DIRECTIVE 2000/78/EC AND THE PROHIBITION OF DISCRIMINATION BASED ON RELIGION

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1. THE PROHIBITION OF DISCRIMINATION BASED ON RELIGION AND ITS EVOLUTION IN WESTERN COUNTRIES: MOVING FROM IDEOLOGICAL CONFLICT IN INDUSTRIAL RELATIONS TO THE PROTECTION OF CERTAIN GROUPS

For a good part of the last century, the special sociological and historical conditions which prevailed traditionally in Western European countries were such that discrimination based on religion in the workplace was dealt with from a distinctly different angle than other instances of discrimination, such as gender-based discrimination.

For many years, the relative homogeneity or near uniformity of religions which characterised most European countries, the valuable contribution of peaceful coexistence between the various communities in the other states of the then European communities – leaving to one side, obviously, the particular circumstances of Northern Ireland and, subsequently, of Greece -, the decline and near disappearance, after years of fascist barbarianism, of unacceptable anti-Semitic attitudes, and the gradual secularisation of Member States and many private institutions, created conditions, over a good part of the 70s and 80s, such that the problem of discrimination based on religion or belief was approached more as an indirect instrument of protection of religious freedom (especially when it materialised in the specific case of conflicts occurring in relation to occupational requirements) than as an equalising instrument aimed at eliminating unjustified prejudices against socially or economically underprivileged groups on grounds of their faith or religious beliefs.

From this traditional perspective of relative homogeneity or peaceful coexistence between communities, the prohibition of discrimination on ideological grounds was viewed essentially as an instrument of protection, in the private or horizontal sphere, of freedom of religion. The overwhelming majority of enterprises and industrial relations were normally neutral in character. As a consequence, religion and beliefs were considered as just one of many aspects of an employee's private life, totally disconnected from production requirements. Thus, the occurrence of such conflicts was normally limited to what is traditionally referred to, in keeping with German terminology, as "tendency" undertakings (Tendenzbetrieb), and mainly with respect to persons whose work was ideologically qualified or oriented (Tendezträger). It was only later, and in the context of very special circumstances of medical ethics and issues of conscience vis-à-vis pregnancy termination, that the general problem of conscientious objection arose in the work environment. Previously, such issues had by and large been settled in court, for instance in Germany, in connection with the production and manufacturing of weapons.

This approach, which may be viewed as traditional, was undoubtedly at the core of the doctrinal analyses which were developed in the 70s and 80s, mainly by T. Rahnm, G. Giugni, or Rodríguez-Piñero. At the same time, certain events which occurred in recent years have shown that this approach, although correct, has its limitations. The reason for this is that this "traditional" vision has now been supplemented by another approach, much closer to the concept of "autonomous" prohibition of discrimination, associated, as such, to socially and generically underprivileged groups, and whose origin is to be found in the synergetic combination of various causes.

The first such cause is, without doubt, the rising immigration trends which the European Union has been experiencing in recent years. This phenomenon has involved, in the first place, a gradual enrichment of the religious typology of our Communities. The basically "Christian" society that emerged in Western Europe after the Second World War – and I have no intention here of re-opening a discussion on the desirability of incorporating this concept in the text of the future European Constitution – gave way to a new, and far more diverse Europe, which absorbs, in the main, an increasingly numerous Islamic population. However, this new population segment, which frequently even enjoys European citizenship, is beginning to suffer social marginalisation, as evidenced by unemployment rates far higher than those found in the rest of the population in the same countries. The very recent events which occurred in France are an instance of these new circumstances. Certainly, there already existed specific social groups defined in terms of their faith or religious beliefs. But the problem is no longer confined to a typical and practical clash between occupational requirements and the religious beliefs of an individual – which, of course, acquires new dimensions with, for instance, the issue of clothing. The problem is now that of a gradual segregation, not merely in occupational terms, but in physical terms as well, of this population which finds itself increasingly boxed up in neighbourhoods which are close to becoming full-scale ghettos, despite the inescapable fact that these same people are often nationals of a European Union member country.

This problem had undoubtedly been brewing over the last decades of the 20th century. But it grew exponentially after the unfortunate events of New York, Madrid

and London . Although the first two events may be ascribed to xenophobia or a rejection of foreigners, the remarkable feature of the most recent tragedy is that it involved British nationals, second generation or earlier immigrants, whose only common feature was solely and exclusively their specific religious orientation. International terrorism thus threatens to increase exponentially the rejection of other people for strictly religious reasons, with complete disregard for the fact that most Muslims are not really concerned with these issues. Likewise, the recent linkage of this evil with the Palestinian conflict triggered an upsurge of the hateful and incomprehensible anti-Semitic movements which have been gaining ground in recent years.

If, to all of the above, we add the gradual opening up of the Union to territories where religious segregation has been the source, not just of mere conflicts but of full-scale massacres – the old and intractable problem of the Balkans - or problems of religious freedom in such countries as Belarus or Turkey, we have every reason to believe that the prohibition of discrimination based on religion in the work environment has now become a far more complex and acute problem than it was but a few years ago. In the work environment, in addition to the basic issue of conflict of conscience, it is necessary to deal with more recent, and, if I may say so, quantitatively more important problems, which bring employment issues closer to the models, instruments and basic concepts devised to deal with gender-related issues.

For all of these reasons, the aim of this presentation will be to discuss both aspects of the issue: the traditional, or practically individual aspect, and the more recent and urgent aspect, where whole communities are involved. This will be discussed in the light of Directive 2000/78/EC, a directive which (and this should not be overlooked) still operates in a context in which the European Union is unfortunately lacking a genuine and binding Declaration of Rights going beyond the provisions of the Nice Community Charter (which was merely proclaimed) and its status as a mere statement of general principles of Law whose observance would be ensured by a community judge, according to the well-known award of the Kremzow Ruling (C-299/95 of 29 May 1997).

2. DISCRIMINATION ON IDEOLOGICAL GROUNDS AND DIRECTIVE 2000/78: AN INITIAL APPROACH

Directive 2000/78/EC of 27 November 2000 is based on a number of basic principles - diverse, rather unconvincing and unstable as to their structure and substance – contained in such heterogeneous sources as Art. 6 TEU (para. 1), the principle of equal treatment between men and women (para. 2), Art. 3.2 TEC, the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all Forms of Discrimination against Women, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms, ILO Convention 111, para. 4, the Community Charter of Fundamental Social Rights of Workers (para. 6), the Employment provisions of the TEC and the Employment Guidelines of 2000 (paras.7, 8 and 9). When all is said and done, an exhaustive series of precepts of scant relevance in the context of communities, in the strict sense of the term,

and which remain surprisingly silent on the Plan of action to combat discrimination which also came into force at the same time.

As we have explained above, of all the causes of discrimination mentioned in the Directive and other texts which preceded it immediately, discrimination on grounds of ideology or religious belief presents a number of peculiarities, inasmuch as it is associated with the enjoyment of a right which is not expressly recognised by the Union – except for the necessarily indirect reference which is to be found in Art. 6 TEU or Art. 10 of the Solemn Proclamation of Nice – i.e. the right to freedom of thought (in the general sense) and the right to freedom of religion (in the concrete sense), whose protection is ensured in the ambit of strict equality. Therefore, the first question to be asked is whether this characteristic makes protection against this type of discrimination more difficult or more specialised, and, and if so, whether the Directive adequately provides for such protection.

In fact, the effect of a form of protection of a given right based on a factor which is accessory to the exercise of that right (equality, in this case, important though it may be) is necessarily imperfect, and fraught with major uncertainties, since it necessarily presupposes the conditions for the exercise of the right itself, which, up to this date at any rate, have been set by another structure, a structure in which, precisely because of the regulatory architecture of its Treaties, the Union would have, in theory at any rate, no legitimacy to intervene. By making it possible to regulate cases of infringement, by laying down the hypothetical cases in which the deprivation of rights could be viewed as discriminatory, such provisions would also define, albeit indirectly, the internal limits of the scope of the right, and consequently its degree of coverage and extension. In fact, under the stated purpose of regulating discrimination, on ideological grounds, we are faced with a full-scale transfer of competence, which, permits, if only in a partial and negative manner, to define and regulate a whole swath of a fundamental right, at any rate in the occupational environment referred to in Art. 13 and the Directive itself.

From this perspective the Directive seems at first hand and in principle to provide a purely passive protection for a right – ideological freedom -, whose definition and scope are assumed to belong, rather, to the legal order of Member States: the Community Directive applies, in fact, only to possible inequalities in the enforcement of this right. This seems to tally with the provision in IGC Statement N° 11 whereby the Union shall respect and, more importantly, shall *"not prejudice"* the status *"under national law of churches and religious associations or communities in the Member States"* and shall also respect *"the status of philosophical and non confessional organisations"*. If this is assumed to be true, the protection of freedom of religion would seem to be, if only in appearance, irretrievably split in two parts. The positive part, which lays downs the boundaries of the exercise of the right of freedom of religion, would be enshrined in the Directive, subject to its being further defined by the various Member States, in keeping with their own Constitutions and the Treaties to which they are signatories. The other part, restricted to the exercise of that right in conditions of equality, would come under the jurisdiction of Community law. In actual fact, nothing prevents the Directive, or the legal entities in charge of enforcing it, from expanding their mandate to define the cases which would constitute a violation of that right and which, by extension, could be considered as acts of discrimination. And if that were to occur, or if the Court itself gave a proactive interpretation of the Directive, the result

could be a transfer of the regulatory scope of this right, contrary to the rationale of Art. 13 and its strictly anti-discriminatory intent.

At the end of the day, the intent enunciated in the wording which defines protection against discrimination seems forceful. But we believe that it is partially open to questioning. Indeed, we cannot ignore the fact that, under Art. 6 TEU, fundamental rights are amongst the core principles of the Union, as provided in the ECHR and in all the constitutional traditions shared by Member States. Although this precept is of scant binding effect, it is probably safer to ignore its existence and its connection with another provision, TEC 13, which selects one of these fundamental rights as the bedrock for the prohibition of discrimination. The text of the ECHR is therefore an essential factor when determining the scope of the legitimate exercise of the right on the basis of which a prohibition of discrimination may emerge. A positive minimum, with material content, to put some substance on the eminently formal prohibition[1] of discrimination. In this manner, as we see it, one of the most challenging aspects of Community prohibition comes to light fully: it is the route via which a number, at least, of fundamental rights are introduced in positively worded texts, rather than in the necessarily fragile framework of case-law.

