EU Anti-discrimination Law and Domestic Negotiated Law as Legal Instruments to Protect Religious Freedom at Work in Europe: Concurring or Conflicting?

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Abstract: Il diritto antidiscriminatorio europeo e le legislazioni nazionali di tipo pattizio come strumenti di protezione della libertà religiosa in materia di lavoro: due approcci concorrenti o conflittuali? – In Europe, the protection of the fundamental right to freedom of religion and belief at workplace relies on EU antidiscrimination law, which is based on the conceptual premise of "sameness of treatment" logic. By contrast, at domestic level, we may find legal provisions that recognise to certain religious groups special or derogatory rights. Here the logic is to favour the right to difference and to promote distinctiveness. The CJEU case-law seems to pursue the aim to neutralize religion at workplace as if this were the only way to grant equal treatment to all forms of religion. This may lead to possible clashes of constitutional intensity.

Keywords: Antidiscrimination law; Freedom of thought, Conscience and religion; Negotiated law; Special rights; Secularism.

1. Introduction. Religious Freedom at Work: Which Protection?

Freedom of religion includes not only the right to religious belief or lack of it – the so-called *forum internum* – but also the freedom to manifest it, both in private and in public – the so-called *forum externum*[1]. In the workplace, this may typically comprehend requests for time off in order to celebrate religious festivals, the wearing of religious symbols, and exemptions from certain job functions when these are against religious rules[2].

[1] For this terminology as implemented by the CJEU see decision 14.3.2017, Case C-188/15, *Bougnaoui – Micropole*, § 30. The distinction between the two tenets of freedom of religion derives from art. 9 of the ECHR, according to which «Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance»- While the internal component of religious freedom is not subject to limits, the second paragraph of art. 9 provides a different discipline for the external dimension: «Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others».

[2] See L. Vickers, *Religion and the Workplace*, in *Equal Rights Review*, 14, 2015, 106 ff.; Ead.,

The enjoyment of *forum externum* of religious freedom may be problematic in the workplace. Employers have the right to organize their working staff and to set those rules they think suitable for their business. However, these rules may conflict with the religious rules of the employees. Should the law or the judge sustain employees' claims to manifest their religious identity? After all, employment is also a matter of choice and accommodating religious rules in the workplace may imply a cost or burden for the employer. Granting employees days off for celebrating religious festivals is just an example. Employers themselves may pursue a policy of neutrality with regard to religion or belief: this choice may be functional to business, as customers may feel uneasy when a given religion is exhibited. Moreover, religious neutrality in the workplace may be a practical way to avoid complaints from other employees who might feel uncomfortable because of the manifestation of their colleagues' religious identity.

These brief remarks may offer a quick understanding of why the enjoyment of freedom of religion in the workplace is subject to considerable debate and has become so contentious[3].

As regards the current European legal landscape, the issue of freedom of religion in the workplace can be assessed by taking into account three main legal sources. The first is the perspective of fundamental and human rights. Freedom of religion and belief is enshrined in the constitution of each European country and it is also set in art. 9 of the European Convention on Human Rights[4].

One limit that characterizes the fundamental/human rights approach is the fact that, traditionally, these provisions apply vertically, i.e. to state and public authorities only. The UK is the best example in this regard: according to art. 6, the Human Rights Act 1998, which incorporates the rights set out in the ECHR into British domestic law, applies only to the acts of public authorities.

Some domestic legal systems do theorize the horizontal effect of fundamental rights[5]. However, this may occur on a selective

Religious Freedom, Religious Discrimination, and the Workplace, Oxford-Portland, 2008.

[3] See K. Alidadi, *Religion, Equality and Employment in Europe – The case for reasonable accommodation*, Oxford – Portland, 2017; M. Hunter-Henin, *Why Religious Freedom matters for democracy*, Oxford, 2020, spec. pp. 119-174; L. Vickers, *Religious Freedom, Religious Discrimination, and the Workplace*, cit.

[4] See for an overview C. Evans, *Freedom of religion under the European Convention on Human Rights*, Oxford, 2001.

[5] The horizontal effect of Constitutional rights is a subject which has been particularly elaborated by German legal scholarship (so-called *Drittwirkung*) and Italian legal doctrine as well (see A. Pace, *Problematica delle libertà costituzionali*, vol. I, III ed., Padova, 2003, 17-19; G. Lombardi, *Potere privato e diritti fondamentali*, Torino, 1970). Indeed, the Italian Constitution explicitly provides that some rights may also be claimed in the private sector (see for instance art. 36 and 37 of Italian Constitution). For a comparative overview, see R. Goswami, *Human Rights and the private sphere: a Comparative Analysis*, in *National University of Juridical Sciences Law Review*, 1, 2008, 185 ff..; J. Krzeminska-Vamvaka, *Horizontal effect of Fundamental rights and freedom – Much*

basis[6] and consequently the scope of protection can be different from that currently applied when a public authority is involved.

With regard to the European Convention, its rights and freedoms apply only to the public authorities of the states parties. Nevertheless, the European Court has elaborated the notion of "positive duties", according to which the Court has the jurisdiction to review how domestic courts grant protection to provisions of the Convention in disputes which involve private parties as well. Despite this, the European Court has traditionally adopted a narrow approach in relation to art. 9 claims which arise in the workplace, considered an area where a wide margin of discretion should be left to the States parties. Moreover, the Court has traditionally framed these claims within the filter of the "freedom to resign" doctrine, according to which, whenever the employees find that an internal rule conflicts with their religious belief, they are free to relinquish their post[7]. This position was finally set aside in the well-known *Eweida* case[8], where the Strasbourg Court found that the UK courts had not fairly balanced the rights of the employer to conduct business and the religious freedom of the employee who wished to wear a small cross[9].

The second instrument through which freedom of religion is today protected in Europe is EU antidiscrimination law[10]. With the adoption of Council Directive 2000/78/EC (the so-called Framework Directive), the EU has offered an important instrument to fight religious discrimination in the workplace, allowing a more structured remedy than that based on the above-

ado about nothing? German, Polish and EU theories compared after Viking Line, Jean Monnet Working Paper 2009, available at centers.law.nyu.edu.

[6] In the Netherlands, the Supreme Court applied the fundamental right to freedom of religion and non-discrimination to a private dispute, holding that an employer may not deny a request for time off in order to celebrate an important religious holiday, unless this would imply too heavy a burden for the employer. (see Supreme Court of the Netherlands, 30.3.1984, *Inan/de Venhorst*, NJ, 1985, 350, referred to by K. Alidadi, *op. cit.*, at p. 176). A contrary position has emerged in Spain. The Spanish Constitutional Tribunal has denied that from art 16 of the Spanish Constitution the duty can be derived for a private employer to accommodate an employee's religious practice (in relation to the request of a member of the Seventh-day Adventist Church to have Saturday as a day off). See Tribunal Constitution, n. 19/1985, «Podrá existir - no hay inconveniente en reconocerlo - una incompatibilidad entre los deberes religiosos, en cuanto impongan la inactividad laboral y la ejecución del trabajo o el cumplimiento de obligaciones laborales, pero no una coercibilidad contraria al principio de neutralidad que debe presidir, en la materia, la conducta del empresario».

[7] See EComHr, 12.3.1981, *X/Ahmad v UK*, (appl. N. 8160/78); EComHr, 3.12.1996, *Kontinen v. Finland*, (appl. N. 29107/95)

[8] ECtHR, *Eweida v UK*, 15.1.2013

[9] See later in the text. For a detailed analysis and for further bibliographical references, K. Alidadi, *op. cit.*, 40 ff.

[10] See M. Hill (ed.), *Religion and Discrimination Law in the European Union*, Trier, 2012; R. McCrea, *Religion and the Public Order of the European Union*, Oxford, 2010; M. Bell, *Antidiscrimination Law and the European Union*, Oxford, 2002.

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ISSN: 2037-6677

mentioned human rights approach[11]. The directive has also allowed circumvention of the main shortcomings of the fundamental/human rights approach to the protection of religious freedom, namely its traditional vertical application, as it is precisely designed to be applied both vertically and horizontally[12].

The EU directive prohibits both direct and indirect discrimination. The former arises when a person is treated less favourably than another on one of the enumerated protected grounds (religion, age, disability and so on). Setting aside the positive action framework, direct discrimination cannot be justified unless a characteristic related to one of the protected groups constitutes a genuine occupational requirement, i.e. the work, because of its nature and/or context, cannot be carried out without having that requirement.

Indirect discrimination occurs when a seemingly neutral provision, requirement or practice puts persons of a particular religion or belief (or members of one of the group/factors protected by the directive) at a particular disadvantage. However, the employer can still justify the measure, provided it seeks to pursue a legitimate aim and is appropriate and necessary to fulfil this aim.

The directive also contains important provisions aimed at making the prohibition of discrimination effective through a strengthening of the legal position of the victim of discrimination. This is done by lightening the burden of proof for the alleged victim of discrimination and the granting of *locus standi* to associations, organisations or other legal entities which may engage either on behalf or in support of the complainant with his or her approval in any judicial procedure providing for the enforcement of obligations under the directive.

Finally, a third instrument to protect employees' religious claims in the workplace can be used in some European states. This hypothesis occurs when the legislator recognises that members of certain religious group have special rights or are given derogatory treatment with regard to otherwise generally applicable rules. In these cases, protection is structural, basically permanent and directly provided by the law with the aim of protecting the specificities of a given religious minority.

[11] Besides religion or belief, the 2000/78/EC directive grants protection to age, disability and sexual orientation.

[12] The issue of the horizontal direct effect of non-discrimination provisions through the instrument of the general principle of EU law was established by the CJEU in the *Mangold* and *Kücükdeveci* decisions, with regard to age, and in *Egenberger* with regard to religion. See D. Leczykiewicz, *Horizontal Effect of Fundamental Rights*, in U. Bernitz, X. Groussot and F. Schulyok (eds), *General Principles of EU Law and European Private Law*, Alphen aan den Rijn, 2013, 174 ff.; EAD. *Horizontal Application of the Charter of Fundamental rights*, in *Eur. L. Rev*, vol. 38, 4, 2013, 479 ff.; M. De Mol, *Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law*, in *European Constitutional Law Review*, vol. 6, 2, 2010, pp. 293 ff.

