



Survey on Selected Topical Issues Concerning Gender and Religion under the EU Gender Equality Directives

THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

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Part I

Survey on Selected Topical Issues Concerning Gender and Religion under the EU Gender Equality Directives

Titia Loenen^{*}

Summary

This report deals with a number of selected issues concerning gender and religion that have inspired considerable debate and that raise all kinds of questions from the perspective of the EU gender equality directives: prohibitions on wearing a headscarf or burqa and related issues involving gender equality and Islam.. Dress codes involving prohibitions on wearing a headscarf or burqa have attracted a lot of attention in Europe and even worldwide. Apart from dress codes, other controversial issues involving potential tensions between gender equality and Islam have surfaced. Thus in several countries some courts have had to deal with Muslim workers complaining of being denied employment opportunities because they refuse to shake hands with persons of the opposite sex on religious grounds. In addition, some countries face religiously inspired demands for segregated facilities for men and women, e.g. separate male/female integration courses, health services or social counselling. In all instances, the position of women takes centre stage.

The sensitivity of the debates on the above issues stems from several factors. To start with, opinions differ widely on the relationship between Islamic practices such as wearing a headscarf or burqa and sex equality. Some argue that dress codes prohibiting headscarves or burqas are justified and necessary to uphold a commitment to gender equality. Others would say that such dress codes are paternalistic, affect the freedom of religion of Muslim women and may limit their job opportunities. A second major factor explaining the sensitivity of the discussion concerns its relationship with controversies on immigration and the integration of Muslim and other minorities of non-Western origin in European societies. Due to this setting a detached, neutral discussion of Islamic practices such as wearing a headscarf has become very difficult.

Against this complex background and with due regard to their sensitive character, the above issues are the focus of this thematic study. They raise several fundamental questions concerning the position of women in key areas such as (access to) employment and access to and the supply of goods and services, which fall under the scope of application of the EU gender equality directives.

The study has several aims. First, it endeavours to provide a general sketch of the extent of the tensions between gender and religion referred to above in those countries that are covered in this report, and to identify the types of issues that generate the most discussion (Section 2). The national reports show that over a third of the Member States of the EU experience some or major tensions of the kind explored in this study. The headscarf is clearly the single most important issue to generate debate, though in several countries the burqa has become a hotly debated topic more recently. Other controversies, such as those concerning persons who for religious reasons refuse to shake hands with colleagues or clients of the opposite sex or who claim sex-

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segregated services, are much less common. As several reports suggest, however, this could be a matter of time.

Second, the study analyses and discusses the various ways in which the issues mentioned can be approached or framed and have been dealt with so far, as is illustrated by the different practices in the states included in this study. The focus is on *legal* approaches. This includes a discussion of relevant national case law (Section 3). The national reports show legal differences between the Member States of the EU in framing the issues. Though in almost all countries dress codes involving a prohibition on wearing a headscarf are legally framed in terms of religious freedom and/or discrimination on the basis of religion, sometimes it is also framed in terms of sex equality and/or discrimination based on sex. The latter kind of framing acknowledges the specific disparate impact of headscarf bans on the opportunities of women belonging to immigrant groups. No examples were mentioned in the reports of presenting them in case law as (potential) discrimination based on race or ethnic origin, but given the link with debates on immigration and integration several reports mention this could also be feasible. Apparently religion is the most obvious angle to legally address prohibitions on wearing headscarves, but not exclusively.

The reports also show that tolerance towards headscarves differs widely between Member States. In some countries, such as the UK, headscarf bans are unacceptable as a rule, both in private and public employment. In others, such as France, they are deemed indispensable in the public sphere to protect freedom of religion and guarantee the neutrality of the state. Thus, all personnel in public employment and pupils attending public schools are not allowed to wear religious symbols such as headscarves. In other countries, the picture is more mixed. From the point of view of the EU equality directives, the different outcomes could be problematic. Though directives leave the Member States with discretion as to the means to be employed for their transposition, they impose uniform obligations as to the results to be achieved.

The national reports show the approach to burqas to be quite different. Burqa bans are much more squarely framed as protecting women from oppression and upholding the principle of sex equality and hardly perceived as problematic in terms of freedom of religion or discrimination based on religion. Nevertheless, several courts in e.g. France and Italy have held that a general ban on burqas as proposed or under way would be legally unacceptable. In other settings, such as education, burqa bans will probably be held to be justified, as the practice in several countries suggests.

Given the increasing importance of the European Convention on Human Rights as a frame of reference for the EU and the Member States, and its relevance for the specific subject of this report, attention has been paid to the way the European Court of Human Rights has dealt with this type of issue so far (Section 4). The Court starts from the premise that the States Parties to the Convention enjoy a wide margin of appreciation in regulating the relationship between state and religion and in limiting manifestations of religion accordingly outside the private sphere. The *forum internum*, that is adhering to a religion or holding a belief as such, is considered to be the core of the right to freedom of religion that is protected by Article 9 ECHR. Much less protection is given to individual *manifestations* of religion. This approach is borne out by the case law concerning headscarf bans in public education. States enjoy a wide margin of appreciation and may, for example, prohibit pupils or students from wearing a headscarf or other religious symbol in public educational institutions. At the same time, states are not required to adopt a headscarf ban to protect the rights and freedoms of others. The Court has refused to support the claim that a headscarf ban constitutes sex discrimination. On the contrary, the Court considers that wearing a

headscarf is 'hard to square' with notions of sex equality. In the scant case law which deals with tensions or conflicts between religious norms and sex equality, priority was given to the latter.

Section 5 explores how to approach the issues under the Recast Directive (2006/54/EC) and the Goods and Services Directive (2004/113/EC). Headscarf bans, whether in private or public employment, fall under the scope of application of the Recast Directive (2006/54/EC). For pupils, the situation is more complex, as education is excluded from the scope of application of the Goods and Services Directive (2004/113/EC). The only type of education that is covered by the gender directives is vocational training, as it falls under the scope of application of the Recast Directive (2006/54/EC).

As most headscarf and burqa bans are part of more general dress codes that will have a disparate impact on Muslim women, they could constitute indirect sex discrimination. This means they have to meet the objective justification test and are only allowed if they serve a legitimate aim and are appropriate and necessary to achieve that aim. Several aims which are put forward in the national reports are controversial. This is particularly true of headscarf bans which are argued to protect women and uphold notions of sex equality. The reading of the headscarf as oppressive for women is highly contested. Accepting sex equality as a justification for headscarf bans has been questioned from the perspective of women's autonomy and agency. In addition, headscarf bans may limit the employment opportunities of Muslim women and could thus negatively affect their emancipation instead of promoting it.

Other justifications for headscarf bans referred to in the national reports that are under discussion concern the image of the enterprise and, in public employment, state neutrality. Though both seem to provide legitimate aims in themselves, an important question is whether complete bans on headscarves will be able to pass the test of being not just appropriate, but also 'necessary', that is proportionate. So far, different Member States have come to different conclusions. This raises the question as to which of these approaches will be approved by the ECJ. Or will the Court leave this to be dealt with by the national authorities?

The general burqa bans which are proposed in several of the Member States do not seem to fall under the scope of application of the gender equality directives. More limited burqa bans in specific settings, such as employment and education, could fall under the scope of application of the Recast Directive (2006/54/EC) in the same way as headscarf bans. The report identifies several justifications that have been put forward to justify burqa bans. These include the promotion of good and respectful communication as well as countering a form of sex segregation which seems to be linked to 'separate spheres' ideologies. Similar objections could be put forward against claims that have surfaced in some countries for segregated services which are informed solely by religious convictions. At the end of the day, it will be up to the ECJ to decide on the proper interpretation of the provisions involved. Much may depend on how strict the ECJ will be and whether the Court will develop uniform standards in this area or leave a wide margin of discretion to the Member States.

The final section provides some overall conclusions and reflections on the overlapping applicability of the Race Directive (2000/43/EC) and the Framework Directive (2000/78/EC). The ground chosen to bring a challenge to headscarf or burqa bans (that is discrimination based on religion, sex or race/ethnic origin) could have consequences for the possibilities of justifying such bans. This could also hold true if the objective justification test is applied, even if it is formulated in the same way under all equality directives. The main author of this study concludes that some

differentiation in levels of scrutiny between indirect discrimination based on religion, on the one hand, and sex and race/ethnic origin, on the other, would be feasible and would seem to fit approaches by the European Court of Human Rights under the ECHR.

1. Introduction

This report deals with a number of selected issues concerning gender and religion that have inspired considerable debate and that raise all kinds of questions from the perspective of the EU gender equality directives. Dress codes involving prohibitions on wearing a headscarf or burqa have attracted a lot of attention in Europe and even worldwide. Apart from dress codes, other controversial issues involving tensions between gender equality and Islam have surfaced. Thus in several countries some courts have had to deal with Muslim workers complaining of being denied employment opportunities because they refuse to shake hands with persons of the opposite sex on religious grounds. In addition, some countries face religiously inspired demands for segregated facilities for men and women, e.g. separate male/female integration courses, health services or social counselling.¹ In all instances, the position of women takes centre stage.

The sensitivity of the debates on the above issues stems from several factors. To start with, opinions differ widely on the relationship between Islamic practices such as wearing a headscarf or burqa and sex equality. They seem to cut right across traditional political divides. Thus banning headscarves or burqas finds both feminist supporters and opponents. Some argue that dress codes prohibiting headscarves or burqas are justified and necessary to uphold a commitment to gender equality. Others would say that such dress codes are paternalistic, affect the freedom of religion of Muslim women and may limit their job opportunities. Thus direct or indirect discrimination on grounds of religion and/or sex could be at stake.

A second major factor explaining the sensitivity of the discussion concerns its relationship with controversies on immigration and the integration of Muslim and other minorities of non-Western origin in European societies. This issue in turn cannot be isolated from the global tensions that have intensified after 9/11, in which Islam figures as an important element. Due to this setting a detached, neutral discussion of Islamic practices such as wearing a headscarf has become very difficult. To complicate matters, the issue often occupies a prominent place on the agenda of right-wing politicians who oppose non-Western immigration and multiculturalism as such and refer to sex equality to argue for headscarf and burqa bans.² As a consequence, any critique of Islamic practices from other directions, such as women's right groups, runs the risk of being perceived as support for xenophobic positions, which may keep such groups from participating in the debates or from speaking their minds openly. In addition, the focus on Islamic practices may obscure the fact that Christian and other religions may also pose problems from a gender equality perspective. Tensions between gender and religion are not an Islamic prerogative.

Against this complex background and with due regard to their sensitive character, the above issues are the focus of this thematic study. It has benefited greatly from the

¹ Religion-based segregation was also touched upon, though not extensively dealt with, in the network report on leisure-related, sex-segregated services, see S. Burri & A. McColgan, *Sex-Segregated Services*. European Network of Legal Experts in the Field of Gender Equality, 2008, see <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 14 June 2010.

² For instance, Geert Wilders, known for his anti-Islam film *Fitna*, in the Netherlands.

input of the national reports written by the legal experts of the network on gender equality on the basis of a questionnaire on the subject.³ The issues raise several fundamental questions concerning the position of women in key areas such as (access to) employment and access to and the supply of goods and services, which fall under the scope of application of the EU gender equality directives.⁴

This study has several aims. First, it endeavours to provide a general sketch of the extent of the tensions between gender and religion referred to above in those countries that are covered in this report, and to identify the types of issues that generate the most discussion (Section 2). Second, the study will analyse and discuss the various ways in which the issues mentioned can be approached or framed and have been dealt with so far, as is illustrated by the different practices in the states included in this study. The focus is on *legal* approaches. This includes a discussion of the relevant case law (Section 3). Given the increasing importance of the European Convention on Human Rights as a frame of reference for the EU and the Member States, and its relevance for the specific subject of this report, Section 4 will pay attention to the way the European Court of Human Rights has dealt with this type of issue so far. In Section 5, this report will explore how to approach the issues under the Recast Directive (2006/54/EC) and the Goods and Services Directive (2004/113/EC). The final section provides an overview of the conclusions of this study and reflects on the overlapping applicability of the Race Directive (2000/43/EC) and the Framework Directive (2000/78/EC) and some of the consequences this may have for addressing the issues that are the focus of this report (Section 6).

2. General picture

The national reports show that over a third of the Member States of the EU experience some tensions of the kind explored in this study, in some cases major tensions.⁵ They also show that considerable differences exist between European countries. Roughly speaking, countries in the eastern part of Europe have so far not experienced problems concerning the issues mentioned in the introduction, whereas countries that do face some or important tensions lie in the western part, except **Turkey**.⁶ Most of the legal experts relate an absence of tensions to the absence of a substantial Muslim minority in their countries. In some countries where a considerable Muslim minority does exist the absence of tension is largely attributed to their long-standing historical presence, which has resulted in a *modus vivendi* between different religious groups.⁷ Thus it seems that the tensions concerning the issues that are the focus of this study are closely related to problems connected with more recent immigration and the

³ The countries covered include the 27 members of the EU and Iceland, Norway, Liechtenstein, Croatia, FYR of Macedonia and Turkey.

⁴ Cf. S. Burri, *Discrimination on grounds of gender and religion: a case of conflict between grounds?* (discussion paper for the Legal seminar on 6 October 2009 on the implementation of EU law on equal opportunities and anti-discrimination), available at <http://www.regonline.co.uk/builder/site/tab2.aspx?EventID=733822>, accessed 14 June 2010.

⁵ Countries reported to be facing quite some or major tensions: **Austria, Belgium, Germany, France, Norway, Italy, the Netherlands, Turkey**. Countries reported to be facing some tension: **Denmark, Spain, Sweden and the UK**.

⁶ Countries reported not to be facing or to be facing hardly any of the issues: **Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Greece, Hungary, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, FYR of Macedonia, Malta, Poland, Portugal, Romania, Slovakia, and Slovenia**.

⁷ See the reports on **Cyprus, Greece, and FYR of Macedonia**.

concomitant growth of Muslim minority groups. In this respect, some legal experts who do not report any problems suggest the issues might become manifest in the future if such immigration increases.⁸ Again, **Turkey** provides an exception, as Muslims make up the vast majority of the population. According to the **Turkish** legal expert, in **Turkey** the tensions focus on headscarf bans in public institutions such as universities and are embedded in a political and ideological struggle that involves, among other things, diametrically opposed views on secularism. This makes the **Turkish** situation quite unique.

It should be added that tensions between sex equality and religion do not only arise from recent immigration or only in the context of religions that are ‘new’ to Europe, such as Islam. Some country reports mention serious tensions between more familiar, traditional Christian views and sex equality. Thus the position of women as ministers and their position more generally in religious organisations of Christian denominations may still cause considerable tensions.⁹ And in several countries women face increasing limitations on their reproductive rights due to the influence of religious groups on public policies and health-care services. As this type of tension does not belong to the selected issues it will not be explored any further.

In the following sections this report will focus on those countries which are reported to be facing some or major tensions between gender and Islamic norms and practices.

2.1 Types of issues

Headscarf

The headscarf is clearly the single most important issue addressed in the reports. It occupies a central place in the debates and figures prominently in the case law. In several countries, Muslim women wearing headscarves sometimes appear to face outright harassment and have fewer job and other opportunities.¹⁰ Employment dress codes that prohibit headscarves and other religious symbols in the workplace seem quite common. Most case law, which will be discussed in Section 3, deals with employment.

The national reports also show that important differences in focus may exist between public and private employment. On the whole, wearing a headscarf in private employment is less contentious than in public employment, because the latter may be perceived as jeopardizing the principle of state neutrality. The prime examples of the latter are **Turkey** and **France**. Both countries adhere to a specific type of secularism that is considered to require a ban on all religious manifestations in the public sphere generally and in all public employment more specifically. In **Turkey**, the Muslim headscarf is a bone of contention between opposing political forces with opposing views on secularism and the proper relationship between religion and the state. Controversies concerning students wearing a headscarf at state universities have been at the centre of the struggle for the last thirty years.

In **France**, the headscarf became a hotly debated topic in the late 1980s and has remained so since then. The introduction in 2004 of legislation banning the wearing of all ‘ostentatious’ religious symbols in public schools, including by pupils, attracted worldwide attention.

⁸ See the reports on **the Czech Republic, Luxembourg, and Malta**.

⁹ See e.g. the report on **Finland**.

¹⁰ See e.g. the reports on **Austria, Italy, and Turkey**.

The national reports show that in several other countries also education is a major area where tensions concerning the headscarf have surfaced.¹¹ Some reports also refer to more specific debates on dress codes involving headscarves for the police and/or the judiciary. Thus in **Norway** a significant public debate developed in 2009 on the compatibility of wearing a headscarf or other religious symbols with the need for police officers and judges to appear ‘neutral’.