That being said, it should be recalled that the exercise of the protection which is afforded, although it does contain minimally positive provisions regarding the right under review, is nonetheless theoretically discriminatory. As a consequence, once a case of exercise of ideological freedom is at issue, an equal treatment assumption must also be included, in order for the regulatory content of Directive 2000/78, stricto sensu, to be carried forward. Absent this second element, the rule will not be applicable, including – at any rate in theory – if in the particular instance, the right which theoretically it purports to protect has been infringed.

In line with the above, we come to one of the provisions that need to be underscored in this preliminary section, i.e. the provision dealing with the scope of non permissible conduct under the Directive, which is essential in order to gauge, as a negative reflection, the scope of the protected right. As indicated above, one of the basic instruments which may be of help in understanding the very concept of the Community regulation, is the wide-ranging experience gathered in the implementation of the rules and case-law at Community level in terms of defining gender-based discrimination. The effect of this reflection is provided by Art. 2 of the Directive, which enshrines the concept of direct and indirect discrimination which may apply across the board to all the causes for such conduct which have been previously questioned. This is to be understood in the broadest sense, as regards the acts which may give rise to discrimination, since the concept includes regulations in the broad sense of the term (provisions), as well as unregulated behaviours, (opinions or practices); and in the most advanced terms which have been used at the time of defining the phenomenon in the case of gender-based discrimination, especially because it refers back to the normative

[1] The reference to "minimal requirements" provided for in Art. 8 of the Directive 2000/78 is not an obstacle, since it relates in any case to protection against discrimination, and, as a consequence, to instances where the principle of equal treatment are at stake, rather than the "substance" of the right of ideological freedom, an issue to which the Directive in no way makes any express reference.

interpretation of the concept of indirect discrimination– and we are all aware of the arduous jurisprudential work which led to it in the area of gender-based discrimination – as well as the confirmation of the reversal of the burden of proof laid down in Art. 10, and quite recently associated with gender-based discrimination.

Disregarding for the time being the issue of the burden of proof, it should be recalled at this stage that the notion of discrimination in this context includes both specific and concrete instances of unequal treatment, and discriminatory results, in which the comparative factor is more diffuse, or even totally non-existent as a concrete occurrence, as is the case in instances of indirect discrimination. Because of its particular characteristics, the concept of indirect discrimination is qualified by an exemption, which enshrines the justification for unequal treatment, i.e. that *"that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"* (Art. 2.2.i) Dir. 2000/78). Legitimacy of the aims of the measure and appropriateness and necessity of the means of achieving that aim are extremely far-reaching terms which open a significant breach in the protection afforded, and which may be used in such a way as to void totally the substance of that protection. In order to allay this risk, the precedent of gender-based discrimination may again be extremely useful by bringing to the foreground the case-law of the ECJ whereby the justification of the measure and the appropriateness of the means should be assessed consistent with a rule of *strict scrutiny*, which down-size considerably the terms under which an exemption is permissible.

The list of definitions given by the Directive concludes on a concept which emerged initially in the context of North American law and has since been focused on repeatedly in Community circles: harassment. Obviously the type of harassment we have in mind is sexual harassment, where sex is the triggering factor of specific or environmental pressures. However, the Directive meritoriously attempts to include this specific type of conduct as one of the many grounds for discrimination that it contemplates. From this point of view, discriminatory harassment shall be *"unwanted conduct related to any of the grounds referred to in Art. 1 which takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States"* (Art. 2.3). This definition recognises, first of all, the possibility of the concept of harassment being covered in the national legislation of Member States, although this cannot be construed as a licence for Member States to void the prohibition of its effects. Yet again, the concept of minimum requirement seems to be the most appropriate interpretative method to make sense of this enigmatic wording. On that basis, the definition of harassment given here seems to apply essentially to harassment in a given environment, which indeed is best suited to the type of grounds for discrimination covered by the Directive. As a consequence, and in view of the general scope of Art. 1 of the Directive, occupational harassment *"as regards employment and occupation"*, which delineates the context in which harassment practices may occur, as well as, for a good part, the circle of persons who are liable to exercise such harassment: employer, colleagues and even clients, although in the last two instances, the treatment of such incidents in the workplace is subject to the employer's own acceptance of such conduct, an unduly permissive behaviour which, per se, warrants the qualification of discriminatory behaviour as such.

Be things as they may, it should be noted here that the rationale followed in the Directive was used previously in order to extend to sexual harassment the protection mechanisms originally devised for gender-based discrimination. In actual fact, there remains no doubt whatsoever that harassment is more than mere discriminatory behaviour: it is a violation of human dignity which deserves autonomous protection, as well as interpretation and enforcement provisions of its own. Similar problems are to be expected with regard to the type of harassment regulated by Directive 2000/78 especially so in an area as full of nuances as that of religious freedom. In matters relating to religious freedom, difficulties may arise if the issue is viewed strictly in terms of the prohibition of discrimination, since there may be instances where equality in the strict sense of the term is not at stake.

Finally, many additional issues need to be reviewed as part of the problem, not least of which is the specific situation of organisations with an ideological orientation, or "tendency" organisations, which will be discussed below.

3. THE SCOPE OF APPLICATION OF DIRECTIVE 2000/78

Art. 3 of the Directive deals with the material scope of what is meant in broad terms by *"employment"* and *"occupation"* for the purposes of the Directive, and incorporates in good part the achievements obtained through a succession of previous Directives on gender-based discrimination, except for benefits derived from *"state schemes or similar, including state social security or social protection schemes"* (Art. 3.3). However, the laboristic approach which for some time has dominated the treatment of gender-based inequality in remuneration as mentioned in Art. 141 TEC, ignoring the advances made in this regard – advances which have led up to the adoption of a special Directive – resulted in a material decline of its scope of application, which is hardly comprehensible and is certainly not emulated in other regulations relating to discrimination adopted at the time[2].

In view of the above, the range of coverage of the Directive extends firstly to access to employment and occupation, including self-employment and professional activities (Art. 3.1.a), subject to the exceptions laid down in Art. 4 of the same regulation. Implicitly the specific reference is linked to selection criteria and hiring conditions, in which, it is assumed, the ideological allegiance of the worker (and therefore any investigation in that regard) is deemed to be irrelevant, and therefore unlawful, except in duties or undertakings with ideological characteristics. An equally broad and mandatory obligation applies to issues of promotion, *"whatever the branch of activity and at all levels of the professional hierarchy"*. Employment and working conditions are also covered, with specific reference to economic conditions for dismissal and pay (Art. 3.1.c). The full gamut of professional activity is covered with the inclusion

[2] In this sense, the solution suggested in Directive 2000/43 of 29 June, DOC L 180 of 19 July, is radically different, as set out in Art. 3.1, which specifically extends the scope of application of the Directive to *"social protection, including social security and health benefits*" (par. (e)) and *"social benefits"* (para.(f)). This is a surprising solution, radically different to that of Directive 2000/78, especially when bearing in mind that race or ethnic origin are often associated with specific ideological orientations, mainly religious, in which case the two Directives would seem to cancel out each other.

of vocational training and retraining at all levels, *"including practical work experience" (Art. 3.1.b).*

The positive description of the scope of application of the Directive finally includes a provision covering *"membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations" (Art. 3.1.d)*. As regards discrimination associated with membership in professional organisations, the prohibition is to be conceived in absolute terms. This means that it would apparently not be legitimate to restrict access to any such organisations on grounds of the profession of a given idea, ignoring the possibility that such groups, in exercising their right to freedom of association – trades unions especially –, deliberately choose to identify with a given ideology and to require therefore from aspiring members a profession of allegiance more binding than a mere statement of principle. This interpretation does not seem to be correct, unless the recognition of the principle of non-discrimination interferes unduly with "the right of groupings to draw up their constitutions and rules and to formulate their programmes", as provided under ILO Convention 87, Art.3, an aspect which, apparently, the Directive does not purport to deal with. The concept of discrimination that needs to be resorted to for this purpose should be more nuanced. It should exclude any requirement for affiliation based on ideological grounds that does not maintain an obvious and reasonable link with the professional goals of the group concerned: only professional aims can be invoked to justify infringements to the principle of equality, which the paramount goal.

Finally, the reference to the benefits that organisations may provide to their members may be understood to apply, obviously, to the benefits and services which result from membership in a workers', employers', professional or other organisation, but also from membership in professionally based insurance organisations and to the benefits they provide. The only legitimate differences of treatment concern state social security or social protection schemes, which are specifically excluded from the scope of the Directive.

The scope of application of the Directive is also defined in negative terms for the purposes of this presentation. In view of its importance, a part of this definition will be analysed more fully in a separate section**.** At this stage, we shall concentrate on the exemption laid down in Art. 3.2 of the Directive, derived from the policy of the Union and Members States on issues of nationality. This policy may be of special significance in practice, bearing in mind that national or ethnic origin may often be linked to ideological orientations – and mainly, if not exclusively, religious options – in such a way that any distinction on grounds of nationality may result in a distinction on grounds of belief, and afford the victim of that distinction an additional motive for demanding equal treatment. The Directive does not purport to change this situation, nor does it claim to offer a hold for claims on issues of equality to nationals from third States or stateless persons professing a prevailing or dominant religion and representing as ideological a difference of treatment based on nationality. For that reason, the Directive forcefully lays down that it does not *"cover differences of treatment based on nationality"*, and shall apply *"without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons ... and to any treatment which arises from the legal status of the third-country nationals and*

stateless persons concerned". Although this wording may be open to criticism, it nonetheless reveals clearly the difficulty of ensuring protection against discrimination in respect of a fundamental right which is not expressly recognised in the context of the transnational structure of the European Union[3].

4. EXCEPTIONS TO THE PRINCIPLE OF PROHIBITION OF DISCRIMINATION BASED ON RELIGION OR BELIEF. ART. 4 AND "OCCUPATIONAL REQUIREMENTS".

In this general framework, the only two general exemptions[4] expressly laid down in Directive 2000/78/EC in relation to the prohibition of discrimination on ideological grounds or belief are to be found in Art. 4. of the Directive. Under the generic heading of "*Occupational Requirements*" the Directive contemplates two assumptions which obviously operate along the lines of the genus to species relationship.

Thus, the first paragraph establishes in a generic manner that *"Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Art. 1"* – i.e. freedom of religion and belief – *"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"*. This is a standard exemption, similar in its wording and substance to that contemplated in the Directives on gender-based discrimination.

