

## **The principle of secularity as a neutral approach and the indirect religious discriminations in the employment relationship**<sup>§</sup>

### ***Il principio di laicità come neutralità e le possibili discriminazioni indirette nelle relazioni lavorative***

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#### *1. Introduction*

According to Article 1 of the Italian Constitution «*Italy is a democratic Republic founded on labour*»; Article 2 states: «*The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed (...)*»; Article 3 protects all the citizens against discriminations founded, among the others, on religion and affirms the duty of the Republic to remove those obstacles which constrain the freedom and equality of citizens, thereby impeding the full development of the human person; Article 4, par. 2: «*Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society*»; Article 8: «*All religious denominations are equally free before the law*»; finally, Article 19 provides: «*Anyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality*».

In the light of these Constitutional provisions, it emerges the relevance of:

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§ Claudia Carchio is the sole author of paragraphs 2, 3.

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1) the working environment as one of the most important public places where each person might express their own personality;

2) the personality of each citizen, which is composed of many aspects, includes the religious sphere or sentiment<sup>2</sup>;

3) the religious freedom deserves a specific protection properly within the workplace as the deep involvement of the person into the labor relationship has an impact on each one's faith: in fact every creed does not only impose liturgical rules, but also lifestyles, behaviors and daily practices that produce many implications on employment relationship<sup>3</sup>.

However, what the Constitution does not say is how this freedom should be protected within the workplace and which are the best tools to effectively achieve the constitutional principles.

The paper will try to provide an answer to this question.

## 2. *The pluralist and proactive conception of the principle of laicism in Italy*

The Italian Republic is a non-confessional state. This principle stems from those constitutional provisions that recognize the widest freedom of religion, state the equal freedom to all religious confessions and exclude the profession of a certain religion as a ground of legitimate discriminations among citizens<sup>4</sup>. Since 1989, the Italian Constitutional Court has stated, on one hand, that the principle of secularity is one of the supreme principles (judgment n. 203/1989). On the other hand, the Court affirmed that: «*the intervention of the public authorities aimed at making possible or facilitating cult activities - such as the manifestation of the fundamental and inviolable religious freedom set by Article 19 of the Constitution - must be compliant to the supreme principle of secularity, which implies not indifference to religions, but the role of the State as a guarantor of the freedom of religion, in a regime of confessional and cultural pluralism*»<sup>5</sup>.

According to these indications, the Italian Republic is a secular State. It does not mean that the state is not involved into religious issues, considering them a private matter of its citizens, but in the sense that it recognizes the equal freedom of all religious denominations before the law and the widest freedom of conscience and worship. Regarding the civil effects as well, the state cannot discriminate citizens on the ground of the religion they profess<sup>6</sup>.

<sup>2</sup> P. BELLOCCHI, *Pluralismo religioso, discriminazioni ideologiche e diritto del lavoro*, in *Arg. dir. lav.*, 2003, 1, 157 ff.; G. ZAGREBELSKY, *Fondata sul lavoro. La solitudine dell'art. 1*, Torino, 2013, 20; U. CARGIULO, *Identità culturale e tempo di lavoro: un'analisi della contrattazione collettiva*, in A. VISCOMI (Ed.), *Diritto del lavoro e società multiculturale*, Napoli, 2001, 199.

<sup>3</sup> S. FERRARI, *Lo spirito dei diritti religiosi. Ebraismo, cristianesimo e islam a confronto*, Bologna, 2002.

<sup>4</sup> E. CAMASSA, *Democrazie e religioni. Libertà religiosa, diversità e convivenza nell'Europa dell'XXI secolo*. Atti del Convegno Nazionale (Trento, 22-23 October 2015).

<sup>5</sup> Even Constitutional Court n. 58/2000 reiterated this principle stating that: «*an attitude of the State which is not equidistant and impartial towards all religious confessions and the lack of parity regarding the protection of the conscience of each person who recognizes themselves in a faith, whatever confession they belong to, are in contrast with the supreme principle of secularism that characterizes the form of our State in a pluralistic sense*».

<sup>6</sup> E. CAMASSA, *Democrazie e religioni. Libertà religiosa, diversità e convivenza nell'Europa dell'XXI secolo*. Atti del Convegno Nazionale (Trento, 22-23 October 2015).

Consequently, an authentic interpretation of the Constitutional Charter imposes to read the principle of laicism in a ‘strong’ sense: in other words, in the national legal framework, laicism does not mean neutrality<sup>7</sup>. The equidistance of the State from all religious beliefs does not mean indifference to them or a difficulty in cohabitation with one another: on the contrary, it requires the institutions to positively intervene in order to ensure effective religious freedom for all faiths. Therefore, the right to religious freedom, as well as having a negative dimension (which implies the prohibition for the State to interfere into religious matters), also assumes a positive or promotional connotation, consisting in the commitment of the Republic «to remove obstacles of an economic and social nature, which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country» (Article 3, second paragraph)<sup>8</sup>. Indeed, it would be incompatible with the principle of substantial equality to adopt the rule - typical of those legal systems who have a neutral approach to the principle of secularism (such as the French and Swiss) – according to which the States «never ask citizens about their religious convictions, as well as never intervene helping or hindering religious groups»<sup>9</sup>. On the contrary, our Country, according to the constitutional interpretation proposed before, should certainly intervene, in a positive and promotional perspective, when the freedoms and the rights of a religious faith could be at risk<sup>10</sup>.

