ISSN: 1885-298X

Anuario de Acción Humanitaria y Derechos Humanos

Yearbook on Humanitarian Action and Human Rights

2011

Edición especial / Special edition

Deusto
Universidad de Deusto
University of Deusto

Anuario de Acción Humanitaria y Derechos Humanos

Yearbook on Humanitarian Action and Human Rights

2011

N.º 8
Edición especial / Special issue

Universidad de Deusto - Instituto de Derechos Humanos Pedro Arrupe
University of Deusto - Pedro Arrupe Institute of Human Rights
2011

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ISSN: 1885-298X
Depósito legal: BI-1984-06

Impreso en España/Printed in Spain

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Prólogo

La gestión democrática de la diversidad religiosa se ha convertido en los últimos años en uno de los ámbitos recurrentes de debate sobre derechos humanos en sociedades desarrolladas. Frente a discursos y profecías ya periclitadas que vaticinaban la progresiva (y definitiva) desaparición del factor religioso del campo de la relevancia pública, nos encontramos hoy en día con contextos en los que el elemento religioso adquiere un innegable protagonismo en los debates sociales y políticos. Las religiones, así como las convicciones profundas de orden moral o espiritual en sus más variadas formas y manifestaciones, constituyen no ya el objeto de un derecho humano fundamental, sino elementos de gran valor identitario que condicionan la interpretación del resto de los derechos, así como del uso que deba darse a los distintos espacios públicos.

Si bien no todos los ciudadanos experimentan el hecho religioso, o no lo hacen con la misma intensidad ni de la misma manera, la realidad es que varios de los debates más candentes que afectan al diseño del espacio público en las sociedades europeas tienen que ver con el tratamiento de hechos religiosos diferenciados que en muchas ocasiones se imbrican inevitablemente con diferencias culturales más profundas. Basta recordar en este sentido los todavía recurrentes debates sobre la posible prohibición de vestimentas teóricamente fundamentadas en filiaciones religiosas, los conflictos derivados de la petición de apertura de lugares de culto que contrastan con la experiencia histórica del país respectivo, o las diferencias en torno a la presencia de la religión en el sistema educativo, sea en cuanto a la transmisión de enseñanzas o a la mera exhibición de símbolos religiosos, como nos recuerda la controvertida sentencia reciente del Tribunal Europeo de Derechos Humanos en el caso Lautsi contra Italia.

Por todo ello, el debate sobre la relación entre una diversidad religiosa inevitablemente creciente y una sociedad fundada sobre los derechos humanos es no solo recurrente, sino también pertinente. En algunas de nuestras sociedades, la pluralidad religiosa era percibida como un fenómeno ajeno o limitado a determinados sectores claramente identificados. Los debates tradicionales en este campo se sustentaban sobre la dicotomía entre visiones religiosas o confesionales y visiones arreligiosas o incluso antirreligiosas. Hoy día, sin embargo, el proceso de pluralización social es imparable, y ello afecta o se expresa en buena medida en las creencias y en las prácticas de índole espiritual de los ciudadanos y de los grupos en los que éstos se integran. La aplicación «nacionalizada» de los derechos humanos en cada país se enfrenta así ante un reto relativamente reciente, al menos en cuanto a su expresividad pública, que no es otro que el de la necesidad de gestionar unos derechos universales a través de ejercicios variados y respetuosos a su vez con las diferentes identidades que conviven en la sociedad. No cabe duda a este respecto que procesos sociales desarrollados en las últimas décadas, como la secularización o los flujos de población hacia sociedades europeas, han ayudado a elevar la importancia de estos debates, aun sin ser la única causa de los mismos. Siendo como son los temas afectados, extraordinariamente sensibles, no debe sorprender que en ocasiones los debates sean acalorados o que las soluciones propuestas resulten drásticas, aparente-

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ISSN: 1885 - 298X, 2011, Bilbao, págs. 07-08

mente más propias de épocas pasadas que de concepciones inclusivas y abiertas de la democracia. No por ello, el debate y la reflexión dejan de ser necesarios. Al contrario, las instituciones públicas en particular y la sociedad en general necesita de nuevas pautas y discursos que le permitan enfocar la convivencia en la pluralidad, también religiosa, desde claves de inclusión y pluralidad, a través de un ejercicio constante e imperfecto de acomodos recíprocos y diálogos permanentes, en los que la participación de los distintos grupos implicados deviene fundamental.

El Instituto de Derechos Humanos de la Universidad de Deusto lleva tiempo centrando parte de su labor investigadora y difusora sobre estos debates. Varios proyectos de investigación, así como publicaciones, seminarios o conferencias realizados en los últimos años han tenido como eje temático el de los derechos en un marco democrático de gestión de la diversidad religiosa, con un enfoque preferente desde las comunidades religiosas en situación minoritaria. En este contexto, deben destacarse dos iniciativas recientes que sirven para nutrir el presente número especial del Anuario de Acción Humanitaria y Derechos Humanos. Por un lado, el pasado mes de febrero de 2011 se celebró en el Instituto un seminario internacional bajo el título *Religious diversity and public policies. Implications of Religious Diversity for Public Policies from a Human Rights Perspective. Accommodation of rights at the subnational level*, y que contó con el apoyo de la Red de excelencia europea IMISCOE (*International Migration, Integration and Social Cohesion in Europe*) y de la Dirección de Derechos Humanos del Gobierno Vasco. Dicho seminario se enmarcaba a su vez en el proyecto de investigación «La diversidad religiosa en el País Vasco. Nuevos retos sociales y culturales para las políticas públicas», financiado por el Departamento de Educación, Universidades e Investigación del Gobierno Vasco, así como del Proyecto Consolider-Ingenio 2010 «Huri-Age, El tiempo de los Derechos», financiado por el Ministerio de Ciencia e Innovación. Por otro lado, el propio Instituto organizó en septiembre de 2011 un segundo seminario internacional, esta vez en Varsovia (Polonia), bajo el título *Religious diversity: Accommodation for Social Cohesion*, en el marco de la VIII Conferencia Anual de la mencionada red europea IMISCOE. El presente número especial recoge en gran medida las principales contribuciones presentadas en el marco de ambos seminarios y abre un nuevo espacio para la reflexión y el contraste de experiencias diferentes pero complementarias. La vocación pluridisciplinar de este Instituto de Derechos Humanos y de la investigación que desarrolla se plasma en la concurrencia de métodos y enfoques científicos diferenciados en estas páginas. Una buena parte de las aportaciones trenzan su discurso sobre análisis jurídicos complementarios entre sí, a lo que se suman reflexiones y otros resultados de investigación empírica que provienen fundamentalmente del campo de las Ciencias Sociales y Políticas. El resultado global es el de un nuevo aporte científico en la materia que pretende, por una parte, diseminar en lengua inglesa algunos de los trabajos ya realizados en la materia y, por otra parte, alumbrar el camino a nuevos proyectos y propuestas de investigación interdisciplinar. Se trata en todo caso de fenómenos o problemas que desbordan en potencia las estrechas fronteras de los Estados y que deberán abordarse desde una perspectiva, cuanto menos, europea, buscando nuevas lecturas de los derechos que nos permitan conseguir mayores cotas de integración en el continente y articular espacios de convivencia en un contexto de creciente y definitiva pluralidad, también religiosa.

Foreword

In recent years, democratic management of religious diversity has become a recurring topic in human rights debate in developed societies. As opposed to the discourse and prophecies now in decline that once predicted the gradual (and permanent) disappearance of the religious factor as a publicly relevant topic, today we are facing contexts in which the religious element acquires an undeniably leading role in social and political debates. Religions, as well as deep moral or spiritual convictions in their most varied forms and manifestations, are no longer the object of a fundamental human right. These have become identifying elements that determine interpretation of the rest of the rights, as well as the use that should be given to different public spaces.

Not all citizens experience the religious fact or live it as intensely or in the same manner. However, several of the most heated debates that affect how public space in society is designed are related to the manner in which differentiated religious facts are dealt with and these often cannot be separated from deeper cultural differences. We need only recall the debate still recurring at present concerning the ban on clothing theoretically based on religious affiliations or the conflicts arising from requests to open places of worship which are different from the history of the country concerned. Other cases in point are the differences of opinion about including religion in the school system, as we are reminded by the recent controversial ruling from the European Court of Human Rights in Lautsi vs Italy.

For all of these reasons, the debate on the relationship between the inevitable increase of religious diversity and a society based on human rights is not only a recurring theme but also relevant. In some of our societies, religious pluralism was thought to be alien to us or limited to certain clearly identified sectors. Traditional debate in this field was based on the dichotomy between religious or confessional views and irreligious and even antireligious views. However, at present, there is no stopping social pluralisation, and its influence and expression is shown to a great extent in the beliefs and spiritual practices of citizens and the groups that make them up. "Nationalised" application of human rights in each country thus faces a relatively recent challenge, at least in the sense of its public expression. This can basically be defined as the need to manage some universal rights though practice that is both varied and respectful with the different identities that live together in society. There is no doubt that recent social processes such as secularisation or the population flows towards Europe have helped to make these debates more important while not being the sole cause that triggered them. It is no surprise that these extremely sensitive subjects sometimes lead to heated debate or that the solutions proposed seem drastic, often seen as more typical of the past than of the inclusive open ideas of democracies. However, this does mean that debate and reflection are unnecessary. Quite the opposite, public institutions in particular and society in general need new guidelines and discourse that will enable them to focus coexistence on pluralism, which is also applicable to religion. This should be interpreted from the perspective of inclusion and pluralism through the constant and imperfect practice of reciprocal accommodation and permanent dialogue. Par-

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Yearbook on Humanitarian Action and Human Rights
ISSN: 1885 - 298X, 2011, Bilbao, págs. 09-10

ticipation of the different groups involved is essential in this process.

For some time now, the Human Rights Institute at the University of Deusto has centred part of its research and dissemination activities on this debate. In the last several years, different research projects, as well as publications, seminars or lectures have examined rights within a democratic framework of managing religious diversity. The preferential approach has been from minority religious communities. Two recent initiatives have especially contributed to this special issue of the Yearbook of Humanitarian Action and Human Rights. In February 2011, the Institute held an international seminar titled: *Religious diversity and public policies. Implications of Religious Diversity for Public Policies from a Human Rights Perspective. Accommodation of rights at the subnational level*, with the support of MISCOE (*International Migration, Integration and Social Cohesion in Europe*) and the Basque Government Directorate on Human Rights. The seminar was part of the research project "Religious diversity in the Basque Country. New social and cultural challenges for public policies", financed by the Department of Education, Universities and Research of the Basque Government, and the project: Consolider-Ingenio 2010 "Huri-Age, The Time of Rights", financed by the Ministry of Science and Innovation. The Institute organised a second international seminar in September 2011, which was held in Warsaw, Poland and was titled: *Religious diversity:*

Accommodation for Social Cohesion, within the framework of the 8th Annual IMISCOE Conference. This special issue includes the main contributions presented at both seminars and opens up a new space for reflection and contrast of different yet complementary experiences. The essence of the pluridisciplinary commitment of this Human Rights Institute and the research it carries out are captured in the variety of scientific methods and approaches included in this special issue. A great many of the contributions are intertwined with legal analyses which complement each other. These are added to reflections and other empirical research results that mainly come from the field of Social and Political Sciences. The overall result is a new scientific contribution to the subject which looks to share some of the completed works in English and to open up the path for new interdisciplinary research proposals and projects. The topics or problems examined potentially go beyond the narrow boundaries of States and should be tackled from a European perspective at least. Emphasis should be placed on searching for new interpretations of rights that enable us to achieve greater integration on the continent and coordinate shared spaces within a context of increasing permanent pluralism, which must necessarily be religious as well.

Estudios
Articles

Religious Diversity: accomodation for Social Cohesion. Gaps in the legal protection of religious diversity: generic versus specific protection instruments

Eduardo J. Ruiz Vieytez*

Abstract

The legal protection of religious diversity in plural societies is mainly supported by the human right to freedom of religion and belief, which is widely recognized under the international human rights law. However, interpretations of this law are far from univocal when it comes to managing the situation of persons whose religious beliefs are a minority. The so-called harmonisation practices are techniques to spread the content and exercise of this right. Similarly, the so-called Rights of minorities (as is the case of religious ones) also provide a protection framework, the scope of which has not yet been clearly defined. The current diversity of European societies and their commitment to protect the diversity and minorities lead us to seek a more focused and effective framework of protection, choosing between rights and generic or specific instruments.

Key words: Religious diversity, harmonisation practices, minorities, social cohesion.

Resumen

La protección jurídica de la diversidad religiosa en sociedades plurales se vertebra principalmente sobre el derecho humano a la libertad de religión y creencias, ampliamente reconocido en el marco del Derecho internacional de los derechos humanos. Sin embargo, las interpretaciones de este derecho distan de ser unívocas cuando se trata de gestionar la situación de personas cuyas creencias religiosas son minoritarias. Las llamadas prácticas de armonización constituyen técnicas destinadas a pluralizar el contenido y el ejercicio de este derecho. Paralelamente, el denominado Derecho de las minorías (en su caso, religiosas) ofrece también un marco de protección cuyo alcance no ha sido aún nítidamente definido. La pluralidad actual de las sociedades europeas y su compromiso de proteger la diversidad y a las minorías obligan a buscar un marco más certero y eficaz de protección, optando entre derechos e instrumentos genéricos o específicos.

Palabras clave: Diversidad religiosa, prácticas de armonización, minorías, cohesión social.

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ISSN: 1885 - 298X, 2011, Bilbao, págs. 13-26

1. The context of religious diversity and the need for legal regulation

For some European countries religious diversity is almost a new experience. Even if they have always experienced a low degree of religious plurality, recent immigration and globalization processes have dramatically increased the real diversity of these societies in this respect. This is the case of the Basque society (as well as of the Spanish society), a formerly strongly homogeneous Catholic society which today hosts religious communities of over 30 different denominations.

Two phenomena have promoted the increase in religious plurality in recent decades. On the one hand, the secularization process, both in terms of the separation of Church and State and the decrease of practices and beliefs[1]; on the other hand, international migration movements, which affect religious plurality in two ways. First, they bring about an increase in the existing religious communities with the arrival of immigrants sharing their beliefs with already established communities. Secondly, they help to "import" new minority confessions, religions from the immigrants' places of origin that were previously inexistent in the host society.

Despite the experience of the intense secularization process European societies have gone through, the religious fact has not disappeared for the sake of modernity; on the contrary, it has burst into the public debate. This "resurrection" of the religious fact occurs, indeed, in much more plural circumstances, with a wider range of religions, which, in a way, operate in a kind of globalized market. All these changes and alterations have produced a much more complex scene as regards relations between religion and identity, challenging our reading and enjoyment of human rights.

Religion is a complex phenomenon in itself and this obviously affects its legal regulation and the design of public policies corresponding to it. Both Law and Politics have great difficulty when having to regulate or plan an element like the religious one, which is closely linked to individual and collective identity. In this paper we will try to demonstrate that legal responses to religious diversity are still far from being clear and secure, in particular from an international human rights perspective.

In addition, creating a generally accepted and valid definition of religion, one that is adjustable to any phenomena existing in our societies, is also a delicate matter. It is equally complex to trace the map of religious communities or groups and the relations that may be established among them depending on the dogmas or the organization they share. Added to this, within the current context there is also a growing complexity of identities as a result of syncretistic trends, the fusion of traditions or the emergence of new spiritual movements[2]. Today's result is probably much more plural and diversified than ever before, and this causes great problems when it comes to defining which experiences or groups can be regarded as religious or when their members are exercising their own freedom of religion. Furthermore, it is also necessary to progressively broaden the proper concept of religion or belief in order to include new phenomena and expressions that do not coincide with traditional great religious facts[3]. All this significantly complicates the role to be played by Law, which partially consists, as in any other field of social life, of offering certain legal security.

However, Law is obliged to set boundaries to concepts, to limit the assumptions of fact and also to clarify, as accurately as possible, the content, entitlement and exercising of rights. And religion is and must continue to be an object of legal regulation. The fundamental reason for this is its close relationship with human rights, and with the interpretation of its content and exercise. Indeed, religion not only constitutes a right as such, freedom of religion, but it also affects, conditions or is related to the content of other rights protected by the legal system of any democratic country.

Finally, it would be contradictory if democratic and liberal societies, based on pluralism of opinions of any kind, nevertheless intended to create a homogenous public space within the scope

[1] Esteban, Valeriano (2007): "La secularización en entredicho", in *El fenómeno religioso. Presencia de la religión y la religiosidad en las sociedades avanzadas*, Centro de Estudios Andaluces, Sevilla, p. 311.

[2] We may also consider the new phenomena of "believing without belonging" and "belonging without believing" pointed out by Grace Davie and Danièle Hervieu-Léger: Davie, Grace (2000): *Religion in Modern Europe: A Memory mutates*, Oxford University Press, Oxford; Hervieu-Léger, Danièle (1993): *La religion pour mémoire*, Éditions du Cerf, Paris.

[3] Human Rights Committee, General Comment number 22, *The right to freedom of thought, conscience and religion (article 18), 30 July 1993*: Doc. CCPR/C/21/Rev.1/Add.4, paragraph 2.

of the transcendental visions of life. Quite the opposite, what has to be regulated and arranged by the public apparatus is the plurality of such visions. Given that freedom of conscience is a basic value of democracy, we must admit, first of all, that religious pluralism is the normal and healthy condition of a democratic and free society[4]. Therefore, the public expression of religion must be the object of attention for any political community. Leaving religious facts to the private sphere is neither convenient nor feasible from the point of view of public administration, because religion participates in both the private and the public spheres simultaneously, bringing claims, needs and implications to the public space and resources[5]. The aim of Law cannot be fighting this pluralism, but regulating it in the most successful and enriching way possible. The point is whether the current legal system is validly drafted in order to do so in a fair and comprehensive way.

2. Legal instruments for managing religious diversity from a human rights perspective: Reasonable accommodation, non-discrimination and minority protection: an unsolved puzzle

Freedom of religion may be considered one of the first human rights to be conceived and developed in international legal regulations. The origin of its success is related to the division undergone in Western Europe resulting from the Protestant Reformation[6]. In the 20th century, with the appearance of Human Rights International Law, freedom of religion was universally recognized. The Universal Declaration of Human Rights, approved in 1948, refers to religion in Article 2 as one of the elements that prohibits any distinction in recognizing the ownership of the rights and freedoms proclaimed in the Declaration. More specifically, Article 18 of the Declaration acknowledges that everyone has the right to freedom of thought, conscience and religion, including "freedom to change his religion or belief, and freedom, either alone or in community and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

Very similar provisions were included in the International Covenant of Civil and Political Rights (hereinafter ICCPR) of 1966, as well as the European Convention on Human Rights (hereinafter ECHR) of 1950. In the latter, Article 9 recognizes everyone's "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 other and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance." And the International Covenant on Economic, Social and Cultural Rights, apart from the non-discrimination clause, also states the right to education in Article 13, including the freedom for parents to choose the religious or moral education that fits with their own beliefs for their children, within the framework of the state educational system.

In this ranking the Declaration of the United Nations General Assembly on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed on 25 November 1981 can also be highlighted; as well as several documents approved by the Parliamentary Assembly of the Council of Europe, such as Recommendation 1086 (1988) on the situation of the Churches and freedom of religion in Eastern Europe, which includes a list of faculties derived from freedom of religion. It is also worth mentioning Recommendation 1202 (1993) on religious tolerance in a democratic society that asks states for flexibility so as to accommodate the different religious practices, in order to build a truly democratic society. Finally, it is also worth referring to Recommendation 1396 (1999) on Religion and Democracy. This document also insists on the need to guarantee the same conditions for the development of all religions present in the society, and invites states to facilitate the accommodation of the diverse religious practices within their own institutional and legal framework.

As regards comparative constitutional law, the religious fact is also present in the constitutional texts of the different European countries, according to each one's political tradition. The most extended constitutional provisions in our neighbouring countries are the ones recognizing the freedom of religion

[4] Relaño Pastor, Eugenia (2010): "Religious Pluralism in liberal democracies: Should the diversity of religious and secular conceptions of the good in a multicultural citizenship be privatized?", in Rufino, Annamaria and Pizzo, Ciro (eds.): *Right, True, Reasonable. The Perception of Justice in the Global Era*, Scriptaweb, Napoli, p. 160.

[5] Novak, David (2009): *In defense of religious liberty*, ISI Books, Wilmington, p. 89.

[6] Ruiz Vieytez, Eduardo (1999): *The History of Legal Protection of Minorities in Europe (XVIIth - XXth Centuries),* University of Derby, Derby.

or conscience as a fundamental right of everybody and the ones prohibiting discrimination based on religion or belief. The differences in the ways of managing the existing religious diversity in the different European societies lie in the interpretative scope of both principles.

Contents and interpretation of freedom of religion

With respect to freedom of religion, the UN Human Rights Committee makes a distinction in Article 18 ICCPR between the right to religion and the right to manifest one's religion[7]. The former is protected in an unconditional and unrestricted manner, and no limit can be put over it[8]. As for the latter, its contents include not only ceremonial or liturgical events, but also reach such practices as the observance of certain food regimes, dress codes, traditional rituals linked to particular life moments, or even the use of a particular language. Restrictions or limitations to be applied to this right to manifest beliefs must be adopted in accordance with what it is established in paragraph 3 of Article 18 ICCPR. In any case, the Committee clearly states that this paragraph must be interpreted in a restrictive manner. When commenting on the use of common (but vague) legal concepts like public order, national security or public moral, the same Committee says that "*the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition*"[9].

For the European Court of Human Rights (hereinafter ECtHR), Article 9 of the ECHR does not cover all acts based on a religion or belief[10]. Thus, it admits that it may be necessary in a plural society to impose some restrictions on the freedom to manifest religions, in order to reconcile the interests of different groups and to ensure that all beliefs are respected[11]. Like the UN Human Rights Committee, the Court of Strasbourg establishes that the manifestation of a given religious belief may include diverse aspects, such as physical appearance, dress codes, food codes, public religious demonstrations, the teaching of religion, rituals and other practices. On the contrary, any kind of related activity developed in order to obtain some kind of economic or commercial benefit is excluded [12].

As for the relation between religions and the state, the ECtHR considers that it is admissible to make differences among groups or communities of the same religion according to their numerical or official importance[13]. Furthermore, there are European states officially or constitutionally linked to particular churches, which is not incompatible with the ECHR according to the Court[14]. What is important here is that there will always be an important margin of appreciation for states at a national level. However, at the same time, the Court of Strasbourg has also insisted on maintaining religious pluralism, something which it considers to be closely linked to the idea of democracy[15]. This also means that the state has to keep a neutral and impartial attitude with respect to the legitimacy of different religious beliefs[16]. The Court points out that religious pluralism correspond to a certain level of social division that must be respected[17]. In this sense the general principle of recognizing the different religious

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[7] Human Rights Committee, General Comment number 22, *The right to freedom of thought, conscience and religion (article 18), 30 July 1993*: Doc. CCPR/C/21/rev.1/Add.4.

[8] *Ibid.*, paragraph 3.

[9] *Ibid.*, paragraph 8.

[10] Case *Kalaç against Turkey*, judgment of 1 July 1997, paragraph 27.

[11] Case *Kokkinakis against Greece*, judgment of 19 April 1993, paragraph 33.

[12] Case *X and Church of Scientology against Sweden*, decision of 5 May 1979, DR 16, p. 68.

[13] Case *Chaare Shalom Ve Tsedek against France*, judgment of 27 June 2000, paragraph 80.

[14] The Advisory Committee of the FCNM has also admitted that the existence of an official church is not per se incompatible with the convention. However, in such a case, public authorities must pay special attention to the situation of the remaining religious communities, in particular in areas like education. Vid.: *Opinion on Norway*, adopted on 12 September 2002; doc. ACFC/INF/OP/I(2003)003, pp. 39 y 40.

[15] Case *Metropolitan Church of Bessarabia against Moldova*, judgment of 13 December 2001, paragraph 119; case *Refah Partisi against Turkey*, judgment of 31 July 2001, paragraph 69.

[16] Case *Metropolitan Church of Bessarabia against Moldova*, judgment of 13 December 2001, paragraph 123; case *Manoussakis and others against Greece*, judgment of 26 September 1996, paragraph 47; case *Refah Partisi against Turkey*, judgment of 31 July 2001, paragraph 91.

[17] Case *Agga against Greece*, judgment of 17 October 2002, paragraphs 58-60.

communities or organizations in a given society is a consequence of the very right to religious freedom[18]. Moreover, the minority condition of a given confession cannot constitute per se an excuse for the prohibition of its expression[19]. This means that, at the end of the day, it is not in the sole decision of the majority how the public space has to be modelled.

The ECtHR also recognizes that it is not possible to find a common and unique conception of religion within European societies and that the impact of external manifestations of religious beliefs may vary significantly in different times and contexts[20]. In any case, freedom of religion is not an absolute right, some restrictions being legitimate in certain conditions. Thus, the Court has validated the prohibition of some dress codes in certain educational institutions, for both teaching staff[21]and students[22]. On other occasions, it has denied protection for absence in the workplace for reasons of unofficial religious festivities[23] and the ritual slaughter of animals[24], to give only a few examples. In all cases, the issue at stake in the legal interpretation is the scope of the possible limitations or restrictions on freedom of religion based on eventual reasons of public safety, order, health, or a national option in favour of laicism.

Harmonization practices, reasonable accommodation and non-discrimination

Canadian courts have been using the concept of reasonable accommodation as a legal technique in relation to freedom of religion in a plural society. The central idea of this game is that when the right to religious freedom comes into conflict with a neutral legislation, public or private actors have the duty to accommodate or adapt the application of such legislation, unless it can be proved that the adaptation may cause an undue hardship. The principle of religious neutrality is imposed on public authority, but not on individuals, and therefore, freedom of religion implies the duty to accommodate as far as it is reasonable[25]. The Canadian Supreme Court has recognized that when a piece of legislation pursues a neutral and valid aim, but its application implies negative (adverse) effects on a person's freedom of religion, this person has the right to obtain accommodation. This accommodation may be implemented through an exemption of the application of the law, as far as this is compatible with public interest[26].

The concept of reasonable accommodation does not derive from a legislative recognition, but from an idea of equality formed through case-law and jurisprudence[27]. The first appearance of this concept regarding religious freedom happened in the so-called *Simpsons-Sears* case judgment. In this case, the Canadian Supreme Court stated for the first time that a prima facie neutral legislation (in this case a work calendar) may have a discriminatory effect on an employee because it is incompatible with his religious beliefs or practices[28]. Thus, issues related to dress, food, worship places, exhibition of religious symbols and others are at stake in the formulation of reasonable accommodations in the Canadian experience. What is relevant for us to point out at this moment is that, within this Canadian experience, the concept of reasonable accommodation is applied as a consequence of the principle

[18] Case *Metropolitan Church of Bessarabia against Moldova*, judgment of 13 December 2001.

[19] Case Barankevich against Russian Federation, judgment of 26 July 2007, paragraph 31.

[20] Case Leyla Sahin against Turkey, judgment of 10 November 2005, paragraph 109; case Refah Partisi against Turkey, judgment of 13 February 2003.

[21] Case Dahlab against Switzerland, judgment of 15 February 2001.

[22] Case Leyla Sahin against Turkey, judgment of 10 November 2005; case Kervanci against France, judgment of 4 December 2008.

[23] Case *Konttinen against Finland*, decision of 3 December 1996, DR 87-B.

[24] Case *Chaare Shalom Ve Tsedek against France*, judgment of 27 June 2000.

[25] Bosset, Pierre (2007): "Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable", in Jézéquel, Myriam (dir.): *Les accommodements raisonnables: quoi, comment, jusqu'où? Des outils pour tous*, Éditions Yvon Blais, Cowansville, pp. 9-10.

[26] R. v. Edwards Books and Art Ltd., [1986] 2 *Supreme Court Review* 713, p. 32; judgment of 18 December 1986. Woehrling, Jose (2006): "La liberté de religion, le droit à l'accommodement raisonnable et l'obligation de neutralité religieuse de l'état en droit canadien", *Revista Catalana de Dret Public*, no. 33, p. 380.

[27] Bosset, Pierre, *op. cit.*, p. 10.

[28] Ontario Human Rights Commission versus Simpsons-Sears, [1985] 2 *Supreme Court Review* 536; Judgment of 17 December 1985.

of non-discrimination, and with an individual basis. Therefore, the traditional or historical character of a given religious group is not a particularly relevant element when reasonable accommodation has to be implemented.

Reasonable accommodation is therefore definitely linked to the prohibition of discrimination and it has been defined as a "corollary" of the right not to be discriminated against. Reasonable accommodation is not conceptualized from the perspective of minority rights, since it is not a measure that has to be implemented collectively. It does not open the door to collective rights nor to parallel legal systems.

In the report by the Bouchard-Taylor Commission on intercultural harmonization practices, developed in Quebec in 2007-08[29], reasonable accommodation appears as one of the possible harmonization practices, along with concerted adjustment or informal agreements. What makes reasonable accommodation different is the need for a fundamental right to be at stake and the legal/judicial procedure used to reach a solution that will consequently be binding for all parties involved[30].

Within the European framework, the concept of reasonable accommodation has not been incorporated clearly and several debates have arisen over the possibility of "importing" this North-American institution. Reasonable accommodation could be regarded as a way of avoiding indirect discrimination situations. In this respect, it is relevant to mention the so-called Thlimmenos doctrine of the ECtHR, according to which, treating substantially different situations equally may also lead to discrimination. Moreover, religious differences may qualify for this substantial differentness as it proves the very case of Thlimmenos against Greece, ruled by the Court in the year 2000[31]. The main obstacle to using this doctrine as a base for including the obligation to provide reasonable accommodation within European human rights law is that we cannot find further judgments and decisions where the Court has already found any discrimination following the same reasoning. It seems, therefore, that the doctrine, although occasionally repeated, has not been consolidated[32]. In this sense, the idea of reasonable accommodation would still be far from entering the European human rights system.

Additional protection of Religious Minorities

In addition to the general recognition of freedom of religion as a fundamental civil liberty, international instruments on human rights also include references to religious minorities. In concrete, Article 27 of the ICCPR states the right of persons belonging to religious minorities to profess their own religion, "where they exist". And Articles 8 and 9 of the Framework Convention for the Protection of National Minorities (hereinafter FCNM), adopted by the Committee of Ministers of the Council of Europe in 1994, recognizes the right of the persons belonging to minorities to practice in private and public their own religion and the States' obligation to adopt the adequate measures to promote full and effective equality of minority groups in society.

Clauses of this kind are also repeated in other relevant documents, such as Article 30 of the Convention of the Rights of the Child of 1989, and in the Declaration on the Rights of persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly on 18 December

[29] Bouchard, Gerard and Taylor, Charles (2008): *Building the Future. A Time for Reconciliation*, Consultation Commission on Accommodation Practices Related to Cultural Differences, Quebec.

[30] See also the impact of the so-called "multicultural clause" of section 27 of the Canadian Charter of Rights and Freedoms: Ruiz Vieytez, Eduardo (2007): "Constitución y multiculturalismo. Una valoración del artículo 27 de la Carta Canadiense de Derechos y Libertades", *Revista Española de Derecho Constitucional*, no. 80, pp. 169-197.

[31] Case Thlimmenos against Greece (application No. 34369/97), judgment of 6 April 2000, paragraph 44.

[32] Indeed, there are a good many later judgments which, despite a finding of non-discrimination, refer explicitly to the doctrine contained in the Thlimmenos case. The following can be mentioned: the Chapman against United Kingdom, Beard against United Kingdom, Jane Smith against United Kingdom, Coster against United Kingdom and Lee against United Kingdom cases, judgments of 18 January 2001; Fretté against France, judgment of 26 February 2002; Pretty against United Kingdom, judgment of 29 April 2002; Posti and Rakho against Finland, judgment of 24 September 2002; Natchova and others against Bulgaria, judgment of 6 July 2005; Stec and others against United Kingdom, judgment of 12 April 2006; Zeman against Austria, judgment of 29 June 2006; Snegon against Slovakia, judgment of 12 December 2006; Dobal against Slovakia, judgment of 12 December 2006.

1992. Within this last document it is explicit that the states are obliged to undertake positive measures to ensure the fulfilment of the rights of persons belonging to such minorities and for the preservation of their own religion (and language and other elements of their identity). The same Declaration includes the obligation for the states to protect and foster the promotion of the "religious identity" of minorities (Article 1), as well as the right of their members to take part in the cultural and religious life of the society (Article 2).

In relation to Article 27 of the ICCPR, the United Nations Human Rights Committee has said[33] that the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria[34]. The same treaty body affirms that Article 27 entails the obligation for the states to implement positive measures for the protection of minorities, which obviously also includes religious minorities.

In a nutshell, the right of persons belonging to religious minorities to profess their own religion cannot be fulfilled with the abstention of the public powers. On the contrary, it clearly requires the adoption of positive measures to ensure that possibility.

A double (and parallel) track of protection? Two questions to be solved

Therefore, from the point of view of public intervention, freedom of religion implies an attitude of respect and tolerance in relation to the religious beliefs of all people. But on the other hand, it is admitted that there is also the obligation of adopting those positive measures needed to guarantee the exercise of such a freedom. In other words, freedom of religion not only implies a non-interference of public powers in its essential content, but also, eventually, the adoption of positive measures to make the development of this right possible[35].

The point is to determine what kind of measures may be required by state authorities for the protection of freedom of religion. It is also necessary to define what the legal basis is for the requirement of such measures. Do they derive from the non-discrimination principle or from the protection of minorities framework? Do these positive measures adopt the shape of reasonable accommodations or do they have to be incorporated into the legislative framework? In principle we can state that reasonable accommodation measures are conceived from an individual perspective, whereas positive measures to protect religious minorities tend to be permanent and collective.

For some authors, it is precisely the application of the principle of substantial equality that makes this freedom a credit right, giving the holders the possibility to demand given public behaviour or specific services or provisions[36]. At the same time, the adoption of positive measures, due or not, could not be carried out in a discriminatory manner among the different religious groups. And historical or even constitutional arguments may not be prevalent over this last consideration[37].

However, the explicit recognition of the rights of religious minorities in Art.27 ICCPR or 9 FCNM places another problem on the table. This leads us to the problem of having to determine which religious communities qualify for the category of minority. Also, it is necessary to determine whether the practice of some specific religious communities considered minorities deserves greater state protection than one from other groups or individuals professing different religions.

This means that we are faced with two substantial issues that are far from being solved from the perspective of international law on human rights. The first one is to find objective and reasonable criteria to determine what religions constitute minorities in a particular country or region. The second one is to know what additional rights or faculties correspond to religious minorities as regards individual freedom of religion and non-discrimination, or to define what kind of positive measures

[33] Human Rights Committee, General Comment number 23, *The rights of minorities (article 27),6 April 1994*: Doc. CCPR/C/21/Rev.1/Add.5

[34] *Ibid*. paragraph 5.2, and CCPR/C/79/Add.80, paragraph 24.

[35] Contreras, Jose Maria (2007): "La libertad de conciencia y convicción en el sistema constitucional español", *Revista cidob d'afers internacionals*, no. 77, p. 55.

[36] Contreras, Jose Maria, *op. cit.,* p. 50.

[37] Human Rights Committee, case Waldman v. Canada (communication 694/1996), decision of 3 November 1999, document CCPR/C/67/D/694/1996, paras. 10.4 and 10.7.

are required in each case, should there be a real difference in this respect.

As for the first problem, any criterion we may use to make the legal distinction would possibly be arbitrary. The distinction could lead to a differentiated treatment, not a reasonable and objective justification for such a difference. This would bring us directly to the risk of facing discriminations among religious groups or beliefs[38]. But, on the other hand, if we consider that all existing religious groups in a given society fall within the category of minority, in practice we would be deleting any possible difference in the level of protection offered by the general right to freedom of religion and the specific protection for religious minorities. This solution obviously encounters the problem of having to explain why international law includes specific clauses to refer to the protection of members of religious minorities. If there is no difference in practical terms, as the possible added value of these minority clauses would disappear.

Following this reasoning, there should be then some criteria to distinguish members of religious minorities from other believers or religious practitioners. But the Human Rights Committee points out that this criterion cannot be the national condition of their members, as is the trend in Europe (to define them as national minorities, following the FCNM). For the Committee, any person, including immigrants, and even visitors, may qualify as members of religious (linguistic or ethnic) minorities with respect to Article 27 of the ICCPR. This widens the scope of application of the minority condition a great deal. Differently, in Europe the dominant idea is to try to apply different legal regimes to both traditional and new minorities. However, again in the case of religious minorities, the traditional aspect is not always easily determined and a growing number of immigrants practising minority religions may have already acquired the nationality of the host country. This means that the nationality or citizenship criterion of the definition of religious (national) minorities is not practical. What is happening in practice is that the consideration of religious minority is being extended to all groups whose religion or beliefs are not those of the traditional majority of the country (unlike the case of linguistic minorities).

Another option would be to include new legal requirements to regard some religious groups, and not others, as minorities. This could be the case of the Spanish legislation when it recognizes some confessions due to their condition as religions with social rooting within Spanish society. However, the adjudication of this category could also lead to discriminatory situations and we would be reverting to a very broad consideration of religious minorities, neglecting the more individually followed practices or beliefs.

The second problem is knowing whether minority protection offers additional rights as regards what is already protected by the freedom of religion. If there is a difference, it is probably related to the positive measures that have to be adopted in order to protect religious minorities, according to the doctrine of the Human Rights Committee and the Advisory Committee of the FCNM. The instruments deriving from non-discrimination clauses, such as reasonable accommodation, probably do not correspond to minority rights, since they are individually applied mechanisms. But if minority rights means something else, this "else" should be defined in a better way. If minority rights recognized in Article 27 do not add anything to what is already protected in Article 18 of the same ICCPR, then Article 27 would simply be superfluous or rhetorical, contrary to the doctrine of the same Committee. But if Article 27 incorporates a specific set of religious protection for members of minorities (whoever they may be), there must be a specific differential treatment in favor of these groups. This brings us to the last difficult question regarding the relation between religious minorities and the majority. A specific protection of religious minorities through positive measures would also mean that the treatment given to those minorities is in fact better than that offered to the religious majority. This would be consistent with a social perspective of the (welfare) state, but more often than not contradictory to the normal policies in many of our European countries.

3. Public management of religious diversity at the local or regional level: the case of worship places in the Basque Country: what is required from human rights law protection?

The Spanish Constitution of 1978 includes an explicit acknowledgement of freedom of religion as a fundamental right, a prohibition of discrimination based on religion and a declaration of absence of official confessions. However, this does

[38] See the aforementioned case *Waldman v. Canada*.

not represent a mandate of fundamental separation between the State and religious entities, but it is not opposed to an institutional collaboration, explicitly recognizing the majority or traditional condition of the Catholic Church, which, in turn, does not impede the State's relations with other beliefs present in the Spanish society[39].

Laicism, implicitly established in Article 16 of the Constitution[40], includes both the institutional separation between the State and the churches as a guarantee of religious freedom, which also implies its promotion[41]. The regulation of this article is developed through two different channels: on the one hand, through the Organic Act 7/1980, 5 July, on Freedom of Religion, and on the other hand, through the diverse cooperation agreements signed between the State and certain churches or confessions.

The Organic Act on Freedom of Religion covers the right of religious communities to establish worship or meeting places with religious purposes, to designate and train their ministers and spread their own beliefs, and maintain relations with their own organizations or with other religious confessions, either within the national territory or abroad. The Act includes a number of concrete obligations for public authorities, such as adopting the necessary measures to provide religious assistance in public centres, military centres, hospitals, social aid centres, prisons and other institutions under their responsibility, as well as religious education in state education centres. However, the Act has no developing legislation (bylaws) and some of the rights remain vague, with no clear undertakings for the public authorities. The latter is the case of the right to establish worship places for religious communities.

The Spanish state has so far established formal agreements with four different confessions. On the one hand, the agreements reached between the Spanish State and the Holy See on 3 January 1979, settling the relationship of the State with the Catholic Church, which should be legally considered International Treaties. On the contrary, the Cooperation Agreements of the State with the Federation of Evangelical Religious Entities of Spain, the Federation of Israeli Communities of Spain and the Islamic Commission of Spain are settled in their respective ordinary acts 24/1992, 25/1992, and 26/1992, all of them of 10 November 1992.

As regards the question of opening worship places, no specific or explicit positive measure is mentioned in the different agreements, in the case of the Catholic Church probably because it was not necessary, taking account of the deep historical rooting of this Church in Spain. In the case of the minority religions, the agreements apply to every community inscribed in the Registry of Religious Entities that are part of or may be later included in their respective federation with which the State is executing the agreement. The agreements regulate the condition of the worship places or cemeteries, guaranteeing their sacred character for urban purposes, although there are no provisions related to their location. In the same way, the agreements deal with other matters such as burials, recognition —for civil purposes— of marriages celebrated according to their respective confessions, teaching religion in the education system, religious assistance in the army, hospitals, prisons and other public institutions, the right to respect religious holidays in certain contexts, as well as taxation exceptions for religious entities.

Lastly, if we descend down the legal pyramid to the autonomous or local sphere, we soon identify the regulatory moderation existing in the Basque Country as regards this[42]. In any case, it seems clear that autonomous (regional) and local institutions have so far been unaware of the need to develop

[39] Article 16: "1. Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.

2. No one may be compelled to make statements regarding his or her ideology, religion or beliefs.

3. No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions."

[40] Ollero, Andrés (2005). *España: ¿un Estado laico? La libertad religiosa en perspectiva constitucional,* Thomson-Civitas, Cizur Menor, pp. 50-51.

[41] López Castillo, Antonio (2002): *La libertad religiosa en la jurisprudencia constitucional*, Aranzadi, Cizur Menor, p. 86.

[42] See a description of it in Labaca Zabala, Lourdes (2008): "La regulación del factor religioso en la Comunidad Autónoma del País Vasco", in García García; Ricardo (dir.): *La libertad religiosa en las Comunidades Autónomas. Veinticinco años de su regulación jurídica*, Institut d'Estudis Autonómics, Barcelona, pp. 603-645.

regulatory or administrative measures that allow the exercise of religious freedom for citizens belonging to religious minorities, or at least for those belonging to confessions with which the State already has collaboration agreements or that have been recognized as having "social rooting".

As regards Basque public institutions, the traditional abstention on the matter seems to respond to an alleged lack of jurisdiction. Initially, because the trend was to confuse the fact of religious diversity with immigration or foreigners' integration, but also because the matter of relations with religious organisations has traditionally been considered an exclusive power of the central (state) authorities. These, and a possible ignorance of the religious diversity fact, are the main reasons why Basque public institutions have washed their hands of religious subjects, convinced that they were out of their jurisdiction. In spite of this, there are a great number of transversal questions affecting other jurisdiction questions on which the autonomous and local institutions exercise legislative or executive competences. This has compelled Basque public authorities to redefine their traditional abstention (or non-systemic intervention) in the matter, as has already happened in other Autonomous Communities, with Catalonia leading the way.

From the field work developed in a previous research project carried out among a large number of religious communities in the Basque Country[43], one of the most important discoveries has been the general ignorance of the existing regulatory framework. Such ignorance does not only exist among members of religious minorities, but also among the majority population and within the Basque public institutions. However, also important is the fact that the legal system is not specially detailed for it, and therefore the scarce existing rules do not offer solutions to the specific problems that appear in daily life.

The specific and possibly most urgent problem with a hard solution for many communities in a reality like the one in the Basque Country is the shortage of worship places. On the one hand, accessing a place implies an economic capacity that the recently born communities cannot guarantee. This seriously affects the exercise of a fundamental right and public authorities do not offer any positive measure to guarantee it. On the other hand, the communities consider the usual regulation applied to worship places unfair, owing to its symbolic and practical implications. In that sense, the provision of municipal licenses granted for the opening of sites for religious purposes is a complex matter because there is no specific regulation thereto. Additionally, the specific cases of some special celebrations where the use of public spaces is necessary for specific ceremonies such as weddings or baptisms[44], or important holidays belonging to the religious tradition of each community come up against additional difficulties. There are also cases in which the majority religion (Catholicism) is in charge of providing adequate spaces for different confessions so they can celebrate their worship are not few, and this is obvious as regards Christian Orthodox communities[45].

This situation led the regional authorities in Catalonia to pass a new regional Act to regulate the proceedings for opening new worship spaces in that Autonomous Community[46]. This initiative has recently been invoked by the Basque Government, which has publicly announced a bill on the matter to be sent to the regional parliament before the end of 2011. If is enacted, it will be the first specific piece of legislation at the regional level concerning religious matters.

The first text of this bill has already been drafted by a small group of legal experts. However, the problems in the regulation of the matter are relevant, since there is no clear political principle behind it, and also because the standards of international human rights law are far from being sufficiently clear. It is true that the issue is affecting many believers' exercise of their own freedom to religion, and this has been proved by the research work carried out among Basque religious communities other than Catholics. On the other hand, the bill could also be considered an issue of the regulation of religious minorities in a demo-

[43] Research project no. HU2009-30, funded by the Ministry of Education of the Basque Government and developed by the Human Rights Institute of University of Deusto and Ellacuria Foundation.

[44] It must be taken into account that celebrations such as weddings or baptisms have, in some confessions, a highly communitarian character, which increases the need to have wide spaces.

[45] In this case it is worth highlighting the work carried out by the Ignacio Ellacuría Social Centre in Bilbao, from the Society of Jesus, providing different confessions with spaces both for prayer and other related activities.

[46] Act of the Autonomous Community of Catalonia 16/2009, of 22 July on worship centers.

cratic society. Finally we could also try to bring the philosophy of the so-called intercultural harmonization practices to the matter and, in particular, the instrument of reasonable accommodation to see if this could be a convenient way of respecting the rights at stake.

Within the Basque bill on worship places, a non-discrimination clause has been introduced, yet no reference to specific religious minorities. This would mean that all possible communities of believers in the Basque Country should be regarded as religious minorities and, accordingly, entitled to the specific protection (if any) that international treaties offer such groups. If the new bill just includes a protection of the freedom of religion, we would be missing this additional protection deserved by minorities. One possible explanation of this is to consider the whole issue of opening worship places as a collective right (or a collectively defined right). In this sense it would not derive from the individual freedom of religion but from the rights of religious minorities. And any religious community, other than Catholic, willing to establish a religious worship place in the Basque Country would be considered a religious minority in this perspective.

But in this case the positive measures that correspond to the public authorities in order to facilitate or ensure the implementation of this right (of the members of religious minorities to profess their own religion through the opening of worship places) should be clarified. The only clear positive measure prescribed in the bill (as well as in the Catalan Act) is the obligation for municipalities to reserve some public space for religious purposes. If this is the case, the next question would be to determine if any kind of reservation fulfils this undertaking. Should this reservation just be reasonable, considering the availability of space in the municipality, or are local public institutions obliged to ensure access to spaces for religious minorities? Obviously this second option is far more demanding and it could lead to problems if we take small municipalities as references. On the other hand, a vague obligation to reserve space in the urban planning can also produce effective discrimination if the municipality just does it in a nominal (practically empty) way. This is why in this case, the term "reasonable" can play a role. In fact, in Canada an attempt was made to use the reasonable accommodation concept (at least its theory) when a given religious community was not able to find a proper place for a worship space within the reserved urban planning of the municipality. This means that local authorities must try to be effective when reserving the space, but probably cannot be totally obliged to ensure access to spaces, depending on the local situation of the estate market.

Another additional question is to decide whether the reservation of public space is the only positive measure that public authorities must fulfil when protecting the right to open worship places. We may ask if there can be any kind of obligation, under certain circumstances, to help, religious minorities in this respect, even financially (e.g., at least, when a given minority has no other worship places in the same municipality or in a nearby area). No such concrete measures have been introduced in the Basque draft bill, but a vague clause has saying that public institutions may facilitate access to worship places if required. This could be one of the clear consequences of having a minority protection system that stipulates the adoption of positive measures. The obligation of financing (or giving other kinds of help) should be balanced according to the situation of the religious community wishing togain access to a worship place. But any different treatment among communities should be based on objective and reasonable justifications.

Again, we could ask if this possible obligation to provide material help in the opening of (the first, or sufficient) worship places in a given territory (e.g. a municipality, although it might be reasonable to take greater areas into consideration, such as counties or metropolitan areas, bearing in mind the transport facilities) has to be given to religious minorities only. In the particular case of the Basque Country, the only legal key to restrict this concept would be to follow the category of "socially rooted" confession which the state authorities may recognize. It may also be possible to create a regional category of social rooting, but in this case, it should probably be defined in addition to the state categorization, and possible discrimination claims might be easily raised.

Finally, an additional non-rhetorical issue arises at this stage. If the specific protection given to religious minorities is the legal basis to justify the adoption of positive measures, such as the reservation of urban spaces and/or material help to the communities intending to open worship places, it is necessary to conclude that the public authorities are not obliged to provide the majority confession with the same treatment (or at least the traditionally majority confession). This could be seen by some as discrimination against the situation of the Catholic Church

in the case of the Basque Country; however, it would be totally consistent with the provisions of international law on human rights and with the principle of substantial equality, which obliges public authorities to remove obstacles that prevent weak groups from participating in equal conditions in public life. This is precisely what may happen in the field of religious diversity when small, new and weak communities encounter a great number of obstacles when wishing to open or renew adequate worship places. The point is not a minor one, since it seems to go against a high number of current policies in the field of relations with majority and minority confessions in most European countries, including Spain. However, a minority and/or equality approach would imply a profound review of the way state or local authorities are managing religious diversity, should the fundamental right to religious freedom and the protection of minority rights be properly protected.

4. Conclusion

In a nutshell, the reasonable accommodation institution, in its technical sense, does not offer a clear solution to the shortage of worship places of minority communities. It may, on the contrary, prove useful when adapting specific regulations to individual situations. The shortage of worship places has to be faced either through an updated vision of the principle of substantial equality (which may be difficult to achieve in terms of avoiding indirect discrimination), or though the specific protection (positive measures) that states must adopt to protect religious minorities existing within their territories. And, as long as a clear, reasonable and justified criterion is not determined to differentiate religious minorities from other kind of religious communities, we must admit in principle that all religious groups wishing to open (stable) worship spaces in the country have to be considered religious minorities in the sense of Article 27 of the ICCPR. This extension of the minority concept would probably go in parallel with that of ethnic minorities, unlike the case of linguistic minorities, whose extension remains much more problematic, due to the fact that states still use language as an element of defining the official identity of the country. Religious neutrality opens the door to a wide legal identification of religious minorities and to the adoption of positive obligations for public authorities, not even applicable to the traditional religious majority group. Therefore, state authorities at all levels, as well as the local and regional ones within their respective devolved powers, have to reasonably provide help to substantially facilitate the profession of minority religions, even facilitating the opening of new worship places or facilitating other ritual activities. State authorities should not refrain from financing worship activities themselves if this is necessary to ensure the fulfilment of freedom of religion for members of religious minorities.

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After the Bouchard-Taylor Commission: Religious Accommodation and Human Rights in Quebec[1]

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Abstract

Like other liberal democracies, Canada and Quebec is facing important challenges raised by moral and religious diversity, such as the legitimacy of reasonable accommodations and the meaning of secularism in a pluralistic society. Focusing on these latter issues in the context of Quebec's recent history and political culture, with a particular emphasis on the 2007-08 *Consultation Commission on Accommodation Practices Related to Cultural Differences*, I intend to outline the current state of the debate in Quebec. First, I define the legal obligation to accommodate and specify what are its limits. Second, I pinpoint the meaning of secularism and defend a liberal and pluralist conception. Third, I discuss the main piece of legislation (Bill 94) that was drafted by the Government of Quebec in response to the recommendations of the aforementioned *Commission*.

Key words: Pluralism; Religious Diversity; Secularism; Reasonable Accommodation (as a legal norm); Concerted Adjustments; Freedom of Conscience and Religion; Quebec's Consultation Commission on Accommodation Practices Related to Cultural Differences.

Resumen

Como sucede con otras democracias liberales, Canadá y Quebec se enfrentan a los importantes retos que plantean la diversidad moral y religiosa, como son la legitimidad de los acomodamientos razonables y el significado de la laicidad en una sociedad pluralista. Este estudio tiene por objeto describir el estado actual del debate en Quebec, prestando particular atención a estas últimas cuestiones en el contexto de la historia y cultura políticas recientes de Quebec, y haciendo especial hincapié en la Comisión de Consulta sobre las Prácticas de Acomodación relacionadas con las Diferencias Culturales de 2007-08. En primer lugar, se ofrece una definición de la obligación legal de acomodar y se especifica cuáles son sus límites. En segundo lugar, se identifica el significado de laicidad y se defiende una concepción liberal y pluralista. En tercer lugar, se analiza una ley (Ley 94) que fue elaborada por el Gobierno de Quebec, en respuesta a las recomendaciones de la Comisión antes mencionada.

Palabras clave: Pluralismo, diversidad religiosa, laicismo, acomodo razonable, ajustes concertados, libertad de conciencia y religión, Comisión Consultiva de Quebec sobre el acomodo de prácticas relacionadas con las diferencias culturales.

[1] I wish to thank the participants to the workshop "*Religious diversity and public policies. Implications of Religious Diversity for Public Policies from a Human Rights Perspective. Accommodation of rights at the sub-national level*" for their very helpful questions and comments, as well as Dominic Cliche for his first rate editorial work.

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Introduction

The issues surrounding secularism and the management of religious diversity in contemporary societies gain from being approached from a contextual and comparative perspective. Liberal democracies come to these thorny issues from very different historical pathways, but they all have to grapple with the challenges raised by moral and religious diversity. My own contribution to this comparative research agenda is to talk about the Quebec experience with a particular emphasis on Quebec's *Consultation Commission on Accommodation Practices Related to Cultural Differences* (CCAPRCD), and its aftermath.