Usually such an approach is enforced in countries such as Italy and Spain that regulate relations between the state and religious denominations by means of agreements concluded by the state government and representatives of the religious denominations. However, derogatory rules and/or special rights in favour of certain religious groups may also be granted unilaterally by the legislator, outside the framework of previous and systematic agreements. Think of the case of section 11 and 12 of the British Employment Act 1989, as amended by art. 6 of the Deregulation Act 2015, which exempts turban-wearing Sikhs from any legal requirement to wear head protection in the workplace.

The three approaches, in granting legal protection to religious freedom, are often cumulative and, to a certain extent, they complement each other[13]. For instance, when it comes to cases concerning religious freedom in the workplace, the protection offered under the framework of fundamental rights and that offered under the antidiscrimination approach are mostly overlapping. To give an example, the issue of the wearing of the veil in the workplace can be framed both in terms of the fundamental right of the employee to manifest her religion – to be balanced with the right of the employer to freely conduct their business – or as an issue involving the non-discrimination principle[14].

However, under the antidiscrimination approach, direct discrimination cannot be justified according to a general clause, whereas this possibility is always applicable under art. 9.2 of the European Convention, which explicitly provides for the possibility to limit the manifestation of freedom of religion when this competes with other public interests or with the rights or freedoms of others[15].

This difference in treatment explains why, in domestic and CJEU courts, there has been heated debate on the possibility to classify an internal rule prohibiting the wearing of head coverings as direct discrimination, at least in those cases where the employers explicitly mention the wish to avoid the display of religiously motivated symbols.

This paper aims to emphasize the situations where the three legal approaches, in granting legal protection to religious freedom, may come into conflict. More precisely, we want to consider the hypothesis whereby the enforcement of EU antidiscrimination law contrasts with domestic laws that provide special treatment to some religious groups.

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[13] See for a comparison of CJEU and ECtHR approach to freedom of religion, R. McCrea, *Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State*, in *Oxford Journal of Law and Religion*, 5, 2016, 183 ff.

[14] However, it is still unclear whether this situation amounts to direct or indirect discrimination. See *infra* in the text and CJEU case law in *Bougnaoui* and *Achbita*.

[15] See L. Vickers, *Freedom of Religion and Belief, Article 9 and the EU Equality Directive: Living together in Perfect Harmony?* in F. Dorssemont, K. Lörcher, I. Schömann (eds.), *The European Convention and the Employment Relation*, Oxford, 2013, pp. 1 ff.

We consider that this possible clash is likely to occur given that the two legal approaches rely on different conceptual frameworks: while antidiscrimination law is based on the premise of "sameness of treatment" – discrimination arises because of differential treatment based on one of the protected characteristics – the third approach emphasizes the right to difference and aims to promote distinctiveness.

For instance, granting special treatment to members of one religious group (the possibility for Jews to abstain from work on Saturday rather than on Sunday), without granting the same treatment to members of other religious minorities, may amount to direct discrimination: as a matter of fact, members of a religious group are treated more favourably than others. Since this is direct discrimination, no justification is admissible. On the contrary, under constitutional law analysis, the special treatment granted to a given religion rather than to others may survive constitutional review: one may argue that the special legal treatment is justified by the need to grant protection to a traditional historical minority group in the country.

Thus, the logic of sameness underpinned by antidiscrimination law may be in contradiction with the logic of difference which is implied in domestic legislations providing the positive recognition of religious claims in the workplace.

Given that antidiscrimination law has today a strong basis in EU law, the issue also becomes a question related to EU primacy and its relations with the constitutional traditions of those countries which consider that state secularism does not necessarily mean strict separatism. Is the CJEU fully aware of the potential clash with member states' constitutional identity which is at stake?

2. The "logic of difference" applied in antidiscrimination law and its limits with regard to the religious dimension

2.1 Defining what a religious group means

The general premise of antidiscrimination law is that the protected characteristics are rarely relevant to the employer's decision and therefore should be ignored[16]. The sameness of treatment logic, which is enforced by antidiscrimination law, clearly emerges from the fact that discriminatory treatment arises through a comparison of the legal treatment received by a person holding the protected factor and that of another person in a similar situation to the alleged victim, but for the possession of the relevant and protected characteristic.

[16] On this, I will recommend the reading of Advocate Poiares Maduro's Opinion in the Coleman case (CJEU, Case C-303/06, 31.7.2008), spec.§§ 11-16. See also J. Gardner, *Discrimination as Injustice*, in *Oxford J. Leg. Stud.*, 16 1996, 355 ff.; S. Fredman, *Discrimination Law*, II ed., Oxford, 2011.

This approach is perfectly adequate as an instrument to give protection to issues related to the *forum internum* of freedom of religion, but it is not in relation to the *forum externum*, the protection of which does require the adoption of positive steps that recognise the specificity of the person holding a certain religion or belief.

Religion is not the only factor whose protection may require positive duties, as this feature also characterizes disability. However, the EU framework directive does expressly consider this aspect only in relation to disability, by providing the concept of reasonable accommodation[17]. On the contrary, the right of the employee to request and to obtain, where practicable, reasonable accommodation from their employers on the basis of religion or belief has been developed in North America, both in the US – where it has a statutory basis – and Canada, where it has, at least originally, a judiciary basis[18].

How, then, does European antidiscrimination law provide protection to religious freedom with regard to its *forum externum*?

The antidiscrimination law framework is not totally indifferent to the substantial dimension of the equality notion and, as a consequence, to the logic of difference[19]. Apart from the positive action notion, which is certainly a component of the traditional tools of antidiscrimination law, a more focused reference is to be made to the indirect discrimination notion.

Indirect discrimination relies on the idea that dissimilar cases should be treated differently. Thus, a neutral rule, which is respectful of formal equality, can nevertheless be considered discriminatory insofar as it does not consider the different situation into which members of a social group, identified by the protected characteristic, are placed. Thus, employers may be required to change their internal rules, despite their apparent neutrality and respect for formal equality.

However, the indirect discrimination notion is based on two features whose judicial enforcement may be problematic. First, in order to trigger it,

[17] According to art. 5 of 2000/78/Ce Directive, entitled Reasonable Accommodation for Disabled Persons, «In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned». See L. Waddington, *Reasonable accommodation* (chapter) in D. Schiek et al. (eds.), *Cases, materials and text on national, supranational and international non-discrimination*, Oxford, 2007; L. Waddington, A. Hendriks, *The Expanding Concept of Employment Discrimination in Europe: From Direct to Reasonable Accommodation Discrimination*, in *International Journal of Comparative Labour law and Industrial Relations*, vol. 18, n. 4, 2003, 403 ff.

[18] See K. Alidadi, *op. cit.*, 62 ss.

[19] See C. Barnard, B. Hepple, *Substantive Equality*, in *Cambridge Law Journal* vol. 59, 2000, 562 ff.

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ISSN: 2037-6677

a claimant must show that the challenged provision, criterion or practice affects more, actually or potentially, the members of a *group* identified by a protected characteristic.

When applied to religion, defining what a religious group is, for the purposes of the application of the indirect discrimination notion, may be a difficult task, as religion has different dimensions. Religion may be identified by a precise belief, with a given and structured doctrine. However, religion also has a social and cultural dimension, identifying members of a group irrespective of their adhesion to the given religion. In this second dimension, religion tends to overlap with race/ethnicity protection. Finally, religion is also a way of life *i.e.*, each individual may decide to live their religiosity in their own way[20].

Limiting the *forum externum* of freedom of religion to those manifestations that are generally and formally recognised by a given religious group has two negative consequences. First, it undermines the fact that freedom of religion pertains to the individual, who to a certain extent may live his or her religiosity through conducts that are not necessarily imposed by the given religious group as strict and mandatory religious rules. Second, such an approach would oblige the judge to establish which practices or acts of worship are truly cogent for the given religious group. This may be difficult to ascertain when the religious group has no hierarchical structure and there are different traditions within the same religion.

However, even the adoption of a broad approach in the definition of what constitutes a religious group, somehow detaching this notion from religious mainstream practice, is problematic as it may open the door to any claims based on an intimate conviction of the individual.

The Framework Directive provides protection against discrimination on the grounds of religion *or belief*. This reference to belief, as an alternative to religion, may be seen as an attempt to provide protection to the worldview and conduct that are genuinely pursued by the individual, despite them not being imposed by the doctrine of a given established religion.

The Directive does not provide any guidance on the term "belief", although it is likely that the EU legislator wanted to grant protection to those philosophical worldviews that are not founded on the idea of the supernatural, such as humanism and atheism. This interpretation relies on the fact that recital 24 of 2000/78/EC Directive mentions Declaration 11, annexed to the Amsterdam Treaty and today converted into art. 17 of the TFEU, according to which member states equally respect the status of philosophical and non-confessional organizations.

The terms religion and belief have not been defined even at domestic level[21]. The UK is an exception. Under the current sec. 10 of the 2010 UK

[20] See J.T. Gunn, *The complexity of Religion and the Definition of "Religion" in International Law*, in *Harvard Human Rights Journal*, vol. 16, 2003, 189 ff.

[21] See J. Cormack, M. Bell, *Developing Anti-Discrimination law in Europe: the 25 EU*

Equality Act, «Religion means any religion and a reference to religion includes a reference to a lack of religion» and «belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief». Under the previous Employment Equality (religion or belief) Regulation 2003, the explanatory notes required, in order to qualify as a belief, «a certain level of cogency, seriousness, cohesion and importance, provided that the beliefs are worthy of respect in a democratic society and are not incompatible with human dignity».

These principles have been substantially enforced by the Employment Statutory Code of Practice, realised by the Equality and Human Rights Commission. While the Code does not impose any legal obligations, nor is it an authoritative statement of the law, it can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings[22].