Burqa

In addition to the headscarf, the burqa is also hotly debated in several countries.¹² As only very few women are reported to wear a veil covering the face, it would appear that the burqa has taken on a powerful meaning far beyond the number of women involved. Of late, governments in several countries have been faced with calls for a general ban on burqas. At the time of writing this report, **Belgium** and **France** were well advanced in the process of actually adopting such a ban. In **Italy** and **the Netherlands** a general ban is also or has been a hot topic and supported by (members of) different political parties, not just right-wing ones. In **Denmark**, on the other hand, a proposal by conservatives for a burqa ban was met with ridicule as it was perceived to be a non-issue given the small number of women involved. In the context of education, several countries have been faced with teachers or students claiming the right to wear a burqa in the classroom. Incidental problems involving burqas are reported in the context of providing social services.

Other issues

As mentioned, the headscarf and, to a lesser extent, the burqa have been the major focus of attention so far. Exclusion from employment or from other opportunities because of a refusal to shake hands for religious reasons is reported to have surfaced in three countries only.¹³ Religiously inspired claims for segregated services are not reported as being an issue, except in **the Netherlands**. The **German** report points to related problems, though, that have surfaced in the context of education. Schools are sometimes faced with requests by Muslim parents to have their daughters exempted from physical education, swimming classes or participation in school excursions that involve overnight stays. **The Netherlands** has seen some discussion about separate integration courses for immigrant men and women because of religious qualms about mixed classes, and politicians and public administrators have expressed different opinions about how (un)desirable this is. The **German** and **UK** reports also mention separate courses or services for women from a migrant background, but this does not seem to raise any discussion.

The national reports suggest that preferences for and claims to be treated by a doctor of the same sex is accepted everywhere (except in emergency situations) and may of course also derive from other than religious reasons.¹⁴ A few national reports mention that separate swimming hours for women in public swimming pools are

¹¹ See for instance the reports on **Belgium, Germany, the Netherlands and Norway**.

¹² In May 2010 the president of the German liberals in the European Parliament, Silvana Koch-Mehrin, called for a European ban, see <http://www.dw-world.de/dw/article/0,,5528714,00.html>, accessed 13 June 2010.

¹³ The **Finnish** report refers to an incident reported on the internet. In the **Netherlands** and in **Sweden** it has led to several legal procedures which will be discussed in section 3.3.

¹⁴ The **Belgian** report mentions incidents involving Muslim men who refuse treatment for their wives by male doctors even in emergency situations. Similar incidents have been reported in **the Netherlands**; see <http://www.elsevier.nl/web/10131950/Artikel/Moslims-moeten-beetje-dimmen-in-ziekenhuizen.htm>, accessed 13 June 2010.

provided. The **Belgian** report adds that such hours need not be for religious reasons. In **Finland**, however, bigger cities provide women-only hours in swimming pools that are especially intended for Muslim women.

The rest of this report will focus on the issues that dominate the discussions, that is on dress codes regarding headscarves and burqas, and only pay limited attention to other issues.

3. National legal approaches

As the EU equality directives provide different protection against discrimination depending on the ground of discrimination involved, the way in which controversies concerning headscarf or burqa bans are approached may have important consequences. Dress codes including headscarf or burqa bans may amount to multiple and/or intersectional discrimination.¹⁵ As they mainly affect Muslim women of non-Western origin, they can be framed in different ways (or a combination): as involving freedom of religion and/or (direct or indirect) discrimination based on religion, as involving sex equality and/or (direct or indirect) discrimination based on sex, and as involving (direct or indirect) discrimination based on race or ethnic origin.

In this respect, the national reports show that striking differences exist between the framing of prohibitions on wearing a headscarf, on the one hand, and bans on wearing a burqa on the other. They also show that legal assessments on whether such prohibitions are allowed in employment, education or elsewhere may differ widely between EU countries. In the following sections these subjects will be explored in more detail. As the overview provided is not based on systematic comparative research, it should be emphasized that it is in no way exhaustive and cannot give a comprehensive account of the practices in the Member States of the EU. Nevertheless, the general impression it gives is illuminating.

3.1 Prohibitions on wearing a headscarf

Legal framing

In most countries prohibitions on wearing a headscarf are legally approached as issues centring on religion and involving freedom of religion and/or discrimination based on religion. As most prohibitions do not target Islamic symbols as such, but are directed more generally at wearing either any religious or political symbols or specifically prohibit the wearing of anything on the head, potential indirect discrimination on grounds of religion is at stake, not direct discrimination.¹⁶ In **Denmark**, the leading *Føtex* case classified a prohibition by an employer on wearing a headscarf at work more specifically as indirect discrimination on grounds of religion *against Muslim women*, as they are the ones who are disadvantaged if compared with Muslim men, on the one hand, and with non-Muslim women on the other. Nevertheless, depending on how the regulation or policy is formulated, direct discrimination could be involved.

¹⁵ For an overview of the terminology of multiple and intersectional discrimination used in legal literature see S. Burri & D. Schiek, *Multiple Discrimination in EU Law. Opportunities for legal responses to intersectional gender discrimination?* European Network of Legal Experts in the Field of Gender Equality, 2009, see <http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes>, accessed 30 June 2010.

¹⁶ See e.g. **Austria, Belgium, Finland, Italy, the Netherlands, and Sweden**. Of course, if a neutral dress code is used to cover up the intention of banning headscarves, this may amount to direct discrimination.

Thus the **Dutch** report points out that if indeed an employer directly targets headscarves, this is dealt with as direct discrimination based on religion.

An interesting exception to framing headscarf bans as discrimination based on *religion* is described in the **Norwegian** report. From the first case in 2001, prohibitions on wearing a headscarf have been perceived as problematic from the perspective of *sex* discrimination. In this case the **Norwegian** Equality and Anti-Discrimination Tribunal concluded that a prohibition on wearing a headscarf for a woman working as a chambermaid at a hotel was in fact a rule that constituted indirect discrimination in violation of the Gender Equality Act. However, this labelling may have been due to the fact that until 2006 **Norwegian** legislation only provided for gender discrimination law. According to the **Norwegian** report, with the expansion of the discrimination grounds covered by non-discrimination legislation, the issue is perceived just as much as a religious issue, as well as one linked to ethnic origin.

The reports disclose no examples of the legal framing (in case law) of prohibitions on wearing a headscarf as involving potential direct or indirect discrimination based on race or ethnic origin. This is not to say, of course, that such framing would not be possible under national law. Thus **the UK** report points out that addressing the issue as indirect racial discrimination would be feasible. In fact, several reports refer to the way in which the issues explored in this study are framed in the public media, if not in the case law, as closely linked to the integration of minorities of non-Western origin and thus to race and ethnicity.¹⁷ Apparently religion is the most obvious angle to legally address prohibitions on wearing headscarves, but not exclusively so.

Legal assessments of prohibitions according to the case law

As in most cases bans on the wearing of headscarves are not based directly on grounds of religion, sex or ethnic origin, but are part of facially neutral dress codes which have a disparate impact on Muslim women; legal assessments of their acceptability generally focus on the question whether an objective justification exists for the prohibition. It does not seem to make much difference whether freedom of religion or non-discrimination provisions are invoked.

The case law mentioned in the national reports suggests that safety and security are seen as generally accepted justifications for banning headscarves from the shop floor, as well as health and hygienic considerations.¹⁸ Apart from this, not much consensus seems to exist. In the following sections, an impression is given of the case law in the Member States so far and of the often diverging outcomes of the decisions by courts and/or equality bodies. In several countries important differences exist between dress codes in private and public employment (or the public sphere more generally). Each will be addressed in turn.

Private employment

The national reports show that courts in several countries require a more specific justification for headscarf bans in private employment than arguing that the dress code does not provide for any head covering or the wish to take the preferences of clients or the feelings of co-workers into account.¹⁹ In some countries the wish to uphold the image of the shop or the enterprise is accepted as such a justification. In **Belgium**, for

¹⁷ See e.g. the reports on **Belgium, Denmark and the Netherlands**.

¹⁸ See e.g. the reports on **Belgium, Denmark, France and the Netherlands**.

¹⁹ See the examples mentioned in the reports on **Austria, Belgium, Norway**, but also **France**.

instance, the Labour Court of Appeal in Brussels found that wearing a headscarf in a shop where the work rules prohibited such clothing for the sake of the commercial image of the enterprise was a serious ground for dismissal. Similarly a **French** court considered the dismissal of a sales assistant in a clothes shop to be justified because her clothing (she was wearing a headscarf and long clothes) did not reflect the spirit of the enterprise; there was a contradiction between her clothing and the clothes she was supposed to sell. In **the Netherlands**, on the other hand, such justifications are less readily accepted. Instead of banning headscarves altogether, a solution is sought in adapting the style and colour of the headscarf to match the image of the enterprise.

In several countries, courts have decided that women are not to be denied benefits because they leave a job that requires dress that offends their religious convictions. In **Belgium** in 2002 the Labour Court of Appeal in Brussels found that, in consideration of her Islamic beliefs, an attendant in a sportswear shop had been entitled to abandon her job when the 'summer uniform', which included Bermuda shorts, was introduced. Similarly, the **Finnish** Insurance Court held in 1997 that a Muslim woman is entitled to unemployment benefits if she is not employed because she refuses to stop wearing a headscarf.

Danish case law provides a somewhat different approach to deciding whether a ban on headscarves in private employment is justified or not. In **Denmark**, this seems to depend on the views of the workers themselves. The *Føtex* case from 2005 is the leading case on this issue. In this case a supermarket, Føtex, dismissed a young Muslim woman when she started wearing a headscarf at work four years after the company began to employ her. The employer's dress code prohibited the wearing of all kinds of political or religious symbols at work for all staff irrespective of sex, religion, ethnicity or any other criteria. The dress code had been agreed upon by representatives of the staff in accordance with **Danish** collective labour law on collaboration. The purpose of the dress code was to ensure that the employees had a neutral and uniform appearance in order to avoid potential conflicts between sub-groups of the staff and between members of the staff and customers. The purpose was thus to promote 'peace at the workplace'.

The plaintiff claimed compensation for unlawful indirect discrimination on grounds of religion in violation of the Discrimination Act. The **Danish** Supreme Court held that Føtex's dress code indirectly discriminated against Muslim women, but that the dress code did not violate the Discrimination Act's prohibition against discrimination on grounds of religion because it was justified by a legitimate and neutral objective and the principle of proportionality was complied with. The court emphasised that the contested dress code was not an expression of a unilateral employer's decision, but was accepted by the staff at the collective level. The plaintiff in the *Føtex* case was thus not just opposing her employer, but also her fellow workers. The court in fact left considerable discretion to the employer in collaboration with the staff at the collective level. This implies that dress codes may vary widely from one workplace to another if they have only been discussed and agreed upon at the collective level.

Public employment and the public sphere

In public employment and in the public sphere more generally, the case law on dress codes affecting headscarves also varies considerably between countries. A major cause is the differing views on the proper relationship between the state and religion. These may range from adherence to models of strict secularism to models which allow for differing degrees of accommodation of religion in the public sphere,

including public employment. **France** provides a well known example of the former. Its so-called *laïcité* implies a strictly secular model. The model is based on respect for freedom of thought and freedom of religion. The absence of a state religion and the separation of Church and State are considered to be prerequisites for such freedom. Thus *laïcité* relies on the state being strictly neutral. As the French report puts it:

‘The principle of neutrality intends to protect the public servants from their employer. But it also intends to protect the users of public services who have the right of the neutrality of the State. As a consequence of this principle of neutrality, civil servants are prohibited to wear overt religious symbols and thus to wear a headscarf and sanctions are possible if they don’t.’

The prohibition on wearing any religious symbols in public employment is general. It applies in all public employment and it does not depend on the function of the public servants. Cleaning personnel are therefore also included. As the requirement of neutrality is linked to the state sphere, this translates into an important difference between public and private employment: *laïcité* does not apply to private enterprises and institutions, only to public ones. As far as public employment is concerned, the Council of State (*Conseil d’Etat*) strictly controls the application of the principle of neutrality.

Turkey is also well known for its similarly strict approach to wearing religious symbols in public functions. Yet in **Turkey**, major controversies exist in this respect between the legislative and judicial branches of government. The former has tried to lift the overall ban on headscarves, but so far such efforts have been overturned by the Constitutional Court, which deems any legislation intending to do so to be unconstitutional.

In some other countries, the approach is much more accommodating. **The UK** seems to be the most liberal in this respect. In fact, in **the UK** wearing religious symbols even by those exercising functions that typically represent the state, such as the police, is accepted. Police uniforms have been adapted so as to include a headscarf or turban. One Sikh High Court judge sits wearing a turban instead of a wig.²⁰ **Sweden** has adopted a similar practice towards police uniforms. On the other hand, in **Norway** and in **the Netherlands** considerable debates have led to the opposite approach being adopted. The need for police officers to appear neutral to the general public was felt to be incompatible with wearing a headscarf or other visible religious attributes. In **Norway**, discussions on whether or not a judge can sit with a headscarf flared up recently when the National Courts Administration announced that it would no longer support a ban.

Public education

The case law on headscarves in public employment discussed in the national reports often concerns public education. Again the national reports show a very mixed picture. Several countries do not allow teachers to wear any religious symbols in the classroom, whereas others do not regard this as problematic. **Finland**, **the Netherlands**, **the UK** and **Sweden** provide examples of the latter. In **France** and **Turkey**, on the other hand, it is unacceptable for teachers to wear a headscarf in the classroom. In **Germany**, prohibitions on teachers wearing religious symbols have

²⁰ http://www.sikhiwiki.org/index.php/First_High_court_judge_to_wear_turban, accessed 13 June 2010.

been held to be justified in order to protect school peace and to protect the (negative) freedom of religion of the pupils and their parents. In **Belgium**, several cases are pending before the highest courts on this issue. Thus, in March 2010, the Court of Appeal in Mons ordered the local council of Charleroi to allow a teacher of mathematics to continue teaching while wearing a headscarf. The local council has decided to lodge an appeal with the Court of Cassation.

In quite a number of instances the case law also deals with the rights of students to wear religious symbols in school. Again major differences exist between countries. **Turkey** is the most restrictive so far, as dress codes banning headscarves and other religious symbols apply to all public education, including the university level. In **France**, on the other hand, the legislation banning ostentatious religious symbols from public education does not extend to universities or other higher education.

So far, the national reports suggest that no other countries prohibit students or pupils from wearing religious symbols in public school classrooms. Freedom of religion and the right to education are given priority. Thus the **Swedish** National Board of Education considered that a prohibition on pupils wearing headscarves at school was contrary to the requirement of providing a school 'open to all pupils'. According to the Board, the choice of clothing is a personal choice normally not to be prescribed by school rules. Prohibitions are only acceptable if order or safety so demand. To prohibit a pupil from wearing a headscarf in accordance with general school rules is to deny such a pupil access to schooling for religious reasons. The right to wear a headscarf is thus considered as part of the freedom of religion and a prohibition would also amount to discrimination based on religion. The other countries which do not object to pupils wearing headscarves in school seem to have adopted similar lines of thought. In **Belgium**, the debate continues. In the Flemish Community, the Council of Community Education adopted a decision which uniformly prohibits the wearing of religious signs. When a pupil applied for the suspension and annulment of that decision, the Council of State (*Raad van State*) ordered its suspension and referred to the Constitutional Court for a preliminary ruling on the compatibility of the regulation on which the decision was based with the constitutional right to education. The case is still pending.

3.2 Prohibitions on wearing a burqa

Framing of the issue

Compared with the headscarf, the framing of the controversy surrounding the burqa is strikingly different. The burqa is much more often discussed in terms of being offensive to sex equality and much less as a religious symbol. The **French** discussions on the burqa seem typical of this line of thought. As the **French** report points out, it is interesting to note that if legally the issue of headscarves in **France** has been framed mainly in terms of discrimination on the ground of religion (even if comments on case law and legislation have underlined the gender perspectives), the debates regarding the possibility of adopting a general law banning the burqa in public life is framed in terms of gender equality. In that perspective, the burqa is not analysed as a religious symbol, but as a sign of women's submission, or, according to the **French** President Nicolas Sarkozy, as 'a sign of subservience and debasement', contrary to the principle of sex equality.²¹ In the same vein, a parliamentary commission of inquiry on the

²¹ See e.g. <http://www.timesonline.co.uk/tol/news/world/europe/article6557252.ece>, accessed 30 June 2010.

wearing of the burqa, which published its report in January 2010, considers that wearing it is a practice that contradicts the fundamental values of the **French** Republic, especially the freedom and dignity of women. And the *Conseil d'État* (Council of State) approved a decision denying French citizenship to a woman who wore a burqa on the ground that she was insufficiently assimilated. The *Conseil d'Etat* considered that the woman's way of life did not reflect '**French** values', particularly the goal of gender equality. The judgement claims she lived in 'total submission' to the men in her life because she wore a burqa. Also the **French** equality body, the Halde, considers that the burqa conveys an idea of female submission.