### 3. Implementing the principle of laicism within the working relationships: a difficult challenge

Despite the suggested interpretation of the principle of laicism seems to be the most compliant with the Constitution, however many factors support the conclusion that this approach often remains – unfortunately – unfulfilled in our country.

First, we can notice that many aspects of the right of religious freedom receive a different protection depending on the existence (or not) of a specific agreement between the State and each religious confession (Article 8, par. 2, Const.). For instance, while the Italian Republic ensures all the schools pupils the Catholic education and finance it directly, teaching other religion beliefs requires a specific agreement with the State, a specific request from the faithful and their own financing. In a similar way, although Article 26 of the Law n. 354/1975 recognizes to all prisoners «the freedom to profess their religious faith, to educate themselves in it and to practice its worship», these rights are reserved in a stable manner just in favor of the Catholics. They alone can celebrate their rituals thanks to

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<sup>7</sup> T. VETTOR, *Modelli e tecniche regolative della libertà religiosa nel lavoro: analisi e prospettive*, in *Il Diritto del Mercato del Lavoro*, 2006.

<sup>8</sup> A. BARBERA, *Le basi filosofiche del costituzionalismo*, in A. BARBERA (Ed.), *Le basi filosofiche del costituzionalismo. Lineamenti di filosofia del diritto costituzionale* (coordinated by) A. BARBERA, G. ZANETTI, Laterza, Roma-Bari, 1997, 14 ff.

<sup>9</sup> C. JEMOLO, *Geografia della laicità in Italia*, in *Nuovi studi politici*, III, Roma, 1987.

<sup>10</sup> In general, on the positive or promotional dimension of the right to religious freedom, T. MAURO, *Interventi dello Stato in materia religiosa*, in *Dig. Disc. Pubbl.*, VIII, Utet, Torino, 1993, 500 ff.

the presence, in each prison, of a special chaplain, bound by an employment relationship with the prison administration.

On the contrary, members of other religions can benefit of this freedom in a different manner, as they are granted, only upon request and with the authorization of the administration, to receive the assistance of the ministers of their own cult and to celebrate their rites<sup>11</sup>.

Similar conditionings in the access of these fundamental rights of the faithful, such as education and spiritual assistance, are even more restrictive due to a recent interpretation of the Constitutional Court<sup>12</sup>. Some judgments have denied the existence of a legal obligation for the State to negotiate agreements with each requesting religious confessions. Consequently, - as some authors argued<sup>13</sup> - the Government can refuse to begin any negotiations, based on a discretionary choice, which is moreover unquestionable by the judiciary. Religious confessions, who are interested in concluding an agreement to make effective and improve their religious freedom, find themselves unprotected and this is in contrasts with both, the principle of jurisdictional protection and the principle of laicism, in its promotional and proactive perspective.

In addition, - and to the extent that here concerns - it should be noted that the pluralist, positive and proactive perspective of the principle of secularism is often betrayed precisely in the context of the labor relationships. Paradoxically, despite the labor law has always been characterized by mandatory rules that apply regardless the will of the contractual parties, with regard to the protection of religious beliefs we can observe a lack of legislative indications in order to implement the principle of secularism within the workplaces<sup>14</sup>. In some cases, we can even witness a tendency of the legislator to adopt the so-called '*subtraction laicism*' model (also known as '*assimilationist model*'<sup>15</sup>), which requires to ignore the

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<sup>11</sup> The situation is even more problematic with regard to spiritual assistance in identification and expulsion centers (Article 21 of Legislative Decree No. May 23, 2008, No. 92): the legislation provides that within the center the methods of treatment must also guarantee freedom of conversation with the ministers of worship, that freedom of worship is ensured within the limits provided by the Constitution and that ministers of religion can access the centers. The latter hypothesis does not, however, provide any further indications as to the methods of identifying the ministers of worship to which access to the centers is actually allowed, and this does nothing but render the rule ineffective. In fact, to make it actually applicable, it will be necessary to resort to the provisions of the specific Agreements pursuant to art. 8 paragraph 2 of the Constitution provided for the other forms of spiritual assistance: if this allows an easy application relative to the faithful subjects of the religions who have signed an agreement or an agreement with the State, it reiterates the doubts about the actual guarantee of spiritual assistance for confessions not "covered" by these provisions.

<sup>12</sup> Constitutional Court, no. 52/2016.

<sup>13</sup> V. PACILLO, *La politica ecclesiastica tra discrezionalità dell'Esecutivo, principio di bilateralità e laicità/neutralità dello Stato: brevi note a margine della sentenza della Corte costituzionale n. 52 del 10 marzo 2016*, in *Riv. Semestrale di Scienza costituzionale e teoria del diritto*, 2016, VI, 245 ff.

<sup>14</sup> Cass., S.U., 14 May 2011, n. 5924 established that «it is true that on the theoretical level the principle of secularism is compatible both with a model of upward equation (secularity by addition) which allows each subject to see the symbols of his own religion represented in public places, and a downward equation model (secularity by subtraction)», but at the same time noted a lack of legislative indication in this regard. All this results in the difficulty «of carrying out from time to time a balance between the guarantee of pluralism and possible conflicts between a plurality of incompatible religious identities». About the different kind of contractual discrimination between individuals see M. CIANCIMINO, *La discriminazione contrattuale: profili rilevanti per la tutela della persona. Note a margine di un recente dibattito giurisprudenziale*, in *Diritto di Famiglia e delle Persone*, 2018, 2, 667 ff.