According to the Code, the notion of belief may be divided into religious and philosophical belief. The former goes «beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion»[23]. The latter refers to a belief that is not related to the existence of the supernatural, such as humanism or atheism. A belief, whether religious or philosophical, «need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world»[24]. For a philosophical belief to be protected under the Act, the Code states that it must be genuinely held; it must be a belief and not an opinion or viewpoint based on the present state of information available; it must be a belief as to a weighty and substantial aspect of human life and behaviour; it must attain a certain level of cogency, seriousness, cohesion and importance; it must be worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others[25].

Thus, both in the case of philosophical or religious belief, the point of reference is the individual and his or her sincere adhesion to a certain worldview that concerns a substantial aspect of human life.

While adopting quite a wide approach to defining a philosophical belief[26], British judges have shown some inconsistencies in protecting

Member State compared, European Network of Independent Experts in the non-discrimination field, 2005. In Italy, the word belief has been translated as "convinzioni personali" (personal convictions). According to the Cassation Court this covers trade-union membership. See Italian Cassation Court, 1/2020, 2nd January 2020.

[22] See § 1.13, p. 23, Employment statutory code of practice, 2011 available at www.equalityhumanrights.com/sites/default/files/employercode.pdf

[23] See 2.56, p. 40.

[24] See 2.58, p. 40

[25] See 2.59, p. 40

[26] For instance, veganism has been recognized as a philosophical belief. See Employment Tribunal, decision 3.2.2020, *J. Casamitjana Costa v. the Leagues Against*

DPCE online
ISSN: 2037-6677

religious practices when these are not shared by the other members of a well-established religious group. In this sense, they have narrowly construed the notion of religious group for the purposes of the application of the indirect discrimination notion.

This narrow approach clearly emerged in the *Eweida* case, where the Court of Appeal had to decide whether a policy adopted by British Airways, according to which any item of visible jewellery could not be worn by employees (unless the wearing of the item was imposed by religious rules and permitted by the management) amounted to indirect discrimination on the grounds of religion and belief. The claimant, Mrs. Eweida, was dismissed after refusing to conform to the internal policy rule and continuing to wear a small cross on a necklace as a sign of her Christian faith[27].

The Court of Appeal, affirming previous UK employment court decisions, held that the claimant had not established that the neutral policy enforced by British Airways affected a religious group. The wearing of the cross was seen by the Court as a matter of personal choice and not as behaviour mandated by her religion. According to the Court of Appeal, indirect discrimination requires the identification of a group, defined in relation to one of the protected characteristics, which has been or would be disadvantaged by the challenged provision. Even if the EC Framework Directive adopted the words "would put" - thus making the comparison possible even if the comparator is merely hypothetical -, this cannot be interpreted as if it operated 'wherever evidence showed that there were in society others who shared the material religion or belief and so would suffer a disadvantage were they to be British Airways employees». Adopting such a view would place «an impossible burden on employers to anticipate and provide for what may be parochial or even factitious beliefs in society at large»[28].

The Court of Appeal seems to reject any individualistic approach in the construction of the group disadvantage requirement and this may be an obstacle for 'sole believers' in establishing their case[29].

However, the European Court of Human Rights did not share this line of reasoning. Basing its analysis on art. 9 of the Convention, the ECtHR stated as follows:

> in order to count as a "manifestation" within the meaning of art. 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worships or devotion which forms part of the practice of a religion or belief in a generally recognised form.

Cruel Sports, n. 3331129-18.

[27] See *Eweida v British Airways* [2010] EWCA Civ 80, on which L. Vickers, *Indirect discrimination and Individual Belief: Eweida v British Airways plc'*, in *Ecclesiastical Law Journal*, vol. 11, 2009, 197 ff. The *Eweida* case has led to a decision by the ECtHR (see below in the text), where the ECtHR condemned the UK for the wrong balancing of the claimant's religious claim conducted by the UK judges.

[28] See *Eweida v British Airways* [2010] EWCA Civ 80.

[29] See K. Alidadi, *op. cit.*, p. 97.

> *However, the manifestation of religion or belief is not limited to such acts: the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the application to establish that he or she acted in fulfilment of a duty mandated by the religion in question* (italics added)[30].

2.2. The swinging test of proportionality

The "group" requirement is not the only limit to the enforcement of the indirect discrimination notion in religious cases and, through it, to the recognition of a logic of difference in antidiscrimination law when applied to religion.

As noted, while direct discrimination is not subject to a general justification clause, indirect discrimination is: if the claimant succeeds in proving that the neutral criterion causes a disparate impact with regard to a given protected social group, it is up to the employer to show that the criterion is needed to pursue a legitimate interest. The threshold required to pass the proportionality test is high. The EU directive mandates that the challenged measure be necessary to meet the aim, which must be legitimate, and according to CJEU case law, economic cost arguments, especially linked to customers preference, would fail to be considered as a legitimate aim[31].

Despite these findings, the legal and judicial enforcement of indirect discrimination has failed to ensure protection of the *forum externum* tenet of freedom of religion. CJEU case law concerning the wearing of the veil in the workplace is emblematic in this regard[32].

As already noted, it is highly controversial to establish whether a rule forbidding the wearing of religious symbols at work amounts to direct or indirect discrimination, as the answer may depend on factual circumstances[33].

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[30] ECtHR, *Eweida v UK*, 15.1.2013.

[31] See CJEU decision 14.3.2017, Case C-188/15, *Bougnaoui – Micropole*

[32] See CJEU decision 14.3.2017, Case C-188/15, *Bougnaoui – Micropole* and decision 13.3.2017, case C-157/15, *Achbita*. The decision in Achbita has raised much criticism. See E. Howard, *Islamic Head Scarves and the CJEU: Achbita and Bougnaoui*, in *Maastricht Journal of European and Comparative Law*, vol. 24, 2017, 348-366; Ead., *Headscarves return to the CJEU. Unfinished Business*, vol. 27, 1, 2020, 10 ff.; M. Bell, *Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace*, in *Human Rights Law Review*, 17, 2017, p. 784-796; S. Hennette-Vauchez, *Equality and the Market: the Unhappy Fate of Religious Discrimination in Europe*, in *European Constitutional Law Review*, vol. 13, 2017, pp. 744-758; S. Jolly, *Religious Discrimination in the Workplace: the European Court of Justice Confronts a Challenge*, in *European Human Rights Law Review*, 3, 2017, pp. 308-314; T. Loenen, *In Search of an EU Approach to Headscarf Bans: Where to go After Achbita and Bougnaoui?*, in *Review of European Administrative Law*, 10, 2017, pp. 47-73; L. Vickers, *Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace*, in *European Labour Law Journal*, vol. 8, 2017, pp. 232-257; E. Relano Pastor, *Religious Discrimination in the Workplace: Achbita and Bougnaoui*, in U. Belavusau, K. Henrard (eds.), *EU Antidiscrimination Law Beyond Gender*, Oxford-Portland, 2019, pp. 183-202.

[33] See E. Howard, *Religious Clothing and Symbols in Employment*, *European Network of*

According to some authors, when the employer rejects or dismisses an applicant due to the fact he or she wears a religious symbol and the employer directly refers to it or mentions the fact that customers do not feel at ease with it, this is direct discrimination. When the employer makes use of an internal rule prohibiting the wearing of head coverings or imposes uniform, this may be considered as indirect discrimination on the grounds of religion. The consequences of this legal qualification are not meaningless, as only in the first case can the measure not be justified, whereas in the second case it may be[34].

Because of this, in order to avoid religious claims in the workplace relating to the wearing of religious symbols, private companies have started to increasingly adopt alleged "neutral" policies concerning the employees' dress code that ban all religious, philosophical or political expression in the workplace.

Required by the Belgian Court of Cassation to decide whether a rule as such amounted to direct or indirect discrimination, the CJEU chose the second option. According to the Court, direct discrimination on the grounds of religion or belief exists only when the challenged measure targets *a single* religion or *a selection* of religions, but not when it targets *all* religions and beliefs. This is so despite the fact that the Directive speaks of discrimination on the grounds of religion and not on the grounds of a particular religion. Thus, the right comparison should not be with another person belonging to a different religion that does not require the wearing of religious symbols, but with a person not belonging to any religion at all.[35]

Even admitting that the entrepreneurial measure was neutral and thus challengeable only under an indirect discrimination scheme, the Court would have had to apply a strict proportionality test, as required by the Directive. On the contrary, the Court considered it a legitimate goal for a private enterprise to pursue a policy of neutrality in the workplace, provided this is consistently and systematically applied to those employees who come into contact with customers. The dismissal of the employee does not go beyond what is necessary in order to meet the aim of the employer, at least when it is not possible – taking into account «the inherent constraints to which the undertaking is subject and without taking on an additional burden» – to give the applicant a post not involving any visual contact with customers.

Legal Experts, European Commission, Brussels, 2017.

[34] See E. Bribosia, I. Chopin, I. Rorive, *Rapport de synthèse relatif aux signes d'appartenance religieuse dans quinze pays de l'Union européenne*, Migration Policy Group, 2004, 13.

[35] See E. Spaventa, *What is the Point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the Achbita Case*, 2017, eulawanalysis.blogspot.co.uk/2017/03/what-is-point-of-minimum-harmonization.html. 201; E. Brems, *Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace*, 2017, Blog of the IACL, AIDC: iacl-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/.

In sum, the Court endorsed the logic of the private/public sphere: freedom to manifest religion is admitted in private, but in the public sphere religious neutrality is preferred. The wearing of religious minority symbols is accepted within the strict limits of the closet principle[36].

Advocate General Kokotte has adopted an even narrower view. While recognising that in past case law the Court of Justice has adopted a wide understanding of direct discrimination, admitting it whenever the challenged measure is inseparably linked to the relevant discriminatory grounds at stake, the Advocate General considers that this approach cannot be applied to religion. For her, this wide reading of the direct discrimination notion is «concerned with individuals' immutable physical features or personal characteristics – such as gender, age or sexual orientation – rather than with modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering at issue here».