Quebec and Canada are highly stimulating contexts for those who study questions related to identity and diversity. The issues that were mainly debated until perhaps 2006 were the nationalism and the right to self-determination, federalism, and immigration and integration models such as multiculturalism and interculturalism. Since 2006, these issues were overshadowed by the debates around secularism and the management of religious diversity, including the issue of religious accommodations.

In 2007, a high-profile public commission—the CCAPRCD[3]—was put together by the Government of Quebec. The Commission was co-chaired by the philosopher Charles Taylor and the historian Gérard Bouchard. Its mandate was fourfold: first, to take stock of accommodation practices in Quebec; second, to analyze the attendant issues, bearing in mind the experience of other societies; third, to conduct an extensive public consultation on this topic; and fourth, to formulate recommendations to the government to ensure that accommodation practices conform to the values of Quebec society as a pluralistic, democratic, and egalitarian society.

The co-chairmen quickly decided to opt for a wide interpretation of their mandate. Rather than focusing strictly on the legal obligation to accommodate as it was defined in the jurisprudence, they choose to tackle the related but larger issues raised by citizens, such as the meaning of secularism, the place of religion in the public sphere, immigration and integration and the fate of Quebec identity. Addressing all these issues in a comprehensive fashion was of course not possible, but it is doubtful, however, that the Quebec public would have been satisfied with a narrow and legalistic interpretation of the mandate.

In this paper, I will first zero in on the debate over "reasonable accommodation." I will try to define the legal obligation to accommodate and specify what are its limits. I will then try to pinpoint the meaning of secularism and defend what I will call a liberal and pluralist conception of secularism. Finally, I will discuss the main piece of legislation that was passed in the aftermath of the Bouchard-Taylor Commission, viz Bill 94.

1. Reasonable Accommodation

1.1. *The Definition of a Reasonable Accommodation*

The legal norm of "reasonable accommodation" was at the heart of the debate in Quebec, as an important number of citizens felt that the accommodation of religious diversity was going too far and that it was threatening basic public values. The concept of a "reasonable accommodation," though, was not very well understood. One of the positive contributions of the CCAPRCD was that the media and members of the public came to a better understanding of the legal duty to accommodate.

In the Canadian jurisprudence, reasonable accommodation is a rather well defined and circumscribed legal norm that stipulates that there is a duty on the part of an employer or an institution to offer accommodation measures to someone who is adversely affected by a rule or a policy that seems *prima facie* neutral, but that indirectly discriminates against the members of a group. The discriminated individual can be a part of a religious group, but it can as well consist in, for instance, people living with disabilities or pregnant women. The notion of reasonable accommodation was thus conceived as a way to correct indirect and involuntary discrimination, i.e. cases when a norm of general application can be shown to be discriminatory against members of a group on the basis of some their attributes, such as their physical condition, gender, age, ethnicity, language,

[3] Bouchard, Gérard, Taylor, Charles (2008): *Building the Future: A Time for Reconciliation: Report.* Consultation Commission on Accommodation Practices Related to Cultural Differences, Les Publications du Québec [Online]. <http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>

or religion. For example, there is no explicit discrimination in a rule prohibiting headgear at school, for it does not target any particular group. In its application, however, the rule constrains those whose faith requires wearing headgear, while those whose conscientious convictions do not include the wearing of headgear can more easily harmonize their freedom of religion and their right to a public education. This does not mean that the rule itself cannot be legitimate. Maybe it would not be a good idea, generally speaking, to allow high school students to wear headgears in class. But a religious obligation (or any other deeply-held, meaning-giving belief) is not the same thing a personal preference,[4] and this is why accommodation measures are sometimes necessary. Similarly, it is easy to understand why prisons or hospitals have rules that prevent patients or detainees to choose their meals—this would be too costly and impractical. However, few people believe that vegetarians (either for religious or secular reasons) should not benefit from an exception.[5] This is why fairness sometimes requires a differential treatment even if the rule does not explicitly discriminate against anyone.[6]

The duty to accommodate is thus a jurisprudential creation. It originates from the interpretive work of the courts rather than from an explicit legislative act. it is not explicitly stated in the *Canadian Charter of Rights and Freedoms*.[7] But the courts established that the norm of reasonable accommodation is a logical corollary of the equality rights and freedom of religion that are enshrined in the *Charter*.[8] It stems from a material, rather than a purely formal, conception of equality; its purpose is generally to enable a member of a minority or a vulnerable individual to take advantage of an opportunity or of a public good.[9] For example, accommodation measures can remove the obligation to choose between two basic human rights, such as having an equal right to apply for a position and practicing one's religion, or having access to a public good (such as education, health care, or all kind of permits) and respecting the prescriptions of one's faith.

One misunderstanding that the CCAPRCD Report helped correcting was that the duty to offer reasonable accommodation measures was thought by many to apply in all possible cases of accommodation claims. What needed to be reminded is that there has to be discrimination for the duty to accommodate to apply. As the Report suggested, "reasonable accommodation" ought be distinguished from "concerted adjustment." The former is derived from more general human rights, whereas the latter is the result of voluntary negotiations between consenting parties who wish to cooperate, to live together peacefully as neighbors or to establish a business relationship.

In order to illustrate this distinction, consider one of the cases that was at the origin of the reasonable accommodation controversy: the so-called "YMCA case." The YMCA is a sport center located in a neighborhood of Montreal where an important Hassidic Jews community lives. The YMCA is right next to a Hassidic primary school. The pupils, when they were playing in the school's yard, could see inside the gym where

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[4] For a defense of that argument, see the second part of Maclure, Jocelyn; Taylor, Charles (2011): *Secularism and Freedom of Conscience*, Harvard University Press, Cambridge, MA.

[5] See, for instance, the decision by the Federal Court of Canada in the case Maurice v. Canada (Attorney General), 2002 FCT 69, [2002] 2 F.C. D-47, 186.

[6] The Supreme Court of Canada explicitly formulated the legal obligation of reasonable accommodation for the first time in 1985 in the *Simpson-Sears* ruling. As a member of the Seventh-Day Adventist Church, the plaintiff had to keep Sabbath, which for this Church extends from sundown Friday to sundown Saturday. This entailed that she could not work on Friday evenings as well as on Saturdays. Arguing that her religious obligation was incompatible with the employment policy of the company for full-time sales clerks, Simpson-Sears discharged the plaintiff on the basis of her refusal to work on Saturday. The Supreme Court claimed that the refusal from the part of Simpson-Sears to take "reasonable steps to accommodate the complainant" constituted a form of indirect discrimination. See Ontario Human Rights Commission (O'Malley) v. Simpson-Sears [1985] 2 S.C.R. 536.

[7] Canadian constitutional culture, I think, partly vindicates Ronald Dworkin's interpretive theory of constitutional adjudication. When it is confronted to hard cases, such as claims for accommodations, end of life issues or the right of a province to secede, it readily invokes implicit principles of political morality.

[8] Woehrling, José (1998): "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse", *McGill Law Journal*, 43, pp. 325-401.

[9] Pierre Bosset « Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable », introduction générale de l'ouvrage *Les accommodements raisonnables : quoi, comment, jusqu'où Des outils pour* tous (M. Jézéquel, dir.), Cowansville, Éditions Yvon Blais, pp. 3-28.

people, including women, worked out. The school board asked the YMCA whether they would mind frosting the windows so that the young children would not see inside, and offered to pay for the new windows. The board of the YMCA agreed. But when some clients of the YMCA heard about the deal, they expressed their discontent and reported it to the media. The YMCA's decision was widely criticized. Many citizens thought that this was a clear demonstration that the accommodation of religious diversity was going too far and the norm of reasonable accommodation was in fact unreasonable.

This case, however, had nothing to do with the legal obligation to offer accommodation measures. There was no indirect discrimination involved and the YMCA was consequently under no obligation to frost its windows. This was a case of "concerted adjustment." The media were unfortunately not quick enough to correct the misperception. Combined with other cases, this fueled the public outcry with regard to the accommodation of religious diversity.

1.2. *The Limits to the Duty to Accommodate*

That being said, one of the main concerns expressed by citizens with regard to the legal duty to accommodate concerned the limits of such an obligation. Many feared that freedom of religion, as interpreted by the Court, would end up trumping other fundamental values such as gender equality or the religious neutrality of the State or fairness among co-workers. That fear was compounded by the "personal and subjective" conception of freedom of religion found in the jurisprudence. Before I get back to the question of the limits of the obligation to accommodate, I shall say a few words on the subjective conception of freedom of religion and, more generally, on how rulings of the Canadian Supreme Court are often perceived in Quebec.

In Canada, as well as in the U.S., the claimant requesting an adjustment or an exemption is not expected to demonstrate the objectivity of her belief. In the Canadian Supreme Court 2004 *Amselem* decision, the majority established that the claimants "need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion."[10] For the Court, the crucial point is that the belief held by the claimants has "a nexus with religion", and that the she sincerely believes that his or her faith prescribes a given practice or act. No authorized religious representatives or experts need to confirm the existence of the precept invoked for a request for an accommodation to be taken under advisement. The criterion used by the Supreme Court is thus that of the *sincerity* of belief: the petitioner must demonstrate that he or she truly believes she is obligated to conform to the religious precept in question.

The chief advantage of a personal and subjective conception of freedom of religion is that it spares the courts from having to act as interpreters of religious dogma and as arbiters of the inevitable theological disagreements that divide all religious communities. In relying on personal belief, they avoid having to choose between the contradictory interpretations of religious doctrines. They also circumvent the danger of falling back on the majority opinion within the religious community and thereby contributing to the marginalization of minority voices.

The downside, however, is that this very broad conception can end up opening the door, first, to an excessive number of accommodations—this is the problem of proliferation—and, second, to the strategic or manipulative invocation of freedom of conscience and religion and of the legal obligation to accommodate—this is the problem of instrumentalization.

At this juncture, and this is probably something relevant in other multinational political associations such as Spain, the debate about the status of Quebec within the Canadian federation interfered with the debate about religious accommodations. Even if the support for the separation of Quebec is not particularly strong nowadays, there is a strong subset of the Quebec population which believes that some basic federal institutions and policies suffer from a legitimacy deficit. This mainly goes back to the events of 1981-82 when the new *Constitution Act* was passed without the consent of Quebec, when the *Canadian Charter of Rights and Freedoms* was designed and constitutionalized, and judicial review imported to Canada. Many believe,

[10] Syndicat Northcrest v. Amselem, 2004 SCC 47, [2004] 2 S.C.R. 551, pp. 4, 37.

rightly or wrongly, that the Canadian Supreme Court cannot or will not properly recognize Quebec's rights and interests, and that many of its rulings prove it.[11]

For instance, most observers agree that it was the Supreme Court's decision in the *Multani* case in March 2006 that kick-started the reasonable accommodation debate in Quebec. In that case, the Court allowed the young Multani, a Sikh schoolboy who wanted to bear a kirpan—the Sikh ceremonial dagger—at school, to do so under strict conditions. Up to this day, even if the Supreme Court said that the kirpan had to be worn under the shirt, placed in a case and wrapped and sewn in a cloth envelope that itself needed to be sewn to the shirt, more that 90% of the Quebec population believes that the Supreme Court was wrong. The decision was widely interpreted as another symptom of the Supreme Court's propensity to overrule legitimate laws passed by the Quebec legislative assembly (judicial activism), and of the imposition of Canadian-style multiculturalism in Quebec, a policy which is seen as encouraging ghettoization and fragmentation, and as conflicting with Quebec's own integration policy, that is, "interculturalism."[12]

This perception that the Canadian *Charter* and the Supreme Court, as well as the multiculturalism policy, go against the grain of Quebec's interest heightened the crisis. It did not create the crisis, but it amplified it. As I pointed out, many feared that religious accommodations were threatening fundamental rights or public values. As a consequence of that fear, the idea of institutionalizing a formal hierarchy within fundamental rights gained some traction; many thought that gender equality, for instance, needed to trump freedom of religion in cases of collision between the two rights. But the answer to this fear, as it should become clear, lies not in the philosophically and morally unsustainable proposal to hierarchize basic human rights but in the notion that the accommodation claims ought to be "reasonable."

Courts have indeed specified that accommodation claims ought to be "reasonable." Courts can assess not only the sincerity of the claimant but also the effects of the desired accommodation measure on the rights of others and on the capacity of the institution to function efficiently and achieve its goals. We are moving here into the terrain of the "undue hardship" or, better still, "excessive constraint" *(contrainte excessive)* set of criteria that can be reconstructed from case law. The content of the excessive constraint set of criteria is not fixed and immutable, for it must always be specified with reference to the facts of the matter. But looking at a wide range of cases involving both public and private organizations reveals some general and transversal criteria. An accommodation claim cannot (1) create excessive functional constraints (in terms of cost and functioning), (2) compromise the ends of the institutions (making profits, educating, or providing health care or social services), or (3) infringe upon the rights and freedoms of coworkers or fellow citizens.[13] As is well known, individual rights were never seen as absolute by liberal philosophers from Locke to Kymlicka and through Mill and Dworkin; basic human rights can legitimately be restricted in the name of the rights of others or of compelling public interests.[14] Accommodation claims must be reasonable because exemptions, compensations, or adaptation measures modify, to varying degrees, the prevailing terms of social cooperation. The obligation to accommodate is meant to redress an injustice by correcting indirect discrimination; logically, it should not do so by creating new situations of unfairness. Yet, for an accommodation claim to be turned down, it must be shown that its deleterious effects are real and significant. Dissociating itself from its US counterpart, the Canadian Supreme Court points out in *Central Okanagan School District No. 23 v. Renaud* that a minimalist and insufficiently demanding notion of excessive constraint would amount to a removal altogether of the legal duty to accommodate.[15] The burden of proof, in the Canadian jurisprudence, is placed upon the party who claims that

[11] See James Tully (2001): "Introduction", in Tully, James; Gagnon, Alain-G. (ed): *Multinational Democracies*, Cambridge University Press, Cambridge, pp.1-34.

[12] For a critical discussion of the alleged difference between multiculturalism and interculturalism, see Maclure, Jocelyn (2010): "Multiculturalism and Political Morality", in Ivison, Duncan (ed.) *The Research Companion to Multiculturalism*, Ashgate Publishing Limited, Farnham, pp. 39-56.

[13] Bosset, Pierre (2007): "Limites de l'accommodement: Le droit a-t-il tout dit?", *Éthique Publique*, 9 (1), pp.165-68.

[14] The "excessive constraint" set of criteria is thus consistent with s. 1 of the 1982 Constitution and with the Oakes Test, which is applied by Canadian courts to assess when a law can legitimately restrict individual rights. See *R. v. Oakes*, [1986] 1 R.C.S. 103. Since the limits to the duty to accommodate include not only deontological reasons (the rights of others must be respected), but also functional considerations, "excessive constraints" is more appropriate than the narrower "undue hardship."

[15] Central Okanagan School District No. 23 v. Renaud, [1992] 2 R.C.S. 970.

a norm is reasonable *even* if it restricts the religious freedom of another party.

Accommodation claims can thus in some cases be legitimately turned down. For instance, a Canadian provincial Court of Appeal recently denied the right to civil marriage commissioners to decline to solemnize same-sex marriages even if doing so would be contrary to their religious beliefs.[16] The majority's *ratio* was that, although the freedom of conscience of the marriage commissioners was genuinely infringed by the obligation to solemnize same-sex marriages, the stakes of allowing them to opt out were too high. This would amount, according to the Court, to "perpetuate a brand of discrimination which our national community has only recently begun to successfully overcome"; this would have "genuinely harmful impacts", the refusal on the part of commissioners being perceived by gays and lesbian, as well as by the other citizens, as an act as offensive as any racist or sexist one; and it would "undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis."[17] Consequently, the deleterious effects of the accommodation have been judged, in that case, to overweight the positive ones.

As the Canadian jurisprudence testifies, the notion of "reasonableness" that delineates the obligation of the accommodation measures is flexible enough to adapt to a wide variety of empirical situations but yet sufficiently well defined and robust to safeguard basic rights and common public values.[18]

2. **Secularism**

The management of religious diversity also raises the question of the appropriate place of religion in the public sphere and of the relationship between public institutions and religious practice. All democracies, notwithstanding the fact that they are officially secular such as France or Turkey or that they have a "separation" clause enshrined in their constitution, such as the U.S., or that some form of official recognition are granted to one or more religions, such as Denmark or the U.K., have to deal with religion and cope with the challenges raised by religious diversity.

France, for instance, is often thought to be the most secular society, but we know that 85 percent of the funding for private religious schools comes from the state (as opposed to 60% in Quebec); that the French state maintains and preserves Catholic and Protestant churches and Jewish synagogues built before the 1905 Law on the Separation of the Churches and State; that six Catholic holidays (Easter, Ascension, Pentecost, Assumption, All Saints' Day, and Christmas) are legal holidays; and that a concordat granting privileges to the Catholic, Protestant, and Jewish religions is maintained in Alsace-Moselle. Separation and neutrality, as the example of France attests, are never fully realized in practice.

Fully excluding religion from the public space is not, even in the most secular regimes, a real option. On the one hand, freedom of religion includes the freedom to act on the basis of one's beliefs, within reasonable limits. This is what the Americans call the "free-exercise of religion," which cannot be strictly confined to the private sphere. On the other hand, we cannot extract a society from its cultural and historical context. We will not require that churches stop ringing their bells; that all the villages or streets that borrow their names from saints be renamed; or that the cross that stands on top of the Mount-Royal in Montreal be taken down. No one seriously asks that we eliminate all the statutory Holidays that come from Christianity and design a deculturalized calendar like the French revolutionaries tried to do. Very few would suggest that spaces such as hospitals, prisons and armies stop offering religious or spiritual counseling.

A theory and practice of secularism that allow us to arbitrate the dilemma related to the presence of religion in the public sphere are thus needed. Elements for such a model were gathered in the CCAPRCD Report,[19] and Charles Taylor and I further developed it in *Secularism and Freedom of Conscience*.[20] The

[16] The Court of Appeal for Saskatchewan, [2011] SKCA 3.

[17] *Ibid.,* pp. 17-18, 40-42.

[18] For other cases where accommodation claims were turned down by Canadian courts, see Maclure, Jocelyn (forthcoming): "Reasonable Accommodation and The Subjective Conception of Freedom of Religion", in Eisenberg, Avigail; Kymlicka, Will (ed.): *How Public Institutions Assess Identity Claims*, UBC Press, Vancouver.

[19] See Bouchard, Gérard; Taylor, Charles, *op. cit.*, chapter 5.

[20] Maclure, Jocelyn; Taylor, Charles (2011): *Secularism and Freedom of Conscience*, Harvard University Press, Cambridge, MA. Originally published in French in 2010 under the title: *Laïcité et liberté de conscience*, Boréal/La Découverte, Montréal/Paris. See also the spanish translation: Maclure, Jocelyn; Taylor, Charles (2011): *Laicidad y libertad de conciencia*, Alianza Editorial, Madrid.

Commission recommended that the government drafts and submits to the Quebec legislative assembly a "white paper" or a Policy statement on secularism. This formal recommendation was alas disregarded.

The CCAPRCD Report defended what Taylor and I called a liberal and pluralist conception of *laïcité*. It is liberal because it is a human rights-based conception. It primarily seeks to protect the equality and freedom of conscience of all. It is pluralist because it does not believe that a "difference-blind" conception of liberalism is appropriate under condition of deep moral and religious diversity.

This model is called in the Quebec political culture "*laïcité ouverte*" (or open secularism). It is a model of *laïcité* that recognizes that strictly confining religion to the private sphere is a not real option and that is thus "open" to some forms of reasonable presence of religion within the public sphere. I now want to go over a few general guidelines that were sketched out regarding the place of religion in the public space and in public institutions.

2.1. *Distinction Between Institutions and Individuals*

Broadly speaking, secularism requires that there is no organic connection between the state and religion. The secular state must take its orders from the people through their elected representatives and not from religion. But the state's religious neutrality demands that *public institutions* favor no religion, not that the *individuals* who find themselves in these institutions privatize their religious affiliation. What I mean is that there is an important difference between, on the one hand, allowing citizens, for instance, to display religious symbols in public institutions and, on the other hand, favoring a particular religion through public interventions.

For example, we must contrast the act, by a student, of wearing a religious symbol in class to parochial teaching or to the recitation of a prayer before the beginning of classes in public schools. The essential point, if we wish to grant students equal respect and protect their freedom of conscience, is not to remove religion in all its manifestations from the schools but rather to ensure that the school does not espouse or favor any religion. The same distinction applies to other public institutions such as municipalities or courts.

2.2. *Should Public Officials Be Allowed to Wear Visible Religious Signs?*

At this point, one obvious question that this theory raises is about the implications of the state's religious neutrality for state officials, that is, for those who represent it and allow it to perform its functions. In some countries, such as France and Turkey, civil servants cannot display religious symbols when they are on duty. The reason most often mentioned for prohibiting state officials from wearing religious symbols is that they represent the state and must consequently embody the values it promotes. Since the state is in theory neutral toward citizens' various religious affiliations, its representatives must exemplify that neutrality.

At first sight, that position seems reasonable and legitimate. As individuals, citizens are free to display their religious affiliations both in the private sphere and in the public sphere, understood in the broad sense. But as state officials, they must agree to embody or personify the state's neutrality toward religions. A state employee wearing a visible religious symbol might give the impression that he is serving his church before serving the state, or that there is an organic link between the state and his religious community, whereas a uniform rule prohibiting the wearing of such religious symbols avoids the appearance of a conflict of interests.

That being said, it is important to be aware that prohibiting public officials from wearing religious symbols bears a cost, namely, either the restriction of their freedom of religion or of their equal access to positions in the public administration. No right is absolute, but a liberal democracy must always have strong reasons for restricting fundamental rights and socio-economic opportunities. So the question is: Does the appearance of neutrality, which is the objective of the rule prohibiting the wearing of visible religious symbols by public officials, constitute a strong reason?

Although the appearance of neutrality is important, the Commissioners Gérard Bouchard and Charles Taylor did not believe that it justifies a general rule prohibiting public officials from wearing conspicuous religious symbols. What matters above all, according to them, is that such officials demonstrate impartiality in the *exercise* of their duties. State employees must seek to perform the mission attributed by lawmakers to

the institution they serve; their acts must be dictated neither by their faith nor by their philosophical beliefs but rather by the will to accomplish the tasks associated with the position they hold.

But why think that the person who wears a visible religious symbol is less liable to demonstrate impartiality, professionalism, and loyalty to the institution than the person who wears none? Why, in that case, stop at external manifestations of faith? Logically, should not state employees be required to renounce all convictions of conscience, thus instituting a modern version of the Ironclad Test Oath that Catholics needed to take in order to have a public office after England took New France in 1760?[21] That would obviously be absurd. It is unclear why we should think *a priori* that those who display their religious affiliation are less capable of being professional and loyal to their employer than those whose convictions of conscience are not externalized or are so in a less conspicuous manner (the wearing of a cross, for example). Why deny the presumption of impartiality to one and grant it to the other?

Public officials must be evaluated in light of their actions. Do they display impartiality in the exercise of their duties? Do their religious beliefs interfere with the exercise of their professional judgment? It is possible to evaluate the neutrality of the actions performed by state officials without systematically restricting their freedom of conscience and religion. For example, when an employee wears a visible religious symbol and proselytizes at work, what would need to be proscribed is the proselytism and not the wearing of the religious symbol, which is not in itself an act of proselytism.

The position just outlined does not mean, however, that the wearing of all religious symbols by all public officials must be accepted. Rather, it implies that wearing a religious symbol ought not to be prohibited simply because it is religious. Other reasons may justify the prohibition, however. Here, we go back to the reasonable limits on freedom of religion that I sketched out in section 2.2. The wearing of a religious symbol must not interfere with the performance of one's duties. A teacher or a nurse, for example, could not wear a burqa or niqab at work and still adequately discharge her duties since the full veil hinders communication and raises security issues.

2.3. *Heritage vs. Establishment*

Another source of discontent about measures of accommodation for religious minorities has to do with the perceived asymmetry between what is required of members of the majority and what is required of members of minority groups. Some have trouble understanding why accommodations must be granted to individuals belonging to minority religious groups so that they can practice their religion in the public space, whereas the majority must accept, in the name of secularism, the privatization of some of their religious symbols and rituals.

Does secularism indeed require the sacrifice of a society's religious heritage? In particular, must public institutions and public places be purged of any trace of religion, and especially, that of the majority? Would that not amount to obliterating the past, severing ties between the past and the present?

An adequate conception of secularism must seek to distinguish what constitutes a form of establishment of religion from what belongs to a society's religious heritage. In Canada, the old Lord's Day Act, the privileges granted not long ago to Catholics and Protestants in the teaching of religion in the public schools, the recitation of a prayer before the beginning of sessions of municipal councils, and the obligatory use of the Bible to swear an oath in court constituted forms of establishment of the majority religion. In all these cases, practicing Christians were favored and non-Christians compelled to respect a law or a norm that was at odds with their conscience. To put it differently, Christian beliefs were directly turned into positive law. But some practices or symbols that may have originated in the religion of the majority do not truly constrain the conscience of those who are not part of that majority. Such is the case for practices and symbols that have a heritage value rather than a regulatory function. The cross on Mount-Royal in Montreal, for example, does not signify that the City of Montreal identifies itself as Catholic, and it does not compel non-Catholics to act against their conscience. It is simply a symbol that attests to an episode in Quebec's history.

A religious symbol is thus compatible with secularism when it is a reminder of the past rather than a sign of religious identification on the part of a public institution. As the Quebec Human Rights Commission points out, a symbol or ritual stemming from

[21] Milot, Micheline (2008): *La laïcité*, Novalis, Ottawa, p. 99.

the religion of the majority "does not infringe on fundamental liberties if it is not accompanied by any constraint on individuals' behavior."[22]

As always, there will be limit cases. Religious symbols in public institutions, like crosses in public schools, do not constrain individual behavior, but they do entail that there is a special link between the school and the religion of the majority; it creates a form of symbolic inequality, and for that reason I think they should be removed. It is necessary to keep practices that do constitute a form of identification on the state's part with a religion—usually that of the majority—from being preserved on the pretext that they now have only a heritage value.[23]

3. The aftermath of the Bouchard-Taylor Commission: Quebec's *Bill 94*

The post Bouchard-Taylor Commission debate was predominantly focused on religious signs in the public sphere. Some wished that the Quebec legislative assembly would follow Belgium and France and ban burqa and niqab in the public space. This was not really taken up by legislators of the different parties. The more heated debate had to do with religious signs in the public administration. A majority among the public thinks that public officials should not be allowed to wear visible religious signs, an opinion voiced in parliament by the official opposition.

However, the government decided otherwise. In March 2010, it introduced "Bill n°94: An Act to establish guidelines governing accommodation requests within the Administration and certain institutions,"[24] that it saw as its main legislative response to the CCAPRCD Report and to the ongoing debate on secularism and reasonable accommodations. Despite the political rhetoric of the government, the scope of the bill is fairly limited. For the main part, the bill gives an explicit legislative status to already existing positive legal norms. Articles 1, 4 and 5, for instance, simply reaffirms the duty to accommodate within reasonable limits as it was already defined in the jurisprudence. In addition, article 4 enunciates the principle of the «religious neutrality» of the State, which was until then indirectly inferred from the rights and freedoms granted to all citizens. The element of novelty in the bill is contained in article 6:

> 6. The practice whereby a personnel member of the Administration or an institution and a person to whom services are being provided by the Administration or the institution show their face during the delivery of services is a general practice.
>
> Is an accommodation involves an adaptation of that practice and reasons of security, communication or identification warrant it, the accommodation must be denied.

This main target of this norm is to ban the wearing of the burqa and the niqab by public officials and to require women who wear such kind of veils to remove it while they are transacting with a civil servant. The second paragraph of the article is a restatement that they are reasonable limits to freedom of religion, i.e., that motives related to security, communication and identification can justify turning down accommodation requests. Finally, article 7 stipulates that "the highest administrative authority of a department, body or institution is responsible for ensuring compliance with this Act", under the final authority of the Minister of Justice.

One of the positive effects of this bill is that all departments and bodies now have a legal duty to adopt guidelines related to the management of religious diversity and to monitor the practices of accommodation and non accommodation that are taking place on the ground. However, many, including the official opposition, think this bill does not go far enough.

4. Conclusion

The debate in Quebec between the competing models of secularism is not settled yet. The Parti Québécois, the sovereignist party which currently is the official opposition in the parliament, is now preparing a legislation on *laïcité*—that will

[22] Bosset, Pierre (1999): *Les symboles et rituels religieux dans les institutions publiques* [Cat. 2.120-4.6], Commission des Droits de la Personne et de la Jeunesse du Québec, Quebec, p. 10. My translation.

[23] The European Court of Human Rights succumbed, I think, to this fallacy in *Lautsi and Others v. Italy*, Application no. 30814/06, 18 March 2011, Strasbourg [Online]. http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=30814/06&sessionid=71434273&skin=hudoc-en

[24] National Assembly of Quebec (2010): *Bill n° 94: An Act to establish guidelines governing accommodation requests within the Administration and certain institutions* [Online]. http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-94-39-1.html

perhaps take the form of a charter (*charte de la laïcité*) inspired by the *Charter of the French Language*.[25] The current liberal government maintains that Bill 94 testified of their endorsement of *laïcité ouverte*. This where we are now in Quebec.

One the pending issues in the current context is that more coercive rules regulating religious practice could easily be challenged before the courts and ultimately struck down by the Supreme Court of Canada. Going back to the intersection between the debate over the status of Quebec within the Canadian federation and the debate within Quebec on religious diversity, such an outcome could in turn fuel the resentment against Canadian federalism and the Supreme Court of Canada in particular. This is very speculative but, if the PQ defeats the currently very unpopular Liberal Party in the next provincial election, the internal debate over secularism and religious accommodation could lead to another round of constitutional debate over the future of Canadian federalism.

[25] R.S.Q., chapter C-11, April 2011 [2010].

The Contribution of the European Court of Human Rights to the Accommodation of Contemporary Religious Diversity

Roberta Medda-Windischer[1]

Abstract

The present article analyzes how main issues and dilemmas that religious minorities and groups pose and face in contemporary societies in which, in the terms of the European Court of Human Rights, several religions coexist within one and the same population, have been or may be addressed through the lens of the European Convention on Human Rights.

Key words: Freedom of Religion, Religious Diversity, Religious Minorities, Accommodation, European Convention on Human Rights.

Resumen

El presente artículo analiza el modo en el que se han abordado o pueden abordarse, desde la óptica de la Convención Europea de Derechos Humanos, los principales problemas y dilemas que plantean y ante los que se encuentran las minorías y grupos religiosos en las sociedades contemporáneas en las que, en términos del Tribunal Europeo de Derechos Humanos, varias religiones coexisten en el seno de una misma población.

Palabras clave: Libertad religiosa, diversidad religiosa, minorías religiosas, acomodos, Convención Europea de Derechos Humanos.

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1. Definitional questions

1.1. *Freedom of Religion and the European Convention on Human Rights*

The international catalogue of human rights contains many treaties and provisions concerning freedom of religion and beliefs.[2] Regarding Europe, the first legally binding provision enshrining freedom of thought, conscience, and religion is Article 9 of the European Convention on Human Rights.[3] Under this article, everyone has the right to freedom of thought, conscience, and religion.[4] This right includes freedom to *change* one's religion or belief, and freedom, either alone or in community with others[5] and in public or private, to *manifest* one's religion or belief, in worship, teaching, practice and observance (para. 1). 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 (para. 2).[6]

The freedoms guaranteed by Article 9 of the Convention are twofold: *internal* and *external*.[7] *Internal* freedom can only be *unconditional* because it concerns deep-seated ideas and convictions formed in an individual's conscience which cannot, in themselves, disturb public order and consequently cannot be limited by state authorities. However, *external* freedom, despite its considerable importance, can only be *relative*. This relativity is logical inasmuch as, because the freedom in question is the freedom to manifest one's beliefs, public order may be affected or even threatened. Consequently, although the freedom to *hold* beliefs and convictions can only be unconditional, the freedom to *manifest* them can be relative.[8]

1.2. *Freedom of Religion and States' Margin of Appreciation*

Particularly when regulating matters related to intimate personal convictions in the sphere of morals or religion, the Convention system has traditionally made available to the

[2] See, Universal Declaration of Human Rights, Art. 18; International Covenant on Civil and Political Rights, Art. 18; Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, Art. 1; American Convention on Human Rights, Art. 12(3). Human rights law has so far avoided a definition of *religion*, except to ensure that it includes the concept of belief. As John Witte Jr. has noted: "This capacious definition of religion in international law has left it largely to individual states and individual claimants to define the boundaries of the regime of religious rights". Unfortunately, continues the same author, individual legislatures "embrace a bewildering array of definitions of religion". Witte Jr., John (1996): "Introduction", in Witte Jr., John and van der Vyver, Johan D. (eds.): *Religious Human Rights in a Global Perspective: Religious Perspectives,* Martinus Nijhoff Publisher, The Hague. The concept of *belief* includes religion but is not limited to its traditional meaning. Belief is thus a broader concept than religion and has been defined legally as "a conviction of the truth of a proposition, existing subjectively in the mind, and induced by argument, persuasion, or proof addressed to the judgment". See, Lerner, Natan (2006): *Religion, Secular Beliefs and Human Rights: 25 years after the 1981 Declaration*, Martinus Nijhoff Publisher, Leiden.

[3] The Charter of Fundamental Rights of the European Union, signed on 7 April 2000, as amended by the Treaty of Lisbon, OJ C 303/01, 14 December 2007, also protects freedom of thought, conscience, and religion in the same terms (Art. 10).

[4] In ECtHR, Appl. No. 24645/94, *Buscarini v. San Marino*, judgment of 18 February 1999, the Court expressly stated that Art. 9 also covers the freedom to *not* hold religious beliefs or practice a religion. Note the different formulation of Art. 18 ICCPR that expressly states: "This right shall include freedom *to have or to adopt* a religion or belief of his choice", but it does not specifically mention "the freedom *to change* his religion or belief", as Art. 9 ECHR (emphasis added).

[5] A problem of interpretation has emerged regarding the phrase in Art. 9 that sets out the possibility of practising one's religion "either alone or in community with others": after some hesitation, the Commission stated that the two alternatives "either alone or in community with others" could be regarded not as mutually exclusive or as leaving a choice to the authorities but only as recognising that religion could be practised in either form: ECommHR, Appl. No. 8160/78, *X v. the United Kingdom,* decision of 12 March 1981, 22 DR, p. 27.

[6] The Commission has clarified the content of Art. 9 as follows: "Art. 9 primarily protects the sphere of personal beliefs and religious creeds, i.e., the area which is sometimes called the forum *internum*. In addition, it protects acts which are intimately linked to these attitudes, such as the acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognized form". ECommHR, Appl. No. 10358/83, *C. v. the United Kingdom*, decision of 15 December 1983, DR 37, p.142.

[7] See, among others, Renucci, Jean-François (2005): *Article 9 on the European Convention on Human Rights. Freedom of Thought, Conscience and Religion,* Council of Europe Publications, Strasbourg.

[8] *Ibid.*

states a broad margin of appreciation[9] because the Court sees this as an area in which there is considerable variation in practice. Indeed, in the field of ethics and religious convictions, there is no uniform European conception of the legitimate aims for state restrictions of certain rights guaranteed by the Convention such as 'the protection of the rights of others', 'morals' or '*ordre public*'.[10] For instance, what is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations.

The Strasbourg Court has taken the line that by reason of their direct and continuous contact with the vital forces of their countries, state authorities, including the national courts, are in principle in a better position than the international judge to give an opinion on the exact content and on the necessity of these restrictions, leaving to the international courts the competence to provide general guidelines and a framework of reference.

Obviously, this does not give the state an unlimited discretion to determine whether a restriction is proportionate to the aim pursued. In fact, if it is true that the Court does reserve for itself the authority to review state actions against principles and limits set forth under the restriction invoked,[11] it leaves a certain amount of discretion for the states to decide whether a given course of action is compatible with the Convention requirements. Moreover, it is always open to the Court to narrow that margin should a more general consensus on the relationship between the state and the manifestation of religion or belief emerge. It follows from this that different responses to similar situations will be acceptable within the Convention framework, providing that they properly reflect a balancing of the particular issues in the *contexts* in which they emerge. Evans appropriately noted: "This means that the decisions of the Court in relation to Article 9(2) must be treated with extreme caution: for example, just because a restriction on the wearing of a religious symbol has been upheld in one case does not mean that a similar restriction will be upheld in another, where the context may be very different."[12]

As seen earlier, the fact that the right to manifest religion is not unconditional makes regulation and restrictions possible. Indeed, the Strasbourg Court has repeatedly stated that in a democratic society in which several religions coexist in one and the same population, it may be necessary to place restrictions on this freedom to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.[13]

The rule allowing restrictions and limitations must be interpreted in light of the Court's view according to which "although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a *balance* must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."[14]

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[9] The 'margin of appreciation' doctrine stems from the understanding that it is beyond the capability of the Court to exercise complete practical or political control over the implementation of the Convention. See, ECtHR, Appl. No. 5493/72, *Handyside v. United Kingdom*, judgment of 7 December 1976. See, among others, Arai-Takahashi, Yutaka (2002): *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* Intersentia, Antwerpen.

[10] See, in particular, ECtHR, Appl. No. 44774/98, *Şahin v. Turkey*, judgment (Grand Chamber) of 10 November 2005, and ECtHR, Appl. No. 42393/98, *Lucia Dahlab v. Switzerland*, decision (on the admissibility) of 15 February 2001.

[11] The Court clarified this point as follows: "It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. [...] Nevertheless [...] this does not mean that the Contracting Parties enjoy an unlimited discretion [...] the Contracting States may not [...] adopt whatever measures they deem appropriate." ECtHR, *Klass and Others v. Germany*, judgment of 6 September 1978, Series A, No. 28, p. 23, para. 49.

[12] Evans, Malcolm D. (2008): *Manual on the Wearing of Religious Symbols in Public Areas,* Council of Europe Manuals, Martinus Nijhoff Publisher, Leiden.

[13] *Ibid.*, at para. 115. See also, ECtHR, Appl. No. 14307/88, *Kokkinakis v. Greece,* judgment of 25 May 1993, para. 33. It is worth noting that of the four Arts. of the Convention with a similar structure (including, Arts. 8 [Private and family life], 10 [Freedom of expression], and 11 [Freedom of association]), Art. 9 is the only one that does not allow the state to invoke "national security" to restrict the exercise of protected rights. The other legitimate aims of restrictions according to para. 2 of Art. 9 are: public safety; the protection of public order, health, and morals; and the protection of the rights and freedoms of others.

[14] See, ECtHR, Appl. No. 74/1995/580/666, *Valsamis v. Greece*, judgment of 18 December 1996, para. 27. (emphasis added).

Which types, under which conditions, and to what extent these restrictions can be imposed to respect the principle of 'necessary in a democratic society' will be the content of the next sections. In fact, although the Court noted that it is not possible to discern throughout Europe a uniform conception of the significance of religion in society, and that even in a single country such conceptions may vary,[15] a number of key concepts have emerged from cases related to the accommodation of religious diversity which, reflecting core Convention values, provide clear benchmarks against which to assess the legitimacy of any restriction.

2. Accommodation of Religious Diversity in Everyday Life

The increased diversity of contemporary societies has multiplied the claims to accommodate diversity in different contexts of everyday life such as work places, public offices and schools.[16] As for the accommodation of religious diversity, for Article 9 to be applied, it is necessary that an act or inactivity of a person fall within the meaning of a form of *manifestation* of religion or belief. As Evans observed, this approach is problematic because it is difficult to see *who is to decide* whether a form of action is to be understood, in a *prima facie* sense, as a manifestation of a religion or belief at all, as well as *on what basis* it can be determined that a person does not understand an issue to be of a religious nature if he or she says that it is.[17]

2.1. *Labour and Public Employment*

The Strasbourg Court has dealt with cases in which the question was whether a person's inability to manifest his or her religion or belief was something for which the *state was responsible*, or whether it was instead attributable to *choices which those individuals have freely made for themselves*. For example, a number of cases have considered the question of whether employees may be required to work on days or at times that prevent them from fulfilling their religious obligations. In the case of *X v. the United Kingdom*,[18] it was decided that there had been no interference with the freedom of religion or belief by requiring the applicant, a Muslim teacher, to work at a given time on a Friday afternoon, despite his belief that he should be at prayer because he remained *free to renegotiate his contract or change his employment altogether*. His inability to attend prayers was a result of his choosing to accept a full-time position as a teacher rather than as a result of a restriction placed on him.

A similar approach was taken in the case of *Konttinei v. Finland,*[19] in which the applicant was a Seventh Day Adventist who objected to being required to work after sunset on a Friday on the grounds that this was forbidden by his religious beliefs. Similarly, in *Stedman v. the United Kingdom,*[20] the applicant's employer, following a change in national legislation, required the applicant to work on Sunday but the Commission found the applicant's complaints to be inadmissible because of her contractual obligations. The Commission stated that the applicant was dismissed for failing to agree

[15] See, ECtHR, Appl. No. 13470/87, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A, No. 295-A.

[16] For an overview of diversity claims and suggestions from the perspective of the 'reasonable accommodation' principle, see, where Québec is concerned, The Consultation Commission on Accommodation Practices Related to Cultural Differences (cochaired by Gérard Bouchard and Charles Taylor)*, Building the Future. A Time for Reconciliation*, Report of 22 May 2008, at <http://www.accommodements.qc.ca/index-en.html>.

[17] Malcolm D. Evans, *op.cit.*, p.12. This question was central in the case of *Valsamis v. Greece*, in which the Court ruled that a pupil's one-day suspension from school for having refused to take part in a parade on a national holiday was not a breach of Art. 9 of the Convention. The parents submitted that pacifism was a fundamental tenet of their religion and forbade any conduct associated with war, even indirectly, but the Court (as had the Commission before it) rejected this contention, arguing that "it can discern nothing, either in the purposes of the parade or in the arrangements for it, which could offend the applicants' pacifist convictions" and concluded that the obligation to take part in the school parade was not such as to offend her parents' religious convictions. See, ECtHR, *Valsamis v. Greece*, *op. cit.*, para 31.

[18] ECommHR, Appl. No. 8160/78, *X. v. the United Kingdom,* decision of 12 March 1981, D.R. 22, 27, para. 36.

[19] ECommHR, Appl. No. 24949/94, *Konttinen v. Finland,* decision of 3 December 1996, D.R. 87, p. 68.

[20] ECommHR, Appl. No 29107/95, *Stedman v. the United Kingdom,* decision of 9 April 1997, D.R.87- A, p. 104.

to work certain hours rather than for her religious belief as such and was *free to resign* and did in effect resign from her employment.[21]

Another interesting case is *Pichon and Sajous v. France*,[22] in which the applicants were pharmacists who had refused on religious grounds to sell contraceptives, but the Court took the view that because they were *free to take up a different profession* there was no interference with their freedom to manifest their religion. The Court reiterated that Article 9 of the Convention does not always guarantee the right to behave in public in a manner governed by one´s religion or belief and, consequently, not each and every act or form of behaviour motivated or inspired by a religion or a belief is protected by Article 9. The Court considered that, as long as the sale of contraceptives is legal and occurs on medical prescription *nowhere other than in a pharmacy*, the applicants could not give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products because they can *manifest those beliefs in many ways outside the professional sphere*.[23] The pharmacists' conviction by the national courts did not thus constitute interference with the exercise of the rights guaranteed by Article 9.

The restrictive approach of the Strasbourg Court *vis-á-vis* forms of accommodation of religious diversity at work has been confirmed in many other cases, including a case against the United Kingdom in which the Strasbourg judges had to balance an individual's religious beliefs against the interests of the state in the context of *public employment*. More precisely, the case concerned a Muslim teacher in a state school who claimed the right to attend religious service in a mosque located near the school.[24] Although the Strasbourg Commission at the time noted that in principle it is up to the individual rather than the state to determine whether to manifest religion alone or 'in community with others', it held that a person should, in the exercise of his freedom to manifest his religion, have to *take into account his particular professional or contractual position*, that *there is no right to public employment*, that the teacher had *entered into the employment contract of his own will*, and that he had not made a similar claim when posted further away from the mosque.[25]

The Court also followed this line of reasoning in the *Kalaç v. Turkey* case, in which a military judge was dismissed from his position on account of his membership to the Suleyman community, a religious community that, in the view of the military authorities, was inimical to the proper functioning of a judge.[26] In declaring the retirement of the applicant as not in breach of Article 9, the Court stated that in choosing to pursue a military career Mr. Kalaç was accepting of *his own accord* a system of military discipline that by its nature implied the possibility of placing limitations incapable of being imposed on civilians on certain of the rights and freedoms of members of the armed forces. In conclusion, in the Court´s view, by voluntarily accepting to pursue a chosen career, the applicant was held to have accepted the consequent necessary limitations on the right to manifest his religious belief.

Obviously, the restrictive, less accommodating approach of the Strasbourg organs cannot be necessarily shared by all Contracting Parties of the Convention. There are indeed cases in which the respondent government displayed a more accommodating approach than the Strasbourg organs. For instance, in a case against the United Kingdom, the applicant, an Indian Sikh, complained that the requirement to wear a crash helmet that obliged him to remove his turban while riding his motorcycle interfered with his freedom of religion.[27] The Commission considered that the compulsory wearing of crash helmets was a necessary safety measure for motor cyclists and upheld state interests in health against the individual's religious beliefs. Despite the Strasbourg decision, Sikhs were later granted an exemption to the traffic regulations by the respondent government, the United Kingdom, but in the Commission's opinion, this did not vitiate the valid health considerations on which the regulations were based.

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[21] *Ibid.*

[22] ECtHR, Appl. No. 49853/99, *Pichon and Sajous v. France*, decision (on the admissibility) of 2 October 2001.

[23] *Ibid.*, p. 4.

[24] ECommHR, Appl. No. 8160/78, *X. v. the United Kingdom, op. cit.*, p. 27.

[25] *Ibid.*

[26] ECtHR, Appl. No. 20741/92, *Kalaç v. Turkey*, judgment of 1 July 1997.

[27] ECommHR, Appl. No. 7992/77, *X. v. the United Kingdom*, decision of 12 July 1978, D.R. 14, p. 234.

The Strasbourg organs' rather restrictive approach to accommodate religious diversity at work has been counterbalanced by a leading pronouncement on accommodation of religious diversity in the procedure to obtain a job. The case has become a seminal case in the area of nondiscrimination because it has clarified the difference between the concept of *effective*, *de facto* equality and the concept of *formal, de jure* equality. The case in question is *Thlimmenos v. Greece*,[28] which concerned the refusal to appoint the applicant to a civil service post on the ground of a former conviction for refusing wear a military uniform because of his religious convictions. What was at issue was not the distinction made by domestic law between convicted persons and others for access to a profession but the lack of distinction between convicted persons whatever their offences, and the fact that no account was taken of the applicant's offence being of a special nature because of the religious motivation. The Strasbourg judges therefore considered that Article 14 (Prohibition of discrimination) had been violated in conjunction with Article 9 because the right to not be discriminated against in the enjoyment of the rights guaranteed under the Convention was violated not only when states failed to treat equally persons in analogous situations but also when states without an objective and reasonable justification failed to treat differently persons whose situations were significantly different.

2.2. *Use of Religious Symbols in Public Spaces*

Throughout the year 2010, many European countries such as Belgium,[29] France[30] and Spain[31] adopted, or are in the process of adopting, legislation aiming at prohibiting the *burqa* and the *niqab* in *public spaces* or solely in public buildings.[32] Recently, the Court ruled on a case that may be relevant in the current discussion about the prohibition of religious symbols in public spaces.

The case of *Arslan v. Turkey*[33] concerned a religious group known as *Aczimendi tarikatÿ* who were convicted, on the basis of the antiterrorism legislation, of appearing on the streets of the city while wearing the distinctive dress of their group: a tunic and a stick. For the Court, it was central that the case concerned punishment for wearing a particular dress style in *public areas that were open to all*, and not, as in other cases, wearing

[28] ECtHR, Appl. No. 34369/97, *Thlimmenos v. Greece*, judgment (Grand Chamber) of 6 April 2000.

[29] Belgium´s lower house of parliament voted on 29 April 2010 to ban clothes or veils that do not allow the wearer to be fully identified, including *burqa* and *niqab*. A cross-party consensus of 136 deputies voted for the measure, with just two abstentions and no opposing votes. At the time of writing, the ban had still to be passed by the Senate. See, at <http://www.spiegel.de/international/europe/0 ,1518,692212,00.html>.

[30] The French Constitutional Council ruled on 7 October 2010 that a bill making it illegal to wear the Islamic *burqa*, *niqab*, or other full face veils in public conforms with the Constitution (Decision no. 2010-613 DC, 7 October). Under the legislation, women who wear the veil can be required by police to show their face, and if they refuse, they can be forced to attend citizenship classes or be charged a fine. The legislation also makes it a crime to force a woman to cover her face, with a penalty of one year in prison and a fine. The bill was approved by the National Assembly in July 2010 and by the Senate in September. It is thought that the law will come into force in Spring 2011. See, at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010-613DC-en2010_613dc.pdf>.

[31] On 20 July 2010, the Spanish parliament rejected a proposed *general ban* of the full Islamic veil for women in public places, by a vote of 183 against and 162 for, with two abstentions. The proposal had been put forward by the Popular Party, which characterized it as a measure in support of women's rights. The ruling Socialist Party opposed the ban, although the government did express support for the notion of banning the wearing of the *burqa* in *government buildings*. This proposal will be part of an upcoming bill on religious issues, which is scheduled for debate in 2011. Meanwhile, a small number of Spanish towns and cities, including in the country's second-largest city, Barcelona, have already banned the wearing of *burqas* and *niqabs* in *municipal buildings*. See, Associate Press Report, 20 July 2010, at <http://www.religlaw.org/index.php?blurb_id=976&page_id=25>.

[32] On 23 June 2010, PACE stated that there should be *no general prohibition* on wearing the *burqa* and the *niqab* or other religious clothing, although legal restrictions may be justified "for security purposes, or where the public or professional functions of individuals require their religious neutrality, or that their face can be seen." The unanimously adopted resolution said the veiling of women is often perceived as "a symbol of the subjugation of women to men" but a general ban would deny women "who genuinely and freely desire to do so" their right to cover their face. PACE added that European governments should also seek to educate Muslim women, as well as their families and communities, on their rights and encourage them to take part in public and professional life. See, PACE, *Islam, Islamism and Islamophobia in Europe,* Resolution No. 1743 (2010), 23 June 2010.

[33] ECtHR, Appl. No. 41135/98, *Ahmet Arslan and others v. Turkey*, judgment of 23 February 2010. At the time of writing the judgment was only available in French.

religious symbols in *public establishments* in which religious neutrality might take precedence over the right to manifest one's religion.[34] Moreover, it was also relevant for the Court that the applicants were *ordinary citizens* and did not represent the state in the exercise of a *public function*; consequently, they could not be subjected on the basis of an official status "to the discretionary obligation in the public expression of their religious convictions."[35]

In this case, there was no evidence that the applicants represented a threat to public order or that they had been involved in proselytism by exerting inappropriate pressure on passers-by during their gathering.[36] Therefore, the Court considered that the necessity for the disputed restriction had not been convincingly established by the Turkish Government and held that the interference with the applicants' right of freedom to manifest their convictions had not been based on sufficient reasons.

2.3. *Wearing Religious Symbols in Public Schools*

Almost certainly, the diversity claim that has developed more debates and media attention, especially in France,[37] Turkey, and Germany,[38] is the wearing of Islamic headscarves by female Muslim teachers and pupils in public schools and university. The leading cases on the use of the veil in education institutions are the *Dahlab v. Switzerland*[39] and *Şahin v. Turkey*[40] cases in which the concept of secularism was central.[41]

Regarding the relationship between state and religion, the Strasbourg Court has frequently emphasised the state's role as "the neutral and impartial organizer of the exercise of various religions, faiths, and beliefs",[42] that this role is "conducive to public order, religious harmony, and tolerance in a democratic society",[43] that the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs,[44] and that the state is required to ensure mutual tolerance between opposing groups.[45]

In the *Dahlab* case,[46] the applicant submitted that the measure prohibiting her from wearing a headscarf in the performance of her teaching duties infringed on her freedom to manifest her religion. To rule on this case, the Court had to weigh the requirements of the protection of the rights and liberties of others (e.g., the pupils attending her classes) against the conduct of which the applicant stood accused. The Court accepted that it is difficult to assess the impact that a *powerful external symbol* such as the wearing of a headscarf might have on the freedom of conscience and religion of young children, and it questioned whether it might have a proselytising effect,[47] seeing

[34] *Ibid.*, para. 49.

[35] *Ibid.*, para. 48, (author´s translation).

[36] *Ibid.*, para. 51.

[37] See, French Law No. 22 of 15 March 2004 (*infra*).

[38] See, Rohe, Mathias (2002/4): "On the Applicability of Islamic Rules in Germany and Europe", *European Yearbook of Minority Issues,*3, pp. 181-197; Selbmann, Frank (2002/4): "Developments in German Case Law Regarding the Freedom of Religion", *European Yearbook of Minority Issues*, 3, pp. 199-216.

