceptions: a statement neutral for some persons can be regarded as offensive or humiliating for others. Moreover, the religion or belief is not necessarily known to the interlocutors; therefore it is possible to commit a faux pas or to harass a person by, first, not knowing the religion or belief of the other person or, second, by wrongly assuming that the person is of a certain religion or belief. Lucy Vickers points out that the ‘tribunal could not rule with any certainty whether a person who was offended was being unduly sensitive, and taking offence too easily’.²⁰ Finally, proselytism in the workplace (whether on purpose or accidental) cannot be excluded either.

So far there is no definition of religion or belief at the EU level, either in legislation or in the jurisprudence of the ECJ. As religious identity often overlaps with race or ethnic background, this issue is particularly complicated. Moreover, the EU legislature has to bear in mind various traditions and perception of Member States, as the Council of the EU frequently reiterates.

19 CDDH-UE(2011) 16, final version.

20 L Vickers, ‘Is all harassment equal? The case of religious harassment’, (2006) 65 *Cambridge Law Journal* 595.

CONCLUSIONS AND REFLECTIONS

NORMAN DOE

Over the past 23 years the annual conferences of the European Consortium for Church and State Research have examined a very wide range of subjects associated with the regulation of religion by national laws in the European Union. All of these subjects have been important, but not every one of them has enjoyed such a high profile in recent years as that of religious discrimination. It seems that not a week passes these days without the media covering a case related to religious discrimination. Moreover, to date, one dominant theme in Consortium conference discussions has been that of religious freedom – needless to say, there has been a religious freedom (and therefore Strasbourg) dimension to all of the Consortium’s discussions over the years. However, the Oxford conference in 2011 identified the general pervasiveness or ubiquity of religious discrimination law in the field of law and religion in Europe. Alongside religious freedom, issues of discrimination surface in relation to a host of subjects that represent the standard diet of Consortium discussions – state favouritism or otherwise with regard to, for example, the respective legal positions of religious organisations; intervention in the affairs of religious organisations; and parity (or not) in state treatment of religious organisations as to protection of their doctrines and worship, property and finances, and their roles in public institutions in such fields as education and marriage. All of these areas – and doubtless there are many more – raise serious questions about the possibility of religious discrimination by states in their treatment of institutional or organised religion. Be that as it may, discussions at this Oxford meeting of the Consortium have taught me at least three fundamental lessons about national religious discrimination law *per se*.

To begin with, I give you some reflections on what we seem to have agreed in broad terms about the legal materials. First, needless to say, the studies provided in the national reports are not comparative. They represent simply a statement and commentary on the national religious discrimination law of each state. It is in debate that the Consortium has sought to provide something of a comparison of national laws on religion and discrimination. This debate has re-

vealed profound similarities between national laws on this subject, and from these similarities it is clearly possible to induce common principles of religious discrimination law shared by the states of Europe as they frequently face recurrent common problems in this field.

Second, debate has also generated a working framework within which to approach religious discrimination law in terms of method. The laws of all states deal with the prohibition against religious discrimination with respect to the grounds of religious discrimination (from ‘religion’ to ‘religious belief’, for example), the fields to which the prohibition applies (from employment to the provision of goods and services), the types of religious discrimination prohibited (such as direct and indirect discrimination, harassment and victimisation) and the exceptions that provide a relaxation of the prohibition in the case of religious organisations where there are genuine occupational and other requirements to permit this on the basis of the doctrines of those organisations. However, with regard to these exceptions, interesting questions arise as to whether these generate a ‘right to discriminate’ for religious organisations or whether such organisations have no right to do so but enjoy a privilege to deviate from the duty not to discriminate.

Third, that there is much commonality between national laws in this field is not surprising: the law of the European Union represents a key unifying force in this field as national laws seek to implement EU directives in this area. Indeed, we know that historically and under the Lisbon Treaty the prohibition against religious (and other species of) discrimination is one of the fundamental principles of the growing EU law on religion (alongside, for instance, its recognition of the value of religion, national subsidiarity in religious matters and the obligation of the EU to be in dialogue with religions). The impact of EU religious discrimination law on national laws is clearly analogous to the unifying force of the European Convention on Human Rights (ECHR) provision on religious freedom (Article 9) and, though perhaps to a lesser extent, Strasbourg jurisprudence.

Fourth, the delegates have also raised questions about the relationship between religious discrimination and religious freedom. That these are related is an assumption strongly made in some national laws and in key instruments of the United Nations. However, the general assertion that an individual is somehow less free to hold

and practise their religion when discriminated against on grounds of their religion is itself a complex issue that deserves careful consideration.