The freedom of choice argument, which had for years been the main argument used by the ECtHR to paralyze any religious claims in the employment field, clearly re-emerged here, coupled with an explicit reference to the fundamental right of the employer to conduct their business, as enshrined in art. 16 of the Charter, a right which includes the employer's decision to determine how and under which conditions the roles within the organization are organized and performed and in what forms the products and services are offered. The two rights at stake – on the one hand, the individual right not to be discriminated against for religion and through it the protection of human dignity and, on the other hand, the freedom to conduct a business – are placed on the same footing, despite the fact that in certain constitutional traditions the latter clearly has a minor role[37].

Even the application of the proportionality test, according to the indirect discrimination scheme, raises criticism: for the Advocate General not only is it perfectly legitimate for the employer to pursue a neutrality policy that applies to all types of religious dress or symbols, provided that this policy is genuinely pursued in a consistent and systematic manner, but the goal of having a neutral religious work environment justifies the necessity of a general rule forbidding the wearing of any religious symbols, no matter whether the job implies interaction with customers, a view that even the Court of Justice did not subscribe to.

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[36] See in general K. Alidadi, *From Front-office to Back-Office: Religious Dress Code Crossing the Public-Private Divide in the Workplace*, in S. Ferrari, S. Pastorelli (eds.), *Religion and the Public-Private Divide*, Aldershot, 2012, 159 ff.

[37] For instance, under the Italian Constitution, freedom to conduct business is protected by art. 41 but it can never be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. As noted by the CJEU, in the famous *P v. S.* decision (30.4.1996, Case C-13/94), human dignity is the legal value that is protected by antidiscrimination law. For a detailed and fierce criticism of the balancing test conducted by the CJEU in the *Achbita* decision, see J.H.H. Weiler, *'Je suis Achbita'*, in *European Journal of International Law*, vol. 28, 2017, 989 ff.

3. Special rights and derogatory treatments for religious groups in domestic legislation

The alleged limitations of antidiscrimination law as a remedy to give protection to the *external forum* of religious freedom can be usefully put into relation with those domestic approaches that do provide special legal arrangements to protect the external manifestations of religious groups.

In many European countries, secularism does not mean strict separatism of state authority from religious groups and indifference towards religious belief. Traditionally, state and religion relations in Europe are classified according to three main models: confessional, concordatarian and separatist[38]. The confessional model includes those states that recognize a given religion as the official religion of the state and consequently grant it a special position, also in terms of financing. However, this special protection implies the state's strict involvement in the religious institution to the extent that religious bodies are considered as quasi-public institutions. This is traditionally the case of Nordic countries and to a certain extent of England and Greece[39].

The Concordatarian model includes those countries that regulate their relations with the Catholic Church by means of a concordat, which is an international treaty. However, at least in Italy and Spain, a covenantal approach applies to other religious denominations as well[40]. State authorities

[38] This classification is used by S. Ferrari, *Stato, diritti e libertà religiosa: un modello europeo*, in *Il Regno*, fasc. 18, 1996. See also a comparative perspective S. Mancini, M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford, 2013; S. Ceccanti, *Una libertà comparata. Libertà religiosa, fondamentalismi e società multietniche*, Bologna, 2001; F. Margiotta Broglio, C. Mirabelli, F. Onida, *Religioni e sistemi giuridici. Introduzione al diritto ecclesiastico comparato*, Bologna, 1997.

[39] According to art. 13 of the Greek Constitution, Greek Orthodoxy is defined as the prevailing religion. See K.N. Kyriazopoulos, *The "Prevailing Religion" in Greece: Its Meaning and Implications*, in *Journal of Church and State*, vol. 43, n. 3, 2001, pp. 511 ff.

[40] According to the Italian Constitutional Court (decision 203/1989), secularism, which is part of the supreme principles of the Constitution not subject to constitutional amendments, does not mean indifference towards religious belief, provided this applies equally to all religious denominations. Indeed, the Italian Constitution does not refer only to the individual dimension of freedom of religion (art. 19 Cost.), which as such pertains to every person and group of persons, but also to religious groups and denominations, recognizing that the relationship between these groups and the public authorities has to be currently framed according to agreements. According to art. 7 of the Italian Constitution the state and the Catholic Church are each within their own order independent and sovereign. Their relationships are regulated by a concordat, an international treaty subscribed to in 1929 and substantially amended in 1984. Art. 8 of the Constitution sets the principle according to which the relationship between the state and religious denominations other than the Catholic Church are regulated on the basis of agreement. While the Concordat is an international treaty with a quasi-constitutional rank, agreements are signed by both parties (the Italian government and the religious representatives) and then need to be transformed into law by the Chambers.
In Spain, art. 16.3 of the Constitution states: «There shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and

may conclude agreements with religious denominations that are transformed into statute law.

Finally, separatist countries are a residual category that includes those national experiences which have neither an official religion of the state, nor a concordat. However, this does not necessarily mean they apply a strict separation in their relations: for instance, under art. 181 of the Belgian Constitution, the salaries and pensions of ministers of religion and representatives of organizations recognized by the law as providing moral assistance according to a non-denominational philosophical concept are paid by the state.

Despite these differences and setting aside the French case, which is characterized by a strict neutral and militant separatism[41], European countries share the common understanding that the religious sphere, lived both individually and collectively, is relevant for the development of human beings. Because of this, state authorities have an interest in coming to terms with the representatives of the religious denominations and granting them some form of public support[42]. A process of negotiation, whether formalized or informal[43], takes place between the public authority and the relevant religious denomination, which, in turn, needs to be institutionalized, in order to be a credible and representative interlocutor.

As already noted in some experiences, such as Italy and Spain, these negotiations lead to the conclusion of agreements covering different issues that include, for instance, the procedure to be followed for a religious body to have/acquire legal personality, provisions regarding the teaching of religious doctrine in public schools, provisions relating to religious assistance for prisoners or members of the army, provisions relating to the celebration of religious marriage in order for this act to produce legal effect in the state order and so on. Despite having a common scheme, each agreement contains provisions that take into consideration the specificities of each religious denomination.

These instruments are mainly meant to regulate the relations between public authorities and the relevant religious denomination. As a

shall consequently maintain appropriate cooperation with the Catholic Church and the other confessions». With a view to enforcing this, the legislator passed in 1980 the *Ley organica de libertad religiosa* whose art. 7 provides for a legal basis for state and church agreements. At present, Spain has concluded three agreements with the Jewish communities (Ley 25/1992), with the Seventh-day Adventist Church (Ley 24/1992) and with Islam communities (ley 26/1992).

[41] See M. d'Arienzo, *La laicità francese: "aperta", "positiva" o "impositiva"?*, in *Stato, Chiese e pluralismo confessionale*, dicembre 2011.

[42] See S. FERRARI, *op. cit.*, who speaks of "selective collaboration" (collaborazione selettiva) as a characteristic of the European model of state and religion relations; see also S. Ferrari, I.C. Iban, *Diritto e religione in Europa occidentale*, Bologna, 1996.

[43] For a comparative overview, see R. Puza, N. Due (eds.), *Religion and Law in Dialogue: Covenantal and Non-Covenantal Cooperation between Sate and Religion in Europe*, Leuven-Paris-Dudley, MA, 2006.

consequence, their provisions have mostly a vertical scope of application. However, the labour field is an exception since it may occur that these agreements do provide, for people who belong to the relevant religion, special rights in relation, for instance, to days off for celebrating religious festivals and/or in relation to the weekly day of collective worship.

With regard to Spain, we may refer to art. 12 of the ley 25/1992, the statute which codified the agreement between the Spanish government and the federation of Israelite communities. According to this, members of the Israelite communities may enjoy Saturday as their weekly day off and are granted a paid day off in order to celebrate religious festivals listed in the law, in substitution of those applicable to the generality of Spanish workers. However, this special treatment is subject to agreement between the worker and the employer. A similar provision is made by law 26/1991 with regard to Islamic communities and by Law 24/1992 with regard to the Seventh-day Adventist Church (art 12).

As for the Italian case, we may refer to Art. 14 of Law 101/1989 and art. 17 of Law 516/1988 which grant to employees that are members, respectively, of Jewish communities and of the Seventh-day Adventist Church the right not to work on Saturday, and for members of Jewish communities paid days off to celebrate religious festivals listed in the agreement. In both cases this right, which is enforceable *vis-à-vis* private companies as well, is made conditional to the working organization.

Under the described model, it is the political actors, rather than the judiciary, who strike the balance between religious freedom and other competing interests or rights, including business freedom, and who grant a favourable, structural, legal treatment to one religious group[44].

Being based on a logic of distinctiveness, this approach may contradict formal equality. Recognising special rights to members of one religious group, but not to others in a similar position – for instance the possibility only for Jews, but not for Muslims, to abstain from work on a day other than Sunday – represents a breach of equal treatment and amounts to a direct discrimination situation under the EU framework directive.

The possible breach of formal equality, as a result of the preferential treatment granted to one religious group, may not in principle be alleviated by making use of analogy. Since these are special rules, the judge could not apply them to members of religious groups who are not covered by the law provision, despite them being in a similar situation.

In this regard, it is worth referring to the Italian case in relation to the weekly day of rest. Art. 36.3 of the Italian Constitution states the right of the employee to a weekly day of rest, with no explicit reference to Sunday.

[44] However, in both cases within the limit of the employer's business organisation. For judicial application, see *infra* in the text and footnotes. Similar provisions are also set in Austrian law. The *Achatzi* CJEU case, referred to below in the text, originated from the application of such a rule.

At statutory level only[45], it is set that the worker has the right to a weekly day of rest each week, which, as a general rule, corresponds to Sunday. However, derogations were provided in relation to certain categories of work. On many occasions, the Constitutional Court has ruled that the constitutional right to a weekly day of rest – as set in art. 36.3 of the Italian Constitution – does not necessarily correspond to Sunday[46].