<sup>15</sup> V. NUZZO, *Verso una società multiculturale. Gli inediti conflitti tra la libertà di vestirsi secondo la propria fede e l'interesse datoriale al profitto*, in *WP CSDLE "Massimo D'Antona"*. IT – 324/2017.

differences<sup>16</sup>, rather than recognizing, accepting and allowing them in their full manifestation.

In this direction, we can observe the approach assumed by the INPS regarding the recognition of some social security rights within a polygamous marriage. In the event that two or more wives are part of the same family unit, only the first spouse in order of time can benefit from the family allowance, with the consequence that her income is the only one accounted among the family unit incomes. Likewise, the allowance for the marriage leave is paid once, even if the worker belongs to a state where polygamy is admitted – the only exception is the case in which a marriage follows the death of the first spouse or the divorce<sup>17</sup>.

#### *4. The prohibition of indirect discrimination as a tool for the full implementation of the principle of laicism in a 'strong sense'*

The most recent cases ruled by the Court of Justice and the European Court of Human Rights concerning religious discrimination within the workplace move towards a neutral approach to the principle of laicism. In this way, judgments on the prohibition of indirect religious discriminations within the workplaces tend to be less restrictive, compared with the national legislation – despite some uncertainties and ambiguities persist<sup>18</sup>.

Before focusing on the prohibition of indirect discrimination, it is worth to remind the main provisions concerning the religious discrimination stated at national and European level.

First, the Charter of Fundamental Rights of the European Union (the so-called Charter of Nice) that, since 2009, has acquired the same binding legal effect of the Founding Treaties, declares some fundamental principles against the religious discriminations. According to its Article 10 «*everyone has the right to freedom of thought, conscience and religion. This right includes 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*». Article 20 enshrines the principle of equality and Article 21 establishes that «*any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited*». Finally, Article 22 specifies «*the Union shall respect cultural, religious and linguistic diversity*».

Among the secondary European legislation, paragraph 2 of the Directive no. 2000/78/EC defines and prohibits direct and indirect discrimination based, *inter alia*, on the religious ground.

In the Italian order, the Legislative decree n. 216/2003 implemented this directive and is, nowadays, the main regulatory reference.

<sup>16</sup> See also P. ICHINO, *Il contratto di lavoro*, in *Trattato di diritto civile e commerciale*, (already directed by) A. CICU e F. MESSINEO (continued by L. MENGONI), XXVII, 2, Milano, 2000, 570.

<sup>17</sup> See circolare Inps n. 190, 22 July 1992. About the access to requirement this provisions see [www.inps.it](http://www.inps.it).

<sup>18</sup> See V. NUZZO, *cit.*

Nevertheless, regarding the derogation admitted to the prohibition of indirect discriminations, scholars observed a discrepancy between by the European legislation and the national provision<sup>19</sup>. According to Article 2, par. 2, letter b, Directive n. 2000/78/EC, an «*indirect discrimination*» 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.

The prohibition of indirect discrimination, which strikes only measures that appear neutral and, therefore, are compliant with the principle of laicism intended as neutrality, can be the tool to actually implement the principle of secularism in a strong sense, that is to say proactive and pluralist. This prohibition, by its very nature, prevents from ignoring the differences and treating different situations equally<sup>20</sup>. In order to clarify this concept, an example could fit: if an employer prohibits the employees to exhibit any religious symbol, invoking the desire to convey the customers a neutral image of the company and respecting any religious confession, ends to make an indirect discrimination for those who profess a religion that imposes the ostentation of its religious symbol. Even more specific is the example of indirect discrimination for the members of those religions that impose certain food prohibitions, when the INAIL denies the insurance coverage for an accident on the way to and from work occurred to an employee who, in respect of his religious precepts, could not use the company canteen<sup>21</sup>.

Resuming the previous observations, the Court of Justice and the European Court of Human Rights intend the prohibition of indirect discrimination in a wide perspective. Moreover, this orientation is justified considering, as mentioned, the discrepancy between the regime established by Article 2, par. 2, letter b), Directive n. 2000/78/EC and that one provided by Article 3, par. 3, Legislative Decree n. 216/2003. It follows that:

- according to the EU directive, measures that, although seem to be neutral, end up disadvantaging people of a certain belief are allowed if they are aimed at «*legitimate purpose*» and implemented according to «*appropriate and necessary means*»;
- the Italian legislator provides a more restrictive derogatory regime: such measures are allowed only if they are «*essential and decisive*» for the work performance, «*proportionate and reasonable*», as well as aimed to a legitimate purpose.

In this respect, it is worth to remember the recent Court of Justice decision C-157/15 (Achbita cause). It considered the dismissal of a receptionist of a Belgian company caused by her decision to wear the veil despite the explicit prohibition, imposed to the employees by the company regulations, to wear visible signs of religious beliefs at work. The judges recognized the corporate ban as a form of indirect discrimination because, in accordance with the policy of neutrality chosen by the company, it

<sup>19</sup> V. NUZZO, *cit.*

<sup>20</sup> P. BELLOCCHI, *cit.*, 193.

<sup>21</sup> This consideration represents a free elaboration of the panel discussion held during “Seminari Previdenziali Maceratesi”, Modena - 24 e 27 June 2019, titled *La tutela infortunistica oggi*.

was applied all the employees. They considered the employer's aim as a legitimate purpose and therefore allowed a derogation from the ban of religious discrimination set by Article 2, par. 2 letter b), Directive n. 2000/78/EC.

