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RELIGIOUS DISCRIMINATION IN LABOR RELATIONSHIPS

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ABSTRACT: This paper deals with a reflection around discrimination based on religious factors, especially in labor relationships, from a legal perspective. Thus, the goal here was to recognize the main focal points of the working class man's religious discrimination. We intend to demonstrate that one can't ask of the principles of equality and nondiscrimination more than they are already capable of offering. This reflection plan goes about perfecting opportunities to the level of articulation between anti-discriminatory attitudes and religious freedom.

KEYWORDS: freedom of religion, discrimination, labour law

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INTRODUCTION

One of the most controversial subjects that can be found in labor relationship fields is the issue that concerns religious freedom of the workers (Fahlbeck 2004, 28). It is a subject whose discussion, serious and considerate, is relatively recent but that starts to have a bigger and more outstanding occurrence in the labor world. In fact, modern societies experiment a certain fragmentation and diversification of the religious phenomena (Valdés Dal-Ré 2006, 575-576) since the cultural and religious monolithism from other ages gave place, gradually, and in part by virtue of the massive immigration of workers of Islamic faith, to a strong religious pluralism (Gomes 2007, 295).

Truthfully, there is a growing number of disputes related to religious freedom at the various stages of the employment procedures that can go from the struggle against discriminatory behaviors for religious reasons to real duties confrontations: duties that appear in the religious sphere and duties regarding the execution of the employment contract.

The question is to consider the effectiveness of fundamental rights in the field of labor relationships and once the recognition of rights such as religious freedom cannot leave a legal relationship that was conceived without taking them into account or, at least, without highlighting them unchanged. (Abrantes 2005, 19).

And one cannot talk about freedom of consciousness, religion and cult without mentioning a stone principle of any constitutional system that it is closely related to it: the *principle of equality and discrimination prohibition*, based on religion.

THE ANTI-DISCRIMINATION TUTELAGE FOR RELIGIOUS REASONS

Starting up from the centrality of equality and nondiscrimination when it comes to discuss religious freedom, we will make a roadmap of some legislative contents that seek to regulate the dynamics underlying the two realities.

In generic terms we can assume the existence of several legislative instruments that consecrate discrimination's prohibition for religious reasons, at international level, European or even national law within the Member-States.

Let's see, first of all, that the *Labor International Organization* itself, in an official report dated from May 12 2003, showed the types of discrimination for religious reasons that can be found in the workplace: "aggressive behavior by

colleagues or superiors before members of religious minorities; absence of respect and ignorance for religious customs; obligation to work during religious holidays; bias in the field of recruitment or promotion; refusal of licenses and disrespect for clothing".

To what concerns European Union Law, we can start to say that the *Charter of Fundamental Rights of the European Union* (CFREU), states, in its article 10 the right for freedom of thought, consciousness and religion, being that this right includes "the freedom to change religion or belief, and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance."

Also in the *European Convention on Human Rights* in its article 9, it is proclaimed that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance".

In this plan, the tutelage of discrimination will be continuously formed at a pace until it reaches a certain stage of solidification "as a consequence of the hermeneutic activity performed by the Court of Justice of the European Union, whose doctrine influenced in a considerable way the Amsterdam Treaty" (Núnez-Fernandéz and García Testal 2010, 221). The Treaty then starts to proclaim the respect for human dignity, freedom, democracy, equality, with special distinction for minorities' rights. Accordingly, the Treaty of Amsterdam represents a milestone because it started to consider that these values are common to the member states of a society characterized by pluralism, nondiscrimination, tolerance, justice, solidarity and equality between women and men.

These new outlines were to be seen in the primary law in two distinct dimensions: on the one hand, through the extending of the scope of the protection based in gender registered by the new article, the article 141 ECC on the version of the Amsterdam Treaty (article 157 of the Treaty of Lisbon); on the other hand, in its subjective scope, through the introduction of the article 13 (article 19 of the Treaty Lisbon) on which it is foreseen the prohibition of discrimination by reasons of sex, racial origins, ethnic, religion or beliefs, deficiency, age, sexual orientation but it also contemplates a principle of non discrimination in generic terms.