Scholars[47] and the judiciary[48] agree that the primary aim of the above-mentioned constitutional provision is to protect the wellbeing of employees and not to enhance their religious convictions. The statutory choice of having Sunday as the weekly day of rest does not involve any alleged preference towards the Catholic religion. Rather, it is meant to be a functional solution to meet the current majoritarian social needs of the Italian population.

Legislative decree 66/2003, which transposed into national legal order Dir. 93/104/EC and Dir. 2000/34/EC concerning certain aspects of the organisation of working time, introduced a new regulation. Art. 9 of this statute establishes that Sunday as the day of weekly rest is the rule, but the legislative decree provides a long list of occupations where the employer is authorised to rule differently. Moreover, in accordance with trade unions, the Minister of Labour may add other jobs to the list. Even an agreement between the employer and the local trade unions is enough to derogate the rule.

As a consequence, the rule that Sunday is the day of weekly rest is subject to many derogations. If the conditions set in the law are met, employers may require their employees to work on Sundays and they are not under any legal obligation to accommodate the religious convictions of the *individual* employee. This is so despite the fact that art. 6 of the Concordat between Italy and the Holy See provides that the Italian Republic recognises Sundays and other religious festivities agreed by both parties as festivity days. Probably due to the loose wording of the clause, which does not explicitly confer a right to individuals and does not mention private sector employment, this clause has never been invoked in disputes concerning Sunday as the day of weekly rest and has not played any role at the interpretative level either, although the Concordat ranks higher than ordinary law and it is considered as having para-constitutional legal value[49].

[45] Law n. 370/1934 and art. 2019, c. 1 of the Italian Civil Code
[46] Const. Court n. 76/1962; n. 105/1972, n. 16/1987.
[47] See P. Ichino, *L'orario di lavoro e i riposi, Artt. 2107-2109*, Milano, Giuffrè, 1987, p. 170 ff.; P. Bellocchi, *Pluralismo religioso, Discriminazioni ideologiche e diritto del lavoro*, *Argomenti di diritto del lavoro*, 2003, vol. 8, n. 1, 157-217
[48] Italian Court of Cassation n. 5923/1982; n. 6365/1985.
[49] For a judiciary application, see Court of Cassation, n. 3416/2016, where, in assessing the proportionality of a disciplining sanction inflicted upon a Catholic employee who refused to work a Sunday shift, the Court did not give substantial consideration to the constitutional argument of the right to religious freedom advanced by the claimant. The decision is annotated by L. Scarano, *Il potere datoriale di esigere il lavoro domenicale*

A different solution applies with regard to Jews and members of the Seventh-day Adventist Church, two religious denominations with which the Italian state has concluded agreements that grant the right not to work on Saturdays to their members. In both cases this right, which is enforceable against private companies as well, is made conditional to the working organization. This means that it is up to the employer to discharge the burden of proof and to adduce objective elements (for instance no available workers due to the small size of the enterprise) proving that it is too hard to satisfy the employee's religious request. Lacking this showing on the employer's part, the disciplining measure or the dismissal due to the worker refusal to work on Saturday are considered illegitimate [50].

The result of this normative framework is a patchwork protection, with some religious groups less protected than others or not protected at all (notably, those denominations that have not concluded any agreements with the Italian Republic, as is currently the case for Islam communities).

Moreover, unequal treatment may arise not only between religious denominations, but in relation to the manifestation of cultural rather than religious personal identity. For instance, relying on the agreement concluded between the Italian Government and the Jewish communities, the Italian Cassation Court considered that a Jewish ritual circumcision is compatible with Italian legal order, even if it is performed by a non-doctor. On the contrary, circumcision motivated by ethnic traditions is to be qualified as a crime, especially in cases where it is performed by a person without medical expertise[51].

Thus, the adoption of a positive approach towards religious freedom, through which the legislator grants protection of the special needs of some religious groups only, raises many problematic issues with the principle of equality. However, there may be legitimate grounds that, under an equal constitutional principle analysis, may justify these different levels of protection in relation to religion. For instance, in many European countries, public support is limited to those religious groups that are historically settled, or in consideration of the numbers of believers, or by reason of the compatibility of religious doctrine and practice with civic values.

e i limiti giurisprudenziali nella determinazione delle sanzioni, in *Riv. it. dir. lavoro*, 2016, 569 ff.; C. Gagliardi, *Il diritto al riposto domenicale nel rapporto di lavoro subordinato. Brevi riflessioni a margine della sentenza Corte di Cassazione, 22 febbraio 2016, n. 3416*, in *Diritto e religioni*, 2, 2016, 542 ff.

[50] See, for a practical application, Tribunal of Rome, decision 26.3.2002, which, in pursuance of art. 17 of law 516/1988, declared illegitimate a dismissal of a Seventh Day member who refused to work on Saturdays.

[51] See Court of Cassation n. 43646/2011. The Court of Cassation had to decide whether a practising Roman Catholic Nigerian mother committed a crime for having the child subjected to circumcision for cultural reasons by a person not authorised to practise medicine. On the issue, see A. Licastro, *La questione della liceità della circoncisione "rituale" tra tutela dell'identità religiosa del gruppo e salvaguardia del diritto individuale all'integrità fisica*, in *Stato, Chiese e pluralismo confessionale*, n. 22, 2019.

To give some examples, in Austria, relations between the state and religious communities are regulated according to a system based on public registration. Since the entry into force of the Religious Communities Act on 10 January 1998, religious associations may be granted legal personality upon application. Religious associations may also be recognised as a "religious society" and thus obtain legal personality under public law. This may occur either by law or by a ministerial decree enforcing the law of 1874 on the recognition of religious societies. Being recognised as a "religious society" allows religious communities to enjoy certain rights, such as the right to provide religious education in public schools, exemption from real estate tax for religious sites, and the possibility to levy church taxes for members of the religious group, which are deductible. In order to be granted the status of religious society under the 1874 Recognition Act several requirements must be met: the religious group has to have been registered as a religious community, according to the 1998 religious community act, for at least 20 years; a minimum number of adherents per thousand members of the Austrian population (at the moment, this mean about 16,000 members); the use of income and other assets for religious purposes, including charity activities; a positive attitude towards society and the state, and no illegal interference as regards the community's relationship with recognised or other religious societies[52].

In Spain, the 1980 *Ley Organica* on Freedom of Religion states that churches, religions and religious communities can acquire legal personality after enrolment in the Registry of Religious Entities (RRE). However, according to art. 7 of the above-mentioned statute, only those churches, religions and religious communities which are registered in the RRE and are known to be well-established in Spain in terms of their size and number of worshippers may enter into cooperation agreements with the state[53].

With regard to Italy, the opening of negotiations and the signing of the agreement with a relevant religious group, in pursuance of art. 8 of the Italian Constitution, is a discretionary decision that is left to the government and cannot be subject to judicial review. Moreover, even after the signing of the agreement, it may occur that Parliament does not ratify the intergovernmental agreement. The content of each agreement is meant to be different as the purpose of it is precisely for the state to grant the relevant religious denomination any treatment that is needed to protect or promote the specificity of that religious group[54]. The agreement grants a special status to the relevant religion, including public financing.

[52] For an overview of the Austrian legal framework; see R. Potz, *Covenantal and non-covenantal Cooperation of State and Religion in Austria*, in R. Puza, N. Doe (eds.), *op. cit.*, p. 11.

[53] For the Spanish case, see M. Rodríguez Blanco, *Religion and Law in Dialogue: the Covenantal and Non-covenantal cooperation of State and religions in Spanish Law*, in R. Puza, N. Doe (eds.), *op. cit.*, 197 ff.

[54] In this sense, see Constitutional Court decisions n. 235/1997 and n. 52/2016.

Nevertheless, the lack of such an agreement cannot justify a violation of the individual and collective dimension of religious freedom. For instance, in relation to the building of places of worship, the Constitutional Court quashed several statutes passed by Italian Regions which limited financial support for religious buildings to the Catholic Church and to those religious communities with an agreement with the state, under art. 8 of the Constitution. This legal discipline had the effect of excluding Islamic communities, which have not concluded an agreement with the state, from getting financial support in order to build mosques. However, the Constitutional Court has recognised that it is legitimate for the public authorities to limit financial contributions to those religious communities that have an organised and stable presence in the local territory[55].

Thus, differential treatment granted by the legislator to a certain religious denomination may under certain conditions survive even a strict scrutiny of the equality principle insofar as this measure is applied reasonably and proportionately, with regard to the specificity of the given religious group.

However, under EU antidiscrimination law, differential treatment based expressly on religion can hardly be justified. The logic of sameness, underpinned by antidiscrimination law, and the logic of difference, promoted at the domestic level, have come into conflict.

To what extent, then, can the two legal instruments be reconciled?

4. Reconciling the opposite?

4.1. The Achatzi case

The possible clash between the two legal approaches has already emerged in CJEU case law. In the *Achatzi* case, the Court of Justice was asked to consider, in the light of the EU Framework Directive and art. 21 of the Charter of Fundamental Rights, the discriminatory character of Austrian labour legislation, which defined Good Friday as a public holiday for the members of four small Christian minority churches (the Evangelical churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church)[56].

According to the provision, members of the four churches were entitled to a paid holiday or to an additional indemnity if they chose to work on that day. For members of other religious groups or non-believers, Good Friday was considered an ordinary day of work.

Achatzi, who was not a member of any of the four churches, requested additional pay from his employer for having worked on Good Friday. His employer – a private enterprise – having denied the benefit, Achatzi brought

[55] See Constitutional Court decisions n. 195/1993 and n. 63/2016.
[56] See CJEU, decision 22.1.2019, case C-193/17, *Cresco – Achatzi*.

an action against him, claiming that denial of the additional indemnity amounted to direct discrimination on the grounds of religion and/or belief.