However, under para. 2, Member States may specifically maintain national legislation or national practices existing on 27 November 2000 and may consider as non-discriminatory *"a difference of treatment based on a person's religion or belief ... where, by reason of the nature of these activities or of the context in which they are carried out a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos..."* in the case of *"occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief"*. This exception is coupled, in a far less nuanced wording, with the right of the same "*churches and other public or private organisations, the ethos of which is based on religion or belief"* to *"require individuals working for them to act in good faith and with loyalty to the organisation's ethos*",

[3] For the same reasons, and possibly with more validity, see Art. 3.2 of Directive 2000/43 of 29 June, DOCE L 180 of 19 July, concerning the principle of equal treatment of individuals in relation to the application of the principle of equal treatment of individuals, irrespective of their racial or ethnic origin, a word for word counterpart of the text being discussed here.

[4] For obvious reasons, and because of its extreme specificity, we shall not discuss the special rule on Northern Ireland laid down in Art. 15 of the Directive, which provides that: "*1.In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation. 2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation."*

provided the provisions of the Directive are *"complied with"* and that they act *"in conformity with national constitutions and laws"*.

4.1. "Tendency" undertakings and discrimination on ideological grounds.

Starting out with the last of the above-mentioned paragraphs, which is specifically intended to apply to freedom of belief, it is obvious that it is meant to apply to a specific type of employer: churches and other public or private organisations the ethos of which is based on the religion or belief of an individual. It is also quite evident that this wording in the Directive – which is not particularly clear or obvious – seems to be directed, albeit in part only, to a group of entities commonly identified as "Tendenzbetriebe" or "tendency" undertakings, thereby following the German terminology, which the doctrine of the countries of the rest of the Union has slowly but surely been taking over.

4.1.1. The dual protection of the "tendency" and its gradual incorporation in Community legislation as applying to groups and individuals.

In an overwhelming majority of EU Member States, such organisations are essentially characterised by a combination of three basic features. The first is their recognition of the pluralistic nature of any society – in political, trade-union, religious, and more broadly, ideological, matters. The second is that they act as channels or instruments through which fundamental individual and collective rights to constitutional protection are recognised, displayed and exercised – which at times converts them into actual epicentres of regulatory systems or genuine autonomous or independent legislative systems of the State. The third and essential feature is that they act as direct support for an activity geared directly and predominantly to the dissemination of a given system of values, beliefs and ideas[5].

In any event, the main idiosyncrasy of such organisations, for the purposes of this presentation, is that they themselves require usually, for the dissemination of their ideologies to be credible, and therefore effective, a certain measure of internal consistency and unity, which involves a high degree of uniformity in the proclamation of the message. Irrespective of the degree of internal democracy in the decision-making process, it remains that these organisations, once their orientations have been adopted, usually require a more or less rigid observance of, and, as a consequence, the identification of their spokespersons to, such principles, both in their representation of the organisation and in other activities which, although theoretically not directly linked to the organisation, may, because of their being known or publicised, make it impossible for the employee to perform fully or adequately[6].

[5] For the sake of brevity, we shall merely refer to the remarkable work of F. BLAT GIMENO, *Relaciones Laborales en empresas ideológicas*, MTSS, Madrid, 1986, and to the more recent publication of F. JAVIER CALVO GALLEGO, *Contrato de Trabajo y libertad ideológica. Derechos fundamentales y organisaciones de "tendency"*, CES, Madrid, 1995, to whose bibliography we would generally refer. On the same subject, M.Fª. FERNÁNDEZ LÓPEZ, "Libertad ideológica y prestación de servicios", in *Relaciones Laborales*, 1985, II, p. 431.

[6] On the dual character of ideological organisations, products of pluralism which are at the same time characterised by authoritarian traits in their internal organisation, see M. PEDRAZZOLI, "Aziende di Tendenza", in *Digest delle discipline Privatistiche*, Sez. Commerciale, II, UTET, 1987, p. 109.

As long as this publicisation occurs through entities, members or affiliates whose connection with the organisation is merely commercial, associative or simply religious (as opposed to occupational), it would not warrant any discussion. The internal dynamics of these groups usually require that minorities submit to majorities. Thus, if a member does not conform with the ideology of his group, possible negative consequences within the group may be legitimate[7]. In such a case, the dissent should be genuine, public and not a pretext to justify real discrimination based on criteria other than those professed by the organisation. For the purposes of this discussion, the problem occurs when, due to the gradual extension of the scope of duties laid down in the person's work contract[8] and the steady extension of his activities, the link between the person who has expressed an opinion and the organisation has evolved into an occupational relationship, including the gradual acquisition of labour rights (such as the right to join a trade union), or unspecified constitutional rights (such as the right to freedom of religion and conscience). Broadly interpreted, such rights might eventually clash with the "tendency" embraced by the organisation by virtue of its own constitutional rights.

The need to afford protection to the "tendency" (*Tendenzschutz*) involves a difficult balance between the defence of pluralism, of the constitutional rights of the organisation and the ever delicate coordination between the state regulatory order and other independent regulations, such as those of religious entities. This protection should be ensured, not only vis-à-vis the public authorities (*vertical protection*), but also vis-à-vis private third parties (*horizontal protection*). As a matter of fact, private third parties might well subject the dissemination of their message or their internal rules to external requirements which would be unacceptable for the group and its internal system of mental conditioning, either through measures of collective participation and joint management, which might qualify or restrict the occupational measures required in connection with the dissemination of the "tendency", or through the imposition of a new ideological orientation specific to the individuals concerned but unacceptable from the standpoint of the undertaking or organisation. This is the reason why, in Western countries, this horizontal protection involves two types of limitations. The first and original limitation, which prevails in the main in those countries where joint management and participation schemes are most widespread, consists in limiting or restricting the operation and effectiveness of such instruments of industrial democracy, especially where there is a risk of their conflicting with the freely-chosen orientation of the organisation[9]. The second limitation, which emerged more recently, probably

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[7] In general, A. DE SANCTIS RICCIARDONE, *L'ideologia nei rapporti priviti*, Eugenio Jovene, Napoli, 1980.

[8] For a specific case, M. PÉREZ PÉREZ, "El sindicato, empleador", in *Actualidad Laboral*, 1994, n. 41, page 641 ff. Generally, on the substantiality of the work contract in "tendency" undertakings, especially in political parties, ideologically oriented associations as well as churches and religious confessions. F.J. CALVO GALLEGO, *Contrato de Trabajo*, op. cit. page 132 ff.

[9] Such would be the case, for instance, of the exemption of "tendency" undertakings from the scope of Art. 2 of the Swedish law on joint management of 1977 (MBL), of 10 July 1976, the so-called "aim and direction clause" or the relevant exemptions clauses in the participation and joint management laws in German undertakings - § 118 and 1 Abs IV of BetrVG de 15 of January 1972 and MbG of 4 May 1976--

because of the later recognition of the horizontal applicability of fundamental rights in a work environment, consists in exempting such undertakings or organisations, or more specifically certain precise tasks to be performed, from a number of progressive rules, e.g. the prohibition of prior investigations into the private life of the worker, the application of discriminatory criteria to access or permanency in the undertaking on religious or ideological grounds in the broad sense of the term[10]. All of the above should not preclude, quite obviously, the fact that certain general clauses were necessarily subject to modalities, such as good faith or diligence[11], which gave rise to serious doubts concerning the supposed peculiarity of the organisations propagating specific attitudes (*"Tendenzträger")*[12].

At this stage, our concern is to show how this concept of double protection – at the individual and collective levels – was not, contrary to certain contentions, a unique and exclusive peculiarity of the German legal system[13]. A cursory review of comparative law shows that even today it is possible to find regulations of this or a similar nature in other countries such as Austria or Sweden[14]. Even in Mediterranean countries such as Italy, France or even Spain, similar regulations may be found, e.g. Art. 4 of Legge Italiana 108[15] or Art. 6.2 of the Ley Orgánica de Libertad Religiosa (LOLR hereinafter LOLR)[16]. In these texts, "tendency" protection focuses more on individual

.On these two regulations, F. SCHMIDT, *Law and Industrial Relations in Sweden*, Almquist & Wiksell, Stockholm, 1977, p. 95 ff. and 234; A. VICTORIN, "Codetermination in Sweden: The Union Way", en *Journal of Comparative Law and Securities Regulation 2 (1979) 11-114*, p. 429; ANDERMAN, NEAL, SIGEMAN, VICTORIN, *Law and Weaker party, An anglo-sweden Comparative Study , Vol. I. The Swedish experience*, Professional Books, LTD, p. 149 E. FREY, *Der Tendenzschutz im Betriebsverfassungsgesetz 1972*, Verlagsgesellschaft Recht und Wirtschaft MBH, Heidelberg. K. FITTING, F. UFFARTH, H. KAISER, *Betriebsverfassungsgesetz Handkommentar*, München, 1977, p. 1179, 1 in fine; K. FITTING, O. WLOTZKE, H. WIßMANN, *Mitbestimmungsgesetz mit Wahlordnungen*[2], Verlag Franz Vahlen, München, 1978,

[10] To give but one example out of many, see M.G. MATTAROLO, Il rapporto di lavoro subordinato nelle organizzazioni di tendenza. Profili generali, Cedam, Padova, 1983

[11] F. SANTONI, Le organizzazioni di tendenza e i rapporti di lavoro, Milano, Giuffrè, 1983.

[12] In the case of Germany, the specificity is expressed in the large number of additional duties stemming from the contract, in particular the duty of loyalty, which likens the work relationship to that existing between a public servant and the State. In this respect, observe how W. DAÜBLER, in his manual Das Arbeitsrecht I[11], Hamburg, 1990 deals with the peculiarities of Church workers in the same paragraph as those of State employees. For a different view, see M. PEDRAZZOLI, "Aziende di tendenza", op. cit. , p. 109, who points to the radical differences between traditional subordination and that applying to "tendency" workers.

[13] Vid. W. DÄUBLER, Das Arbeitsrecht I[11], Hamburg, 1990, p. 591: "Der hier skizzierte Tendenzschutz ist eine deutsche Besonderheit. Weder die französiche noch die italienische oder die englische Rechtsordnung kennen eine vergleichbare Beschränkung".

[14] Vid. F. J. CALVO GALLEGO, *Contrato de trabajo...*, op, cit., p. 34 ff., n. 64.

[15] On this precept and its particular connection with "tendency" protection, F.J. CALVO GALLEGO, "Alcune riflessioni sul concetto di organizzazioni di tendenza e sulla cosituzionalità dell'Art. 4, Legge 108/90" in *Rivista Giuridica del Lavoro*, 1994, n.2.