In the discussions in **Austria**, **Belgium**, **Italy** and **the Netherlands** similar approaches to the burqa seem to dominate, although in **the Netherlands** the Equal Treatment Commission has so far refrained from discussing the burqa as problematic from the perspective of gender equality.

The UK provides a clear exception in this respect. The national report points out that any ban on a headscarf *or* burqa would be considered as a potential case of discrimination on grounds of religion. It could perhaps also be treated as indirect racial discrimination.

Legal assessment of prohibitions

Viewing burqas as incompatible with sex equality does not necessarily mean that wearing it can and should be legally banned. Looking at the legal assessment of prohibitions on the wearing of a burqa it seems important to distinguish between general bans that extend to the public sphere throughout and more limited bans.

To date, two countries are in the process of adopting a general legal ban on wearing a burqa in public places: **Belgium** and **France**. So far, the (quasi-)judicial bodies that are reported to have rendered a decision or an opinion on this issue have held that such a general ban is legally unacceptable. Apparently, political and legal approaches may diverge in this respect. In **France**, for instance, the *Conseil d'Etat* was asked by the Government to give its opinion on a general ban. In its report, the *Conseil d'Etat* considers that a general prohibition will not be constitutional. The principle of sex equality cannot justify a general prohibition as it would be contrary to the individual freedom of each woman. A limited prohibition for security reasons or in specific spaces could be possible, but not a general one. The Halde is of the same view. Notwithstanding the opinion of the *Conseil d'Etat* the Sarkozy Government is determined to see it through. In **Denmark** a proposal for a general burqa ban was addressed by the Ministry of Justice. The Ministry considered such a ban to be unconstitutional. In Italy the Council of State (*Consiglio di Stato*) held in 2008 that safety and security do not provide a sufficient justification for a general ban, as security necessities are satisfied by removing the burqa when required to allow identification and by its prohibition during demonstrations. In another case, the Tribunal of Cremona similarly stated that the use of burqas in public places is allowed, provided that identification is made possible where it is required.

Specific bans on burqas are discussed in several of the national reports and mainly concern education. Apart from arguments concerning security and safety, the main argument to justify a ban on burqas in an educational setting is based on pedagogical considerations. Wearing a burqa affects communication and thus the quality of the education.²²

²² See for examples the reports on the **Netherlands**, **Norway**, **Sweden** and **the UK**. In **Finland**, a high-ranking civil servant in school administration said in an interview that a teacher wearing a

3.3 Other issues

Shaking hands

The refusal to shake hands with persons of the opposite sex because of religious reasons has surfaced as an issue in a few countries only. **The Netherlands** is the only one which has been confronted with a number of complaints by persons who were dismissed or not employed for this reason. Interestingly, the Equal Treatment Commission came to different conclusions on the question whether this constitutes indirect discrimination based on religion than the courts who decided the subsequent procedures. The first case concerned a Muslim man who was denied a job as a customer manager at the Social Services Department of the city of Rotterdam because of his refusal to shake hands with women. The municipality stated in its defence that it had to protect women against sex discrimination by a civil servant. The Equal Treatment Commission held that the protection of women against discrimination constituted a legitimate aim, but that the municipality had failed to seek alternative ways of showing respect for both male and female clients equally, as the applicant had offered to refrain from shaking hands with both men and women and to greet everyone respectfully in some other way. The District Court of Rotterdam, however, considered that a customer manager is an important contact person between the local authorities and citizens. The Court ruled that the city of Rotterdam has the right to choose 'to observe the usual rules of etiquette and of greeting customs in the Netherlands'. As a result, the Court considered it necessary and proportional to reject a candidate for the specific position who is not willing to observe those rules of etiquette.

The second case concerned a female teacher at a public school who decided that she would no longer shake hands with male persons and was subsequently dismissed. The Equal Treatment Commission considered this to constitute indirect discrimination on the ground of religion for similar reasons as in the first case. The teacher was prepared to greet everyone in the same (sex-neutral) way and in a polite manner, but without shaking hands. In subsequent legal procedures, however, the Central Appeals Tribunal considered that the school had a legitimate aim in requiring its teachers to shake hands irrespective of sex, as it wanted to comply with prevailing customs in Dutch society. This was deemed particularly important, as the school had many pupils and teachers of multi-ethnic descent. Pupils have to be prepared for a society in which shaking hands is the prevailing custom for greeting and showing respect. The dismissal of the teacher was judged to be lawful as it pursued a legitimate aim and the dismissal was deemed necessary and proportional.

In **Sweden** the Equality Ombudsman claimed discrimination on the grounds of religion when the Employment Board withdrew the assignment to support employment for a Muslim man as he had refused to shake hands with the female manager of his potential employer. The Stockholm District Court that decided the case held that the withdrawal amounted to direct discrimination since the Employment Board could not prove that there had been any other reason for the withdrawal of the assignment/employment support other than the denial to shake hands with the potential female employer. The case sparked a debate in Sweden. The question of the refusal to shake hands amounting to a discriminatory act against women, i.e.

burqa would be acceptable, but the opinion was given in the abstract and this has so far not been tested in practice.

constituting sex discrimination or harassment of the female manager, had been an issue in this debate, but was not part of the legal framing in the case itself.

Sex-segregated services

On this subject hardly any case law is reported regarding the admissibility of sex-segregated services. In **Finland** the Equality Ombudsman was faced with the question whether separate swimming hours for women to accommodate Muslim immigrant women was acceptable. The Ombudsman considered that the practice did not violate the Act on Equality between Women and Men, because such sex-segregated services were needed for religious and other reasons (for example, on post-surgery cosmetic grounds), and because there were other similar services available for men in other facilities during the time slots exclusively offered to women. Thus, the segregated service promoted equality in a manner that was in proportion to the inconvenience caused to men.

In **Germany**, some case law exists on the issue of parents who sometimes request that their daughters should be exempted from school activities for religious reasons. The **German** courts have rendered differing solutions depending on the type of activity for which an exemption was requested. In applying the principle of proportionality (to strike a balance between religious freedom and the child's right to education), courts have asked whether there were other solutions possible which would ensure the girl's right to education without forcing her to act in ways which are incompatible with her religious feelings. In this vein, courts have permitted exemptions from swimming classes, but not from physical education classes, where girls could wear clothing fully covering their bodies.

To conclude this section, a **Dutch** case is worth mentioning in which the Equal Treatment Commission came to a rather controversial conclusion when it decided that women who refuse to remove their burqa in male company may claim to be helped by a female person if it is deemed necessary for communication purposes to speak with her while she is unveiled. The case concerned a public organization that offers counselling to citizens in the field of rent subsidies, maintenance payments, study costs, taxes and debts. The organisation required their female clients to remove their face-covering veil during conversations with social workers to facilitate communication and eye-to-eye contact. The Commission concluded that this requirement involves indirect discrimination based on religion, because the measure particularly affects women who wear face-covering veils because of their religious beliefs. No objective justification was present, because these women can also be assisted by female social workers in which case they will remove the veil. Although segregated services were not explicitly claimed by the complainant, the Equal Treatment Commission's opinion seems to suggest that these are a proper solution to the desire to wear a face-covering veil.

3.4 Conclusions

So far, the headscarf is the most important issue if we take into account the range of countries in which it is an issue and the number of women involved. In terms of political and media attention the burqa has raised a lot of debate. Controversies involving other issues are present in several countries though they are not (yet?) very manifest.

The national reports show interesting differences between the Member States of the EU in framing the issues. Though in almost all countries dress codes involving a prohibition on wearing a headscarf are legally framed in terms of religious freedom

and/or discrimination on the basis of religion, sometimes they are also framed in terms of sex equality and/or discrimination based on sex. The latter kind of framing acknowledges the specific disparate impact of headscarf bans on the opportunities for women belonging to immigrant groups. No examples were mentioned in the reports of presenting them in case law as (potential) discrimination based on race or ethnic origin, but given the link with debates on immigration and integration several reports mention that this could also be feasible. Apparently religion is the most obvious angle to legally address prohibitions on wearing headscarves, but not exclusively.

The reports also show that tolerance towards headscarves differs widely between Member States. In some countries, such as **the UK**, bans on headscarves (and other religious symbols) are unacceptable as a rule, both in private and public employment. In others, such as **France**, they are deemed indispensable in the public sphere to protect the freedom of religion and guarantee the neutrality of the state. Thus, all personnel in public employment and pupils attending public schools are not allowed to wear religious symbols such as headscarves. In other countries the picture is more mixed. From the point of view of the EU equality directives (and as far as the issues are covered by them), the different outcomes could be problematic. Though the relevant directives leave the Member States with discretion as to the means to be employed to transpose them, they impose uniform obligations as to the results to be achieved.

The national reports show the approach to burqas to be quite different. Burqa bans are much more squarely framed as protecting women against oppression and upholding the principle of sex equality and are hardly perceived as problematic in terms of freedom of religion or discrimination based on religion. Nevertheless, several courts in e.g. France and Italy have held that a general ban on burqas as is proposed would be legally unacceptable. In other settings, such as education, burqa bans will probably be held to be justified, as the practice in several countries suggests

Before turning to the question of how to approach the issues that are central to this report under the EU gender directives, we need to consider the way in which the European Court of Human Rights has dealt with these issues so far.

4. Approaching the issues under the ECHR

4.1 Introduction

The ECHR is of increasing importance as a frame of reference for EU law.²³ The Treaty on the European Union now provides in Article 6 that the EU shall accede to the ECHR. Similarly the EU Charter of Fundamental Rights pays tribute to the ECHR by stipulating that in so far as the Charter contains rights that correspond to rights in the ECHR, ‘the meaning and scope of those rights shall be the same as those laid down by the said Convention’, although EU law may provide more extensive protection (Article 52 Section 3).²⁴ All this suggests that the ECHR provides an

²³ Cf. O. De Schutter, *The prohibition of discrimination under European human rights law. Relevance for EU racial and employment directives*, European Network of Legal Experts in the non-discrimination field, European Commission, 2005, p. 9. See <http://www.non-discrimination.net/en/publications>, accessed 2 December 2010.

²⁴ Charter of Fundamental Rights of the European Union, 2000/C 364/01, OJ C 364, 18.12.2000, p. 1. Pursuant to the entry into force of the Treaty of Lisbon on 1 December 2009, the Treaty on European Union now provides in article 6 (1) that the Charter ‘shall have the same legal value as the Treaties’. This means that it has become legally binding.

overarching human rights framework for the EU and may perhaps even have to be given priority if legal norms stemming from both legal regimes conflict.²⁵

When exploring the relevance of the ECHR for EU law it is important to keep in mind the different legal roles and functions or mandates of the European Court of Human Rights and the EU Court of Justice. The latter is to guarantee a uniform interpretation of EU law throughout the Union, whereas the former is called upon to decide whether a State Party violates the European Convention in a specific case. In this respect, in the case law of the European Court of Human Rights the ‘margin of appreciation’ to be left to the States Parties plays an important role. Besides, the ECHR sets minimum standards only, which means EU law is free to provide more human rights protection.

Many of the issues which are the focus of this study could give rise to an individual complaint under the Convention. In fact, the European Court of Human Rights has dealt in a number of cases with headscarf bans, especially in public education.²⁶ In the following, the Court’s case law will be explored as far as it is relevant for the subject of this study.

4.2 Headscarves in public education

Under the Convention, state regulations prohibiting teachers or pupils from wearing a headscarf or religious symbols in general fall under the scope of Article 9 ECHR. Article 9(1) guarantees everyone’s right to freedom of thought, conscience and religion, which

‘includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance’.

Under Section 2 limitations on the freedom to manifest one’s religion or beliefs are allowed only if they 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.’

Article 14 ECHR may be applicable as well if discrimination on the basis of sex, race or religion is at stake, but so far it has played no significant role in the Court’s case law given its accessory character.²⁷

²⁵ In the *Bosphorus* decision the European Court of Human Rights clarified the relationship between the European Convention on Human Rights and Community law and the responsibilities of the States Parties under both. The Court’s general approach is rather deferential: as the protection offered by the Community can be considered to be ‘equivalent’ to the protection offered by the Convention, the European Court of Human Rights will presume no conflict with the Convention exists unless ‘in the circumstances of a particular case, it is considered that the protection of the Convention rights was manifestly deficient’. ECtHR 30 June 2005, *Bosphorus v. Ireland*, appl. No. 45036/98, section 156.

²⁶ It is important to note that the ECHR mainly concerns vertical relationships, not horizontal ones. This means that any overlap in the scope of application between the EU gender directives and the ECHR will be limited mainly to public employment (not private) and to access to goods and services supplied by the state (and not private parties).

²⁷ Article 14 ECHR: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political

Dahlab v. Switzerland

To start with, several cases dealing specifically with the prohibition of headscarves in public education merit attention. As far as teachers are concerned, the case of *Dahlab v. Switzerland* stands out.²⁸ Dahlab was a female, Catholic teacher at a Swiss public school who had converted to Islam and started wearing a headscarf. After three years, the General Director of primary education in the *Canton* of Geneva initiated action and prohibited her from wearing the headscarf. The Director considered that wearing a headscarf, being a manifestation of religious belief, jeopardized the principle of the separation of Church and State and endangered the neutrality that the state should uphold in public school classrooms. The Swiss Federal Court that heard her case upheld the ban and gave priority to the right of the pupils to receive education in a religiously neutral context over the teacher's freedom to manifest her religion.

Bringing a complaint to the European Court of Human Rights, Dahlab claimed that her right to freedom of religion was infringed, as well as her right to non-discrimination, as a Muslim man could teach at a state school without being subject to any form of prohibition.

The European Court of Human Rights upheld the judgment of the Swiss court in 2001. The interference with Dahlab's freedom of religion as protected by Article 9 of the ECHR was considered to be justified. The European Court emphasized that the national court had been very careful in balancing the rights at stake. The fact that, before the General Director's actions, three years had already passed without complaints by either parents or the school board did not influence the Court in its judgment.

The most important part of the decision starts with the Court's consideration that it is difficult to assess what impact the wearing of a clearly religious sign like a headscarf will have on the freedom of conscience and religion of the pupils, especially on pupils of such a tender age (four to eight year olds) who are even more vulnerable to being influenced than older children. Interestingly, the Court then linked the question of the required neutrality of the teacher to the question of how wearing a headscarf relates to gender equality. This is rather surprising, as the Swiss Court had time and again identified the problem involved as one of religious expression as such and only referred to its possible meaning in terms of women's inequality in a marginal note. Yet, according to the Court, in the circumstances

'it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils'.²⁹

After this negative statement on what a headscarf represents, the Court concluded that the interference with the teacher's freedom to manifest her religion was justified. As far as the claim of discrimination on the basis of sex was concerned, the Court was

or other opinion, national or social origin, association with a national minority, property, birth or other status'.

²⁸ ECtHR 15 February 2001, *Dahlab v. Switzerland* (decision on admissibility), appl.no. 42393/98, see <http://www.echr.coe.int/echr/>, accessed 2 December 2010.

²⁹ Idem.

relatively brief. As the prohibition on wearing a headscarf is ‘not directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the State primary-education system’, such a measure ‘could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith’. The Court accordingly concluded that there was no sex discrimination at issue.³⁰

Sahin v. Turkey

In respect of prohibitions on students wearing a headscarf or other religious symbols the judgment of the Grand Chamber of the Court in *Sahin v. Turkey* has set an important standard.³¹ This case concerned a university student who objected to the dress regulations of a **Turkish** state university, which prohibited religious attire being worn in the university. In 2004, the European Court of Human Rights held the ban to be compatible with the rights enshrined in the ECHR. The Grand Chamber of the Court confirmed this decision in 2005. In its decision the Court repeated its consideration, citing from *Dahlab*, that wearing a headscarf is difficult to reconcile with the principle of gender equality, tolerance, respect for others and non-discrimination.³² In its further considerations, however, it kept its distance and emphasized the margin of appreciation to be left to the States Parties to the Convention:

‘(...) where questions concerning the relationship between State and religions are concerned, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance’.³³

Thus the **Turkish** Government was accorded a significant margin of appreciation to decide whether it is indeed ‘necessary’ in the Turkish context to prohibit wearing religious symbols in teaching institutions. The Court accepted the arguments put forward by the **Turkish** Government, especially those that referred to the specific Turkish history of secularism, and the strong political significance of wearing a headscarf in **Turkey** connected with the growing influence of extremist political movements in that country.