[39] ECtHR, *Lucia Dahlab v. Switzerland*, *op.cit.*

[40] ECtHR, *Şahin v. Turkey*, *op.cit.*

[41] Secularism is one possible model of religion–state relation and secularism itself has its variations. Secularism or French *laïcité* is considered one of the principal French Republican values. According to some authors, the French *laïcité* is something more than the simple separation of church and state: it refers to the "institutional dissociation of religion and morals; the creation of secular morals, the transmission of which is ensured by educational institutions." See, among others, Baubérot, Jean (1998): « La laïcité française et ses mutations », *Social Compass,* 45(1), pp. 175-187. See also, Ministère de L´intérieur et de L´aménagement du Territoire (France) (2005): "Les relations des cultes avec les pouvoirs publics: Rapport de la commission de réflexion juridique", 20 September 2005, at <http://www.olir.it/areetematich/pagine/documents/ News_0875_Rapport%20 MACHELON.pdf>.

[42] ECtHR, Appl. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (the Welfare Party) and Others v. Turkey*, judgment (Grand Chamber) of 13 February 2003, para. 91. Amongst the vast literature on this case, see Cumper, Peter (2002/4): "Europe, Islam and Democracy: Balancing Religious and Secular Values under the European Convention on Human Rights", *European Yearbook of Minority Issues*, 3, pp. 163-180.

[43] *Ibid.*

[44] See, *mutatis mutandis*, ECtHR, Appl. No. 27417/95, *Cha'are Shalom Ve Tsedek v. France*, judgment (Grand Chamber) of 27 June 2000, para. 84.

[45] See, *mutatis mutandis*, ECtHR, Appl. No. 45701/99, *Metropolitan Church of Bessarabia and Others v. Moldova*, judgment of 13 December 2001, para. 123.

[46] ECtHR, *Lucia Dahlab v. Switzerland*, *op.cit*.

[47] *Ibid*., at p. 13.

as it appeared to be imposed on women by a precept laid down in the Koran that was hard to reconcile with the principle of gender equality.[48]

In a controversial passage, the Court considered that it "appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."[49] Consequently, it concluded that, in light of the circumstances of the case, in particular the extremely young age of the children for whom the applicant was responsible as a representative of the state, the Swiss authorities did not exceed their margin of appreciation and the measures they had taken were therefore not unreasonable.[50]

Subsequently, the Court had another occasion to review a variation of this theme. The *Şahin* case[51] concerned the prohibition of female students wearing the Islamic headscarf, covering their hair and throat, while attending classes and examinations at Istanbul University; the prohibition was found not to violate Article 9 by a Chamber and Grand Chamber. The applicant, at that time a nursing student, was refused admission to classes following a circular issued by the Higher Education Council stating that it was a disciplinary and criminal offence for students to wear Islamic headscarves in higher education establishments. The Turkish government submitted that the ban was aimed at guaranteeing the principle of secularism laid down in the Constitution as well as guaranteeing the peaceful coexistence of different religions and beliefs in the same community or establishment.

The Strasbourg judges noted that this notion of secularism appeared to the Court to be consistent with the values underpinning the Convention and it accepted that upholding that principle might be regarded as necessary for the protection of the democratic system in Turkey. The Court reiterated the principle that Article 9 does not always guarantee the right to behave in a manner governed by a religious belief[52] and does not confer on people who do so the right to disregard rules that have proved to be justified.[53]

Imposing limitations on freedom in the sphere of wearing religious symbols in teaching institutions may, therefore, be regarded as meeting a pressing social need because this *religious symbol*—the headscarf—has taken on political significance in Turkey in recent years.[54] Under this perspective, the Court also took into consideration that, on the one hand, there are extremist political movements in Turkey that seek to impose on society their religious symbols and conception of a society founded on religious precepts. On the other hand, the Court noted that in Turkish universities it is undisputed that practising Muslim students are free to perform the religious duties that are habitually part of Muslim observance to the extent that they do not overstep the limits imposed by the organisational requirements of state education, and that in the University of Istanbul in particular, all forms of dress symbolising or manifesting a religion or faith are treated on an equal footing as they are all barred from the university premises. In conclusion, the Court found, unanimously, no violation of the Convention on the part of the Turkish government.[55]

For the Strasbourg judges, the fact that the interference was based, in particular, on two principles—*secularism and equality*—that reinforced and complemented each other was central. The Court noted that this notion of secularism appeared to be consistent with the values underpinning the Convention and it accepted that upholding that principle might be regarded as necessary for the protection of the democratic system in Turkey.[56]

In the *Şahin* case, the Court clearly taken the line that when it comes to states' regulation of wearing religious symbols in teaching institutions, reference to the state margin of appre-

[48] *Ibid.*

[49] *Ibid.*

[50] On the dismissal of teachers for their political opinions, see ECtHR, *Vogt v. Germany*, judgment (Grand Chamber) of 26 September 1995, Series A No. 232, concerning the dismissal of a secondary-school teacher on account of her political activities as a member of the Communist Party (DKP) in Germany, and similarly, ECtHR, Appl. No. 9228/80, *Glasenapp v. Germany*, judgment of 28 August 1986.

[51] ECtHR, Appl. No. 44774/98, *Şahin v. Turkey*, judgment (Grand Chamber) of 10 November 2005. See also, ECtHR, Appl. No. 41556/98, *Tekin v. Turkey*, judgment (friendly settlement) of 29 June 2004.

[52] See, ECtHR, Appl. No. 49853/99, *Pichon and Sajous v. France*, *op. cit.*

[53] ECtHR, *Şahin v. Turkey*, *op.cit.*, para. 121.

[54] *Ibid.*, para. 115.

[55] *Ibid.*, paras. 115-123.

[56] *Ibid.*, paras. 104, p.106.

ciation is particularly appropriate because rules in this field vary from one country to another depending on national traditions, and in this context there is no uniform European conception of the requirements of 'the protection of the rights of others' and of 'public order'.[57]

Therefore, for the Court, when questions concerning the relationship between state and religion is at stake, on which opinion in a democratic society might reasonably differ widely, the role of the national decision-making body, along with the consideration of the local context and the use of the margin of appreciation must be given special importance

Judge Tulkens annexed a pertinent and passionate dissenting opinion. She did not believe that the reasons underlying the restriction on the applicant's freedom to wear the Islamic headscarf at the University were relevant and sufficient. She observed that:

> Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and 'extremists' who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views. […] I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted.[58]

And further:

> 'Paternalism' of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of Article 8. Finally, if wearing the headscarf really was contrary to the principle of the equality of men and women in any event, the State would have the positive obligation to prohibit it in all places, whether public or private.[59]

The principle of secularism was also central to the case of *Dogru v. France*,[60] in which the Court examined, for the first time, the reforms introduced in France following the Stasi Commission's proposals on the place of Islam in a republican society.[61] The applicant, a Muslim girl who was 11 years old at the relevant time, started wearing a headscarf in the second term of secondary school. When she went to physical education and sports classes she was asked to remove it by her teacher who explained that wearing a headscarf was incompatible with physical education classes. The applicant repeatedly refused to remove it. As a result, she was expelled for breaching the 'duty of assiduity' by failing to participate actively in physical education classes.

The French authorities invited the Court to adopt the same conclusion as in the *Leyla Şahin* case, because the impugned measure was based on the constitutional principles of secularism and gender equality. They submitted that the French conception of secularism respects the principles of the Convention, permitting the peaceful coexistence of people belonging to different faiths while maintaining the neutrality of the public arena.

The Court reiterated that pluralism and democracy are based on a *spirit of compromise* that entails various concessions on the part of individuals to reconcile the interests of the various groups and promote the ideas of a democratic society.[62] Applying its case law, the Court found that the conclusion reached by the national authorities was not unreasonable.[63] In fact, the ban had been limited to the classes of physical education and was imposed in accordance with the school rules on health, safety, and assiduity, which applied to all pupils equally. The Court, then, underlined an important principle, namely that the ban was imposed to protect secularism in state schools and that, *although wearing religious signs*

[57] *Ibid.*, para. 109.

[58] *Ibid.*, Dissenting Opinion of Judge Tulkens, pp. 42-52, at para. 10.

[59] *Ibid.,* para. 12.

[60] ECtHR, Appl. No. 27058/05, *Dogru v. France*, judgment of 4 December 2008. See also the judgment of the Court in the case of ECtHR, Appl. No. 31645/04, *Kervanci v. France*, judgment of 4 December 2008, which was delivered on the same date.

[61] See, French Law No. 228 of 15 March 2004, pursuant to the principle of secularism, on the wearing in state primary and secondary schools of symbols or attire manifesting a religious affiliation. For a commentary, see, among others, Poggeschi, Giovanni (2002/4): "Religion in France: A Juridical Approach", *European Yearbook of Minority Issues*, 3, pp. 263-271.

[62] ECtHR*, Dogru v. France*, *op.cit.*, para. 62.

[63] *Ibid.*, para. 73.

at schools was not inherently incompatible with the principle of secularism, it was for the national authorities to decide whether the applicant had exceeded the relevant limits. The Court also observed that the applicant's position had created tension in the school, and the disciplinary process provided for sufficient safeguards that were apt to protect the applicant's interests. For the Court, overall, the expulsion of the applicant, who could continue her schooling by correspondence classes, had not been disproportionate.[64]

In this regard, an important principle formulated by the Court is that states must ensure an *open school environment* that encourages inclusion rather than exclusion, regardless of the pupils' social background, religious beliefs, or ethnic origins. "Schools should not be the arena for missionary activities or preaching; they should be a meeting place for different religions and philosophical convictions, in which pupils can acquire knowledge about their respective thoughts and traditions."[65] This is a corollary of the duty of neutrality and impartiality on the part of the states that implies that they are forbidden to pursue an aim of indoctrination that might be considered disrespectful of parents' religious and philosophical convictions.

In other terms, this entails the states' obligation to refrain from imposing beliefs, even indirectly, in places on which persons are dependent or in places in which they are particularly vulnerable. For the Court, the schooling of children is a particularly sensitive area in which the compelling power of the state is imposed on minds that still lack (depending on the child's level of maturity) the *critical capacity* enabling them to keep their distance from a message derived from a preference manifested by the state in religious matters.[66]

2.4. *Organization of Public Education: School Environment and Curricula*

As seen in the previous sections, an important area in which diversity claims often arise is education. In this regard, the protection afforded by Article 9 has been complemented by other Convention's provisions and certain additional protocols. In particular, Article 2 of the First Additional Protocol specifies that the state has respect for the right of parents to ensure education and teaching in conformity with their religious and philosophical convictions.[67] This freedom however cannot be unlimited, and if a conflict arises between the parents' convictions and the interests of the children, especially regarding their fundamental right to education, the Strasbourg organs have clearly taken the position that the latter must take precedence.[68] For instance, in connection with school attendance, protection of the child's right to education takes precedence if it clashes with the parents' convictions, and it was precisely on these grounds that the Strasbourg judges justified their refusal of an exemption from attending school on Saturday requested by parents who were members of the Seventh-Day Adventist Church.[69]

The recent Court´s decisions in the case of *Lautsi v. Italy* concerned the practice of the Italian public schools attended by the applicants' children (aged 11 and 13) of displaying a crucifix

[64] A similar outcome was reached in the case of *Mann Singh v. France* (ECtHR, Appl. No. 24479/07, decision (on the admissibility) of 13 November 2008), in which the authorities refused to reissue the applicant's driving license because he was wearing a turban, as a practicing Sikh, in his identity pictures. The Court found that the measure was limited in nature and was clearly imposed to protect public order and security, given that in road controls, the identification of the driver had to be facilitated to ensure that he was indeed entitled to drive his vehicle. Moreover, in the case of *El Morsli v. France* (ECtHR, Appl. No. 15585/06, decision (on the admissibility) of 4 March 2008) the Court stated that requests to remove headscarves and turbans to enable security checks were justified for the protection of public order. The applicant, a Moroccan national, applied for a visa to enter France to join her French husband but refused to remove her headscarf at the ensuing identity check taking place at the French consulate in Marrakesh. The Court held that the inability of the French authorities to accommodate the applicant's request to have the check done by a female agent did not exceed their margin of appreciation. See, Cariolou, Leto (2007/8): "Recent Case Law of the European Court of Human Rights Concerning the Protection of Minorities", *European Yearbook of Minorities Issues*, 7, pp. 513-544, at pp. 525-6.

[65] ECtHR, Appl. No. 30814/06, *Lautsi v. Italy*, judgment (Chamber) of 3 November 2009, para. 47.

[66] *Ibid.*

[67] For the exemption from sex education classes, see, ECtHR, Appls. Nos. 5095/71, 5920/72 and 5926/72, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A, No. 23.

[68] ECommHR, Appl. No. 17187/90, *Bernard and others v. Luxembourg*, decision of 8 September 1993.

[69] ECtHR, Appl. No. 44888/98, *Martins Casimiro and Cerveira Ferreira v. Luxembourg*, decision (on the admissibility) of 27 April 1999.

in each classroom.[70] The question for the Court was whether, while imposing the display of crucifixes in classrooms, Italy was able to ensure that education and teaching knowledge was passed on in an objective, critical, and pluralist way and that parents' religious and philosophical convictions were respected.

The Italian authorities justified the obligation to display (or the fact of displaying) the crucifix by referring to the positive moral message of the Christian faith (which *transcended secular constitutional values*), to the role of religion in *Italian history*, and to the deep roots of religion in the *country's tradition*. They attributed to the crucifix a *neutral and secular meaning* with reference to Italian history and traditions that were closely bound up with Christianity. They submitted that the crucifix was a religious symbol but one which could equally represent other values.[71]

For the Court—Chamber and Grand Chamber—although the symbol of the crucifix can have a number of meanings, the religious meaning was predominant. However, while the Chamber considered the presence of the crucifix in public schools to be "emotionally disturbing for pupils of other religions or those who profess no religion",[72] and deemed it thus contrary to Art. 2 of Protocol No.1, the Grand Chamber found no evidence that "the display of [such a symbol] may have an influence on pupils"[73] being, according to the Court, "an essentially passive symbol" as opposed to active teaching on religion or participation in religious activities.[74]

By reversing the Chamber's decision that had prompted the Italian Government to refer the case to the Grand Chamber, the Court ruled by a large majority (fifteen votes to two) that the decision whether or not to allow the presence of crucifixes in public classrooms falls within the state's margin of appreciation and that, although the regulation confers on Italy's majority religion preponderant visibility in the school environment, this as such does not amount to indoctrination.[75]

The main principle the Court reiterated in this regard is that states, in the efforts to reconcile the functions they assume in relation to education and teaching, which include the setting and planning of the curriculum as well as the organisation of the school environment and the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions, enjoy a broad margin of appreciation limited by the principles of *pluralism and objectivity* and the *prohibition of indoctrination*.[76] To reach the conclusion that the principle of pluralism and the prohibition of indoctrination were respected in the *Lautsi* case, the Grand Chamber gave particular importance to a series of additional arguments submitted by Italy, in particular: the presence of crucifixes in the classroom is not associated with compulsory teaching about Christianity; it is not forbidden for pupils to wear symbols or apparel having religious connotations; alternative arrangements are possible to support schooling fit in with nonmajority religious practices; optional religious education can be organised in schools.[77]

The Grand Chamber decision in the *Lautsi* case prompted diverging reactions well illustrated by the concurring and dissenting opinions annexed to the judgment. Judge Bonello, for instance, exemplified the reactions in favour of the pronouncement of the Court in these passages:

> [A] court in a glass box a thousand kilometres away has been engaged to veto overnight what has survived countless generations. The Court has been asked to be an accomplice in a major act of *cultural vandalism*. [...] Most of the arguments raised by the applicant called

[70] ECtHR, Appl. No. 30814/06, *Lautsi v. Italy*, judgment (Grand Chamber) of 18 March 2011; judgment (Chamber) of 3 November 2009. It is worth noting that a number of Member States and associations submitted written observations before the Grand Chamber either on behalf of Italy or the applicants. For Italy were authorized observations by the governments of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, the Russian Federation, and San-Marino (8t of the 10 governments were also granted the right to intervene during the hearing), jointly 33 members of the European Parliament (in a memorandum by Alliance Defense Fund), the European Centre for Law and Justice, Eurojuris, and *Zentralkomitee des deutschen Katholiken*, *Semaines sociales de France* and *Associazioni cristiane lavoratori italiani*. For the applicants intervened the Greek Helsinki Monitor, *Associazione nazionale del libero pensiero* and jointly the International Commission of Jurists, Interights, Human Rights Watch.

[71] *Ibid.* (Chamber), paras. 34-44.

[72] *Ibid.* (Chamber), para. 55.

[73] *Ibid.* (Grand Chamber), para. 66.

[74] *Ibid.*, para. 72.

[75] *Ibid.*, paras. 70-71.

[76] *Ibid.*, paras. 68-69.

[77] *Ibid.*, para. 74.

> upon the Court to ensure the separation of Church and State and to enforce a regime of *aseptic secularism* in Italian schools. Bluntly, that ought to be none of this Court's business.[78]

Contrary to this approach, Judge Malinverni in his dissenting opinion, after having noted that besides Italy, only in a very limited number of states (Austria, Poland and some German *Länder*) is there express provision for the presence of religious symbols in state schools, whereas in the vast majority of states the question is not specifically regulated, noted:

> We now live in a multicultural society, in which the effective protection of religious freedom and of the right to education requires strict State *neutrality* in State-school education. [...] The State should not impose on pupils, against their will and without their being able to extract themselves, the symbol of a religion with which they do not identify.[79]

It has to be acknowledged that the reasoning of the Grand Chamber is partly unconvincing especially with regard to the explanation concerning the difference between the present case and the *Dahlab* case (*infra*) in which the Court considered legitimate the prohibition imposed on a primary teacher of a public school to wear the Islamic veil. For the Grand Chamber the difference lays on the tender age of the pupils in the *Dahlab* case (although the Lautsi children were respectively 8 and 13 at the time of the alleged violation of the Convention) and the need to respect the principle of denominational neutrality in schools that a teacher with a *powerful external symbol* was unable to guarantee.[80] The main divergence lies thus in the different religious symbol under discussion: for the Court, the crucifix on the wall of a classroom by being a 'passive symbol' is less capable of influencing children's minds. The legal reasoning of the Grand Chamber remains rather unconvincing, notably because it departed from most previous case-law of the Court in this field in which the neutrality of either curriculum and school environment was established and assured.

At this stage, it is probably premature to argue that following the *Lautsi* case the Court has relinquished the principle of neutrality as the apparent contradiction with some relevant case-law of the Court, particularly the *Dahlab* case (*supra*), may suggest. Beyond the enthusiastic and critical reactions that the *Lautsi* Grand Chamber's judgment has elicited, it remains to be seen whether in future cases in which the applicants will be able to provide evidence that they do directly suffer from religious pressure in schools, the Strasbourg Court will find violations of the Convention.

Similar to the *Lautsi* case, the *Folgerø and Others v. Norway* case[81] concerned the duty of the state to fulfill its functions regarding education and teaching in a way that information or knowledge included in the curriculum is conveyed in an objective, critical, and pluralistic manner. The case concerned an application lodged by parents, who were members of the Norwegian Humanist Association, and their children, who were primary school pupils. The applicants complained that despite amendment, which had been introduced as a result of a petition brought to the UN Human Rights Committee,[82] the subject called Christianity, Religion, and Philosophy contained a clear preponderance of Christianity, the state religion and state church in Norway (of which 86% of the population are members) and was compulsory in the 10-year schooling in Norway. As the Norwegian authorities had amended the KRL subject according to the Views of the UN Human Rights Committee, they refused to grant the applicants' children full exemption from the subject itself.

In the *Folgerø* case, the Court reiterated a principle that is recurrent in many of its pronouncements, namely that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a *balance* must be achieved that ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[83] In particular, regarding the issue object of the case, the Court noted that the setting and planning of the curriculum involves questions of expediency on which it is not for the Court to rule and whose solution may le-

[78] *Ibid.*, Concurring Opinion of Judge Bonello, paras. 1.4. and 2.4 (emphases added).

[79] *Ibid.*, Dissenting Opinion of Judge Malinverni Joined by Judge Kalaydjieva, paras. 1, 2 and 8. See also, Conforti, Benedetto (2011) (former Judge of the ECtHR): *Crocifisso nelle scuole, una sentenza che lascia perplessi*, 24 March 2011, at <www.affariinternazionali.it/stampa.asp?ID=1705>.

[80] *Ibid.*, para. 73.

[81] ECtHR, Appl. No. 15472/02, *Folgerø and Others v. Norway,* judgment (Grand Chamber) of 29 June 2007.

[82] UN Human Rights Committee, Communication No. 1155/2003, Views of 3 November 2004.

[83] ECtHR, *Valsamis v. Greece*, *op.cit*.

gitimately vary according to the country and the era.[84] However, the Court also reiterated and emphasized the principle of neutrality and the prohibition to pursue an aim of indoctrination.

The Court noted that in the curriculum concerned, approximately half of the items included referred to Christianity alone, whereas the remainder of the items were shared between other religions and philosophies. Moreover, the Court found that the system of partial exemption available to the applicants subjected the parents concerned to a heavy burden with a risk of compelling them to disclose intimate aspects of their religious and philosophical convictions and that the *potential breeding ground for conflict* was likely to deter them from making such requests. The Court thus concluded, though by a narrow majority—nine to eight—that notwithstanding the many laudable legislative purposes stated in connection with the amendment of the curriculum, it did not appear that Norway took sufficient care that information and knowledge included in the curriculum be conveyed in an *objective, critical, and pluralistic manner* as the Convention rights provided.[85]

Finally, the case of *Grzelak v. Poland* is a relevant similar case with a different conclusion.[86] The case was lodged by parents who did not want their son to follow religious instruction in a public school, but rather attend an alternative course in ethics in accordance with their personal convictions. Due to a lack of other pupils in a similar situation, no alternative courses such as ethics were offered and he had to spend those hours apart from the other pupils. According to his parents, this made him the subject of social ridicule and exclusion. Moreover, on his school reports, he received no grade for religion or ethics because despite various demands by the parents, no interschool ethics were organized due to the small number of interested pupils. The Court noted that in this case, the core of the boy's right to not manifest his convictions was infringed (Art. 14 in conjunction with Art. 9). However, on the refusal to offer alternative courses in ethics the Court concluded under Article 2 of Protocol 1 (Right to education) that Poland had remained within its margin of appreciation. After all, religious and ethics education were optional and subject to the requirement that a minimum number of students was interested. The practice in Poland of requiring a minimum of seven pupils for such classes was in that sense not deemed unreasonable and thus no violation on that count was found.

3. Conclusions

At the end of the analysis of the Strasbourg case law, which principles can be inferred from the Strasbourg jurisprudence for the most urgent dilemmas surrounding freedom of religion in contemporary societies in which, in the Courts's terms, "several religions coexist within one and the same population"?[87]

Perhaps, the most important principle the Court formulated is the duty of the state to maintain a climate of *toleration* and *respect* for the rights of others. At the same time, the duty to ensure toleration and respect is to be read together with the duty to remain *impartial*. But on which basis should a climate of toleration and respect and the duty of impartiality be grounded? These are rather general principles that should be anchored to more specific tenets to find application in practical, concrete situations.

The Court has formulated a central corollary of the aforementioned principles in the *Kokkinakis* case,[88] the 'first real case' on freedom of religion decided by the Strasbourg Court: this is based on the fact that in contemporary, increasingly diversified societies *restrictions of the freedom to manifest religion or belief are legitimate* to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.

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[84] See, *ibid.*, para. 28.

[85] The Court found a violation of Art. 2 Prot. No. 1, and regarding its final findings, the Court did not find it necessary to carry out a separate examination on Art. 9. ECtHR, *Folgerø and Others v. Norway*, *op. cit.*

[86] ECtHR, Appl. No. 7710/02, *Grzelak v. Poland*, judgment of 15 June 2010. For a different conclusion, see, ECtHR, Appl. No. 40319/98, *Saniewski v. Poland*, decision (of the admissibility) of 26 June 2001, on the alleged breached of freedom of thought and conscience due to the absence in the applicant´s school report of a mark for the course of religion revealing that the applicant did not attend this course and thus obliging him to make a public statement as to his beliefs. The Court declared the application to be inadmissible because the applicant did not show that he had suffered such consequences from the school report which could be said to amount to an interference with his rights and freedoms guaranteed by Art. 9 of the Convention.

[87] ECtHR, Appl. No. 14307/88, *Kokkinakis v. Greece,* judgment of 25 May 1993, para. 33.

[88] *Ibid.*

Restrictions and reconciliation of conflicting interests must be implemented in a way that ensures the fair and proper treatment of minorities while avoiding any abuse of a dominant position. This means that believers must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. The state has the duty to ensure that believers are able to manifest their beliefs by bringing their faith to the attention of others and by trying to persuade others to their point of view. This is what the Court considers a genuine and legitimate missionary evangelism. At the same time, the Court considers that the state pursues a legitimate aim when it seeks to limit 'improper' forms of proselytism that run the risk of subjecting individuals to pressure which they might find it difficult to resist.

However, what are the limits that believers and nonbelievers must accept in the Convention system? As noted in the aforementioned, for the Court, the climate of *tolerance* and *respect* is not maintained when antireligious expressions or behavior reach the level of being *gratuitously offensive*, *incite to disrespect or hatred* or *cast doubt on clearly established historical facts*; or when there is a *malicious violation of the spirit of tolerance*; or a *hostile environment* is created because this comes close to a negation of the freedom of religion of others and thus, in the Court's terms, "*it loses the right to society's tolerance*".[89]

As for the principle of *impartiality*, this seems to be based on a vision according to which the state should respect all religious beliefs as long as they do not contravene the Convention's rights, protect freedom of religion, and in cases in which public funding is provided to one or more churches, then other churches should also receive funding in a nondiscriminatory manner.[90] The principle of impartiality also means that a state is to avoid entering into religious or doctrinal questions in the associative life of believers and nonbelievers, other than to test them for compatibility with the foundational convention values of democratic governance, pluralism, and tolerance. The state's duty of impartiality means, in other terms, that the state should refrain from assessing the legitimacy of religious beliefs or the ways in which they are expressed.

The principle of *equality* is another crucial principle when it is necessary to assess an interference with the manifestation of a religion or belief, for instance those concerning the wearing of religious symbols. As was established in the *Thlimmenos* case, the principle of equality requires not only that equal situations are treated equally but also that unequal situations are treated differently. This twofold canon is crucial to understanding the dichotomy of the *de facto* or substantial equality and *de jure* or formal equality.

The case of a general restriction on the wearing of a particular type of clothing or symbol which is of religious significance to some but not to all, such as the prohibition of the use of *burqa* or *niqab* foreseen in a number of European laws or draft laws, raises the question of whether the state is responsible for a *failure to treat differently persons whose situations are significantly different*. Should this be the case, there will be a violation of Article 14 in conjunction with Article 9 unless an objective and reasonable basis is given that justifies a differential treatment. The question thus arises whether, for instance, antiterrorism or public order are legitimate justifications for a general ban of *burqa* or *niqab*. The Court assists the decision-making by drawing a difference, first, between prohibitions that find application in public areas *that are open to all* and those limited to *public establishments*, and second, between prohibitions that apply to *ordinary citizens* and those limited to citizens who exercise a *public function*.

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[89] ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey* (Chamber), *op.cit.*, para. 75.

[90] See the recent *Savez crkava "Rijec zivota" and Others v. Croatia* case (ECtHR, Appl. No. 7798/08, judgment of 9 December 2010), in which the Strasbourg Court found a violation of Art. 14 (prohibition of discrimination) in conjunction with Art. 9 (freedom of religion) in circumstances in which the Government of Croatia failed to provide an objective and reasonable justification for its less favourable treatment—including the right to provide religious education in public schools and nurseries and the right to perform religious marriages with the effects of a civil marriage—of three Reformist churches (the Applicant Churches) in Croatia. See, also, ECtHR, Appl. No. 40825/98, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, judgment of 31 July 2008. Similarly, in *Darby v. Sweden* (ECtHR, Appl. No. 11581/85, judgment of 23 October 1990), the Court found that the distinction made between nonresident workers and resident workers to be exempted from church tax lacked a legitimate aim under the Convention and thus, a violation of the antidiscrimination clause (Art. 14) was found taken together with Art.1 of Prot. No. 1 which guarantees the right of property (the Court did not find it necessary to consider the alleged violation of Art. 9).

In the context of bans and limitations, some raise the question whether secularism is actually becoming *intolerant*, especially when individual religious manifestations do not display any signs of political intentions but are performed *bona fide* making these prohibitions difficult to reconcile with the necessity to protect a democratic society.[91]

Recalling that the Convention does not always guarantee the right to behave in public in a manner governed by one's religion or belief, between secularism and its corollary, equality, on the one hand, and manifestation of religion, on the other hand, the Court has clearly given precedence to the former: "An attitude which fails to respect that principle [of secularism] will not necessarily be accepted as being covered by the freedom to manifest one's religion".[92]

Yet, the position expressed by the Court in the *Şahin* case, perhaps more in the direction of a 'strict' form of secularism, has been always referred to Turkey and to the specific situation existing in this country, notably the overwhelming majority of the population belonging to Islam and the existence of fundamentalist religious movements. In all the other cases earlier discussed, the Court has discarded a 'militant' secularism, particularly in the recent *Lautsi* case, and supported a vision according to which the state should respect all religious beliefs as long as they do not contravene the Convention's rights and protect freedom of religion.

From the analysis hitherto conducted on the possible models for religion–state relations and on the case law of the Strasbourg Court, it seems that the Strasbourg Court upholds a pluralist, 'open' secularism model that, as seen, rejects any forms of 'militant secularism' or 'enlightenment fundamentalism', and that for the Court is also an appropriate model to protect nonbelievers, atheists, agnostics and skeptics who, although often neglected, are also covered by Article 9 of the Convention and the other provisions complementing this right.

When implementing the principles governing the right to freedom of religion—respect and tolerance, impartiality and neutrality, secularism and equality—the role of the state is not simply a passive role, as Malcolm Evans noted;[93] on the contrary, the Court recognizes the potential need for the state to be *proactive*, emphasizing the role of the state as the *promoter of tolerance* and noting that the state's duty to ensure religious tolerance and peaceful relations between groups of believers may require engaging in *neutral mediation*.[94] For the Court, this does not amount in principle to state interference with the believers' rights, although the state authorities must be cautious in this particularly delicate area. The role of mediation performed by the state authorities is also clearly beneficial for democratic societies as a whole because it gives opportunities for positive dialogue and a furthering of mutual respect and understanding.

Recalling that the Convention is a 'living instrument' which is to be interpreted in the light of present-day conditions and that the Court can be influenced by the developments of standards shared by member states of the Council of Europe, the processes of interpretation and application of the principles of respect, tolerance, impartiality, and neutrality as well as secularism and equality are also able to address newly emerging issues or reconsider previous Court's approaches. In other words, the interpretative and implementing approaches set out in the Court's jurisprudence are not rigid and immutable but are open to reappraisal and adaptations to new standards, should they emerge among the contracting states of the Convention.

This is particularly appropriate in areas such as the freedom of religion or belief in which states usually enjoy a significant margin of appreciation and where the role of the national decision-making body, together with the consideration of the local context, has always been given special importance. An authentic neutral, nonpartisan role of mediation by the state is perhaps the most valuable and crucial function of the state in our contemporary, increasingly diversified societies. In perform-

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[91] See, among others, Lerner, *op.cit.*; Finke, Jasper (2010): „Warum das ‚Burka-Verbot' gegen die EMRK verstößt", *Neue Zeitschrift für Verwaltungsrecht*, 18, pp. 1127-1131.

[92] ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey* (Grand Chamber), *op.cit.*, para. 93.

[93] Evans, Malcolm D. (2008): *Freedom of Religion and the Role of the State–More Than Setting an Impartial and Neutral Framework?,* Conference Proceedings, *Human rights in culturally diverse societies. Challenges and perspectives*, Council of Europe, DG Human Rights and Legal Affairs, The Hague, Netherlands, 12-13 November 2008, at pp.67-69.

[94] See, ECtHR, Appl. No. 39023/97, *Supreme Holy Council of the Muslim Community v. Bulgaria*, judgment of 16 December 2004, para. 80.

ing this function, the state is sustained and complemented by the Strasbourg Court that ensures not only a supervisory role in the implementation *ex post*, of state policies and legislation, but also an interpretative function *ex ante*, in the elaboration of policies, norms, and judiciary decisions on accommodating religious diversity by providing principles and interpretative rules valuable for the legal production of the member states of the Council of Europe. The increasing number of applications before the Strasbourg Court concerning religious diversity is a clear indication of the growing importance of this topic in the European arena, and this makes the role of the Strasbourg Court more crucial and central than ever before.

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Freedom of religion versus freedom of business management in Spain: Spanish Case-law analyzed in the light of "reasonable accommodation" figure according to Canadian Case-law[1]

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Abstract

The Canadian case-law figure of reasonable accommodation has not found a favourable reception in the Spanish Case-law. Proof of this is the STC 19/1985 judgement of the Spanish Constitutional Court, which affirms that the giving of a different weekly rest because of a religious belief would be a reasonable exception, but it is not imperative for the entrepreneur to grant it. Accommodation is not compulsory neither for Canadian courts, since this obligation to accommodate must be within the limits of "reasonability". Even if several justified reasons can be put forward to refuse the accommodation, Canadian courts opt for the imposition of this legal duty to reconcile religious practice demands with labour market needs. Taking into consideration that accommodation does not happen spontaneously and that *bona fide* in labour relations is not enough, it is advisable to look for good practices in comparative Law to deal with this kind of conflicts.

Key words: Reasonable accommodation, religious minorities, real equality, indirect discrimination, diversity management.

Resumen

La figura de acomodamiento razonable de la jurisprudencia canadiense no ha encontrado una acogida favorable en la jurisprudencia española. Prueba de ello es la sentencia STC 19/1985 del Tribunal Constitucional español, que establece que el otorgamiento de un descanso semanal distinto en base a creencia religiosa supondría una excepcionalidad razonable, pero su imposición no es imperativa para el empresario. El acomodamiento tampoco es obligatorio para los tribunales canadienses, ya que esta obligación de acomodar debe ajustarse a los límites de la «razonabilidad». Aun cuando aunque se puedan esgrimir diversos motivos justificados para la no concesión del acomodamiento, los tribunales canadienses optan por la imposición de este deber legal con el fin de reconciliar las exigencias de la práctica religiosa y las necesidades del mercado laboral. Teniendo en cuenta que el acomodamiento no se produce espontáneamente y que no basta la buena fe en las relaciones laborales, es aconsejable buscar buenas prácticas en el derecho comparado para hacer frente a este tipo de conflictos.

Palabras clave: Acomodo razonable, minorías religiosas, igualdad real, discriminación indirecta, gestión de la diversidad.

[1] This paper contains several translations of the Case Law from Spanish to English. Also other quotations are translated, since a big part of the bibliography is in Spanish. These are not official, but my own translations.

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Anuario de Acción Humanitaria y Derechos Humanos
Yearbook on Humanitarian Action and Human Rights
ISSN: 1885 - 298X, 2011, Bilbao, págs. 55-70

Introduction

In this paper I will start by introducing the north-American legal figure of reasonable accommodation, which stems from the principle of equality and non-discrimination. I will continue by contrasting two case-law decisions issued the same year in Canada and Spain, in which facts are very similar but rulings are completely different. Finally I will explore the feasibility of importing the reasonable accommodation figure into the Spanish context taking into account the Spanish legal framework, and the civil Law judicial system.

Reasonable accommodation is far away from being applied by the Spanish Courts. Proof of this is the judgement of the Spanish Constitutional Court STC 19/1985[3], which affirms that "the giving of a different weekly rest because of a religious belief would be a reasonable exception, but its imposition is not imperative for the employer".[4]

The granting of the accommodation is not imperative neither for Canadian Courts, since this obligation to accommodate must be within the limits of "reasonability". Therefore there are several reasons that can justify a refusal of the accommodation. However, Canadian courts have opted for the establishment of a legal and social duty to make the effort to reconcile religious practice demands with labour market needs, whenever it is possible. This means a step forward compared to the 1992 Agreements[5] between the Spanish State and the religious minorities with evident presence in Spain, since these agreements just allow religious accommodation in the professional field "whenever there is previous agreement between parties". This free agreement wrongly presupposes that the parties that negotiate a labour contract are on an equal footing while agreeing terms concerning working time, paid holidays and other regulations. Since spontaneous accommodation in labour relations rarely exists, it is advisable to explore which solutions are being used in other countries and societies to manage this kind of conflicts.

1. The concept of reasonable accommodation in a technical legal sense

In 2007 a Consultation Commission on Accommodation Practices Related to Cultural Differences co-chaired by Charles Taylor and Gérard Bouchard was established to solve out the crisis of perception of reasonable accommodations in Québec. Fruit of the Commission's work is a valuable report that puts an end to the misconceptions on reasonable accommodation and helps us to clear concepts up, and to delimit the scope and limits of the accommodation practices.

According to the glossary of terminology of the Bouchard-Taylor report, *Reasonable accommodation* is "an arrangement that falls under the legal sphere, more specifically case law, aimed at relaxing the application of a norm or a statute in favour of an individual or a group of people threatened with discrimination for one of the reasons specified in the Charter"[6]. So reasonable accommodation is a legal instrument of jurisprudential origin, which, from the starting point of situation of discrimination prohibited by the declarations of rights, allows bringing a lawsuit to restore equality in a particular case. This request must be addressed as far as possible, or as far as reasonable, as we will see later on.

We could synthesized the features of reasonable accommodation as follows:

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[3] STC stands for Sentencia del Tribunal Constitucional (Constitutional Court Judgment). The Spanish Constitutional Court (TC) is an extraordinary Court to deal with important cases that need an interpretation of the Spanish Constitution. The TC is the highest interpret of the Constitution.

[4] STC 19/1985 of February 13th 1985. Second division of the Constitutional Court. Judge-Rapporteur: Jerónimo Arozamena Sierra. Fundamento Jurídico (FJ) 3.

[5] In 1992, to promote religious pluralism, the Spanish State signed three Agreements of Cooperation with the religious minorities with evident presence in Spain, which are the Federation of Israelite Communities of Spain (BOE, 1992, 272). the Islamic Commission of Spain (BOE, 1992, 272) and the Federation of Evangelical Religious Entities of Spain (BOE, 1992, 272).

[6] Bouchard, Gérard and Taylor, Charles (2008): *Building the future. A time for reconciliation,* Québec. Complete report of the Consultation Commission on Accommodation Practices Related to Cultural Differences. Only available online in pdf format: http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf

1.1. *Characteristics of reasonable accommodation*

a) It is a requirement that follows directly from the principle of equality

As stated by Woehrling, it is the corollary of the prohibition of indirect discrimination[7]. It is not stipulated as such in any law, that is, there is no *reasonable accommodation law.* It is a jurisprudential concept stemming directly from the article 15 of the *Canadian Charter of Rights and Freedoms*[8] and article 10 of the *Charter of Rights and Freedoms of Quebec*.[9]

As reported by Añón Roig, reasonable accommodation "in a technical legal sense can be understood as an obligation that results, even if implicitly from the principle of non discrimination and the demands of realization of the constitutional rights of the person".[10]

b) The basic assumption is the existence of a discriminatory situation

It is not only religious discrimination which can lead to demands for accommodation, but they can be also based on any of the grounds of discrimination described in the charters of rights, such as race, colour, sex, pregnancy, sexual orientation, marital status, age, religion, political convictions, language, ethnic or national origin, social status, disability, or analogous.

According to Jézequel, "From a strictly legal standpoint, therefore, requests for accommodation will only be admissible if (1) the contested rule or standard is discriminatory; (2) the discrimination is prohibited by the charter; (3) the obligation meeting that rule or standard is detrimental to the complainant".[11]

It is worth mentioning that although the burden of proof to avoid the obligation to accommodate falls on the respondent, the complainant must show a minimal probative evidence of discrimination.

c) The obligation to accommodate affects the public and the private sector

Although the principal context of claims is the exercise of freedom of religion in the workplace, the accommodation can occur in many other environments, such as hospitals, schools, universities ... or any other situation where a conflict caused by a uniform treatment of diversity may arise. Because "the concept of reasonable accommodation is inherent to the right to equality, the application of this concept outside the realm of labour relations was embedded in their genetic code."[12]

It is worth noting that *reasonable accommodation* itself is the legal figure applied by the courts, whereas when the matter is resolved between the parties without the intervention

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[7] "Le corollaire de l'interdiction de la discrimination indirecte consiste plutôt en une obligation d'accommodement, c'est à dire un devoir pour celui qui est à l'origine de la discrimination de prendre tous les moyens raisonnables pour soustraire les victimes de la discrimination indirecte aux effets de celle-ci."

Woehrling, José (1998): "L'obligation d'accommodement raisonnable et l'adaptation de la societé a la diversité religieuse", *Revue de droit de McGill*, 43, p. 330.

[8] The *Canadian Charter of Rights and Freedoms*, is the preamble of the Canadian Constitution of 1982. Art.15 "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[9] Art. 10 de la *Charte de droits et libertés de la personne*: "Toute personne a droit à la reconnaissance et à l'exercice, en pleine égalité, des droits et libertés de la personne, sans distinction, exclusion ou préférence fondée sur la race, la couleur, le sexe, la grossesse, l'orientation sexuelle, l'état civil, l'âge sauf dans la mesure prévue par la loi, la religion, les convictions politiques, la langue, l'origine ethnique ou nationale, la condition sociale, le handicap ou l'utilisation d'un moyen pour pallier ce handicap".

[10] Añón Roig, María José (2010): «Multiculturalidad y derechos humanos en los espacios públicos: diversidad cultural y responsabilidad pública» in Ruiz Vieytez, Eduardo and Urrutia, Gorka (eds.) (2010): *Derechos humanos en contextos multiculturales. ¿Acomodo de derechos o derechos de acomodo?*, 1ª ed., Alberdania, San Sebastián, p. 63.

[11] Jézéquel, Myriam (2010); "L'obligation d'accommodement raisonnable : ses potentiels et ses limites", in *Institutional accommodation and the citizen: legal and political interaction in a pluralist society. Trends in social cohesion 21*, Council of Europe Publishing, Brussels, p. 26. http://www.coe.int/t/dg3/socialpolicies/socialcohesiondev/trends_en.asp

[12] Bosset, Pierre (2007): "Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable", in Jézéquel, Myriam. (2010) (dir.): *Les accommodements raisonnables : quoi, comment, jusqu'où ?,* 1ª ed., Editions Yvon Blais, Cowansville, Québec, p. 8.

of a judge, it is called *concerted adjustment*. According to the glossary of terminology of the Bouchard-Taylor report: "Concerted adjustment is similar to reasonable accommodation except that the handling of the request falls under the citizen sphere while the former falls under the legal sphere. It is usually granted by the manager of a public or private institution following amicable agreement or negotiation with users such as patients, students or customers, or with employees. Concerted adjustment can also apply to situations that do not involve discrimination. The obligation to adjust may be of a legal, ethical, administrative or other nature."[13]

If the parties were a public institution and a particular person, it would still be a concerted adjustment, whenever the matter is not referred to a court. We can say that the logical sequence would be to try first a concerted adjustment and, just in case it is ineffective, then referring the demand of reasonable accommodation to a judicial process. The courts will impose the duty to accommodate whenever is not sufficiently proved an undue hardship, as we will see in the next section. Obviously, concerted adjustments are preferred and promoted, since they mean a self-management of the conflicts by the actors themselves.

d) This is a personal and individual claim, which is made at the request of the interested party, and does not operate automatically

When we talk about reasonable accommodation, we are in the particular and specific level, not in the general and abstract one. In the words of Woehrling "reasonable accommodation as currently known in Canada is an essentially jurisprudential construction, progressive, case by case and pragmatic".[14]

Moreover, reasonable accommodation is not a collective right, because it must be demanded individually. In this sense, it gives protection to people that belong to minorities without protecting the minority itself. As stated by Jackson Preece:

> "Reasonable accommodations are not block exemptions. They are directed at the individual member of the group and not the group per se, prescribed only where necessary, and are tailored to the specific characteristics of each and every case."[15]

e) Possibility to refuse the request for accommodation with justification: the undue hardship, unfair or disproportionate burden

This last point allows us to link with the limits on the legal obligation to accommodate.

1.2. *Limits to reasonable accommodation*

As applied by Canadian courts, the limit to this obligation to accommodate is the concept of *undue hardship (contrainte excessive)*[16]. It applies when a demand causes obligations that the other party cannot or does not want to assume because it implies a disproportionate effort. Let's see some examples of what the Case law in Quebec accepts as grounds for rejecting demands for accommodation.

To be considered undue hardship, the accommodation has to cause:

— Financial constraints: excessive cost, whether financial, material or human.

[13] Also note the concept of "Informal agreement: In the realm of intercultural harmonization practices, the informal agreement refers to any agreement concluded between individuals outside the framework of institutions and organizations.", Bouchard, Gérard and Taylor, Charles, *op. cit.*, p. 286.

[14] Woehrling, José, *op.cit.*, p. 400.

[15] Jackson Preece, Jennifer (2010): "Emerging standards of reasonable accommodation towards minorities in Europe?", in *Institutional accommodation and the citizen: legal and political interaction in a pluralist society. Trends in social cohesion 21*, Council of Europe Publishing, Brussels, p. 120. http://www.coe.int/t/dg3/socialpolicies/socialcohesiondev/trends_en.asp

[16] "Undue hardship: the examination of an accommodation or adjustment request centres primarily on an assessment of undue hardship. The notion covers a variable number of factors, the most frequently mentioned ones being the financial and administrative burden stemming from the request, the extent to which other people's right are infringed, and impact to security and public order.", Bouchard, Gérard and Taylor, Charles, *op. cit.*, p. 290.

A very similar term would be *disproportionate burden*, which is currently used by European Case-law.

— Functional limitations: an obstacle to the proper running of the company or institution.
— Conflict with the objectives or deontology of the institution or company.
— Violate the collective interest, democratic values or public policy.
— Damage other people's rights and freedoms.

As we can see, the concept of undue hardship is not noticeable in the abstract, but by examining the particular case. For example, to determine which financial costs may be considered excessive, we would need to know the turnover of the company in question.

In any case, compelling reasons are required to deny the arrangement because, as stated by the Case law, "minor inconveniences are the price to pay for freedom of religion in a multicultural society".[17]

2. The doctrine of the decision STC 19/1985 of the Spanish Constitutional Court and the doctrine of the decision O'Malley v. Simpsons-Sears Ltd. of the Supreme Court of Canada: two similar cases, two different rulings

The decision 19/1985 of 13 February resolved an appeal (*recurso de amparo*[18]) before the Spanish Constitutional Court, which is the last and highest court having jurisdiction in matters related to fundamental rights. The cause of the appeal must always be an infringement of a fundamental right, which in this case was freedom of religion. The fact provoking the infringement was the dismissal of an employee who, due to the fact of becoming a member of the Seventh-day Adventist Church, failed to meet the normal working hours to comply with her religious beliefs, which demanded the observance of the Sabbath (from Friday's sunset to Saturday morning). The worker attempted to reconcile her new faith with the demands of her job, requesting a shift change or a justified absence with a corresponding loss of salary or compensation at other time outside the agreed working hours. The conclusion reached by the Spanish Constitutional Court is that the granting of a different weekly rest on the basis of religious belief would be a reasonable and legitimate exception, but it is not imperative for the entrepreneur to grant it. Considering this, it was lawful for the company not to offer any accommodation. Thus, when the worker repeatedly and systematically was failing to work in order to fulfil their religious observance, she was breaching her work contract. For this reason, the dismissal was deemed appropriate, and the *amparo*, was rejected.

That same year, the Canadian Supreme Court was judging the *O'Malley v. Simpsons-Sears Ltd decision*[19]. A worker in a clothing store, which opened every Saturday, and in which all employees worked three Saturdays out of four in rotating shifts, became afterwards a member of the Seventh-day Adventist Church. From then on, she had to comply with the religious observance on Saturdays. When she reported this change to the entrepreneur, he was forced to dismiss her, arguing that he could not give her all Saturdays off, since it was a key day for business. Finally, they agreed on a part-time job, with the consequent reduction of wage. The worker claimed before the Courts for the economic losses due to part-time work, arguing that she had suffered discrimination on religious grounds. In the end, the Supreme Court reversed the decisions of all previous courts and ruled that the worker had actually been the victim of indirect discrimination caused by a working rule, in principle neutral, which obliged to work on Saturdays.

As a natural consequence of the prohibition on indirect discrimination, a duty of accommodation arises. Owing to that, the employer is obliged to take measures to accommodate the employee, unless this would involve an unreasonable burden (*undue hardship*). In this case, since it has not been proved that he made the effort to accommodate the employee's religious needs, or that such accommodation would have resulted in an undue hardship on him, the court ruled against the employer and condemned him to pay a compensation to the worker.

Let's see a table that reflects the similarities and differences between the two decisions.

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[17] Central Okanagan School District No. 23 c. Renaud, [1992] 2 R.C.S. 970, p. 984 and 985.

[18] In Spanish Constitution, the hardcore of human rights are known as fundamental rights, and they are contained within the articles 14 to 29. One of the safeguards for these fundamental rights is the possibility to appeal to an extraordinary Court, once all the ordinary tribunals have unsuccessfully been held. This is the Constitutional Court, and the appeal is know by "recurso de amparo", "amparo constitucional" or just "amparo".

[19] Ontario Commission of Human Rights and Theresa O'Malley (Vincent) v. Simpsons- Sears Ltd., [1985] 2 S.C.R. 536.

Table comparing STC 19/1985 and Simpsons-Sears Decision

	STC 19/1985	O'Malley v. Simpsons- Sears Ltd., [1985]
Date of sentence	February 13th, 1985	December 17th, 1985
Tribunal Court	**Spanish Constitutional Court**	**Supreme Court of Canada**
Previous Courts' decisions and final judgment	Labour Court No. 2 of Vigo. The employee is right: nullity of the dismissal. Central Labour Court, The employer is right: the dismissal is legal. Constitutional Court: the employer is right: the dismissal is legal.	Board of Inquiry of Ontario Human Rights Code. The employee's complaint is dismissed. Divisional Court: The employer is right; the employee's appeal is dismissed. Ontario Court of Appeal: The employer is right; the employee's appeal is dismissed. Supreme Court of Canada: the employee is right, employer must indemnify.
Legal Issue	Incompatibility between the freedom of religion of the employee and the right of the employer to proceed with the lawful conduct of business.	
Position held in the company	Specialized printer in Company "Industrial Dik, SA."	Saleswoman in Simpsons-Sears (ladies wear department)
Years worked in the company	From 1971 to 1982	From 1971 to 1978
Date of conversion	September 1982	October 1978
Date of dismissal	December 9th, 1982	October 20th, 1978
Reason for dismissal	Letter of dismissal for abandonment of the job and absenteeism.	The employer discharged the complainant from full-time employment because of her refusal to work on Saturdays, but he immediately rehired her as a part-time employee, on reduced hours.
Complainant legal basis	The dismissal occurred violates freedom of religion in the aspect of worship and practice, since the company does not make possible the fulfilment of her religious duties. Violation of art. 16.1 of Spanish Constitution (CE)[20], freedom of religion, in connection with art.14 CE, which prohibits discrimination based on religion.	Discrimination on the basis of her creed. The s. 4 (1)(g) of the Ontario Human Rights Code prohibited not only employment conditions, which are discriminatory on their face, but also those that have the practical consequence of discriminating on a prohibited ground. That is, indirect discrimination protection is also included in the Ontario Human Rights Code provisions.

[20] Note that CE stands for Constitución Española (Spanish Constitution).

	STC 19/1985	O'Malley v. Simpsons- Sears Ltd., [1985]
Respondent legal basis	Dismissal was for breach of contract. No discriminatory dismissal. Freedom of religion is not an absolute right, but limited by 35.2 CE. Sunday is a holiday by tradition, and not to favour one religion over another. Contract was born from the free will of both parties: changes cannot be imposed on a one-sided criterion to the other party. Not granting favourable treatment does not imply discrimination. On the contrary, to grant it would be discriminatory against the other workers because their weekly rest would last longer.	From Thursday evening to Saturday evening was considered "the time for selling". Accommodation would involve preferential treatment against the other workers, because they all work on a rotational basis.
Grounds for the decision (Ratio Decidendi)	The rule that establishes the Sunday weekly rest (37.1 ET[21]) can be changed by the initiative of the parties. It is possible that they come to an agreement on another day of rest, but this can never be imposed unilaterally. The granting of a weekly rest period on the basis of different religious belief would be a reasonable and legitimate exception, but its granting cannot be compulsory for the entrepreneur. Moreover, Sunday is the holiday not only because of religious reasons, but also for historical and secular, but above all, is not established with the intention of favouring the Roman Catholic Church and discriminating against other faiths.	There is no evidence in the record bearing on the question of undue hardship to the employer. And onus of the proof is on the respondent. The first reaction of the employer was to offer her a part-time job, which was accepted. Also to consider Mrs. O'Malley for other jobs that not require to work on Saturday. However, there was no evidence regarding the problems which could have arisen as a result of a real and serious intention to accommodate, such as in what expense he would have incurred in rearranging working periods for her benefit, or what other problems could have arisen if further steps were taken towards her accommodation. There was therefore no evidence of how further steps would have caused undue hardship for the respondent and thus have been unreasonable.
Rule of Law	Denial of protection. Judgment Confirming the Central Labour Court: just cause of dismissal.	Appeal accepted. The Supreme Court reversed the decisions of all previous courts, because they did not prove that the employer took all the reasonable steps at his disposal to accommodate the employee.
Sentence		The respondent pay to the complainant as compensation, the difference between the sum of her earnings while engaged as a part-time employee of the respondent from October 23, 1978 to July 6, 1979[22], and the amount she would have earned as a full-time employee during that period.