The Court considered the national provision incompatible with the EU Framework Directive and as a consequence it recognised the employee's right to obtain the requested indemnity from the employer. At the same time, the Court invited the domestic legislator to adopt measures aimed at reinstating equal treatment.

A first issue the Court had to address was the argument advanced by the Polish government, according to which the Court of Justice lacked jurisdiction in the matter, given art. 17.1 of the TFEU.

The Court, as it had already done in the previous *Egenberger*[57] and *IQ*[58] cases, gave a narrow interpretation of the clause. Art. 17 of the TFEU merely expresses the neutrality of the Union in relation to the different ways in which member states organize their relations with churches and religious bodies, but it cannot be claimed as grounds for avoiding the judicial review of domestic provision for non-compliance with EU norms. According to the Court, «the national provisions at issue in the main proceedings do not seek to organize the relations between Member State and Churches, but seek only to give employees who are members of certain churches an additional public holiday to coincide with an important religious festival for those churches»[59].

It is not clear what the statement of the Court means exactly. It may be assumed the Court wanted to refer to situations where the state's legal order grants recognition to acts produced by the relevant church or religious group so that they could have public legal effect (for instance, marriage or the appointment of an individual as a religious minister). However, typical issues that are regulated by state-church agreements also include financial relations between church and state, including tax exemptions, which can fall within the scope of EU law[60]. Norms dealing with religious festival provisions, as in the *Achatzi* case, or dietary rules concerning, for instance animal slaughtering[61], are further examples of issues currently dealt with by

[57] CJEU, decision 17.4.2018, Case C-414/16, *Egenberger*.
[58] CJEU decision, 11.9.2018, Case C-68/17, *JQ*.
[59] See § 33, of the decision 22.1.2019, Case C-193/17, *Cresco – Achatzi*.
[60] See decision 27.6.2017, Case C-74/17, *Congregación de Escuelas Pías Provincia Betania* where the Court examined whether tax exemptions applied to a congregation belonging to the Catholic Church in Spain amounted to forbidden state aids, under art. 107 of the TFEU, without even questioning its jurisdiction in the light of art. 17 of the TFEU. Fiscal exemption for church bodies and activities, other than the economic one, are set in Art IV of the Agreement of 3 January 1979 between Spain and the Holy See.
[61] See decision 29.5.2018, case C-426/16, *Liga van Moskeeën en Islamitische organisaties provincie Antwerpen VZW and Others*. The Court was asked to consider the validity of art. 4.4 of Council Regulation n. 1099/2009 on the protection of animals at the time of killing in that the requirement – that animals may be slaughtered in accordance with special methods required by religious rites without being stunned only if such slaughter takes place in a slaughterhouse falling within the prescriptions of Regulation n. 853/2004 – is in breach of freedom of religion. This is according to art. 10 of the

such state-church agreements that may impinge upon EU norms. In light of this, it would be important for the CJEU to be more precise regarding the scope of application of art. 17 TFEU, also in light of the national identity provision set in art. 4.2 TEU[62].

As far as the merits of the case are concerned, the Court considered the employer's denial of the indemnity as direct discrimination on the grounds of religion and belief. Since the employer's discriminatory act arose because of the enforcement of a national legal provision, the Court considered whether this could be justified under art. 2.5 of the Framework Directive, according to which the Directive is «without prejudice to measures laid down by national law which, in a democratic society, are necessary [...] for the protection of the right and freedoms of others».

This clause, which is not reproduced in the race and ethnic directive, allows the judge to justify direct discrimination, provided that the differential treatment is caused by a legal provision, and not only by behaviour. It was meant to provide the legislator with a certain margin of appreciation since the pursuance of certain public aims may justify a differential legal treatment in relation to one of the protected factors of the Framework Directive. Age is a classic example: the legislator, with the aim of favouring the inclusion in the labour force of certain categories, may limit certain benefits or grant special treatment, assuming a given age as a parameter[63].

Thus far, the Court has interpreted very strictly the exception set in art. 2.5 of the Framework Directive and *Achatzi* confirmed this previous case-law. While admitting that Austrian legislation pursued an objective included among those listed in art. 2.5 of the Framework Directive, the Court considered the measure to exceed what is necessary for the protection of freedom of religion. In particular, the Court found that for those employees whose religious festivals do not coincide with any publicly recognised Austrian holidays and/or who are not granted work days off by law on the occasion of religious festivals, Austrian law provides only the imposition of a duty of care on the employer vis-à-vis their employees. This may allow employees to obtain, if they wish, the right to be absent from their work for the amount of time necessary to perform certain religious rules.

Thus, the inconsistency of Austrian legislation in granting protection with the same objective – namely to promote freedom of religion in its *forum externum* – was considered flawed under the proportionality test. Analogously, the Court considered as untenable the argument directed to

Charter, given the insufficient capacity in the Flemish Region to meet the annual demand for the ritual slaughter of unstunned animals in approved slaughterhouses on the occasion of the Feast of Sacrifice. The Court rejected the preliminary reference.

[62] This point is also stressed by P. Floris, *Organizzazioni di tendenza religiosa tra Direttiva europea, diritti nazionali e Corte di giustizia*, in *Stato, Chiese e pluralismo confessionale*, 12, 2019, 27 ff.

[63] CJEU, decision 19.7.2017, Case C-143/16, *Abercrombie & Fitch Italia*.

classify the challenged provision as a positive measure. According to the Court, positive action is to be considered as a derogation from the equal treatment principle. Because of this, a strict proportionality test applies. Since the Austrian legislator treated a similar situation in a very different manner, with some religious groups having the right to a paid day off or indemnity in the case of working on a religious festival day, and others having the right only to the employer's duty of care, such inconsistency in legal treatment did not allow the domestic provision to survive the review.

Thus, the Court was clearly unfavourable to «rules that provide in a blanket fashion advantages or disadvantages to categories of people identified by their religion»[64]. However, this is exactly the logic underpinned by several domestic legislations that, either unilaterally or by means of agreements with the relevant religious groups, do grant special legal treatment to certain religious groups only.

Certainly, the Austrian provision, insofar as it granted to members of the four religious groups the choice either to have Good Friday off or an additional indemnity for working that day could be considered a disincentive to exercise freedom of religion and an inappropriate way to pursue the very aim it sought to pursue, namely to protect religious freedom. The Advocate General stressed this point[65] and the Court indirectly touched on it when it emphasized that the norm applies irrespectively of the effective wish of the employee to take part in the religious festivity.

However, the Advocate General's opinion includes a more nuanced position towards domestic provisions that, like the Austrian legislation, favour the *forum externum* of the freedom of religion of groups, although on a selective basis. While substantially agreeing on the discriminatory character of the Austrian provision, the Advocate General seems to suggest that the result would be different if the Austrian legislation had provided members of certain religious groups only a right to an unpaid day off rather than a paid day off or an indemnity if they chose to work. In such a situation, the Advocate General suggests that either the choice of the comparator and/or the proportionality test could lead to a different conclusion from the finding of direct discrimination[66].

As already noted, the existence of direct discrimination implies a comparison between the situation of the alleged victim of discrimination and that of another person in a similar position, but for the possession of the protected discriminatory grounds.

In the *Achatzi* case, the Austrian government suggested that the claimant was not in a comparable position to that of the members of the four religious minorities, since for him Good Friday was not the most important

[64] See R. McCrea, *"You are all individuals!" The CJEU rules on special status for minority religious groups*, available at eulawanalysis.blogspot.com/2019/01/youre-all-individuals-cjeu-rules-on.html.
[65] Opinion of Advocate General Bobek Opinion at § 100
[66] See § 84 of the AG Bobek Opinion.

religious festival of the year. The Commission adopted a more nuanced position, according to which the comparison should be between the treatment received by the members of the four religious minorities and other employees for whom there is a "particular special" religious festival not coinciding with any other public holiday already recognised under national law. This would have probably led to the conclusion that the claimant was not in a similar situation to that of the members of the four religious groups, given that he was a non-believer. This approach would have meant recognising the specificity of the members of religious groups and their different position with regard to other non-believers or non-practising employees in enjoying days off for celebrating religious festivals, but admittedly it would not have addressed the question of the other religious groups or communities not covered by the legislative provision.

However, the Court decided differently and it seemed unwilling to recognise religious expression as being entitled to greater protection than non-religious expression[67]. Indeed, the Court emphasized that the Austrian provision did not make the granting of the public holiday on Good Friday conditional on the fact that the employee had to perform a particular religious duty that day, but only on the fact that the employee formally belonged to one of these churches. As a consequence, the Court said, «that employee remains free to choose, as he wishes, how to spend his time on that public holiday, and may, for example, use it for rest or leisure purposes»[68]. However, the Court did not suggest how the employer or the law could effectively control the genuine intention of the employee to participate in the religious festival without breaching his right to privacy.

The effect of the Court's decision was to downgrade the protection granted to some historical religious minorities in Austria. Following the *Achatzi* case, the Austrian legislator amended the challenged provision in that it now allows employees to claim one day a year as a "personal holiday", which can be used to celebrate religious festivals but does not have to be. This is not an additional paid holiday but is deducted from the employee's usual paid leave quota[69].

4.2. The Egenberger (and IR) case

As the *Achtazi* case has shown, the enforcement of antidiscrimination law on the grounds of religion and belief might come into conflict with domestic provisions dealing with state and religion relations. Bearing in mind the huge differences existing in this regard between member states' constitutional traditions and the fact that this is an aspect that can arguably be considered as a component of the national identity of a member state,

[67] This is the view of C. McCrea, *"You are all individuals!"*, cit.
[68] See § 46, decision 22.1.2019, case C-193/17, *Cresco – Achatzi*.
[69] See M. Pearson, *Religious Holidays for the Non-religious? Cresco Investigations v Achatzi*, in *Industrial Law Journal*, vol. 48, n. 3, 2019, pp. 478 ff.

according to art. 4.2 TEU[70], one may expect that the CJEU would adopt a deferential attitude in relation to relevant national domestic provisions. This deferential approach would also be justified in light of art. 17 of the TFEU, a provision inserted by the Lisbon Treaty which, as already mentioned, should be interpreted at least in the sense that the scale and intensity of the judicial review of domestic provisions for breaching EU law should take into consideration member states' specificities and legal traditions in promoting religious freedom.