In this situation, we can observe a shortsightedness of the Court of Justice, consisting in the qualification of the company regulation that prohibits all workers the exhibition of religious symbol as a «neutral measure». Indeed, such a negative imposition, concretely, ends up discriminating - even if only in indirect way - those employees whose religion imposes the exhibition of religious symbols, thus mortifying their legitimate request to express their own religious freedom.

The qualification of the Court regarding both, the employer's order and its aims as legitimate, is not entirely convincing and raises some doubts. The employer's private interest aimed at guarantee a religiously neutral image of the company can definitely offend the religious sentiments of the employees who could instead manifest them harmlessly, without damaging the rights or freedoms of others.

The interpretation and the balancing of interests proposed by the Court of Justice seem ultimately to contrast with the principle of secularism in its strong sense, that is in its pluralist and purposeful meaning sanctioned by the Italian Constitutional Charter, which requires to strengthen the diversity, respect each other's rights and freedoms, and not suppress them<sup>22</sup>.

Similar conclusions may be referred to the European Court of Human Rights judgment passed in the Dahlab against Switzerland case<sup>23</sup>. However, this pronouncement – whose meaning will be explained later – leads to think about the contradictory consequences that the application of the principle of secularism in a weak sense may lead to.

In this case, a Muslim kindergarten teacher challenged the legality of a school director's order that impose her not to wear the veil as incompatible with the Swiss laws in the field of education. Ms. Dahlab complained a double discrimination, both on the ground of religious belief and gender, arguing that a man, belonging to the Islamic religion, would not have been treated in the same way because he is not obliged to express his religious adhesion by wearing particular clothing.

The Court stated the legitimacy of the ban on wearing the Islamic headscarf, considering - as well as the Court of Justice in the Achbita cause - the employer's aim to preserve the principle of neutrality within the primary public education worthy of protection.

Once again, in this pronouncement, the balance between the principle of secularity and the worker's religious freedom was resolved in favor of the first of the values at stake. This is the reason why we can consider the supranational judges' approach rather deficient, especially considering that the unstoppable growth of a multi-ethnic society among the European States make it impossible to ignore the existence

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<sup>22</sup> V. NUZZO, *cit.*, 22: «European judges consider the regulation which prohibits the wearing of visible signs of religion to be "neutral", thus ending up inhibiting the right to manifest a "different" faith, the one characterized by "visible" symbols, such as the veil. Of course, the regulation does not specifically target it. But through an undifferentiated disposition it generates a norm that is not neutral at all, because it mortifies the request to respect a characteristic related to a specific religious affiliation».

<sup>23</sup> European Court of Human Rights 15 February 2001.

of different religion and culture. The latter should be managed rather than removed, even by the judges, whose role is - in the perspective of an effective and not presumed balance of values - to avoid a drastic alternative between the employers' interest of neutrality and the worker's freedom of religion.

##### 5. *The implementation of the principle of secularity within the workplace: a response to the socio-economic integration need and a reaction to multiple discriminations*

Instead of choosing between the employers' interest of neutrality and the worker's religious freedom, a "third way" approach appears to better accomplish the principle of secularism in a strong sense. Indeed, it could allow everyone to manifest their own belief freely, of course with the only limitation of respecting the fundamental human rights and the public order of each state<sup>24</sup>.

This conclusion is not weakened by the argument that considers the restrictive interpretation of the principle of non-discrimination (both direct and indirect) as an unjustified limitation to the contractual freedom of private individuals and the State in its contractual relations. According to this theory, the employer's imposition of particular conditions could be justified by the need to protect the contractual freedom, even when they contrast with the religious needs of the employees<sup>25</sup>.

Contrary to this interpretation, it should to be noted that the notion of contractual autonomy changes over times, in order to defend more and more the weakest people. In other words, the boundaries of the contractual autonomy should be redraw - rather than limited - in order to reflect the new sensitivity towards the fundamental human rights and prevent the risk that the contractual manifestation may conflict with those unavoidable rights<sup>26</sup>.

Moreover, a "third way" approach appears to be the best method to implement social and cultural integration of people from different cultures and thus avoid manifest violations of the principle of equality, especially when workers access the labor market and have to keep their jobs<sup>27</sup>.

The heterogenesis of the purposes mentioned above consists precisely of this: ignoring the differences - as the supporters of the assimilationist model do - ends up generating other differences, and therefore new tensions based, above all, on gender and socio-economic condition of members of different religions. Indeed, the analyzed Dahlab case highlights how the neutral approach to the principle of religious freedom actually increases the difficulties faced by some weaker categories, such

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<sup>24</sup> E. DI GERONIMO, *Corte di Giustizia – Vera Egenberger Le intricate questioni delle discriminazioni fondate sul fattore religioso: la tutela offerta alle vittime è reale o solo apparente?* in [www.osservatoriodiscriminazioni.org](http://www.osservatoriodiscriminazioni.org), 5 giugno 2018. Indeed, one of the main criticisms of the ruling of the Strasbourg judges concerns the failure to assess the proportionality and essentiality of the prohibition imposed by the educational institution in the face of the need to ensure respect for the principle of secularism.

<sup>25</sup> D. MAFFEIS, *Diritto contrattuale antidiscriminatorio nelle indagini dottrinali recenti*, in *Nuove leggi civ. comm.*, 2015, 165. According to this doctrine, the circumstance that a subject is sanctioned for not having contracted or for having done it but imposing more onerous conditions, only because of a certain quality of the counterpart, is understood as an unjustified injury to the autonomy of the contractor, who, should to be as free as possible from external screens.