Though the plaintiff in *Sahin* also complained that the ban resulted in sex discrimination, she did not dwell on this in any significant way, but focused on her freedom of religion. Consequently the Court apparently did not feel inclined to explore this issue any further either. It remarked only that the reasons that led the Court to conclude that there was no violation of Article 9 ECHR also applied to the complaint under Article 14, read together with that Article or taken separately.

The judgment in *Sahin* leaves a wide margin of appreciation to the States Parties where the regulation of the relationship between the state and religion is concerned. Thus it seems likely that the Court will be reluctant to question the national

³⁰ It should be noted that before the judgments of the Court in *Hoogendijk v. the Netherlands* (6 January 2005, appl. no. 58641/00) and *D.H. v. Czech Republic* (Grand Chamber 13 November 2007, appl. no. 57325) the Court had shown itself to be very reluctant to apply the concept of indirect discrimination.

³¹ ECtHR (Grand Chamber) 10 November 2005, *Sahin v. Turkey*, appl. no. 44774/98, see <http://www.echr.coe.int/echr/>, accessed 2 December 2010.

³² *Sahin*, section 111.

³³ *Sahin*, section 109.

authorities' assessment of whether a ban on religious symbols in public education (or elsewhere) is 'necessary' or not. If this is a correct interpretation of the *Sahin* judgment, it will mean the decision on the limits to be placed on religious manifestations is left largely to the national level. This could mean that the European Court of Human Rights allows freedom of religion to mean something fundamentally different in different European countries.

More recent case law seems to confirm this conclusion, at least where regulations regarding the wearing of religious symbols is involved. Thus the Court has decided that several complaints by both Muslim and Sikh pupils directed against the **French** ban on wearing ostentatious symbols in public education were 'manifestly ill-founded' and thus inadmissible. This means that a full consideration of the merits of the ban in the **French** context was not deemed to be necessary, though the **French** setting is very different from the **Turkish** one (if only because in France the ban affects minority groups) and some of the complainants had suggested that wearing a less ostentatious head covering than a headscarf or turban should be acceptable. Apparently the **French** state was left a wide margin of appreciation to regulate the issue.³⁴

4.3 Other case law

The above cases seem to fit into a larger picture of the Court being pretty deferential where regulation of manifestations of religion is concerned and not providing extensive protection. As the comprehensive studies of Article 9 ECHR by Carol Evans and Malcolm Evans show, the case law of the Strasbourg organs is very protective only as regards the so-called *forum internum*, that is as regards adhering to a religion or holding a belief as such. As far as the *forum externum* is concerned, that is the *manifestation* of religion or belief, the Court does not show much willingness to derive positive obligations from Article 9 ECHR to accommodate religion in the public sphere.³⁵ Several of the barriers that complainants have to overcome account for this.

To start with, it may be difficult to have a religious manifestation recognised as worthy of protection under Article 9 ECHR. As the European Commission on Human Rights put it in the *Arrowsmith* case, Article 9 'does not cover each act which is motivated or influenced by a religion or belief'. Instead the Commission required the

³⁴ ECtHR 30 June 2009; on Muslim women's complaints: *Aktas v. France*, appl. no. 43563/08; *Bayrak v. France*, appl. no. 14308/08; *Gamaleddyn v. France*, appl. no. 18527/08; *Ghazal v. France*, appl. no. 29134/08; on complaints by Sikh pupils: *Javir Singh v. France*, appl. no. 25463/08; *Ranjit Singh v. France*, appl. no. 27561/08. These (in)admissibility decisions were preceded by two judgments upholding more specific headscarf bans in physical exercise classes stemming from complaints that were brought to the Court before the introduction of the French legislation banning ostentatious symbols from public education: ECtHR 4 December 2008, *Dogru v. France*, appl. no. 27085/05 and on the same date *Kervanci v. France*, appl. no. 31645/04. Outside the context of education the Court has rendered several judgments similarly allowing the state a wide margin of appreciation to interfere with the wearing of religious symbols if security and safety measures so require. Thus at security checks a Sikh can rightfully be asked to remove his turban. See ECtHR 11 January 2005, *Phull v. France*, appl. no. 35753/03 and ECtHR 13 November 2008, *Mann Singh v. France*, appl. no. 24479/07.

³⁵ M.D. Evans, *Religious liberty and international law in Europe*, Cambridge: Cambridge University Press 1997 and C. Evans, *Freedom of religion under the European Convention on Human Rights*, Oxford: Oxford University Press 2001. See also the chapter on article 9 ECHR in P. van Dijk, F. van Hoof, A. van Rijn & L. Zwaak (eds), *Theory and practice of the European Convention on Human Rights*, Antwerp/Oxford: Intersentia 2006 (4th edition).

manifestation to be a ‘necessary expression’ of someone’s religion or belief.³⁶ Thus a Muslim teacher was considered not to have a case under Article 9 ECHR when he claimed that his time schedule should be adjusted to enable him to pray in the mosque on Friday afternoons. This was not considered to be a ‘necessary’ manifestation of his religion, as he had been functioning as a teacher for years without attending the mosque on Friday afternoons. The fact that he had not claimed a desire to do so, because before the case arose no mosque was available in the vicinity of his school, was considered irrelevant.³⁷ Similarly, the European Court of Human Rights has not been prone either to take the perspective of the complainants as a starting point for deciding whether their religious freedom is interfered with. Thus, in the cases of *Valsamis* and *Efstratiou*, in which several Jehovah’s Witnesses objected to the compulsory participation of their children in a parade on **Greek** National Day, which they considered to be militaristic and thus contrary to their pacifist convictions, the Court held that it could discern nothing in the parade that could offend these convictions in such a way as to engage their freedom of religion as protected by the Convention.³⁸

A second barrier for complainants arises from the emphasis the Strasbourg organs often place on the ‘voluntariness’ of the situation complainants find themselves in: if they do not want to abide by the prevalent rules, they are free to leave. In this respect, the Court and the Commission on Human Rights seem to be rather insensitive to the price complainants may have to pay for adhering to their religious convictions. Thus, the Muslim teacher referred to was deemed free to leave his employment and renegotiate a new, part-time contract which would leave him free on Friday afternoons. In a similar way, a Seventh Day Adventist was considered able to solve the tension between his wish not to work on his Sabbath with the demands made by his employer, the Finnish railways, by resigning from his job and looking for another one:

‘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.’³⁹

And the student who refused to have her picture without a headscarf on a **Turkish** state university identity card was considered to be free not to attend a state university and go to a private (and thus much more costly) university instead.⁴⁰

All in all, limitations on the *manifestations* of religion are apparently not considered as deserving a very high degree of protection. This fits with the remark by De Schutter that as far as can be inferred from the scant case law on Article 14 ECHR on this topic, unlike sex or race, ‘religion does not seem to be in general considered a suspect ground’.⁴¹

³⁶ See *Arrowsmith v. UK*, appl. no. 7050/75, *Decisions & Reports* no. 19, 1978, p. 5-35.

³⁷ Appl. no. 8160/78, *Decisions and Reports* no. 22, 1981, p. 27-50.

³⁸ ECtHR 18 December 1996, cases *Valsamis* and *Efstratiou*, section 31-33

³⁹ European Commission on Human Rights 3 December 1996, *Konttinen v. Finland*, appl. no. 24949/94.

⁴⁰ European Commission on Human Rights, *Karaduman v. Turkey*, appl. no. 14524/89, *Decisions & Reports* no. 74 (1993), p. 93-110.

⁴¹ O. De Schutter, *The prohibition of discrimination under European human rights law. Relevance for EU racial and employment directives*, *European Network of Legal Experts in the non-*

Priority of sex equality over religious freedom?

So far, the Court has not dealt extensively with conflicts between religion and sex equality. Yet one case should be mentioned in which sex equality was given priority over respect for (far-reaching forms of) religious pluralism that would affect the equal treatment of women. The case concerned a Turkish political party that, among other things, was accused of striving for a multireligious legal order, in which every religious group would be subjected to its own, religion-based legal rules. For Muslims this would mean the introduction of *sharia* law. The Court made it very clear that it deemed the *sharia* to be incompatible with the values enshrined in the Convention:

‘It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.’⁴²

Similarly the State can legitimately limit the freedom of individuals to regulate private relationships according to their religious precepts through private law if the rights of women are affected:

‘(...) Turkey, like any other Contracting Party, may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes (such as rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession).’⁴³

Apparently, at least in this type of case the Court gives priority to the rights of women over religious freedom.

4.4 Conclusions

The European Court of Human Rights starts from the premise that the States Parties to the Convention enjoy a wide margin of appreciation to regulate relationships between state and religion outside the private sphere and to limit manifestations of religion accordingly. The *forum internum* is considered to be the core of the right to freedom of religion that is protected by Article 9 ECHR. Much less protection is given to individual *manifestations* of religion. This approach is borne out by the case law concerning headscarf bans in public education. States enjoy a wide margin of appreciation and may, for instance, prohibit both teachers and pupils or students from wearing a headscarf or other religious symbols in public educational institutions. At the same time, states are not required to adopt such bans in order to protect the rights and freedoms of others.

The Court has refused a claim that a headscarf ban constitutes sex discrimination. On the contrary, the Court considers wearing a headscarf as ‘hard to square’ with

discrimination field, European Commission, 2005, p. 15, see <http://www.non-discrimination.net/en/publications>, accessed 2 December 2010.

⁴² ECtHR (Grand Chamber) 13 February 2003, *Refah Partisi and others v. Turkey*, appl. no. 41340/98, section 123.

⁴³ *Idem*, section 128.

notions of sex equality. In the *scant* case law which deals with tensions or conflicts between religious norms and sex equality, priority is given to the latter.

5. Approaching the issues under the EU gender directives

5.1 Introduction

As has been remarked before, the headscarf and burqa issues are clear examples of (potential) multiple discrimination. So, it is not surprising that differences have emerged between different countries in framing these issues, with some defining them as involving discrimination based on religion, or sex, or race or ethnic origin. From the EU perspective, it is important to explore how different framing results in different directives or a combination of directives being applicable and hence in different levels of protection against bans. For the purposes of this report from the Gender Network this study will delve somewhat deeper into an analysis from the perspective of framing the issues as involving sex equality and reflect on how to approach the issues under the gender equality directives.⁴⁴ Again prohibiting the wearing of a headscarf will be distinguished from wearing a burqa, and a few words will be devoted to the other issues dealt with above.

5.2 Prohibiting the wearing of a headscarf

The first question to ask is to what extent headscarf bans in employment and in education fall under the scope of application of the EU gender directives. As far as headscarf bans in employment are concerned the answer is relatively clear. Whether in private or public employment, they fall under the scope of application of the Recast Directive (2006/54/EC). So all dress codes prohibiting workers from wearing headscarves are covered. This means that such dress codes in public education also have to meet the requirements of the directive as far as teachers are concerned.

For pupils the situation is quite different and more complicated. Though access to education could be expected to fall under the scope of application of the Goods and Services Directive (2004/113/EC), education has been excluded specifically in Article 3(3). The only type of education that is covered by the gender directives is the type of education that is more closely geared towards employment. Article 1 of the Recast Directive (2006/54/EC) includes ‘access to vocational training’ in its scope of application. Vocational training encompasses all forms of education that prepare a person for a qualification or the training and skills necessary for a particular profession, employment or trade. To be regarded as ‘vocational training’ the age of the students or pupils or the level of training is not relevant. Vocational training may even include an element of general education. Yet, general primary and secondary education as such are not meant to be included.⁴⁵ All in all, this means that some dress codes affecting pupils or students could be challenged on the basis of the Recast Directive (2006/54/EC).

The subsequent and more important question to answer is whether the Recast Directive (2006/54/EC) allows for headscarf bans, as far as they fall under its scope of application. Given the structure of EU sex equality law, it is important to distinguish between bans that could amount to indirect discrimination and those that could

⁴⁴ The report by Vickers deals with the headscarf issue from the perspective of the Framework directive, see L. Vickers, Religion and belief discrimination in employment – the EU law, European network of legal experts in the non-discrimination field, European Commission 2007, see <http://www.non-discrimination.net/en/publications>, accessed 2 December 2010.

⁴⁵ ECJ 13 February 1985 C-293/83 (*Gravier*).

constitute direct discrimination based on sex. The Directive allows for hardly any exceptions if direct sex discrimination is at stake. If headscarves are singled out as such, that is if headscarves are banned but not other types of head covering or other religious symbols, this could arguably be considered a form of direct discrimination, as women only will be affected.⁴⁶ The Directive does not provide for an exception to direct discrimination which would cover this situation.

The more common practice, however, concerns headscarf bans as part of general dress codes. They are often formulated in a neutral way as banning all headwear or all symbols showing a person's religious or personal convictions. Unless this 'neutral' ban is simply a pretext for banning the headscarf (in which case it also amounts to direct discrimination), the ban amounts to indirect discrimination because of the disparate impact of such dress codes on women's employment opportunities, unless it can be objectively justified. It follows that dress codes involving headscarf bans are only allowed if they serve a legitimate aim and are appropriate and necessary to achieve that aim.

This brings us to the crucial question of which types of justifications for a ban would be acceptable. Though at the end of the day it is up to the ECJ to decide this, for the purposes of this report some reflections seem appropriate.

Justifications for headscarf bans

First, headscarf bans have to pursue a legitimate aim. Some aims seem to be generally accepted and rather uncontroversial. The prime example is a headscarf ban for security and safety purposes. The national reports mention quite a few examples that do not seem to raise much protest. Similarly, the European Court of Human Rights has considered limitations on the right to dress according to religious precepts to be justified by security reasons.⁴⁷ Nevertheless, the extent of a ban can give rise to discussions in respect of the second part of the objective justification test, that is in respect of the question whether a ban is appropriate and necessary for security or safety purposes. In the context of the police, for instance, it may well be necessary to ban certain types of headscarves for safety reasons because they could possibly lead to injuries in confrontations with criminals. If, however, safe headscarves can be designed an overall ban is not proportionate. (Of course, other reasons may be considered legitimate to justify headscarf bans, such as state neutrality; see further below).

Some other aims of the bans on headscarves, however, are highly controversial in themselves. This is particularly true of headscarf bans that are argued to protect women from oppressive practices and to uphold notions of sex equality. How should we assess this argument? An interpretation of the headscarf as necessarily oppressive for women is highly contested. The opposite position would hold that this interpretation denies Muslim women's autonomy and agency and represent them as helpless victims of 'their' oppressive men. Remarkably, this perception of the headscarf seems to cut right across traditional political divides and finds both feminist supporters and opponents. Taking a look at the empirical research on the headscarf, it becomes clear that wearing a headscarf may have very different meanings for different people.⁴⁸ And even on an individual level a headscarf need not represent a

⁴⁶ Cf. discrimination based on pregnancy. See ECJ 8 November 1990 C-177/88 (*Dekker v. VJV Centrum*).

⁴⁷ See e.g. ECtHR 11 January 2005, *Phull v. France*, appl. no. 35753/03.

⁴⁸ For the UK see e.g. C. Dwyer, *Veiled meanings: young British Muslim women and the negotiation of differences*, *Gender, Place and Culture* 1999, p. 5-26; for France see e.g. C. Killian, *The other*

single thing. Thus, headscarves are sometimes worn as a sign of support for political Islam, as a symbol of opposition to assimilationist politics, as a manifestation of piety, or indeed as an expression of women's subservient position to men. In Western Europe, the headscarf could well be part of the search for identity which immigrant groups generally go through in trying to find their own place in their new home country. Muslim groups and Muslim women are no exception in this respect, and Islam often plays an important role in this process. Besides, for Muslim women living in traditional communities, wearing a headscarf may also provide more space for emancipation. Wearing a headscarf in education or work may show that they can live emancipated lives without foregoing their Islamic identity.⁴⁹

One may wonder whether the European Court of Human Rights took this type of research into account or was even aware of it when it considered that the headscarf appeared 'to be imposed on women' and was 'hard to square with the principle of gender equality'. Whatever the case may be, the research suggests that to accept sex equality as a justification for headscarf bans is not just problematic from the perspective of women's autonomy and agency, but may also be questionable from a practical point of view. It runs the risk of putting the cart before the horse; paid work is an important way to improve the position of women; excluding women from employment opportunities for wearing a headscarf could slow down their emancipation instead of promoting it.