[21] ET stands for Estatuto de los Trabajadores (Workers' Rights Statute). BOE 29th March 1995, n. 75, p. 9654.

[22] The complainant is just indemnified until this date because she stated that since her marriage (1979), she did not want to work full-time anymore, but she would prefer working part-time. Therefore, she just claimed for compensation for the period in which she do wanted to work full-time and she could not due to the reasons already mentioned.

Now we will analyze in detail the doctrine in these two decisions.

2.1. *The Spanish Constitutional Court decision STC 19/1985*

The problem is the alleged[23] incompatibility between the religious practice and the compliance with labour obligations.

The employee claimed violation of art. 16.1 CE, freedom of religion, in the aspect of the practice of worship, since the company does not make possible the fulfilment of their religious obligations. She also claimed violation of art. 14 CE, which prohibits discrimination based on religion.

The appeal was also based in the art. 2.1 of the Organic Law on Freedom of religion 1980 (LOLR)[24], and art. 3.1 in relation to this limits.[25]

The worker believes that the practice of religion is part of the essence of freedom of religion and that this freedom must prevail over the right of the employer to conduct his business. Therefore, she required the employer to reconcile the organization of the work with her religious practice, since in her opinion, this was possible without imposing a serious disorder or an operational constraint for the company. Article 3.1 of the LOLR points as limits the protection of the rights of others and the safeguarding of safety, health and public morality. The complainant stated that the rights of other workers were not hurt by the fact that he agreed to a schedule change, since similar changes had already been made for other workers of the company. Of course, her request did not breach the second limit.

The worker also mentioned the Universal Declaration of Human Rights (art. 18), the International Covenant on Civil and Political Rights (art. 18), the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 9).

Moreover, she put forward an erroneous transcription of the s. 6.3 of the ILO Convention 106, by which "religion is mistaken for region". Therefore the Central Labour Court reasoning was based on a misunderstanding[26]. She also added that s. 6.4 of the ILO Convention was not included in the judgment.

For the complainant, the dismissal should be considered null and void according to art. 54.2b[27] of the Workers' Rights Statute. That would imply the immediate reinstatement of the worker and the remuneration of all the unpaid wages.

The Constitutional Court in accordance with the public prosecutor[28], confirmed the decision of the Central Labour Court. The ruling was based in the fact that the dismissal was because of the breach of contract, and not at all a discriminatory dismissal on religious grounds.

On the one hand, the Constitutional Court agreed with the Central Labour Court, as for the interpretation of Article 37.1 of the Workers' Rights Statute in relation to Convention 106 of ILO, which stated that the weekly rest must coincide whenever possible with the day fixed by tradition or customs of the country or region. Moreover, the fact that Sunday is the holiday is not only because of religious reasons, but also historical and secular, and above all, is not established with the intention of favouring the Roman Catholic Church or discriminating against other faiths.

> *"Weekly Rest is a secular and labour institution. It is Sunday because it is a general rule settled by tradition. (...)*
>
> *The purpose of a general preference is evident, because matching the ordinary weekly rest of workers with the one of public offices, schools, etc., facilitates a better achievement of the objectives of the rest."*[29]

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[23] I say *alleged* because its incompatibility has not been proved. In fact, the minimum attempt to make it compatible has not even been tried.

[24] LO 7/1980, de 5 de julio (RCL 1980\1680), de libertad religiosa (art. 2.1),

[25] Art. 3.1 LOLR: "Exercise of rights that arise from freedom of religion and worship has as only limit the protection of the rights and freedoms of the others, and the safeguarding of safety, health and public morality, essential elements of public order protected by the Law within a democratic society".

[26] The ILO Convention 106 states: "*The weekly rest period shall, wherever possible, coincide with the day of the week established as a day of rest by the traditions or customs of the country or district."*

In the Spanish translation, district was translated by *región*, which was mistaken for *religión*. We can see that according to the English version of the ILO Convention district and religion cannot easily be mistaken.

[27] At present it is art. 55.5 ET. "It will be null and void the dismissal based on any of the discrimination grounds forbidden by the Constitution or the Law, as well as the dismissal provoked by violation of fundamental rights and liberties of the worker".

[28] In Spain, the Ministerio Fiscal is the institution in charge of promoting the action of justice to defend public interest and citizen rights.

[29] STC 19/1985, FJ 4 y FJ 5.

On the other the 37.1 ET places Sunday within the scope of the non-mandatory provisions: it means that by agreement, the contract may settle another day of rest, but this cannot be imposed unilaterally.

> *"Workers are entitled to a minimum weekly rest of day and a half uninterrupted, which as a general rule will include Saturday afternoon or, if necessary, Monday morning and the whole Sunday". However, this general rule non-mandatory may be amended by collective agreement or contract of employment (also by law or authorization of the competent authority), so that the will of the parties can set another resting day (...) The granting of a weekly rest period on the basis of different religious belief would be a reasonable and legitimate exception, but granting it cannot be not compulsory for the entrepreneur."*[30]

The problem is that the judgment did not assess the compatibility of religious freedom with the characteristics of the workplace in particular. Instead, it focused on the fact that contractual changes cannot be imposed, but agreed. But we should not forget that parties are not on an equal footing to negotiate.

The judgment also focused too much on the fact that there was no discrimination because if Sunday is the day preferred (unless otherwise agreed) it is not to establish a favourable regime to some believers and unfavourable for others, but because it is the day fixed by tradition. Although this preference had religious origin, now it can be considered secular. As Seglers comments, "it is kind of a 'religious-secularized' day"[31], because "the long-standing cultural tradition tends to dissociate the festivity from its origin. For the State's part there is not here and 'internal bond' to anything but 'external confirmation' of something".[32]

However, the important thing is not the reason why Sunday is the holiday[33]: what matters is that this situation results in indirect discrimination and violation of freedom of religion.

It is obvious that the right to freedom of religion (like all other rights) is not absolute, but it has limits, as the rights and freedoms of others, or public order. The Court understood that the complainant was trying to impose her beliefs to the other party by demanding unilaterally a change in the contractual relationship, when the contract was pre-existing and resulting of the free will of both parties. Given that no machine was free nor she could work for the company any other day instead of Saturday, the Court thought that meeting her request, would really involve discrimination with regard to the other workers, since her weekly rest would last more than the rest of the others. The Court concluded that not to give a favourable treatment, did not entail any discrimination.

> "What the complainant seeks is not the total or partial cancellation of the contract, but being excused from the obligations she freely accepted and which are considered according to law, so that despite her non-compliance, she would not be dismissed. This shows that the whole line of argument of the appellant is that a purely factual change (in her ideas or religious beliefs), being a manifestation of a constitutionally guaranteed freedom, causes a modification of the contract signed by her, whose performance will only be enforceable to the extent it is not inconsistent with the obligations of her new religious faith. No doubt concerning her good faith and deeply religious feelings, but that leads to unacceptable extremes the subjection of all to the Constitution (art. 9.1), being contrary to principles, such as legal certainty, which are constitutionally guaranteed (art. 9.3)."[34]

From my point of view, this reasoning entails a misinterpretation of the employee's demand. When the Court stated that she was trying to impose her beliefs unilaterally, it is not true, since she did not try to impose her beliefs to the employer's beliefs, but to obtain the permission to exercise hers. On the other hand, she did not expect neither to obtain more favourable treatment than other workers, since her adaptation request was an exemption of Sabbath hours to exercise religious worship, being willing to recover those hours in another time, or even to lose the proportional part of the wage.

2.2. *The decision O'Malley vs. Simpsons-Sears Ltd.*

In the Simpsons-Sears decision, the Supreme Court interpreted the Ontario Human Rights Code, which prohibits discrimination on religious grounds. The Court distinguished be-

[30] STC 19/1985, FJ 3.

[31] Seglers Gómez-Quintero, Alex (2004): "La acomodación de las festividades religiosas y nueva protección por discriminación indirecta en el orden laboral", *Ius Canonicum*, vol. XLIV n.º 88, p. 669.

[32] Rodriguez de Santiago, Jose María (2008) "El estado aconfesional o neutro como sujeto 'religiosamente incapaz'. Un modelo explicativo del art. 16.3 CE", *Repertorio Aranzadi del Tribunal Constitucional,* 14, Aranzadi, Pamplona, p. 126.

[33] Note that the word holiday itself, is not secular at all. (día santo).

[34] STC 19/1985, FJ 1º in fine.

tween direct discrimination, which would not be a problem, and indirect discrimination. It adopted exactly the same reasoning as the U.S. Supreme Court, which took as a precedent: should the law fill the legal loophole in the Human Rights Code of Ontario?

> *"[...] the duty to accommodate, referred to in the American cases, in the case that it is shown that a working rule has caused discrimination, it is incumbent upon the employer to make a reasonable effort to accommodate the religious needs of the employee, short of undue hardship to the employer in the conduct of his business. There is no express statutory base for such a proposition in the Code. Hence, the vacuum is the Code and the question: Should such a doctrine be imported to fill it?"*[35]

Finally, in this case the Canadian Supreme Court reversed the rulings of the lower courts, and stated that the employer had not met its burden of proving that the accommodation would have involved for him and undue hardship.

This figure of reasonable accommodation was constructed jurisprudentially to save indirect discrimination caused by a seemingly neutral and standard rule, *a priori* in accordance with the laws. In this case, an employment contract which includes Saturday working hours.

In short, the doctrine stated in Case Simpsons-Sears could be synthesized as follows: to safeguard equality, direct discrimination needs justification; indirect discrimination needs accommodation (or a justified denial of this accommodation).

3. STC 19/1985 analysed in the light of the figure of reasonable accommodation

It is striking that from two such similar cases can follow completely different ways of reasoning, which consequently lead to such divergent and conflicting rulings. "Unlike the Canadian Jurisprudence, Spanish Courts have not required any effort on the employer to accommodate workers in cases of indirect religious discrimination."[36]

In the Spanish case, the fact of the discrimination itself is not even accepted. Consequently it is not considered either the possibility that the employer has a minimum obligation (beyond the moral one) to try to satisfy the demand of the employee. Quite the opposite, it distorts the worker's demand accusing her of trying to unilaterally impose her belief on the employer.

Also the Spanish Constitutional Court insists too much on the idea that the worker was bound to the company because she freely accepted its conditions. The changes in beliefs are not considered reason enough to request an adjustment of any kind. It degrades the exercise of religious freedom to a change in preferences. The doctrine of the Constitutional Court contains the idea that if for any reason, including the exercise of a fundamental right as the religious freedom is, the employee ceases to be satisfied with their working conditions, no one forces him or her to continue working: in no case it is considered, the possibility of requiring neither the employer nor the authorities an accommodation to their new needs.

As stated by Proulx "the individual accommodation, either for direct or indirect discrimination, is to take reasonable steps to prevent that competent and skilled workers excluded by a personal characteristic that has nothing to do with the effective performance in a particular job."[37]

From my point of view, the fact that the employee has been working for 10 years for the company, shows more than enough her competence and suitability for this job in particular. Unfortunately, it happens that, indeed, an intimate and personal issue completely unrelated to the technical characteristics of the job, which is her adherence to the beliefs of a new creed, is the cause (although indirect[38]) of a dismissal, which ends with the professional opportunities of a fully capable worker in question.

This is not about to impose the precepts of the religion to the business organization, but about trying to reconcile the new circumstances. Compatibility is not mandatory, what is

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[35] Ontario Commission of Human Rights and Theresa O'Malley (Vincent) v. Simpsons- Sears Ltd., [1985] 2 S.C.R. 536. Paragraph 20

[36] Seglers Gómez-Quintero, Alex, *op.cit.*, p. 672

[37] Proulx uses that in a different context (discrimination on the retirement age), but this reasoning is perfectly applicable to our case: "L'accommodement individuel, qu'il se présente en situation de discrimination directe ou indirecte, consiste à prendre des mesures raisonnables afin d'éviter que des gens competents et aptes au travai ne soient injustement exclus à cause d'une caractéristique personnelle qui n'a rien à voir avec l'exécution sûre et efficace d'un emploi donné.", Proulx, Daniel (1996): "L'accommodement raisonnable, cet incompris: Commentaire de l'arrêt Large c. Stratford", *Revue de Droit de McGill*, vol. 41, p. 702.

[38] We should remind that the direct cause of the dismissal was the breach of the contract due to unjustified and systematic absenteeism.

mandatory is the attempt to reconcile. The legal obligation of reasonable accommodation is an obligation of means, not of results. If you obliged to the result, then you would be forcing the employer to grant preferential treatment, which would "place the categories of people protected against discrimination, not on an equal footing with other employees, but on a pedestal, upon giving them a preferential treatment comparing to the other workers."[39] But on the contrary, if nothing forces to try to achieve an outcome that satisfies both parties, there would be too much indolence to harmonize interests as important as the right to work and the right to exercise religious freedom. Failure to establish this legal duty to accommodate, is indirectly infringing the right to work, and produces ghetization of work because religious minorities could work only in companies in which the compatibility between the right to work and the full exercise of their religious freedom is ensured. That is, they are doomed to working in companies run by members of the same religion or minority culture. This results in a lack of integration into society of religious minorities[40].

A way to force this attempt is the mechanism established by the figure of reasonable accommodation: there is a legal obligation to accommodate, unless it involves an excessive demand, a disproportionate burden on the other side. The mere fact of reversing the burden of proof constitutes in itself an effective guarantee on the symbolic level and on the pragmatic front, since it compels at least to devote time and energy to consider the ways to allow the exercise of a fundamental right.

In case the facts related in the judgment 19/1985 had occurred in Canada, it would have been considered first whether the discrimination is direct or indirect. Indeed, it would have been appreciated that there is no direct intention by the employer to discriminate against the employee in particular, or against members of the Seventh-day Adventist Church in general. On the contrary, the rule is in principle neutral. But for all practical purposes, this obligation of including Saturday as a working day has detrimental effects on a worker in question. That is exactly how accommodation was born, as an essential part of the obligation to avoid indirect discrimination.

According to this north-American doctrine of accommodation, the Spanish employer should have also tried by all means available to accommodate the employee so that she continued working in the company. In case this accommodation entailed an unreasonable effort, the employer should have shown why, and only then, if it is true that the burden was disproportional, he or she would have been exempted from the legal obligation to accommodate.

In this particular case, the employer would have argued one of the options consolidated in Canadian case-law: the affectation of the rights of other workers. The employer declared that to grant the accommodation was discriminatory with regard to other workers, because it meant preferential treatment, since his weekly break would last longer: "it would lead to discrimination against the other producers of the company since their weekly break would last from Friday afternoon until the following Monday, while the other co-workers would only have the Saturday and Sunday; altering also the regime of work, since the workers use at every turn, the entire machinery in the workshop, so neither is free machine that could be used out of the day, nor the employee can work in the company out of this day".[41]

If all this were proved, then that would be a valid reason for denying the accommodation. The problem is that there was no evidence that the employer had tried to accommodate the running of his business to the working hours required by the employee; it was not demonstrated that there were not any free machine available to compensate for the hours not worked; nor it was proven that the failure to work these hours with the proportional decrease in her salary would have entailed a serious disruption for the normal running of the company. The proof was therefore crucial, and even more considering that the complainant claimed as proven fact, just the opposite: "the other workers or the company were not affected by a change in schedule,

[39] Proulx, Daniel, *op.cit.*, p. 703. "Cela place les catégories de personnes protéges contre la discrimination non pas sur un pied d'égalité avec les autres employés, mais sur un piédestal, en leur accordant un traitement de faveur auquel n'ont pas droit les autres employés".

[40] This example could be extrapolated to the religious symbols in schools, another example of reasonable accommodation. If it is not allowed, those concerned could feel forced to renounce to public education in order to turn to religious private schools where it is actually permitted. This results in a lack of integration and interaction with the majority culture.

[41] STC 19/1985 FJ.4º

which, as reported in the facts of the sentence, had already been established for other workers."[42] By applying the reasonable accommodation doctrine as in the Simpsons-Sears decision, the Spanish employer would have been condemned to pay compensation to the employee since he could not demonstrate that he had undertaken all the possible steps to accommodate the employee. Or, on the contrary, he would have been discharged if indeed he had demonstrated that any machine was free and that there was not any other way for the employee to compensate the Saturday hours exempted, so it was totally incompatible to comply with her religious practice without a serious disruption for the company or for the workers rights.

4. The applicability of reasonable accommodation in the Spanish context

The figure of RA has been very successful in Canada thanks to its jurisprudential and doctrinal development, its importance in the quantity of decisions on it, and its popular dissemination. However, it was not born in this country, but it had its origin in the United States[43]. The special features of Canada allow reasonable accommodation to flourish. According RUIZ-VIEYTEZ it is in Quebec where "this idea finds a fertile ground for the exercise of competences on immigration and for the recognition of the maintenance of minority cultures".[44]

In fact, the legal reasoning of the decision Simpsons-Sears, first case in applying the reasonable accommodation in Canada, refers to United States Courts, the ones who first faced up to this problem and applied this newborn concept of "duty to accommodate", which later became institutionalized as "reasonable accommodation". American Courts needed for this creation to introduce in year 1972 an Amendment to the Civil Rights Act of 1964.

In the Simpons-Sears decision, judges just "adopted" this concept:

> *"There is no express statutory base for such a proposition in the Code. Hence, the vacuum is the Code and the question: should such a doctrine be imported to fill it?"*[45]

Indeed, this void was filled by importing a case-law doctrine from the U.S.A, just because this doctrine was entirely consistent with the 4.1 Ontario Human Rights Code.

Taking these facts into account, what hinders this figure to be imported into the Spanish legal system?

First, the existence of common law and civil law systems implies an essential difference. Freedom of judges in United States and Canada to resolve on the basis of judicial precedents following the previous cases logician means a much wider margin of action compared to judges in Spain, who must adhere to current law in force, according to the system of sources of Law established by the Constitution. Therefore, the interpretation of the valid law is the only margin of freedom permitted to them.

In Canada there is no law that shows the parameters and limits of reasonable accommodation. Courts have constructed and elaborated this figure by means of its application, giving shape to it case by case. This construction would be totally unfeasible in the Spanish judicial system. I do not argue, therefore, that this culture of accommodation is easy to import to the Spanish context. However, the principles underlying the figure of reasonable accommodation and the effects derived from it, perfectly fit in with the legal and constitutional logician that prohibits direct and indirect discrimination and promotes freedom of religion, in the terms it is configured and guaranteed in the Spanish legal system.

To start with, the Spanish Constitution: article 14 prohibits direct and indirect discrimination; article 9.2 promotes real and effective equality; and religious freedom is enshrined in art. 16, and it is configured under the principles of open secularism and cooperation with the Catholic Church and the several religious denominations with representation in the Spanish society.

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[42] STC 19/1985 FJ.2º

[43] I have writen on the origins of reasonable accommodation in Borges Blázquez, Lola (2011): "Derechos e integración: el acomodo razonable como instrumento para la igualdad material", *Cuadernos Electrónicos de Filosofía del Derecho* 23, pp. 47-73. http://ojs.uv.es/index.php/CEFD/article/view/711

[44] Ruiz Vieytez, Eduardo (2010): "Acomodo razonable y diversidad cultural: valoración y crítica", in Solanes Corella, Ángeles (2010): *Derechos humanos, migraciones y diversidad*, Tirant lo Blanch, Valencia, pp. 65-103.

[45] Ontario Commission of Human Rights and Theresa O'Malley (Vincent) v. Simpsons- Sears Ltd., [1985] 2 S.C.R. 536, paragraph 20.

To continue with, the Spanish Organic Law on Religious freedom (LOLR 1980): article 1.2 that "Religious beliefs will not constitute reason for inequality or discrimination before the law. Religious grounds cannot be invoked to prevent anyone from exercising any work or activity or hold office or public functions"; article 2.1 "Freedom of religion and worship guaranteed by the Constitution includes, with the consequent immunity from coercion, the right of everyone:

a. To profess religious beliefs freely choose or not to profess any, change or abandon the confession; express freely their own religious beliefs or the lack of them, as well as refrain from testifying about them.
b. To practice acts of worship and receive religious assistance of his own denomination, celebrate their festivities, celebrate their marriage rites, to be buried with dignity, without discrimination on religious grounds, and not to be compelled to perform acts of worship or receive religious assistance contrary to his personal convictions".

Also article 3.1 of LOLR contains the limits to the exercise, already mentioned in this paper: "The exercise of rights under freedom of religion and worship is just limited by the protection of the right of others to exercise their civil liberties and fundamental rights, as well as safeguarding the safety, health and public morality, elements which constitute the public order protected by law in the context of a democratic society".

On the other hand, we must notice that the right to freedom of enterprise is not a fundamental right. Article 38 CE states: «It is recognized freedom of enterprise within the free market economy. The public authorities guarantee and protect its exercise and the safeguarding of productivity in accordance with the requirements of the general economy and, where appropriate, with economy planning". Also the art. 20 of the ET confers management, organization and monitoring powers to the employer.[46]

However, we should think that if business management is not a fundamental right, in case of collision of rights, the tension should be easily solved in favour of freedom of religion. But it was not the case in STC 19/1985, because an alleged freedom on the moment of signing the labour contract made impossible to demand any accommodation afterwards, as if the change in the personal circumstances of the employee was a mere caprice. Did the situation change after 1985?

4.1. *Cooperation Agreements between the Spanish State and the religious minorities with presence in Spain: reasonable accommodation for religious diversity in the workfield?*

In 1992, the Spanish State signed three Agreements of Cooperation with the religious minorities with notorious presence in Spain, to promote religious pluralism, which were the Federation of Israelite Communities of Spain (FCIE), the Islamic Commission of Spain (CIE) and the Federation of Evangelical Religious Entities of Spain (FEREDE). These agreements did not mean a substantial progress concerning the accommodation of religious needs in the workfield.

To start with, these agreements were expressly restricted to three religious denominations. This lets aside any other demand of a religious minority which has not signed an agreement, what in the end means delegating effectiveness of freedom of religion to the diplomatic State level.

To continue with, the solution given by the agreements leaves a lot to be desired, in the sense that the wording of the agreements explicitly states:

> *Art. 12 1. "Members of Islamic Communities (there is an equivalent article for Israelite and Evangelical Churches), may ask for the interruption of their work every Friday, because of the collective obligatory and solemn prayer of Muslims, from 1.30 am*

[46] Art. 20. Of Worker's Rights Statute. Direction and control of work activity

1. The worker is required to perform the agreed work under the direction of the employer. and, failing that, by custom. In any case, the worker and the employer are subject in their mutual benefits to the requirements of good faith.

2. In compliance with the obligation to work undertaken in the contract, the worker owes the employer the diligence and collaboration at work, according to the laws, collective agreements and orders or instructions issued by him in the regular exercise of its directions powers.

3. The employer may take the appropriate actions of surveillance and monitoring to verify the compliance by the employee of his or her obligations and work duties, whenever its adoption and implementation regards for human dignity, and taking into account the actual capacity of disabled workers, if necessary.

until 4.30 pm, as well as the completion of the working day one hour before the sunset during the Fast month (Ramadán)".

Until here we can think that it is a freedom protective legal provision. But the article continues: *In both cases, it will be necessary the previous agreement between parties. Hours not worked will have to be made up for without compensation.*

The same reasoning applies for religious festivities and holidays[47]: the ones established by the Workers' Rights Statute in art. 37 may be replaced by others religious festivities, whenever there is previous agreement between parties.

We must note that the real and effective realization of the freedom of religion in the aspect of worship, and the equality of treatment in case of indirect discrimination is abandoned to the sphere of the employer's decision, without any effort requirement and thus, any guarantee. This vagueness turns this legal provision into worthless scrap of paper.

4.2. *European Equality Directives and the Spanish Act of transposal L62/2003*

More convincing protection is given by 62/2003[48] Law, which entered into force in 2003 to adequate the Spanish legal framework to the Equality Directives: the Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC) and the Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC).

Specifically, Council Directive 2000/78/EC of 27 November sets as purpose "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment" and continues like that: "For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

> (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
>
> (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

However the figure of reasonable accommodation is only explicitly stated for people with disabilities, in its art. 5:

> "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."

We could wonder why the others grounds of discrimination do not enjoy of this extra protection, so that the legal wording of the Directive could have been:

> "Employers shall take appropriate measures, where needed in a particular case, to enable a person indirectly discriminated because of religion or belief, disability, age or sexual orientation 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".

Even though "It appears that reasonable accommodation practices, although not directly stipulated, are emerging within European Union member states as a consequence of EU prohibitions against indirect discrimination".[49]

In Spain, the Act of transposal of the Equality Directives meant a step forward regarding the 1992 Agreements.

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[47] Art. 12.2 of the 1992 Agreement between the Spanish State and the Islamic Communities, with an equivalent article for Evangelical and Israelite communities. "Religious festivities and holidays expressed here below may sustitute, whenever previous agreement between parties, the ones established by the Workers' Rights Statute in art. 37, with the same character of paid and non-recoverable, at the Muslim Community members request".

[48] Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y del orden social. (L62/2003 Act, December 30th , of fiscal, administrative and social order measures).

[49] Jackson Preece, Jennifer, *op.cit.*, p. 124.

Art. 27.1 of the L62/2003 asserts that the purpose of the Act is "to establish measures for the real and effective implementation of the principle of treatment equality and non-discrimination, in particular for racial or ethnic origin, religion or convictions, disability, age or sexual orientation".

Therefore, one of the modifications to achieve this goal is to add explicitly the wording indirect discrimination in the Consolidated Workers' Rights Statute (1995), which now reads as follows:

> Art. 4.2c) Not to be discriminated directly or indirectly for employment, or once employed, for reasons of sex, marital status, age within the limits established by this Act, racial or ethnic origin, social status, religion or beliefs, political ideology, sexual orientation, membership or not to an union, or use of language within the Spanish state.

Also the art. 17.1 declares null and void all regulation, clause of collective labour agreement, individual agreements or unilateral decision of the employer, which contain direct or indirect discrimination on employment, concerning salary, working hours, and the rest of working conditions based on the same grounds of the previous article.

However, if something similar to reasonable accommodation is being applied for cases of disability, there is still some reluctance to apply it for cases of cultural or religious discrimination.

As stated by Henrard, "there is a lack of consensus among European States on the appropriate nature and scope of the necessary adaptation of religious practice to labour relationships"[50]. So, even if indirect discrimination legislation is a good strategy to construct a legal duty to accommodate, there is still a long way to go.

5. Concluding remarks

It would not be necessary to create a reasonable accommodation law, since it would destroy the essence of reasonable accommodation. Maybe it would be enough if judges made a more guarantist interpretation of the existing legal provisions and rules, an interpretation aimed to proactively promote the full exercise of religious freedom in the workplace in particular, and the compatibility of fundamental rights with other rights in a general sense, by means of allowing singular exceptions to rules that are in principle neutral and non-discriminatory, but that actually lead to indirect discrimination situations, and thus require an *ad hoc* solution.

In these cases, a change at the policy or legislative level in order to include each and every one of the exceptions needed is a slow, cumbersome and inefficient process to achieve the necessary results, at least in the short term. However, the jurisprudential tool of reasonable accommodation is an agile and dynamic solution, with immediate effects not only on individuals but also on society. Proof of this is the significant progress experienced in Canada, where there are less and less reasonable accommodations and more and more concerted adjustments (as already explained in this article, a kind of reasonable accommodation made between individuals without the intervention of a judge). That means a popularisation and generalization of these adjustments. In this way, society manages its own diversity by itself, turning less and less to the judicial system.

The ordinary granting of reasonable accommodations, such as allowing certain hours and facilities inside the company to pray, or altering the weekly working hours in order to make it compatible with worship, or something much more simple as providing appropriate menus to religious or spiritual needs, creates a medium-term normalization of these demands, as the same time as it promotes empathy with their requests. The more these practices become widespread, they less they are perceived as costly, disproportionate or impossible situations to reconcile. Moreover, it is verifiable that it has been carried out in other countries and the results have been positive. Now then, as Jézéquel, Ruiz Vieytez and Santoro conclude, "transposition of reasonable accommodation would make sense only with a political model that accepted a definition of plural citizenship and was based on inclusive social and economic structures. In other words, reasonable accommodation's chances of success in Europe largely depend on support from inclusive policies. Hence the importance of linking the legal concept of accommodation with a political and ethical conception of plural democratic citi-

[50] Henrard, Kristin (2010): "Libertad de Religión y Minorías Religiosas: ¿una adaptación adecuada de la diversidad religiosa?", in Ruiz Vieytez, Eduardo and Urrutia, Gorka (eds.): *Derechos humanos en contextos multiculturales. ¿Acomodo de derechos o derechos de acomodo?*, 1ª ed., Alberdania, San Sebastián, p. 265.

zenship, which alone is able to open up to otherness and secure genuine recognition of a plural identity. It is, in fact, the political model and ideological background that are likely to determine the application of RA".[51]

Just moving forward this direction we will evolve into a society more and more aware of diversity and above all, more willing to adapt to the essential needs of each and every one of its members.

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Henrard, Kristin (2010): "Libertad de Religión y Minorías Religiosas: ¿una adaptación adecuada de la diversidad religiosa?", in Ruiz Vieytez, Eduardo and Urrutia, Gorka (eds.) (2010): *Derechos humanos en contextos multiculturales. ¿Acomodo de derechos o derechos de acomodo?*, 1ª ed., Alberdania, San Sebastián, p.247-276.

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[51] Jézéquel, Myriam. "Overview and Conclusions. Lessons to be learned", in *Institutional accommodation and the citizen: legal and political interaction in a pluralist society. Trends in social cohesion 21*, Council of Europe Publishing, Brussels, p. 316. http://www.coe.int/t/dg3/socialpolicies/socialcohesiondev/trends_en.asp

Contribution of secularism and discrimination law to the protection of religious pluralism: the French experience

Frédérique Ast*

Abstract

In public debate and in the media, French secularism is often understood as a straightforward principle that not only prescribes the separation of Church and State and the neutrality of the State but also, by extension, a ban on all religious expression within the State institutions or more generally in public. This ideological point of view is nonetheless without any legal foundation in France. This paper aims at demonstrating that the genuine rationale and objective of French secularism consist for the State to treat all religions equally. It may even lead, to a certain extent, to the funding and the accommodation of religious needs, in order to guarantee individual and collective expression of religious beliefs. Moreover, non-discrimination law has also become a suitable legal tool to fostering religious pluralism in France.

Key words: Secularism, accommodation, non-discrimination, religious pluralism.

Resumen

En el debate público y en los medios de comunicación, el laicismo francés a menudo se contempla como un principio sencillo que no sólo establece la separación de Iglesia y Estado y la neutralidad del Estado, sino también, por extensión, la prohibición de toda expresión religiosa dentro de las instituciones del Estado o, en general, en público. Este punto de vista ideológico carece, sin embargo, de todo fundamento jurídico en Francia. El presente estudio tiene por objeto demostrar que la verdadera razón y objetivo de la laicidad francesa consiste en que el Estado trate todas las religiones por igual. Incluso puede llevar, en cierta medida, a la financiación y el acomodamiento de las necesidades religiosas, con el fin de garantizar la expresión individual y colectiva de las creencias religiosas. Por otra parte, la ley contra la discriminación se ha convertido en una herramienta jurídica adecuada para fomentar el pluralismo religioso en Francia.

Palabras clave: Laicismo, acomodo, no discriminación, pluralismo religioso.

* This article reflects only the opinion of its author, not those of the institution for which she works, i.e. the HALDE. She would like to thank Mr Stephen Suffern for helping her translate this paper in English.

Anuario de Acción Humanitaria y Derechos Humanos
Yearbook on Humanitarian Action and Human Rights
ISSN: 1885 - 298X, 2011, Bilbao, págs. 71-104

Introduction

For the European Court of Human Rights (ECHR), a democratic society is one *"in which diversity is not perceived as a threat but as a source of enrichment"*[1]. Pluralism, although dearly won over the centuries, now seems a precious asset in great danger, especially when talking about religious pluralism[2], i.e. a system or philosophy, which, in the name of respect for diversity, acknowledges the existence of different opinions, moral and religious beliefs, as well as of cultural and social behaviour[3].

Many official observers, including the Human Rights Committee, the European Commission against Racism and Intolerance or the Fundamental Rights Agency of the EU, have sounded the alarm about the rise in religious intolerance, in our deconfessionalized Western countries, in particular in the aftermath of 9/11. In its report dated April 2011, the French National Consultative Commission on Human Rights denounced an alarming "anti-Muslim sentiment" coming to the fore in France. It thus seems that we are losing, in the 21st century, what was previously taken for granted and yet is one of the fundamental values of our modern societies. Even if this issue seems to affect all democratic countries, the French context is unique in that it combines three very specific features.

First of all, the French Republic is founded on secularism, which has constitutional status in France. The exercise of religious freedom in the public space is directly linked to it. For over a century, secularism has been enshrined as a fundamental value of the French Republic, conciliating freedom of conscience, religious pluralism and the neutrality of the State. The 1905 French Law on the separation of Church and State guarantees freedom of religion, as it ensures freedom of conscience, and guarantees free exercise. Nevertheless, French secularism developed, historically, as a reaction against the influence of the Catholic Church in public affairs such as the education of children. It is therefore closely linked to hostility or suspicion towards religion since a religiously based political order would, in its view, be unfair, oppressive, and anti-progressive, and might jeopardize enlightened policy decisions[4].

Secondly, the French Republic is historically based on a model of formal equality. According to a universalistic idea of humankind, based on Enlightenment philosophy, the French model of the Nation-State puts forward the notion of an "abstract" citizen. The consequence of this tradition is two-fold. It enshrines the principle of equality before the law, without regard to differences in identity based on factors such as religion and beliefs. Without denying religious or cultural identities, it does not take such specificities into account when equality is concerned. Moreover, the French Republic is "one and indivisible", which is interpreted as meaning that it is made up of equal citizens and not of separate communities. Accordingly, France does not officially recognize minority groups within its territory and does not provide for minority rights.

Last but not least, despite the lack of official statistics, the Muslim population in France is evaluated as the largest in Western Europe (5-6 million). It also bears mentioning that France is the European country with the largest Buddhist, Jewish, Muslim and atheist and agnostic communities. This is rather new, since a century ago, when the Law separating Church and State was enacted, France was predominantly Catholic, with very small Protestant (1%) and Jewish (0.2%) "minority" populations. There is nowadays significant tension between the French secular State, historically and socially rooted in Catholicism, and Islam. The ban on religious symbols in State schools, for example, is widely regarded as being, for all intents and purposes, a ban on the *hijab*, the headscarf worn by certain Muslim women. Recently, the French legislature has forbidden the dissimulation of the face in the public space, a ban which, in practice, concerns exclusively radical Muslims. French media often present a distorted image of Islam as the enemy of the modernised

[1] ECHR 6 July 2005 *Nachova and al v. Bulgaria*, no. 43577/98 and 43579/98, parag. 145.

[2] ECHR 25 May 1993 *Kokkinakis c/ Grèce*, no. 14307/88.

[3] This definition of pluralism comes partially from that given by the Canadian Commission on Accommodation Practices Related to Cultural Differences. See the glossary attached to the Consultation paper, www.accommodements.qc.ca/documentation/glossaire-en.html

[4] Kuru, A.T. (2009): *Secularism and State Policies towards Religion: The United States, France, and Turkey*, Cambridge University Press, 334 p. To the contrary, for Americans, secularism is based on the fact that religion is so important for people that the State should be prevented from having any say about it.

and progressive West. In some ways, the importance and size of the Muslim population in France is perceived as challenging the French ideal of strict separation of religious and public life. This focus does not mean that there are no tensions with other religious communities but they are less visible.

In this very specific context, the protection of religious pluralism has become crucial. As the religious composition of the population has dramatically changed in France over the last decades, new issues and new balances have emerged. Moreover, there is currently a propensity for damaging misuse of the legal concept of secularism. For some French politicians, administrative bodies, private employers, and even the French public at large, secularism means prohibiting any manifestation of religion, including display of religious signs or symbols in the public sphere.

This paper attempts to demonstrate, first, that the rationale and the objective of secularism is for the State to treat all religions equally. It may even lead, to a certain extent, to the funding and the accommodation of religious needs, in order to guarantee individual and collective expression of religious beliefs. Second, discrimination law has become a suitable legal tool for fostering this goal. Though this right to non-discrimination was largely ignored until recently by civil justice in France[5], the situation has changed in part due to the influence of EU Law and in particular Directives 2000/43 and 2002/73, but also due to the creation of the HALDE (*Haute autorité contre les discriminations et pour l'égalité*), the independent French Equality Body. The HALDE is competent to deal with all forms of direct and indirect discrimination prohibited by law or by duly ratified international conventions, including discrimination on the basis of religion or belief[6]. A claim may be filed with the HALDE by any person who considers himself or herself to be a victim of discrimination. It helps victims of discrimination put together their case files and informs them about the appropriate procedure for their cases. After investigation, the HALDE Council decides what further action is to be taken. For instance, it may suggest that a dispute be settled out of court through mediation, or present observations during judicial proceedings when the matter is brought before a court. HALDE may also make non binding general or individual recommendations.

1. Contribution of the French model of secularism to the protection of religious pluralism

The principle of religious neutrality is an essential part of the French legal tradition. As the Council of State, the highest administrative court in France[7], pointed out in its 2004 report entitled *"A Century of Secularism"*, secularism should *"express itself in three principles: state neutrality, religious freedom and respect for pluralism"*[8].

The concept of secularism is embodied in the French Declaration of the Rights of Man and of the Citizen of 1789, of which Article 10 provides that *"no one shall be disturbed on account of his opinions, including his religious opinions, provided their expression does not disturb public order as established by law."* Furthermore, Article 1 of the Law on the Separation of Church and State of 9 December 1905, which intended to mark the end of the conflict between French Republicans and the Catholic Church, clearly states that: *"The Republic ensures freedom of conscience. It guarantees the freedom of religious worship, subject only to restrictions laid down (...) in the interest of public order".* Article 2 of the same law provides that: *"The Republic may not recognise, pay stipends to or subsidise any religious denomination."* These principles were later enshrined in the Preamble to the Constitution of 27 October 1946 as well

[5] See Stasi, B. (2004): "Vers la haute autorité de lutte contre les discriminations et pour l'égalité", Rapport au Premier Ministre, *La Documentation française*, Collection des rapports officiels, février 2004, 131 p.

[6] For a complete overview of the HALDE's powers, see Law no. 2004-1486 of 30 December 2004 creating the High Authority against Discrimination and for Equality as amended by Law no 2006-396 on Equal Opportunities of 31st March, 2006.

[7] In France, as in most civil law countries, civil and administrative courts are separated. There are two completely separate orders of jurisdictions, having each its own supreme court at its head: the "Cour de cassation", or Court of Cassation, for the ordinary courts, and the "Conseil d'Etat", or Council of State, for the administrative courts. The administrative courts have jurisdiction over all disputes related to decisions or actions of public authorities.

[8] Council of State (2004): "A Century of Secularism", Report, *La Documentation française*, Paris, p. 326; http://lesrapports.ladocumentationfrancaise.fr/BRP/044000121/0000.pdf

as in Article 1 of the Constitution of 4 October 1958, which affirms that *"France is an indivisible, secular, democratic and social Republic. It ensures the equality of all citizens before the law, without any distinction founded on origin, race, or religion. It respects all beliefs."*

The principle of secularism requires a strictly neutral attitude on the part of the State and public authorities towards the practitioners of a religion. The State must protect each citizen's freedom of opinion and conscience, a principle whose corollary is the complete neutrality of civil servants. Since civil servants represent the State, their conduct must not suggest that the State identifies itself with a particular religion. That is true, for example, when allegiance to a particular religion is expressed by displaying a religious sign or symbol. According to a settled administrative case law, public employees are thus not allowed to display their religious beliefs on-the-job, such as by wearing a headscarf[9]. For example, the Conseil d'Etat, has held that a civil servant violated this duty of neutrality when his professional e-mail address appeared on the website of an association related to the Unification Church (founded by the Korean Sun Myung Moon), even in the absence of proselytising behaviour[10]. It also upheld the decision to suspend a postal worker for six months because he had given out religious leaflets to the public at the counter[11].

This prohibition concerns all civil servants, even if they have no direct contact with users of public services[12]. Moreover, if they are civil servants, all nursery assistants, not only those work in municipal nurseries but also home childcare providers[13], must comply with requirement of State neutrality.

Although this concept may be criticised, it complies with European law. For the European Court of Human Rights, it is legitimate for a State to impose on public servants, given their status, a duty to refrain from any ostentatious expression of their religious beliefs in public, since *"a fair balance has been struck between the fundamental right of the individual to freedom of religion and the legitimate interest of a democratic State in ensuring that its public service properly furthers purposes"* such as public safety, public order, health or morals, or the protection of the rights and freedoms of others[14]. The ECHR acknowledges the constitutional status of secularism as a founding principle of the French Republic, to which the entire population adheres. According to this European analysis, religious freedom may be restricted by the requirements of secularism in a democratic society[15].

However, in French constitutional rhetoric, secularism is not presented as a principle authorising limited exceptions to religious freedom, but as a legal and political system counteracting religious intolerance and favouring an equal respect of all beliefs. *"Indeed, the secular nature of France is founded on the principle of equality of religions in law, meaning that the State does not give any religion its preference"*[16]. In French public law, secularism is inseparable from freedom of conscience and religion and also from the universal freedom to proclaim one's religion or convictions. Secularism is *"a doctrine of separation between the political and the religious spheres provided an early, paradigmatic articulation of the liberal ambition to combine the protection of individual freedoms and the diversity of conceptions of the good in society with shared norms of political membership as equal status"*[17]. It implies an acknowledgement both of religious plural-

[9] Council of State 3 May 2000, *Marteaux*, no. 217017

[10] Council of State 15 October 2003 *Jean-Philippe M.*, no. 246215

[11] Council of State 19 February 2009 *Christophe A.*, no. 311633

[12] See for example, Toulouse Administrative Tribunal (interim order) 17 April 2009 *Sabrina Trojet*, no. 0901424 dealing with the case of a veiled student who, at the same time, was also considered as being a public agent since her Ph.D. research was funded by the State. Nevertheless, when the neutrality principle has been violated, the absence of contact with the public is taking into consideration in appreciating the proportionality of the sanction.

[13] Versailles Administrative Court of Appeal 23 February 2006 *E.*, no. 04VE03227; Paris Administrative Tribunal 22 February 2007 *Ms B.*, no. 0415268/5-2; See also HALDE Decision no. 2011-70 of 21 March 2011

[14] ECHR 24 January 2006 *Kurtulmus v. Turkey*, no. 65500/01, see also ECHR 26 September 1995, *Vogt v. Germany*, no.17851/91, parag. 53; ECHR [GC] 5 May 1999 *Rekvényi v. Hungary,* no. 25390/94, parag. 43

[15] ECHR 4 December 2008 *Dogru and Kervanci v. France*, no. 27058/05 and 31645/04

[16] Garay, A., Chelini-Pont, B., Tawil, E. & Anseur, Z. (2005): "The permissible scope of legal limitations on the freedom of religion or belief in France", *Emory International Law Review*, Vol. 19, pp. 785-840

[17] Laborde, Cécile (2005): "Secular Philosophy and Muslim Headscarves in Schools", *The Journal of Political Philosophy*, Vol. 13, no. 3, pp. 305-329; http://centauro.cmq.edu.mx/dav/libela/paginas/infoEspecial/pdfArticulosLaicidad/100101169.pdf

ism and of State neutrality towards the various religions. In this sense, the neutrality of the State is by no means in contradiction with freedom of religion. The secular State not only supports but also accommodates religious needs in the public sphere.

Many religious needs and constraints are taken into consideration and, to a certain extent, "accommodated" in France through the general French framework concerning the organisation of freedom of religion. In order to be real and effective, this fundamental freedom requires that individuals be able to behave individually and collectively in conformity with their own religious beliefs. Therefore, even if secular, the French Republic must ensure freedom of conscience and guarantee the free exercise of religion to all "citizens" in the broad meaning of the term. It must not only refrain from interfering with religion, but must take positive measures to guarantee the individual and collective expression of religious beliefs. These positive measures indirectly give rights to believers.

1.1. *Public funding of religious needs*

Although Article 2 of the Law on the Separation of Church and State provides that the Republic does not "recognize" any religion, the French State has had fruitful, long-lasting relationships with all the major religions present in France[18]. In addition to the French Bishops' Conference (which speaks for French Catholics) or the Consistory (which speaks for French Jews), the French Council of the Muslim Faith was created in 2003 in order officially to represent practising Muslims in their relations with French political institutions. This Council performs a number of duties of common interest, dealing with issues such as places of worship, the pilgrimage, specific areas in public cemeteries for Muslim burials, chaplains, the training of imams, and the organisation of ritual slaughter[19].

In addition to the exception of the regions still under the Concordat regime[20], there are, moreover, many exceptions to the prohibition subsidising religious needs provided for in the Law of 1905. The following paragraphs give a brief description of the measures related to the respect of religion in the public sphere.

A) Indirect financial support for all religious buildings

The Council of State has held that the right to build religious buildings is a corollary of free exercise[21], a fundamental freedom. Moreover, in a judgement dated 10 March 2005, the highest administrative Court ruled that *"the constitutional principle of secularity, which implies the neutrality of the State and of the local authorities and the equal treatment of the different religions, does not in itself prohibit the award of grants for religious activities or facilities which are in the public interest and respect the limitations provided for by law"*[22]. Although the Court does not define precisely which religious activities or facilities are in the public interest, it seems clear that the principle that no financial aid shall be given to any religious project is not absolute and is not of constitutional status.

Despite the importance of this critical issue, this paper will not focus on the scope and therefore the limits of the prohibition on the grant of public subsidies for places of worship[23]. It is just to show that notwithstanding the apparently strict position of the Law of 1905, the State subsidizes places of worship to a certain extent, even if very indirectly and implicitly. In fact, the prohibition set forth in the Law of 1905 has been mitigated by the legislature on numerous occasions.

First of all, in accordance with the Law of 1905 itself, the French State remains the formal owner of a very substantial number of places of worship, principally Catholic churches, built

[18] Note also that the President of the French Republic is co-prince, with a Spanish bishop, of the Kingdom of Kingdom (where Catholicism is still the official religion) and honorary canon *(Chanoine honoraire*) of the Lateran basilica in Rome.

[19] For more information, see Laurence, J. & Vaisse, J. (2006): *Integrating Islam: Political and Religious Challenges in Contemporary France*, pp. 135-62. It should be noted that this organisation has not really overcome the divisions within the Muslim community itself. Its action is criticised as being more political than religious.

[20] The Concordat was abrogated by the Law of 1905 on the separation between Church and State. However, some terms of the Concordat are still in effect in the Alsace-Lorraine region under the local law of Alsace-Moselle, as the region was controlled by the German Empire at the time of the law's passage.

[21] Council of State (interim order) 5 August 2005 *Commune de Massat*, no 284307, *A.J.D.A.* 16 January 2006, p. 91.

[22] Council of State 16 March 2005, *Minister for Overseas/ President of French Polynesia*, no. 265560.

before the 20th century. According to the Laws of 13 April 1908 and of 25 December 1942, which amended the original text, local authorities may allot funds to ensure the conservation and the maintenance of State-owned buildings of worship, and also of buildings belonging to religious associations[24]. For example, between 2001 and 2007, EUR 80 million were allotted for the maintenance of these buildings in Paris alone[25]. If such buildings are officially classified as "historical monuments", the State is also responsible of their maintenance. For example, the city of Paris, which is the owner of the building, and the French State have agreed to share the costs of restoring the Catholic Church of Saint-Sulpice in Paris. The cost of the project is estimated at EUR 28 million.

Secondly, a Law dated 19 July 1909 also exempts religious buildings from property tax obligations. Religious associations also exempted from the VAT for all their activities[26].

A Law of 25 December 1942 also permits the State to fund cultural activities, including those performed by religious authorities, as well as commemorative activities[27]. In practice, therefore, public authorities can often fund the building of religious buildings —churches, synagogues, and mosques— since they commonly incorporate facilities for cultural and religious activities. They may include, for example, a conference room, or a museum, or a cultural centre.

The first and best known exception to the ban on public funding of places of worship was the Great Mosque of Paris. It was built in the 1920's with substantial State financial aid, voted by the parliament. This gesture was however made, in part, in recognition of the contribution of North African Muslims who fought and died for France during the First World War. This motivation did not exist, however, in the case of a new mosque built in Paris (Barbès-Rochechouart), which recently received public subsidies of up to EUR 20 million. This recently-built mosque contains prayer rooms facilities for cultural activities and for Islamic institutes. Public funding also exists for synagogues and other places of worship. For example, the synagogue of Puteaux, a Paris suburb, was built in the middle of the last decade with the help of EUR 8 million in subsidies from the municipal government.

Finally, local authorities also indirectly subsidise the building of places of worship by conveying land to religious groups at extremely low prices or by allocating funds for cultural purposes which are then in fact used for religious purposes. In such situations, public funding lacks transparency. As the former President of the French Council of Muslim Worship and current Rector of the Great Paris Mosque explained[28], local authorities often "play a cat and mouse game" with administrative law and the administrative courts. Local elected representatives are torn between their desire to avoid their fellow-citizens having to pray in the streets and their fear of upsetting a segment of their electorate.

There are also many other exceptions to the principle of non-subsidization of religious practices, organisations and personnel as set forth in the Law of 1905.

B) The funding of religious education

In France the freedom to teach (and therefore the freedom to impart and receive private, including religious, education) has

[23] For a complete overview, please refer to the report of the Council of State, "One Century of Secularism", Report, *op. cit.*; http://lesrapports.ladocumentationfrancaise.fr/BRP/044000121/0000.pdf ; See also Machelon, J.-P. (2006): "Les relations des cultes avec les pouvoirs publics", *La Documentation française*, Paris; http://www.ladocumentationfrancaise.fr/rapports-publics/064000727/index.shtml

[24] Council of State 10 June 1921, *Commune de Monségur, Rec. Lebon* p. 573; Council of State 20 April 1966 *Ville de Marseille, Rec. Lebon*, p. 266.

[25] "Paris débordé par l'entretien de ses églises", *La Croix*, 11 January 2011, http://www.la-croix.com/Paris-deborde-par-l-entretien-de-ses-eglises/article/2452255/4078

[26] See Article 1382-4 of the General Tax Code; Salton, H. (2007): *Veiled Threats. Islam, Headscarves and Religious Freedom in America and France*, PhD Thesis, University of Auckland, 2007; https://researchspace.auckland.ac.nz/bitstream/handle/2292/2317/02whole.pdf;jsessionid=8304F2883E088A0211C3207ED3B75C95?sequence=14; See also Charlier-Dagras, M D. (2002): *La Laïcité Française à l'Epreuve de l'Intégration Européenne*, L'Harmattan, Paris.

[27] Council of State 1st June 1956 *Canivez*, *Rec. Lebon*, p. 220, concerning the public funding of the Catholic University of Lille and an association aiding students. See also Council of State 25 November 1988 *Dubois*, *Rec. Lebon*, p. 422 concerning the funding of a statue in memory of an archbishop.

[28] "The number of Mosques must be doubled", *France Soir*, 28 June 2010, http://www.francesoir.fr/actualite/societe/dalil-boubakeur-%E2%80%9Cil-faut-doubler-nombremosquees-en-france%E2%80%9D-54083.html

constitutional status[29]. Since the end of the 19th century, public education in France, including the personnel and the teaching programmes, have been secular[30]. But this does not preclude private religious education. In fact, since the *Debré Law* of 31st December 1959, private schools as well as State schools can be financially supported by the State.

Such public funding is not considered incompatible with the principle of secularity, since secularity does not require a system of strict separation and takes into account the religious freedom of citizens. The French Constitutional Council has frankly acknowledged that "*the legislature can give financial aid to private teaching in light of the nature and importance of their contribution to the accomplishment of the educational mission*" entrusted to schools[31]. Private schools which have signed a contract with the State benefit from a number of financial advantages. In return, pursuant to Article L-442-1 of the Education Code, they must respect the religious freedom of their pupils and are required to admit pupils without regard to their religious beliefs.

Furthermore, Article L. 141-3 of the Education Code provides that State schools must close one day a week in addition to Sunday, to allow for optional religious teaching outside State school facilities[32]. According to a State regulation dated 2 May 1972, this day off is scheduled on Wednesdays[33].

C) The organisation of State-funded chaplain services

The Law of 1905 does not prohibit State-funded chaplain services in public institutions such as schools, jails, and hospitals or in the armed forces. However, the Law does not expressly oblige the State create such services. Their creation resulted initially from a constructive approach to the 1905 Act by the administrative courts, which held that the prohibition of religious ceremonies in these public institutions would illegitimately hinder freedom of worship[34]. Currently, the State finances the presence of priests, imams, rabbis etc engaged in spiritual counselling in prisons, schools[35], and the armed forces, and also for religious funerals of soldiers. The Council of States explicitly defines this funding as *"a legitimate remuneration for a given service"*[36].

In public hospitals, according to Article R. 1112-46 of the Public Health Code, patients may receive visits from the religious minister of their choice[37]. Hospital chaplains of the different faiths are hired, or simply authorized to enter hospitals, by the head of hospital services. They are named on the basis of propositions made by religious authorities (the Catholic dioceses, the Jewish consistories, the French Council of the Muslim Faith, the French Protestant Federation, etc.). If, for a particular faith, these authorities cannot be identified clearly, no chaplain service is organised[38]. Moreover, new hospital buildings must be

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[29] See Constitutional Council Decision no. 77-87 DC of 23 November 1977 *Complementary Law to the Law no. 59-1557 of 31st December 1959 amended by Law no. 71-400 of 1st June 1971 relating to the freedom of teaching, Official Journal of the French Republic* 25 November 1977, p. 5530.