However, thus far the Court of Justice has not shown any willingness to act in this way and, in doing so, it might raise conflicts with constitutional courts.

A concrete example where this possible clash is likely to emerge is represented by the enforcement of art. 4.2 of the Framework Directive, a provision which grants special treatment for churches and other public or private organisations whose ethos is based on religion or belief. According to art. 4.2, these organisations may treat persons differently on account of religion or belief where, by reason of the nature of the working activities or the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, with regard to the organization's ethos.

The provision refers twice to member states' constitutional traditions. First, the derogation only applies to those member states that either already had such a legal discipline at the date of the adoption of the Directive, or that will provide for future legislation, incorporating national practices existing at the date of the adoption of the Directive.

Second, art. 4.2 mentions the fact that when implementing this provision, member states' constitutional provisions and principles, as well as the general principles of community law, will be taken into account.

As a matter of fact, many national legal orders have adopted legislations and/or practices generated by case law that, with regard to the employment relationship, apply derogatory rules to working institutions which are based on a certain religious ethos.

By and large, at the European state level, we may recognise two different approaches[71]. According to the first, the breadth of derogation from the equal treatment rule that is granted to religious organizations must be related to the type of labour activity at stake: the more crucial the employee's working position is within the organization for externally spreading the relevant ethos, the wider becomes the discretionary power of the religious

[70] On this nexus see Advocate General Kokott in the Opinion delivered for case C-157/15, *Achbita*.

[71] On the two approaches, F. Rizzi, *Soffia il vento del cambiamento: sapremo costruire i mulini?* In *GenIus*, vol. 3, n. 2, 2016, p. 220, who refers to R. Fahlbeck, *Ora et Labora on the Freedom of Religion at the Work Place: A Stakeholder cum Balancing Factors Model*, in *International Journal of Comparative Labour Law and Industrial Relations*, vol. 20, 2004, pp. 20 ff.

organization in the disciplinary sanctioning of employees for breaching their duty of loyalty.

The second approach, which is called the organic approach, does not distinguish according to the position held by the employee within the organization as all employees, irrespective of the function they carry out, are required to follow the given religious ethos and behave consistently even in their private lives.

Under the first approach, we may briefly refer to the Spanish, Italian and British experiences. In Spain, the normative grounds for granting churches and religious communities the above-mentioned special treatment is art. 6 of the already referred to 1980 *Ley Organica de libertad religiosa*. The provision is articulated in an ambiguous way and leaves judges the final responsibility of striking the balance between the protection of religious freedom and other competing rights, especially non-discrimination. According to the Spanish Constitutional Tribunal (sent. 106/1996) religious group autonomy must prevail with regard to the rights of employees whenever the working position is of such importance that it directly brings into question the ethos of the religious organization. This typically applies in religious schools when the teaching position concerns religious matter[72].

In Italy, the granting of special powers to such organisations, allowing them to require employees to conform their private ways of life to the ethos of the relevant organization, was developed by case law.

In 1972, the Constitutional Court made a decision that is still regarded as an important point of reference in the field[73]. According to a provision set in the Concordat, the Catholic Church has the right to give its assent to the appointing of professors at the Sacro Cuore Catholic University. Cordero, a law professor at the Sacro Cuore university, was dismissed after the ecclesiastical authority withdrew its assent, following some Cordero writings that were considered as breaching Catholic doctrine. Asked to review the constitutional legitimacy of the above-mentioned Concordat provision, the Constitutional Court deemed the issue unfounded. According to the Court, pluralism in schooling and teaching is among the principles that the Italian Constitution has endorsed. In order to make it effective, schools which are directed by organizations grounded in a given way of thinking can select employees on account of their ideological beliefs and may require them to conduct a life in line with the ethos of the organization. The Constitutional Court did not distinguish on the grounds of the working position at stake and on its importance for promoting the ethos of the

[72] See Spanish Constitutional Tribunal, 12.6.1996, n. 106/1996. In the Spanish literature, see J. Rossell, *La no discriminación por motivos religiosos*, Ministerio de Trabajo y Asuntos Sociales, 2008, Madrid, 92 ff.; C. Odrizola Igual, *Relaciones de trabajo en el contexto de organizaciones ideológicas y religiosas: la Directiva 2000/78/CE del 27 de diciembre, sobre empleo y trabajo*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 6, 2004, 3 ff.

[73] See Italian Constitutional Court n. 195/1972.

relevant working organization. Moreover, the reasoning of the Court was not limited to the specific case of the Sacro Cuore University but referred to confessional schools in general.

In 1990, the legislator provided a legal basis that granted special rights to private organizations whose ethos is based on religion or beliefs. It was a very loose definition that covered not only religious, but also other non-profit organizations conducting activities of a political, cultural, or educational nature and it applied to trade unions as well. The provision granted a derogatory treatment with regard to the otherwise general discipline of the cessation of labour relations[74].

In 1994 the Cassation Court had to decide about the dismissal of a professor of physical education who was removed by a Catholic School after he was married in a civil ceremony. While acknowledging that the Italian Constitution purports ideological pluralism in schooling, in line with the Constitutional Court in the Cordero case, the Cassation Court states that the 1990 statutory provision must be narrowly construed and be enforced in the light of a proportionality principle since it provides a derogation from the general rules dealing with dismissal. As a result, only in relation to those occupational activities that are specifically directed to promote the relevant religious ethos may the organization legitimately require workers to conform their ways of life to the ethics of the religious groups. Teaching physical education cannot be interpreted as an activity which is strictly necessary to promote the religious ethos of a school. The transposition of directive 2000/78/EC, which substantially reproduced the directive text, seems to confirm the functional reading of the Cassation court[75].

In the UK, schedule 9 (3) of the Equality Act 2010 sets the principle according to which, when the employer is an organization with a religious ethos, it must be taken into account when assessing the proportionality of any work requirement.

The second approach we may find in the European states with regard to the legal treatment of working organizations based on a given religious ethos characterizes the German legal system. This is grounded in a very deferential approach, according to which it is essentially up to churches and religious communities to define "religious self-concepts" and these determinations are, to a certain extent, legally binding for state authorities. Referring to art. 137 of the Weimar German Constitution, a provision which

[74] See art. 4, L. 108/90.

[75] In Italian legal scholarship, the so-called functional approach is subject to criticism or at least it is submitted that it should be up to the given religious groups to determine whether a worker's position or behaviour is important in order to express and publicize the relevant ethos of the organization. See R. Santagata de Castro, *Organizzazioni di tendenza (dir. lav.)*, in *Treccani, Diritto on line*, 2017; F. Onida, *Il problema delle organizzazioni di tendenza nella direttiva 2000/78/CE attuativa dell'art. 13 del Trattato sull'Unione Europea*, in *Dir. eccl.*, 2001, pp. 905 ff.; G. Pera, *Le organizzazioni di tendenza nella legge sui licenziamenti*, in *Riv. it, dir. lav.*, 1991, I, 455.

is still applicable and under which «religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all», the Constitutional Tribunal limited the intensity of the judicial review in relation to the decisions of religious organizations, when they act as employer, with the aim of preserving their right to self-determination. Consistently with this approach, the judiciary applies only a plausibility standard of review and does not distinguish according to the position the employee has within the religious organization[76].

The ECtHR has already scrutinized cases originating from Germany which dealt with the balancing, on the one hand, of the right of an organization, whose ethos is based on a given religion, to require employees to conform their ways of life to the doctrine of the given religious organization and, on the other hand, the employee's right to respect for his or her private and family life. In *Obst*, the ECtHR stated that German judges did not violate art. 8 of the Convention[77]. Obst, who was the European director of public relations for the Church of Jesus Christ of Latter-Day Saints, was dismissed due to an extramarital affair. On the contrary, in *Schüth v. Germany*, the ECtHR found a violation of art. 8 of the Convention[78]. Schüth was a Roman Catholic parish and deanery musician, who was dismissed because of an extramarital affair.

The difference in the two cases seems to be based on a proportionality test, where the importance of the working position for the spreading of the doctrine of the relevant religious group plays a crucial role. This would confirm that also the ECtHR endorses a functional approach, although explicitly granting a wide margin of appreciation of the Convention to the states parties.

The CJEU has already had the chance to twice review the German approach towards the *Tendenzbetrieb*[79]. In the seminal *Egenberger* case[80], the CJEU was asked to answer a preliminary reference raised by the Federal Labour Court of Germany. The Protestant Agency for Diakonia and

[76] See I. Augsberg, *Taking Religion Seriously: On the Legal Relevance of Religious Self-Concepts*, in *Journal of Law, Religion & State*, 1, 2012, pp. 291 ff.; R. Santagata, *Discriminazioni nel luogo di lavoro e "fattore religioso": l'esperienza tedesca*, in *RIDL*, 1, 2011, 355 ff.

[77] See ECtHR, 23.9.2010, *Obst v. Germany* (n. 425/03).

[7878] See ECtHR, 23.9.2010, *Schüth v. Germany*, (n. 1620/03).

[79] After *Egenberger*, the Court of Justice decided with regard to the IR case (CJEU, 11.9.2018, Case C-68/17, IR), where it further implemented the necessary proportionality test elaborated in *Egenberger*. JQ was a doctor, covering a managerial role at IR, a Catholic hospital subject to the supervision of the Archbishop of Cologne. He was dismissed after he got married without his first marriage being religiously annulled. According to the Court, adherence to the Catholic notion of marriage – namely the sacred and indissoluble nature of religious marriage – does not appear to be necessary for the promotion of IR's ethos, bearing in mind the occupational activities carried out by JQ, namely the provision of medical advice and care in a hospital setting and the management of the internal medicine department which he headed (spec. 58 §).

[80] CJEU decision (GC), 17.4.2018, Case C-414/16, *Egenberger*.