We are standing before a "modern anti-discriminatory construction of political and judicial character (legislative and judicial) of the European Union" (Núnez-Fernandéz and García Testal 2010, 222), where the objective and subjective scope of the tutelage against discrimination was extended and the concepts of direct and indirect discrimination already consolidated by the jurisprudence of the Communities' Court of Justice were incorporated.

In terms of secondary law, the *Directive 2000/78/EC*, of 27th November, establishes a general framework for equal treatment in employment and occupation and also regulates, therefore, freedom of religion under the prism of nondiscrimination (López and Gallego 2001, 131-141). It can be said that the community standard does not have as its exclusive object the treatment of the principle of nondiscrimination by religious reasons but it includes other reasons, for example, beliefs, age, sexual orientation, and because of that it was not equated to an exclusive projection about workers' religious freedom, limited to ensure nondiscrimination (direct or indirect) and the equality of treatment, through positive actions, but never recognizes the worker's religious freedom in order to model its labor obligations and much less places on the employer the obligation to adapt the company's organization to the beliefs of their employers (Férnandéz Alvaréz 2007, 86).

Amongst the goals of the Directive 2000/78/EC we can find the battle against discrimination based on religious reasons in what concerns employment and professional activity, towards putting into practice amongst the Member-States the principle of equality of treatment (article 1). This preoccupation results from the fact that the discrimination based on religion or belief "may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons" (Whereas 11).

And to achieve such purpose, there must be forbidden in all Union any means of direct or indirect discrimination, based on religion or convictions, amongst others, in the fields covered by the directive. Moreover, "this prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the

entry and residence of third-country nationals and their access to employment and occupation" (Whereas 12).

However, the Directive authorizes that Member-States, on an exceptional basis, to provide "a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate" (Article 4 (1) of the Directive).

Anyway, as GOMES alerts, the question arises of knowing if "this number 1 can be applied to religion, seeing that, to a sector of the doctrine, the number 2 of the same precept introduces a detour, being more demanding than number 1" (2007, 301). In fact, the number 2 of the Article 4 of the Directive, referring to churches' professional activities and other activities, public or private, whose ethics are based on religion or beliefs, establishes that the Member-States may keep the national legislation in force at the date of adoption of Directive, or create new legislation that incorporates existing national practices to the date of adoption of Directive, according to which a difference of treatment in those institutions is not discriminatory even though based on religion and other beliefs when these represent a legitimate professional requirement, genuine and justified, attending the organization's specificities. That is why the doctrine, following such understanding, believes that it will not be discriminatory "the demanding that the worker that is hired to ritually slaughter animals in a *kosher* butcher must be a Jew or that it the teacher of moral and catholic religion course in a school must be Catholic" (Gomes 2007, 302).

Although the preoccupation demonstrated by European Union Law around discrimination on religious grounds, we think that this Directive ends up having a short range towards what would be expected before the demands of a society increasingly marked by religious pluralism, particularly the employer's duty to strive to adapt, respecting criteria of reasonability, the company's organization towards the religious beliefs of their employees. Thus, in line with ÁLVAREZ, we repeat that the 2000/78/EC Directive itself, of 27th of November, that establishes a general framework of equality of treatment in employment and professional activity foresees in its Article 4, number 1, that "the Member-States may predict that a difference in treatment based on a characteristic related to any of the reasons for discrimination

referred on the 1st article shall not constitute discrimination whenever, due to the nature of the professional activity in question or of the context of its execution, this characteristic constitutes and essential and determinant requirement to the exercise of this activity, on the condition that the objective is legitimate and the requirement is proportionate", which includes, obviously, reasons related to certain religious practices (2007, 83).

This fact denotes a certain shyness on the protection given by European Union's law to religious freedom to the employed worker, as such.