[30] See the so-called *Ferry* Laws of 28 March 1882 and 30 October 1886.

[31] Constitutional Council Decision no. 93-15 DC of 13 January 1994 *Law relating to the financial aid to private educational institutions by the local authorities*, *Official Journal of the French Republic* 15 January 1994, p. 832.

[32] See Article 56 of the law of September 30, 1986, *Official Journal*, 1st October 1986, 11760. See also *Official Journal,* 24 April 1991, 5408-9 and Sitruk, J. (2003): *L'État et les Religions en France: Réflexions et Perspectives,* Grand Rabbinat de France, Paris.

[33] Debray, R. (2002): "L'enseignement du fait religieux dans l'École laïque", Report to the Minister of Education, *La Documentation française*, February 32 p., http://lesrapports.ladocumentationfrancaise.fr/BRP/024000544/0000.pdf

Moreover, on 5 February 2010, a Bill of Rights proposed to complement civic curricula with courses relating to religion. Such courses would aim to provide an understanding of religious culture to French children. However, no legislation of this sort has yet been adopted; Parliamentary Bill of Law, no. 2287, http://www.assemblee-nationale.fr/13/pdf/propositions/pion2287.pdf

[34] Council of State (ass.) 6 June 1947, *Union catholique des hommes du diocèse de Versailles*, *Rec. Lebon*, p. 250, quoted in the Report of the Council of State entitled "A Century of Secularism", *op. cit.*

[35] For an overview, Texier, A. (1984): "Les aumôneries de l'enseignement secondaire, incertitudes d'une institution", *Revue de Droit Public*, p. 105.

[36] Council of State 6 January 1922 *Commune de Perquié, no. 74289, Rec. Lebon,* p. 14.

[37] See Decree no. 2003-462 of 23 May 2003. This right must also be reconciled with the requirements of hospital services (Council of State 28 January 1955, *Aubrun et Villechenoux*).

[38] Ministerial Circular DHOS/P1 no. 2006-538 of 20 December 2006 concerning the chaplains in public entities defined in article 2 of Act no. 86-33 du 9 January 1986 on hospital public service. For a general overview, see Ouchia, N. (2010): "Les aumôneries musulmanes dans les établissements de santé en France", *Droit, déontologie et soin*, March, 2010, Vol. 10, no. 1, pp. 32-40.

built with a specific room for religious services, and this room must be made available to the various faiths.

The situation of chaplains **in the armed forces** is dealt with by Decree no. 2005-247 of 16 March 2005[39]. Armed forces chaplains may be military personnel or civilians. In some cases, the role of chaplain is played by simple volunteers drawn from the ranks of the armed services. Military chaplains are appointed by the Ministry of Defence on the basis of propositions made by religious authorities. They are responsible for providing religious counselling to any member of the armed forces who requests it[40]. Muslim chaplains in the armed services were authorized only recently, by a regulation dated 16 March 2005. Previously, only Christian, Protestant and Jewish chaplains were appointed.

In prisons, Articles D. 432 et seq. of the Criminal Procedure Code provide that any persons who are incarcerated may participate in the religious services or meetings organised by accredited chaplains. These chaplains are appointed by the regional director of the prison service after consultation of the Prefect. They may be assisted by volunteers, who must also be accredited. The main tasks of prison chaplains consist in celebrating religious services, in carrying out religious rites and in providing spiritual and pastoral counselling. They are entitled to meet with the prisoners as often as they like, and their meetings take place without the presence of a prison officer. No disciplinary sanction can suspend this right and likewise, even when collective prayer in prison is not authorized, its practice cannot justify confinement in a punishment cell[41]. Article 26 of the Prison Regulation Act (law no. 2009-1436 of 24 November 2009) also provides that all prisoners shall be able to practise the religion of their choice, without any limit other than those required by security or public order, as the conditions and organisation of the prison must also be taken into account.

Examples of the financial intervention of the public authorities could be multiplied. They concern for example the programming of religious and spiritual broadcasts on national public radio and television channels[42]. Under the *Léotard* Law (as modified on 5 March 2009), public television must ensure a place for religion: «*France Télévisions shall schedule religious television broadcasts on Sundays, dedicated to the principal religious faiths present in France. These broadcasts are the responsibility of each of the different religious faith*»[43]. On Sunday mornings, there is a programme entitled «The Paths of Faith» on France Television. It is a multi-faith broadcast dealing with Buddhism, Islam, Christianity and Judaism. Catholics co-produce the Sunday Mass, which is the oldest programme on television (since 1948). The same obligations exist for public radio, pursuant to the Decree of 13 November 1987 concerning Radio France and its specification requirements.

This brief overview, though not exhaustive, demonstrates that the ban on the State funding of religion is subject to many exceptions. Going beyond this financial intervention, religion is also taken into consideration within the public sphere through the accommodation of religious needs or constraints.

1.2. *The accommodation of religious needs within the public sphere*

Some accommodating measures are regulated, while others consist in social practices or initiatives which fit into an overall "living together" approach. For example, the question of the ritual slaughter of animals for kosher or halal food is regulated by the Decree no. 2003-768 of 1st August 2003[44]. Only individuals accredited by approved religious organisations can ritually slaughter animals, and it is required the animals be killed in a slaughterhouse.

[39] *Official Journal of the French Republic* no. 65 of 18 March 2005 p. 4599. See also Decree no. 2005-248 of 16 March 2005 amending Decree no. 64-498 of 1st June 1964 relating to religious ministers within the security forces. See also Law of 8 July 1880 and Decree of 1st June 1964 recognizing the fundamental right for each member of the Armed Forces to practice his or her religion and defining the responsibilities of the military command in this respect.

[40] See also Decree no. 2008-1524 of 30 December 2008, defining the status of military chaplains.

[41] See Administrative Tribunal of Versailles 24 march 2005 *M. B.*, no. 0406598, which invalidates the sanction of placement in a punishment cell for 8 days.

[42] Article 56 of Law no. 86-1067 of 30 September 1986 (so-called *Léotard* Law) on the freedom of communication and Decree no. 92-280 of 27 March 1992 as modified most recently by Decree no. 2010-1379 of 12 November 2010; Decree 13 November 1987 on Radio France.

[43] This mission is assigned to France 2 (Decree of 23 June 2009).

[44] This Decree repealed Decree no. 97-903 of 1st October 1997.

In connection with dietary requirements, the catering services of State schools, the armed forces and the prisons adapt their menus to a certain extent to meet the needs of students, military personnel and prisoners. Other examples refer to adaptation of work or school schedules to accommodate religious constraints.

An interesting legal issue is determining whether such administrative practices result from a right, under French law, to reasonable accommodation of religious requirements.

A) Accommodation of religious constraints related to dietary requirements and holy days

• The accommodation of dietary constraints

In some cases, the French public authorities facilitate compliance by believers with the dietary requirements and restrictions that their religion imposes on them. Even if the secular principle does not prohibit any replacement menu, the Stasi Commission, set up in 2003 to rethink the application of the principle of secularity in France, favoured the promotion of practices to "accommodate" religious constraints while reconciling them with the proper functioning of the institutional catering sector[45]. As a consequence, insofar as public service recognises the exercise of all faiths, local authorities are entitled to propose specific menus taking into account religious requirements[46].

In practice, many **State school cafeterias** offer an alternative when pork is on the menu. However, there has not yet been an official decision by school authorities concerning the serving of halal or kosher meat. Some municipalities such as Lyon and Aulnay-sous-Bois have taken successful and innovative initiatives in order to provide two menus, one with meat, the other meat-free. Not only does this solution accommodate Muslims, Jews, Buddhists, Hindus and vegetarians but it also provides a way not to segregate the school pupils at lunchtime on the basis of their religion.

The changeover in Lyon occurred in 2008. One reason for it was the fact that, in previous years, some 30% of pupils refused to eat the meals served in the 130 school cafeterias (i.e. approximately 16,400 meals are served every day)[47]. Today, the municipality of Reims is confronted with equally dramatic figures: in early 2011, 1165 children were refusing to eat pork (6,350 meals are served daily). Even when pork is replaced by some other meat, 550 children refuse to eat meat of any sort. In this context, the municipality is trying to find an adequate solution, since providing nourishment for children attending school is one of its principal missions[48]. Reims may learn from Lyon's experience.

In any case, there is no legal obligation for municipal, departmental and regional councils to take religious dietary restrictions into consideration in deciding on the functioning of school cafeterias. In fact, under French law, school cafeterias are considered an "optional" public service. The Ministry of Education also considers that refusing to modify menus in school cafeterias in order to accommodate religious requests does not undermine freedom of religion[49]. At present, the administrative courts do not consider that such a refusal violates freedom of religion[50]. In 2002, the Council of State was asked to decide if providing meat-free menus every Friday, and only on Friday, constituted illegal discrimination between Christians and Muslims. The Coun-

[45] Stasi, B. (2004): "Laïcité et République", Report to the President of the Republic, *La documentation française*, Paris, 166 p., p. 66; http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf

[46] The Law of 13 August 2004 transferred from the State to local authorities all issues related to school catering, including the composition of meals proposed to school pupils. See also the Ministerial Instruction of the Ministry of Education no. 2001-118 of 25 June 2001 (which recommends providing a variety of dishes) and the Ministerial Instruction no. 82-598 of 21st December 1982 (which recommends taking into account familial food habits and customs, including those of children of foreign origin); For an overview, Ramel, A. (2010): "Les collectivités seules face aux choix des menus", *La Gazette*, 25 October, pp. 54-56. http://www.seban-associes.avocat.fr/fichiers/pub_gaz40_analyse_laicite_cantines.pdf

[47] Lapoix, S. (2007): "Lyon négocie la laïcité dans les cantines scolaires", *Marianne 2*, 10 Octobre, http://www.marianne2.fr/Lyon-negocie-la-laicite-dans-les-cantines-scolaires_a78923.html

[48] "Une enquête sur les 'menus spéciaux' dans les cantines"; 10 February 2011, http://www.lunion.presse.fr/article/marne/une-enquete-sur-les-%C2%AB-menus-speciaux-%C2%BB-dans-les-cantines

[49] See the answer of the Ministry of Education to a written parliamentary question published in the *Official Journal of the French Republic* of 29 January 2010, p. 619, http://questions.assemblee-nationale.fr/q13/13-906QOSD.htm

[50] Marseille Administrative Tribunal 26 November 1996 *Ms Zitoussi, Ghribi et al v. Municipalité de Marignane, Dalloz* 1997, IR, p. 30.

cil of State ruled that such menus were not explicitly founded on dietary requirements based on religion, and therefore concluded that the situation was not discriminatory[51].

If providing replacement meals only to pupils belonging to a specific religion would obviously be discriminatory, the HALDE's approach seems to go a step further: it seems to attempt to unmask religious discrimination behind apparently neutral practices. In its decision no. 2006-203 of 2nd October 2006[52], an individual claim was lodged with the French Equality Body concerning provisions accommodating Muslim schoolchildren's dietary requirements, while not providing a similar accommodation for Hindu school children. After noting that such a situation *"would constitute a discriminatory practice"*, HALDE decided to organise a mediation procedure, which it considered as the *"most appropriate"*. Four months later, the municipality decided to provide Hindus with another kind of meal substitute for animal proteins, similar in effect to the provision which already existed for Muslims.

Halal and kosher menus are also offered to military personnel[53]. To our knowledge, equivalent accommodations do not exist in prisons, except in certain regions placed under the Concordat regime[54]. This is so despite the fact that Article D 354 of the Criminal Procedure Code provides that prisoners should receive *"a varied diet (...) that meets the requirements of nutritional science and food safety (...) and as far as possible, their philosophical or religious beliefs"*. An administrative regulatory note, issued in 1994, encouraged prison authorities to provide kosher or halal food, but this does not seem to have been put into effect. Pork, however, is excluded from the menus of Muslim prisoners, and kosher food is available but at the prisoners' own expense[55].

As for **the practice of Ramadan**, in 2010 a municipality requested the HALDE's opinion about the legal framework applicable to Muslim children and educators. It should be recalled that Ramadan fell during the summer in 2010. The issue was therefore raised of the compatibility of fasting with the normal activities and proper functioning of public "leisure centres" (a public service providing activities for children during the summertime, during other school holidays, and after school).

In its Decision no. 2011-69 of 21 March 2011, the HALDE considered that fasting for Ramadan cannot necessarily be considered risky. It affirmed that the systematic exclusion of fasting children from activities provided by public leisure centres seemed disproportionate to the legitimate aim of security. A concrete analysis of the real risks for the children's safety was necessary, taking into account the specific context, and particularly the sport or recreational activities in question. The Equality Body recommended further that, in case of a real safety risk, alternative activities compatible with respect for the obligation to fast should be proposed to the children. Moreover, except for exceptional circumstances, when the children are present at a public leisure centre for several days, meals should be provided to the children outside of fasting periods. As for the public agents supervising the children, the HALDE considered that fasting should be viewed an aspect of their private lives which could result from reasons other than religious belief (health, personal choice…). It could not therefore be considered as ostentatious or proselytising behaviour which would be in conflict with their civil servant's duty of neutrality. However, given the existence of this duty, the personnel could be required to continue supervising the children during lunchtime even if they themselves were fasting.

- The accommodation of work schedules

In field of public employment, although civil servants are prohibited from expressing their religious beliefs during work time, the French public administration may legally adjust working schedules in order to facilitate the free exercise of religion. It

[51] Council of State 25 October 2002 *Ms Renault*, no. 251161.

[52] http://www.halde.fr/IMG/alexandrie/2363.PDF

[53] See the answer of the Ministry of Defence to parliamentary question no. 61152, *Official Journal of the French Republic*, 29 December 2009, p. 12492.

[54] The Concordat was abrogated by the Law of 1905 on the separation between Church and State. However, some terms of the Concordat are still in effect in the Alsace-Lorraine region under the local law of Alsace-Moselle, as the region was controlled by the German Empire at the time of the law's passage.

[55] Council of State, "A Century of Secularism", Report, *op. cit.*

is not illegal to request or authorize absences, or to reschedule work time, for this purpose, provided that the continuity and proper functioning of public service can be guaranteed[56]. Restrictions to religious freedom must thus to be motivated by the needs of public service, and the heads of public services must rule individually on each request they receive[57].

Since Ministerial instruction no. 901 of 23 September 1967, civil servants can be authorised by their superiors to absent themselves in order to celebrate the holy days of their religious denomination. However, their absence can only be authorised if it is compatible with the normal operation of their department. This possibility, to which the superior must give "sympathic consideration"[58], is not to be understood as an absolute right[59]. It depends primarily on the individual assessment that the head of the department makes regarding the normal operations required to maintain public service. Each year, a ministerial instruction specifies the dates of the main religious ceremonies to be taken into account. For example, for 2011, about fifteen Orthodox, Armenian, Muslim, Jewish and Buddhist holy days are listed[60]. Catholic celebrations are not mentioned, since most of them already correspond to public holidays. However, the list is not closed. Catholics, for example, can receive an authorisation to be absent for holy days that are not public holidays[61]. Believers of other faiths, such as Raelians, can also obtain time off[62]. Although this document is not legally binding[63], systematically turning down requests corresponding to days that are not listed in the ministerial instruction is sanctioned[64].

These rules are quite similar to those applicable to private employment. Article L. 1131-1 of the Labour Code prohibits religious discrimination in the field of employment. Article L. 1121-1 of the same code provides that *"No one may restrict individual rights, or individual or collective liberties, in a way which is not justified by the nature of the work to be performed, or which is not proportionate to the objective to be reached."* Private must therefore consider any request for time off for religious reasons in good faith. They must normally accede to it, if it is possible to do so and would not be contrary to the needs of the business[65].

In its decision no. 2007-301 of 13 November 2007, the HALDE dealt with the refusal of an employer to authorize the absence of his employees for the Aïd el-Kébir, a one-day Muslim holiday, despite the fact that he authorized the absence of his Jewish employees on Yom Kippur. The Equality Body held that the Labour Code provides for a subtle balance between the freedom of religion and the interests of the company. If discrimination based on religious grounds is prohibited during the employment contract, restrictions can be authorised only if they are justified and proportionate in light of the organisation of work within the company. Therefore, the employer must justify, by reference to factors unrelated to any discrimination, the refusal to authorise the absence of an employee on a holy day. The HALDE thus implicitly acknowledged that any worker should normally benefit from days off in order to fulfil religious requirements, the only limit being the proper organisation of the service in which he or she works.

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[56] Council of State 16 December 1992 *Ms G*, about a 7th Day Adventist working in a hospital and who request to absent herself Saturdays was rejected because she could not be replaced. See also Council of State (interim order) 16 February 2004 *OPHLM Saint-Dizier*, no. 264314 and Fort-de-France Administrative Tribunal 19 June 1976 *C.*, *Rec. Lebon*, p. 653; Paris Administrative Court of Appeal 31 March 2009 *Ms Marie-Henriette X*, no. 08PA01648.

[57] Council of State 12 February 1997 *Ms Henry,* no. 125893, *Droit Administratif*, 1998 no. 248; Melun Administrative Tribunal 8 July 2003 *Ms C.*, no. 01-2769; For a complete overview, Vasseur, J.-L. & Seban, D. (2010): "Liberté religieuse et service public", *La Gazette*, 11 October, p. 52.

[58] Ministerial answer to a parliamentary question, no. 32539, *Official Journal of the French Republic*, 20 October 1999, p. 5514.

[59] Council of State 3 June 1988 *Barsacq-Adde*, no. 67791.

[60] For example, see the indicative calendar of holy days for the year 2011, for which authorization of absences can be granted: Ministerial Instruction no. 2010-250 of 20 December 2010; http://www.education.gouv.fr/cid54294/menh1032539c.html

[61] Council of State 12 February 1997 *Ms Henry, op. cit.* about Good Friday, the Miraculous Medal Day or Corpus Christi.

[62] Paris Administrative Court of Appeal 22 March 2001, *Crouzat, no.* 99PA02621; http://www.droitdesreligions.net/juris/caa/20012203.htm.

[63] Council of State 8 April 2010, *Mr Christian A*. no. 326609.

[64] Council of State 12 February 1997 *Ms Henry, op. cit.*

[65] Savatier, J. (2001): "Liberté religieuse et relations de travail", in *Mélanges Verdier, Droit syndical et droit de l'homme à l'aube du XXIème siècle*, Dalloz, Paris, 529 p., p. 455; See also Gaudu, F. (2008): "Droit du travail et religion", *Droit social*, September-October, no. 9/10, pp. 959-968, spec. p. 967.

It seems, at first sight, that French labour courts accept the employees of workers considered as having "deserted" their posts because they refused to work at certain times for religious reasons. In fact, however, the judgements in question stress the particular circumstances of each case, and particularly the good faith of the employers who had proposed different but reasonable accommodation and/or who could not propose such an accommodation because of legitimate business needs[66].

For example, the Paris Court of Appeal found against a Jewish salaried worker in charge of data capture and processing who had requested a specific work schedule accommodation to comply with his religious constraints. The judgement explained that such an accommodation was not possible given the organisation of the business and the plaintiff's specific job. The plaintiff had also refused another work schedule which would have permitted him to comply with his religious obligations for the Shabbat every Friday evening[67]. In another case, the same Court reasoned that the refusal of an employer to grant a five-week leave-of-absence to an employee who wished to celebrate his wedding religiously in Portugal was justified, both because of the need to deal with an urgent and important order and because this leave, one month before the wedding, was not really essential[68].

Within the State schools, pupils, despite there obligation to attend courses, are excused from school for the most important holy days of their religion when they do not coincide with public holidays[69]. The abovementioned ministerial instruction, used for authorization of civil servants' absence, is also pertinent for the school authorities in making these decisions, as indicated by Ministerial instruction no. 2004-84 of 18 May 2004[70].

Time off from school for religious reasons can thus be granted to pupils individually and for specific reasons, in a way similar to the system for civil servants. Absences must be compatible both with the pupil's duties required by his or her course of study and with public order. Therefore, *"any requests for systematic or prolonged absences should be refused insofar as they are incompatible with the organisation of schooling"*[71]. Neither school pupils nor university-level students may be allowed to absent themselves systematically from a mathematics class on Saturday mornings[72], or from physical education classes, or even from sex education programmes[73].

In 2008, a religious association and the Jewish Central Consistory lodged a claim with the HALDE based on the difficulties encountered by practising Jewish students when examinations in public higher education took place on Saturdays and on Jewish religious holidays. In fact, the Jewish religion prohibits taking examinations during these periods. The HALDE found that Jewish students had no absolute right to the rescheduling of classes or examinations to accommodate their religious practices[74]. However, the French Equality Body also reaffirmed the obligation of the heads of academic establishments, whose decisions are subject to review by the courts, to each case individually, and to reconcile as far as possible religious freedom and the obligations inherent in school life. This position is similar that taken by the Council of State[75] and with the position taken in abovementioned Ministerial instruction of 2004 indicating that *"school and university services should take all necessary measures in order not to organize examinations or*

[66] *Contra*, Brisseau, C. (2008): "La religion du salarié", *Droit social*, September-October, no. 9/10, pp. 969-980, spec. p. 979.

[67] Paris Court of Appeal 10 January 1989 *Eric Hassoun c/ SA Luc Durand*, no. 35228/87 et 35180/87.

[68] Paris Court of Appeal 25 January 1995 *Luis Rodruigues c/ Eduardo Simoes*, no. 31766/94.

[69] Article L. 511-1 of the Education Code requires pupils to attend all mandatory and optional courses; Council of State 10 March 1995 *Aoukili*, *A.J.D.A.*, 1995, p. 332.

[70] *Official Journal of French Republic* 22 May 2004; http://www.education.gouv.fr/bo/2004/21/MENG0401138C.htm

[71] Article 2-4 of the Ministerial instruction of 2004.

[72] Council of State, April 14, 1995, *Consistoire central des Israelites de France*, no. 125148 ; Council of State (Grand Chamber) April 14, 1995, *M. Koen*, no. 157653.

[73] Council of State 18 October 2000 *Association Promouvoir*, no. 213303. See also Ministerial Instruction of 19 November 1998, requiring courses on sexuality and AIDS in schools.

[74] HALDE Decision no. 2008-33 of 18 February 2008. See also HALDE Decision no. 2009-151 of 27 April 2009.

[75] Council of State 14 April 1995, *Consistoire central des Israelites de France* and *Koen, op. cit.* commented on in *Revue Française de Droit Administratif*, 1995, p. 58.

important tests during religious holidays". It also seems to be in line with ECHR and ECJ case law[76].

Two months after the HALDE decision, the Ministry of Education issued a note calling educational authorities to find solutions, such as a non failing grade or the organisation of special sessions of an examination, for those who cannot take an examination due to religious constraints.

These decisions do not however systemize in what way, or even whether, the refusal to take into account religious needs is discriminatory. Even if they can be interpreted as founded on discrimination, the requirement to reach a balanced and mutually satisfactory solution is not described as a procedure to vindicate a subjective right to differential treatment. The phrasing chosen by the Council of State seems more to rely on deontological rules.

The abovementioned examples are not exhaustive. Many others related to the accommodation of religious needs in the public sphere could be given. To name just two: the controversial creation of specific time periods reserved for women at the public swimming pools in Lille, Strasburg and Sarcelles[77]; and the recommendation addressed by the Ministry of the Interior to the municipalities, suggesting that they reserve specific areas in public cemeteries for faith-related (particularly Muslim and Jewish) burials[78]. All these measures appear as concrete actions intended fully to respect religious beliefs and the right to engage in worship. Even if some of them have been taken to compensate specific religious communities faced with a particular problem because of their beliefs or practices, they do not result from discrimination law, or only very implicitly and in a very elusive way.

B) Towards the recognition of a right to reasonable accommodation?

In its decision in *O'Malley v. Simpson-Sears*[79], the Supreme Court of Canada recognized a legal obligation, in order to avoid a situation of discrimination, to reasonably limit a generally applicable standard or practice by granting differential treatment to an individual who would otherwise be penalised by such standard or practice. It conceives this right to "accommodation" as a corollary to the right to equality. Therefore, for example, when an employment rule has a discriminatory effect, an employer has a duty to take reasonable steps to accommodate the employee, except in case of undue hardship for the business. In the *O'Malley* case, the duty to work occasionally on Friday evenings and on Saturdays, which resulted from a "neutral" rotating work schedule, was considered as discriminatory toward the claimant, a 7th Day Adventist, since the employer could not prove that accommodating her work schedule would have created undue hardship for the business. The right to reasonable accommodation was later expressly enshrined in the Canadian Human Rights Act of 1998.

In contrast, the French Constitutional Council seems to link the principle of secularity with a refusal to recognize exceptions, on religious grounds, to generally applicable legal rules. In fact, it interprets the principle of secularity as prohibiting anyone from refusing to respect a generally applicable rule on the basis of his or her religious beliefs. In its Decision no. 2004-505 DC of 19 November 2004, it stated that *"the provisions of Article 1 of the Constitution whereby 'France is a secular republic' which forbids persons to profess religious beliefs for the purpose of non compliance with the common rules governing the relations*

[76] See ECHR 27 April 1999 *Martins Casimiro et Cerveira Pereira v. Luxemburg*, no. 44888/98, concerning the refusal to give Seventh-Day Adventists a general exemption on religious grounds from attending school on Saturdays, justified by the need to protect the rights and freedoms of others, notably the right to education; E.J.C. 27 October 1976 *Vivian Prais*, aff. 130/75 ruling that *"if it is desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests"* and *"if informed of the difficulty in good time, [the defendant] would have been obliged to take reasonable steps to avoid fixing for a test a date which would make it impossible for a person of a particular religious persuasion to undergo the test (...)".*

[77] Simon, C. (2003): "Swimming-pools for women", *Le Monde*, 23 September.

[78] Ministerial Instruction of 19 February 2008, Cemetery regulations, NOR: INTA0800038C, http://www.decisionlocale.com/circulaire-intA0800038C-police-des-lieux-de-sepulture.pdf ; Vasseur, J.-L. & Seban, D. (2010): "Carrés confessionnels, la quadrature du cercle", *La Gazette*, 8 November, pp. 54-56; http://www.seban-associes.avocat.fr/fichiers/pub_laiciteetcollectivitescarresconfessionnelslaquadratureducercle.pdf

[79] Canadian Supreme Court, *Ontario (Human Rights Comm.) and O'Malley* v. *Simpsons-Sears Ltd.*(1985), 7 *C.H.R.R.* D/3102 (S.C.C.).

between public communities and private individuals are thus respected"[80].

- The accommodation of religious constraints through other legal tools than the right to reasonable accommodation

Despite the Constitutional Council's very general language, French courts, in particular lower courts, do take into consideration the litigants' religious constraints, even if they usually leave this practice unspoken. The following cases demonstrate that the judicial system does in fact take into account the consequences of religious requirements, at least to a certain extent.

For example, the Paris Court of Appeal did not draw any legal consequences from certified reports demonstrating that a restaurant managed by a Muslim did not operate during Ramadan[81]. However, although it is quite clear that the cultural and social reality of religious requirements is the principal explanation for this "accommodation", the court leaves it unsaid. Another example of this kind of "taboo" can be found in the interim order of the presiding judge of a Court of Assizes, postponing a trial until after Ramadan[82]. In doing so, he granted a request of the defendant, a Muslim who was fasting, and who argued that he would not, as a consequence, be *"in fully able to defend himself"*. This differential treatment was not considered the direct result of religious accommodation, as it would have been in Canada. The judge explained his decision merely as a way to *"meet the needs of a sound administration of justice"*. This decision upset many people, and was the focus of a wide public debate[83]. Nonetheless, it is not surprising in France to see judges in most courts postpone hearings so that they do not fall on a holy day observed by one of the parties.

Furthermore, French courts permit ritual practices like circumcision, practised by Jews and Muslims, to be carried out in public hospitals([84]). Hence, no doctor or accredited *mohel* has ever been convicted on the basis of Article 222-1 of the Penal Code which prohibits inflicting physical harm on individuals for performing ritual circumcision, contrary to cases of excision[85]. However, since Article 16-3 of the Civil Code requires the prior consent of the concerned person to infringe the integrity of his or her body (when medically necessary), those performing circumcisions are sanctioned if they have not obtained the consent of both parents[86].

In fact, when courts adjust legal rules in order to take into account religious beliefs, they are generally silent about the impact of religious considerations on their decisions. For the time being, therefore, in France, unlike Canada, neither statute nor case law has explicitly acknowledged a right to reasonable accommodation on the grounds of religion or belief.

This does not imply that nothing is done to reach this goal. France in fact accommodates certain religious needs. It simply uses other legal tools to do so. Legislative and regulatory measures appear the most appropriate. Where they do not exist, solutions are often found at the local level, and mediation is frequently used.

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[80] Constitutional Council Decision no. 2004-505 DC of 19 November 2004 *The Treaty establishing a Constitution for Europe,* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2004-505DC-en2004_505dc.pdf

[81] Paris Court of Appeal 20 December 2007 *Ghoufali c/ SCI Immobess*, no. 07/00211.

[82] "Un procès renvoyé pour cause de ramadan", *Le Figaro*, 4 septembre 2008; *Le Monde*, 5 September 2008.

[83] For another case which attracted enormous interest in the media, concerning the attempt to obtain the annulment his marriage by a Muslim who discovered that his wife was not virgin, see Lille County Court 1st April 2008, no. 07-08458 and Douai Court of Appeal (interim order) 19 June 2008 no. 95/8; Malaurie, Ph. (2008): "Mensonge sur la virginité et nullité de mariage", *JCP Edition Générale*, no. 26, 25 Juin, act. 440; Terre, F. (2008): "Le libre choix du conjoint", *JCP Edition Générale*, no. 26, 25 juin, actualité 439; *JCP* G 2008, II, 10122, note G. Raoul-Cormeil.

[84] Council of State 3 November 1997 *Hopital Joseph-Imbert d'Arles, Revue Française de Droit Administratif,* Jan-Feb. 1998, p. 90.

[85] In a case related to an ill-fated circumcision performed on a baby by a person without French medical qualifications, the prosecutor of Lille noted that such a customary practice could not be assimilated to a surgical act and that he could not prosecute the person who had performed the circumcision for negligence, since the law does not require the hospitalisation of children for circumcision, and the United Nations does not consider circumcision to be genital mutilation. The Court of Appeal of Douai upheld the decision to acquit the accused on June 15, 2010 (Mazen M. Case).

[86] Rennes Court of Appeal 4 April 2005, no. 04/04000; Lyon Court of Appeal 25 July 2007, *L. v. M.;* However, it is only reimbursed under French health insurance plan when it is performed for medical reasons. See the answer given by Ms Roselyne Bachelot to the MP Valérie Boyer in 2009, *Official journal*, 30 June 2009. See contra, County Court 20 March 1986 *Mutuelle d'assurances du corps sanitaire français v. Benzaïd.*

What is striking is thus the excessive caution of French courts in recognizing the possibility for certain persons or groups to obtain new rights on the basis of discrimination law. The public outcry inspired by any decision which can be interpreted as affording unjustifiable preferential treatment seems to restrain judicial initiative in this field. However, although the reasoning of French courts is sometimes less convincing than it might be, since the judges censure the real motives underlying their decisions, their solutions are fully as pragmatic as those of the Canadian Supreme Court.

In addition to the sensitive nature of the subject, several other aspects of the French context contribute to the judicial results. France has a civil law system and French judges seem not to be very familiar with discrimination law: the notion of indirect discrimination, in particular, seems virtually unknown, and is occasionally misused[87]. Moreover, it is not certain that discrimination issues are raised by the litigants. The abovementioned decision of the Constitutional Council gives an idea of the weight in French tradition of the concept of formal equality. Even the French Equality Body seems reluctant to enshrine a right to reasonable accommodation, since there is so far no supporting case law at the European level.

- An approach in line with the current state of European law

The European Court of Human Rights seems reluctant to recognize the existence of a positive obligation to implement reasonable accommodation when religion or culture is involved[88]. Even if the Court did recognize, in its recent *Munoz Diaz* decision[89] relating to a marriage performed in accordance with the rites of the Roma community, that belonging to a minority may influence the manner in which the law is applied, it did not take the plunge. Nor did it do so in the *Jacobski* case[90], involving the request for dietary accommodation of a Buddhist detainee, even if the Court emphasised the recommendation of the Committee of Ministers of the Council of Europe, in the European Prison Rules, indicating that prisoners' religion should be taken into account when providing them with food. The litigants won their case on different grounds, directly related to the behaviour of the national authorities and/or the good faith of the claimant, and not on the basis of a right to reasonable accommodation[91].

Moreover, these cases are much more progressive than others which the Court simply dismissed without consideration of the issue of religious accommodation. This may be seen, for example, in *Dogru and Kervanci v. France*[92]. These cases concerned the applicants' expulsion from school because of their refusal to remove their Muslim headscarves during physical education classes. Although both girls had offered to replace their headscarf by a hat, the Court did not find it opportune to deal with the question of "accommodation", holding that this sort of issue fell squarely within the margin of appreciation of the State. These two cases arose before the enactment of the 2004 French law banning ostentatious religious signs in State schools. The ECHR found no reason to alter its point of view in more recent cases decided after the passage of that law[93]. The Court thus agreed with French authorities that the wearing other head coverings, without ever removing them, also constituted a manifestation of religious affiliation. It pointed out that the 2004 law had also to apply to the new religious symbols which might appear, and had to deal with potential attempts to circumvent the law.

[87] We develop these questions in more detail in Ast, F. (2002): *Les droits sociaux fondamentaux dans l'Union européenne*, Ph.D. Thesis, Paris, 625 p. See also Cluzel-Metayer, L. & Mercat-Bruns, M. (2011): "Discriminations dans l'emploi, Analyse comparative de la jurisprudence du Conseil d'Etat et de la Cour de cassation", *La Documentation française*, Paris, 115 p., spec. p. 33 and seq.

[88] See, contra, ECHR 30 April 2009 *Glor v. Swizerland* no. 13444/04 relating to discrimination on grounds of disability. For further details, see Ast, F. (2009): "Indirect Discrimination as a Means of Protecting Pluralism: Challenges and Limits", in *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society, Trends in Social Cohesion*, no. 21, Council of Europe Publishing, Dec. 2009, 325 p., pp. 85-109, spec. p. 98.

[89] ECHR 8 December 2009 *Munoz Diaz v. Spain,* no. 49151/07.

[90] ECHR 7 December 2010 *Jakobski v. Poland*, no. 18429/06.

[91] Nevertheless, in *Munoz Diaz* case, the applicant believed in good faith that the marriage performed according to Roma rites and traditions had produced all the effects inherent to the institution of marriage, especially as official documents indicated that she was indeed a "wife". She thus had legitimate expectation that she would be entitled to a survivor's pension.

[92] ECHR 4 December 2004 *Dogru v. France,* no. 27058/05 and *Kervanci v. France,* no. 31645/04.

[93] ECHR 30 June 2009 *Aktas v. France, no.* 43563/08; *Bayrak v. France*, no. 14308/08; *Gamaleddyn v. France*, no. 18527/08; *Ghazal v. France*, no.29134/08; *J. Singh v. France*, no. 25463/08; *R. Singh v. France*, no. 27561/08.

It is not predictable how the ECHR's case law will evolve. In *Arslan v. Turkey*[94], the Court seemed to narrow the margin of appreciation of States with regard to the proportionality of measures prohibiting religious signs outside public establishments. Within such establishments, religious neutrality could take precedence over the right to manifest one's religion. This margin of appreciation thus seemed to be understood in a much broader sense by the Grand Chamber in *Lautsi v. Italy*[95], which dealt with the presence of crucifixes in State school classrooms: the decision held that it was not the Court's role to take a position in domestic debate concerning the religious meaning of crucifixes or the lack of such religious meaning.

Whatever happens at the European level, the current political atmosphere in France is not at all conducive to legal recognition of reasonable accommodation for religious practices. On the contrary, during this pre-electoral period (French presidential elections will be held in spring 2012), certain politicians intentionally distort the meaning of secularism, in order to justify restricting the display of religious signs and to delegitimize any demands based on religious grounds. Most of the time, political figures and the media present these demands as a form of self-imposed cultural and religious isolation which flouts the principle of harmonious "living together"[96].

Such a context doubtlessly weighs on the courts. For example, even if civil law recognizes only the civil wedding ceremony, the courts traditionally consider religion to be a decisive factor for spousal consent for annulment of the civil marriage, or when one spouse wants to raise the child in his or her own religion. In 2008, a Lille civil court thus decided to annul the marriage of a Muslim man who had discovered, after the marriage, that his wife was not a virgin. This decision led to such a public outcry that the Public Prosecutor unexpectedly filed an appeal. The lower court's judgment was then reversed by the Court of Appeal, which was subjected to intense political and media pressure[97].

At present, reasonable accommodation has become so sensitive a subject in public opinion that the courts could not legitimately apply the principle in question unless it were first enacted into law by the National Assembly. Nonetheless, as we demonstrated in the first part of this paper, many legal texts and local initiatives already make room for religious accommodation.

Despite the richness of the French principle of secularism, its contribution to the protection of religious pluralism is however not above criticism. One point meriting such criticism could be the lack of real substantive neutrality at the State level. Historically, France has been a dominantly a Catholic country. Even though the State is now formally secular, there are still traces of the former establishment of the Catholic religion. This situation indirectly favours a secularized Christian culture and tradition.

Because of the anteriority of Catholicism in French society, the distribution of official holidays is non-egalitarian: fifty-two Sundays where most businesses and public institutions are closed favour religions that recognize Sunday as their day of rest. Among eleven other holidays in France, six are of Catholic origin and only five are secular.

Another example concerns the number of places of worship. An Evangelical prayer room opens every week and a Muslim place of worship opens every ten days. Nevertheless, their number is still insufficient compared to the demand, and the nature of the buildings used to house them is frequently detrimental to these religions, which have taken root only recently in France. There are about 45,000 Catholic churches in France, whose maintenance depends largely on the local authorities, but there are only some 2,100 mosques[98]. According to Muslim authorities, this figure should be doubled to satisfy

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[94] ECHR 23 February 2010 *Ahmet Arslan and others v. Turkey*, no. 41135/98.

[95] ECHR 18 March 2011 *Lautsi v. Italy*, no. 30814/06.

[96] "Ni voile, ni menu spécial", *Libération*, 31 March 2011; "Voyage au pays des nouveaux islamophobes", *Le Point*, 31 March 2011; Fassin, E. (2011): "L'Islam, vous dis-je ou Sarkozy le malade imaginaire ?", *Libération*, 31 March.

[97] Lille County Court 1st April 2008, no. 07-08458 and Douai Court of Appeal Douai (interim order) 19 June 2008 no. 95/8; Malaurie, Ph. (2008): "Mensonge sur la virginité et nullité de mariage", *JCP Edition Générale*, no. 26, 25 Juin, act. 440; Terre, F. (2008): "Le libre choix du conjoint", *JCP Edition Générale*, no. 26, 25 juin, actualité 439; *JCP* G 2008, II, 10122, note G. Raoul-Cormeil.

[98] Leschi, D. (2008): "Les lieux de culte et le bureau central des cultes", in Lalouette, J. & Sorrel, Ch. (eds): *Les lieux de culte en France, 1905-2008*, Letouzey & Ané, Paris.

the practicing Muslims, who make up 20% of the total Muslim population in France of about 5 million[99]. Lately, political debate has focused on the presence of Muslims praying illegally in the streets of French cities and towns. In December 2010, the new leader of the far-right Front National even made a shameful comparison between a so-called "occupation" by Muslims of French streets, and the Nazi occupation of France during the Second World War. However, all proposals to reform the 1905 Law in order to permit the funding of new mosques have been rejected[100]. The mosques which are built frequently depend on foreign funding, such as the mosque of Clermont-Ferrand payed for in great part by King Mohammed VI of Morocco.

What is more, the number of Muslim prison chaplains is still completely insufficient given the prison population[101]. Although the number of Muslim prison chaplains has doubled since 2006, there are still only 142, compared to 600 Catholics and 265 Protestants[102]. According to the General Inspector of Places involving the Deprivation of Liberty, this situation hinders the practice of their religion by Muslim prisoners[103].

In this context, discrimination law seems best placed to increase the protection of religious pluralism. Even if there is conscious and unconscious resistance to recognising a specific right to reasonable accommodation (frequently understood by the public as simply granting special privileges), the prohibition of discrimination may, at this stage, help widen the impact of measures provided to certain religious groups in the past through other means.

Discrimination law has, for example, already helped counteract the illegal use, by certain mayors, of their power of eminent domain to prevent religious associations from acquiring land or buildings for places of worship[104]. It has also helped counteract the refusal of prison authorities to provide spiritual assistance to an imprisoned Jehovah's Witness. In a case dealt by the HALDE, a Jehovah's Witness minister had been denied access to the prison, and prison authorities refused to accredit a Jehovah's Witnesses chaplain. The prison authorities argued during the HALDE's investigation that the very low demand for a Jehovah's Witnesses chaplain justified their failure to hire one. In fact, the authorities' refusal seems to have been based principally on the absence of any mention of the Jehovah's Witnesses in the Ministerial instruction of 18 December 1997 which mentions the appointment of chaplains of only six faiths. However, it its 2007 decision, the Administrative Tribunal of Paris insisted on the fact that this list is not closed. The court therefore ordered the re-examination by prison authorities of the requests of the five Jehovah Witnesses' plaintiffs[105]. It should be recalled that, in France, the Jehovah's Witnesses are not considered a religious group which violates French public order[106].

In its decision no. 2010-44 of 22 February 2010, the HALDE decided another case of religious discrimination against impris-

[99] "Aider à construire. Des mosquées", *Libération*, 31 March 2011.

[100] Machelon, J.-P. (2006): "Les relations des cultes avec les pouvoirs publics", *La Documentation française*, Paris, http://www.ladocumentationfrancaise.fr/rapports-publics/064000727/index.shtml. See also parliamentary proposal no. 3215 of Mr. Grosdidier on 28 June 2006, http://www.assemblee-nationale.fr/12/propositions/pion3215.asp. See also the recent debate within the governing party and the assertions of the Under-Secretary of State for Housing in favour of a public funding of mosques: "Le débat sur l'Islam a déjà eu lieu au sein de l'UMP", *Le Monde*, 24 février 2011, http://www.lemonde.fr/politique/article/2011/02/24/le-debat-sur-l-islam-a-deja-lieu-au-sein-de-l-ump_1481979_823448.html

[101] Khosrokhavar, F. (2004): *L'Islam dans les prisons*, Éd. Balland, Paris. According to this sociologist, the majority of the prison population is Muslim (50-80% in average).

[102] There are also 54 Jews, 7 Orthodox Christians, and 1 Buddhist. See Ministry of Justice, The key figures of the prison administration, 2006 et 2010, http://www.justice.gouv.fr/art_pix/Chiffresclesjanv2010_opt.pdf ; http://www.justice.gouv.fr/art_pix/1_chiffrescles2006.pdf.

[103] "Prison. L'Islam en pénitence", *L'Express*, 13 April 201. See also his opinion dated 24 March 2001 and issued in the *Official Journal* of 17 April 2011.

[104] See HALDE Decision no. 2009-398 of 14 December 2009 proposing a mediation which was eventually successful in 2010: the Muslim association was authorized by the mayor to occupy the site without payment. See also Bordeaux Administrative Tribunal 12 April 2007 *Local Association of Jehovah of Agen*, no. 0503070; For another recent condemnation by the Administrative Tribunal of Bordeaux on 28 March 2011, see *La Croix*, *8* April 2011.

[105] See in particular, Paris Administrative Tribunal 6 July 2007, *M. Alfred B.*, no. 0613450/7, http://www.droitdesreligions.net/pdf_ta/20070607.pdf.

[106] However, this religious group was described as a sect in a parliamentary report in 1995. In 2001, the predecessor of Miviludes, the Inter-Ministerial Mission of Vigilance and Combat against Sectarian Aberrations, qualified it not as a full sect but as a religious movement which, on specific issues, defends positions contrary to fundamental rights and freedoms.

oned Jehovah's Witnesses on the basis of articles 9 and 14 of the European Convention of Human Rights. The HALDE then presented its observations in the case before the Administrative Tribunal of Lille. By a judgement dated 4 February 2011[107], the court overturned the decision of the head of the prison in Lille on the grounds that neither legislative nor regulatory provisions provide that the appointment of a chaplain should dependent on the number of prisoners of a certain faith who request spiritual assistance. On the contrary, the second paragraph of article D. 433 of the Criminal Procedure Code expressly provides that *"chaplains devote all or part of their time to this mission, according the number of prisoners of the same faith who are detained in the establishment"*.

As shown below, discrimination law also efficiently contributes to religious pluralism.

2. Contribution of discrimination law to religious pluralism

Secularism is inseparable from freedom of conscience and religion as well as from the universal freedom to proclaim one's religion or convictions. However, it is often misinterpreted as imposing neutrality in spheres other than the public one, or on individuals who do not represent the State. In public debate and in the media, secularism is often understood as a straightforward principle that not only prescribes the separation of Church and State and the neutrality of the State but also, by extension, a ban on all religious expression within the State institutions or more generally in public. This conception would confine religious practice entirely to the private sphere, and embodies what the Canadian Bouchard-Taylor Commission calls a kind of *"radical secularism"*[108]. This ideological point of view is nonetheless without any legal foundation in France.

According to a survey of the French National Advisory Commission on Human Rights (*Commission nationale consultative des droits de l'homme*)[109], while anti-Semitism seems to be declining, Muslims often bear the brunt of a certain public wariness, which constitutes a new form of "McCarthyism" or "cultural racism"[110]. This assumes the form of doubts about their real willingness and even capacity to "integrate" and to respect "French values". According to a recent study[111], 68% of the French believe that Muslims are not well integrated into French society and 61% consider that Muslim themselves do not want to integrate. The ideas most frequently connected with Islam are a rejection of Western values (31%), fanaticism (18%) and subservience (17%). The ideas least frequently associated with Islam are democracy (1%), protection of women (2%), and freedom (2%). Two-thirds of the French oppose the wearing of Muslim headscarves in public. In twenty years' time, this figure has almost doubled.

The results of this survey are striking. If human rights are indeed universal, that universality cannot be achieved without taking into account a religious and cultural dimension[112]. The idea of universal human rights would be inconsistent if it did not take Islam into consideration, especially since Muslims constitute a fifth of the world's population and live in every continent and region[113]. It is extremely dubious to consider that simply being a Muslim is relevant in assessing a particular individual's compliance with human rights or his/her attachment to human rights values. In this respect, the wearing of the headscarf and more recently the burqa or niqab has become a crucial issue in

[107] Lille Administrative Tribunal 4 February 2011 *Leprevost*, no. 0803808.

[108] Bouchard, G. & Taylor, Ch. (2008): *Building the future: A Time for Reconciliation*, Report, 10 p., http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf.

The Consultation Commission on Accommodation Practices Related to Cultural Differences was established in Quebec in response to public discontent over reasonable accommodation.

[109] Commission nationale consultative des droits de l'homme, La lutte contre le racisme, l'antisémitisme et la xénophobie, 2009 Report, Paris, *La Documentation française*, May 2010, 310 p., pp. 86-87 http://lesrapports.ladocumentationfrancaise.fr/BRP/104000267/0000.pdf.

[110] Shooman, Y. & Spielhaus, R. (2010): "The concept of Muslim enemy in the public discourse", in Cesar, J.: *Muslims in the West after 9/11, Religion, Politics, and Law*, Routledge, New York, pp. 198-228.

[111] IFOP, Regards croisés France/Allemagne sur l'Islam, 13 décembre 2010.

[112] Lochak, D. (2010): *Le droit et les paradoxes de l'universalité*, PUF, Paris, Nov., 254 p.

[113] An-Na'im, A.A. (2007): "Global citizenship and human rights: from Muslims in Europe to European Muslims", in Loenen, M.L.P. & Goldschmidt, J.E. (eds): *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?,* Intersentia, Antwerpen, Oxford, 336 p., pp.13-55, spec.19.

France. *"The Muslim woman, veiled or not, incarnates in the eyes of a relatively homogeneous public opinion (…) the irreducible incompatibility between Islam and modern democratic values."*[114]

For some, the headscarf promotes gender inequality and backwardness, and is also a sign of fundamentalism and extremism. This vision perpetuates the stereotype that the headscarf is oppressive and sexist. For others, the headscarf is an expression of personal religious conviction, freedom of religion, the individual woman's choice and her religious/cultural identity, etc[115]. In reality, any particular veiled woman has various reasons for wearing the veil, and these reasons may change over time. In any case, numerous Muslim women have obviously chosen to wear the headscarf despite societal disapproval. A survey found that while younger girls may feel family pressure to wear the headscarf, young women, between the ages of 18 and 22, often decide to adopt the headscarf out of personal religious conviction or pride[116].

Various misconceptions of the secular principle lead to genuinely discriminatory practices on the basis of religion and belief. This paper attempts to demonstrate how discrimination law can help put an end to these situations and can constitute an effective guarantee of religious pluralism. It also addresses the question of the headscarf's compatibility with gender equality. More recently, a related issue has also arisen in Europe, and especially in France, concerning the wearing of the niqab or the burqa: the wearing of such garments is now totally banned in France by a law which entered into effect on 11 April 2011.

2.1. *A legal tool to combat misconceptions of French secularism*

In practice, in everyday life situations Muslim women in France are often pressured or required to remove their headscarves either by public employees or private individuals. These pressures or demands are generally against French law. They lead to increased feelings of victimisation and stigmatisation amongst Muslims, and especially among Muslim women.

Religious discrimination often occurs because of a mistaken understanding of the scope and the limits of the principle of secularity and/or of the legislation banning the wearing of religious signs in State schools. In this context, one of the HALDE's and courts' main challenges has been to clear up misunderstandings related to the scope of secularism and to warn against misleading conceptions of this principle which give rise to religious discrimination.

Preliminarily, it should be stressed that apart from a restriction on the public expression of their religion while on the job, public servants, like the users of public services, enjoy complete protection of freedom of thought, conscience, and religion. Any discrimination against a public servant against on this basis is absolutely prohibited by article 6 of the Law no. 83-634 of 13 July 1983 (called *Le Pors* Law), which sets out the rights and duties of public servants.

For example, the HALDE and the Council of State both found that asking a police officer, candidate for a promotion, invasive questions about his ethnic origins and religion of a police was discriminatory. Such promotions are granted only after a series of competitive examinations. During the last, oral examination, the candidate, Mr. El Haddioui, was asked such questions as: *"Does your wife wear a headscarf?" "Do you observe Ramadan?" "Don't you find it strange that there are Arab ministers in the government?" "What's your view on corruption in the Moroccan police force?"* After this interview, Mr. El Haddioui was refused promotion, although he had previously ranked among the top 20 candidates out of 479. He was the only one whose name clearly marked him out as of North African origin. The HALDE investigated this case. The jury of examiners admitted asking the questions noted, but argued that they were asked only in order to check on elements of dissimulation, ma-

[114] Amiraux, V. (2003): "Discours voilés sur les musulmanes en Europe: comment les musulmans sont-ils devenus des musulmanes?", *Social Compass*, March, Vol. 50, pp. 85-96, p. 86.

[115] For a complete overview, Wing, A.K. & Smith, M.N. (2005-2006): "Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban", *UC Davis Law Review*, Vol. 39, no. 3, pp. 743-790.

[116] Quoted in Killian, C. (2003): "The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair", *Gender & Society*, Vol. 17, pp. 567-69.

nipulation, or over sensitivity that appeared in the psychological tests of the candidate. The HALDE nonetheless concluded that *"the jury based its questions on his ethnic origins and his religion in order to eliminate him as a candidate"*[117].

The HALDE presented its observations in this case to the Conseil d'Etat, which decided to invalidate the results of the 2007 competitive examination for senior police officers, since it had been tainted by racial and religious discrimination[118]. The State was condemned to pay EUR 3,000 in damages to the victim.

Many misunderstandings and subsequent discriminatory practices have derived from the adoption of legislation in 2004 prohibiting the wearing of conspicuous religious signs or dress in State schools. In fact, the educational sphere, and more generally all relationships with children, constitute a zone of growing tension within civil society.

A) An effective tool for combating the threat of radical secularism to religious pluralism

In its decisions, the HALDE has consistently recalled that, although public servants are forbidden to wear of religious signs on the job, this legal prohibition does not apply in the private sphere, public or academic beliefs to the contrary notwithstanding. Three main categories of litigation concerning the public sphere can be distinguished: cases concerning users of French public services; cases concerning specifically the field of public education; and cases concerning political actors. The private sector has also adopted certain illegal practices based on radical secularism. Since HALDE has already delivered some 80 decisions in the field of religious discrimination, the cases cited in this part are simply illustrative.

• Within French public institutions

Traditionally, the prefectures which are established in every French *département* organise an official ceremony for the presentation to newly naturalised French citizens of their citizenship decrees. A complaint was lodged with the HALDE by a woman excluded from this event because she wore a headscarf. In its decision no. 2006-131 of 5 June 2006, the HALDE held that such a practice was discriminatory and recommended measures to put an end to the misapplication of the principles of secularism and neutrality.

In August 2006, the Minister for the Interior, then Mr Nicolas Sarkozy, issued specific instructions to all prefects indicating that there was no justification for excluding a newly naturalised citizen from taking part in this sort of welcoming ceremony on the sole grounds that the person was wearing a veil (or some other religious symbol). He also stressed that wearing the veil does not, in and of itself, signify a lack of integration into the French community.