Development opened a fixed-term position for the preparation of a legal report on the UN International Convention on the Elimination of All Forms of Racial Discriminations. In the job offer description, it was clearly stated that previous affiliation to one of the German Protestant Churches was a precondition for the job. Egenberger, a non-believer, brought an action claiming religious discrimination: according to her, she was not selected due to her non-believer status.

The decision raised several issues, including the issue of the horizontal direct effect of directive provisions and general principles of EU law[81]. For the purposes of our work, it is important to highlight that the CJEU made it clear that the right to self-determination of churches and religious groups and the reference to art. 17 TFUE clause cannot be interpreted as limiting, in any way, the capacity of a judge to review the determinations of an ethos-based organization, taken in pursuance of art. 4.2 of 2000/78/EC directive. It would be a breach of the right to an effective remedy to conclude otherwise[82].

Having reaffirmed the full power of the judge to review compliance with art. 4.2 of the 2000/78/EC directive of these organizations' decisions, the Court enters into the merits of the case and it highlights that in order to consider legitimate a difference of treatment on the grounds of religion or belief, there must be a direct link between the occupational requirement and the type of activity at stake. Thus, it is legitimate for a church or religious organization to stipulate an occupational requirement that distinguishes on the grounds of religion or belief whenever the work activity involves, for example, taking part in the determination of the ethos of the church or religious organization or it contributes to the mission of externally proclaiming a given worldview or, again, it ensures a credible presentation of the church or religious organization to the outside world.

Thus, in the balancing test between, on the one hand, the right of churches and religious organizations to self-determination and the right of the employee to a private life, the Court adopts a functional approach, according to which the more the worker's position is important for the spreading of the doctrine of the relevant church or religious group, the greater the discretion granted to churches and religious groups. This seems consistent with the majority of the constitutional traditions we have illustrated above, with ECtHR case law and with the letter of art. 4.2 which requires that consideration be given in the balancing test to the nature of the labour activities or the context in which they are carried out.

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[81] See L. Lourenço, *Religion, discrimination and the EU general principles' gospel: Egenberger*, in *Common Market Law Review*, vol. 56, 2019, p. 193; A. Colombi Ciacchi, *The Direct Horizontal Effect of EU Fundamental Rights*, in *European Constitutional Law Rev.*, vol. 15, 2019, pp. 294 ff.; M.L. Gennusa, *Libertà religiosa e principio di non discriminazione nel sistema costituzionale dell'Unione europea*, in *Stato, Chiese e pluralismo confessionale*, 2, 2019.

[82] CJEU decision (GC), 17.4.2018, Case C-414/16, *Egenberger*, § 57-58.

However, the Court goes a step further, which, in our view, is more controversial. Art. 4.2 of Directive 2000/78/EC states that a difference of treatment which is based on religion or belief does not amount to (direct) discrimination if such a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement. It does not hold that the requirement must be proportionate[83]. Nevertheless, the Court considered that the directive provision must be read in conformity with EU general principles, among which proportionality is included. While this finding is acceptable, what is more controversial is the intensity of the proportionality test applied by the Court. This is a strict proportionality test: «the church or organization imposing the requirement is obliged to show, in the light of the factual circumstances of the case, that the supposed risk of causing harm to its ethos or to its right of autonomy is *probable and substantial*, so that *imposing such a requirement is indeed necessary*».

The burden of proof is entirely on the part of the religious organization that must show in objective terms that the working requirement is strictly necessary to avoid the probable – not merely possible – and substantial risk of causing harm to the relevant ethos of the religious organization.

It is a very high threshold to be met. A proportionality test based on reasonableness, rather than on necessity, would be more consistent and respectful of both, on the one hand, art. 17 TFEU clause and the self-determination right of churches and religious groups and, on the other hand, the different constitutional traditions of member states, such as the German one, whose importance is highlighted twice in art. 4.2 2000/78/EC Directive.

The position taken by the Court of Justice is nevertheless in line with the ECtHR. In *Martinez v. Spain*, while acknowledging that states parties enjoy a wide margin of appreciation (see § 122), the ECtHR adopted a proportionality test that echoes that used by the CJEU in the *Egemberger* decision[84].

[83] See on this point R. McCrea, *Salvation outside the church? The CJEU rules on religious discrimination in employment*, EU Law Analysis, 18 April 2018, available at eulawanalysis.blogspot.com/2018/09/religious-discrimination-at-work-can.html. In Italian legal scholarship, Pacillo has argued that despite proportionality not being mentioned in art. 4.2 of 2000/78/EC Directive, it could be applied as a general principle of EU Law. See V. Pacillo, *Contributo allo studio del diritto di libertà religiosa nel rapporto di lavoro subordinato*, Milano, 2003, pp. 294-295.

[84] See ECtHR, 12.6.2014, *Fernández Martínez v. Spain*, concerning the right to private and family life under art. 8 of the European Convention of a secondary school teacher of the Catholic religion, whose labour contract was not renewed after publicity was given to his personal status as a married priest. Because of this, the ecclesiastical authorities withdrew their consent to the appointment, which in Spain is necessary in order to be employed by the state authority as a teacher of the Catholic religion. The Grand Chamber considered that Spanish Constitutional Tribunal did not err in concluding against the claimant. However, the ECtHR, at 131, highlights as follows: «a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to

The possible conflict between the *Egenberger* case and German Constitutional Court case law may soon arise. After the Federal Labour court implemented the *Egemberger* decision of the CJEU, stating in favour of the claimant, the *Diakonie*, which is part of the Protestant Church, lodged a constitutional complaint. It argued that the Federal Labour Court, by its decision, limited the autonomy of religious organizations, as guaranteed by German constitutional law. According to the complaint, the CJEU did not properly assess German constitutional law and it acted beyond its competences[85]. It is also worth highlighting that in its famous *Lissabon Urteil* the German Constitutional Court has clearly stated that the EU integration process cannot impinge upon certain powers that must be left to member states in order to allow them to exercise their democratic actions. Among these, the Constitutional Court included dealing with the profession of faith and ideology[86].

respect for their private or family life compatible with Article 8 of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake».

[85] See for a short factual report *European Equality Law Review*, 2, 2019, 102-103. For an overview of the German legal scholarship reactions after *Egenberger*, see M. van den Brink, *Is Egenberger next?*, in *VerfBlog*, 2020/5/15, who argues a possible reply by the German constitutional Court, verfassungsblog.de/is-egenberger-next/, DOI: 10.17176/20200516-013207-0. See also H.M. Heinig, *Why Egenberger Could Be Next*, in *VerfBlog*, 2020/5/19, verfassungsblog.de/why-egenberger-could-be-next/, DOI: 10.17176/20200520-013153-0, who argues that the CJEU lacks dogmatic subtlety and sensitivity with regard to religion and cultural policy and claims for the intervention of supreme or constitutional courts. In the author's view, «they can enter into dialogue with the CJEU and make it clear that a certain sense of religion and its manifold forms of inculturation is necessary in order to avoid a superunitarization of the Member States' religion law systems and at the same time to keep European institutions capable of acting in the long term on the normative basis of equal freedom».

[86] See BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 -, paras. 249, «*European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way* that *not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions.* [...] Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution. *These important areas also include cultural issues such as* the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and *the dealing with the profession of faith or ideology*» (italics added by author). The full text of the English translation of the Constitutional

5. Concluding remarks

Antidiscrimination law provides for instruments that allow for the recognition of the *forum externum* of religious freedom but their effectiveness relies on judicial enforcement which is keen to consider eemployment and occupation as «key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential»[87].

As an alternative, the protection of the positive tenet of religious freedom may be grounded at the domestic level, especially in those constitutional traditions that conceive of the relations between state and religion not in terms of strict separation but rather of institutional cooperation and that, although on a selective basis, grant to members of some religious group special protection of their religious needs. While it is true that this solution may result in differentiation on the grounds of religion that could disadvantage more recently settled religious groups, both domestic Constitutional Courts and the ECtHR seem to have the sensitivity to avoid discriminatory practices.

Thus far, CJEU case law in the field of religion and employment is disappointing.

On the one hand, the Luxembourg Court seems unwilling to strategically enforce indirect discrimination as an instrument to effectively grant religious minorities full participation in social life, without at the same time requiring them to renounce a part of their identity.

On the other hand, despite art. 17 TFEU, the national identity clause and other references contained in the Framework Directive with respect to the specificities of national legal orders regarding state and religion relations[88], the Court has not shown any deferential attitude in dealing with the review of domestic norms or practices in the field.

The result has been a neutralization of religion in the workplace as if this were the only way to grant equal treatment to all forms of religion and beliefs[89]. However, this is not the approach towards religious freedom that is enforced in all the EU countries. In order to avoid possible clashes of constitutional intensity, it is advisable that the Court of Justice take a

Court decision is available at www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html

[87] See recital 9 of the Framework Directive 2000/78/EC.

[88] This is the case of art. 4.2 with regard to religious ethos organisations and art. 2.5 according to which «this Directive shall be without prejudice to measures laid down by national law which, 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» that could be considered as a safeguard for domestic provisions protecting freedom of religion at work.

[89] See A. Hambler, *Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from Achbita and Bougnaoui*, in *Industrial L. Journal*, vol. 47, n. 1, 2018, 149 ff.

different stance and show more empathy towards religious claims at work. For instance, as suggested in the literature[90], the Court might develop, on its own, a rule imposing a duty for employers to reasonably accommodate the religious claims of their workforce, despite the fact that a provision as such is lacking in the EU Framework Directive. In doing so, the CJEU would emulate their North American counterparts. The reasonable accommodation duty has the advantage of applying to all religions and beliefs, at the same time leaving the two parties room for an adaptation of the rule to practical situations. Of course, in order to work, it needs to be judicially enforced consistently with a view to effectively protecting a fundamental right of primary importance, such as religious freedom.

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[90] See K. Alidadi, *op. cit.*

DPCE online
ISSN: 2037-6677