As far as internal law is concerned, throughout all Europe the constitutional forecasts of the Member-States are recognizing the freedom of religion and the prohibition of discrimination based on such ground. Let's see.

In the *French legal system*, the Constitution proclaims equality before the law to every citizen, without origin, race or religion distinction, respecting all beliefs (Article 1). The 1946 Constitution's preamble itself sustains that no one can be harmed based on their beliefs, to the extent that every human being, without distinction of race, religion or belief has sacred and inalienable rights. And the Republic respects all beliefs.

Concerning the *Italian legal system*, the Constitution establishes that all citizens are equal before the law without distinction to sex, race, language, religion, political opinions and personal and social conditions (Article 3). In coherence to such purpose it is also proclaimed that every person has the right to freely profess religious faith individually or collectively (Article 19).

The *Spanish Constitution* consecrates the principle of nondiscrimination based on birth, race, sex, religion, opinion, or any other condition or personal or social circumstance (Article 14). It also recognizes, jointly, the liberty, ideological, religious and of cult, clarifying that no one can be compelled to testify about ideology, religion of beliefs (Article 16).

In the *Portuguese legal system*, the freedom of consciousness, religion and cult is recognized on the Article 41 of the Constitution, consecrating three distinct but related rights. Associated to this freedom is also the principle of equality and prohibition of discrimination, based on religion, political ideologically beliefs (Article 13).

From what we have seen and despite the current recognition at an international and constitutional level of religious freedom, its exercise is not peaceful at all, as we shall see.

PERSPECTIVES OF ARTICULATION BETWEEN RELIGIOUS FREEDOM AND NON-DISCRIMINATION

Nowadays we can state that the tutelage of fundamental rights is following an increasingly wider and demanding model on what concerns equality, as a right in itself but also as a condition to the exercise of other fundamental rights (Rodriguez Piñero 2003, 211). It has become clear that the recognition of equality can be seen found amongst the major concerns of the European Union in recent years.

However, we believe that the recognition of religious freedom in labor world is marked by a certain shyness since, traditionally, its statement is based only on the principle of equality and nondiscrimination, which is not capable of assuming itself as the solution to all evils. According to this stone principle, no employer can be discriminated against in access to employment or in the exercise of a profession by virtue of their religious beliefs. Thus, the associated rights to religious freedom of the employer are usually protected having into account the fact that the employer cannot treat the employee any better or any worse by reason of their beliefs, either by granting him worse conditions of work or promoting the termination of the contract.

Note that according to PATRICK RÉMY's testimony (2004, 10), the *Cour de Cassation* on the analysis of particular case decided that, not having been proved that there had been discrimination by the employer, the female employee could only invoke her religious freedom against the expression of her beliefs since those same beliefs had been integrated into the contract (RTDC 2003, 290).

RELIGIOUS MINORITY COMMUNITIES

In matters of religious freedom, one cannot palm the fact, actuality culturally normal, that the fundamental ideas in Europe are strongly supported by the catholic tradition since the weekly rest day coincides, except in certain situations related with business organization, with Sunday. This means that the religious minority communities are the target of discriminatory treatment on what concerns the weekly rest day and other holidays. Think, for example, the case of a seventh day Adventist

worker that missed, without excuse, on a Saturday because this is the weekly rest day according to his religion. There will be, then, the need to ensure and guard the interests of that employee because "although we find ourselves before judicial differences, it doesn't mean that it is violated the principle of equality. On the contrary, these serve the substantive constitutional principle of ensuring all citizens an equal measure of dignity and liberty" (Machado 1996, 293).

It is therefore clear the lack of protection of the religious minority communities and, for that reason, we believe that it is essential to take into account mechanisms to an effective equality in the exercise of religious freedom, pondering more vehemently the interests of workers belonging to a minority religion.