The HALDE issued a similar legal interpretation of the scope of neutrality in a case concerning the right of individuals wearing religious headgear to have access to courtrooms. In its decision no. 2006-132 dated 5 June 2006, the HALDE decided that refusing access to a courtroom of a Sikh wearing a turban constituted religious discrimination. The claimant had been denied access to the courtroom solely and only because he was wearing a turban. He had not been disrespectful or engaged in disruptive behaviour and had in no way troubled the fair administration of justice. Adopting the HALDE's recommendation, the Minister of Justice issued a note to the presidents of all French judicial courts restating the principle that neutrality applies to public agents and not to the users of public services such as the courts.

Nonetheless, the day after the decision of the Constitutional Council "validating" the law banning full-face veils, a woman wearing a niqab was excluded from a courtroom in Bobigny (contrary to women wearing the headscarf, whose faces were visible)[119]. The presiding judge took this decision despite the fact that, at the time, the law in question had not yet come into effect, and the fact that the Prosecutor considered that the woman's presence was not detrimental to the hearing going forward smoothly. But even this recent decision does not un-

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[117] HALDE Decision no. 2008-163 of July 7, 2008; http://www.halde.fr/IMG/pdf/Deliberation_2008-163.pdf

[118] Council of State 10 April 2009 *M. El Haddioui,* no. 311888. http://www.conseil-etat.fr/cde/node.php?articleid=388

[119] Konczaty, J. (2010): "Femme voilée au tribunal: la loi n'est pas encore applicable", *L'Express*, 8 October, http://www.lexpress.fr/actualite/societe/femme-voilee-au-tribunal-la-loi-n-est-pas-encore-applicable_926242.html

dermine the principle that secularism is inapplicable to a person subject to trial[120].

- Within the public and private educational institutions providing vocational training for adults

Another situation where tension arises in the public sphere was dealt with by the HALDE in its decisions no. 2008-121 of 2 June 2008, no. 2008-167 and 168 of 1st Sept. 2008, no. 2009-234, 235, 236 and 238 of 8 June 2009, no. 2009-402 of 14 December 2009, and more recently no. 2011-36 of 21 March 2011. All these cases concern the denial to veiled women of access to **vocational training programs for adults administered in public high schools**. The HALDE held that the 2004 law prohibiting public high school students from wearing religious signs did not apply to adults attending vocational training programmes simply because these programmes take place in State school buildings, since such adults cannot be assimilated to public high school students. The HALDE also held that neither the simple proximity of these adults to State school students, nor the respect of the public status of establishments administrating vocational training nor the internal rules of the high schools where the training took place, could justify a general and absolute ban on the wearing of a headscarf by the trainees. The Ministry of Education has now conceded that the 2004 law does not apply to these adult trainees, but still insists that a general ban of religious symbols can be justified by the need to maintain public order and to guarantee the normal functioning of public service.

In fact, some training organisations have complied with the HALDE's recommendations but others have not. On 5 November 2010[121], the Administrative Tribunal of Paris adopted the HALDE's reasoning in invalidating the exclusion of a veiled woman from a traineeship programme for adults administered in a State high school. The court held that the 2004 legislation must be construed restrictively and did not apply to a woman who was not a high school student. On 27 April 2009, a judge of the same court had already issued a preliminary injunction ordering the readmisson of the trainee in question, noting furthermore that the exclusion of the claimant was not founded on her personal behaviour, since there was no evidence that she had done anything contrary to public order. Since the Ministry of Education did not appeal, this judgement constitutes a clear precedent.

The same kind of litigation arises **in the private sector**. For example, in its decision no. 2009-339 of 28 September 2009, the HALDE had to deal with the exclusion of a veiled woman from a private training centre. The complainant was a public university student (veils are in fact permitted in public universities) but her courses, in the field of finance and accounting, were administered for the university by a private institution. As part of the programme, she had simultaneously to work, several days a week, in a private business, which dismissed her after her exclusion from the training programme. The director of the centre justified her decision excluding the student on the basis of an internal rule prohibiting the wearing of all religious signs.

In this case, the HALDE found that the student's exclusion constituted discrimination on the basis of religion, in violation of articles 225-1 and 225-2 of the French Penal Code: these articles prohibit discrimination consisting in subjecting the provision of goods or services to a condition based on membership or non-membership, real or presumed, in a given religion group. The maximum sentence authorised is three years' imprisonment and a fine of EUR 45,000.

Adopting the observations of the HALDE in this case, the Paris Court of Appeal, in 2010, convicted of discrimination both the association administering the training programme and its director. The association was fined EUR 3,775 and the director EUR 1,250[122]. They were in addition held jointly liable to pay a

[120] Less than a week later, the Ontario Court of Appeal accepted that a claimant wearing a niqab who had filed a complaint for sexual assault could, on the contrary, wear this religious dress while testifying. Banning the niqab could be permitted only if a witness' exercise of her religious freedom truly impaired an accused's right to defend himself or herself. See the judgement of Ontario Court of Justice dated 13 October 2008 *R v. N.S.* http://www.ontariocourts.on.ca/decisions/2010/october/2010ONCA0670.pdf

[121] Paris Administrative Tribunal 5 November 2010 *Saïd*, no. 0905232.

[122] Paris Court of Appeal 8 June 2010 *Benkirane*, no. 08/08286; For a comment, Pradelle, S. (2011): "L'interdiction du port du voile dans l'enseignement supérieur peut être le signe d'une discrimination", *A.J. P.*, no. 2, p. 79 and seq.

total of EUR 10,500 in damages and legal costs to the victim. The court specifically held that the 2004 law was inapplicable in this case which involved adults studying in a private institute. It also noted that there was no evidence that the victim had in engaged in proselytising behaviour or in any was disrupted public order.

In a similar case concerning the refusal to permit a veiled woman to enter a vocational training programme to become a childminder, the HALDE proposed, in its Decision no. 2008-176 of 1st September 2008, a criminal "settlement" involving a EUR 1,000 fine and the payment of EUR 500 in damages to the victim. This settlement was approved by the State prosecutor in 2009.

Recently, the HALDE delivered two new decisions in cases with similar facts. Though these two decisions also found the existence of religious discrimination, the remedy proposed seems more lenient than in previous cases: in its Decisions no. 2011-34 and 35 of 21 March 2011, the HALDE simply recommended that the private training centres in question remove the discriminatory clause from their in-house rules. This shift may perhaps be explained by the changes which had intervened in the Chairmanship of the HALDE and half of its Board in mid-2010.

In another decision on the same day, Decision no. 2011-33, the HALDE had to deal with the case of a woman who had received a failing grade on her final examination to become a nursing assistant. During her oral examination, she wore a headscarf. The panel examining her explicitly warned her that she would be failed if she wore her headscarf, and also asked her questions relating to the compatibility of her religious convictions with her future duties in caring for male patients. The HALDE, extending the application of its prior decision concerning a police officer, reminded the examining institution that the asking of invasive questions about ethnic origin and religion, during a competitive examination in the field of vocational training, was discriminatory. But again, the new HALDE Board did not decide to severely sanction such behaviour. Its action was limited to reminding the training centre involved of law, and informing the competent Ministry. The training center would have to review the situation of the victim only in the case of a possible new application.

- Within the political arena

The Criminal Chamber of the Court of Cassation has recently approved the conviction for discrimination of a mayor who forbid a town councillor from speaking during a town council meeting because she was wearing a Christian cross[123]. The highest judicial Court noted that there was no evidence that such a cross had in any way disturbed public order, and that there was therefore no justification for depriving her of her right to express herself as a town councillor. The Court recalled, furthermore, that no legislative provision exists, as would be required by the article 9 of the ECHR, prohibiting an elected representative from manifesting his/her religion or beliefs.

Similarly, on 23 December 2010, the Council of State held that the manifestation of her religious beliefs by a candidate in a regional election has no influence on the freedom of choice of the electorate and it does not raise questions about the independence of the candidate[124]. The highest administrative Court noted that no constitutional norm, and in particular secularism and gender equality, requires the exclusion from an election of candidates choosing to disclose their religious beliefs.

This case concerned the 2010 regional elections, where the New Anti-Capitalist Party (NPA) ran a veiled Muslim candidate, Ms. Moussaïd, on one of its lists. The feminist organization *Ni Putes ni soumises (Neither Whores Nor Submissive)* and the Arab Women's Solidarity Organization filed suit to prevent the prefect from registering the NPA list. Their complaint was based principally on the grounds of secularism. On 23 February 2010, the Marseille administrative tribunal dismissed the action, since *"such a decision did not seriously and obviously conflict with fundamental freedom, since these principles* [secularism, gender equality, security and indivisibility of the Republic] *must be reconciled with the individual freedom of the candidate and her right to stand for election"*[125].

[123] Court of Cassation, Criminal Chamber, 1st September 2010, no. 10-80.584.

[124] Council of State 23 December 2010 2010 *Association AWSA France*, no. 337899.

[125] Marseille Administrative Tribunal 23 February 2010 *Association AWSA France*, no. 1001134.

- Within the private sector

Within the private sector, there are a large number of cases of religious discrimination which arise in very different contexts. They frequently concern questions of employment, which will be discussed in later section of this paper, but also frequently involve different kinds of private services. In addition to the field vocational training, already discussed, religious discrimination manifests itself, for example, in the refusal to provide driving lessons[126], in the refusal of access to sports centres[127] or even in the refusal to rent because of the wearing of a headscarf. For example, the HALDE, in its Decision no. 2006-133 of 5 June 2006, held that the refusal of a hotel to rent a room to a veiled customer, on the basis of a rule (displayed in every room) prohibiting ostentatious religious and political signs, constituted illegal religious discrimination. In a similar case, decided on 8 October 2008, the Nancy Criminal Court of Appeal came to a similar conclusion, and sentenced the owner of a rural bed-and-breakfast to a two-month suspended prison sentence. The Court also awarded EUR 500 in damages to each victim.

More surprisingly, religious discrimination also occurs in the context of acts of charity[128]. In its Decision no. 2010-232 of 18 October 2010, the HALDE dealt with the complaint a veiled woman filed after a private association refused to give her food aid. The association argued that its decision was based on the basis of secularism and that a "moral contract" with the association required its members not to wear any religious signs. The HALDE solemnly reminded the association that *"no legislative, regulatory or judicial rule enshrines the necessity of neutrality of private places open to the public"*, and found that such a prohibition was unjustified and discriminatory. It has presented its observations before the State prosecutor who is in charge of prosecuting the case before the criminal courts.

These various cases of religious discrimination derive from a complete misunderstanding of the scope of secularism, but it should also be recalled that freedom of religion and discrimination law have their limits.

B) Limits

In 2004, by legislative action, the concept of secularism was extended to prohibit the wearing of "conspicuous" religious signs and dress in State schools. The European Court of Human Rights has accepted this legislative expansion of the notion of secularism, holding that it is not invalidate by the general prohibition of discrimination on the grounds of religion and conviction. More generally, for the ECHR, the principle of non-discrimination does not exclude the banning of religious signs if such a ban is justified by a legitimate aim and proportionate to it.

- Legislative expansion of secularism in 2004 : the compatibility of the ban on conspicuous religious signs in primary and secondary State schools with discrimination law

The school is, above all, a space offering education and promoting integration, where children and adolescents learn to live together and respect each other. In France, the educational sphere is controlled and regulated by the secular principle, but also by the 1989 Law on Orientation in Education guaranteeing the individual's right to freedom of conscience. Starting in the late 1980s, these two principles appear to come into conflict when three young girls were expelled from their school in Creil, a suburb of Paris, for wearing headscarves. Over the years, the problem took on considerable proportions: 3,000 cases were registered in 2004[129]. In some French schools, certain pupils, for religious reasons, refused to abide by the general rules

[126] See HALDE Decisions no. 2005-25 of 19 May 2005 and 2010-75 of 1st March 2010; See, contra, Nîmes Court of Appeal 8 November 2007 *Sibari v. Mr Didier Jouanne.* See also Nantes County Court 13 December 2010, which quashed the fine of EUR 22 imposed on a woman wearing the burqa while driving, on the grounds that wearing a burqa is not incompatible with security requirements.

[127] HALDE Decision no. 2009-298 of 14 September 2009.

[128] HALDE Decisions no. 2006-25 of 6 February 2006 and no. 2007-80 of 12 March 2007 concerning private charities which distributed soup with pork in it to the homeless, which was considered discriminatory on the basis of religion. In the same sense, see Council of State 5 January 2007, no. 300311 *Ministre d'Etat, Ministre de l'intérieur et de l'aménagement du territoire v. Association « Solidarité des français »* and ECHR 16 June 2009 *Association « Solidarité des français » v. France*, no. 26787/07 (inadmissibility). For a comment, "Victory for Pigs: France Prohibits Soup", *The Brussels Journal,* 8 January 2008, http://www.brusselsjournal.com/node/1819

[129] Report of the National Education Inspectorate, submitted to the Minister in July 2005: "Application of the Act of 15 March 2004".

governing school life, or to attend the same courses as the other pupils. Some considered that this behaviour constituted "proselytizing", in contradiction with the need to insulate the 'educational community' from any kind of ideological or religious pressure[130].

In a famous 1989 opinion, the General Assembly of the Council of State nonetheless indicated: *"That pupils wear signs in school by which they manifest their affiliation to a particular religion is not in itself incompatible with the principle of secularism, insofar as it constitutes the exercise of the freedom of expression and manifestation of religious beliefs. However, this freedom should not allow pupils to display signs of religious affiliation, which, inherently, given the circumstances in which they are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytising or propaganda, undermining the dignity or freedom of the pupil or other members of the educational community, or might compromise their health or safety, disrupt teaching activities and the educational role of the teachers, or, lastly, interfere with order in the school or the normal functioning of public service"*[131].

After problems in French high schools increased, the President of the Republic set up a special commission (known as the "Stasi Commission") to study the application of the principle of secularism in the Republic. According to this Commission, *"the visibility of a religious sign [is] perceived by many as contrary to the role of a school, which should remain a neutral forum and a place where the development of critical faculties is encouraged. It also infringes on the principles and values that schools are to teach, in particular, equality between men and women"*[132].

As a consequence of the multiplication in schools of conspicuous religious signs, such signs were prohibited by Law no. 2004-228, voted by the French parliament in March 15th, 2004. The law is frequently referred to as "the Law on secularism", and regulates, in accordance with the principle of secularism, the wearing of signs or attire manifesting a religious affiliation in primary and secondary State schools. The law inserted a new Article L. 141-5-1 in the Code of Education, providing that: *"In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The school rules shall provide that the institution of disciplinary proceedings shall be preceded by dialogue with the pupil."*

Therefore, although wearing a headscarf was at first not, in itself, incompatible with secularism, it has become so by law. State educational institutions became *"the apogee of a religion-free zone"*[133]. However, this law does not cover university students, pursuant to article 811-1 of the Code of Education.

The United Nations considers that the French ban is incompatible with United Nations legal instruments. Its Human Rights Committee has declared that *"respect for a public culture of 'laïcité' would not seem to require forbidding wearing such common religious symbols"*, and noted that such a prohibition may lead observant Jewish, Muslim, and Sikh pupils to be excluded from State schools. The Committee thus asked the French authorities to re-examine the 2004 legislation *"in light of the guarantees of article 18 of the Covenant concerning freedom of conscience and religion, including the right to manifest one's religion in public as well as in private, as well as the guarantee of equality under article 26"*[134]. In 2004, the Committee on the Rights of the Child indicated its fear that the prohibition *"may be counterproductive, by neglecting the principle of the best interests of the child and the right of the child to access education, and [may] not achieve the expected results"*[135].

However, according to statistics of the Ministry of the Interior[136], the actual disparate impact of the ban on these pupils appears to be very limited. Shortly after the entry into force of the 2004 legislation, 90% of the 639 pupils wearing conspicuous religious symbols made the decision to conform to the legislation after mediation (this out-of-court procedure being provided for by

[130] See in this sense, Ministerial Instruction Bayrou, 20 September 1994, *Bulletin officiel de l'Éducation nationale,* no 35, 29 September 1994.

[131] Council of State, 27 November 1989, Opinion, no. 346 893, http://www.conseil-etat.fr/cde/media/document//avis/346893.pdf.

[132] Stasi, B.: "Laïcité et République", Report to the President of the Republic, *op. cit.*

[133] Wing, A.K. & Smith, M.N.: "Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban", *op. cit., spec.* p. 755.

[134] UN Human Rights Committee, Concluding observations on France, CCPR/C/FRA/CO/4, 31 July 2008, http://www.unhcr.org/refworld/publisher,HRC,,FRA,48c50ebe2,0.html

[135] UN Committe on the Rights of the Child, Concluding Observations on France, CRC/C/15/Add.240, 30 June 2004; http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f77a0c288462b9efc1256f33003c8c0a?Opendocument

[136] Written answer of the Minister of the Interior to a parliamentary question, *Official Journal*, 21 December 2010, p. 13791

law). No claims were lodged with the Office of the Education Ombudsman. For the academic year 2004-2005, only 47 pupils (3 of whom were Sikhs) were excluded from State schools for breach of the law. A total of some 96 pupils decided to leave the State schools. Fifty of them chose to study through correspondence courses. Since 2008-2009, there have been no disciplinary procedures, and no new proceeding has been initiated. Registration in the National Centre for Distance Learning, which administers correspondence courses, has remained stable since 2005.

Even if the implementation of the 2004 Law has not caused major problems, the European Commission against Racism and Intolerance regularly calls for its re-evaluation and stresses that the effects of the ban should be examined from the point of view of indirect discrimination and the possible stigmatisation of those concerned, especially young Muslim females[137].

Since the entry into force of the legislation, 33 proceedings have been unsuccessfully initiated before the administrative tribunals, including complaints arguing that the 2004 Law was indirectly discriminatory. The Council of State, the HALDE and eventually the ECHR[138] have all held that the ban of conspicuous religious symbols at State primary and secondary schools is not discriminatory as it can reasonably be justified by the secular principle. Since the ECHR's judgement that the 2004 Law conforms to the European Convention of Human Rights, which provides the law with a European "umbrella", the debate seems definitely closed. There is almost certainly no way to call back into question the Law on secularism by arguing that it is discriminatory.

- The requirements of security and the prohibition of proselytising behaviour

Both the Stasi Commission in its Report in 2003 and the High Council for Integration in 2010, have recommended amending the Labour Code so as to permit private companies to insert in their staff rules provisions restricting the wearing of religious garments and symbols if these restrictions are based on requirements related to security, to contact with customers, or to maintaining social peace within the business enterprise. These proposals have, for the moment, gone unheeded.

At present, therefore, freedom of religion and belief are limited in the private business sector only when there is abuse of the freedom of expression, notably in case of proselytizing or pressure on other employees. Article L. 1121-1 of the Labour Code allows employers, as part of their management powers, to establish restrictions on individual and collective freedoms in a company if they are justified by the nature of the work to be done and are proportional to their purpose. The Labour Code also specifies that *"staff rules cannot include provisions establishing restrictions on the rights of persons and on individual and collective freedoms that are not justified by the nature of the work to be done or are not proportional to the goal to be achieved"* (article L. 1321-3 parag. 2).

Two kinds of concerns can justify the restriction of freedom of religion and belief: on the one hand, health and work safety requirements, and on the other hand, requirements related to the nature of the work to be done by the employee. When a restriction on freedom is justified by the specific nature of the work to be done, the way in which the restriction is applied and its consequences should be discussed with the employees so that, insofar as it is possible, their beliefs and the company's interest can be reconciled. The relevance and the proportionality of the decisions must be justified on a case-by-case basis, taking into account the employee's job and its context so that any restriction will be based on objective, non-discriminatory elements.

In a decision dated 25 January 1989, the Council of State invalidated the staff rules of a private company which prohibited *"political or religious discussions, and more generally, any conversation that is not job-related"*[139]. The highest administrative Court held that such a provision exceeded the scope of the employer's power *"given the infringement of individual rights".* The Directorate for Industrial Relations, a division of the Labour

[137] Lastly, see ECRI Report on France, 15 June 2010, CRI(2010) 16 http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/France/FRA-CbC-IV-2010-016-ENG.pdf

[138] Council of State 8 October 2004 *Union française pour la cohésion nationale*, no. 269077; HALDE Decision no. 2008-181 of 1st September 2008; ECHR 30 June 2009, *Aktas v. France,* no. 43563/08 and others (6 decisions of inadmissibility); For a comment, Decaux, E. (2010): "Chronique d'une jurisprudence annoncée : laïcité française et liberté religieuse devant la Cour européenne des droits de l'homme", *Revue Trimestrielle des Droits de l'Homme*, April, no. 82, pp. 251-268.

[139] Council of State 25 January 1989 *Société industrielle Teinture et apprêts*, no. 64296.

Ministry, explained in a decision dated 1st October 2004 that any overall prohibition, in a private company's staff rules, of all overt religious or political signs shown or worn by employees would violate article L. 1321-1 of the Labour Code, due to its general and absolute nature.

In its decisions no. 2009-117 of 6 April 2009 and no. 2008-32 of 3 March 2008, the HALDE stated that a private employer's overall ban on wearing any symbol manifesting one's opinions or beliefs would be contrary to Articles 9 and 14 of the ECHR, which protects the freedom of religion from discriminatory practices. In the absence of any proselytising behaviour, pressure, or aggressiveness, wearing a religious symbol cannot be construed, in and of itself, as an infringement of the rights and freedoms of the other employees.

The HALDE, applying the "test" set forth in the Labour Code, has made several decisions related to the balance between the freedom of religion and safety requirements[140]. In this field, two cases dealt with by the HALDE can best be considered together, as they both relate to the sensitive issue of work performed in close contact with young children.

In its decision no. 2006-242 of 6 November 2006, the HALDE decided that there had been no discrimination in a case involving the termination of the contract of a youth leader for sporting and leisure activities who was dismissed by an organisation charged with the social integration of autistic children. At preparatory meetings, the claimant had attended veiled, and indicated that she would refuse to go swimming with the children. The HALDE held that, although the secularism principle could not found the decision to terminate the employment contract, the termination could legitimately be justified by the specific requirements of swimming pool safety for autistic children. This position is perfectly consistent with the Court of Cassation's case law[141].

Nevertheless, in its decision no. 2010-82 of 1st March 2010, while Mr Louis Schweitzer was still its chairman, the HALDE reached a different conclusion concerning the application of a private entity's staff rules, allegedly founded on the principles of neutrality and secularity. The case involved the dismissal for serious misconduct of a veiled woman working as an assistant director in a private day-nursery called *Baby-Loup*. After her return from parental leave, she refused to remove the headscarf that she had started to wear on a permanent basis, despite a new staff rule imposing respect for the principles of secularity and neutrality, and requiring the protection of young children. According to the HALDE, her dismissal constituted discrimination on the basis of religion. The HALDE held, first, that the principles of secularism and neutrality were not applicable in the private sector. The French Equality Body also held that the free exercise of religion, as long as there was no proselytising, could not in itself be considered a threat to children's well-being.

However, on 8 November 2010, when the case was heard by the labour court, the new chairwoman of the HALDE, Ms. Jeannette Bougrab, appointed by the President of the Republic, intervened personally before the judges to disown the HALDE's early decision, asserting that secularity was relevant and could justify the employee's dismissal. Two weeks earlier, Ms. Nadine Morano, Secretary of State for the Family, had already made the following public statement: «*In nurseries and schools, we do not want to see conspicuous religious signs. The government is concerned about this.*» However, by 13 December 2010, the day the judgement in the case was handed down, Ms. Bougrab, after being appointed a member of the government, had resigned from her position at the HALDE, where she was replaced by Mr. Eric Molinié.

The Mantes-la-Jolie labour court upheld the dismissal of the veiled employee, arguing that the staff rule did in fact comply with the Labour Code and noting that the labour inspector had indeed approved it. The court noted, in addition, that although *Baby-Loup* was legally a private body, it had a public service mission and 80% of its funding came from public subsidies[142].

However, despite receiving such substantial subsidies from local authorities, *Baby-Loup* could not prove that it had received a delegation to perform a public. In absence of such a special delegation, French administrative courts, in order to determine whether a private entity in fact carries out a mission of public service, usually consider cumulatively several factual

[140] See for example, HALDE Decisions no. 2009-311 of 14 September 2009 and 2010-166 of 18 October 2010 concerning the incompatibility of the wearing of a headscarf with the observance of rules of hygiene, to be applied at all levels of the food production chain.

[141] Court of Cassation Social Chamber 24 March 1998 *Azad*, no. 95-44.738.

[142] Mantes-la-Jolie Labour Tribunal 13 December 2010 *Fatima Laaouej épouse Afif v. Association Baby-Loup*, RG no. F 10/00587.

elements: whether the activity engaged in is of public interest; the conditions of the entity's creation, organisation and functioning; the obligations imposed on it and the measures taken to ascertain whether assigned objectives are reached[143]. In the case of *Baby-Loup*, the private entity could demonstrate neither a real partnership with public authorities nor the participation of any town councillor on its management board. Moreover, it exercised no aspect of "public power", and its employees are not legally considered as being "public agents".

The reasoning underlying this judgement therefore seems quite fragile[144]. It holds that the principle of secularism is applicable to a private body, but does so without any real legal ground in private labour law. It validates the staff rule on the sole basis that it was registered without objection by the Labour inspectorate, but legally such registration does not imply approval of the contents of the document which is registered. In any case, it is settled case law that the courts retain the power to decide on the legality of staff rules' provisions when the question is raised in case brought before them[145]. Furthermore, the labour court implicitly justifies the application of secularism on the basis of the alleged "public mission" of *Baby-Loup*. But if the nursery were in fact a "public" body, the question posed would be the neutrality of a public service and of public agents. In that case, the labour tribunal itself would be incompetent, and the case should have been brought before an administrative court.

The judgement in this well-publicised case in now on appeal before the Versailles Court of Appeal, which will hear the parties on 13 September 2011. Whether or not the HALDE will maintain its initial position is, at the moment, unclear. In fact, in May 2011 the HALDE merged into a new structure called the Defender of Rights, and its chairmanship may change again. Before the merger went into effect, its last director, Mr. Molinié, organised an in-depth reflection on this complex issue. He carried out hearings with employers from the private sector, diversity consultants and human resources officers, as well as with managers in the health care sector. He explained to the media that: *"The problem concerns not only childcare but also other situations where the public is vulnerable, such as patients in private hospitals to which a public service is delegated, or the elderly confined in nursing homes"*[146].

Certain politicians consider that the *Baby-Loup* case exposed a legal loophole. They have requested new legislation covering this specific situation. In the same line, on 28 March 2011, the HALDE requested a clarification of the legal framework guaranteeing a fair balance, within a democratic society, between the prohibition of discrimination on religious grounds, the freedom of religion and the restrictions on religious practice provided for by law[147]. On March 5, 2011, the current governing party decided to examine the opportunity to extend the duty of neutrality in order to cover specific private entities entrusted with missions of public service in the social field and the ones concerning health care and childcare. The government may soon introduce a new bill in parliament concerning these matters[148].

This paper has shown how discrimination law may act as a barrier to the misuse or the abuse of secularity, but has also shown its limits. Another question concerns its impact on issues that are not directly connected to secularism.

2.2. The scope of protection beyond the misunderstanding of secularism

Although the European Court of Human Rights has held that *"an attitude which fails to respect that principle [of secularism] will not necessarily be accepted as being covered by the freedom to manifest one's religion"*[149], and has in fact already

[143] Council of State 22 February 2007 *APREI*, no. 264541.

[144] For a critical analysis of this decision, see also Adam, P. (2011): "L'entreprise, sans foi... ni voile?", *Revue de Droit du Travail*, March, pp. 182-185.

[145] Court of Cassation, Social Chamber 16 December 1992, *Société CEGELEC v. Union nationale des syndicats CGT-CGEE Alsthom et autre*, no. 90-14.337.

[146] "Secularism shall better protect vulnerable people", *La Croix*, 26 January 2011; http://www.la-croix.com/Eric-Molinie---La-laicite-doit-davantage-proteger-les-person/article/2453250/4076

[147] See also written question no. 17860 addressed by Senator Jean-Pierre Plancade to the Ministry of the Interior, *Official Journal of the French Republic*, 31 March 2011, p. 768.

[148] "The UMP propositions to protect secularism", *Le Figaro*, 5 April 2011.

[149] ECHR 13 February 2003 *Refah Partisi (the Welfare Party) and Others v. Turkey* ([GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98.

accepted the banning of the headscarf in certain cases, French substantive law is more restrictive. In French law, except for public servants and State school pupils, wearing the headscarf is not necessarily seen as being a provocation. The HALDE has repeatedly affirmed, in accordance with the Council of State's case law, that «*wearing the veil is not, in itself, an act of pressure or proselytism*»[150]. The highest administrative court has also held that the veil is not, without more, incompatible with the principle of secularism, and that the questions raised by wearing the veil must be decided case-by-case, in accordance with the circumstances[151].

Although the secularist tradition in France is very strong, the legal scope of secularism is not as wide, for example, as in Turkey. In France, the 2004 law concerns only primary and secondary education. The wearing of religious symbols such as the headscarf is perfectly legal in French institutions of public higher education. Even during the parliamentary debates leading to the 2004 ban, *"there was no question of forbidding religious signs in universities or elsewhere in the world of adults"*[152]. The HALDE recalled this principle in its decision no. 2008-194 of 29 September 2008, which was handed down after the filing of a complaint by two veiled university students who had been excluded from their Spanish course. Following the HALDE's intervention, the president of the university committed herself to taking disciplinary action against the accused professor if she continued to discriminate against female Muslim students.

Beyond the questions of secularism and religious pluralism, there is an ongoing debate concerning the compatibility of the headscarf with gender equality. The European Court of Human Rights, as well as the Swiss and Turkish Constitutional Courts, have held that the headscarf may not be compatible with the principle of gender equality, or with a message of tolerance and respect for others. The ECHR has thus validated the exclusion of adult Muslim women wearing headscarves from certain parts of the labour market and from higher education: in *Dahlab v. Switzerland* the ECHR considered justified banning the wearing of the headscarf by a teacher of young children; and in *Sahin v. Turkey*[153] it considered justified banning the wearing of the headscarf by a university student in her 5th year of medical school. The reasoning in both decisions was based in large part on questions of gender equality.

French case law, on the contrary, has never found any contradiction between the wearing of a headscarf and the right of women not to be discriminated against. There are however many associations, including a large part of those in the feminist movement, who challenge this aspect of the current French legal framework. More recently, another debate has also emerged in France concerning the compatibility of the burqa or the niqab with the French Republic's underlying values, including non-discrimination.

Muslims and particularly Muslim women wearing the *hidjab* have faced increased discrimination in Europe, especially in the aftermath of 9/11. National debates related to the banning of conspicuous religious signs at State schools, or of the burqa in the public space, have reinforced the stigmatization of Muslim women, and in some cases has led to their discriminatory exclusion in everyday life. This has been reported particularly with reference to France but exists as well in other Western European countries[154]. This paper attempts to show how discrimination law may help resolve these problems.

A) The compatibility of the headscarf with gender equality

- European mistrust…

As we have seen, in *Dahlab v. Swizertland* and *Sahin v. Turkey,* the European Court of Human Rights validated a ban on the headscarf concerning a teacher of young children and a student

[150] Council of State 27 November 1996 *Mr and Ms Jeouit*, no. 172.686.

[151] Council of State, Opinion, 27 November 1989, no. 346 893, http://www.conseil-etat.fr/cde/media/document//avis/346893.pdf

[152] WEIL (P.), Why the French Laïcité is liberal?", *Cardozo Law Review*, 2009, Vol. 30, no. 6, pp. 2699-2714.

[153] ECHR 15 February 2001 *Dahlab v. Switzerland*, no 42393/98 and ECHR 10 November 2005 *Sahin v. Turkey* (GC), no. 44774/98.

[154] See Open Society Institute (2009): *Muslims in Europe: A Report on 11 EU Cities,* http://www.soros.org/initiatives/home/articles_publications/publications/muslims-europe-20091215/a-muslims-europe-20110214.pdf; EUMC, Muslims in the EU: Discrimination and Islamophobia, Vienna, 2006, http://www.fra.europa.eu/fraWebsite/attachments/Manifestations_EN.pdf; EU Fundamental Rights Agency, Data in Focus Report Muslims, 2009, http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS_MUSLIMS_EN.pdf.

in her 5th year of medical school, in two secular States. These decisions were based on various grounds, among which gender equality played an important role. However, Carolyn Evans has argued convincingly that the *"Court uses both stereotypes of Muslim women without any recognition of the inherent contradiction between the two and with minimal evidence to demonstrate that either stereotype is accurate with respect either to the applicants or to Muslim women more generally"*[155]. On the one hand, each Muslim woman is presented as *"the victim of a gender oppressive religion, needing protection from abusive, violent male relatives, and passive, unable to help herself in the face of a culture of male dominance"*. On the other hand, each Muslim woman is also presented as an aggressor, as she is *"inherently and unavoidably engaged in ruthlessly propagating her views"*.

Referring to Frances Raday's research[156], Professors Isabelle Rorive and Emmanuelle Bribosia point out that *"the vast majority of traditional religions and cultures are founded on social norms and practices that were developed in a patriarchal context at a time when there was no protection systematically accorded to individual human rights in general, and to women's right to equality or to the freedoms of any individual in particular"*[157]. Consequently, finding a balance between the principle of equal treatment on the basis of religion, on the one hand, and on gender, on the other hand, may somewhat become difficult in certain cases.

Dominant strands among feminists do not support Muslim women's religious freedom and seem to favor the solution that compels them to take off their headscarves. Veiled Muslim women are thus categorised and treated as "second-class women" compared to Western-style and so-called "emancipated" women. As Ms. Vakulenko, an expert on gender, Islamic dress and human rights notes, "*there is (…) a noticeable tendency to overlook or underestimate the gender dimension of the hijab controversy. In particular, the intersection of gender and religion inherent in the 'Islamic headscarf' (…) has not been adequately considered or analysed*"[158]. As a whole, the current European approach, including that in France, ignores the multi-layered identity of Muslim women in a social and historical context of wariness towards religion that increases their social vulnerability in our modern and deconfessionalized societies[159].

To our knowledge, the Norwegian Ombudsperson is the sole European institution that addressed the ban of the headscarf as indirect discrimination on the grounds of gender[160]. It thus treated the headscarf as a part of the physical integrity of Muslim women. However, even in this case, this approach used did not seem entirely satisfactory, since the standard of protection under gender equality and its remedy did not address an aggravated form of intersectional discrimination. In two more recent decisions, the Ombud has upheld this general line of reasoning. A hijab ban was tried both according to the gender equality act and the act against ethnic and religious discrimination. The Ombud held that such a ban was in violation on both prohibition grounds[161]. This approach is nevertheless unique in Europe.

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[155] Evans, C. (2006): "The 'Islamic Scarf' in the European Court of Human Rights", *Melbourne Journal of international Law*, no. 7, pp. 52.

[156] "Culture, Religion and Gender", *International Journal of Constitutional Law*, 2003, Vol. 4, pp. 663–715, pp. 664–665. See also, "Secular Constitutionalism Vindicated", *Cardozo Law Review*, 2009, Vol. 30, no. 6, pp. 2769–2798.

[157] Bribosia, E. & Rorive, I. (2010): *In search of a balance between the right to equality and other fundamental rights*, Luxembourg, Publications Office of the European Union, 88 p., spec. p. 67, ec.europa.eu/social/BlobServlet?docId=6264&langId=en

[158] Vakulenko, A. (2007): "'Islamic Headscarves' and the European Convention on Human Rights: an Intersectional Perspective", *Social & Legal Studies* 16, pp. 183-199. See also Fournier, P. and Yurdakul, G. (2006): "Unveiling Distribution: Muslim Women with Headscarves in France and Germany", in Bodemann, M. and Yurdakul, G. (eds.): *Migration, Citizenship, Ethnos*, pp. 167-184

[159] This language is taken from the decision of the Supreme Court of Canada in *Egan v. Canada*, (1995) 2, *R.C.S.* 513, pp. 551-552.

[160] Craig, R.: "The Religious Headscarf (hijab) and Access to Employment under Norwegian Antidiscrimination Laws", in Durham, W.C. & Lindholm, T.: *Islam in Europe: Emerging Legal Issues*; See also Loenen, M.L.P. & Goldschmidt, G.E. (ed.) (2007): *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?,* p. 219-237, Intersentia, Antwerpen, Oxford, 336 p.

[161] Siim, B. & Skjeie, H. (2008): "Tracks, intersections and dead ends. Multicultural challenges to state feminism in Denmark and Norway", in Phillips, A. & Saharso, S.: *The Rights of Women and the Crisis of Multiculturalism*, special issue of *Ethnicities*, http://org.uib.no/imer/14Nordic/Papers%20fra%2014.%20Migrasjonsforskerkonferanse/Siim%20and%20Skjeie.pdf

- … versus the French legal framework

In France, there is no *"mistrust"* of the headscarf comparable to that which seems to exist at the ECHR[162]. For the time being, neither the French courts nor the HALDE have ever held that the headscarf was hard to square with the principle of gender equality or with a message of tolerance and respect for others, as the ECHR did in the *Dahlab* and *Sahin* cases. From a strictly legal point of view, the headscarf is not understood by French courts as a sign of the alienation of women[163]. Implicitly at least, French judges take into consideration the fact, highlighted by sociological studies, that women's reasons for wearing the *headscarf* are various and ambiguous. The headscarf in itself cannot therefore simply be assumed to be a sign of Islamic fundamentalism or obscurantism which oppresses women. The HALDE is generally very suspicious about such stereotypical proxies, and not only in the field of religious discrimination. For example, age is often used as a proxy for health, and on a number of occasions, the HALDE has seen through this pretext.

The so-called «veiled mothers» case, which provoked a public outcry amongst French feminists, provides an excellent illustration of the difficulty encountered in balancing non-discrimination on the basis of religion and non-discrimination on the basis gender. The case concerned eight Muslim women who wore the headscarf. They lodged a complaint with HALDE after the heads of the State schools which their children attended refused to let them accompany schoolchildren on State school outings and/or supervise educational activities, while other mothers were permitted to do so. In its decision no. 2007-117 of 14 May 2007, the HALDE found that, as simple volunteers, parents accompanying school children could not be considered civil servants and were thus not subject to the obligations of civil servants. The HALDE further pointed out that ministerial instruction issued in 2004, after passage of the 2004 Law regarding the display of religious signs in schools, expressly state that the 2004 Law does not apply to parents. The HALDE therefore held that in the absence of legislation, veiled mothers could not automatically be refused the possibility of accompanying children. Such a refusal could only be justified by particular circumstances which could be construed as acts of pressure or proselytism. The HALDE noted that legal status as a "volunteer" afforded only coverage for damages suffered by such a person who, without being a civil servant, takes part in a public service mission. This decision is in line with the case law of the Council of State. The HALDE in fact drew upon the case law of the Council of State holding that neither the principle of Church-State separation, nor that of the neutrality of public service, precluded the voluntary action, within prisons, of Congregationalists, as long as their activities were unrelated to the surveillance of inmates.

In its Annual Report for 2007, the HALDE responded as follows to the criticism of certain elements of the feminist movement: «*The HALDE's decision is not intended to take a stance on the reasoning behind the wearing of the veil, or on an interpretation of the veil as such; that does not fall within the scope of its powers. (...) The HALDE refuses any indoctrination of children, just as it refuses any form of incentive for women, veiled or not, to refrain from taking action in the public arena. It works to ensure that all women benefit from the same rights, without discrimination. The HALDE has adopted the same approach when it was faced with other cases of discrimination founded on gender*».

Despite the negative public reaction to the HALDE's decision, which was nonetheless based on settled law, the Minister of Education stated publicly in mid 2008 that all parents should have the possibility of accompanying State school outings, and that no form of discrimination should be exercised against them. The heads of the school districts were asked to ensure that department-wide regulations and internal rules and regulations in schools did not include discriminatory clauses[164]. However, very recently, the new Minister of Education has reversed this decision. On January 29, 2011, a parents' association denounced new cases of discrimination against veiled mothers in the suburbs of Paris and asked the Ministry to intervene. Contrary to all expectations, the minister, Mr Luc Châtel, announced on March 3, 2011 that secularism required preventing women from

[162] Rorive, I. (2009): "Religious symbols in the public spaces: in search of a European answer", *Cardozo Law Review*, Vol. 30, pp. 2279-2698, http://www.cardozolawreview.com/content/30-6/RORIVE.30-6.pdf

[163] Weil, P.: "Why the French Laïcité is liberal", *op. cit.*

[164] See the written answer of the Minister, Mr Xavier Darcos, to parliamentary question no. 28396; *Official Journal*, 26 August 2008 p. 7378

wearing headscarves from participating in public services. This statement was clearly politically motivated. Under current law, such an exclusion is clearly illegal and discriminatory[165].

The minister's position must be understood in conjunction with other initiatives of the current government with regard to Islam and secularism. For example, this ministerial decision can be linked with that of the Minister of immigration, integration and national identity in October 2010 awarding a grant of EUR 80,000 to the association *Ni Putes Ni soumises* in order to promote secularism and gender equality, particularly vis-à-vis immigrants and immigrants' descendants living in "difficult" neighbourhoods.

In making his statement, the Minister of Education effectively put into application, without waiting for the necessary legislation, a proposal to Prime Minister of the High Council for Integration. This body, composed of 16 independent members drawn from various backgrounds, professions and generations, was created in 1989 to advise and make proposals on all issues related to the integration of foreign residents or residents of foreign origin. In March 2010, it requested a reassessment of the principle of secularism in public services. The High Council suggested the passage of a law requiring that this principle be respected by all persons who, without being public servants, contributed to a public service, including specifically veiled mothers who, in its view, should be prohibited from accompanying children during school outings[166].

As the law stands, secularism does not apply to this category of users of public services, but the government by its statements itself provokes confusion. Not surprisingly, this change in position occurred shortly before important local elections in which secularism and Islam were at the heart of public debate. In this context, the recent ban on the full veil in the public sphere, and the legality of the ban, are also an issue.

B) The compatibility with discrimination law of the ban on the full veil

• The rationale of the Law of 2010 prohibiting covering one's face in a public space

Addressing the assembled members of the two chambers of Parliament at the Palace of Versailles, President Sarkozy stated in mid 2009: *"The problem of the burqa is not religious. It is an issue of women's freedom and dignity. The burqa is not a religious sign; it is a sign of subservience, a sign of debasement. I want to solemnly say it is not be welcome on the territory of the French Republic! […] … I say to you; let us not be ashamed of our values, let us not be afraid of defending them"*[167].

Following this speech, the governing party launched a debate on the compatibility of the burqa with French values[168].

On 26 January 2010, a French parliamentary commission (including members of the governing party and of the opposition) having found that the burqa constituted a «*symbol of subservience to men*» and posed an "unacceptable" challenge to French values, issued a report recommending that the burqa be banned in certain public places such as schools, hospitals, public transport and government offices. However, it did not propose prohibiting the full face veil in the streets, or in shopping centres or other public venues[169].

The French Prime Minister, Mr. François Fillon, then asked the Council of State to study the legal solutions for prohibiting the wearing of the full veil. He indicated that he wanted the ban «*to be as wide and effective as possible*», which meant going beyond the recommendation of the parliamentary commission. The Council of State submitted its findings in a report dated 25 March 2010[170], expressing legal reservations about the possibility of a complete ban. It considered such a ban *"fragile in light of the principle of non-discrimination"* and felt that it

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[165] Le Bars, S. (2011): "Luc Châtel interdit aux femmes voilées d'accompagner des sorties scolaires", *Le Monde*, 4 March.

[166] High Council for Integration, Recommendations to the Prime Minister relating to religious expression in public places, March 2010, http://www.hci.gouv.fr/article.php3?id_article=126

[167] The full speech is available at http://www.elysee.fr/president/les-dossiers/etat/institutions/discours-devant-le-parlement-reuni-en-congres/discours-devant-le-parlement-reuni-encongres.8463.html

[168] Gerin, A., Schwartz, R., Lamine, A.-S., Portier, Ph. (2010): "La laïcité à l'épreuve du voile intégral", *Regards sur l'actualité*, October, 65 p.

[169] Gerin, A. & Raoult, E. (2010): *Rapport d'information sur la pratique du voile intégral sur le territoire national*, 26 January, 644 p. See also the opinion of the National Advisory Council of Human Rights dated 21 January 2010 which was not in favour of the legal banning of the burqa; http://sancerre/GEIDEFile/5107.PDF?Archive=194149191232#xml=http://192.168.200.17/hlPDF.xml?Record=365031318321&idlist=19

[170] Council of State, Study of possible legal grounds for banning the full veil, 25 March 2010 http://www.conseil-etat.fr/cde/media/document/RAPPORT%20ETUDES/etude_voile_integral_anglais.pdf

could not be based on "*any indisputable legal foundation.*" Secularism could not provide the basis for a general restriction on the expression of religious convictions in the public space, as the European Court of Human Rights had just ruled in the case *Arslan and others v Turkey*[171]. The Council of State recalled that the secular principle concerns relations between public authorities and the various religions or persons who subscribe to them. It is only *"directly binding on society or individuals in the case of specific demands made on certain public services (as in the case of educational institutions"*[172].

Despite this unfavourable opinion of the Council of State, Parliament adopted Law no. 2010-1192 dated October 11, 2010 that completely prohibits the covering of one's face in a public space[173]. Its rationale is principally based on the protection of public security and gender equality. As noted by the Constitutional Council, *"Parliament felt that such practices are dangerous for public safety and security, and fail to comply with the minimum requirements for life in society. It also felt that those women who conceal their face, voluntarily or otherwise, are placed in a situation of exclusion and inferiority patently incompatible with constitutional principles of liberty and equality. In enacting the provisions we are asked to review, Parliament has completed and generalized rules which previously were reserved for ad hoc situations for the purpose of protecting public order*[174].

The Constitutional Council declared the first[175] legislation in Europe banning the burqa compatible with the French Constitution of 1958. It refused the application of this legislation only in the case of places of worship open to the public. With its decision, the Constitutional Council seems to have validated an unprecedented interpretation of the concept of public order[176]. Traditionally, public order had been held to rest on three pillars: public security, public peace, and public health. The criterion of public security permits the State to combat fraud. Its can legitimately be used to prevent people from concealing their appearance, or even authorise demands that they reveal their identity. However, for this principle to apply, it would traditionally, have had to be shown, *in concreto*, that a particular security problem is associated with the full veil as such. However no such security problem has ever arisen in relation with the 1,900 women who, according to statistics of the Ministry of the Interior, wear the burqa or the niqab in France[177]. Moreover, when the criterion of public security is to be applied, the risk of a disturbance to public order normally shall be found to limited specific areas and/or to a specific period of time. In its ruling, the Constitutional Council referred for the first time to a "non-substantive" dimension of public security, referring to public decency, public order or dignity.

- The relevance of the Law of 2010 for gender equality

In regard to the question of gender equality, it should be recalled that *"but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs are legitimate or the means used to express such beliefs are legitimate* (…)"[178]. However, the European Court of Human Rights does take into consideration the implications

[171] ECHR 23 February 2010 *Arslan and others v Turkey*, no. 41135/98

[172] Council of State, Study of possible legal grounds for banning the full veil, Report adopted by the Plenary General Assembly 25 March 2010, 50 p.; http://www.conseiletat.fr/cde/media/document/RAPPORT%20ETUDES/etude_voile_integral_anglais.pdf

[173] *Official Journal*, no. 237, 12 October 2010 p.18344.

[174] Constitutional Council 7 October 2010, DC no. 2010-613, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010-613DC-en2010_613dc.pdf

[175] Technically speaking, Belgium was the first European State to adopt such a legislation on 29 April 2010, but it never came into force, due to a long political crisis. For a complete overview of the situation in Europe, see Dord, O. (2010): "Should the full Islamic veil be banned? European States respond in various ways according to their own national rationale", *European Issue*, 18 October, no.183.

[176] Verpeaux, M. (2010): "Dissimulation du visage, la délicate conciliation entre la liberté et un nouvel ordre public", *Actualité Juridique de Droit Administratif*, 13 December, no. 42; McBroom, K. & Jomier, S. (2010): "Synthèse et commentaires sur la loi no. 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public", *Droits-libertés.org*, 29 October; Gonzalez, G. (2010): "L'inconventionnalité des sanctions pour port de tenues à caractère religieux dans les lieux publics ouverts à tous", *Semaine juridique Edition générale*, no. 18, 3 May.

[177] This official figure is reported by the Parliamentary Mission on the full veil in France: Information report, no. 2262, 26 January 2010, http://www.assemblee-nationale.fr/13/dossiers/voile_integral.asp.

[178] ECHR 26 October 2000 *Hasan and Chaush v. Bulgaria*, no. 30985/96.

of wearing certain garments, especially insofar as they relate to gender equality. That was so in its *Leyla Sahin* decision but, above all, in the *Refah Partisi* case, where the Court validated the dissolution of a political organisation calling for the introduction of the *sharia*, which is incompatible with the objectives of the European Convention, "*particularly with regard to (…) its rules on the legal status of women (…)*"[179].

Without legitimizing a total ban on the wearing of the full veil, both the Council of State and the HALDE had held that, in specific circumstances, certain unfavourable conclusions can be drawn from a woman's wearing the burqa, and certain restrictions on wearing the burqa are permissible, in both cases on the ground of sex equality. For example, in 2008 the Council of State ruled that the denial of French citizenship to a burqa-clad woman was justified, since she had *"adopted a radical practice of her religion that [was] incompatible with the essential values of the French community, in particular with the principle of gender equality"*[180].

The HALDE, for its part, received a request from the National Agency for the Reception of Foreigners and Migration for its opinion on the legality of the prohibition of the burqa during compulsory language training courses for foreigners immigrating to France. In response, the HALDE indicated that the requirements of public safety, and the protection of the rights and freedoms of others, were legitimate aims recognized by law, which could justify the prohibition of the full-face veil in the specific situation concerned. Given the fact that the language training courses are free, and that attendance is compulsory for newcomers who do not have a sufficient knowledge of the French language, the beneficiaries of these courses could legitimately be required to identify themselves. Furthermore, the HALDE indicated that «*the burqa, beyond its religious scope, may be considered as conveying an idea of female submission and as violating the national values that govern France's integration process, in particular the principle of equality between men and women*»[181].

The question raised now is whether the overall prohibition provided for in the 2011 law, sanctioned by fines of EUR 150 or citizenship classes, or both, for any woman caught covering her face, can be considered as adequate and proportionate to properly safeguard protection of women's rights. Fortunately, a recent ministerial instruction, issued on March 2, 2011[182], notes that the law on the burqa does not authorize public agents to compel a person to unveil or to leave public facilities.

With regard to women who are subjected to undue pressure to wear the burqa or the niqab, there is no evidence that a blanket ban and their conviction of a criminal offense is the best way to stop this practice. However, the women who have been interviewed in the media or by research institutes[183] have offered very diverse religious, political and personal arguments for their decision to dress as they do. Indeed, the parliamentary mission on the full veil found that most women wearing a full veil in France do so on a voluntary basis. Furthermore, considering the extremely small number of women wearing such garments, it is difficult to prove that, generally speaking, they are victims of greater gender repression than other women.

According to the European Commissioner of Human Rights, "prohibition of the burqa and the niqab would not liberate oppressed women, but might instead lead to their further alienation in European societies"[184]. Mr Thomas Hammerberg has thus called for an assessment of the genuine consequences of banning the burqa or the niqab in public institutions like hospitals or government offices. He feared that such a decision may only result in these women avoiding such places entirely. Along these same lines, on January 28, 2011, the Brussels magistrates' court quashed a EUR 200 fine imposed on a woman wearing a niqab, on the grounds that such a restriction, provided for by

[179] ECHR 13 February 2003 *Refah Partisi v. Turkey*, no. 41340/98.

[180] Council of State 27 June 2008, *Ms Mabchour*, no. 286798. See also the Versailles Court of Appeal, 27 June 2006, relating to a divorce case and taking into account excesses stemming from the practice of a religion, such as the obligation to wear the Islamic veil. Such excesses, if they make married life unendurable, may be grounds for divorce, the blame being ascribed to the person responsible for them, pursuant to Article 242 of the Civil Code.

[181] HALDE decision no. 2008-193, 15 September 2008.

[182] *Official Journal of the French Republic* no. 52, 3 March 2011, p. 4128.

[183] Open Society Institute, Unveiling the Truth: Why 32 Women Wear the Full-Face Veil in France, April 2011, 178 p. http://www.soros.org/initiatives/home/articles_publications/publications/unveiling-the-truth-20110411/unveiling-truth-20110411.pdf.

[184] See his declaration dated 8 March 2010,http://www.coe.int/t/commissioner/Viewpoints/100308_en.asp.

a municipal police regulation on individual freedom, was not proportionate to the legitimate goal of furthering public security.

Much more could be said about this legislation and its compatibility with European standards of fundamental rights, including the justifications for a State to interfere so broadly in the right to personal autonomy[185]. However, as this is not the goal of this article, I will briefly conclude by saying that, in my view, even a secular State should refrain from legislating on how individuals dress themselves in public spaces, except in very limited cases and/or specific circumstances, especially when such a limitation targets a specific religion and exclusively concerns women. There is a high risk that this kind of legislation will be stigmatizing and discriminatory.

3. Final considerations

This paper has attempted to give a comprehensive view of the French model of secularism. After recalling the legal meaning of secularism, it describes the practical consequences of this concept for the funding and the accommodation of religious needs. It is our hope that this paper will help eliminate preconceived notions concerning the alleged lack of protection of religious pluralism in our secular country. Quite to the contrary, it is a misconception of the legal notion of secularism that jeopardizes religious pluralism. In this respect, even if the case law relating to discrimination illustrates the tensions existing within the civil society, it also shows that the legal framework is clear and that existing law clearly prohibits illegitimate practices of religious discrimination.