[16] G. MORENO BOTELLA, "El carácter propio de las entidades religious and sus consecuencias en el derecho laboral español", in *Revista Española de Derecho Canónico*, 1987, n. 123, Vol. 44, p. 531.

cases, such as dismissals on ideological grounds of individual employees. However, in this other aspect it was mainly jurisprudential decisions and trends which sometimes gave rise to intense debate. Suffice it to recall the notorious Cordero case in Italy[17].In this case, there was an admission, with all the possible nuances one may wish, of certain modalities, of a certain acceptance of inferior treatment linked to this type of occupation and employment in organisations of this type, or at any rate, and as we shall see, to some of the duties discharged in such organisations[18].

Viewed from this angle, it should be no surprise that a legal order such as that of the Communities, which is often the result of the formalisation of the minimum common internal requirements existing in Member States should have ultimately enshrined both aspects in its own regulation. Indeed, it should be noted that this dual protection has been surfacing in the same chronological order as it did in some of the member countries. In Community law as in Germany, this protection appeared initially in respect of groupings, with Art. 8.3 of Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council, which provides that "*each Member State may lay down particular provisions for the central management of undertakings in its territory which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions, on condition that, at the date of adoption of this Directive such particular provisions already exist in the national legislation"*; an author**i**zation which, most certainly, has not failed to be confirmed in a number of transpositions of some Member States[19], the importance of which may have been underestimated in our own country.

Only six years later came Art. 4.2 D. 2000/78/EC, that is above all linked to the second dimension of this horizontal protection of the "tendency", that is, to the possibility of creating modalities or exceptions to the prohibition on discrimination on

[17] Ruling of the Italian Constitutional Council of 29 December 1972, n. 195.

[18] For this purpose, see in the German case-law BAG 25 April 1978 in *Arbeit und Recht*, 1978, p. 185 and in *Neue Juristische Wochenschrift*, 1978, p. 2116 ff: - dismissal of a teacher in a catholic school is justified on grounds of her marriage with a divorced man, because of her inability to comply adequately with her contractual duties: LAG Hamm 3 November 1977 in *Neue Juristische Wochenschrift*, 1978, p. 850; - dismissal of a teacher from a catholic centre on grounds of her living with a priest: LAG Düsseldorf of 25 May 1960 in *Entscheidungen in Kirchensachen*, 5, Vr. 30; - dismissal of a kindergarten teacher belonging to an evangelical community, on grounds that she was educating her children in the catholic faith: ruling of the *Bundesarbeitsgericht* of 31 January 1956. Another somewhat ludicrous case was the dismissal by a catholic hospital, of a painter who, after his divorce, had married a woman with whom he had previously had a child. This was hardly a case where the worker might have been considered as a *Tendenzträger*. The German Federal Court nonetheless ruled that, consistent with the moral standards and customs of that time, the employer could not be forced to maintain the work relation, in view of the impact which the private life of the worker had on the discharge of the work contract. This interpretation was upheld in 1985 by the Federal Constitutional Court with regards to opinions expressed by the worker contrary to those of the church BverfG *Der Betrieb*, 1985,p. 2103. In an opposite direction, see LAG Saarbrücken, 29 October 1975 in *Neue Juristiche Wochenschrift*, 1976, p. 645, which denied the legitimacy of the dismissal of the headmistress of a catholic kindergarten on grounds of her marriage with a divorced man.

[19] See for example Art. 34 of Europäisches Betriebsräte-Gesetz-EBRG in Germany and, more drastically, Art. 5 of the Swedish Law for the Establishment of a Works Council.

grounds of religion or belief in both the profession and employment in relation to this type of employer. And it is only when the protection afforded under Art. 13 of the Treaty starts to point to the possibility of regulating the protection of these fundamental rights which are unspecified in European undertakings that the correlative need to mark this exception to a hitherto inexistent general rule arises.

Another issue is that the wording of the precept has been especially confused and very difficult to understand. The problem is that the latter standard of course lacks the great clarity and technical perfection of Art. 8.3 D. 94/95; an article which, it should not be forgotten, was elaborated on the basis – one need only observe the terminology – of the German standards on co-determination and participation in the enterprise, a long-standing tradition which has been extensively fine-tuned, both scientifically and legally. In contradistinction, the cumbersome and sometimes extremely confusing wording of Art. 4.2 poses enormous problems as regards not only the limits of this exemption but also as to the very delimitation of the organisations at which it is aimed. This is why we shall examine this point very closely in the following pages.

4.1.2 The organisational framework of the exemption: occupational activities of churches and other public and private organisations the ethos of which is based on the religion or belief of an individual

From this perspective, and since we are striving for sincerity, it seems clear that the only indisputable element is that this exemption covers only "*the occupational activities of churches and other public and private organisations the ethos of which is based on the religion or belief of an individual*". Yet what is much less clear are the concrete limits of each of these terms, the necessary requirements that would justify such pejorative treatment of certain employees, including the degree of ideological loyalty that such organisations can demand from the rest of their employees. But let us proceed by stages.

First of all, it seems obvious that, even though in the Spanish version, Art. 4.2 D. 2000/78 refers exclusively to the term "Iglesia" – naturally, as do the texts in other languages such as German or Italian[20] - this standard does not appear to be aimed solely and exclusively at the different Christian communities, which, with their concrete denomination of Catholic or Protestant, define themselves strictly as such. There is no gainsaying that, due to their longer historical tradition and greater presence or the constant protection of their legal independence vis-à-vis the State order, these concrete professions have generally spawned the most conflicts in such Member States as Germany, Italy and Spain. It is therefore clear that it is surely these very same associations which, owing to their importance and their widespread presence, most frequently have recourse to such protection. But this does not seem like sufficient grounds for excluding from this same protection any other non-Christian confession or community whose occupational activities require workers, as a genuine and legitimate occupational requirement, to maintain a certain ideological connection with the corresponding creed or confession.

[20] "Kirchen", not "Religiongemeinschaft", "Chiesa", not "confessione religiosa".

In our view, minimum respect for the equality of all confessions and beliefs and for the fact that their internal operating norms must be configured as genuinely independent regulations that are constitutionally recognised by many Member States should lead us, so to speak, to extend this same possibility to other, non-Christian creeds and religious entities such as, for example, the Israeli or Islamic communities, to mention only two entities with which the Spanish State has already had signed agreements. What is more, it would perhaps be reasonable -- although the question is for from clear -- to consider that this same protection could be requested by any confession whatsoever without having previously registered in any public State registry[21], without the State having signed an agreement with the confession and without any need for the confession to wield any special influence stemming from the number of its followers. It would suffice for them to carry out activities allowing them to be recognised publicly as such in the Member States and, as we will see, for the said exception to be recognised and assumed in practice in connection with the concrete relevant legislation. It would even appear logical to accept that the same exemption should also apply to other confessions and religious organisations which, in the future, could establish themselves on EU soil and ask the respective State for a similar agreement as those which some of these traditional confessions had already signed prior to the adoption of the Directive. In general, whenever the organisational form of a given belief is involved,[22] we find ourselves facing a de facto situation where part of this exemption is closely linked – as recalled in the preamble of the Directive – to the simple Declaration No. 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Treaty of Amsterdam, in accordance with which the European Union respects and does not prejudge the status under national law which other Member States have granted to these organisations.

Next we have the much more complex interpretation which must be given to the term "*occupational activities*" carried out by the said Churches or organisations the ethos of which is based on religion. A first interpretation, the most simple and direct given the confused terminology of the precept, could lead us to believe that this reference is an attempt to fundamentally include other activities of these same not strictly religious bodies, such as organisations for charitable works, care, counselling, housing and hospitals, which have achieved a certain visibility in quantitative terms in other EU countries and which, strictly speaking, cannot be deemed "churches". This first interpretation would thus reflect the reality in some European countries where a great

[21] As recalled by S. BUENO SALINAS, "El ámbito del amparo del derecho de libertad religiosa y las asociaciones" in *Anuario de Derecho Eclesiastico del Estado,* 1985, Vol. I, pp. 191 and 194 "Registration in the Registry of the Ministry of Justice is not the ultimate, definitive criterion to consider a body as a religious confession worthy of protection of the right to religious freedom, given that the only aspect covered is its legal personality vis-à-vis the State order". However, cf. also STC 46/2001 of 15 February, 7th Legal Grounds, in which, by dint of emphasising the importance of registration, refusal of the same is perhaps viewed as discrimination, or this perhaps excessively limits the legal position of confessions which, exercising their freedom of choice, do not request registration. As noted in the specific vote of the said ruling: "religious entities are situated on the fringe and above and beyond any official Registry. They do not need to ask the State to grant them legal personality".

[22] As regards the characteristics that define religious acts – acts of faith, cultural practice and moral implications, see S. BUENO SALINAS, "El ámbito ...", cit., p. 186. In Spanish jurisprudence STS of 11 June 1989 (RJ 5349). The judgement in the case STC 46/2001 of 15 February is enormously important.

many such problems have arisen with such bodies[23], or even Spain's own regulations which, as we will see later, have made it possible to establish clauses to safeguard the religious identity and nature of not only churches and confessions, but also of "*the institutions set up by them for the achievement of their goals*". However, the point should be made that this first interpretation leaves some doubts. The first is surely the fact that it would be more fitting to place the bulk of these collateral organisations in the second type of bodies referred to by this paragraph to which we shall revert: that is, public or private organisations the ethos of which is based on religion, thereby making this interpretation somewhat redundant. Likewise, we could be led to the same conclusion by the fact that these occupational activities delimit the scope of the exemption for both churches and organisations the ethos of which is based on religion. But above all, as can be seen from the use of this same expression in the first paragraph of the same article – even in the very name of the precept --, with the expression "occupational activities" the Directive appears to try to refer -- albeit in truly obscure fashion -- to the concrete services performed on a professional, stable and remunerated basis, including in its scope of the application, which would normally not be covered by the strictly regulated field of associative, ecclesiastical or canonical rules.

From this other perspective, the second possible conclusion is that with this expression, the Directive aims to refer exclusively to those services or activities carried out professionally in a normal work relationship for these churches or their collateral entities -- which, in the strict sense of the term, are not churches -- that, in this way, they would be included, as far as possible, in the second group to which we shall revert. The reference to professional activities would thus be designed to limit protection afforded by the Directive exclusively to the field to which explicit reference is made: that is, to the professional relations that have sprung up within these bodies but which are regulated by private law, but excluding, because they do not even fall within the scope of the application of the general rule – Art. 1 – other relationships of worship that, in the exercise of the religious freedom of the organisation and the will of the individual, have remained lawfully excluded from the State's legislation – usually work-related – which would be regulated by other ecclesiastical or confessional norms specific to each organisation. Accordingly, these relationships and their status would remain normally excluded from the scope of not only the Directive but even from the domestic legislation of the member countries, and be regulated by the internal norms of the confession.