<sup>26</sup> M. CIANCIMINO, *cit.*

<sup>27</sup> P. MOROZZO DELLA ROCCA, *Gli atti discriminatori nel diritto civile, alla luce degli artt. 43 e 44 del T.U. sull'immigrazione*, in *Diritto della Famiglia e delle Persone*, 2002, 112 ff.



as women of different cultures, when they enter or remain into the labor market and thus need to be economically and socially integrated into the Western Countries context<sup>28</sup>.

This phenomenon also determines the development of increasingly evident forms of multiple discrimination that, in general terms, refers to those cases in which a person is discriminated on the ground of two or more discriminatory factors<sup>29</sup>. In this respect, the Dahlab case demonstrates how religious discrimination can lead other discriminations. As already stated, the female worker complained not only for religious, but also even for gender discrimination: if she had been a man with Islamic faith, she would not have had to wear the veil and therefore she would not have been fired for the observance of her religious precepts. Furthermore, imposing working conditions that hinder the free manifestation of a personal belief (despite the formal respect of each one's freedoms and rights) can even lead to other discrimination grounded on economic and social basis, in a sort of a domino effect<sup>30</sup>.

Regarding this aspect, a recent research on the women's condition showed a straightforward proportionate link between their religious affiliation and their access to the world of work<sup>31</sup>. This study highlighted a relevant difference in the employment rates of women belonging to different religious faiths: Muslim women have the lowest employment rate, followed by women of Hindu faith, Jews and Christian Orthodox. On the contrary, women of Protestant and Evangelist faith have positive employment rates<sup>32</sup>. Even considering the women's chances to entering the world of work in relation to their religious affiliation, Muslim women resulted disadvantaged, with fewer chances of being employed compared to women belonging to other religions.

These data highlight the necessity to increase the level of religious freedom not only providing

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<sup>28</sup> M.C. NUSSBAUM, *Women and human development. The capabilities approach*, Cambridge University Press, Cambridge, 2000, 205 ff.: the opinion that religion plays a central role in the dynamics of the development of social-economic integration is consolidated.

<sup>29</sup> B. G. BELLO, *United in Dignity. Report*, <http://enter.coe.int/roma/Media/Files/United-for-Dignity-Conference-final-report> (24 aprile 2015); T. Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore*, Luxembourg, Office for Official Publications of the European Communities (2002). At the normative level there is no definition of multiple discrimination: in European sources it is spoken in general terms and not very incisive in non-binding documents (soft law) of the European Parliament, such as for example the Resolution on the situation of women belonging to minority groups in the Union European Union (2003/2109 (INI)), which focuses on disabled women, migrants and Roma, and the Resolution on the situation of Roma women in the European Union (2005/2164 (INI)). Other references are contained in some Communications of the European Commission, such as the Communication COM (2005) 224 entitled "Non Discrimination and Equal Opportunities for All - A Framework Strategy" (a framework strategy for non-discrimination and equal opportunities for all).

<sup>30</sup> Both the Dahlab case and the results of the research illustrated above are more properly related to the phenomenon of the c.d. additive or compound discrimination, which occur when discrimination takes place on the same occasion, but based on different discriminatory factors that are added to each other, but remain separate. Thus, the imposition of working conditions that are not compatible with some religious precepts can determine not only religious discrimination but also gender discrimination if these precepts are to be observed and manifested especially by people of female or male sex. For the definition of additive discrimination, see bibliography in the previous footnote.

<sup>31</sup> F. PASTORE, S. TENAGLIA, *Appartenenza religiosa e scelte lavorative delle donne: ora et non labora?*, in A. FUCCILLO (Ed.) *Esercizi di laicità interculturale e pluralismo religioso*, Torino, 2014, 47 ff.

<sup>32</sup> L. SAPORITO, F. SORVILLO, L. DECIMO, *Lavoro, discriminazioni religiose e politiche d'integrazione*, 25th World Congress of Political Science, titled *Politics in a world of inequality*, organized by IPSA - International Political Science Association (Poznań, 23-28 July 2016): it is necessary to take into account the fact that the employment rates are also influenced by a further series of factors not immediately considered in the graph in question, such as the level of education, the individual and family characteristics, or the cultural traditions of the countries to which they belong.

declarations of principles but also developing concrete legal instruments that strengthen this process. This “exercise” of religious freedom for both, individuals and groups, affects that behaviors that implies a choice of belonging and faith and can certainly influence the economic-legal systems: when religious freedom is more allowed and guaranteed, the phenomenon of cultural migration is more effective, and it produces positive direct consequences towards the arrival systems<sup>33</sup>.

One more judicial case tackled by the European Court of Human Rights (15 January 2013, *Eweida v. United Kingdom*) shows the contradictions brought about the assimilationist approach which - besides the multiple discriminations mentioned above - can also lead religious discrimination based on irrational criteria.

In the case analyzed by the Court, Mrs. Eweida, a British Airways hostess, after the change of the staff uniform, decided to show her cross necklace. The employers sanctioned the employee arguing that the company protocol forbade the wearing of any religious symbol, in order to show the secular approach of the airline company (principle of secularism in a weak-neutral sense).

However, the same protocol allowed derogating this prohibition when a religious obligation required the workers to wear specific objects. According to this prescription, the company had admitted in previous cases the use of turbans and silver bracelets for the Sikhs and the hijab for the Muslims. Instead, this permission was denied to Mrs. Eweida because, in the opinion of the company, the Christian faith does not require to wear the cross.