Nevertheless, despite its liberal foundations, the French model is not immune to criticism. This paper mentioned the recent law providing for an complete ban on wearing the burqa in public, which may well be considered as violating fundamental freedoms, notably the right to privacy, and because it stigmatizes Muslim women. A future challenge to the French model would probably consist principally in rethinking the concept of State neutrality. For the time being, and despite the efforts already made, religious "minority" groups, especially Muslims still suffer from the disparate impact of supposedly culture-blind normative prescriptions and a bias in favour of the status quo[186]. In early April 2011, just as this paper was being finished, the ruling conservative party announced 26 propositions covering such areas as the funding of religious activities and the relationship between religion, the State, the public and the workplace. This document suggests the drafting of a specific legal code incorporating all the rules concerning religious freedom and the State, as well as rules covering more specific areas such as the workplace, public spaces, the home etc. It also proposes the drafting of a guide to good practices for religious freedom and living together at the workplace. Without amending the 1905 Law, the governing party would nonetheless like to provide a clear legal basis for certain current practices, such as the financial aid in fact provided to religious organisations for the construction of places of worship (for example, through the granting of inexpensive long term leases on public land with an option to buy; or various devices making it easier to loan money at low interest rates to religious groups). Proposals of this kind are welcome, since they will make the legal framework more transparent. Certain other proposals however are much more controversial, such as a suggested ban on wearing religious symbols in the private sector or by day-care personnel, and forbidding veiled Muslim women volunteers from accompanying their children's classes on school outings. All these proposals will doubtless give rise to an intense debate which will help redefine the challenges and limits of religious pluralism in our modern pluralist society. One thing is certain: the concept of "living together" is constantly evolving, and at every moment needs to be reassessed and rethought.

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[185] This right is understood as the possibility to conduct one's life in a manner of one's own choosing. Such *"an important principle underlying the interpretation of the Convention guarantees"* includes the possibility to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned and/or for others (ECHR 29 April 2002, *Pretty v. United Kingdom*, no. 2346/02). For a complete overview, N.R. Koffeman, (The right to) personal autonomy in the case law of the European Court of Human Rights, Leiden, 2010; http://www.staatscommissiegrondwet.nl/userfiles/files/(The%20right%20to)%20personal%20autonomy%20in%20the%20case%20law%20of%20the%20EC%20of%20Human%20Rights.pdf

[186] Laborde, C. (2008): *Critical Republicanism: The Hijab Controversy and Political Philosophy*, Oxford University Press, 312 p. See also, Jennings, J.: "Citizenship, Republicanism and Multiculturalism in Contemporary France", *British Journal of Political Science*, Vol. 30, pp. 575–598.

Religion, Race and Migrants' Integration in Italy: The Case of Ghanaian Migrant Churches in the Province of Vicenza, Veneto

Edmond Akwasi Agyeman[1]

Abstract

The number of Ghanaian immigrants' Catholic and Pentecostal/Charismatic churches has kept growing since this group began to settle in Italy from the late 1970s. This paper examines that role that these religious congregations play to facilitate the migrants' integration in the province of Vicenza. The paper shows that while the churches offer opportunities for the migrants to find their place in Italian society by providing them a place to be at home, a sense of belonging, identity and resources, the type of integration that the migrants foment through the churches appears to be rather segmented along racial and ethnic lines. Therefore, the churches' integration role would be enhanced if they open up their ethnic and racial borders and provide channels for Ghanaian and Italian populations to interact.

Key words: Ghanaian Migrants, Italy, Churches, Integration.

Resumen

El número de iglesias carismáticas católicas y pentecostales de los inmigrantes ghaneses ha ido en aumento desde que este grupo comenzó a establecerse en Italia a finales de los setenta. Este artículo examina el papel que desempeñan estas congregaciones religiosas a la hora de facilitar la integración de los inmigrantes en la provincia de Vicenza. El estudio revela que mientras las iglesias ofrecen oportunidades para que los inmigrantes encuentren su lugar en la sociedad italiana, proporcionándoles un lugar para sentirse en casa, un sentido de pertenencia, identidad y recursos, el tipo de integración que los inmigrantes fomentan a través de las iglesias parece encontrarse más bien segmentada por motivos raciales y étnicos. Por lo tanto, el papel integrador de las iglesias se vería fortalecido si reconciliaran sus diferencias étnicas y raciales y ofrecieran cauces para que la población de Ghana e Italia interactuara.

Palabras clave: Migrantes Ghaneses, Italia, Iglesias, Integración.

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Introduction

The role of religion in the integration of Sub-Saharan African migrants in Western Europe needs greater attention than has so far been dealt with in Western European migration literature. Among majority of these migrants, Christianity or Islam is the main reference point for constructing communities, social space, identity and belonging.[2]

Sub-Saharan African migrants' Churches in Western Europe are not built upon any doctrinal or ideological motivation, but they respond to the migrants' quest for identity, a place to be at home and spiritual satisfaction.[3] One most important issue in studying these churches, however, is to understand the extent to which they enable the migrants to integrate in the host societies.

Studying Ghanaian migrant churches in the Netherlands, Van Dijk argued that they foster the formation of the concept of 'strangerhood' among the migrants in the host societies.[4] This same condition was observed by Ugba during his study of Nigerian Pentecostal churches in Ireland. He observed that through membership in these churches the migrants remain 'part' but 'apart' from the Irish society.[5]

But why do the black communities in predominantly which societies prefer to foment 'strangerhood' or distinct communities rather than binding social and religious structures that open borders for the local population? The explanation may lie in the context of the host society; historical experiences (colonialism and racism); and the migrants' desire to keep their identity; maintain bonds with African culture, cosmology, spiritual and medical practices.

Since Ghanaian migrants began to settle in Italy, the number of their churches, being Pentecostal/Charismatic or Catholic ethnic congregations, has kept growing with high levels of participation.[6] Do these churches represent a segregationist attitude in response to racial discrimination or they are a path to achieve social integration? The purpose of this paper therefore is to examine the role that these church play for the construction of identity, belonging and integration among the Ghanaian migrants in Italy within a context of racial diversity.

1. Theoretical Framework

Hirschman has argued that religion provides migrants 'refuge, respectability, and resource' during their settlement and integration process.[7] According to this author migrants seek 'refuge' from religion against the trauma of immigration, as it provides them with physical or psychological safety and comfort through membership and participation in rituals and religious activities. He further stated that through parallel religious social institutions (such as schools) migrants "find avenues for social advancement, leadership, community service, and respect than may have been possible in the broader community".[8] And, finally, through membership solidarity and religious groups' social services that cater for the more practical and material needs of the migrants, such as accommodation, information, solidarity, job opportunities and language courses, religion provides resources to migrants to facilitate their integration.[9]

However, the type of integration that migrants achieve in the host country through membership in a religious congregation could take different forms. Migrants' religion and churches

[2] Ugba, Abel (2008): "A Part of and Apart from Society? Pentecostal Africans in the 'New Ireland'", *Translocations*, 4, 1, pp. 86-101; Kaag, Mayke (2008): "Mouride Transnational Livelihoods at the Margins of a European Society: The Case of Residence Prealpino, Brescia, Italy", *Journal of Ethnic and Migration Studies*, 34, 2, pp. 271-285; Van Dijk, A. Rijk, (1997): "From Camp to Encompassment: Discourses of Transsubjectivity in the Ghanaian Pentecostal Diaspora", *Journal Of Religion in Africa,* XXVII, 2, pp. 135-159.

[3] Adogame, Afe (2003): "Betwixt Identity and Security: African New Religious Movement and the Politics of Religious Networking in Europe", *Nova Religio* 7, 2, pp. 24-41.

[4] Van Dijk, A. Rijk, *op. cit.*, p. 135.

[5] Ugba, Abel, *op. cit.*, p. 97.

[6] Pace, Enzo and Butticci, Annalisa (2010): *Le religioni pentecostali*, Carocci, Roma, p. 115.

[7] Hirschman, Charles (2004): "The Role of Religion in the Origins and Adaptation of Immigrant Groups in the United States", *International Migration Review,* 38, 3, p. 1228.

[8] *Ibid.,* p. 1229.

[9] *Ibid.,* p. 1229.

could serve as medium for groups to build a distinct community, reproduce their ethnic identities and resist integration into the local community.[10] During her study of Korean churches in the United States, Chong argued that when a group feels marginalised because of its ethnic and racial status the ethnic church can play important role for the groups' search for identity and belonging.[11] In line with this, Warner has observed that race is a conditioning factor during migrants' negotiation of their religious identity.[12] He therefore argued that while the concept of 'segmented assimilation' has been employed in ethnic studies to analyse the integration of migrants along race and class-conditioned identities,[13] it is necessary to also examine the role religion plays in the formation of 'segmented assimilation'.[14]

When black migrants settle in a predominantly white society, what role does religion play to facilitate their integration? While one may expect that a black Catholic who moves to a predominantly white Catholic society would easily integrate due to common faith, studies have shown the difficulties that such integration entails. In his study of interracial communities in the US, Schwadel observed that religious congregations may provide few opportunities for social interaction along racial lines.[15]

It is therefore important to understand if the Ghanaian migrant churches and congregations in Italy are a reaction to racial discrimination or they rather open a path for the migrants to achieve social integration. Through the study of Ghanaian churches we will try to answer how migrants' religious congregations enhance or not the integration of black minority groups within a predominantly white Italian society. To achieve this, I will analyse the structural composition and membership of these churches.

2. Methodology

The paper is based on participant observation, in-depth qualitative interviews and focused group discussions among church leaders, founders and priests in Ghanaian Christian communities in the province of Vicenza in Italy between 2004 and 2007 and from May to June 2010. In addition to interviews, I also participated in church meetings and rituals such as baptisms, blessings, liturgical celebrations, funerals and religious feasts. The churches I visited include the *Immigrants Catholic Church of SS. Trinità di Angarano parish in Bassano*; the *African Catholic Community under San Pietro parish in Schio* and the *Immigrant Church of Arzignano under the Madonnetta di Arzignano* parish located at Cusco. I also visited the *Unity Pentecostal Church* and *Followers of Christ International Church (FOCIC)* which are both located at the outskirts of Schio. During several visits to these churches, I participated in religious activities, had formal and informal discussions with church members, youth groups and leaders. Additionally, I visited the homes of several church members, and individual interviews were conducted during these visits.

Migration from Ghana to Italy

Migration from Ghana to Italy began in the 1970s, however, until the late 1980s this movement remained on a lower scale. From the mid-1980s increasing numbers of Ghanaians settled in Italy's southern regions of Campania, Puglia and Sicily. Naples and Palermo were the main places they concentrated. They were initially employed as seasonal farm workers, domestic workers, construction workers and hawkers. Following succes-

[10] Yang Fenggang and Ebaugh H. Rose (2001): "Transformations in New Immigrant Religions and Their Global Implications", *American Sociological Review*, 66, 2, pp. 269-288; Yang Fenggang, (1999): *Chinese Christians in America: Conversion, Assimilation and Adhesive Identities,* Pennsylvania State University Press, P-A.

[11] Chong, H. Kelly (1998): "What It Means To Be Christian: The Role Of Religion In The Construction Of Ethnic Identity And Boundary Among Second-Generation Korean Americans", *Sociology of Religion,* 59, 3, pp. 259-286.

[12] Warner, R. Stephen (2000): "Religion and New (Post-1965) Immigrants: Some Principles Drawn from Field Research", *American Studies*, 41, 2/3, p. 275.

[13] Portes, Alejandro and Zhou, Min (1993): "The New Second Generation: Segmented Assimilation and Its Variants", *Annals of the American Academy of Political and Social Science*, 530, pp. 74-96.

[14] Warner, R. Stephen, *op. cit.*, p. 276.

[15] Schwadel, Philip (2009): "Neighbors in the Pews: Social Status Diversity in Religious Congregations', *Interdisciplinary Journal of Research on Religion,* 5, article 2, p. 8.

sive regularisations, they moved to Italy's northern regions to work in industries, mainly as unskilled labourers.[16]

Majority of the early settlers entered Italy through the Mediterranean Sea from the Libyan capital Tripoli and the coastal city Benghazi.[17] Others entered Italy as tourists and stayed on. Ghanaian illegal migrants and asylum seekers whose applications were rejected in northern European countries, such as UK, the Netherlands and Germany also moved to Italy from the 1980s. From the mid-1990s immigration of married women and children from Ghana for family reasons also gathered greater momentum.

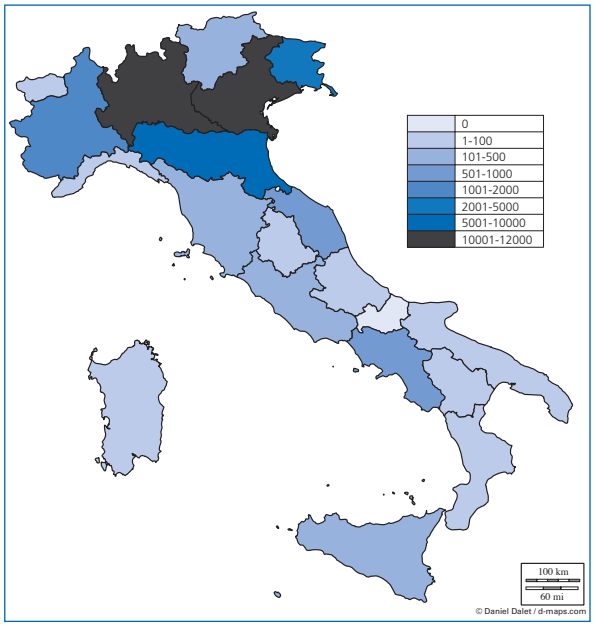
This migration movement was motivated principally by deteriorating socio-economic and political conditions that Ghana began to experience from the 1960s; the mass expulsion of Ghanaian migrants from Nigeria in 1983 and 1985; the armed conflict in West Africa; chain migration, as well as the restrictive immigration policies of the northern European states (Britain, Netherlands, Germany and Belgium) that used to be the main destination of Ghanaian migrants coming to Europe.

Volume, Distribution and Demographic Characteristics

At the end of 2009 there were 44,353 Ghanaian migrants officially resident in Italy, making it the third largest Sub-Saharan migrant community in the country. This shows that the Ghanaian population in this country multiplied by four within two decades, because in 1990 there were only 11,000 Ghanaians in Italy.[18] As illustrated in Map 1, more than 90 percent of Ghanaian migrants with legal residence permits live in northern Italy, mainly in the regions of Lombardy (12,335), Veneto (12,150), Emilia Romagna (10,184) and Friuli-Venezia Giulia (4,997). They are concentrated in the industrial provinces of Brescia (5,750), Vicenza (5,498), Modena (5,259), and Reggio Emilia (2,736). Less than 10 percent live in central and southern Italy.[19] However, it is important to underscore the fact that majority of those without legal residence permit settle in southern Italy.

Map 1

Regional Distribution of Ghanaian Migrants in Italy



Source: Author (based on 2010 ISTAT data of migrant population).

Family Settlement, Children and Working Age Population

The most important demographic characteristics of Ghanaian migrants in Italy include family settlement (43 percent are women), high percentage of children under eighteen (31 percent) and high working-age population (69 percent) as shown in table 1.

The implication is that the migrants will have tended to settle permanently in Italian soil. High under-aged and working populations provide an important relieve for Italy's ageing population.

[16] Andall, Jacqueline (2007): "Industrial Districts and Migrant Labour in Italy", *British Journal of Industrial Relations*, 42, 2, p. 292.

[17] Cf. Van Moppes, D. (2006): *The African Migration Movement: Routes to Europe*, Migration and Development Series, Working Paper, 5, Radboud University, Nijmegen.

[18] Caritas (1991): *Dossier Statistico Immigrazione 1990,* Anterem, Roma.

[19] Istituto nazionale di statistica (ISTAT) (2010: *Demigrafia in Cifre* (www.demo.istat.it).

Table 1

Age group of Ghanaian migrants in Italy on 1st January 2009

Age Group	0-17	18-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65+	Total
Num	14,116	5,236	3,546	5,386	6,301	6,294	3,156	1,412	393	118	88	46,046
%	30.66	11.37	7.70	11.70	13.68	13.67	6.85	3.07	0.85	0.26	0.19	100.00

Source: Author (elaborated from ISTAT data of migrants' population structure).

Consequently, significant and inclusive integration policies that respect ethnic, cultural, religious and racial diversity, and provide equal opportunities, particularly for migrants' children, are required to foster brighter prospects for social cohesion in Italian society in the near future.

Identity Negotiation, Integration and Exclusion

While Italy has become an important destination for Sub-Saharan Africans since the late 1970s, recent studies have shown that this group struggles to incorporate into Italian society due to the level of exclusion and discrimination that they encounter.[20] The origin of this exclusion has been traced to colonial heritage and Italy's class structure,[21] the bad image associated with African migration to Europe, seen as invasion,[22] and, more importantly, the use of immigration by both right-wing and left-wing political parties in Italy as symbolic resource to create 'new regional identities'.[23] The presence of black African migrants and other 'unwanted' immigrant populations has been employed by Italian political parties, most notably the Northern League, to create a territorial identity (*la Padania*) through the production of an 'imaginary enemy', impersonated in the immigrants.[24]

Society's reaction to political manipulations has been to shrink is borders against the immigrants seen as enemies, even when they have been born and bred in Italian soil. Consequently, black Africans in Italy, whose skin colour symbolically enacts the presence of the imaginary enemy suffer various degrees of rejection in all ambits of society, including access to housing,[25] skilled employment,[26] and Italian citizenship.[27] Additionally increasing numbers of African women are pushed into sex work or in-service domestic work, irrespective of their educational attainment, generating what Andall has described as new 'service-caste'.[28] Migrants' exclusion in Italy is legally backed by what Calavita describe as "amorphous regulations, administrative discretion, and 'street level bureaucracies'".[29]

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[20] Kaag, Mayke; *op. cit.,* pp. 271-285; Calavita, Kitty (2005): *Immigrants at the Margins: Law, Race and Exclusion in Southern Europe*, Cambridge University Press, New York; Cole, Jeffrey (1997): *New Racism in Europe: A Sicilian Ethnography,* Cambridge University Press, Cambridge, United Kingdom.

[21] Carter, D. Martin. (1997): *States of Grace: Senegalese in Italy and the New European Immigration*, University of Minnesota Press, Minneapolis.

[22] De Haas, Hein., (2007): *The Myth of invasion: Irregular migration from West Africa to the Maghreb and the European Union*, International Migration Institute, James Martin 21st Century School, University of Oxford, Oxford

[23] Saitta, Pietro (2011): "Between Kafka and *carnevale*: an introduction to the immigrant condition in Italy", *Journal of Modern Italian Studies,* 16, 3, pp. 317-320.

[24] Ibid., p. 317.

[25] Kaag, Mayke; *op. cit.,* pp. 271-285.

[26] Reyneri, Emilio (2004): "Immigrants in a segmented and often undeclared labour market", *Journal of Modern Italian Studies,* 9, 1, pp. 71-93; Cole, Jeffrey (1997): *New Racism in Europe: A Sicilian Ethnography,* Cambridge, Cambridge University Press, United Kingdom, p. 100.

[27] Andall, Jacqueline (2002): "Second Generation Attitude?: African-Italians in Milan", *Journal of Ethnic and Migration Studies,* 28, 3, p. 400.

[28] Andall, Jacqueline (2000): *Gender, Migration and Domestic Service: The Politics of Black Women in Italy*, Ashgate, Aldershot.

[29] Calavita, Kitty, *op. cit.,* p. 100.

Ghanaian migrants who constitute one of the major black communities in Italy live at the margins of society. According to a sample survey in the Lombardy region, only 3.5% of Ghanaian males and 10.6% females associate more with Italians than with their fellow nationals. Their social space revolves around family, work and church.[30] This is one of the main reasons why the Ghanaian migrants' churches have developed in Italy to serve as a point of reference for identity formation.

3. Christianity in Ghana and the Ghanaian Diaspora

Ghana is a predominantly Christian country. Christianity accounts for over two-thirds (68.8 percent) of the country's population, followed by Islam (15.9 percent) and Traditional religion (8.5 percent). Roman Catholics represent the single largest Christian denomination in Ghana, with 15 percent of the total population. Protestants constitute 18 percent, and numerous Christian churches classified as Charismatic/Pentecostals and other Christians represent 24 percent and 11 percent respectively of the total population of Ghana.[31]

To better understand the origin, growth and activities of these churches among Ghanaian migrants in Europe, it is necessary to go back to their roots in Ghana. This is because, rising Pentecostal/Charismatic Churches have a lot of influence in Ghanaian society today.[32] During the colonial era many Christian sects rose up in Ghana in "response to inadequacies and discrimination in European colonial administrative and religious establishments".[33] They used African culture in their theology and worship. And their main activities included healing, prophesising about impending dangers or misfortunes, interpreting dreams and helping to alleviate social problems.

The first wave of Pentecostal churches began in Ghana in the 1930s. However, it was not until the 1980s that these churches began to spread rapidly in urban centres in Ghana, recruiting most of their members from the mainstream churches. While they commanded more than half the Christian population in Ghana in 2000, they were only 2 percent of the Ghanaian population prior to the 1980s. Most of them are linked to Charismatic churches in the United States. The most influential and successful ones include Nicholas Duncan-Williams' Christian Action Faith Ministries (CAFM) in Accra; The International Central Gospel Church (ICGC) founded by Mensa Otabil also in Accra; Redemption Hour Faith Ministry; International Bible Worship Centre; Victory Bible Church; Evangelical Church and Living Waters Ministry, all in Accra.[34] They are characterised by speaking in tongues (glossalalia), baptism in the Holy Spirit by immersion and the use of African music and dance in worship as a way of expressing joy.

Religious, political, economic-sociological, psychological and anthropological explanations have been given to explain their proliferation and influence in Ghanaian society. According to Sackey "the insider or church view attributes the formation of the churches to a divine revelation…to win more souls for Christ, to turn people from idolatry and fetishism, to overcome the power of Satan".[35] However, critics or outsider perspectives attribute their growth to the socio-economic situation in Ghana during the 1980s. Their preaching of hope and prosperity, establishment of prayer camps for healing services (for poor people who had no money to go to hospitals) made them more attractive to the ordinary Ghanaian than the older mainstream churches. Gifford has emphasised that the economic-motivated theology of these churches, exemplified in pastor Duncan-Williams' book, *You are Destined to Succeed!* And Mensa Otabil's book, *Four Laws of Productivity: God's Foundation for Living,* made them more attractive and convincing to the educated youth, due to high unemployment rates and poverty in Ghana.

He further observed that while leadership positions in the mainstream churches were a reserve of the educated elite and

[30] Stocchiero, Andrea (2008): *Learning by Doing: Migrant Transnationalism for Local Development in MIDA Italy-Ghana/Senegal Programme*, Working Papers, 48, CeSPI, Roma, p. 10.

[31] Ghana Statistical Service (GSS) (2002): *2000 Population and Housing Census: Summary report of final results*, GSS, Accra.

[32] Gifford, Paul (1998): *African Christianity: Its Public Role,* Hurst and Company, London.

[33] Sackey, M. Brigid (1999): *Proliferation of Churches. Impact on Ghanaian Society,* A Lecture at St. Paul's Catholic Seminary, Accra, p. 2.

[34] Gifford, *op. cit.,* pp. 77-84.

[35] Sackey, *op. cit.,* p. 8.

older generations, the new churches offered such positions to the youth. Consequently, "the Pentecostal churches were seen as the young creating their own space where they can exercise some responsibility".[36] Moreover, by offering leadership and clerical positions to women in the same manner as men, these churches were more responsive to the matrilineal Ghanaian culture. Finally, the organisational structure of these churches is also one of the main factors for their growth. Because local churches cannot pay a full-time pastor, each local church is run by a presiding elder. About thirty of these fall under a district pastor or overseer. And anyone who wanted to begin a church on behalf of the church of Pentecost was allowed to do so and no specific educational qualification is required.

The growth of the Pentecostal/Charismatic churches in Ghana coincided with the beginning of large-scale emigration to Western countries, and they spread among the immigrants for several reasons. According to Van Dijk two main factors account for this. The first is the *sending discourse* which represents the situation whereby prospective migrants turn to prayer camps for spiritual help and protection in their transnational journey. The second is the *receiving discourse*, which relates to the figure of the Pentecostal/Charismatic church leader as *abusia pinyin,* family head, who provides close personal assistance, support and leadership to members.[37] Other explanations include the freedom given to individuals to start churches on behalf of the Pentecost/Charismatic church in Ghana. Therefore, individual migrants were able to start new churches in the immigrant communities and later obtained endorsement and support from a mother church in Ghana. Additionally, due to the need for the Pentecostal/Charismatic churches founded in Ghana to gain a broader international recognition and source of income, some church founders and pastors in Ghana also reached out to the Ghanaian diaspora in Europe and North America to establish new churches.[38]

In the case of Italy, the Ghanaian Catholic migrants became more conscious of their religious, ethnic and national identity and began to press for religious services in their language and culture as a result of the growth of the Ghanaian Pentecostal/Charismatic churches. Additionally, the difficulty of worshipping in a predominantly white society and culture with little room for cultural diversity was another reason for the establishment of Ghanaian Catholic congregations. We shall discuss these developments in Italy, focusing on the nature and structure of the Ghanaian diasporan churches in the province of Vicenza in Italy.

4. Ghanaian Diasporan Churches in the Vicenza Province

Ghanaian migrant churches began to spread out in this province during the late 1980s. They are of two main types. The first group consists of Pentecostal/Charismatic churches while the second group are Catholic migrant congregations established by the local Catholic Church for migrants.

The Pentecostal/Charismatic churches were founded by the Ghanaian migrants when they first settled in the Vicenza area in the 1980s. The number of these churches in the province is hard to determine. However, the most dominant ones include: the Christ Cornerstone International Church (Vicenza), Resurrection Power and Living Bread (Caldogno, Bassano), Followers of Christ International Church—FOCIC (Schio), Unity Pentecostal (Schio, Brescia and Bassano), New Life Pentecostal (Schio), Church of Pentecost (Malo).

The second group of churches, which are made up of Catholic migrant congregations, were established by the Italian Catholic diocese of Vicenza (which roughly coincides with the territorial boundaries of the Vicenza province) during the 1990s to offer religions services in English to the migrants. These churches were initially entrusted to missionary priests who were mostly Italians and later joined by Ghanaian priests. At the time of this research there were four of such congregations in the diocese. They include the Immigrants Catholic Church of SS. Trinità di Angarano parish in Bassano; the African Catholic Community under San Pietro parish in Schio; the Immigrant Church of Arzignano under the Madonnetta di Arzignano parish located at Cusco and the Immigrant Church of Vicenza.

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[36] Gifford, *op. cit.*, pp. 88-89.

[37] Van Dijk, A. Rijk, *op. cit.*, p. 143.

[38] Tonah, Steve (2007): *Ghanaians Abroad and Their Ties Home: Cultural and Religious Dimensions of Transnational Migration,* Centre on Migration, Citizenship and Development, Working Paper, 25, Bielefeld, p. 16.

Structure and Composition

In order to understand the place of the Ghanaian migrant churches in Italian society and the extent to which they facilitate integration, we find it necessary to examine how they are composed in terms memberships, leadership, locations, language and culture, dominant social activities and transnationalism.

Membership: The Catholic congregations aggregate migrants from different nationalities. A common language (English) is the main denominator for the formation of the groups. Ghanaian migrants constitute the dominant group in all the congregations. However, they worship together with other nationals such as Philippines, Indians and Nigerians. The migrant congregation in Bassano is made up of Ghanaian and Pilipino nationals; the one in Arzignano is made of Ghanaians and few Indian migrants, while the church in Schio is made of Ghanaian and Nigerian migrants. Membership in the Ghanaian Pentecostal/Charismatic churches is predominantly made up of Ghanaian migrants. In few churches it is possible to find a few other African nationals from English speaking countries. But there are no non-African population in these churches. Membership in both Catholic migrant congregations and Pentecostal/Charismatic churches ranges between thirty (30) and three hundred (300).

Clergy and Leadership: The Catholic congregations are led by Italians priests (majority), Ghanaian priests and other nationals. The clergy plays dominant leadership roles. However, there is strong lay leadership (catechists, presidents, secretaries, organisers and cashiers). The lay leaders are mostly men and most leaders are well educated. The clergy of the Pentecostal/Charismatic churches is made up of Ghanaian pastors, some of who are founders of the churches. Other pastors are periodically invited from Ghana and other European countries for short visits. Nearly all members, men and women, young and old, play various forms of leadership roles. Persons with high or lower education hold roles. Church attendance and commitment is the main criteria for the selection of leaders.

Language and Culture: English language and Akan (Twi) are the main languages used in the Catholic congregations during service. However, depending on the national and ethnic composition of the church, other languages are used. In the church of Schio, for example, the Gospel is also read in Italian followed by a short sermon in Italian language for the migrants' children, before the main mass proceeds in English and Akan. In the Pentecostal/Charismatic churches Akan (Twi) is the main language used with simultaneous English interpretation, when necessary. Songs are in English and Twi. Modern Ghanaian gospel music is

Table 2

Structure and Composition of Ghanaian Diasporan Churches

	Catholics	Pentecostal/Charismatics
Membership	Ghanaians with Nigerians, Philippines, and Indians.	Ghanaians with few other Africans
Clergy and Leadership	Italian and Ghanaian priests; strong lay leadership.	Ghanaian pastors and founders; most members have roles. Important female leadership.
Language and Culture	English, Akan (Twi), other languages.	Akan (Twi) with English interpretation.
Location	Small chapels and sometimes main parish	Outskirts of towns and villages. In industrial areas.
Social Services	Have no formal structures. Depend on the local Catholic Church. Provide informal services.	Have no formal structures. Provide informal services to members.
Transnationalism	Less home-oriented; but reproduces African culture and religious identity.	Home-oriented. Reproduces African culture and cosmology. Linked to churches in Ghana and the diaspora.

Source: By author.

dominant. The King James Version of the Bible and the Akuapim Twi translations are used for service.

Location: In the Catholic migrant congregations religious services are held in small chapels, most often far from the migrants' parish. Periodically, and depending upon the pastoral arrangement of the immigrants church, the migrants celebrate mass together with the local church community in a selected parish. The Pentecostal/Charismatic churches, on the other hand, are mostly located in the outskirts of the towns and villages. Normally, an unused industrial building is rented for their religions services. Worshippers commute to these places from various locations on Sundays. The Churches normally provide private transportations for their members to go to the places of worship on Sundays.

Social services: By social service I refer to the services that these churches provide to their members in terms of language courses, schools, training, information and aid to find employment, housing, etc. No formal structures exist in the Catholic migrant congregation or Pentecostal churches that provide such services. The Catholic migrants, and of course non-Catholic migrants too, depend on the local Catholic Church institutions (*Caritas* and *Migrantes*) for these services. But the migrant churches do not play any active role in these institutions. However, both migrant Catholic and Pentecostal/Charismatic churches use informal channels to provide various forms of aid and support to their members.

Transnationalism: the Catholic congregations are less home-oriented even though they reproduce African culture and religious identity. There is however, collaboration at the hierarchical level between the Italian clergy and the clergy in Ghana. On the contrary, the Pentecostal/Charismatic churches are strongly home-oriented. They have strong links with mother churches in Ghana. And they rely on African cosmology (power of witches, devil, healings, etc) during services. The social organisation is also based on the African concept of family and community, with the church leaders playing the role as elders in the diasporan community, who people turn to for support and help to resolve differences, such as marriage problems. The Catholic lay leaders and Ghanaian priests also play such roles in the communities. Additionally, the Pentecostal/Charismatic churches have strong ties with other diasporan Christian communities in Europe and North America.

5. The Churches and Migrants Integration

After presenting the structure and composition of the Ghanaian migrant churches in the Vicenza province, we can now critically examine the role that these churches play for the integration of the migrants. Obviously, the Catholic congregations and the Pentecostal/Charismatic churches provide various forms of avenues and social capital for the migrants to participate or not to participate in Italian society.

The Catholic diocese of Vicenza plays a forefront role in the activities of the migrant Catholic congregations. Italian priests have dominant role in these congregations. And their intermediary role as a bridge between the migrants and the local community as well as the local authority is obvious. Additionally there is coordination with the Catholic clergy in Ghana that sends priests to support the mission. Moreover, there is strong lay participation in leadership activities of the migrant congregations.

Therefore, such pastoral structure apparently opens channels for the migrants' inclusion in the Italian local church and community. In the first place, the migrant congregations are considered integral part of the Catholic Church in the diocese of Vicenza and the diocesan bishop is the overall boss. The collaboration between Italian and Ghanaian clergy makes these congregations look more inclusive. Additionally, membership is not limited to Ghanaian migrants only, but aggregates various nationalities with a common language (English in this case) as the main denominator, while a lot of space is given to migrant languages and culture during worship. Therefore the Catholic spiritual care for migrants is guided by the principle of unity in diversity. While ensuring that the migrants remain an integral part of the Catholic Church, their culture is respected.

However, these congregations are physically separated from the local church communities and their activities. The migrants normally worship in small chapels that are not frequented by native Catholics except for individual devotional activities. One remarkable observation is the absence of Italian worshippers in the migrant congregations. Consequently, there are no common activities between the migrant congregations and the autochthonous congregations except in special celebrations such as first communion, baptism, religious feasts and funerals when the migrant communities are invited. This presents a

parallel church model between migrants' congregations and the local population within the same religious community, as has been observed in the United States.[39] The pros and cons of this structure are obvious. While it gives a chance for Catholic migrants to express their faith in their own language and culture, it provides little opportunities for them to share their religious experiences and faith through dialogue and daily interaction with the local church members. When I posed this problem to the church elders in Schio, one of them said:

> We do the service at Salesiani, every Sunday at 11am. However, the last week of the month we go to the main parish to celebrate Mass with the Italians. We want to have integration. Because we had a course and the bishop was telling us that we shouldn't exclude ourselves from the Italians. A time would come that the immigrant churches would be dissolved, so we need to have integration. That is why we do join the Italians (Schio, May, 2010).

Whether the migrant congregations need to be dissolved, and how, is also another problem. However, once the structure has been erected it is difficult to simply dissolve it, as it will easily pass on to other generations. While the solution of worshipping in the 'main parish' together with Italians once every month is a good step, it appears not to be far reaching enough. This is because, the migrant congregations do not appear to fit in well with the territorial structure of the Catholic Church, which begins at the local level as parish, then a deanery and a diocese, etc. Since, for example, migrants in parish 'A', 'B' and 'C' have to all go to parish 'D', where the migrant church is located, for religious services, they are unable to participate in religious and social activities of the parishes where they belong (territorially). However, parish level participation could have implied local community-level participation, which would have enhanced migrants' integration at the local community or grassroots level. But, once the migrants have to move to other places of worship, which are in most cases far from the parishes where they belong, they remain estranged members to their fellow Italian Catholics in their own parishes and communities. Therefore, there appear to be some kind of imbalance between the structure of the migrant congregations and the integration of church members of Italian or immigrant origin. It appears that the Catholic Church in Vicenza has placed major importance on the ethnicity and national origin of its members rather than a common faith.

The Pentecostal/Charismatic churches do not have the same benefits as the Catholic Church with *a priori* institutional structures to promote their activities. They are new in Italy and closely linked to immigration. In the Ghanaian churches the head pastors and those who hold key leadership positions are Ghanaians. These churches are closely tied to African migrants and do not aim to reach out to the local population. When I raised this issue to the head pastor of Followers of Christ International Church (FOCIC) in Schio he said: "We are open to everyone. White people sometimes attend our church services, but they do not stay. Maybe it is because of the language barrier", (Schio, June, 2010).

While the head pastor identified language barrier as one of the main obstacles preventing the local population from joining them, there was no interest to address the issue, as it appeared no steps have been taken to make their churches attractive to the local population. Additionally, the churches' preference for Ghanaian language (Akan) instead of Italian makes them incapable to incorporate other nationals. FOCIC is among the earliest Ghanaian churches in Vicenza, yet I noticed a remarkable absence of other African worshippers, particularly Nigerians. But the head pastor explained: "We used to have Nigerians with us. However, their number became big and they decided to form their own church to be able to use their own language".

Most of the Pentecostal/Charismatic churches are located in industrial areas and in the outskirts of the towns. Members commute to these places by private transportation system provided by the church or church members. Such locations physically separate the church from Italian society and do not seem help much in terms of integration.

However, these churches' relations with the Italian local population and its institutions are very low, they provide strong avenues for leadership roles, especially for women,[40]

[39] Sullivan, Kathleen (2000): "St Catherine's Catholic Church: One Church, Parallel Congregations", in Ebaugh H. Rose and Chafetz, J. Saltzman, *Religion and the New Immigrants:Continuities and Adaptation in Immigrants Congregations*, AltaMira Press, Walnut Creek, CA.

[40] Pace, Enzo and Butticci, Annalisa, *op. cit*., p. 115.

and in-group identification. They also forge strong transnational ties with mother Pentecostal churches in Ghana and other diasporan communities in Europe and North America. Their members regularly organise and attend international conventions which permit them to interact with other migrants in other countries.

6. Conclusion: Migrant Churches and Segmented Assimilation

At the beginning of this work I asked if the Ghanaian migrants' churches represent a segregationist attitude in response to racial discrimination or they are a path to achieve social integration. I think that they serve both ends. The fact that migrants who move to predominantly Christian countries are Christians does not necessarily mean that they would easily integrate into the Christian churches of the destination country. In some cases ethnic, cultural and racial factors have more weight than a common religion for the structural adaptation of migrants in churches. There is abundant literature about the bad experiences of Italian migrants in American churches during the period of large-scale Italian migration.[41]

From my study of the Ghanaian churches, I see that on one hand the churches provide opportunities for the migrants to find their place in Italian society by providing them with a sense of belonging, identity and resources. Additionally, they provide opportunities, albeit sporadic, for the migrants to negotiate their place in Italian society and find avenues for integration. However, on the other hand, the type of integration that the migrants foment through the churches appears to be rather segmented along racial, ethnic and class lines.

Therefore, behind the churches' organisational structures, membership participation and activities hide deep racial divide between black Africans and Italians within the Italian society. During an interview with the founder of Unity Pentecostal Church, which has a branch in Brescia, Bassano and about twenty branches in Ghana, he told me he is a baptised Catholic and he used to attend the Catholic Church when he first came to Italy. However, he founded his own church due to language barrier. He said:

> We started the Church in 1990 in Schio, and then we joined it with a Church in Ghana called Resurrection Power. When we first came here, we used to go to the Catholic Church. But we did not understand the language and we really wanted to worship and pray. So I started prayer meetings in my house. We used to meet and pray in my kitchen. Then more migrants started joining us and our number became very big, so we started a church. We named it Unity Pentecostal Church (Schio, May 2010).

Yet in the course of the interview he began to raise important issues of deep racial concern. He complained he is a building contractor but does get contracts because of his colour. He went on like this:

> Let me give you an example, a few days ago I was returning from Vicenza by bus. I sat in the middle seat and there was another empty seat beside me. People came and occupied the seats behind and in front of me. And even though the bus was full and many people were standing on their feet no one came to sit at the empty seat beside me....My children have often returned from school with tears, complaining they have been racially abused. Other times it is their school authority who have brought me reports that my children have attacked someone (Schio, May 2010).

The main challenge for the migrant churches in Italy, therefore, is to break the racial barrier between the Ghanaian and Italian populations. This could be achieved in the Catholic Church if it facilitates and puts ups appropriate channels that permit migrants to take up active roles in the main parishes. With regards to the Pentecostal/Charismatic churches, their ability to open up and attract members from the local population is indispensable if their desire to become part and parcel of Italian society is to be realised. Otherwise these churches and their members are likely to remain at the margins of Italian society and the task of surpassing racial borders would be insurmountable. When this happens the Ghanaian migrants will continue to be estranged from Italian society as the political pressure to exclude migrants mounts.

[41] Prencipe, Lorenzo (2010): "La religione dei migranti: tra repiegamenti ghettizzanti e possibilità de nuovo coesione sociale", *Studi Emigrazione/Migration Studies,* XLVII, 178, pp. 278-279.

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The Religious Integration in Spain of the Moroccan Muslim Second and 1.5 Generation

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Abstract

The purpose of this paper is to explain current processes of immigrant Moroccan children born in Spain, or those that arrived during the first socialization period (until the age of 10). We will describe, using a transnational lens, how this young people follow Islam in a different country from their parent's homeland. At the same time, we will compare and contrast this youth with those from Latin America and observe the most significant differences and similarities.

Based on a previous quantitative survey, the study is developed by an ethnographic work analyzing their religious behaviour as Muslims in Madrid. Two most important conclusions are: the youth that arrived very early in life or were born in Spain look to build a reconciled position for Muslims, with Spanish values. Second, this group in the religious field is playing a double role; first inside the Islamic community and second in the entire society.

Key words: Islam, Second Generation, Integration, Transnationalism, Youth.

Resumen

El propósito de este trabajo es explicar los procesos actuales de los niños inmigrantes marroquíes nacidos en España, o que llegaron durante el primer período de socialización (hasta los 10 años). Adoptaremos una óptica transnacional para describir el modo en el que estos jóvenes siguen el Islam en un país diferente al país de origen de sus padres. Al mismo tiempo, realizaremos una comparación y contraste entre estos jóvenes y otros procedentes de América Latina para ver las diferencias y semejanzas más significativas.

Basándonos en una encuesta cuantitativa anterior, este estudio se ha llevado a cabo mediante un trabajo etnográfico que analiza su comportamiento religioso como musulmanes en Madrid. Dos de las conclusiones más importantes son: los jóvenes que llegaron a una edad muy temprana o que han nacido en España intentan establecer una posición reconciliada para los musulmanes, con los valores españoles. Por otra parte, este grupo dentro del ámbito religioso desempeña una doble función: en primer lugar, dentro de la comunidad islámica y en segundo lugar, en toda la sociedad.

Palabras clave: Islam, segunda generación, integración, transnacionalismo, juventud.

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Anuario de Acción Humanitaria y Derechos Humanos
Yearbook on Humanitarian Action and Human Rights
ISSN: 1885 - 298X, 2011, Bilbao, págs. 117-124

Introduction

Two years ago, in 2009, Spain remembered the fourth centenary expulsion of the Moorish people. Philip III announced la pragmática (a decree) of this expulsion on April 4th, 1609. With this pragmática (decree), 300,000 Spanish people were forced to leave the peninsula and prohibited from returning. That decision was the final moment for Christians and Muslims to experience conviviality, which sometimes was good, and at other times difficult.

Four centuries later, Spanish children of Maghribian origins —specifically, children born in Spain and raised as Muslims, are presently living according to these religious prescriptions. Current historical, social, and cultural conditions are very different for these Maghribian children. Today's Spanish laws permit religious freedom for minorities. Followers of Islam have rights and legal protection to pursue their religion with peace and freedom. Recently though, difficulties have emerged that demonstrate similarities to the problems from four centuries before. Specifically, the problems are fear and ignorance between native inhabitants and the Maghribian population. This creates situations of discrimination and distrust. Some young Muslims are growing up under disapproving looks and mistrust from their neighbors.

With the approval of the 1978 Spanish Constitution, Spain effectively granted freedoms to all religious minorities. The founding of the system created a relationship between religions and the State based on the two primary principles of liberty and equality. Following those principals, the relationship also focuses on secularization and cooperation.

The establishment of the new regime initiated cooperation between the Spanish government and all religions. This new regime responded to the people's desires for political and social changes during the political transition. The new state was built on the principle of neutrality, not indifference, in relation to the expression of religious diversity.[2]

The purpose of this paper is to explain current processes of immigrant Moroccan children born in Spain, or those that arrived during the first socialization period (until the age of 10). We will describe how these young people follow Islam in a different country from their parent's homeland. At the same time, we will compare and contrast these youth with those from Latin America and observe the most significant differences and similarities.

We analyze their religious behaviour as Muslims in a secularized society with a Catholic majority that is learning how to cope with an increasing Islamic population. Simultaneously, they are incorporating into a heterogeneous Islamic community, with different national origins such as Maghribian, Pakistani, Syrian, and others...

This research is based on two methodological pillars. First, we take account of the results from a quantitative survey about the Second Generation in 2001. The second pillar refers to an ethnographic work from 2007 in Madrid, specifically about the Muslim Maghribian Second Generation.

The previous stage of my ethnographic research showed the results of the 2001-2002 quantitative survey regarding the Moroccan, Peruvian, and Dominican second generations born in Spain, or those that arrived before the age of 10 years-old. In this case, the methodology utilized a questionnaire given to 539 second generation youth that lived in Barcelona and Madrid.

For the present study, our ethnographic work has been focused in the Comunidad Autónoma region of Madrid. To gather information, we have formally interviewed twenty second generation youth, conducted three focus groups, and held participant observations during informal meetings at their homes and other locations. We then analyzed the results.

Before the results are presented, it is necessary to discuss the definition to understand the complexity of the second generation.

1. About Second Generation notion

Like Portes (1996)[3] indicated there are three distinct categories related to the second generation. "The first category refers to children born abroad that came to the United States

[2] Amérigo Cuervo-Arango, F. (1995): "Breve apunte histórico de la relación Estado-confesiones religiosas en España", in Abumalham, M. (ed.): *Comunidades Islámicas en Europa*, pp. 155-164

[3] Portes, Alejandro (ed.) (1996): *The new second generation*, Russell Sage Foundation, New York.

after their infancy. The second includes native born children of immigrant parents and children born abroad who came at a very early age, also called the 1.5 generation. The final group is families consisting of both parents and children born in the United States. This third group represents the majority of the American population."

According to Halloway-Friesen (2008)[4] the term 1.5 generation refers specifically to the Latino immigrants that arrived in the United States as children or as adolescents. There is a distinction between the first generation that arrived in the US as adults and the second generation Latinos that were born there.

In the Spanish case it is necessary to approach the study of youth that are in an intermediate situation. As indicated previously, this can be referred to as the 1.5 generation. Specifically, the Moroccan Muslims, the oldest ethnic and religious group, was created by immigration. In this community there are two groups of young people. Most of the young Muslims belong to the 1.5 generation. The others, comprised by those that were born in Spain are considered part of the second generation. In some aspects, we compare this group with Moroccan origins to Latin American Christians.

The late appearance of the Moroccan second generation in Spain is based on the characteristics of the parent's migration patterns. At the beginning of this migration, during the 1970s and the beginning of the 1980s, the goal of many Moroccan men was to travel to France or other European countries, however, many of them ended up staying in Spain. Often, this group of men initially brought their older sons to live with them. Then, after an extended period of time, they also brought their wives and daughters.

The primary hypothesis developed and used in this study are as follows:

First, the supposition is that the majority of young people in Morocco and the Moroccan second generation born in Spain follow Islam. Because of this, we must consider if the political and religious conditions exerts an influence on this belief…

Secondly, there is a group of young people that have a feeling of belonging that is linked to a secular cultural concept of being Muslim. This is a result of the ethnographic work on the Berber Rifains. (Eguren, 2007)[5]

In these cases, the internal religious experiences depend on the environment of where the individual lives. In Morocco, there is social pressure among families to give a religious sense to celebrations while also respecting local customs.

The third hypothesis supposes that young people of Moroccan immigrant children born in Spain or arrived in a very early infancy —during the first socialization— preferred to follow the Muslim religion and incorporate Spanish secular values. These are compatible in the religious and secular areas as tolerance, respect to religious diversity…

Between these young people are found two directions or senses: one group that host their beliefs and "practice religion" and other group of youth who takes distance from the religion, every religion. This last group shows the same attitudes in front of the religion as the many of Spanish young people, maybe the majority.

To analyze young people's social and religious integration, we take a transnational perspective (Levitt, 2007)[6]. In this sense, we observe how transnational connections influence religious practices. This perspective has demonstrated the links between young people with Mediterranean origins on both sides; by kinship or when they chat or talk on the Internet.

2. Feelings of religious belonging

The limited facts that are available, mostly through this study, show that it is essential to confront this theme. The 2001 University Institute for Migration Studies (IEM) research about

[4] Holloway-Friesen, H. (2008): "The invisible immigrants: Revealing 1.5 generation Latino immigrants and their bicultural identities", *Higher Education in Review,* 5, pp. 37-66.

[5] Eguren, Joaquín (2007): "La reformulación de la religión musulmana y la etnicidad bereber (amazigh) en la Comunidad transnacional rifeña", Paper presented at II *Jornadas de Sociología, Centro de Estudios Andaluces*: http://www.centrodeestudiosandaluces.info/cursos/adjuntos/4690246.pdf

[6] Levitt, Peggy (2007): *God Needs No Passport: Immigrants and the Changing American Religious Landscape*, The New Press, New York.

the second generation immigrants raised questions regarding the role of religion. Discussions with Moroccans, Peruvians, and Dominicans were held regarding their opinions on religious confessions and other practices.

Some results of the 2001 Second Generation Survey highlighted that some changes were taking place regarding the religious beliefs and practices of young adults. In particular, there were differences between the young people born in Spain and those that arrived after early infancy. The first group declared themselves more non-believers (22%) than the second group (10%), more than double.

3. Some religious practices

It is described in the following section the comparison of some religious practices between Muslims and Catholics from Latin America. Young people of Moroccan origins showed a significant level of Muslim belief (95%) while youth of Dominican and Peruvians origins reached less level of Catholic belief (77% and 76% respectively). However, when both groups were asked about attendance to the worship their answers were similar: one third never attended worship and half admitted to going sometimes; and the regular attendees had a minor acceptance (Catholics 12% and Muslims 16%).

Table 1

Frequency of worship attendance

	Catholics	Muslims
Regularly	12	16
Sometimes	55	51
Never	33	33

Source: Second Generation Survey 2001. IUEM. UPCOMILLAS.

The most important difference between both religious groups is the frequency of religious service attendance, which is gender based. Young Latin-American Catholic women were more interested in attending Mass than the young men. Young women go to the Mass more than twice as often as men.

Table 2

Frequency of worship attendance by gender and religion

	Catholics		Muslims	
	Male	Female	Male	Female
Regularly	8	15	23	7
Sometimes	49	60	54	46
Never	43	25	23	47

Source: Second Generation Survey 2001. IUEM. UPCOMILLAS.

However, in relation to Catholic Latin-American women, the Muslim young women attitudes were different. They went with lesser frequency to the mosque than Catholic women attend church. The survey showed that Muslim young men went more regularly to the mosque than women. There is a Muslim tradition in Morocco that explains this situation, because men regularly attended the mosque (three times more) and the feminine religious experience is characterized by privacy. If women go to the mosque, it is often at different times and normally they have separate places of worship than the men.

In the Morocco tradition, women don't usually go to the mosque until they get older —generally after 40 years old. A 2005 survey applied to young people in Morocco, published by *L'Economiste*[7], reveals the differences between males and females that attend the mosque. Effectively, 54% of males state that they attend every Friday, compared to 31% of those in Spain. 46% say that they never attend the mosque: twice as many as the young Muslim men of Moroccan origins in Spain.

There is a gender based difference in religious attendance. 94% of young women never go to the mosque on Friday; exactly double the 47% of young Muslim women that never attend in Spain. The most significant result is that in Spain, the youth, (boys and girls) show relatively more interest in the religious experience.

[7] *L'Economiste*, 24/01/2006: « Religion: Une jeunesse à majorité pratiquante mais » www.leconomiste.com

4. What is Religion for? A search for an explanation behind religious beliefs

What is the social function behind religion and what purpose does it serve? Obviously, there are differences between children that were born in Spain and those that arrived during their school age years. To this effect, we have seen that the so-called 1.5 generation maintains certain religious practices. Among those youth, specifically in the males, a sense of guilt exists for not following their religion as closely as their parents. It is interesting that this guilt does not seem to appear in the second generation. It appears as if religion provides security and confidence. When questioned, the 1.5 generation frequently mentions the idea of "returning to religion." As one boy states: *"The truth is, I'm not the same as my mother. I'm really different. My mom has more faith, she's more religious and stuff. I've said lots of times, if things are good, God isn't important. But, if you're between a rock and a hard place, you'll say 'Oh my God!' This is why I said that one day I hope to get back to my roots."* —Mohamed, 21 years old.

Most young Muslims learn about the religion from their parents. Muslim parental model is very representative of religious patterns in this young people. In contrary directions, because their Muslim believes are recreated in front of this model or in its acceptance. For this reason, when many of them (they) state that they would like to return to their religion, they often practice Islam in a similar method as their parents. As most of their parents has a rural provenance and consequently traditional Muslim insight this religious model is very conservative. This means they follow the rules they were used to, the five pillars of Islam. Because of this, the religious education received while growing up is vital. Much of the religion is also learned from friends, acquaintances, known people from the community, or textbooks. Of course, imams and the religious teachers, the fqih, also give spiritual guidance.

The explanation given for the feeling of respecting the rules and Islam are that through the religious experience people are provided access to a transcendental life, better than the one in which they currently live. *"For all of that, what do you feel? Why do you pray? Why do you do Ramadan? Said: Because when we die we are able to go to another world-Paradise."*

Also, there are positive outcomes faced in their daily lives: *"If while doing that too, I think when you pray and respect the religion, your life will be much better.*

Amin: *You get married and that's it. When you follow the rules you see all the good and the bad. It's obvious that God is good. The bad is obvious too. We have all done some bad things.*

Aziz: But we ask for forgiveness." (Focus Group 2)

It is interesting that this guilt does not seem to appear in the second generation, those who were born in Spain.