Moreover, we find that the interpretation of the other group expressively recognised in Art. 4.2 D. 2000/78 is just as complex: that is, "*other public or private organisations the ethos of which is based on the religion or beliefs of an individual*". This is above all because of the difficulty in delimiting this second concept which can significantly broaden or restrict the scope of this exclusion.

In this respect, one initial question that is worth asking is whether this reference to an individual's beliefs as a separate reality of the religion can directly affect the traditional discussion -- classical in other legislation such as German law - on whether or not to broaden this protection to include other agnostic or atheistic entities. In our view, the current text of the Directive and, above all, the specific reference to this second group seems to open up this possibility, albeit with all due caution, thereby

[23] To take only one example, W. DÄUBLER, *Derecho del Trabajo,* MTSS, Madrid, 1994, pp. 913 ff..

extending the same protection - either symmetrically or ideologically, in the broad sense of the term - to those organisations which, exercising their negative religious freedom, choose to reject this possibility. And it appears unquestionable that with agnostic or atheistic or essentially atheistic organisations as well, the convictions of given subjects may be turned into a genuine, legitimate and justified occupational requirement which, in the event that they publicly contravene the orientation of their entity, could lead to loss of employment or profession. The indiscriminate reference not only to religion but also to convictions seems to allow inclusion in the protected groups and beliefs for not only traditional religions or religions and beliefs with institutional characteristics similar to those of the traditional religions -- that is, a belief in the existence of a Higher Being, transcendental or otherwise, with whom communication is possible; belief in a body of doctrinal truths (dogmas) and rules of behaviour (moral standards), which are in one way or another derived from this Higher Being; and, finally, ritual individual or collective acts (worship), which constitute the means through which the communication of the faithful with a Higher Being is institutionalised -- but also, as acknowledged by the United Nations Human Rights Committee in its General Comment of 30 July 1993, for "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. And this is why the terms belief or religion must be understood in the broad sense of the term and not in a limited way". Yet another separate issue is the possible limits based on public order that States could establish in relation to public security, the protection of law and order or, inter alia, the protection of health. But as we will see, the controversial topic of the so-called sects is more a penal issue and a law-and-order problem than a strictly work-related topic.

But the problems do not end there. This is because, according to the authoritative dictionary edited by the Real Academia Español (RAE), these “convicciones” are the body of not only religious ideas but also ethical and political ideas to which a person is strongly attached; that is, the body of beliefs or values that inspire a given individual and shape his ideology. The problem arises because when the reference is interpreted in this way, it could lead us to include not only religious, philosophical or agnostic confessions, but also political organisations or even any type of organisation that is an expression of a given world view, of a body of beliefs, values or ideals aimed at reflecting or transmitting the message of the said organisation: in the final analysis, of any ideological organisation broadly defined. In our view, the only possible solution to this dilemma is to ensure that Art. 4.2 dovetails with the interpretation given of the same term in Art. 1 D. 2000/78/EC. The broader the scope of the former, the broader the scope of the latter, and vice versa. And the greater the protection extended to the individual by the former, the greater the field of exemption laid down in Art. 4.2, therefore also applying to organisations in which the corresponding liberty manifests itself collectively, obviously to the extent that they can require certain employees to display a certain ideological orientation as a genuine, legitimate and justified occupational requirement for their occupational activity. As with the rest, we cannot insist too strongly that these "convictions" appear to be identified with a general vision, with an open or closed system, a system that is flexible or rigid depending on the society or divinity, from which we should logically and necessarily exclude the concrete ideological orientation which, in the final analysis, any undertaking or employer possesses or manifests.

In any event, and to avoid going into excessive detail, we would only like to give a few detailed explanations regarding the scope of this latter expression. First of all, even though all the Directive always speaks of is organisations, it is clear that it never requires the total absence of any profit motive, even though this is most frequently or generally assumed. Therefore, it would seem that under the Directive, we can group together both profit-making and non-profit-making organisations and those organised like businesses and those not organised like businesses, to such an extent that there is no reference to the need to ensure that these religious aims or convictions are public, predominant and principal. Even though the Directive uses confused terminology, it is obvious that what is protected therein is the necessary religious, ethical or moral orientation of the organisation, adopted as a reflection of the orientation of its owner or holder and not -- and this is the most important point – the orientation the owner or holder could hold and try to impose on his/her employees even though it is unrelated to the activity of the undertaking. And this is what German doctrine has recalled ad nauseam: the important consideration is the public orientation of the undertaking and its "products", not the convictions or personal orientation of its owner. Consequently, in the final analysis, this exception can only cover those organisations which currently, not in the past, reflect a given religious orientation or a given set of convictions. On the other hand, even if we can lump together the educational and information bodies of churches and confessions, it seems more dubious to include others which, even though they possess a link to the Church, do not have this specific connection with the shaping or attainment of the Church's goals.

Finally, the reference to the possible public nature of these entities may surprise Spanish legal operators, given that in our legislation, the public administration must be ideologically neutral. Yet we should not forget that national legislation in some Central European countries grants certain public institutions a confessional nature. This is the reason for the inclusion of this reference, which moreover reflects to a large extent the national concrete inspiration to which Art. 4.2 of this Directive owes a great deal.

4.1.3 Duties of good faith and loyalty, neutral workers and "tendency" workers

When viewed from this angle, Art. 4.2 D. 2000/78/EC tackles the individual work-related problems specific to these organisations from a dual perspective, which coincides at least in appearance with the traditional distinction between neutral activities and "tendency" activities that is now widely accepted in the legislation of the main Western countries. Even though the Directive allows these entities to require generically and indiscriminately "*individuals working for them*" to "*act in good faith and with loyalty to the organisation's ethos*", "*acting in conformity with national constitutions and laws*"; it limits the possibility that specific difference of treatment on grounds or religion or belief might not be considered discriminatory to situations where "*by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement with regard to the organisation's ethos*".

This distinction shows, first of all, that such entities are not, as has sometimes been thought, a comprehensive field that is automatically excluded from the general anti-discriminatory rules contained in the Directive. Not all pejorative treatment on

grounds of religion or conviction is admissible for this type of entity. And this possibility remains clearly limited, even in the Directive – albeit in a more generic and open-ended form – to what has come to be known as "tendency" activities in our doctrine.

In general, this type of activity has come to be characterised in most EU countries by the ideological content or pronounced representative nature of the service to be provided, by the fact that the worker's contractual duties (*deuda de actividad*) are closely linked to the attainment, implementation and determination of the organisation's ideological or religious aims. Accordingly, this nuance or ideological qualification, this "nature of occupational activities" in the words of the Directive, normally requires a certain ideological coincidence between the person who performs the occupational activity and the entity it serves. This is for two basic reasons. The first is because any dissent over and above that which is allowed by the organisation in the delivery of the service -- and we must be on the lookout for this peculiarity in each group -- could basically be deemed a failure to fulfil the contractually assumed obligations that would provide grounds for terminating the contract in all legality. Second, because the public display of behaviour incompatible with such beliefs away from the workplace and outside working hours could also compromise or reduce the credibility of the message, making it pointless or impossible to perform the primary service. Recently, it is this ideological nuance of the *deuda de actividad* that requires the "tendency" worker to display public behaviour outside work that is at least compatible with his work. This already exists through the generic duty of good faith or through mere preparatory steps for the primary obligation. In the final analysis, it is in this field that the "*context in which the activities are carried out*" – the second criterion set out in the Directive – takes on added importance. In the final analysis, it is the social appreciation and the compatibility with the teachings of the confession – a question which is always difficult for a State legal body to evaluate – that determines whether or not such behaviour is compatible with the proper fulfilment of the contractual duties[24].

When all is said and done, it is this ideological nuance of the *deuda de actividad* that turns the ideological coincidence or compatibility between the person and the organisation into a legitimate occupational requirement, which justifies the distinction only when it is essential, that is, when it is necessary for the proper performance of the service and hence the credibility of the message. Accordingly, the employer is entitled at the outset to investigate the individual's ideological orientation, and the candidate may not lie about or conceal this same orientation, given that it forms part of his capacity and aptitude for the job; second, this coincidence may also be appreciated during the recruitment process or may constitute valid grounds for terminating the contract during the trial period; finally, any incompatibility that arises may lead in extreme cases to the termination of the contract, even though this is surely the most complex issue and the one which perhaps should have come in for closer scrutiny by Community law.

In this respect, it should perhaps be noted that obviously, not all ideological disagreements, broadly defined, between the individual and the organisation allow or justify such means. Disagreements that arise in the employee's heart of hearts, doubts or

[24] For more information on this question, see M.F. FERNÁNDEZ LÓPEZ, "Libertad ideológica...", cit., pp. 431 ff.; F.J. CALVO GALLEGO, *Contrato de trabajo*..., quoted, pp. 153 ff.

incompatibilities not voiced either in his work or in public outside work or, at most, expressed only within the family or with close friends, and thus not socially significant, do not appear to ever justify such behaviour. This is because such doubts neither affect the performance of his duties nor reduce the effectiveness of the message. In the final analysis, the law can neither appreciate nor act on beliefs or convictions that remain unvoiced, deep inside the worker's heart[25].

Second, it is obvious that this exceptional possibility must not be used as a "carte blanche" so that this type of undertaking may discriminate on other grounds than the beliefs that constitute its justification. Pejorative distinctions or treatment are only admissible when they are based on failure to fulfil contractual obligations or an impossibility that has arisen, whether or not the person is to blame, of fulfilling the obligations inferred from the contractual programme. This being so, absolutely no other distinctions based on convictions other than or foreign to the concrete ideology underpinning the organisation may be envisaged. The Directive itself is surely referring to this when it expressly points out that this exemption "*should not justify discrimination on another ground*". A separate issue is the difficulty of the burden of proof when at times this limitation may lead to situations, on clearly problematic occasions, where a State body is called upon to appreciate whether or not an employee's behaviour is compatible with his/her concrete ideology.

Nor should we forget that when appreciating such acts, above all, those that occur outside work, it is necessary always to take into consideration the specific ideological content that may be manifested through the performance or public or internal importance of the employee, as well as the social and group awareness. Not all "tendency" activities feature this same qualification or the same "ideological" intensity; nor is there a clear separation, like a strict dichotomy, between these ideological activities and those which we shall henceforth call "neutral". Not everything is black and white; rather, there is a wide range of greys. This is why these aspects - the distinct ideological content of the employee's performance, his public importance and even the context and social permissiveness and that of the confession and group that produces a distinct intensity on duties related to conduct outside work, must be evaluated on a case-by-case basis, depending on the concurrent circumstances and the degree of ideological commitment that performance requires from the employee.