Similarly, while there is a consensus that the foundation of religious discrimination law is the principle of equality, and that the beneficiaries of this under national laws are individuals, religious organisations and ‘religions’, consensus about the meaning of ‘equality’ is more problematic – the distinction between equality of dignity and equality of treatment is often made – but a robust justification for this distinction is by no means easy to construct. For this reason, it would be worth considering an exploration of religious equality within the context of concepts of justice.

Finally, national religious discrimination laws also reveal a high level of co-operation between religion and the state in this field. Indeed, co-operation here is perhaps the dominant model shared by states whatever their constitutional postures toward religion. In the state–church model, the separation model and hybrid models, the state co-operates with religion in so far as it legislates to forbid religious discrimination, and courts must co-operate to ascertain the doctrines of religious organisations for the purposes of determining whether they enjoy statutory exceptions – in short, the law necessitates co-operation because the law necessitates enquiries into religious doctrine. However, we need more evidence of actual dialogue (in the form of lobbying and consultations, for example) to substantiate any claim that religions contribute in any meaningful way to legal developments in this field.

There are a number of key areas that are worthy of further exploration in a systematic comparative fashion but that the conference did not have time to explore fully. First, related to the issue of equality is the like treatment of like in the cases entertained by national courts and other bodies charged with addressing disputes about religious discrimination. It is difficult to identify general themes when national cases are set one against the other, because so many cases, as between states, seem to be decided differently on the same or largely similar facts. In this regard, very interesting questions were raised about the margin of appreciation allowed at national level, different practices of interpretation of essentially the same legal provisions, and whether judicial bodies are harder on majority than on minority

religions in this area of discrimination law. A key but somewhat unsatisfactory conclusion that emerges for a comparison of the cases, in the quest for shared principles, is that whether there is discrimination depends so much on the factual situation in question.

Second, religious discrimination law seems to provide a richer definition of ‘religion’ than does religious freedom law and its associated case law. It would have been useful to explore the spectrum of definitions of ‘religion’ that are now to be found in national materials, from judicial decisions to explanatory notes and analogous materials designed to supplement interpretively national discrimination legislation. What emerges from minimalist to maximalist definitions is a consensus about religion as belief in a transcendental worldview practised in teaching, worship and a myriad of norms of conduct for the lives of believers.

Third some states forbid discrimination on grounds of ‘religion’ and others on grounds of ‘religious belief’. It would be worth exploring whether the prohibition of discrimination on grounds of religion (presumably embracing both belief and practice) provides more protection than prohibitions on grounds of religious belief. A related issue is whether Luxembourg allows a greater margin of appreciation in religious discrimination matters than Strasbourg in its approach to religious freedom. The national reports also reveal that some states already operate a duty on employers – for example, to provide reasonable accommodation in the field of religion. This is an issue that, as the President-Elect of the European Court of Human Rights reminded us in his opening lecture of the conference, has yet to exercise the Strasbourg court in its developing jurisprudence.

Fourth, we know that Strasbourg has used what might be styled the specific situation rule (that a person may waive their right to manifest religion by voluntary submission to a restrictive regime, such as contractually in the workplace). This has proved a controversial rule in some national court cases. What is interesting, however, is that the Strasbourg specific situation rule does not apply to direct discrimination (which, under national laws, cannot be justified), but it does apply to cases of indirect discrimination (where a proportionate policy may justify religious and other forms of discrimination) and under the statutory exceptions for bodies with a religious ethos (to comply with their doctrines).

Lastly, it would also be worth exploring whether *civil* religious discrimination laws have now marginalised *criminal* religious discrimination laws (which, typically, penalise incitement to religious discrimination). Indeed, the findings of the Consortium in Finland in 2008 were that there are few prosecutions these days in states for breach of criminal laws on religious discrimination, but that the civil case-load at national level is increasing dramatically.

My third main point is that this Oxford conference has taught us about the importance of context. National religious discrimination laws are best understood in their political, historical, religious and social contexts, and our deliberations have convincingly underlined the need for a contextual approach to this legal field. A dominant feature of the national reports is their focus on the legal material – describing it, explaining it and assessing it. A dominant feature of our debates, however, has been the *political* dimension. This is good, but often speculative, given that so many divergent political strategies may be deployed in an assessment of the law and legal practice. Nevertheless, some core political principles (with their obvious moral texture) are not negotiable: individuals are equal; states should not discriminate; and mechanisms should be in place to combat discrimination.

The *historical* approach to religious discrimination law is also valuable, not least to understand that religious discrimination has regrettably been a major aspect in the legal history of religion in Europe. A key aspect of our debates was the quest to identify the principal influences on the development of national laws on religious discrimination. Beyond the unifying effect of EU law, this is a difficult quest – not least because it requires a careful study of the determinants at work on the minds of those actually responsible for the creation and implementation of laws in this field. It is perhaps tempting to trace the foundational principle of equality back to medieval and earlier juridical notions of equity (*aequitas* and its associates when these require like treatment of like), or to the Reformation or indeed Enlightenment revolutions, and/or to the impact of international law in the twentieth century, or the role of lobbying in the contemporary legal world. Further work needs to be done on this issue of influence, as well as on the matter of when our respective legal histories on this subject begin.