Other justifications for headscarf bans referred to in the national reports concern the image of the enterprise and, in public employment, state neutrality. Both seem to provide legitimate aims in themselves, but this is not to say that complete headscarf bans will be able to pass the test of being not just appropriate, but also 'necessary', that is proportionate. As far as the image of a firm is concerned, how far can headscarves be adapted to fit it so as to render a complete ban unnecessary? In the Netherlands, a firm is not allowed to ban all headscarves from the shop floor if a solution can be found by adapting the design and colour of the headscarf to fit the uniform worn by all employees. And, as far as the aim of state neutrality is concerned, which interpretation of this principle should be taken on board? An interpretation which considers a neutral and uniform appearance of all civil servants indispensable to show that the state is impartial in dealing with its subjects? Or an interpretation that deems it crucial for the impartiality of the state to have persons from all groups visibly represented in carrying out all public functions? So far, different Member States have come to different conclusions. In **France**, it is considered necessary even for cleaners employed by the state to appear religiously neutral; in **the UK** not even judges are prohibited from wearing certain religious symbols. Both approaches are worlds apart. The European Court of Human Rights has so far upheld headscarf bans in public education and has granted the States Parties to the ECHR a wide margin of appreciation in regulating manifestations of religion. Yet, the ECJ can provide more protection under the equality directives if these so require.

This brings us to a final crucial point: will the ECJ apply the objective justification test in a very strict way, and will it formulate uniform standards for all

side of the veil. North African women in France respond to the headscarf affair, *Gender & Society* 2003, p. 567-590.

⁴⁹ See more extensively on the position and identity of Islamic groups in Western Europe, including the position of women: S. Ferrari and A. Bradney (eds.), *Islam and European legal systems*, Dartmouth/Ashgate: Aldershot 2000 and S. Vertovec and C. Peach (eds.), *Islam in Europe. The politics of religion and community*, London: Macmillan Press 1997.

Member States? Or will it be rather deferential and allow different practices in different Member States to continue?

On the one hand, the ECJ can be expected to be strict in assessing the justifications for headscarf bans. As headscarf bans limit women's opportunities, they should be strictly scrutinized. Traditionally, within EU law sex discrimination is perceived as a serious matter which calls for a strict test.⁵⁰ Besides, condoning widely diverging practices concerning headscarf bans may affect the free movement of female workers and result in diverging levels of protection against sex discrimination. In **France**, for instance, no public employment is available to Muslim women wearing headscarves.

On the other hand, given the controversial nature of the issue, the ECJ may refrain from adopting a strict approach. As Bell notes in relation to the hotly debated tensions between religion and sexual orientation in the context of the drafting of the Framework Directive (2000/78/EC), the EU often tries to avoid moral controversies. Thus the EU has been very careful to respect the diversity in the Member States concerning the recognition (or the refusal to do so) of same-sex partnerships. As Bell remarks: 'This is perhaps best described as a form of "moral subsidiarity", which regards issues of cultural or moral sensitivity as best left to national discretion'.⁵¹ If the ECJ follows this approach where headscarf bans are at stake, this would mean the gender directives will provide women challenging such bans with procedural safeguards, but only by requiring national legal bodies to assess whether they serve a legitimate aim and are appropriate and necessary to that end in the specific national context, and without formulating more detailed and uniform European criteria to guide such an assessment.

5.3 Prohibitions on wearing a burqa

It is questionable whether the general burqa bans which are proposed in several of the Member States fall within the scope of application of the gender equality directives. The bans are not adopted by the suppliers of goods and services as such, but by the state in its general competence to regulate public order. Even so, it would seem that a general ban could inhibit women wearing a burqa from participating in public life altogether and as such have the effect of limiting their access to goods and services.

More limited burqa bans in more specific settings, such as employment and education, could fall under the scope of application of the Recast Directive (2006/54/EC) in the same way as headscarf bans. This raises the same questions as in the previous section. Yet, the discussions on assessing their justification would run along somewhat different lines, as wearing a burqa at work or in the classroom is generally perceived as much more problematic than wearing a headscarf in several ways.

To start with, the sex equality argument would seem to be more generally accepted in this context. Without trying to decide the difficult question whether the women involved wear a burqa of their own free will or are pressured to do so, sex equality is implicated in a different way. Burqas are meant to create distance between men and women. Usually, a woman wearing a burqa does not object to removing it in the company of other women. Besides, several of the **Dutch** cases concerning burqas

⁵⁰ Though not always or in all areas such as social policy. See for an overview e.g. C. Tobler, *Indirect discrimination. A case study into the legal development of the concept of indirect discrimination under EU law*, Antwerp/Oxford: Intersentia 2005

⁵¹ M. Bell, *Anti-discrimination law and the European Union*, Oxford: Oxford University Press 2002, p. 120.

show that the women wearing it also object to being alone with a man in a room (notwithstanding the burqa) or to work together with men. In this respect, donning a burqa is an act of sex segregation and seems to be closely connected to convictions about the need to maintain separate spheres for men and women. This, it is submitted by the main author of this study, is highly problematic from the point of view of gender equality. During a large part of history, women were segregated from men and relegated to the private sphere, without being allowed to participate on an equal basis in the public sphere of men. Given this history, sex segregation is suspect. Of course, this is not to say that sex-specific arrangements are never useful or can never be justified (for instance, separate bathrooms for men and women or shelters for battered women only, see further below, Section 5.4), but claims that are linked to convictions opposing the free mingling of the sexes in the public sphere could lead to a proliferation of claims to segregated arrangements and should be viewed with suspicion.

Be that as it may, apart from countering renewed forms of sex segregation flowing from 'separate spheres' ideologies, a more functional argument against burqas seems to provide another justification for banning them from employment and education. This argument focuses on the adverse effects of wearing a burqa on communication and, in the classroom, on pedagogical aims.

In communication, non-verbal aspects are of great importance, at least in Western culture. The way in which people react non-verbally to each other in a meeting can be telling and adds to the quality of communication. As such, facial and bodily expressions are functional for good communication. Of course, no one would claim that communication is impossible without seeing each other face to face, but something important is lost if this is not possible. In addition something else may be at stake. Being able to see each other face to face during communication is perceived as a sign of respect. This seems to be an important aspect of the controversies surrounding the burqa. Like wearing dark sunglasses, but with much more impact, a burqa can have a very intimidating effect in face-to-face communication. The woman wearing it makes herself invisible and thus in a way secure and unassailable, whereas the person she is speaking to remains literally exposed and thus vulnerable. (In this respect it is not so hard to imagine that wearing a burqa may give women a feeling of power instead of submission.) But how mutually respectful does this leave the communication?

To conclude, the overall negative effect of wearing a face-covering veil on good and respectful communication could probably provide a valid argument for restricting women from wearing it in the context of employment or education. A reference to the more contentious issue of whether it represents the submission of women or enhances sex segregation would thus not be necessary.

5.4 Other issues

The cases concerning a refusal to shake hands with persons of the opposite sex seem difficult to frame as a form of (direct or indirect) sex discrimination that falls under the scope of application of the gender directives. For example, not employing someone because (s)he is unwilling to shake hands with colleagues or clients of the opposite sex in itself does not involve any distinction based directly or indirectly on the sex of the worker. Though it is true that the worker him/herself discriminates on the ground of sex, any adverse impact (s)he suffers derives from the religious convictions that underlie this behaviour. Nevertheless, if the approach taken by the **Dutch** Equal Treatment Commission is followed, an employer who would permit

some of his employees to treat co-workers in this way could be faced with complaints for not protecting them against sex discrimination. Such complaints would then fall under the scope of application of the Recast Directive (2006/54/EC) as they concern working conditions, which it does cover.

Supplying sex-segregated services because of the religious preferences of clients falls under the scope of application of the Goods and Services Directive (2004/113/EC). The Directive allows for separate services for men and women if an objective justification exists. The Preamble to the Directive mentions several examples of legitimate aims, such as the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example, single-sex voluntary bodies), freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example, single-sex sports events). Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from the case law of the ECJ.

The list suggests that only a limited range of justifications is acceptable and does not appear to allow for segregated services that are informed solely by religious convictions, but at the end of the day it will be up to the ECJ to decide on the proper interpretation of the provisions involved. Given women's history, the ECJ will probably be suspicious of any practices of sex segregation that are inspired by 'separate sphere' convictions. Again, much will depend on how strict the ECJ will be and whether it will develop uniform standards in this controversial area or leave a wide margin of discretion to the Member States.

5.5 Conclusions

Headscarf or burqa bans, whether in private or public employment, fall under the scope of application of the Recast Directive (2006/54/EC). For pupils the situation is more complex, as education is excluded from the scope of application of the Goods and Services Directive (2004/113/EC). The only type of education which is covered by the gender directives is vocational training, as it falls under the scope of application of the Recast Directive (2006/54/EC).

As most headscarf and burqa bans are part of general dress codes that will have a disparate impact on Muslim women, they could constitute indirect sex discrimination. This means they have to meet the objective justification test and are only allowed if they serve a legitimate aim and are appropriate and necessary to achieve that aim. Several aims which are put forward in the national reports are controversial. This is particularly true for headscarf bans which are argued to protect women and uphold notions of sex equality. The reading of the headscarf as oppressive for women is highly contested. Accepting sex equality as a justification for headscarf bans has been questioned as problematic from the perspective of women's autonomy and agency. In addition it has been pointed out that it may limit the employment opportunities for Muslim women and thus negatively affect their emancipation instead of promoting it.

Other justifications for headscarf bans referred to in the national reports concern the image of the enterprise and, in public employment, state neutrality. Though both seem to provide legitimate aims in themselves, an important question is whether complete bans on headscarves will be able to pass the test of being not just appropriate, but also 'necessary', that is proportionate. So far, different Member States have come to very different conclusions. This raises the question of which of

these approaches will be approved by the ECJ. Or will the Court try to avoid deciding such controversial issues and leave them to be dealt with by the national authorities?

The general burqa bans which are proposed in several of the Member States do not seem to fall under the scope of application of the gender equality directives. More limited burqa bans in specific settings, such as employment and education, could fall under the scope of application of the Recast Directive (2006/54/EC) in the same way as headscarf bans. Contrary to prohibitions concerning headscarves, this study identified several justifications that could be put forward to justify such bans. These include the promotion of good and respectful communication as well as countering forms of sex segregation which seem to be linked to ‘separate sphere’ ideologies. Similar arguments could be put forward against claims that have surfaced in some countries for segregated services which are informed solely by religious convictions. At the end of the day it will be up to the ECJ to decide on the proper interpretation of the provisions involved. Again, much will depend on whether or not the ECJ will be strict and will develop uniform standards in this controversial area, or will leave ample discretion to the Member States.

6. Concluding remarks

The above analysis shows that over a third of the Member States of the EU experience some or major tensions of the kind explored in this study. The headscarf is clearly the single most important issue to generate debate, though in several countries the burqa has become a hotly debated topic more recently. Other controversies, such as concerning persons who for religious reasons refuse to shake hands with colleagues or clients of the opposite sex or who claim sex-segregated services, are much less common. As several reports suggest, this could be a matter of time.

The national reports show several differences between the Member States of the EU in framing the issues. Though in almost all countries dress codes involving a prohibition on wearing a headscarf are legally framed in terms of religious freedom and/or discrimination on the basis of religion, sometimes it is also framed in terms of sex equality and/or discrimination based on sex. The latter acknowledges the adverse impact of headscarf bans on women belonging to immigrant groups. No examples were mentioned in the reports of presenting them in case law as (potential) discrimination based on race or ethnic origin, but given the link with debates on immigration and integration several reports mention that this could also be feasible.

The reports also show tolerance towards headscarves to differ widely between Member States. In some countries, such as the **UK**, headscarf bans are unacceptable as a rule, both in private and public employment. In others, such as **France**, they are deemed indispensable in the public sphere to protect the freedom of religion and guarantee the neutrality of the state. Thus, all personnel in public employment and pupils attending public schools are not allowed to wear religious symbols such as headscarves. In other countries the picture is more mixed.

The approach to burqas, however, is quite different. Burqa bans are much more squarely framed as protecting women and the principle of sex equality and are hardly perceived as problematic in terms of freedom of religion or discrimination based on religion. Nevertheless, several courts in e.g. **France** and **Italy** have held that a general ban on burqas as proposed or under way would be legally unacceptable. In other settings, such as education, burqa bans will probably be held to be justified, as the practice in several countries suggests.

Taking a look at the case law of the European Court of Human Rights that is relevant for the subject of this study, it is important to note that the Court leaves the States Parties to the Convention with a wide margin of appreciation to regulate relationships between state and religion and to limit manifestations of religion accordingly, that is outside the private sphere. The *forum internum* is considered to be the core of the right to freedom of religion which is protected by Article 9 ECHR. Much less protection is given to individual *manifestations* of religion. This approach is borne out by the case law concerning headscarf bans in public education. States enjoy a wide margin of appreciation and may, for example, prohibit both teachers and pupils or students from wearing a headscarf or other religious symbols in public educational institutions. On the other hand, states are not required to do so to protect the rights and freedoms of others. The Court has refused to support the claim that a headscarf ban constitutes sex discrimination. On the contrary, the Court considers wearing a headscarf as hard to square with notions of sex equality. In the scant case law which deals with tensions or conflicts between religious norms and sex equality, priority was given to the latter.

Headscarf bans, whether in private or public employment, fall under the scope of application of the Recast Directive (2006/54/EC). For pupils the situation is more complex, as education is excluded from the scope of application of the Goods and Services Directive (2004/113/EC). The only type of education which is still covered by the gender directives is vocational training, as it falls under the scope of application of the Recast Directive (2006/54/EC).

As most headscarf and burqa bans are part of general dress codes that will have a disparate impact on Muslim women, they could constitute indirect sex discrimination. This means they have to meet the objective justification test and are only allowed if they serve a legitimate aim and are appropriate and necessary to achieve that aim. Several aims which are put forward in the national reports are controversial. This is particularly true of headscarf bans which are argued to protect women and uphold notions of sex equality. The reading of the headscarf as oppressive for women is highly contested. The opposite position would hold that accepting sex equality as a justification for headscarf bans is not just questionable from the perspective of women's autonomy and agency, but also limits the employment opportunities for Muslim women and thus negatively affects their emancipation instead of promoting it.

Other justifications for headscarf bans referred to in the national reports that are under discussion concern the image of the enterprise and, in public employment, state neutrality. Although both seem to provide legitimate aims in themselves, an important question is whether all-out headscarf bans will be able to pass the test of being not just appropriate, but also 'necessary', that is proportionate. So far, different Member States have come to very different conclusions. This raises the question of which of these approaches will be approved by the ECJ. Or will the Court try to evade deciding such controversial issues and leave them to be dealt with by the national authorities?

The general burqa bans which are proposed in several of the Member States do not seem to fall under the scope of application of the gender equality directives. More limited burqa bans in specific settings, such as employment and education, could fall under the scope of application of the Recast Directive (2006/54/EC) in the same way as headscarf bans. This study has identified several justifications that can be put forward to justify such bans. These include the promotion of good and respectful communication as well as countering a form of sex segregation which seems to be linked to 'separate sphere' ideologies. Similar objections could be put forward against claims that have surfaced in some countries for segregated services which are

informed solely by religious convictions. At the end of the day it will be up to the ECJ to decide on the proper interpretation of the provisions involved. Much will depend on how strict the ECJ will be and whether it will develop uniform standards in this controversial area, or will leave a wide margin of discretion to the Member States.

Relationship with the other equality directives

As was mentioned above, the way in which the issues dealt with in this report are or can be framed in terms of either religion, sex or race/ethnic origin results in different directives or a combination of directives entering the picture. To conclude this report, it is pointed out that this is important for at least two reasons: the directives have a different scope of application and differ in the possibilities of justifying discriminatory rules or practices. To give an example: as headscarf and burqa bans can be framed as involving (direct or indirect) discrimination based on sex, religion and/or race/ethnic origin, dress codes in employment including such bans would be covered by the Framework Directive (2000/78/EC), the Race Directive (2000/43/EC) and the Recast Directive (2006/54/EC). Headscarf and burqa bans for pupils in primary and secondary education, however, are not covered by either the Framework Directive or the Recast Directive, but do fall under the Race Directive (Article 3(1)(g)). So any challenges to such bans under the EU equality directives will have to be framed in terms of race/ethnic origin to start with.

Apart from differences in the material scope of application of the directives covering discrimination based on race, sex and religion, the ground chosen to bring a challenge to headscarf or burqa bans could have consequences for the possibility of justifying such bans. Especially if limitations on religious dress amount to direct discrimination based on race or ethnic origin, this could make a major difference, as the Race Directive (2004/43/EC) hardly allows for any exceptions to direct discrimination. As was already mentioned, though, most headscarf and burqa bans tend to be formulated in a neutral way as banning all headwear or all symbols showing a person's religious or personal convictions. This means it may only constitute indirect discrimination. Justification then depends on the objective justification test, which is formulated in the same way for all three grounds. An important question which would remain is whether this test will be applied as strictly in respect of all three grounds. Thus Vickers suggests that the test for indirect discrimination based on religion could be less strict than the test applied in sex discrimination cases:

‘With regard to sex discrimination the standard of justification is high (...) Economic cost or customer preference will not usually justify indirect sex discrimination. It is arguable that such a high standard of justification is not appropriate in cases of religion and belief discrimination (...)’⁵²

Differing levels of scrutiny are not unfamiliar in the ECJ's case law on indirect discrimination. Thus indirect sex discrimination in the area of social security and social policy has met with a less exacting approach.⁵³ Similarly, the ECJ has shown

⁵² L. Vickers, *Religion and belief discrimination in employment – the EU law*, European network of legal experts in the non-discrimination field, European Commission 2007, p. 14.