5. Practicing Islam: perceptions depend on gender

There are different perceptions about Islamic customs for young women and young men. Young women highlight that normally their mothers are more tolerant and receptive than their fathers, mainly to the feminine role inside of the family. Mothers are more sensible and open to the current changes about egalitarian relationships between men and women. Fathers normally represent and defend Islamic and cultural traditions. Young men often aren't so sensible to the egalitarian relationships. They prefer to maintain cultural and Islamic rural traditional patterns referring to the social status of women. This is because they want to preserve their pre-eminent role in social institutions, religion and family.

For these reasons, young women have more interest and necessity to change some of the ancestral traditions in Islam as the second place of the women inside the family, and seek more freedom outside privacy sphere… They are taking positions in the Spanish society creating women associations at social levels and Islamic feminine associations and groups to defend their ideas, examples are AJJM, Bidaia, UMME, … It is particularly relevant that the youth of the women participants of these associations.

¿Do you think that your religious belief is similar to your parents or has it changed some?

R. Islam is always the same. What occurs, maybe, I see my father's mentality as more old fashioned than that of my mother. My mother is more modern. We practice the religion, but my father less flexible. Maybe that is why I say it's not a religious issue. My mother thinks that it is better if I have more freedom. My dad doesn't think that way. (Miriam, 21 years old)

Differences reveal themselves between young Catholics and young Muslims about themes related to the cultural customs and religion. For example in 2001, the Second Generation Survey questions asked: Is it acceptable that a women and a man live together before they get married? Or, is it important that you and your wife have the same religion? Each group had different answers. The great majority of Muslims (65%) disapproved the idea of marrying a person with a different religion. So, they defended the Islamic concept of marrying a person of the same religion. While the Peruvians and Dominicans responded that is was acceptable. There appears to be a distance growing between the young Spanish speaking population and catholic teachings.

These practices must be understood according to Quran teachings: In Islam it is forbidden that a woman marries a non-Muslim man. As Vernet (2003)[8] (says "…Quran permits marriage with a monotheistic women. But the contrary is not allowed. In Islam a tradition that is probably false exists which said that the Prophet married one of his daughters with 'Adelal-Rahman ibn 'Awf, a Christian.

During the interviews with young women a similar discourse appears: *"To tell you the truth, I must marry a Muslim man. Really, I don't agree, because, what if you fall in love with a non-Muslim? Love …"* (Fatiha, 19 years old). This isn't a teaching that is exclusive to the girls; it also applies to the boys.

However, with respect to the question about cohabitation of the couple before marriage, both groups of youth held a similar attitude of approval —in fact, almost 50% of Muslim youth had a positive attitude. In this sense, both groups have a similar approach to this conduct as Spanish young. Maybe the change is more significant in the young Muslims than Latin-American youth because in Morocco cohabitation before marriage is not approved of. While in Peru and Dominican Republican, this social pattern is more accepted.

Consequently, we observe that young immigrants change their minds in relation to religion, and surely with respect to the religious traditions of their country of origin. There are some signals of the second generation assimilating religious and non-religious beliefs and practices of the native Spanish youth.

6. Transnational connections between the Muslim Second Generation in Spain and young Moroccans

Our Studies about migration in Spain reveal that immigrants maintain strong relations with their country of origin, families, parents and friends (Eguren, 2005)[9].

The study, previously mentioned, about the second generation asked Peruvians, Dominicans, and Moroccans about their knowledge of their families living in their country of origin, and the following results were obtained:

96% of young people with Moroccan origins stated that they knew their families in Morocco, while this declined to 90% of Peruvians and 86% of Dominicans. We believe that this high level of knowledge regarding their families, especially in the case of Peruvians and Dominicans, is because a significant number of them arrived between the ages of 6 to 10 years old. It is probable that they knew their families before the emigration.

When asked about the frequency of visits to their families, Moroccans presented with the highest percentage, surely because of the geographical proximity between Morocco and Spain. Declining in frequency were the Dominicans (29%) and Peruvians (12%). Notice, that the further the countries of origin, the less frequent the visits become.

Both issues, knowledge of and the frequency of visits to their families living in their country of origin, sustain the hypothesis that these transnational links influence religious practices and beliefs in both countries.

Ethnographic work on Muslim young people with Moroccan origins confirms this hypothesis. The transnational religious knowledge allows them to compare how Islamic beliefs are practiced in both locations. And, to choose and apply social and religious strategies, according to their personals interests. They recognize the religious freedom available to them in Spain. This situation permits them to practice Islam in a plurality of manners greater than in Morocco, where religious freedom is more restricted.

At the same time, they consider it is easier to practice Islam in Morocco because "Islam it is present everyday in everything":

[8] Vernet, Joan (2003): "Prólogo. Aproximación al Islam", in Roque, M. A. (ed.): *El Islam plural,* Icaria, Antrazyt IEMED, Barcelona, pp. 15-26.

[9] Eguren, Joaquín (2005): "El carácter transnacional de las familias inmigrantes en España", *Razón y Fe*, 1284. pp. 117-132.

to respect prayers and the Holy Month of Ramadan, for example, are less difficult there than in Spain. The most important social and political institutions help apply religious precepts.

As in 1.5 and half Generation focus Group, which stated: The Religion of Islam in Morocco and the Islamic religion here in Spain is different. *"There is a difference: here (Spain), the country is free and there (Morocco) it isn't. For example: you arrive here, you see your friends, you meet Spaniards, Spanish girls, and you go out with these girls and so on… But you arrive in Morocco, and immediately you forget all that. Of course, you arrive and start over in the religion. "* (Focus group 1)

7. The Transnational links and their influence on religion and familiar conviviality

As said previously, young girls often reject familiar traditional customs regarding gender relations that are practiced by their fathers and brothers. From their mothers, these daughters often see more sensitivity to the gender issues. The knowledge of current changes of the Mudawana Code in Morocco —about family and feminine personal status— helps them to maintain this attitude of rejection. Because of this, they compare gender equality within Morocco, specifically the equality available in the big cities of the south and some of the north (Tangier and Tetouan) against the smaller towns within the country.

This feeling of rejection brought about by the situation of unequal gender relations are shared by young Moroccan women in Spain and those still living in Morocco. But the expressions of this rejection take different forms and degrees, depending on the society. For example, this discourse is more expressive and clear in Spain than in Morocco.

"No, but I have good feelings with my Moroccan aunts and they are more sensitive than my father, you know? Because they don't follow some traditional practices, you know? I say that my father is not close-minded, but he is stuck in his ways." Focus group 3.

However, visiting their families and friends in Morocco creates distinct feelings. Some young people, especially those that were born in Morocco, and that have grown up there during their primary socialization, enjoy visits and vacations. But those that were born and were socialized in Spain frequently suffer a cultural shock.

"Because life, there, is very different than here. I'm not adapted to this form of life. And, there, you can't go alone. You can't visit a friend with the clothes I used to wear in Madrid. So, I can't take it anymore because if you go with your family- it doesn't matter. But, if you want to go alone, is not looked down on. Your family criticizes you." Hafifa, 23 years old.

These young women try to balance Moroccan cultural patterns with Spanish ones. It is possible to observe the difference between young women born in Spain and those born in Morocco. The first group has assimilated gender equality patterns and it is easy to see their interactions with boys. But the second group maintains a certain distance from them. Looking at the situation logically, the girls that were born in Spain have more confidence around boys, but they do not have an explanation why for the parents. The other group is more reserved because of routine family patterns and the separation of gender roles that are more present.

¨Here I have freedom. I can´t do everything that I want, but more or less. For example, until a certain time, I have to be home before midnight. My parents are a little old-fashioned. Even though I´m 19 years old". Jadiya, 19 years old.

The conversations in Morocco with family and friends, regarding religion and other themes, reveal that there is interconnectedness. Currently in Spain, a similar kind of conversation is occurring. This interconnectedness creates a "*transnational atmosphere."* Families and friends discuss how Islamic practices —and cultural patterns— are developing. Sometimes in Morocco, parents express admiration about their family and friends' children that are inhabitants of Europe, how well they regard and follow Islamic precepts. But they disapprove of indifferent attitudes towards Islam by the Second generation. While this occurs, these young people of the Second Generation talk and discuss these issues with their families and friends in Morocco, creating a common understanding. For example, related to traditional religious patterns that fathers and families impose on young women, the women of both sides try to help and support each other.

With the cousin in Tetouan we do talk about Religion. He tells me that he doesn't like what I say. But I'm allowed to say what I think. You know? I understand that he doesn't like it

but he was raised in Tetouan. It's a different way of living there. And besides, his point of view is not like mine…Because he is a believer. Often he explains it to me, not to convince me; just that he feels a certain way. We have a mutual discussion and we always get tangled up. Ha ha!". Malika, 22 years old.

8. Conclusions

The first conclusion is related to the transnational analysis that resulted in the connections and links that exists between young Moroccans and those from different countries. These transnational connections are providing religious authenticity in Spain and Morocco for the people living in both places. Understanding this reality, the majority of times that people experienced religion in a different location than their original country, such as those born in Morocco but currently in Spain; know the difficulties and possibilities of being Muslim in both locations. They are also know the value and can compare their lives with those that are non-believers or do not practice the Islamic faith.

Secondly, it is possible to confirm that the majority of young Moroccans that live in Morocco, and also the second generation Moroccan descendants consider themselves Muslim by an overwhelming majority. This makes us reflect why they consider themselves Muslim regardless of the political or religious conditions, even religious freedoms…

Third, it is worth identifying that the Muslim secular culture shows some type of respect towards the sacred world. This stands out, not just because they are confessed Muslims but because, in this sense, these young people coincide with the group in the 1970s and 1980s of leftist, atheist, and agnostic Moroccan college students that desired the university experience and immigrated to Spain.

Fourth, a model has emerged that can be defined as weak socialization (González Blasco, 2004, 120-163)[10]. The males, especially those born in Spain, maintain a series of cultural and religious guides, identical to the major part of the young Spanish population. In particular they show an interest in spirituality, but don't necessarily identify themselves as Muslim.

We also find that the majority of the youth born in Spain has a clear Islamic religious identification. They return to Islam to proselytize and to update themselves. Some of those are the organizers of associations or groups that are clearly Muslim and demand Islam in Spanish society with equal conditions as other religions.

Fifth, we conclude with the hypothesis that was previously used that the youth that arrived very early in life or were born in Spain look to build a reconciled position for Muslims, with Islamic values. They also seek, from Spaniards, tolerance and respect.

Finally, the present emergency of Spain's Second Generation in the religious field probably will play a role in the two segments of society: first inside the Islamic community and second in the entire society. In this first segment, the 1.5 and Second Generation of Maghribian roots are in a winning position to participate in the religious debate. Many of them are looking to combine Islamic traditional concepts and prescriptions with new theological points of views, discussed in the transnational Umma.

The second segment is a hinge group they desire respect and tolerance from society about their religious beliefs and to be recognized as a serious social agent. A representative number of them are creating specific Islamic associations —where frequent social and religious issues are present— with the idea to appear in the social game.

There is another ¨assimilated¨ group that, at the same time, shares a secularized attitude towards religion, similar to their young Spanish colleagues. They empathize with those that have similar religious and ethnic roots.

Still, regarding the Islamic proselytizers in the Second Generation, it is too early to develop a systematic understanding. There is a sensible perception and preoccupation, among the native society, because of the ancient prejudices and conflicts that are present as ghosts in their social imagery.

[10] González Blasco, Pedro (2004): "La socialización religiosa de los jóvenes", in González-Anleo, J., González Blasco, P., Elzo Imaz, J., Carmona, F., *Jóvenes 2000 y Religión* SM, Madrid.

Freedom of religion and worship places: visualization of religious pluralism at local level

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Abstract

The visualization of religious pluralism in the public sphere is a growing phenomenon in all major European cities, and one of the elements that most clearly reflects it is the proliferation of worship places for religious minorities. In many cases, these situations have been quite conflictive, generating bases that make coexistence at local level more difficult. Attitudes coming from public opinion and the speeches by public administration representatives have clashed with the demands of religious communities. These tensions describe a situation where a greater effort should be made to accommodate basic demands related to a human right such as freedom of religion. This article, based on a particular case, pretends to identify the basic fundaments that should be taken into account when the management of religious pluralism is faced at the local level.

Key words: Religious pluralism, worship places, human rights, coexistence.

Resumen

La visualización del pluralismo religioso en la esfera pública es un fenómeno creciente en las principales ciudades europeas, y uno de los elementos que lo refleja más claramente es la proliferación de lugares de culto de las minorías religiosas. En muchos casos, estas situaciones han sido muy conflictivas, generando así las bases para que la convivencia en el ámbito local sea más difícil. Las actitudes por parte de la opinión pública y los discursos de los representantes de la administración pública han entrado en conflicto con las demandas de las comunidades religiosas. Estas tensiones describen una situación en la que se ha de realizar un mayor esfuerzo para acomodar las demandas básicas relacionadas con un derecho humano como es la libertad de culto. Este artículo, basado en un caso concreto, pretende identificar los fundamentos básicos que deben tenerse en cuenta a la hora de gestionar el pluralismo religioso en el ámbito local.

Palabras clave: Pluralismo religioso, lugares de culto, derechos humanos, convivencia.

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Introduction

This article intends to offer a description and analysis of the current religious diversity existing in the Basque Country, on one hand, by determining the global scene of such plurality, identifying the main minority religious communities present in the Basque Autonomous Community (BAC), and on the other hand, by making a specific approach to worship places, which seems to be one of the main challenges of such diversity. There are scarcely any previous studies on this subject within the BAC, but its relevance and importance are growing from a public management perspective and as an element related to a fundamental right[2]. The purpose is to situate the main implications of worship places in relation to the public sphere of a democratic society and the response of its public powers in a society where religious diversity emerges as a current and future characteristic of it.

The article is structured in four parts. In the first place, we clarify the main legal-political elements that emerge when considering the establishment of worship places in relation to religious freedom. Secondly, a brief description of the evolution and actual (real?) situation of minority communities in the BAC and the metropolitan area of Bilbao is included. In third place, we highlight the main friction issues regarding worship places and the needs of religious minorities in the Basque context. Lastly, we conclude with some of the main challenges facing the management of this plurality from an inclusive perspective.

1. Religious Freedom and Worship Places

Religion is a complex phenomenon from the point of view of legal regulation and the design of public policies. Both Law and Politics have many difficulties when they have to regulate or plan an element, such as the religious one, which is closely linked to individual and collective identity. It is also difficult to create a generally accepted and valid definition of religion as well as tracing a map of religious communities or groups. On the other hand, the religious fact has not disappeared for the sake of modernity; on the contrary, it has burst into the public debate[3]. This "resurrection" of the religious fact occurs, indeed, in much more plural circumstances, with a wider range of religions. Therefore, as regards the simple definition of religion, it is firstly necessary to broaden it progressively in order to include new phenomena and expressions that do not coincide with the great traditional religious facts[4].

Nevertheless, it would be contradictory for democratic societies, which are based on the pluralism of opinions of any kind, to try to create a homogenous public space within the scope of the transcendental visions of life[5]. Therefore, leaving religious facts to the private sphere is neither convenient nor feasible from the point of view of the public administration, because religion participates in both the private and the public sphere simultaneously[6], bringing up claims, needs and implications in the public space and resources[7]. To sum up, the settlement of worship places is one of the main public projections and basic needs of religious communities.

2. Religious freedom and the current regulatory framework

Freedom of religion may be regarded as one of the first human rights to be conceived and developed in international legal regulations. The origin of its success is related to the division undergone in Western Europe after/as a result of the Protestant Reformation. In the 20th century, with the appearance of Human Rights International Law, freedom of religion was universally recognized. The Universal Declaration of Human Rights, ap-

[2] This paper is based on some results obtained in the HU2009-30 project financed by the Department of Education, Universities and Research of the Basque Government, as well as by two research agreements entered into between the public Foundation Pluralism and Coexistence, the Social Foundation Ignacio Ellacuria and the Human Rights Institute of the University of Deusto.

[3] López Camps, Jordi (2007): "La necesaria laicidad", *Revista Cidob d'afers internacionals*, no. 77, p. 181.

[4] Human Rights Committee, General Comment number 22, *The right to freedom of thought, conscience and religion (article 18), 30 July 1993*: Doc. CCPR/C/21/rev.1/Add.4, paragraph 2.

[5] Rovira i Llopart, Francesc (2007): "Espacio público y pluralidad de creencias", *Revista Cidob d'afers internacionals*, no. 77, p. 139.

[6] *Ibidem*.

[7] Novak, David (2009): *In defense of religious liberty*, ISI Books, Wilmington, p. 89.

proved in 1948, refers to religion in Article 2 (prohibiting any distinction) and specifically recognizes the universal freedom of religion in Article 18[8] of the Declaration. This same right was included in the International Covenant of Civil and Political Rights of 1966, as well as the European Convention on Human Rights of 1950 in Article 9 (very similar to Article 18 of the UDHR)[9].

One way or another, the religious fact is also present in the constitutional texts of the different European countries, according to each one's political tradition. As regards the Spanish legal system in force, the Constitution of 1978 includes an explicit acknowledgement of the freedom of religion as a fundamental right, a prohibition of discrimination based on religion and a declaration of absence of confession, which represents a mandate of fundamental separation between the State and religious entities. However, it is not opposed to institutional collaboration, explicitly recognizing the majority or traditional condition of the Catholic Church, which in turn does not impede State relations with other beliefs present in Spanish society[10]. The regulation of Article 16 of the Constitution is developed through two different channels:on the one hand, through the Parliamentary Law 7/1980, 5 July, on Freedom of Religion, and on the other hand, through the diverse cooperation agreements signed in 1992 between the State and certain churches or confessions, that is, with Muslims, Jews and Evangelists.

The **Parliamentary Law 7/1980**, of 5 July, on Freedom of Religion, is a rule approved in the early moments of the democratic period, and it lacks a development regulation. Concerning the content of the right to freedom of religion, Article 2 of the LOLR (in English, Parliamentary Law of Freedom of Religion) includes a series of individual capacities derived thereof. Collectively, the LOLR also covers the right of religious communities to establish worship or meeting places with religious purposes (Article 2.2.).

For the public authorities, the guarantee of this right is projected in a double way. Negatively, they are compelled to refrain from any intervention in the essential content of law. Therefore, both the Constitution and the law itself provide the possible limits to exercising the right to religious freedom of individuals and communities: maintaining public order, established as the protection of the right of others to exercise their public freedoms and fundamental rights, and in the safeguard of public safety, health and morality. But state obligations also have a positive side because the LOLR itself obliges public authorities to adopt the necessary measures to provide religious assistance in public centres, military centres, hospitals, social aid centres, prisons and others institutions under their responsibility, as well as religious education in state education centres. The LOLR also regulates the legal personality of Churches, Confessions and religious Communities and their federations in Spain. The Ministry of Justice is in charge of a public registry where their denomination, identification data, operation regime and representative bodies are recorded, just on an informative basis. All of the confessions included in this second point are included in this official recognition, either individually or within the framework of the Cooperation Agreements with religious confessions.

As regards these cooperation agreements, the LOLR provides that the State, taking into account the existing confessions in Spanish society, may conclude, where applicable, the Cooperation Agreements or Conventions with the Churches, Confessions and religious Communities that are listed in the Registry, and

[8] Article 18: "freedom to change his religion or belief, and freedom, either in alone or in community and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

[9] It can also be highlighted the Declaration of the United Nations General Assembly on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed on 25 November 1981, or the Framework Convention for the Protection of National Minorities, adopted by the Committee of Ministers of the Council of Europe in 1994, which recognizes the right of the persons belonging to minorities to practise their own religion and the State's obligation to adopt the adequate measures to promote full and effective equality of minority groups in society. At an international level, the Canadian framework is interesting for this issue; see Ruiz Vieytez, E. (2007): "Constitución y multiculturalismo. Una valoración del artículo 27 de la Carta Canadiense de Derechos y Libertades", *Revista Española de Derecho Constitucional*, no. 80, pp. 169-197.

[10] Article 16: "1. Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.

2. No one may be compelled to make statements regarding his or her ideology, religion or beliefs.

3. No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions."

that, owing to their extent and number of believers, they have achieved a relevant influence in Spain. Such agreements must be regulatorily transformed into a Law, subsequently approved by the Spanish Parliament. However, the Agreements established between the Spanish State and the Holy See on 3 January 1979 are considered International Treaties. The Cooperation Agreements of the State with the Federation of Evangelical Religious Entities of Spain, the Federation of Israeli Communities of Spain and the Islamic Commission of Spain are settled in their respective ordinary laws 24/1992, 25/1992, and 26/1992, all of them on 10 November 1992.There are differences between these agreements and the ones with the Holy from both a formal and material perspective. From the first point of view, the most outstanding difference is that the State's agreements with the Holy See have, as International treaties, higher passive legal force than the laws approved by the other three agreements in force with Muslims, Jews and Evangelists. It is also true that the latter cannot be modified without the consent of both parties; therefore, their transformation into a law must be carried out understanding that the Parliament must not exercise its right to introduce amendments thereto[11]. The three agreements apply to every community inscribed in the Registry of Religious Entities that is part of its respective federation. Among other issues, the agreements do mention some minor issues on worship places.

There is another level of recognition of religious minorities[12], which is defined as ***"notorio arraigo"***[13]. This is a prerequisite for reaching agreements with the State, but does not necessarily mean a step towards obtaining them. In the case of the previous three confessions, they had obtained this recognition before establishing the Agreements. ?? In fact/ Nowadays??, there are four other religions with this recognition: the Church of Jesus Christ of the Latter-day Saints (2003), the Jehova's Witnesses (2006), the Buddhists (2007) and the Orthodox Church (2010).

Now, if we descend the legal pyramid down to the autonomous or local sphere, we soon identify the regulatory moderation existing in the Basque Autonomous Community (BAC) as to this[14]. In any case, it seems clear that autonomous and local institutions are unaware of the need to develop regulatory or administrative measures that allow the exercise of religious freedom by the citizens belonging to religious minorities, or at least of those belonging to confessions with which the State already has collaboration agreements or that have been recognized as having *"notorio arraigo"*, all of them with a relevant presence in the BAC.

As regards Basque public institutions, the ignorance on the matter seems to respond to an alleged lack of jurisdiction. If, on the one hand, the trend was to confuse the fact of religious diversity with immigration or foreigners, it must be observed that these matters correspond basically to the central authorities, which would explain the lack of interest on the part of the autonomous or local institutions.

Regarding worship places, the right to have one is included in all the legal and human rights framework, therefore building them should not be a major problem nor should difficulties be encountered when opening one. But, it is clear that these are one of the most visible manifestations of religion in public space and, with regard to some minority religions, the projection of their worship places, in opposition to Catholic worship places, causes difficulties and friction between the religious minorities, public administration and neighbours[15].

In our particular case, if we look at the Spanish legal framework we see, on one hand, that under the municipal competences the possibility to transfer land for religious purposes exists, even though this has been happening mainly with the Catholic Church (which is the majority and with enough resources to purchase this kind of land). On the other hand and more closely related to minority confessions, another issue linked to the local

[11] Gimenez y Martínez de Carvajal, José (2001): "Las minorías Religiosas en España: Acuerdos de Cooperación como Marco Jurídico", in García Rodríguez, Isabel: *Las minorías en una sociedad democrática y pluricultural*, Universidad de Alcalá, Alcalá de Henares, p. 270.

[12] Díez de Velasco, Francisco (2010): "The Visibilization of Religious Minorities in Spain", in *Social Compass*, No. 57(2), pp. 246-249.

[13] Its meaning would be "those that have clearly taken root". To obtain this recognition two criteria are taken into account: the number of members and the spatial area of their presence.

[14] See a description of it in Labaca Zabala, Lourdes (2008): "La regulación del factor religioso en la Comunidad Autónoma del País Vasco", in García García; Ricardo (dir.): *La libertad religiosa en las Comunidades Autónomas. Veinticinco años de su regulación jurídica*, Institu d'Estudis Autonómics, Barcelona, pp. 603-645.

[15] Ferrari, Silvio & Pastorelli, Sabrina (2010): "The Public Space: The Formal and Substantive Neutrality of the Public Sphere", RELIGARE WP No. 4.

legal framework are the licenses needed to open premises for religious uses and the licenses for these activities. In fact the truth is that beyond what Article 2.2. of LOLR establishes, no more regulation can be found on worship places. There is no specific framework for religious activities; instead there is a diverse type of municipal regulations that makes obtaining licenses more difficult for communities of religious minorities, and this is a crucial issue for religious freedom[16]. At a local level this competence has only been developed by the Autonomous Community of Cataluña[17]. The Basque Government has expressed its will to pass a law on worship places in the first months of 2012, but for the moment this issue is in its preliminary stages.

3. Religious Pluralism: Some Facts on the Local Context

3.1. *The Basque Autonomous Community and religious diversity in the Metropolitan Area of Bilbao*

The presence of religious communities belonging to minority confessions in the BAC is a relatively recent phenomenon. Although in some cases the presence of such communities dates back thirty years, the last two decades have witnessed the appearance of most of the communities currently existing and the growth of the oldest ones. In spite of this, the invisibility of minority confessions remains a fact in our society. The possibility that in the following years the number of communities belonging to such confessions, and in a parallel way the number of members, keeps increasing is a fact that has a high probability of occurrence, as we can observe this same reality in other geographical areas of our environment. Therefore, we can state that the presence of these religious minorities is here to stay and will be part of the Basque society.

The analysis of minority religions in the BAC is difficult, given the lack of information thereon and the scarcity of surveys carried out on this reality[18]. The presence of religious minorities is a relatively new phenomenon, linked to the particular history of Spain. The historical, social and political evolution of these decades partially explains the perception of the religious plurality in the BAC, as well as its evolution and development. It was not until the arrival of democracy that spaces for freedom (of religion) started being opened. Such freedom was particularly developed with the Parliamentary Law of 1980 (LOLR, translated as, Parliamentary Law of Freedom of Religion). From that date Spanish society as a whole started its evolution "from a religiously Catholic society to a culturally Catholic society, where Catholic elements are part of the society's culture, which is getting rid of religious elements; people consider themselves Catholic, but their behaviour does not have a religious character"[19]. The irruption of many minority churches is happening again today and the creation of others is being materialized, mainly Evangelical ones in first place and Muslim ones in second place[20].

In addition to this, there are two phenomena that have promoted the growing religious plurality in the last years. The first one is secularization, both in terms of the separation of Church and State, and the reduction of practices and beliefs[21]. Secularization, among other aspects, affected the decline of Catholic population and its percentage in society. In that sense, many cultural elements linked to the Catholic Church gradually reduced their central presence in society; this fact brought about the decline in the number of Catholics. The second phenomenon, international migration movements, affects religious plurality in two ways. On the one hand, it causes an increase in the existing religious communities with the arrival of immigrants who previously share those beliefs of those communities. On the other hand, it "imports" new minority confessions, religions from the immigrants'

[16] Guardia Hernández, Juan José (2010): *Libertad religiosa y urbanismo. Estudio de los equipamientos de uso religioso en España*, Pamplona: Ed. Universidad de Navarra, pp. 303-308.

[17] Contreras, José María (2010): "El pluralismo religioso y los derechos de las minorías religiosas en España", in *Bandue-Revista de la Sociedad Española de Ciencia de las Religiones*, No. IV, pp. 92-93.

[18] Some of the few and more recent studies are: Perea, Joaquín and Sáez de la Fuente, Izaskun (2008): *Inmigración, identidades religiosas y diálogo intercultural*, IDTP, Bilbao and Ruíz Vieytez, Eduardo J. (dir.) (2010): *Pluralidades latentes. Minorías religiosas en el País Vasco*, Icaria, Barcelona.

[19] Pérez-Agote, Alfonso. & Santiago, José (2009): *La nueva pluralidad religiosa*, Ministerio de Justicia, Madrid.

[20] Ver Gonzalez-Anleo, Juan (2007): "El postcatólico español y el pluralismo religioso", in VV.AA. *El fenómeno religioso. Presencia de la religión y la religiosidad en las sociedades avanzadas*, Centro de Estudios Andaluces: Sevilla, pp. 57-77 and Urrutia, Víctor (2009): "Las minorías religiosas en España", *Inguruak*, No. 46: 67-80.

[21] Esteban, Valeriano (2007): "La secularización en entredicho", in VV.AA.: *El fenómeno religioso. Presencia de la religión y la religiosidad en las sociedades avanzadas*, Centro de Estudios Andaluces, Sevilla, p. 311.

places of origin that were previously inexistent in the host society. These two phenomena have occurred in a very brief lapse of time and, in that sense, the combination of both has produced a shift in the Basque society from being a homogenously Catholic society to a majority Catholic one where greater plurality can be observed, in terms of a greater diversity of confessions as well as a larger number of people that do not profess any faith at all.

In parallel to these phenomena and as an evident result, a proliferation of non-Catholic worship places has been taken place in recent decades, a fact which projects this new religious diversity in the BAC. As can be observed in the table below, the number of communities is distributed very unequally among the different confessions. There are a total of 214 communities, associations or congregations of each religious minority. In contrast to this, and to illustrate the presence of religious worship places in global terms, there are over 900 parishes of the Catholic Church in the same territory[22]. The number of members of each confession (Catholic Church and religious minorities) varies significantly, but the number of worship places helps to visualize the global picture.

Table 1

Distribution of minority religious communities with worship centres in the BAC by religious confession[23]

Confession	Number
Eastern and Orthodox Christianity	8
Reformed and Evangelical Christianity	96
Seventh-day Adventist Church	9
Jehova's Witnesses Church	32
CJCLDS-Mormons	4
Lectorium Rosacrucianum	1
Islam	38
Buddhism	15
Bahá'i Faith	9
Church of Scientology	2
Total	**214**

If the focus is applied more locally, precisely in the metropolitan area of Bilbao, it can be seen that the distribution of these religious communities is very similar to the BAC, as can be appreciated in the following table.

Table 2

Distribution of minority religious communities with worship centres in the metropolitan area of Bilbao by religious confession[24]

Confession	Number
Eastern and Orthodox Christianity	1
Reformed and Evangelical Christianity	57
Seventh-day Adventist Church	4
Jehova's Witnesses Church	14
CJCLDS-Mormons	2
Islam	12
Buddhism	6
Bahá'i Faith	3
Church of Scientology	1
Total	**100**

3.2. *Some characteristics of the communities of religious minorities*[25]

Beyond the quantitative data on communities of religious minorities, it is necessary to highlight some of the main facts concerning these communities. In order to complete their picture, the following pages provide a brief description of their main characteristics.

a) Eastern and Orthodox Christianity

The presence of Eastern and Orthodox communities and churches is tightly linked to the migration phenomenon, as the origin of their membership is strictly linked to their country

[22] This does not include chapels, monasteries or other religious institutions.

[23] Source: Ruíz Vieytez, Eduardo J. (dir.) (2010): *Pluralidades latentes. Minorías religiosas en el País Vasco*, Icaria, Barcelona.

[24] Source: Ruíz Vieytez, Eduardo J. (2010): *Idem.*

[25] The information contained in this section is mainly based on Ruiz Vieytez, Eduardo J. (2010): *Idem.*; on the "GESDIVERE (municipal Management of the Religious Diversity)" project, promoted by the Fundación Pluralismo y Convivencia (Pluralism and Coexistence Foundation) throughout 2009, as well as on the empiric work carried out in the research project: "La diversidad religiosa en el País Vasco: nuevos retos sociales y culturales para las políticas públicas" (Religious Diversity in the Basque Country: new social and cultural challenges for public policies), promoted by the Pedro Arrupe Human Rights Institute throughout 2009 and 2010.

of origin, basically: Serbia, Romania, Georgia and Russia. The most settled and largest community is the Orthodox Church of Romania. In the particular case of Bilbao, the Romanian parish meets in the nearby town of Derio, in a chapel transferred by the Catholic Diocese of Bizkaia.

b) Reformed and Evangelical Christianity

The high number of Protestant or Evangelical Churches included in tables 1 and 2 proves their importance among all the Basque minority confessions. An element that helps us to understand this wide range of communities is the fact that from its beginning Protestantism has been a plural and diverse confession, and this is also characteristic of the Evangelical community of Bilbao and the Basque Country.

The origins of the most ancient churches (Trinity Anglican Church and Spanish Evangelical Church) date from the end of the 19th century, when some foreign families moved to Bilbao for reasons of work and as a consequence of the industrialisation of the region. But it was not until the 1970s that these Churches started to grow. The different communities of Reformed and Evangelical Christianity included in the previous tables can be classified according to the following scheme:

Table 3

Reformed and Evangelical Christianity
in the Basque Autonomous Country

Denomination
Episcopal Reformed Church of Spain
Brethren Assembly
Evangelical Church of Spain
Baptist Churches
Pentecostal Churches:
— *Pentecostal Churches (FADE in Spanish, Federation of God's Assemblies of Spain)*
— *Evangelical Church of Philadelphia*
— *Other Pentecostal Churches and of recent implantation*

The ecclesiastical organization of these communities depends on the religious family they belong to and it is arranged into three basic structures, depending on the degree of centralization: Episcopal (greater centralization), Presbyterian and Congregational (greater decentralization). The former are hierarchically organized under the supervision of a bishop, and in the case of Bilbao and the Basque Country churches of this kind belong to the Reformed Episcopalian Church of Spain (IERE, in Spanish), which is linked either to the Anglican Communion or the Lutheran Church. The second, the Presbyterian communities are governed by a qualified body (Presbiterium), comprised of the pastor and a group of priests. The priests hold meetings in national or regional synods in order to make decisions for common actions. The Evangelical Church of Spain in the Basque Country has great similarities with this organization. The third kind, similar to the last one, is the Evangelical Church of Philadelphia. Lastly, the most extended organization system in the Basque Country is the congregational model, characterized by assemblies. On the other hand, the Evangelical Council of the Basque Country also exists (*Euskal Herriko Kontseilu Ebangelikoa*, CEPV-EHKE), founded in the 1980s and is run/works as a federation of various Basque Evangelical Churches. The doubts shared by the federated churches are processed through this Council. Some examples are the position adopted regarding regulation on the opening of premises to be used by churches and the use of worship places in public spaces such as hospitals, prisons, airports, etc. There are differences between the religious families in their particular reality in relation to their year of creation, origin of members and profile of their members.

As regrds the worship places, each community has its own particularity and situations therefore vary. There are communities that own the premises, while others have rental contracts. This usually depends on the degree of settlement of the community.

c) Other Christianity-based communities

The **Seventh-day Adventist Church** is a confession with relative tradition and whose first community emerged in the Basque Country in 1936, and currently has nine worship places located in different towns of the Basque geography (in the area of Bilbao, four). All of their worship places are of their own property and have been purchased by their own resources. The Adventist Church, apart from being registered with the Ministry of Justice, is part of the FEREDE.

The origin of the **Jehova's Witnesses Church** in the Basque Country dates from the end of the 1950s, when some precursors started preaching in San Sebastian and Bilbao, with discretion owing to the difficulties of those years. Currently there are 14 groups in the area of Bilbao and, regarding their worship places, the situation varies from one to another as some congregations own the property and others are renting the premises of the Kingdom Halls. In any case, they fund themselves and do not receive any funds from public institutions. Its degree of institutionalization and federation is high, mainly due to its own organization structure, which depends on central bodies. In 2006, this confession was recognised as "*notorio arraigo*" by the Ministry of Justice.

Finally, the **Church of Jesus Christ of Latter-day Saints (LDS)** was firstly implanted in the Basque Country towards/at the end of the 1970s. Since then it has grown slowly but constantly, and today is composed of 2 communities in Bilbao and Getxo. The worship places of this Church are their own property, having been acquired by their own private resources. The LDS's institutionalization degree is relatively high, mainly due to its highly organizational character. Its relative settlement is recognized by its acknowledgement as "*notorio arraigo*" from the Ministry of Justice.

d) Islam

Historical references offer little information on the presence of Muslim communities in the Basque Country before the 20th century. The first modern signs date from the 1970s, when some families from Maghreb settled in the industrial areas of Gipuzkoa and created the first Muslim community of the Basque Country. Since then, the main Muslim communities have been promoted by immigrants from Morocco and Algeria; therefore, *Sunni Islam* prevails among Basque Muslims. The presence of Islamic communities did not take off until the end of the 1980s and the beginning of the 1990s, with the growth of immigration. That is how the first Islamic community appeared in Bilbao (mosque *Badr)*, and from the end of the 90s the first Islamic communities are registered as such in the Religious Entity Registry of the Ministry of Justice.

It is worth giving special mention to the Socio-cultural Islamic Centre of the Basque Country, *Assabil*, the seed of the Union of Islamic Communities of the Basque Country (UCIPV, in Spanish,Unión de Comunidades Islámicas del País Vasco/*Euskal Herriko Islamiar Komunitateen Batasuna*), and regional member of the UCIDE (Union of Islamic Communities of Spain). This entity is part of the Islamic Council of Spain, a body in charge of the communications with the Spanish State.

There is a total of 12 worship centres of the Muslim community in the area of Bilbao, most of them in rental contract. The type of property, the neighbourhood where the premise is settled, the size of the space and the tidiness of the worship place will depend mostly on the degree of settlement of their members. In recent years some difficulties have been encountered in relation to the space of the premises and also the possibility of obtaining new premises.

e) Other minority confessions

As for **Buddhism**, the branch existing in the Basque Country is called Tibetan Buddhism and Zen Buddhism. These schools belong to the Mahayana tradition and their origin dates back to the 1980s when, after several years travelling to Buddhist centres in France, some Basque pioneers managed to establish the first associations in their own country. This confession was recognised as "*notorio arraigo*" by the Ministry of Justice in 2007. There are 6 centres in Bilbao, most of their members being native ones. These are small groups that grow very slowly, and as a result of this, their worship places are rented and not privately owned.

The origins of the **Bahá'i Faith** in the Basque Country go back to the 1970s when two families from Zaragoza settled in Bizkaia and created the first community. At present, there are three communities in the area of Bilbao, none of which is officially registered as such. They meet each in their own private houses and they have difficulties when trying to make reservations of public places for bigger meetings. This community is basically composed of native members.

Finally, in 2008 a centre of the **Church of Scientology** was founded in Bilbao, although its first appearance in the BAC dates from 1982. They have two premises in the Basque Country, both in rental contract. In relation to its public recognition, this Church was not acknowledged by the Ministry of Justice as a religious group until 2007, when it was finally officially registered.

4. Needs and Limitations Regarding Worship Places

The claims and needs of the minority confessions identified throughout the research provide some similarities for the different communities as a whole[26]. In that sense, with the exception of very few communities, the majority of them stress particular difficulties regarding worship places, especially in relation to finding a premises to house the worship place, obtaining licences to open the sites for their activities, and having special difficulties to obtain enough resources to open and maintain the worship place, among others. These needs and limitations of the communities and the legal framework can be divided into the following two aspects:

4.1. *General aspects*

The main general aspect related to the current legal framework and the difficulties of religious communities regarding worship places is the generalized ignorance of the existing regulatory framework. Such ignorance does not only occur among members of religious minorities, but also within the Basque public institutions, for whom religious diversity still seems to constitute an unaccepted phenomenon, or an issue simply concerning immigration and foreigners. The existing ignorance about minority communities may be explained chiefly by the structural weakness in some of them, the high presence of immigrant population in others or the lack of people trained in legal matters. However, the fact that the legal system is not specially detailed as to it is also important; therefore, the scarce existing rules do not offer solutions to the specific problems that appear in daily life. Minor initiatives have been taken in the last few years to fill this gap, but in our particular case, they still have not been widely spread[27].

In relation to this issue, one of the concerns expressed by the minority religious communities in the Basque Country is the absence of a clear speaker in the different public administrations (neither in the autonomic sphere nor in the regional or local spheres). Again, the certainty that the subject does not belong to their jurisdiction seems to prevail, and therefore, in case of a particular necessity, attention may be derived??? to religious communities, to units without any jurisdiction on the subject, especially the ones related to the management of immigration or the social integration of immigrants[28], which demonstrates the hasty connection established by administrations between the plural religious fact and modern migration movements. Undoubtedly, this relation exists, but limiting these claims to the tight management sphere handled by immigration technicians does not seem the most adequate policy. In this context of religious pluralism it is necessary to design new cooperation strategies among the public administrations, because municipalities do not normally have the necessary capacities to respond to some of the claims or situations submitted.

In any case, there is a repeated claim regarding the vagueness of functions and competences, which, according to many representatives, leads to arbitrary actions from the different administrations. The lack of specific regulations in the local and autonomic spheres increases the lack of both inter- and intra-administrative coordination. Within this framework, public employees' ignorance on how a specific theme must be addressed leads to diverging decisions; at least this is perceived as so. It could be said that the largest regulation problem existing for religious minorities is the legal insecurity caused by all the above mentioned.

4.2. *Specific aspects*

The shortage of worship places is one of the specific and possibly most urgent problems with a tough solution for many communities. Even though there is a global legal framework

[26] The sources are included in the publication, Ruiz Vieytez, Eduardo J. (dir.) (2010): *Pluralidades latentes. Minorías religiosas en el País Vasco*, Icaria, Barcelona; The research project "GESDIVERE (municipal Management of Religious Diversity)"; the results of a debate group comprising immigration technicians from Basque municipalities with a high percentage of immigrant population; and the participation in different workshops and discussion forums on religious diversity).

[27] The main step in this question is the activities and initiatives promoted by the Fundación Pluralismo y Convivencia (Pluralism and Coexistence Foundation), which, among other issues, has established an Observatory on religious pluralism in Spain, with many resources for communities and public administrations. Recently a Guide on worship places at local level has been edited to offer elements and good practices for public management.

[28] This is a position created by the Basque Government and which is present in several Basque town councils, as in the case of Bilbao.

for religious freedom rights, this does not focus on/deal with specific issues, and therefore makes it very difficult for religious minorities to carry out their basic activities and worship. As was previously mentioned, the Basque Government has taken an initiative to propose a Law on worship places, which still has not been presented to parliament and its scope is unknown. Hitherto, several specific difficulties have been identified among religious minorities in the Basque Country.

One of the first specific issues is the possibility of accessing a premise as it implies an economic capacity that the recently born communities cannot guarantee. This is a two-sided issue: on the one hand, there are communities wishing to open a premises for worship but are not able to meet all expenses required to adequate premises to the especial requirements demanded by urbanism departments of the municipalities; on the other hand, a very similar situation occurs with those communities whose worship places have become too small to hold all its new members and have special difficulties finding or obtaining a new place for worship.

Secondly, and in relation to this last issue, the communities consider the usual regulation to be unfair when applied to worship places. In that sense, the extent of license granting for the opening of sites for religious purposes is complex because there is not a specific regulation thereto. Particular difficulties have Muslim Communities, which cannot escape from prejudice in the new neighbourhoods where they find premises.

Additionally, in the specific case of some special celebrations where the use of public spaces is necessary for specific ceremonies such as weddings or baptisms[29], or important holidays belonging to the religious tradition of each community, these encounter additional difficulties when searching for public premises.

Despite all these difficulties, the cases in which the majority religion (Catholic) is in charge of providing adequate spaces for different confessions so that they can celebrate their worship are not few, and this is obvious as regards Orthodox communities[30]. Another example of accommodation of a particular need, especially for the Muslim Community, can be observed with the case of cemeteries. In the specific case of Bizkaia this claim was submitted through the Union of Islamic Communities of the Basque Country (UCIPV) before the Town Council of Bilbao and the Regional Government. Finally, the municipality of Bilbao agreed to the use of their own space in the cemetery of Derio for the Muslim community settled in Bilbao. However, this positive accommodation practice has not extended to other municipalities as yet.

5. Final Considerations

As previously stated, the public experience of religious diversity in the Basque Country can still be described as a recent one. This plural scenario that is already changing the face of Basque society as regards religious identity tends to consolidate itself and become deeper. This requires, from a human rights and an inclusive perspective, special attention being paid to minority religious communities, as religious Freedom is a fundamental right with broad recognition at state and international level.

Furthermore, to a great extent it can be supported that religious plurality has not been assumed by a politically relevant reality, neither by the society as a whole nor by the majority of the institutions representing it. Nevertheless, the accommodation of different religious identities, especially some of them which are a source of conflict owing to their number of members or their particular characteristics, is one of the most relevant challenges that European democratic societies must face urgently, and the Basque society is no exception. Therefore, a space for deeper thought must be presented in order to search for the keys to working out an alternative for accommodation or integration. As a result, it will first be necessary to take into consideration and assume religious pluralism as a natural and healthy condition of a democratic society.

Regarding the need for knowledge, the role played by the **social communication media** acquires great importance. Unfortunately, directly or indirectly discriminatory and stigmatizing discourses on some religious minorities add to the sparse information that the most widely broadcasted media usually provide on the minority religious reality. Discursive strategies of discrimi-

[29] It must be taken into account that celebrations such as weddings or baptisms have a highly communitarian character in some confessions, which increases the need for wide spaces.

[30] In this case it is worth highlighting the work carried out by the Ignacio Ellacuría Social Centre in Bilbao, from the Society of Jesus, leaving spaces both for prayer and other kinds of related activities.

natory potential are frequently detected and they strengthen the possible social prejudices existing against such minority religions. Religious diversity should not be exposed in media as something strange, but as an expression of cultural and identity richness in a modern, developed and complex society.

Concerning **recognition**, it points mainly towards the need to accommodate the existing institutions, rules and practices for the exercise of religious freedom of every person and group conforming society, without any limitation but respect for public order and others' rights[31]. The present reality, however, shows that the current legal and institutional framework is not especially useful for religious minorities because, in practice, these condemn many situations in which there is a high degree of doubt as regards the external manifestation of their religious freedom. A certain lack of institutional interest or information, added to a not very specific regulation framework, is the reason why its implementation may be unequal among institutions (for example municipalities), which in theory should follow the same action line.

In any case, **local public authorities** have not assumed the religious minority reality and their public responsibility towards it at all. It is necessary to avoid the mistaken confusion between the management of religious diversity and different phenomena such as immigration. It is also necessary to foster experiences of socio-institutional dialogue and mutual knowledge, as a participative process will undoubtedly produce benefits in the mid-long term, ensuring a better guarantee of the exercise of religious freedom and non-discrimination.

Finally, it is necessary to assume that at least some religious expressions cannot be reduced to private spheres or to institutional indifference, and due to their public projection worship places are a clear example of it.

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[31] In this sense, it may be interesting to consider the potentialities of Canadian experience in relation to accommodation; see Ruiz Vieytez, E. (2009): "Crítica del acomodo razonable como instrumento jurídico del multiculturalismo", *Cuadernos electrónicos de filosofía del Derecho*, no. 18, pp. 1-22.

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1. Articles must be unpublished originals, and uncommitted to publication elsewhere, and the subject must be related to the ones of the yearbook. The language for submission must be Spanish or English. Articles will be peer-reviewed.

2. The documents should be of between 10,000 and 12,000 words in length for articles, a maximum of 2,500 words for case studies and 500 words for book reviews; they should be printed on A4 paper, 1.5 line spacing, including graphs, charts, tables, notes and bibliography.

3. Articles will be sent during the natural year, electronically in 12-point Times New Roman, to the address indicated in the back cover. Publication will depend on the positive evaluation of two reports made by peer-reviewers related to the subject of the article. The response on the evaluation will be communicated in less than three months.

4. The first page should include the following: the title, the author's full name, address, telephone number and email address, as well as the author's institutional affiliation and the way in which he/she wishes this to be stated. All articles should include an abstract of the text (maximum 150 words), as well as the relevant keywords.

5. All graphs should be correlatively numbered, bear a title and the relevant source. The same requirements apply to charts and tables. An exact reference of the place in which the graph, chart or table is to be located should be included in the text.

6. Abbreviations should be accompanied by their corresponding full form the first time they are used, e.g. United Nations High Commissioner for Refugees (UNHCR).

7. Footnotes should be found at the bottom of each page, and bibliographical references as follows:

Books: Last names,. Coma. Name. Year. Title of the book in italic. Coma. Number of edition. Coma. Editorial. Coma. Place.

Articles: Last names,. Coma. Name. Coma. Title of the article with quotation marks. Coma. Title of publication in italic. Coma. Volume and number of journal. Coma. Year. Coma. Pages.

Examples:

Arnson, Cynthia (1990): *Comparative Peace Processes in Latin America,* 1.ª ed., Woodrow Wilson Center Press, Washington.

Martin, Steven (2007): "The United Nations and Private Security Companies: Responsability in Conflict", *Yearbook on Humanitarian Action and Human Rights*, 1, pp. 89-108.

When an author and a reference are quoted several times, it is not necessary to repeat all the information:

If quotations are consecutive it will be used the abbreviation "Ibid.", example:

Arnson, Cynthia (1990) *Comparative Peace Processes in Latin America,* 1.ª ed., Woodrow Wilson Center Press, Washington, p. 25

Ibíd., p. 35.

If quotations of a same reference are repeated, but are not consecutive "op. cit" abbreviation will be used, example:

Arnson, Cynthia (1990): *Comparative Peace Processes in Latin America,* 1.ª ed., Woodrow Wilson Center Press, Washington, p. 25

Martín, Steven (2007): "The United Nations and Private Security Companies: Responsability in Conflict", *Yearbook on Humanitarian Action and Human Rights*, 1, pp.89-108.

Arnson, Cynthia, *op. cit*., p. 45.

Normas para la presentación de originales

1. Los artículos deberán ser originales e inéditos, su publicación no debe estar comprometida en otro medio y la temática debe estar relacionada con la del Anuario. El idioma para la presentación de originales será el castellano o el inglés. Los artículos serán sometidos a evaluación de pares.

2. La extensión de los trabajos será de entre 10.000 y 12.000 palabras para los artículos, en papel DIN A4, a un espacio y medio, incluyendo gráficos, tablas, notas y bibliografía.

3. Los artículos serán enviados a lo largo del año natural, en soporte informático, Times New Roman 12, a la dirección del Instituto indicada en la contraportada. Su publicación dependerá de la evaluación positiva de los informes confidenciales elaborados por evaluadores externos relacionados con los temas del trabajo. La respuesta de la evaluación se hará en el plazo máximo de tres meses.

4. En la primera página se indicará: título del artículo, nombre y apellidos, dirección, teléfono y correo electrónico, así como su filiación institucional del autor y la forma en que desea que aparezca. Todo los artículos deberán incluir un resumen del texto (máximo 150 palabras), además de las palabras clave del mismo.

5. Todos los gráficos deben estar numerados correlativamente, llevar título y la fuente correspondiente. Los mismos requisitos son aplicables a cuadros y tablas. En el texto se deberá indicar la referencia concreta del lugar en el que debe incluirse el gráfico, el cuadro y la tabla.

6. Las siglas irán acompañadas del nombre completo la primera vez que se citen en el texto, y entre paréntesis. Ejemplo: Alto Comisionado de Naciones Unidas para los Refugiados (ACNUR).

7. Las notas, deberán ir a pie de página, y las referencias bibliográficas tendrán el siguiente formato:

Las **referencias bibliográficas** se citan con una nota a pie de página de la siguiente forma:

Libros: Apellidos. Coma. Nombre. Año. Título del libro en cursiva. Coma. Número de edición. Coma. Editorial. Coma. Lugar.

Artículos: Apellidos. Coma. Nombre. Año. Título del artículo entre comillas. Coma. Título de la revista en cursiva. Coma. Volumen y número de la revista. Coma. Página inicial y final.

Ejemplos:

Sampedro, José Luis (1972): *Conciencia de subdesarrollo*, 1ª ed., Salvat, Barcelona.

Sampedro, José Luis y Martínez Cortiña, Rafael (1969): *Estructura Económica. Teoría básica y estructura mundial*, 1.ª ed., Ariel, Barcelona.

Ejemplo de referencia de artículo publicado en revista:

Sampedro, José Luis (1969): «Una visión del subdesarrollo hace 30 años», *Revista de Economía Mundial*, 1, pp. 135-143.

Cuando un autor y una obra se citan varias veces, no es necesario repetir todos los datos:

Se usa la abreviatura «*Ibíd.*» si las citas son consecutivas. Ejemplo:

Sampedro, José Luis (1972): *Conciencia de subdesarrollo*, 1.ª ed., Salvat, Barcelona, p. 25.

Ibíd., p. 35.

Se usa la abreviatura latina *op. cit.* a continuación de la misma obra, si no son citas consecutivas. Ejemplo:

Sampedro, José Luis (1972): *Conciencia de subdesarrollo*, 1.ª ed., Salvat, Barcelona, p. 25.

Sampedro, José Luis y Martínez Cortiña, Rafael (1969): *Estructura Económica. Teoría básica y estructura mundial*, 1.ª ed., Ariel, Barcelona, p. 20.

Sampedro, José Luis, *op. cit.*, p. 45.

Anuario de Acción Humanitaria y Derechos Humanos 2011
Yearbook on Humanitarian Action and Human Rights 2011

El Anuario de Acción Humanitaria y Derechos Humanos pretende facilitar un espacio de reflexión e intercambio sobre las prácticas, experiencias e investigaciones que se producen en el ámbito de la Acción Humanitaria y los Derechos Humanos. Los estudios y textos aquí incluidos intentan recabar el interés de académicos, profesionales, activistas de movimientos sociales y otras personas interesadas en este campo. El contenido de esta edición especial del Anuario se nutre de las aportaciones realizadas en dos seminarios mantenidos en el marco de la red IMISCOE.

The Yearbook on Humanitarian Action and Human Rights aims to provide a space where the reflection on and exchange of the work, experiences and research in the sphere of Humanitarian Action and Human Rights is made possible. The studies and texts included in this edition intend to be of the interest for academics, professionals, social movement activists and other people connected to this field. The contents of this special edition of the Yearbook are fostered by contributions made in two workshops in the framework of the IMISCOE Network.

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