In any case, what is most worthy of note is the fact that the Directive limits itself to justifying these pejorative acts, without establishing or even mentioning a hypothetical correlative obligation on the part of the employer to try and at least tailor performance to the changes that have occurred in the worker's ideology. This reasonable adjustment of performance, which exists in other systems such as the North American

[25] In Spanish jurisprudence, see S.T.C. 47/1985 of 27 March, B.O.E. n. 94 of 19 April, F.jco.3°. In Spanish doctrine, above all J. APARICIO TOVAR, "Relación de trabajo y libertad de pensamiento en las empresas ideológicas", in *Lecciones de Derecho del Trabajo en homenaje a los Profesores Bayón Chacón y Calvo*, Madrid, 1980, p. 296: "Ideological differences as such are irrelevant and may only be taken into consideration to the extent that such differences reflect ... an incapacity to perform the required service"; Ms. F. FERNÁNDEZ LÓPEZ, "Libertad ideológical...", cit., p. 427: "Only in exceptional cases could the opposability of the rights of the worker and the organisation arise, when the conflict spills over to the outside in such a way that it purely and simply prevents the performance of the contract".

one[26] - which clearly also provides for special treatment in the workplace for this type of religious confession[27] - could have been established as a necessary obligation, with proper limits and conditions, for this type of act. Yet the Directive preferred to avoid any reference to this, which should not be understood as a rejection thereof but rather as a desire not to require for all member countries to observe such a condition.

Finally, as regards the second paragraph of Art. 4.2 D. 2000/78, it is clear that the reference to the good faith and loyalty of the workers as a whole must not be interpreted as an inadmissible duty, namely, that all employees must assume, expressly and publicly, the convictions and beliefs of the entity, or that they are subject to a duty of loyalty that obliges them to subordinate all their interests to the specific goals of the organisation, regardless of the ideological content, whether or not it is representative of their performance. It is clear that in some jobs with ideological and representative content, this ideological coincidence must necessarily exist in order to ensure that the message is credible vis-à-vis the outside world. As to the rest, however, this ideological coincidence or even compatibility does not necessarily appear to be a genuine, legitimate and justified requirement. This being so, with the two expressions the Directive seems to have in mind a generic duty of not publicly and intentionally harming the image or beliefs of the organisation that applies to all employees. Hence, the general rules applicable to any organisation should also be applied to this type of undertaking, with the specificity of the essentially ideological aim that underlies it, without it being possible to infer a subordination that goes beyond the general rules present in the legislation and, in our case, the generic good faith as an element for the contractual heterogeneous integration and limitation of the abusive exercise of rights.

4.1.4 Nature of the exemption: its character of a conditioned possibility

Finally, it does not seem possible to end this commentary without first mentioning the basic aspect which to a large extent determines the entire content of the Directive. In this aspect, the Directive does not in the least strive to rigidly standardise national standards and practices, but rather only to respect pre-existing situations, thereby at most setting limits which, given their broad scope, do not appear to pose serious problems of adjustment for the different member countries.

In this respect, we must not forget that this exemption appears as a mere open-ended conditioned possibility for the Member States, rather than a genuine imposition with which the Member States are inevitably required to comply. Art. 4.2 of the Directive does not claim to establish in a direct and necessary fashion the legitimacy of such acts. On the contrary, all the precept does in this respect - in close connection with

[26] Cf. R. PALOMINO LOZANO, "Objeción de conciencia y relaciones laborales en el Derecho de los Estados Unidos", in *Civitas Revista Española de Derecho del Trabajo*, 1991, pp. 908; S. DEL REY GUANTER, "Contrato de trabajo y derechos fundamentales", in AAVV., *Constitución y Derecho del Trabajo: 1981-1991 (Análisis de diez años de jurisprudencia constitucional*), coord. M.R. ALARCÓN CARACUEL), Marcial Pons, Madrid, 1992, pp. 50 ff., to whose bibliography we refer.

[27] Cf. D. LAYCOCK, "Towards a general theory of the religion clauses: the case of Church labor relations and the right to Church autonomy" in *Columbia Law Review*, Vol. 81, November 1981, No. 7, pp. 1373 ff., and D.L. WILLEN, "NLRB regulation of religiously-affiliated schools: the Board's current jurisdictional test", in *Industrial Relations Law Journal*, Vol. 13, 1991, pp. 38 ff..

Art. 8.2 of the same normative corpus – is to authorise the Member States to maintain legislation legitimising such acts, provided that such national legislation or practices already existed at the time when the above-mentioned Directive was adopted. If this is not the case, in the event that such standards did not exist, this exemption will never be admissible, thereby freezing the pre-existing situation for the benefit of the employees of these undertakings. Hence the importance of the existing legal situation and national practices at the time of adoption in each and every one of the Member States. Likewise – as seems logical – the pre-existence of such standards does not necessarily require their maintenance, leaving this option up to the free will of the corresponding State bodies that could thus decide to maintain or simply eliminate them. This is the only conclusion that we can draw from Art. 8 of the Directive when it refers to the "minimum" requirements and hence the possibility that Member States may adopt more favourable provisions for the protection of the principle of equal treatment.

In any case, it is worth noting the express reference to the so-called national practices, which is absent in other similar exemptions such as the one laid down in Art. 8.3 of Directive 94/45/EC of 22 September. Here, the aim is surely to mention not only possible convention-based standards in force at the time, but also and above all specific jurisprudential orientations that are peculiar to this subject matter. This is also because in this field, practice shows that the majority of Western countries lack a specific, comprehensive body of regulations for such situations, delimiting the concrete normative framework by means of a series of judicial decisions that in each case seek and specify the delicate balance between the interests at stake in these cases.

4.2 "Tendency" activities for neutral employers

Moreover, as we have already mentioned, limiting this exemption to some of the old "tendency" undertakings, and in particular to Churches and other confessions, poses a few problems when we encounter special cases such as, in our country, materially religious services provided by employers who are in theory absolutely neutral. This is because, for example in Spain, due to the principle of cooperation with the Catholic Church and certain precepts of the Agreements with the Holy See, the Spanish State has stopped "employing" priests in the armed forces, hospitals and -- above all from a numerical prospective -- religious teaching staff, whose inclusion in/exclusion from this exemption therefore poses a few problems[28].

Leaving aside the fact that in some of these cases, we are surely seeing some of the clearest signs that the unilateral figure of the employer is inadequate, in our view it is clear that the said activities must expressly be included in the general exemption which is contemplated in the first paragraph of Art. 4 of the Directive; they should also apply de facto to all other services in which this religious, philosophical or ethical qualification is a genuine, legitimate and justified requirement even though the employer may in essence be perfectly neutral or may employ workers with orientations that are very different or incompatible, for the purpose of meeting the various "needs" of its customers, for example those of a religious nature. In such cases as well, ideological

[28] Above all, J. DE OTADUY GUERIN, *Régimen jurídico español del trabajo de eclesiásticos y de religiosas*, Madrid, 1993.

coincidence, compatibility between the message of the subject is a necessary criterion for the proper fulfilment of contractual obligations that are fully legitimate and justified.

In any case, what we would like to underscore is that in all of these cases it is clear that, at least from our point of view, the specific exemption of the "tendency" undertakings is but a materialisation of a broader and more general problem; a concrete case which, paradoxically, comes in for more attention than the basic premise. Even though it is clear that the bulk of these ideological problems arise in "tendency" undertakings and that, moreover, in some of these there is also the underlying difficulty of harmonising an autonomous, independent legislation, it is equally clear that ideological conflicts and their solution are in reality a more general problem, one that is traditionally encompassed under the problematic heading of conscientious objection, and one that is more related to the incompatibility between the legitimate performance that the employee is contractually obliged to deliver and his legitimate beliefs. In other words, it is clear that the most common ideological and religious clashes between the worker and his lawfully imposed work-related duties arise in this type of undertaking; in fact, this is the reason why – as is the case here – such undertakings are usually cited as the most relevant exception to the general rule that the ideology of the employee or candidate is irrelevant for the workplace. Yet we must not forget that the contradiction between the legitimate work-related obligations and the religion or ideology of the worker may also arise above and beyond these organisations, in entities which, without being *strictu sensu* religious or even "tendency", require a concrete, genuine, justified, non-arbitrary ideological commitment by the employee, or those in which the content of such ideology might clash, either at the outset or thereafter, with the worker's beliefs or ideology. Accordingly, we can even say that in this case, the "tendency" undertakings or, more precisely, the "tendency" activities -- are but a mere specification of a more general problem which, however, the Directive by and large fails to address: the clash between the worker's ideology and his work-related obligations or duties.

4.3 The principle of a secular State, particularly in relation to the Islamic veil or headscarf

Finally, a last point of interest will focus on the problems that could stem from the existing requirements in certain States to refrain from wearing images or above all clothes that could be related to a given religious orientation or for civil servants to maintain a certain type of religious behaviour.

In principle, it could appear that this problem is not expressly taken up by the Directive, which if it were the case would obviously pose many problems. However, a recent ruling of the European Court of Human Rights could help us in our efforts to discover a standard in this apparently general Directive that could facilitate the harmonisation of this type of internal State standards with the Directive. Here, we are of course referring to the *Dahlab vs. Switzerland* ruling, whereby the plaintiff, who had converted to Islam, lodged a complaint with the European Court of Human Rights with regard to the possible violation of Art. 9 of the Convention on the grounds of the attitude of the Geneva cantonal authorities, who prevented her from wearing the Islamic veil at her job as a teacher in a public educational institution for small children. In this case, the court considered that there was no violation and endorsed the attitude of the Swiss government based on 9.2 of the Convention "Freedom to manifest one's religion

but that 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". In this case, it was in the interests of the small children, aged between four and eight, not to receive the proselytising influence that justified this limitation, depending on the needs of a democratic society and the protection of the rights and liberties of citizens. Nor should we forget that it is precisely these purposes that are set out in Art. 2.5 of the Directive when it states that "this Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order, for the protection of health and for the protection of the rights and freedoms of others".

In any event, we can see that this possible imposition must be linked to one of these principles or aims to be admissible, and that in principle an order without any cause whatsoever issued by any administrative authority is not admissible. In fact, a similar conclusion, albeit equally justified by the need to maintain a democratic society, can be found in the justification, also maintained by the European Court of Human Rights, as well as the Commission, in relation with the ban on wearing the veil in educational establishments in countries where the liberties of the other pupils could be compromised, as is the case in Turkey – *Karaduman vs. Turkey* (No. 16278/90, Commission 3 May 1993, and even more recently *Leyla Şahin vs. Turkey* (No. 44774/98), ruling of 10 November 2005.