In this case - which is nonetheless similar to *Dahlab* and *Achbita* cases - the judges ruled in favor of the employee’s claim, considering that the British Airways’ need to protect its religious neutral image, despite legitimate, could not prevail over the women’s right to wear the cross.

However, despite the outcome of this decision, we cannot assume that the European Court of Human Rights had agreed to the secularism model in a pluralist sense. The reasons behind the decision - as the scholars noticed – seem to be quite weak<sup>34</sup>, as the company’s prohibition was considered illegitimate by appealing to the consideration (actually not much relevant) that the symbol of the cross was so small that it could not harm the professional image of the company.

In this way, the Court left out to clarify if the employer’s necessity to guarantee the neutrality of its own business have always to prevail over the worker’s right to religious freedom rather than harmonize with it. In other words, the Court did not expressed its opinion about the criterion chosen by the employer to admit or prohibit the exhibition of the religious symbol, that is to say the need to guarantee the right to exhibit religious symbols if someone’s faith requires it.

In conclusion, the issue is: can the private autonomy really influence the intimate choice of the believers to show or not a religious symbol, regardless the dictates of their own religion? When a person

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<sup>33</sup> L. SAPORITO, F. SORVILLO, L. DECIMO, *Lavoro, cit.*

<sup>34</sup> E. SORDA, *Eweida and others v. The United Kingdom, ovvero quando fede e lavoro non vanno d'accordo e il “margine di apprezzamento” non aiuta a chiarire le cose*, in [www.diritticomparati.it](http://www.diritticomparati.it), 4 March 2013.

wish to show a spiritually relevant sign, this will (when it is not detrimental to the rights of others) should not be protected regardless it is sanctioned by the orthodoxy of a faith, just because, first of all, this is a manifestation of one's own personality and thought?

Considering that the European Court of Human Rights has not ruled on this aspect, we can argue, provocatively, that the employer's assessment of whether or not to show a religious symbol could even replace the will of ... God!

#### *6. Guidelines for managing the differences within the workplace: limits of the legal provisions and potentialities of the collective bargaining*

What has been said so far, reveals that the real challenge is to ensure a better integration within the labor relationships in order to uncover that indirect discriminations that, behind 'neutral' measures aimed at all workers (current or potential), actually hide unfavourable actions only for some of them.

On that note, it seems necessary to analyze *how* the differences can be effectively managed in order to make them coexist in the same working environment.

The starting point of this assessment is the general principle according to which each employer has a legal obligation to create the most favorable working conditions for its employees, in order to create a work environment that guarantees mutual respect, safety, physical and psychophysical well-being of all workers (article no. 2087 Civil Code). However, aside from this general principle and the prohibitions of discrimination contained in Legislative Decree no. 216/2003 and in Law no. 300/1970 (in particular articles no. 8 and 15<sup>35</sup>), the Italian legislation does not provide any practical guideline.

Actually, legislative regulation, due to its generality and abstractness, does not seem to be the most appropriate tool to detect and protect the situations that may occur within the company environment.

In order to strengthen the previous statement we can recall the strong criticism who affected the draft law proposed by the Astrid Study Group in 2017 (Rules about the freedom of conscience and religion). Article 8 of that bill provided the employers (both, public and private) to promote positive actions in order to contrast the discrimination grounded on religious belief within the workplaces, adopting the same model proposed by article 42, Legislative Decree no. 198/2006<sup>36</sup>.

According to this draft, unequal treatments could also be implemented to protect the religious

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<sup>35</sup> Article 8 of the Workers' Statute provides that it is forbidden to the employer, for the purpose of hiring or during the employment relationship, to carry out investigations, even made by other persons, regarding worker's political, religious or trade union opinions, as well as facts that are not relevant for the purpose of evaluating their professional attitude; Article 15 provides that any agreement or deed aimed at: subordinating the employment of a worker to the condition that he adheres to or does not belong to a trade union association or ceases to be part of it is void; dismiss a worker, discriminate against him in the assignment of qualifications or duties, in transfers, in disciplinary measures, or otherwise cause him prejudice because of his affiliation or union activity or his participation in a strike. The provisions of the preceding paragraph also apply to agreements or acts aimed at political, religious, racial, language or sex, disability, age or based on sexual orientation or personal beliefs.

<sup>36</sup> A. FERRARI, *La proposta di legge in materia di libertà religiosa nei lavori del gruppo di studio Astrid. Le scelte di fondo*, in *Rassegna Astrid*, n. 7/2017; G. MACRÌ, *Osservazioni sulla proposta di legge "Norme in materia di libertà di coscienza e religione" elaborata dal gruppo di lavoro coordinato dalla Fondazione ASTRID*, in *Stato, Chiese, e pluralismo confessionale*, in [www.statoechiесе.it](http://www.statoechiесе.it), 2018, 10; T. VETTOR, *cit.*

beliefs of workers. For this reason some scholars feared a possible contrast with the principle of secularism as intended in the Italian legal order, so is to say the prohibition for the institutions to pay any attention to religious factor and consequently to provide discriminatory protections<sup>37</sup>.

However, this argument seems to forget the constitutional principles laid down by Article no. 3, par. 2 of the Constitution which, besides being the legal basis of positive actions, also implies a twofold dimension to the principle of secularity. A negative one (the principle of legality by subtraction) which enforces the State neutrality in respect of any religion. A positive one (promotional) that requires the State to intervene in order to effectively and concretely guarantee the full implementation of the right to religious freedom for all confessions.