⁵³ See extensively C. Tobler, *Indirect discrimination. A case study into the legal development of the concept of indirect discrimination under EU law*, Antwerp/Oxford: Intersentia 2005, p. 208-210 and p. 239-245.

that it may be less stringent in applying the objective justification test where age discrimination is at stake.⁵⁴

As was discussed in Section 4, a differentiated approach according more protection against sex or race discrimination than religious discrimination would seem to fit with the case law of the European Court of Human Rights. This Court has not shown itself to be highly protective of individual manifestations of religion that go beyond the *forum internum* and the private sphere. According to Vickers, it could well be that as regards the sensitive issue of headscarf bans, the requirement of an objective justification to uphold such bans under the Framework Directive will be limited to providing procedural safeguards requiring a proper consideration of competing arguments in the cultural and political context of the particular Member States rather than substantive criteria for deciding on an equilibrium between competing interests.⁵⁵

⁵⁴ ECJ 16 October 2007, C-411/05 (*Palacios de la Villa*).

⁵⁵ L.Vickers, *Religion and belief discrimination in employment – the EU law*, European network of legal experts in the non-discrimination field, European Commission 2007, p. 52.

Part II

National Law: Reports from the Experts of the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey

AUSTRIA – Anna Sporrer

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

According to a report on female immigrants in Austria of 2007¹ 336 500 female foreign nationals were living in Austria in 2001. Including all women who were born abroad and had already received Austrian citizenship, this raises the number of females with a migratory background to 575 000. Almost 90 % of the female immigrants are from Europe, due to the still dominant guest-worker migration, mainly from former Yugoslavia and Turkey.

On the labour market, female immigrants are often affected by double discrimination: on the one hand, they are disadvantaged compared to males, having to take up jobs that entail less income and status and having to face all forms of gender-related discrimination, on the other hand they suffer from the same structural discrimination as male immigrants, being identified as a member of a foreign ethnic group. Furthermore, unemployment is higher in the immigrant group than in the Austrian.

Furthermore, many immigrant women – in particular those from the Islamic world – have to cope with the social conflict between the modern and the traditional role of women. In Austria, for instance, more than 60 % of female immigrants of Turkish origin wear the headscarf, often combined with ‘western’ clothes, a phenomenon appearing mainly among the younger generation.

Recently – after the Belgian Parliament passed an Act prohibiting women from wearing the burka – this issue has been discussed by politicians and in the media, whereby several members of Government were in favour of a prohibition. The Minister for Women’s Affairs in particular qualified the burka as a symbol of degradation of and discrimination against women and therefore as incompatible with the Austrian Constitution and the values of our society, as wearing the burka restricts women in all aspects of daily life and prevents women from performing a professional life at all. The Minister plans to discuss this issue with various persons and institutions concerned and considers prohibiting the burka in public buildings.

1.2 Tension or conflicts: selected issues

Tensions or conflicts between the majority of the population and the immigrant community regularly appear during election campaigns, when in particular the Austrian Freedom Party² uses socially marginalising or racist slogans. During the election campaigns for the EU Parliament for instance, one slogan was ‘Occident in

¹ <http://www.frauen.bka.gv.at/DocView.axd?CobId=25457>, accessed 1 December 2010.

² *Freiheitliche Partei Österreichs.*

Christian hands'³ which – according to representatives of the Muslim community – confirmed reservations and sentiments against Muslims in Austria.

Cases of harassment against women in public wearing headscarves have been reported: In Vienna, the headscarf of a female student was violently pulled off her head and her head was soused with a liquid. Another headscarf-wearing woman was spit at.

According to a study of the EU Fundamental Rights Agency⁴ 10 % of (male and female) Turkish immigrants in Austria claim to have been discriminated against (within the last three months prior to the interview), mainly when applying for a job or at the workplace.

Also, the few cases dealt with by the Austrian equality and labour law institutions show that access to jobs is a major issue.

1.2.1 Employment

There is no additional information.

1.2.2 Goods and services

There is no additional information.

1.3. Tension or conflicts: other issues

There is no additional information.

1.4. No issue?

There is no additional information.

2. National approach

Austria provides for legislative and institutional measures against discrimination, inter alia on grounds of gender as well as race, ethnic origin and religion and of multiple discrimination concerning access to employment. For access to goods and services, protection against discrimination covers gender, race and ethnic origin only. These legislative measures are comprehensive and fully comply with the legal framework of the European Union, namely the Recast Directive (2006/54/EC)⁵ and the Goods and Services Directive (2004/113/EC).

In Austria – up to now – there is no explicit prohibition against wearing headscarves, neither for employees, nor for students or pupils.

There is one case, however, where a woman accused in a trial before a penal court was banned from the courtroom, because she refused to show her face during the trial. With reference to Article 9 Paragraph 2 of the European Convention of Human Rights, this ban was confirmed by the Supreme Court, stating that her behaviour constituted a denial of her civic duties and the court's intervention had been appropriate and proportional.⁶

2.1 Selected issues

There is no additional information.

³ 'Abendland in Christenhand'.

⁴ *European Union Minorities: a Discrimination Survey*, Focus report 'Muslims'

⁵ According to Article 34(1) of the Recast Directive, Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC were repealed on 15 August 2009.

⁶ Supreme Court, 27 August 2008, 13 Os 83/08t.

2.2 Other issues

There is no additional information.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights / 3.2 Conformity with EU law

In implementing Recast Directive 2006/54/EC and Goods and Services Directive 2004/113/EC, the Austrian legislation has passed provisions to balance conflicting rights regarding gender equality and religious freedom. Firstly, through the specific exception clauses of Article 14, Section 2 of the Recast Directive (regarding genuine occupational requirements), at least in the context of job advertisements,⁷ and of Article 4 Section 5 of the Goods & Services Directive (which provides for a general exception to non-discrimination if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary).⁸ Secondly, through objective justification in cases of indirect discrimination on the ground of sex.⁹

Also, the Austrian Constitution provides for rules for dealing with conflicting constitutional rights, including the right to gender equality and the freedom of religion. According to the jurisdiction of the Constitutional Court, fundamental rights law and the European Convention on Human Rights, which was ratified as part of constitutional law in Austria, fundamental rights may be restricted by legislation, if this law complies with the constitutional principles of equality and proportionality or is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals or for the protection of rights and freedom of others.¹⁰

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

Up to now, only a few cases concerning questions of discrimination on grounds of gender and/or religion have been dealt with by Austrian equality or labour law institutions, which were made public:

- A female medical doctor, Austrian citizen, wearing a headscarf based on her Muslim belief, applied for a job in a convalescent home. The executive doctor in charge proposed her to the management as a qualified applicant. The chairman of the management board, however, required as a condition for her employment that she take off the headscarf. He claimed that he had to respect the existing dress codes for the employees and the wishes of the guests. He ultimately required her to decide on this question within eight days. An intervention of the Equality Ombudsperson remained without any success. The applicant filed a lawsuit with the labour court, claiming direct discrimination on grounds of religion and compensation of two monthly salaries, amounting to EUR 4 500 in total. The employer proposed a settlement of the lawsuit on the condition that the claimant

⁷ E.g. § 9 Equal Treatment Act, OJ I 66/2004.

⁸ E.g. § 40d Equal Treatment Act, OJ I 66/2004.

⁹ E.g. § 5 Section 2 Equal Treatment Act, OJ I 66/2004.

¹⁰ See e.g. Article 8 Paragraph 2 European Convention of Human Rights.

withdraw her application to the Equal Treatment Commission, which she had submitted simultaneously with the lawsuit. As the claimant refused this proposal, the employer paid the required EUR 4 500 and the court proceedings were stayed. The Equal Treatment Commission only found discrimination on grounds of religion.¹¹

- A woman of Turkish origin applied for a job as a cleaning woman in a cleaning firm, which offered cleaning services for a private hospital. The manager told her that the private hospital did not wish women cleaning the rooms with headscarves. As the woman regarded the wearing of her headscarf as part of exercising her religion, she felt unable to accept the job. The Equal Treatment Commission intervened and claimed that the woman had been discriminated against on ground of her religion. The enterprise offered the woman concerned another job, which was declined because in the meantime the woman had found another job.¹²

As both cases were only assessed with regard to discrimination on grounds of religion, the question of tensions between the right to equality on one hand and the freedom of religion on the other – up to now – did not arise.

4.1.2 Goods and services

This section is not applicable in Austria.

4.2. Probable outcome of case law on selected issues

This section is not applicable in Austria.

4.3 Case law on other relevant issues

This section is not applicable in Austria.

5. Good practices/solutions

Within the Austrian legal system, all discrimination grounds except disability are dealt with by the Equal Treatment Commission, which is divided into three senates, each of them dealing with different grounds and/or different areas of discrimination. Within this division of competences, ‘Senate I’, which deals with gender-related discrimination in all areas, is also competent for all cases concerning multiple discrimination involving gender. In practice, the chairperson of ‘Senate I’ screens all incoming applications, to see if multiple discrimination is involved, and distributes the incoming files among all other senates. The same system is established for the Equal Treatment Ombudspersons.

This sharing of competences makes the equality bodies better equipped to build up expertise and experience in cases of tensions between conflicting grounds of discrimination as well as in cases of multiple discrimination. Tensions, in particular those between gender and religion in the reported cases, have not appeared, because the question of which right might be infringed by the rejection of an applicant based on her wearing a headscarf has been placed into the competence of the senate competent for discrimination on grounds of religion, who obviously made a satisfying decision for the applicant by ascertaining a violation of her right to freedom of religion. Therefore the ideological dispute about whether the ban on headscarves

¹¹ <http://www.klagsverband.at/kommentare/ablehnung-einer-muslimischen-aerztin>, accessed May 2010.

¹² See <http://www.gleichbehandlungsanwaltschaft.at/site/6457/default.aspx#a3>, accessed May 2010.

might also violate the right to non-discrimination on ground of gender did not need to be resolved. For cases of multiple discrimination, the filtering function of the gender senate and ombudsperson can be regarded as a safeguard mechanism for the adequate handling of cases where several grounds of discrimination, in particular those including gender, are involved.

6. Further comments

I have no further comments.

BELGIUM – Jean Jacqmain

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

In the expert's opinion, in Belgium there is significant tension resulting from racism, xenophobia, reluctance to allow differences, and the difficulties of integration. The tension may crystallize locally on any kind of minority, including personnel of EU institutions, citizens of other EU countries, and Belgian citizens belonging to the other linguistic group.

With such a background, issues of religious tolerance/intolerance tend to focus on the community originating from North Africa, specifically from Morocco. It should be stressed immediately that a number of elements combine to generate such issues, mainly the international context, the growth of militant Islamism, the employment crisis, everyday racism and the agglomeration of many young, nearly exclusively male 'Moroccan' teenagers into a 'no future' delinquent subculture (although most of its members are Belgian citizens due to the failed policy of integration through naturalization).

Among this 'Moroccan' community, the 'religious' issue in turn crystallizes around the wearing of the hijab; occurrences of more visible and radical 'Muslim' attire (niqab and burka) seem to originate in much smaller foreign groups (including rich visitors from Saudi Arabia).

Finally, the gender dimension of the issue is not seriously disputed outside intellectual circles, in particular feminist organisations. While equality of men and women is constantly brandished by partisans of the prohibition of the hijab in the public sphere, it is clearly nothing more than a rhetorical or legal argument in a country where by and large substantial gender equality is progressing very slowly, if at all.

1.2 Tension or conflicts: selected issues

While the wearing of the burka has induced such violent indignation that the federal Parliament adopted a proposal for a penal Act to prohibit it¹³ in public spaces, there is no known example of any 'burka dispute' related to employment or access to goods

¹³ *Parl. St./Doc. Parl.*, 52, 2289 on <http://www.dekamer.be> or <http://www.lachambre.be>, accessed 13 April 2010. Actually, the proposal mentions any attire which prevents the identification of the wearer. Reasons of security are invoked, but the burka is branded an unacceptable sign of female subordination. The proposal was adopted on 29 April, but has not been published in the *Moniteur belge/Belgisch Staatsblad* yet. The penalty is a fine (of EUR 82.50 up to 137.50).

and services. Thus, the following answers exclusively concern the hijab, unless stated otherwise.

1.2.1 Employment

Concerning dress codes, there is some case law related to *private employment*. Two kinds of situation were debated: a) Are employers entitled to dismiss an employee on serious grounds because she refuses to wear anything else than the modest attire which she says to be required by Islam? b) Is a woman entitled to unemployment benefits when she misses a chance of employment or loses her job because she refuses to remove her hijab or, in one case, refuses to wear Bermuda shorts as part of the prescribed uniform (in a sportswear shop)?

In the *public sector*, although controversial situations are mentioned in institutions such as hospitals, case law exclusively concerns teachers in schools organised by public authorities. Indeed, for a long time the hijab issue remained limited to pupils and students; more recently, it started involving teachers of Islamic religion, and finally a teacher of mathematics.

There is no known case law related to the requirement of shaking hands. Personally, the expert has never heard any mention of that issue, except from a female university professor whose hand a very orthodox rabbi refused to shake when she was giving a lecture in Antwerp.

1.2.2 Goods and services

The media occasionally report rather shocking cases of Muslim men rushing their wives to emergency departments of hospitals and then refusing that they be treated by male personnel. This has led certain hospitals to adopt house rules mainly aimed at keeping themselves clear of liability claims if no female nurses and doctors are available.

So far, the provisions of the Gender Act of 10 May 2007 aimed at transposing Directive 2004/113/EC have not been fully implemented, as the Royal Decree which must list which goods and services may be reserved to persons of one sex has not been adopted yet. However, there are known examples of ‘women and children only’ opening days or hours in certain public swimming pools, but whether such practices are meant to answer religiously inspired demands or plain demands of women to be left alone by men is unclear.

The expert has no information on other forms of segregation.

1.3 Tension or conflicts: other issues

Another aspect of the issue of employment in hospitals is the refusal of serving pork dishes to patients; it may concern men as well as women, but the latter remain the overwhelming majority in performing menial tasks. No relevant case law is reported.

The wearing of the hijab is also controversial in activities related to political life. In a country where voting is compulsory and citizens may be requisitioned to run polling stations, some chairmen (no chairwomen) of such stations attracted publicity when they rejected hijab wearers who had responded to requisitions. More recently, some agitation arose among political parties when an elected member of the parliament of the Brussels Capital Region took her seat wearing the hijab, and when another hijab wearer was appointed by her political party as a member of the managing board of the Antidiscrimination Agency.

1.4 No issue?

The question is difficult to answer. On the one hand, whether the wearing of hijab in schools (by pupils and teachers) and in public services (by staff members) should be tolerated or prohibited is certainly the theme of a raging debate among political parties and in the media, and occasionally causes bitter polemics at local level. On the other hand, a very recent opinion poll, sponsored by a leading French-speaking newspaper (*Le Soir*), revealed that at national level nearly 70 % of the interviewees do not think that the hijab is a problem, although in the Brussels Capital Region (where the density of ‘Moroccan’ inhabitants is highest) the majority went in the opposite direction.

Indeed, the sequence of cause and effect is becoming inextricable. For instance, until quite recently the Flemish Government had left it to the directions of individual public schools to decide whether the wearing of ‘religious signs’ should be tolerated or prohibited. Consequently, in Antwerp the director of the last school which practised tolerance, a woman of progressive views, finally appealed to the Government for a general rule of prohibition because her institution was turning into a ghetto where hijab-wearing pupils were concentrating. However, the question of ‘Why prohibit at all?’ had stopped being asked in the process.

2. National approach

2.1 Selected issues

It should be stressed that discrimination is hardly mentioned at all throughout the whole debate, which tends to revolve around the principle of religious freedom, enshrined in Article 19 of the Constitution. The principle of religious freedom is then confronted with the correlative principle of neutrality of public institutions, or with rules of social law such as an employer’s right to manage his business or an unemployed person’s duty to accept any suitable job. Gender equality is quoted in an abstract way as an argument (usually by advocates of prohibition). As to discrimination related to race or ethnic origin, this was only used once as a ground for legal action, with disastrous consequences (see below in 4.2).