Finally, so as not to exhaust a much broader topic, suffice it to recall that in accordance with the ECHR ruling of 1 July 1997 – *Aunto Kalaç vs. Turkey* -, the automatic retirement of a military magistrate on the grounds of his behaviour and his acts -- fundamentalist manifestations that were deemed illegal, given that, according to the Turkish authorities, they infringed military discipline and violated the principle of the secular nature of the State -- did not violate Art. 9 of the European Convention on Human Rights either.

5. A FEW QUESTIONS APPARENTLY NOT TACKLED: CONSCIENTIOUS OBJECTION, WORKING TIME AND PHYSICAL APPEARANCE

5.1. Conscientious objection and ideological compatibility as an occupational requirement

This is surely the perspective we should use to tackle the consequences of the worker's possible failure to fulfil his work-related obligations stemming from their incompatibility with his own personal beliefs.

It is clear that the Directive's apparent silence could in principle be interpreted, albeit hastily, as a theoretical need to apply the general rule of prohibition of discrimination to these cases. In such cases, we could think that a person could have been treated less favourably than another in a similar situation on one of the grounds envisaged in Art. 2.1 of the Directive; in this case, his freedom of religion or belief which would prevent him from fulfilling a fully legitimate and justified work-related obligation assumed previously. In this manner, we would end up by accepting a kind of

contractual exception that would prevent any reaction by the opposing party to contractual breaches that would come under the ideology of the person with a duty to perform the contractual obligations.

However, we must not think that we can extract such a conclusion from the text of the Directive. In reality, in the case at hand we cannot even conceive that such a legal silence exists. In fact, nothing prevents us from considering that in such situations the normal ideological compatibility between the employee and his performance also constitutes an occupational requirement that is implicitly accepted by both parties when the employer describes the service to be rendered and the employee agrees to perform the said service. Such compatibility thus turns into a genuine occupational characteristic that is determining insofar as its absence can mean that the subject is ideologically incapable of fulfilling his contractual obligations. It would therefore suffice to ensure that the goal of the performance is legitimate – something facilitated by lawful objection to illegal orders – to view this distinction as lawful via the generic channel of Art. 4.1 of the Directive. Exactly how it would be described in the domestic legislation of each country is obviously another matter.

Thus, Directive 2000/78 does not in any way rule out an interpretation which, by making it possible to create modalities from the fundamental work-related rights not specified by the lawful obligations inferred from the contract, would view as mere breaches of contract the failure to act of the person with contractual obligations to fulfil, caused by an incompatibility that arose or originated because of his beliefs of convictions. The interpretation would therefore assume the apparently majority doctrine in the Western countries and would, barring certain legal exceptions such as healthcare in cases involving termination of pregnancy, base itself on a general rule similar to the one applied in ideological undertaking; namely, that the ideological beliefs or religious convictions of the employee do not allow him to exonerate himself with impunity from the corresponding work-related duties he has accepted voluntarily, provided that such duties are legitimate and not contrary to the law and to the dignity or liberty of the citizen[29].

[29] In Spain, suffice it to recall the oft-mentioned TC ruling 19/1985 of 13 February and the TS rulings of 30 October 1978 (RJ 3937) and 3 May 1978 (RJ 1881). In the doctrine, a classical position is espoused by Mr. ALONSO OLEA *Jurisprudencia Constitucional sobre Trabajo y Seguridad Social*, T/III, Civitas, Madrid, 1986, p. 51. Along similar lines, U. SCHEUNER, "Fundamental rights ...", quoted, p. 265: "He cannot normally invoke equality of the freedom of conscience against freely entered contractual obligations (e.g. a worker in an arms factory cannot withhold his labour because he objects to war; if he has conscientious objections he must find another job". In a more qualified form, W. DÄUBLER, *Derecho del Trabajo*, quoted, pp. 623 ff.. In Italy, the majority view in doctrine and jurisprudence – Ruling of the Court of Milan, 19 December 1981, in *Lavoro e Previdenza Oggi*, 1982, 2, pp. 350 ff., also in *Giustizia Civile*, 1982, I, p. 1077— was that "apart from Law 194 of 22 May 1978, for healthcare and auxiliary staff – various such agreements were subsequently signed with religious organisations – there is no general standard granting the right to reject the work-related performance when such performance clashes with the employee's political, religious or trade union convictions. Along similar lines, Court of Milan, 25 February 1982, in *Il Diritto del Lavoro*, II, pp. 252 ff., and also in *Orientamento della Giurisprudenza del Lavoro*, 1982, pp. 231 ff.. In doctrine, A. FONTANA, "Obiezione di coscienza in fabbrica?", in *Il Diritto del Lavoro*, 1982, II, pp. 253 ff.; ID. "Ancora sull'obiezione di coscienza nei luoghi di lavoro", in *Il Diritto del Lavoro*, 1983, II, pp. 182-184; G. MANNACIO, "Rifiuto del dipendente di svolgere lavoro ritenuto contrario alla propria ideologia. Sanzione disciplinare-legittimità" in *Informatore Pirola*, 1982, pp. 1851 ff.; ID., "Rifiuto del dipendente di svolgere lavoro ritenuto contrario alla propria ideologia. Sanzione disciplinare-legittimità", once again in *Informatore Pirola*, 1983, p. 392; F. ONIDA, "L'obiezione di coscienza nelle prestazioni lavorative", in AAVV, *Rapporti di lavoro e fattore religioso*, Jovene Editore, Napoli, 1988, p. 232; A. VITALE,

In fact, on those occasions when the European Court of Human Rights has taken up this question, it has simply declared, on the one hand, that there was no violation of Art. 9 of the Convention when the issue being analysed was the negative consequences, for the worker, of unfulfilled contractual obligations stemming from this incompatibility, normally relating to working hours, between his work-related obligations and the demands of his faith[30], and on the other hand, that no right of conscientious objection existed, for example, when this supposed right consisted of refusing to sell contraceptives[31].

We are unable to dwell any longer on a topic that goes beyond the limited scope of this commentary but would just like to underscore that such a possible distinction is recognised even when the said incompatibility stems from a change that has occurred in the subject's beliefs, although in such cases many – including ourselves – postulate the need to ensure that the undertaking at least tries, also as an inferred duty of good faith, to reasonably adapt the job content so as to prevent the ideological clash from ending up in a mere breach of contract[32].

5.2. Time off, physical appearance and clothing

In any case, it is also worthy of note that the Directive neither envisages nor mentions any of the problems that could arise for all of these groups through the indiscriminate application of work-related regulations, certain aspects of which can only be justified by the broad Catholic tradition that has permeated these regulations up to our day; or, viewed from a different perspective, the problems that could arise from the rather extensive presence in our undertakings of canons of physical appearance or clothing that could prove incompatible with certain aspects of beliefs and which by and large reproduce a given ideological vision that is present in our society. To cite only a few cases, some examples of all this would be the quasi widespread imposition of

"Obiezione di coscienza e rapporto di lavoro" in *Giustizia Civile*, 1982, p. 1081.

[30] Cf. along these lines the decision of the Commission in the case of *Konttinen vs. Finland* "In these particular circumstances the Commission finds that the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours. This refusal, even if motivated by his religious convictions, cannot as such be considered protected by Art. 9 para. 1 (Art. 9-1). Nor has the applicant shown that he was pressured to change his religious views or prevented from manifesting his religion or belief. The Commission would add that, having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion. In sum, there is no indication that the applicant's dismissal interfered with the exercise of his rights under Art. 9 para. 1 (Art. 9-1). A similar ruling had been handed down previously by the same Commission in *Ahmad vs. United Kingdom*, No. 8160/78. Also *Stedman vs. United Kingdom*, 9 April 1997 (No. 29107/95)

[31] STDHPichon-Sajous of 2 October 2001, No. 49853/99.

[32] Cf. S. DEL REY GUANTER, "Contrato de trabajo ...", quoted, pp. 50 ff.; W. DÄUBLER, *Derecho del Trabajo*, quoted, pp. 623-624. We take a somewhat closer look at this problem in *Contrato de trabajo ...*, quoted, pp. 247 ff.. Of great interest in this respect – even though it tackles the question in a somewhat collateral fashion – is the TC ruling 99/1994 of 11 April.

Sunday as a day off[33] and hence the obligation to work on Saturday; the frequent acceptance of Christian holidays as official holidays; or the obligation to shave or dress in a certain way – or not, in the case of the chador – required in certain activities or undertakings under the generic reference to its right to set a given corporate image in which foreign or, if you will pardon the expression, "exotic" elements could prove to be a problem for its customers.

In this respect, the only point that the Directive makes, in Art. 7, is that the principle of equal treatment does not prevent Member States from maintaining or adopting specific measures in their national legislation to prevent or compensate for the disadvantages linked to any of the grounds referred to in Art. 1. But neither does it require employers expressly and directly to adapt, or at least attempt to adapt, these general rules governing time off – obviously, when one of their employees has submitted such a request – as has already happened in certain Agreements which the State of Italy has signed with religious confessions[34]; nor does it state clearly how to solve these conflicts, for example of appearance or clothing, where the controversy is seen not so much as a hypothetical right to the worker's own image[35] – ineffectual in this respect – or gender-based discrimination, as is usually the case in the United States[36] but above all with his specific and concrete freedom of religion, belief and conviction. What is more, the absence of any reference to these matters is all the more striking if we compare it to what has been laid down with regard to the disabled in Art. 5 and the related right to adapt job content. This perhaps reflects a clear vision of the Directive which, in relation to this right, seems to base itself – as a common minimum requirement for all States, a possible object of improvement by them – on a principle of neutrality insofar as the employer would have to "put up with" and not interfere with the religious or ideological activity of his worker when such activity is not related to the worker's job, but where the employer is not obliged either to facilitate the exercise of such activity by adapting job content so as to ensure the broadest possible enjoyment of this same fundamental right.

[33] It will be recalled that even the original version of Directive 93/194 stated, in Art. 5, that weekly time off "included Sunday in principle". This preference was eliminated by Directive 2000/34/EC of 22 June and no longer appears in the text of Directive 2003/88/EC of 4 November.

[34] Art. 3 of the Agreement between the State of Italy and the Italian Israeli community states "The Republic of Italy recognises that Hebrews shall be entitled to observe the rest on the Sabbath... Hebrews who are answerable to the State, public or private entities or exercise an independent or commercial activity... shall be entitled to enjoy, if they do so request, rest on the Sabbath as a weekly day off. This right shall be exercised within the framework of flexible work organisation. In other cases, working hours not worked on the Sabbath shall be worked on Sunday or other working days, without entitlement to special pay" -- apud S. DEL REY GUANTER, "Contrato de trabajo ...", quoted, p. 50.