It follows that "the freedom of conscience and of religion supposes not the right to freely form their own consciousness as the right to act in a manner as to their own convictions and/or beliefs, as well as, adding now, the right of not be compelled to act in disagreement with the imperatives of their own conscious" (Reis 2004, 99). This takes us to question if a worker, invoking his constitutionally guaranteed right to freedom of consciousness and of religion may, legitimately, not fulfill a certain labor obligation to which he has obliged in contract.

MEANS OF STATING RELIGIOUS FREEDOM

The stating of religious freedom can be manifested in organizing working time, particularly in those cases where the worker's professed religion imposes that a certain day is destined to rest or to practice of a certain ritual. Noted that the UNO's Declaration of 25th November of 1981 concerning the elimination of all forms of discrimination and intolerance based on religion and beliefs, refers itself to the freedom of observing the days of rest and to the celebration of holidays and ceremonies, according to the precepts of religion and creed (Article 6).

The European Court of Human Rights has already deliberated on the subject in the *Konttinen* case, related to the dispute between an employer and an employee who turned to be a member of the Seventh Day Adventist Church and claimed that he would not work from sunset on Friday to sunset on Saturday (Sabbath), ending up f being fired due to over absenteeism (*Tuomo Kontinnen versus* Finland case, December 3rd 1996). In this case in particular, the court decided that what was really in dispute was a dismissal based on faults and not one based on the worker's religious

beliefs, since, in the event of incompatibility between religion and work, he would have the liberty to resign. This is clearly a reductive and unsatisfying response based on an elementary argumentation against the scale of the problem. It is curious to note that, also in France it was considered justified the dismissal based on absenteeism of a Muslim employee on a cult day prescribed by her religion (*Aid-al-Kabir*).

In Spain, a case where a believer of the Seventh Day Adventist Church wanted to enjoy the weekly rest day on Saturday and not on Sunday as the rest of the workers, the Constitutional Court considered that the employer could but was not obliged to accept such demand (Judgment of the Spanish Constitutional Court – CT number 19/85). In this particular case, the court argues that the Constitution forbiddens the employers of a «contrary enforceability» to the fundamental rights of the workers but also doesn't force them to submitting the structuring of productive organization to exercise those rights.

Apart from the impediment to work in some days of the week, we can also look at relatively similar situations concerning the matter of praying at work. In principle, the worker is free to pray whenever he wishes but there is not a clear duty for the employer to facilitate that exercise. Even on what concerns the places to pray inside the company, it all depends on the employer's will and, obviously, the dimension of that company. Being that as it is, according to BRISSEAU, the employer can sanction workers that insist on praying with losses to the execution of the contract, to the prosecution of the company's activity or even to its image (2008, 975). But the same author enhances that the interdiction to pray inside the company cannot be an absolute interdiction but only in relevant cases and for objective reasons considering, however, that, if this practice occurs in working time or is contrary to the security requirements, may be prohibited.

Also the European Court of Human Rights has pronounced itself over the use of religious symbols. In fact, in the case *Dahlab vs. Switzerland,* 2001, faced with the pretence of a primary school teacher that wanted to use the *Hijab* (Islamic head scarf), the ECHR held that the use of the scarf was not compatible with the equality of gender (and whose implementation must be prosecuted by the Convention's Member-States) and that, on the other hand, it would be a very strong omen to use in front of easily impressionable children (case *Lucia Dahlab vs.* Switzerland, February 15th 2001). From the decision, we now quote the following rather curious statement: "it seems difficult to reconcile the use of Islamic scarf with the message of tolerance,

respect for one and other and, above all, equality and non-discrimination that all teachers, in a democratic society should transmit to their students".