2.1.1 Employment

Dress codes

In the *private sector*, certain large corporations such as banks have obviously adopted work rules prohibiting ‘religious signs’, but there is no related case law, most probably because until the antidiscrimination Acts of 10 May 2007 (see below in 3) were adopted, a claim for religious, ethnic or gender discrimination could hardly result in any sort of compensation. In contrast, Labour Courts usually adopt a down-to-earth approach when they have to decide whether complying with Islamic precepts regarding female dress really prevents the performing of tasks or disrupts the smooth working of an enterprise.

In the *public sector*, there is a *de facto* consensus to consider that wearing ‘religious signs’ must not result in hindrance to the performing of tasks or to the observance of health and safety rules, or in disruption of the working of the institution, or in proselytism. Beyond this consensus, the polemic revolves around religious freedom v. neutrality of the public institutions. It is presently focussed on schools, where ad hoc solutions such as assigning a hijab wearer tasks which do not imply contact with the public are not applicable.

2.1.2 Goods and services

Segregated healthcare

There is certainly no systematic organisation of segregated healthcare services. By and large, and unless they have adopted house rules which exclude any consideration for personal tastes of the patients, institutions will try to accommodate such requests (howsoever motivated), within the constraints due to their organisation.

Segregated social services

Again, there is nothing systematic to report. Institutions will try to adapt to the needs of their users, but it all depends on material considerations such as availability of rooms and linguistic abilities among the staff.

2.2 Other issues

Fasting for Ramadan has occasionally been mentioned as a source of tension in certain enterprises; one case was reported of work rules under which applications for sick leave related to fasting would be rejected. However, the problem seems to have become less acute after the social partners adopted Collective Agreement n°95 of the National Labour Council in 2008, which prohibits any sort of discrimination in all aspects of an employment relationship.

3. Legal framework for deciding conflicts: legislation

Again, it is impossible to provide any useful information as so far, both the disputes regarding ideas and the litigation have been nearly exclusively grounded on Constitutional principles and their implementation through legislative instruments, such as *décrets* of the French-speaking or Flemish Communities concerning philosophical neutrality in education. The specific anti-discrimination legislation (i.e. the three federal Acts of 10 May 2007 on ‘Gender’, ‘Race’ and ‘Discrimination in general’, and the corresponding *décrets/decreten/Dekreten/ordonnances/ordonnances* of the federate authorities) has not been applied at all, except in the disastrous case mentioned below in 4.3.

3.1 Rules for dealing with conflicting rights

Consequently, there are absolutely no rules for dealing with conflicting rights; the legal disputes follow the same lines as before the European Court of Human Rights, i.e. has there been a legitimate interference in the exercise of religious freedom? According to the (executive or statutory) nature of the challenged anti-hijab rule, the Constitution test is conducted by the competent court, or the case is referred to the Constitutional Court for a preliminary ruling. Alternatively, in the more down-to-earth cases cited above, the competent court will simply examine if observing religious dress precepts is incompatible with performing the assigned tasks.

3.2 Conformity with EU law

The federal and federate pieces of legislation quoted in 3.1 have been prepared with certain care for the proper implementation of EU law (Directives 2006/54, 2000/43 and 2000/78). However, if no parties in litigation think of relying on these instruments, it is impossible to measure whether they are effective. Moreover, whether the courts should raise the discrimination aspects on their own initiative, i.e. whether the domestic and European anti-discrimination legislation is *d’ordre public*, remains a moot point.

4. Legal framework for deciding conflicts: case law

Again, gender discrimination has never been mentioned in the relevant case law.

4.1 Case law on selected issues

4.1.1 Employment

In the *private sector*, case law regarding employment concerns the wearing of the hijab or the refusal to wear clothes incompatible with an employee's conviction that Muslim women should keep a modest appearance and covers the following grounds:

Serious grounds for dismissal:

- In a judgment of 26 October 1992,¹⁴ the Labour Court of Charleroi found that an employee in a shoe shop who used to wear discreet and ample clothing in compliance with her Islamic persuasion, had given her employer no serious grounds for a dismissal which had been unfair;
- Conversely, in a judgment of 15 January 2008,¹⁵ the Labour Court of Appeal in Brussels found that wearing the hijab in a shop where the work rules prohibited such clothing for the sake of the commercial image of the enterprise, was a serious ground for a dismissal which had not been conducive to religious discrimination.

Adequate grounds to refuse or leave a job:

- On 1 March 1995,¹⁶ the Labour Court of Hasselt found that when a prospective employer refused to let a woman wear her hijab while gathering mushrooms, she was entitled to rely on her Constitutional rights to religious freedom in order to decline the job;
- Conversely, in a judgment of 16 May 1997,¹⁷ the Labour Court of Appeal in Antwerp found that an unemployed woman had no right to refuse a proposed job of shop attendant because she feared not to be allowed to wear a hijab while she had been given no ground for such fear;
- And again, the Labour Court of Appeal in Brussels found on 17 October 2002¹⁸ that, in consideration of her Islamic persuasion, an attendant in a sportswear shop had been entitled to abandon her job when the 'summer uniform', which included Bermuda shorts, was introduced prematurely (i.e. before the end of her fixed-term contract).

In the *public sector*, there were two cases of female teachers of Islamic religion who were dismissed from Dutch-speaking public schools in Brussels for refusing to remove the hijab when outside their classrooms. In both cases, the *Raad van State* (Administrative Court) suspended the decisions of dismissal on technical grounds (i.e. that it was not within an individual school's jurisdiction to prohibit the wearing of 'religious signs'): judgments of 18 October 2007¹⁹ and 2 July 2009.²⁰

¹⁴ *Chroniques de droit social* (1993) p. 84.

¹⁵ *Journal des tribunaux du travail* (2008) p.140.

¹⁶ *Chroniques de droit social* (1996) p. 409 with comments by M. Palumbo & C. Radermecker.

¹⁷ *Chroniques de droit social* (1999) p. 79.

¹⁸ *Journal du droit des jeunes*, No. 220 (2002) p. 44.

¹⁹ N° 175.886, *Journal du droit des jeunes* No. 269 (2007) p. 40.

²⁰ N° 195.044, *Rechtskundig Weekblad* (2009-10) p. 997.

More recently, the Court of Appeal in Mons issued an order to the local council of Charleroi, that they had to allow a teacher of mathematics to continue teaching while wearing the hijab: judgment of 10 March 2010.²¹ The local council have decided to lodge an appeal with the Court of Cassation.

4.1.2 Goods and services

On this issue, there is nothing to report.

4.2 Probable outcome of case law on selected issues

In the single occurrence²² in which the anti-discrimination legislation (i.e. the Race Act of 1 May 2007) was quoted in relation with the hijab, the *Mouvement contre le racisme, l'antisémitisme et la xénophobie* (MRAX), acting on behalf of two female pupils, applied to the *Conseil d'Etat* for annulment of the rules adopted by two public schools to prohibit the wearing of 'any headgear'. In two identical judgments of 17 March 2009,²³ the *Conseil d'Etat* found (without providing any explanation) that such a prohibition was aimed at avoiding ethnic discrimination, which is a mission of MRAX under its own charter; thus, MRAX had no *locus standi* and the case was dismissed.

4.3 Case law on other relevant issues

Finally, in the Flemish Community, the *Raad van het Gemeenschapsonderwijs* (Council of Community Education) adopted a decision which uniformly prohibits the wearing of religious signs, as a measure of implementation of the *decreet* of 14 July 1998. When a pupil applied for suspension and annulment of this decision, the *Raad van State* ordered the suspension and referred to the Constitutional Court for a preliminary ruling on the compatibility of the *decreet* with Article 24 of the Constitution (i.e. the constitutional ground of the right to education): judgment of 18 March 2010.²⁴

5. Good practices/solutions

So far, the only official body which ever emphasised the gender dimension of the issue (other than for polemical purposes) was the Council for Equal Opportunities between Men and Women, an advisory body for the federal Minister in charge of Equal Opportunities. In its opinion n°54 of 13 September 2002 (i.e. before the present crisis in schools, political circles and media), the Council had expressed that the debate around 'religious signs' was in fact exclusively focussed on the hijab and other elements of female dress in the Muslim community. Considering that the woman or girl concerned is the only person who knows why she wears such clothing, the Council advised that when she complains about being forced to wear it, the public institutions had a duty to help her effectively; and that based on that hypothesis, they should refrain from interfering in her personal freedom and increasing her difficulties regarding integration in Western society.

²¹ *Rôle général* n°2009/RF/221, unreported.

²² To be exhaustive: the previous Anti-discrimination Act of 25 February 2003 had been quoted in a previous case, but the plea was rejected as inadmissible on procedural grounds: Labour Court of Appeal in Antwerp, judgment of 18 January 2008, *Chroniques de droit social* (2009) p. 93.

²³ N° 191.532 and n°191.533, *Journal des tribunaux* (2009) p. 252 with comments by S. Van Drooghenbroeck.

²⁴ No. 202.039, at www.raadvst-consetat.be, accessed 12 April 2010.

6. Further comments

Given that ‘the question of the hijab’ has degenerated into a polemical argument in the present extremely unstable political context (and a bonanza for the media), the expert cannot expect that the gender dimension of the issue will emerge readily.

BULGARIA – *Genoveva Tisheva*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Tension or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion are not a real issue in Bulgaria.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

No specific tensions exist in the field of access to employment.

1.2.2 Goods and services

No specific tensions exist in the field of access to and supply of goods and services.

1.3 Tension or conflicts: other issues

There are no other issues related to gender and religion that are relevant to the application of the respective EU directives.

1.4 No issue?

There are no problems related to the above-mentioned selected topics in Bulgaria. This is due mainly to the fact that there is no significant flow of immigrants in Bulgaria yet, being a new EU Member State. Therefore no practices have been introduced by ethnic and religious immigrant communities that may cause conflict with the EU standards for gender equality.

2. National approach

2.1 Selected issues

2.1.1 Employment

The issue does not exist and is not legally framed in any particular way. It is not an issue of debate among the general public or in the media.

2.1.2 Goods and services

The issue does not exist and is not legally framed in a particular way. It is not an issue of debate among the general public or in the media.

2.2 Other issues

No other issues related to EU standards are legally framed or an issue of debate among the general public or in the media.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

Bulgarian legislation does not provide for rules to decide potential conflicts between gender equality and freedom of religion/non-discrimination on the ground of religion. More specifically, legislation does not explicitly provide for rules which prioritise any of the conflicting rights that are the subject of this report, nor for procedural rules to decide cases of conflicting rights. Legislation does not provide in any other way for rules on how to balance the conflicting rights, and it remains silent on what to do if the rights that are the subject of this report conflict.

3.2 Conformity with EU law

Generally speaking, Bulgarian legislation in this field is in compliance with the relevant EU law.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

There is no relevant case law on the issues considered in the present report. There have been no cases of conflict between gender equality and freedom of religion/non-discrimination on the ground of religion, more specifically in the field of access to employment and access to and supply of goods and services, nor in any other fields related to EU standards.

4.2 Probable outcome of case law on selected issues

It is very difficult to assess how the issues monitored in this report would be dealt with by the Bulgarian national courts or by the Commission for Protection against Discrimination under the applicable legislation.

Based on an isolated decision in a case before the Commission for Protection against Discrimination in a field outside the application of EU standards (education), it can be assumed that no discrimination will be found in relation to the requirements to observe a dress code (wear a special uniform) at a public school, for example. The issue at stake was the ban of headscarves at a public secondary school and alleged discrimination based on religion. The Commission did not find discrimination based on religion. Rather, it was argued that wearing headscarves could be considered discriminatory in relation to the students that observe the dress code at the school. The Commission held that wearing religious clothing at school creates conditions for a less favourable treatment of persons of other religions, other than Islam, or of non-religious persons. It places the other students in a disadvantaged position with respect to wearing religious clothing, which affects their rights and freedoms. No specific gender issue was raised in the complaint or in the decision itself. In the justification and motivation part of the decision, Resolution 1464/2005 of the Council of Europe (CE), it was briefly discussed that all Member States of the CE have to ensure that the freedom of religion and respect for culture and tradition should not be used as an excuse for violation of women's rights, including when minor girls are obliged by force to comply with religious norms, including what to wear. Furthermore, the Resolution stresses that at schools the principle of gender equality should be respected. These arguments were not explicitly connected by the Commission with

the concrete circumstances and expressed in the final part of the decision.²⁵ The decision was not appealed. It was debated in society and challenged in opinions of experts and NGOs. According to expert opinions, this case concerned two basic but contrary principles recognized by the State: the right to religious identity and the secular character of education. It was a challenge for the ethnic tolerance of Bulgarians. The experts from the Bulgarian Helsinki Committee indicated that there were different solutions to similar cases brought before international bodies. A decision of the ECtHR in Strasbourg from 2005 ruled against wearing a headscarf by a Turkish student in a secular university, whereas in 2004 in a similar case brought before the UN HRC about an Uzbek university student, the Committee ruled in favour of the headscarves. According to the experts a more pragmatic approach should be taken in such cases and the recognition of the freedom of religion should prevail.

It is difficult to speculate how a case on access to employment where a dress code is involved would be decided. It can be assumed that it will not be similar to the decision mentioned. The latter decision was based on the principle of equality in the field of education and the equality body decided the conflict in favour of the right to education.

It can be stated that the decision has limited application: just to the field of secondary education and limited to the circumstances of a similar case. Different decisions might be issued both by courts and the equality body in cases of a conflict of rights in the field of access to employment and access to and supply of goods and services. More liberal solutions can be expected about respect for religious traditions vs. dress codes, supply of segregated services for women and men, where needed, etc.

4.3 Case law on other relevant issues

There is no case law on other issues relevant to the application of EU standards.

5. Good practices/solutions

Cases being brought before the equality body and thus producing case law, although only in the field of education, can be considered as a good practice. It is the only decision so far where a point was made on gender and religion. It can prepare the courts, the equality body and public opinion for future cases related to gender and religion.

6. Further comments

There is no relevant literature on the issues addressed in the report and in the field of regulation by EU standards.

CROATIA – Goran Selanec

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Tensions or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion are not an issue that is publicly visible in

²⁵ Decision No. 37/27.07.2006 of the Third Specialized Panel of the Commission for Protection against Discrimination.

Croatia. For example, so far, there has only been one case where the issue of religious clothing hindered a woman's access to a public service which got some public attention in 2005.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

I am not aware of any considerable tensions or conflicts either in the private employment or public employment sector. I want to stress that this does not mean that there are no problems but that they are simply not visible.

1.2.2 Goods and services

I am not aware of any considerable tensions or conflicts in the area of access to or supply of goods and services.

1.3 Tension or conflicts: other issues

The only case concerning the issue of women's religious clothing that acquired some public attention was the 2005 case where the Ministry of Internal Affairs refused to issue a personal identification card to a woman who submitted a photo of herself wearing a headscarf.

1.4 No issue?

As noted, it is probably not correct to state that the issue of conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion is 'no issue' in Croatia. It is more likely that the conflicts have not managed to acquire public attention and as such have remained 'invisible'. There are several indications supporting this argument.

For example, according to one study more than 50 % of employers in Croatia insist on some type of dress code.²⁶ It is likely that a significant number of such codes do not tolerate head covers. Furthermore, many of the public institutions such as ministries, administrative offices as well as public schools have some type of dress code. At the same time, a significant number of citizens of the Islamic religion live in Croatia.²⁷ Therefore, it is probably more appropriate to discuss the reasons why existing or potential conflicts fail to acquire sufficient public attention.

In that sense, several issues should be kept in mind. First, the Croatian population is rather 'monolithic' in religious terms. More than 90 % of the population perceive themselves as Christians and almost 5 % perceive themselves as agnostics or atheists. Second, and probably more importantly, a significant number of the population of the Islamic religion in Croatia practises a rather non-strict understanding of Islam, which among other things does not insist on women covering their head.²⁸ Consequently, a

²⁶ The study was conducted by the prominent employment website *MojPosao*, which is the leading jobsite in Croatia and represents the centre of the Croatian job market. Over 25 000 companies use *MojPosao* as the main recruitment channel and the website offers more than 1 500 job postings at any time. The research results can be found on http://www.moj-posao.net/jseeker_wiki.php?wikiName=IstrazivanjeKodeksOdijevanja, accessed 1 December 2010.

²⁷ According to the last 2001 census, 56 777 people (1.28 % of the population) identified themselves as members of the Islam religion. See http://www.dzs.hr/Hrv/censuses/Census2001/Popis/H01_02_04/H01_02_04.html, accessed 1 December 2010.