Considering this, in our opinion, the draft law should be evaluated positively as it allows additional protection compared to that offered by the bilateral agreements (mentioned above in paragraph 2), which only protect those religious confessions who have signed them with the State. On the contrary, it remains a mere precautionary tool, to the extent that it lacks specific legal provisions aimed at achieving the necessary processes of cultural and social integration<sup>38</sup>. In other words, this bill does not appear as innovative because it just affirm general principles, without providing any practical indication: above all, it does not provide for binding sanction when an employer failure to adopt positive actions for those employees who belong to different religions.

From a different perspective, we can argue that positive actions could be exploited to the fullest through the technique of legal incentives, such as those that the legislator has recently experimented in order to promote the corporate welfare<sup>39</sup>. In this direction, a solution could be the introduction of the tax reliefs for those employers who arranges a canteen service or distributes meal vouchers to spend in partner restaurants in favor of the employees who would otherwise have to go home to have lunch because they cannot eat in the company canteen due to religious food bans<sup>40</sup>. In this way, many risks

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<sup>37</sup> V. PACILLO, *Contributo allo studio del diritto di libertà religiosa nel rapporto di lavoro subordinato*, Milano, 2003, 147, ff.

<sup>38</sup> G. MACRÌ, *cit.*, 31-32.

<sup>39</sup> In particular, the 2016 and 2017 Stability Laws have given a strong impetus to the practice of corporate welfare, whose success is linked above all to the tax benefits it brings to companies and employees. The T.U.I.R., in fact, in the articles 51 and 100, identifies sums and values which, if provided by the employer to all employees, do not contribute to the formation of income for the employee and are deductible by the employer for Ires purposes, thus enjoying a particular tax treatment. In essence, for example by providing for the conversion of the performance bonus into a welfare service, the employee benefits from the elimination of the tax levy and contribution on goods and services and this makes it more convenient for him to receive a welfare bonus rather than cash. On the other hand, the employer also benefits from the complete deductibility of the premium and the exemption from tax deduction.

<sup>40</sup> Some examples can be remembered: the small Novagest company from Treviso, which deals with providing food products for coin-operated or key-operated distributors, provided fresh products aligned with the needs of those who have food intolerances and food compliant with religious or philosophical dictates. The food company Tre Alfieri Halal is the first in Italy that offer food canteens in which all the ingredients respect the rules of the Koran (for other examples of Italian and French companies that have taken appropriate measures to protect the religious freedom of the faithful, see C. GAMBA, *Il Ramadan nel contratto di lavoro*, in *Il Sole24Ore*, 20 August 2009). A positive reference in the respect of religious food practices comes from the maritime transport sector. In order to complete the regulatory framework, as far as the Italian legal system is concerned, the operation of the Law 2 August 1952, no. 1035, for the ratification and execution of the I.L.O. (International Labor Organization) n. 68 on the power supply service on board ships. The latter, in particular, as subsequently confirmed by the 2006 MLC Convention, under Title III, concerning the regulation of Accommodation, recreational facilities, food and canteen services, in Rule 3.2 concerning 'Food and catering service' expressly provides for point n. 1) that each Member State must ensure that ships flying its flag carry on board and serve food and drinking water

would be avoided (remind the example made in paragraph 4: the lack of the INAIL insurance coverage in the event that an employee had suffered an accident during a lunch break, could be avoided by the use of the company canteen<sup>41</sup>).

Given the diversified needs that arise within the workplace, collective bargaining can be the best tool to guarantee an effective religious pluralism. Indeed, it can - at least potentially - find a compromise between the employers' needs and the employees' religious rules<sup>42</sup>. Such a compromise, in fact, far from being an abstract and supposed balance, would be suitable to guarantee fairness in each specific case, more than the judges of the supranational courts can do with their decision.

Collective agreements, and specifically the company agreements, are able to best seize the problems of the single entrepreneurial realities and provide individual and suitable solutions. Moreover, they could play a decisive role of substitution compared with the law and the lack of agreements pursuant to article 8, par. 2, of the Constitution, allowing, at the same time, the experimentation of new techniques in order to protect the religious diversity in the workplace.

In practice, a number of good practices is already being tested: it is worth to be monitored and followed. For example, the Collective Agreement for credit companies (1999) and the Collective Agreement for rural and artisan banks (7 December 2000) state that, within the application of their contractual provisions relation to working hours, the companies shall ensure the right of those workers who request it, to practice their religious worship complying the laws in force. The Collective Agreement of the artisan companies operating in the food sector (1 July 1997), in its Article no. 14 provides the companies to encourage – in accordance with their technical and productive needs - the foreign workers' religious needs and habits, when they advise the company in advance. According to Article no. 36 of Collective Agreement of the textile sector (17 July 1999) and the Collective Agreement for the companies belonging to culture, tourism, sport and leisure public services (9 November 1999), the workers who profess a religion according to which the day of celebration is not Sunday, if they request it, may have a different weekly rest and the working hours paid on that day are recovered on Sundays or