Before this last case, we tend to join the position sustained by GOMES when he questions the statement of supposed superiority of gender equality about religious freedom since the guarantee of religious freedom is also "one of the main scopes of a democratic society and a main aspect of a true cultural pluralism" (Gomes 2007, 308). In fact, the use of the *Hijab* (Islamic head scarf) is not a clear signal of a repressive and discriminatory attitude against women. We believe that, like in any culture, there is the option to follow the conventions laid down by that same culture in which we were educated (Onok 2005, 991). We entirely share the opinion that "the use of certain religious symbols or clothing does not have the same meaning in several religions, this should be taken into account when they are regulated by the same tuning fork in such dispersed realities" and "despite the symbolism of the scarf, or the sexual discrimination which underlies therein, this is only another religious symbol included in the sphere of the right of manifestation of religious beliefs" (Guerreiro 2005, 1109). In fact, for many believers the use of the scarf or other clothing or symbols is not always the result of an option, for instance a choice but rather as "something that is part of their own individuality" (Guerreiro 2005, 1109). The use of religious symbols is not always the result of rationally taken decisions but the outcome, most of the time, of an obligation from the divine (Cumper and Lewis 2008, 299).

For all this reasons, in a logic of manifestation of religious beliefs, we are inclined to be suspicious towards any demand from the employer to the employee of not using religious symbols based on the argument that it disturbs the company's peace or that it may scare away some clients.

In these cases of conflicts or fundamental rights collisions there is the clear need to try to establish a practical accordance between those rights. As such, it is required that the differences are resolved based on the religious balance of the worker and the liberty of the employers private economical initiative. As the description of GOMES illustrates, which is based in the French jurisprudence, the employer can often avoid liability from the responsibility of discriminatory attitudes based on religious beliefs because, deep down, this discrimination is based on the expectation of customers "for more prejudicial and xenophobic that this clientele may be" (Gomes 2007, 303). Accordingly, let's note that a sales woman, selling fruits and vegetables, at a shopping

mall was prohibited of using a Muslim scarf, although she had already presented herself using that scarf in the interview, based on the argument that from the workers dealing with the general public is demanded neutrality or, at least, some discretion about their religious beliefs. It is, as we believe, a solution marked by some concealment since the employer throws the responsibilities over to someone that cannot be blamed – the clientele.

WEAKNESS OF THE PRINCIPLE OF EQUALITY AND NONDISCRIMINATION

From what has been said, we believe that the workers' religious freedom reduced to the principle of equality and nondiscrimination by religious reasons, insofar that it is not an absolute principle because it allows the introduction of differences when the circumstances justify it, which is exactly the case of the unfulfillment of those duties related to the execution of the working contract. We believe that the principle of equality and nondiscrimination, *per si*, does not have enough strength to mold labor relationships.

Traditionally, the conflicts between the worker's religious freedom and the employer's right of private economic initiative, result in the sacrifice of religious freedom. All of this due to the fact that the affirmation of religious freedom in labor environment may be seen as a valid factor to impose a differentiated treatment and not as a discriminatory practice, since that attending to the worker's religious beliefs could be reduced to a discriminatory performance in front of the rest of the employees that do not profess to any religion.

The reductive understanding of the worker's religious freedom finds grounds in some jurisprudence that treats the matter of the fundamental right to religious freedom. Let's see, for example, that the Spanish Constitutional Court admits with no reservations the worker's right to not reveal his beliefs or of not participating in certain religious celebrations and, in general, of not being discriminated by religious reasons (Spanish CT Judgment number 101/2004, June 2nd). But it already understood that the religious freedom cannot be invoked in order to let the worker excuse himself of certain labor obligations, voluntarily assumed, when these interfere with their religious beliefs and much less considers that falls over the employer the obligation of adapting the company's organization to the religious duties and practices of their workers (Spanish CT Judgment number 19/1985, February 13th).

Thus, we believe that the perspective to be adopted in the question's analysis must come from articulation between the worker's religious freedom, with special focus in equality and nondiscrimination, and the employer's duty of adaptation.

CONCLUSION

As to the question over which we sought to reflect, one that is embodied in a trilateral dialectics (religious freedom – equality and nondiscrimination – employment contract), we believe that, more than attending to a logic of almost mathematics of the prohibition of discrimination, it is necessary to respect the worker's dignity without conditioning that same dignity to mere contractual dogmatic.

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