It has also become obvious that an understanding of state law on religious discrimination is incomplete without reference to religious law. The principal focus of the conference has, of course, been the former. However, a *religious* perspective is equally important – and needless to say religious organisations and traditions have a lot to say not only about the state’s approach to equality, discrimination and religious justice but also about their own perspectives on these matters in terms of their internal lives. In the world of practice, too, there is often a need to understand religious law: for example, in claims about whether a particular religious belief or activity is required of a claimant in a religious discrimination case; the collective religious voice may be critical here. A fascinating discussion at this conference has been about the possible influence of Christianity on national and international approaches to the right of individuals to change their religion. Some see this as a feature of Reformation theology; others consider choice of religion in Christianity as something of a fallacy (typified in parental choices over infant baptism).

Our debate has further showed that there is a need for lawyers and sociologists of religion to be in dialogue, working together in discussion of topics in this field. Sociology of religion provides lawyers with a big picture of the place of religion in society, which in turn sheds invaluable light on the role of law in the triad of society, religion and the state. Equally, fundamental propositions in the sociology of religion may be verified or refuted by the legal evidence. Law, like religion, is a social phenomenon and the case law in particular is a rich resource for sociological enquiry about religious concerns and demands. For example, the secularisation thesis helps to explain the legal separation of church and state – but religious discrimination law clearly necessitates co-operation between state and religion. Modernity is characterised by the privatisation of religion, and religious discrimination laws apply (in part) in the private sphere of employment – but they also apply in public institutions of government and education. Globalisation and religious pluralism are illustrated well with the impact of international law (from both the UN and the EU) in the area of religious discrimination and patterns of legal accommodation of many faiths. And the new religiosity that many sociologists propose as a key feature of postmodernity is giving rise to religious discrimination cases involving pagans, spiritual-

ism and other new religious movements. Religious discrimination offers a mouth-watering prospect for socio-legal collaboration.

To my mind, this Oxford conference of the European Consortium for Church and State Research has clearly underscored the importance of the topic of religious discrimination and the need for its legal regulation in contemporary society. It has provided a useful conceptual framework with which to address national laws on this subject, it has shaped an academic agenda of valuable research questions in this field, and it has indicated the need for a multidisciplinary approach to law and religion, an approach that goes beyond the black letter of the law into its wider political, historical, religious and social contexts.

ANNEX: GRILLE THÉMATIQUE

I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND

- (1) How, historically, has your national law dealt with religious discrimination?
- In particular:
- (a) How did your law deal with it prior to entry into the European Community and prior to ratification/incorporation of the European Convention on Human Rights (ECHR)?
 - (b) What was the rationale for this approach? Was it ‘equality’ or ‘religious freedom’ or both or some other foundation?
 - (c) What political debate took place on this? What was the role of religion and/or religions in this debate?
- (2) What effect, if any, have UN instruments on religious discrimination and Article 14 of the ECHR had on your national law both before and after their ratification and/or incorporation? What, if any, political debate accompanied these developments? What was the contribution of religions to this debate?
- (3) What was your government’s view on the EU Directives 2000/43/EC and 2000/78/EC when they were in draft form? What national debate (including debate in your national legislature) was there prior to implementation of the Directives in your law? What role did religions play in this debate?

II. THE DUTY NOT TO DISCRIMINATE: THE PROHIBITION AGAINST DISCRIMINATION

- (1) What discrimination authority (eg an Equality Commission) is charged in your state with oversight of religious discrimination?

How is it appointed? What is its membership? What are its functions? What roles, if any, do religions have in its work?

- (2) What are the key instruments or sources of law on religious discrimination in your country? What are the key elements of this law? Are the prohibitions civil or criminal? How is religion defined? Are non-religious beliefs protected?
- (3) What are the fields in which the prohibition is operative (eg employment, the provision of goods and services, education, housing, public authorities)?
- (4) What does the prohibition cover (eg direct or indirect discrimination, incitement to discriminate, victimisation, harassment)? What defences or other justifications are available? What remedies are available and how have these been used in practice?
- (5) What case law has developed on these matters? Are the decisions of the discrimination authority binding or otherwise important (give examples)?

III. THE RIGHT TO DISTINGUISH OR DIFFERENTIATE: EXCEPTIONS TO THE GENERAL PROHIBITION

- (1) On what grounds does the law permit different treatment (eg religion, gender, sexual orientation)?
- (2) Who may discriminate (eg religious organisations, individuals)?
- (3) What conditions must be satisfied (eg to avoid violation of religious doctrine, alienating followers)?
- (4) What case law has developed in the area of exceptions?

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