[35] TC ruling 170/1987. In the doctrine, F. PÉREZ DE LOS COBOS, "Sobre el derecho a la propia imagen" in *Poder Judicial*, 1988, No. 10, pp. 75 ff.. As regards our Superior Law Courts (Tribunales Superiores de Justicia), see the various solutions adopted in the rulings of the TSJ of the Baleares, 25 June 1994 (AS 2621) and the TS ruling of 12 February 1986 (RJ 749) – lawfulness of dismissal over a beard — and the ruling of the TSJ of Madrid, 26 March 1992 (AS 1643).

[36] Mr. EVAN GOLD, *An Introduction to the Law of Employment Discrimination*; 1993, ILR Bulletin 68 ILR Press, Cornell University, p. 8 B. LINDEMANN, P. GROSSMAN, *Employment Discrimination Law*, Vol. I, pp. 462 ff., 1996, pp. 462 ff.; *1996 Guide to Fair Employment Practices*, CCH Incorporated, 45-1 ff.

Be that as it may, the fact that the Directive is silent does not mean – at least in our view – that workers affected by such measures lack legal remedy under Community law, even though such remedy is limited. We could also see to what extent rigid, unjustified requirements regarding these working hours or clothing or appearance incompatible with the beliefs of these individuals, without providing at least an objective and reasonable justification, might come to be viewed as a means of indirect discrimination; that is, a means which, albeit apparently neutral, has a disproportionate negative impact on a population group identified by its religious orientation or convictions. If we admit this new perspective, to avoid the indirect discriminatory character of such acts, the employer would be obliged to demonstrate – as per Art. 22.1 D. 78/2000 – that the said provision, criterion or practice could be objectively justified with a legitimate aim – cleanliness, hygiene, safety and health, etc. – and that the means to arrive at the said aim had been adequate and necessary[37], a development that would open up a certain field to a hypothetical duty on the part of the employer to adapt or to require less stringent or fewer rules with regard to appearance or clothes. In any case, we shall have to hope that in the future, the Spanish *Tribunal de Justicia* will rule on this matter, since at present, national decisions taken by this body do not allow us to venture adequate protection for these groups at present.

6. MECHANISMS FOR PROTECTING THE PROHIBITION OF DISCRIMINATION.

To conclude, with a scope encompassing all causes of discrimination covered by the Directive, Articles 9 to 13 of Directive 2000/78 set out a varied series of means of protection relating to discrimination and – something worth noting in the case of interest to us – the rights protected by it, even indirectly.

The first series of protection mechanisms are fundamentally preventive and fit into the promotion of social dialogue and collective bargaining of a non-discriminatory nature, in the most typical sense that the terms are consolidated within the Community field (Art. 13)[38], and in terms such that it is fitting to speak of the duty to disseminate existing regulations for the purpose of each State and above all at the workplace (Art. 12). The dialogue with non-governmental organisations "*which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination*" is, in this respect, a more novel element, in line with the forecasts which, for the work of the Commission, are contained in Art. 3.1(b) of the Council's Decision of 27 November 2000, already quoted, which opens up the field of appeals for dialogue, aimed not only at organisations geared to fighting discrimination, but also – given the characteristics of ideological freedom – organisations that constitute

[37] In relation to North American law, Mr. A. PLAYER, *Employment Discrimination Law*, West Publishing, 1988, p. 388 writes as follows "An employer may dictate clothing styles and impose rules regarding the growth of beards and the length of hair. If the proscribed attire is required by the employee's religious beliefs, the rule would be a form of religious discrimination as defined by § 791(j). It could be justified only by showing that allowing beards or nonconforming clothing posed an "undue hardship" on the employer's business"

[38] Cf. Art. 18 of the Directive, for the possibility and timeframes for transposition of the Directive via collective agreements into the specific scope of application of such instruments.

the collective dimension of ideological freedom, the exercise of which is safeguarded via the prohibition of discrimination.

A remedial and fundamentally procedural nature characterises the means regulated by Articles 9 to 11 of the Directive, which draw, once again, on the results of the experience gained in fighting gender-based discrimination within the European Union itself. This is the thrust of the general recognition of States' commitment to establish means for extrajudicial or judicial settlement of conflicts for those which could be dealt with using the Directive (Art. 9). This is also the thrust of the establishment of collective legitimisation for the protection of these same rights, that will fall to organisations with a legitimate interest in the subjects covered by the Directive (it is supposed that such organisations will include not only NGOs geared to fighting discrimination and organisations which bear the ideology in themselves as a collective dimension of ideological and religious freedom); and of intervention in the process, which would seem to be attuned to both the protection of own interests and the voluntary empowerment of the person or persons affected by the difference of treatment; Community law places special emphasis on this voluntary nature. In principle, nothing is settled as to the nature of these proceedings, which may be ordinary or created especially for this purpose, even though, in the latter case, the Directive takes pains to expressly recall the need to ensure a prompt outcome.

The exercise of the above actions must not result in any prejudice whatsoever for the actor, as foreseen by the Directive when it stipulates the need to articulate protection systems in the face of retaliation consisting of "*dismissal or other adverse treatment*" (Art. 11) by means of appeals to the courts and the competent authorities. As was the case with gender-based discrimination, the said systems remain linked to the practice and legislation of each Member State, thereby admitting a broad variety that can range from procedural mechanisms for relief from the probative activity for which the existence of retaliation is alleged to the introduction of periods of impunity following the exercise of the right of reaction for which protection is claimed, and in any event, the nullity of the act or omission of the employer with regard to the concrete act of retaliation or the adjustment of the means to render it ineffectual[39].

The Directive winds up this procedural section by specifying rules for sharing the burden of proof in the exercise of action before the judges, courts or competent authorities of each Member State (Art. 10). The technique followed by the norm – once again, with the precedent of gender-based discrimination – is the description of a distribution of the burden on an intermediate level, which neither rules out nor imposes a total reversal of the burden of proof (Art. 10.2). In this way, after the plaintiff has provided the allegations and the evidence that make it possible to presume that discrimination has occurred, the respondent must show "*that there has been no breach of the principle of equal treatment*", naturally by proving that his conduct is justified and free of any discriminatory aim. This probative dimension is protected in all proceedings in which any discrimination is alleged to have occurred on ideological grounds, including others in which the plaintiff may be a collective organisation as defined by Art. 9.2, with the mandatory exclusion of penal proceedings, by the

[39] Compensation for the victim is another possible field foreseen as a general reaction by the State to discrimination on any of the grounds envisaged by the Directive – compensation and, in general, a body of sanctions, which must be "*effective, proportionate and dissuasive*" (Art. 17).

necessary mechanism of the presumption of innocence (Art. 9.3) and the possible exclusion, subordinated to the free choice of each State, of "*proceedings in which it is for the court or competent body to investigate the facts of the case*" (Art. 10.5).

7. THE IMPACT OF THE DIRECTIVE ON SPANISH LEGISLATION TODAY

Finally, all that remains is to point out the possible impact of the Directive on Spanish law. In principle and along general lines it does not appear that the Directive will require any changes in our legal system or in the Spanish convention-based or jurisprudential practices of our system.

Prohibition of discrimination on religious or political grounds in Art. 17.1 and 4.1c) ET, combined with the horizontal and direct effectiveness of Art. 14 ET and the development of the same in LOLR 7/1980 of 5 July, constitute a heterogeneous normative group that does not appear to require any amendments for the transposition of the principles or basic ideas contemplated therein. The multidirectional protection in all aspects of the work relationship and in employment outlined in the Directive already seems sufficiently covered by our legislation, just as the experience with gender-based discrimination has led to the incorporation into our legislation of other concepts taken by this same source by the Directive such as indirect discrimination or positive action.

In reality, this same inspiration running through the entire Directive is the reason why the Directive evinces so few novel aspects with regard to means and compliance. Both the Law on Labour Proceedings and the respective procedural standards make provision for rapid, summary mechanisms to combat any possible violation of such rights. And something similar should be said in relation to the burden of proof, protection against retaliation or the use of social dialogue. These procedural or protection and information mechanisms have already been interiorised in our country from a legal and jurisprudential standpoint, and the transposition of this Directive does not seem to require any changes to the framework currently in force in our system.

In any case, what can be said is that in our country there existed previously and still existed at the time the Directive was approved a consolidated practice that, within numerous limits, equilibriums and corrective measures, enables certain ideologically oriented undertakings to lawfully subject their "tendency" workers to pejorative treatment on ideological grounds that are publicly known and incompatible with their performance. This exception is surely much narrower than in other EU countries in which it is – at least apparently – based on Art. 4.2 of the Directive. Clear proof of this is provided by the timid nature of Art. 6.2 LOLR or the restrictions of some Constitutional Court rulings[40], especially if we compare them with their German counterparts. Notwithstanding, such situations exist and may clearly be covered by the exceptions laid out in Art. 4.2 and even Art. 4.1 when it speaks of "tendency" bearers in

[40] Clear evidence of this may be found in the CC ruling 106/1996 of 12 June. For a commentary on the same, see J. GORELLI HERNÁNDEZ, "Libertad de expresión, ideario de la empresa y despido", in *Actualidad Laboral* , 1997, n. 6.

neutral undertakings; consequently, nothing hinders their maintenance in our country; nor is this imposed from a strictly Community perspective.

Finally, as we have already mentioned, our system does not possess clear rules on the problems generated by conscientious objection or the limits that clothing or physical appearance may imply from the standpoint of ideological and religious freedom. The one thing that does exist is a classical jurisprudential line that, at least in connection with time off, has legitimised disciplinary dismissal on grounds of the worker's resultant failure to fulfil his contractual obligations[41] -- a factor which has come in for consistent criticism, rightly so in our view, from one sector of our doctrine --, and, at least since 1992, a series of agreements with three religious confessions which normally include the possibility of alternative weeks off, or even alternative official work holidays, "subject to the agreement of the parties", which of course is rather a long ways from reflecting even a minimum duty for employers to tailor job content to fit the ideological needs of these employees[42].

[41] STC 19/1985 and the jurisprudential doctrine already cited.

[42] Cf. the respective Art. 12 of the Cooperation Agreement between the Spanish State and the Federation of Spanish Evangelical Bodies, the Cooperation Agreement between the Spanish State and the Federation of Israeli Communities in Spain and the Cooperation Agreement of the Spanish State with the Islamic Commission of Spain endorsed by Laws 2, 25 and 26/1992 of 10 November.