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of an appropriate quality, whose nutritional value and the corresponding quantity adequately meet the needs of the people on board and take into account their different cultural and religious affiliations. Furthermore, in the Convention, in Standard A3.2 concerning 'Food and catering service', it is established in point n. 1) that each Member State adopts legislation or other measures to guarantee minimum standards regarding the quantity and quality of food and drinking water, as well as the rules relating to the catering service for meals served to seafarers on board ships flying its flag, and must, through educational activities, undertake to promote the knowledge and application of the rules indicated in this paragraph, and also in point n. 2) that Each Member State shall ensure that ships flying its flag comply with the following minimum standards: a) sufficient supply of food and drinking water, taking into account the number of sailors present on board, their religion and their cultural habits on food so as of the duration and nature of the journey. The legislation just mentioned, therefore, confirms the importance of protecting food choices made on the basis of religious rules or cultural belonging even in the context of maritime transport. It is evident that in all these cases the particular food choices of passengers and of those who work in such environments, respectful of religious precepts and their geographical and cultural characteristics, are functional in developing some sectors of the economy. In this regard it is not unfair to support, as already noted in paragraph n. 5, that where the religious freedom granted to individuals will be greater, the greater will also be the increase in terms of positive effects in the entire economic sector and in the overall social integration of individuals (see footnote no. 27).

<sup>41</sup> See footnote no. 20.

<sup>42</sup> L. SAPORITO, F. SORVILLO, L. DECIMO, *cit.*, 10 ff.; P. BELLOCCHI, *cit.*, 214 ff.

during other working days without any extra payment or compensation.

Furthermore, according to the Collective Agreement for domestic workers (8 March 2001), when the worker's religion provides celebrations not on Sunday, the parties can agree the replacement, for all contractual purposes, of Sunday with another day. Finally, Collective Agreement for the agricultural sector (1 December 2000) allows, in specific and justified cases, the employee to use short-term permits - maximum of 1 hour per day (equivalent to 4 of the 5 daily Muslim prayers) - in order to recover the hours of absence with as many hours of work.

The provision about the working hours spent by the Muslims to pray is much more relevant if we consider the absence of an Agreement pursuant to Article 8, par. 2, of the Constitution between the State and the Muslim confession that regulates the need to pray with the working hours. In this regard, we can see the draft of agreement proposed by the Islamic Religious Community (CO.RE.IS). Article no. 7 proposes that the State, taking into account the ritual value of the Ramadan period, facilitates the implementation of this religious practice, reducing, if necessary, by one hour the working time spent by Muslim who work in public offices and schools, coinciding with the ritual meal that takes place before the start of the Fasting until its interruption. The state also have to favor the respect of this cultural practice even in the private sector. Any recovery of unpaid working hours will take place without extraordinary compensation. The approximate initial and final terms of the Fasting, determined annually by the Islamic Community, which has to inform the Ministry of the Interior, are published on the Official Journal at the beginning of each year, while the exact dates are communicated to the authorities as soon as possible. Requests from Islamic Religion employees who wish to take annual holidays during the month of Ramadan will be favored.

Meanwhile the draft will be accepted by the Government - which, as seen, is not legally obligated to accept - and made binding according to Article 8, par. 2 of the Constitution, collective bargaining could fill the legislative gap taking inspiration from the mentioned guidelines.

In conclusion and considering the examples above, it is possible to affirm that collective bargaining could be the solution in order to overcome the notion of laicism as neutral principle and the conception of religious freedom as a mere negative freedom. Indeed, religion is not just a personal feeling issue, but especially in the work environments, it influences the social relationships. This explains why, in order to avoid a depersonalization of the working relationship, it seems suitable to promote the role of collective bargaining aiming at adapt the work performance to the interests of the parties and to personalize its discipline<sup>43</sup>.

## 7. Conclusions

Conclusively, it is possible to highlight how many difficulties the right to religious freedom meets

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<sup>43</sup> P. BELLOCCHI, *cit.*, 215.

in its actual implementation: national legislation and collective bargaining have so much work to do.

The challenge of a multi-ethnic society is to guarantee everyone, in their diversity, an equal space of freedom and opportunity, overcoming the formalistic and neutral conception of the principle of secularity. Bearing this in mind, even the contrast between the employers' interests and the workers' religious needs suggested by supranational courts in the examined decisions appears more faded. In other words, the balancing method should be used not to oppose different and irreconcilable instances, but in order to integrate them: this do not mean limiting anyone's freedom (neither the employer's one nor the worker's one), but finding a way to blend them and make them live together<sup>44</sup>.

In our opinion, this result can only be achieved through public incentives (see paragraph 6), which can support entrepreneurs who decide to adapt their company organization to the religious needs of their employees. Leaving private individuals alone facing the responsibility to achieve a similar issue appears utopian and not feasible. Moreover, public incentives would be completely justified in the light of the constitutional purpose it aim to achieve: the implementation of the principle of secularity in a strong, pluralist and proactive sense, as sanctioned by Articles 3, par. 2, 8 and 19 of the Italian Constitution.

A similar inducement should help to create the conditions for a work environment in which cultural and religious integration together with gender and socio-economic assimilation would be ensured. This will benefit not only the employer, who can count on a safer and more efficient working environment, but, above all, the entire community, slowing down the pace of social tensions<sup>45</sup>.

In this perspective companies could become experimental cells of a new social model, incubators of better *habitats*, in which what unites - a work, economic and social serenity - is more valued with respect to what divides<sup>46</sup>.

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<sup>44</sup> M. MANTELLO, *Autonomia dei privati e problemi giuridici della solidarietà*, Milano, 2007, 144.

<sup>45</sup> A. RIVERA, *Regole e roghi. Metamorfosi del razzismo*, Bari, 2009.

<sup>46</sup> L. SAPORITO, F. SORVILLO, L. DECIMO, *cit.*, 47.