²⁸ Moreover, the Croatian population perceives Islam to a great extent based on the version that is dominant in the neighbouring Republic of Bosnia and Herzegovina (RBH). In RBH, a rather non-strict version of Islam has been dominant.

rule such as the prohibition against head covers at work is not immediately perceived as religious discrimination by the general public, particularly since the Croatian citizens of Islamic religions do not insist on head covers. Rather, it is perceived as rule that similarly affects every individual person.

2. National approach

2.1 Selected issues

2.1.1 Employment

Croatian statutory rules do not provide any requirements to observe dress codes, including the dress-code rules prohibiting Islamic women's dress such as headscarves or burkas. However, as noted above, the majority of Croatian employers do prescribe some kind of dress code. As far as I am aware none of such codes explicitly prohibit headscarves or burkas. At the same time, employers often prohibit, at least tacitly, any type of head cover.

Public institutions often provide dress codes for employees in their bylaws such as Codes of Ethical Standards. However, such rules are rather general and they simply require that employees dress '*in accordance with their professional duties and follow the accepted professional standards*'.²⁹ Public schools have similar provisions for their employees.

Similarly, there are no legal provisions, statutory or otherwise, that explicitly regulate the role of religious customs such as handshaking in employment. However, Ethical Codes of some public institutions prescribe that their employees must not treat their colleagues or other parties unfavourably on grounds of their sex, ethnicity or religion.³⁰ Moreover, they oblige them to treat other parties with due respect and courtesy.³¹ Since the handshake is considered one of the most common standards of professional courtesy, it is highly likely that its refusal due to religious and/or sex-related reasons would be considered a violation of professional ethics both in the public and in the private employment sector. Moreover, the act itself could even be perceived as a form of religious intolerance and/or sexism.

Since Croatian law does not explicitly provide for what would happen in situations where, for example, a woman of the Islamic religion showed up at work wearing a religious head cover or where a person refuses a handshake, such situations would have to be dealt with under the general statutory prohibitions of discrimination on grounds of sex, religion or ethnicity. In that sense, the Suppression of Discrimination Act prohibits direct and indirect discrimination, on grounds of ethnicity, religion and sex in *all* areas of social life.³² It also prohibits harassment on the grounds of ethnicity, religion and sex. The Sex Equality Act prohibits direct and indirect discrimination on grounds of sex as well as harassment on grounds of sex.³³

²⁹ Code of Professional Ethics of the Officials of the Ministry of Finance and Customs Administration (*Kodeks profesionalne etike službenika Ministarstva financija, Porezne uprave, Narodne Novine* 76/09).

³⁰ See also Article 10 of the Ethical Code of State Officials (*Etički kodeks državnih službenika, Narodne Novine* 49/2006).

³¹ For example, see Article 4 of the Code of Professional Ethics of the Officials of the Ministry of Finance and Customs Administration.

³² Article 1, Article 2 and Article 3 of the Suppression of Discrimination Act (*Zakon o suzbijanju diskriminacije, Narodne Novine* 85/2008).

³³ Articles 7 and 8 of the Sex Equality Act (*Zakon o ravnopravnosti spolova, Narodne Novine* 82/2008).

All these provisions faithfully transpose the corresponding definitions in the EU equality directives.

2.1.2 Goods and services

Croatian law does not explicitly regulate the supply of segregated healthcare services or the supply of segregated social services for men and women because of religiously inspired demands of clients. In that sense, such situations would have to be dealt with under the general statutory prohibitions of discrimination and harassment cited in 2.1.1.

2.2 Other issues

As noted, the only time that the issue of conflict between religious rules and sex equality acquired some attention in Croatia was a refusal of the Ministry of Internal Affairs to issue a personal identification card to a woman who insisted on wearing a headscarf in her photo. The Personal Identification Card Regulations issued by the Ministry of Internal Affairs at the time required that the photo on personal IDs must show at least 70 % of the face and they did not allow any head covers, including hats or scarves. Although the Personal Identification Act did not prescribe such strict rules but rather stipulated that the photo must ‘faithfully reflect’ the person’s face, the Ministry of Internal Affairs justified their rules by professional standards of criminologists. According to those standards, visibility of the area around the ears was necessary for a person’s correct identification.³⁴ At the same time, the regulations allowed an exception for ‘older persons’ due to cultural reasons. This exception covered headscarves and hats traditionally worn by older people (especially widows) in rural areas.

What was interesting about this particular case was that none of the media reports perceived it as an instance of conflict between religious freedom and sex equality. They all perceived it as a simple question of religious freedom.

Since then, the rules have changed and currently the Ministry is willing to issue an ID to individuals wearing head covers for religious reasons, as long as the ID photo shows their frontal face and a significant part of the forehead.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The Croatian legislation is silent on what to do if the rights that are the subject of this report conflict. Moreover, the Croatian legislation does not provide for an exception to the equal treatment rule in order to protect or promote other fundamental rights. In that sense, for example, if the courts perceived the prohibition of head covers as discrimination on grounds of religion they could not formally justify this ban as a measure necessary for the protection of sex equality and vice versa. Consequently, since Croatian courts favour a formalist interpretation of statutory provisions, such an issue would either be ignored or at best turned into a question of constitutionality of the Suppression of Discrimination Act or Sex Equality Act and as such referred to the Constitutional court.

³⁴ Article 11 of the Personal Identification Card Act (*Zakon o osobnoj iskaznici*, *Narodne Novine* 11/02).

3.2 Conformity with EU law

The Croatian legislation applicable to the issues of concern in this report is formally in accordance with the relevant EU law. However, it is highly doubtful that the Croatian judiciary has the capacity to deal with such issues, which require assuming responsibility for politically sensitive normative judgments.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

There is no case law (at least of which I am aware, since Croatian courts still refuse to publish all of their decisions) dealing with the issues that are relevant to this report.

4.2 Probable outcome of case law on selected issues

Since there has not been a single case dealing with this type of conflict, it is rather difficult to predict the reactions of the Croatian judiciary. Nevertheless, based on some tendencies of the Croatian courts in discrimination cases, I will suggest some probable outcomes. For example, the Croatian courts tend to perceive group-based discrimination such as sex or race/ethnic discrimination in rather narrow terms, reducing it to intent based on prejudicial motivation. The element of intent is not required by any of the statutory definitions of discrimination. As noted before, the Croatian statutory provisions faithfully transpose the EU definitions of discrimination. Accordingly, the statutory provisions are silent as regards the notion of intent. However, the Croatian courts have tended to interpret discrimination not as requiring simple intent but even more as requiring prejudicial motivation. This tendency could have significant implications for this type of cases.

It is therefore probable that Croatian courts would not consider rules prohibiting any type of head cover as a form of discrimination on grounds of religion since they were not motivated by religious prejudice. The courts that would ‘dare’ to engage in the indirect discrimination argumentation would probably find such rules to be justified by some reason of professional necessity such as the importance of a coherent working environment or importance of professional ethics. It is even more likely that they would approve of rules prohibiting the refusal of a handshake or rules denying any supply of segregated healthcare or social services for men and women because of religiously inspired demands of clients.

Furthermore, it is highly unlikely that Croatian courts would perceive such cases as a conflict between religious freedom and sex equality. They would tend to limit their perception to the issue of justified discrimination on grounds of religion. In the rare instances where some individual courts would see the conflict between two equality ideals, it is likely that they would not be willing to assume the responsibility of engaging in any kind of normative balancing. Rather, as noted above, they would refer the case to the Constitutional Court.

As far as the Constitutional Court is concerned, it is probable that the Court would follow the rulings of the European Court of Justice dealing with this type of conflicts. This is even more likely since the Constitutional Court also favours the narrow notion of discrimination that reduces this instrument to intent based on prejudicial motivation. In that sense, since they would not tend to perceive employment rules prohibiting head covers or rules refusing segregated healthcare or social services to men and women as religious discrimination, they would use the ECtHR’s case law to formally justify their decisions.

4.3 Case law on other relevant issues

This section is not applicable in Croatia.

5. Good practices/solutions

In light of the preceding arguments, it is no surprise that there are no ‘good practices’ of which I am aware.

6. Further comments

I have no further comments.

CYPRUS – *Lia Efstratiou-Georgiades*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

The population of Cyprus is not a homogeneous unit. Ethnic and religious minorities have always been present on the island. Cyprus has always traditionally had a significant Muslim minority (18 % of the population).

Cyprus was granted independence in 1960 with a Constitution that set out a power-sharing system, strictly communally divided between the ‘Greeks’ and the ‘Turks’. The Constitution recognises two ‘communities’, the Greeks and the Turks and three ‘religious groups’, the Maronites, the Armenians and the Latins. The ‘religious groups’ were obliged to opt to belong to one of the ‘communities’ and they opted to belong to the Greek community. The Roma group of Cyprus was not invited to opt but was deemed by the authorities to belong to the Turkish community, because of its assumed common language (Turkish) and religion (Muslim) that they shared with the Turkish Cypriots (T/C).

The above legal order remained in place until 1963, when the Greek-Cypriot President proposed 13 amendments to the Constitution. The Turkish-Cypriots reacted by withdrawing from the Government in protest and inter-ethnic violence ensued between 1963 and 1967. Between 1963 and 1974, a large number of Turkish-Cypriots gradually vacated their villages and moved into enclaves. In 1974, following the military intervention from Turkey, the division was further embedded. The three ‘religious groups’ stayed in the south with the Greek-Cypriots. The Roma joined the Turkish-Cypriots who were moved to the north, until early 2000, when many Roma returned to the south and settled in specially designated Roma settlements, renowned for their poverty. Social Services support them financially to have a better life.

The rapid development of Cyprus in the second part of the 1970s is mainly due to the need for reconstruction after the Turkish invasion, and the movement of thousands of Greek-Cypriots to the south resulted in acute labour shortages in the mid 1980s which could not be met locally. Thus, in the late 1980s - beginning of the 1990s, the doors were first opened for the ‘import of foreign workers’. A model of strict labour control was adopted (which is still largely in place), involving short-term contracts, concomitant with short-term residence permits and linked to specific employers.

At this point in time there is no real issue of conflict between gender equality and freedom of religion in Cyprus. Prior to the division of the island, the Muslim Turkish Cypriot community, which now overwhelmingly resides in the northern part of the island following the Turkish invasion of 1974, is a secular community and T/C

women do not wear the headscarf. Thus the issue of dress code has never arisen in the Republic of Cyprus. However, there are Palestinians, Kurds, Iranians and other Muslim refugees residing in Cyprus and some of their girls who attend state schools wear the headscarf.

Should the Cyprus problem ever be settled and the island re-unified, an issue may arise in the T/C federal state as the settlers who have been brought to the north following the invasion (some of whom will presumably remain after a settlement) are mainly from Anatolia and many of their women do wear headscarves and long dress. However, the settlers mainly reside in rural areas and are occupied in farming or the men work as manual labourers on construction sites, so even in the north the issue does not appear to be the subject of discussion at present.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

As mentioned in paragraph 1.1 the issue of dress codes prohibiting Islamic women's dress has never arisen in the Republic of Cyprus, because the T/C women do not wear headscarves or burkas either in private or in public employment.

Since recently some female immigrants (legal or illegal) who stay in Reception Centers for Asylum Seekers and are seeking political asylum can work in specific jobs, e.g. agriculture, after a six months' stay and they may wear a headscarf.

There are some professions, such as doctors, lawyers, policewomen and nurses, which require a special dress code and female employees must observe the relevant dress code.

The non-shaking of hands between sexes has not arisen.

Generally regarding the above matters there is no conflict or tension.

1.2.2 Goods and services

There are no segregated healthcare services for men and women because of religion. In Reception Centers for Asylum Seekers, a woman who is examined by a doctor can ask and have the presence of her husband or a female officer working in the Center.

There are no segregated social services for men and women on ground of religion. Translators are used when necessary.

1.3 Tension or conflicts: other issues

In April 2003 a partial lifting of the ban on freedom of movement by the illegal Turkish Authorities allowed several thousands of T/Cs to cross the dividing line from north to south on a daily basis to travel to work, to access public services, to settle in the south or just to visit. No tensions or conflicts have occurred.

1.4 No issue?

Until 1964, G/Cs and T/Cs used to live together in towns and mixed villages in Cyprus and despite the forced division of the two communities they can still live in peace and respect each other's culture and religion. Political parties and NGOs organize intercommunal meetings, festivals and other events in order to bring together G/Cs and T/Cs, thus preparing the way for future coexistence and cooperation.

Also, there is a special programme on the public television channel (*RIC2*) under the title *Εμείς/Biss* (We) that presents events and gives information about the two communities, in an effort to bring together the two communities, as it was before the invasion.

2. National approach

As there is no ban on Islamic women wearing headscarves or burkas, no issue has arisen relating to discrimination on the ground of sex, race or ethnic origin.

2.1 Selected issues

According to Article 28.1 of the Constitution ‘All persons are equal before the law, the administration and justice and have equal protection thereof and treatment thereby. Every person shall enjoy all the rights and liberties without any direct or indirect discrimination against any person on the ground of his community (Greek or Turkish), race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class or any ground whatsoever, unless there is express provision to the contrary in this Constitution’.

According to Article 18.1 of the Constitution ‘Every person has the right to freedom of thought, conscience and religion’.

Moreover, Article 18.4 provides that ‘Every person is free and has the right to profess his faith and to manifest his religion or belief in worship, teaching practice or observance, in private and public. Freedom to manifest one’s religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in the interest of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person’.

The above provisions of the Constitution provide the legal framework for protection of minorities and enjoyment of all human rights.

Article 35 of the Constitution provides that ‘The legislative, executive and judicial authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of this part’ (Fundamental Rights and Liberties).

Following the ratification of the United Nations Convention on the Elimination of All Forms of Racial Discrimination, by Ratification Law 13/67, Cyprus amended the said Ratification Law in 1992 (by Law No. 11(III)/92) so as to create a number of criminal offences relating to racism. The said Law was further amended in 1999 (by Law No. 28(III)/99), so that the element of intent is no longer an ingredient of the offence of incitement to acts of discrimination. One of the provisions of this Law is the following:

‘Any person who supplies goods or services by profession and refuses such supply to another by reason of his racial or ethnic origin or his religion, or who makes such supply subject to a condition relating to the racial or ethnic origin or to the religion of a person is guilty of an offence and is liable to imprisonment not exceeding one year or to a fine not exceeding four hundred pounds = six hundred and eighty four and 44/100 euro or to both such punishments’.

The laws transposing Directive 2000/78 No. 127(I)/2000 as amended by Laws Nos. 57(I)/2004, 72(I)/2007 and 102(I)/2007 allow for differential treatment based on the grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation when the nature of the particular occupational activities or the context within which these are carried out is such that a specific characteristic constitutes a substantial and determining employment precondition, provided that the aim is legitimate and the requirement proportionate. With regard to age, these provisions do

not apply to the armed forces, to the extent that the fixing of an age limit is justified by the nature and the duties of the occupation.

2.1.1 Employment

As mentioned in paragraph 2 above, there is a legal framework (with justified limitations). Up to now there has been no debate or tension on matters relating to access to employment for women wearing headscarves or burkas either in private and public employment or relating to the shaking of hands regardless of sex in private or public employment.

2.1.2 Goods and services

As mentioned in paragraph 2 above, there is a legal framework (with justified limitations).

There are no segregated healthcare services for men and women because of religion. In Reception Centers for Asylum Seekers, a woman who is examined by a doctor can ask and have the presence of her husband or a female officer working in the Center.

There are no segregated social services for men and women on ground of religion. Translators are used when necessary.

2.2 Other issues

There is no state religion in Cyprus and there is no law which enumerates or makes any distinction between religions, which are recognized and not recognized.

There are no other issues relating to sex/gender discrimination, discrimination on the ground of racial or ethnic origin, discrimination on the ground of religion of any other way.

3. Legal framework for deciding conflicts: legislation

Protection against any form of discrimination and recourse procedures for persons claiming to be victims thereof are safeguarded in the legal system of Cyprus. Our Constitution defines the fundamental rights and liberties and provides effective remedies for their enforcement. Cyprus has ratified or signed most international legal instruments in the field of human rights, including civil, political, economic, social and cultural rights, and rights in the field of protection and respect of minorities and combating racism. The most important ones are the following:

- The European Convention for the Protection of Human Rights and Fundamental Freedoms and almost all the Protocols thereof: 39/62, 118/68, 52/89, 12 (III)/99, 35/86, 25(III)/92, 41(III)/93, 8(III)/95, 18(III)/00, 13(III)/02 and 1(III)/03;
- the Protocol amending the European Social Charter: 10(III)/93;
- the International Convention on the Elimination of All Forms of Racial Discrimination: 12/67, as amended by Laws 11/92, 6(III)/95 and 28(III)/99;
- the UN Convention on the Elimination of Discrimination against Women: 78/85;
- the Framework Convention for the Protection of National Minorities: 28(III)/95;
- the European Charter for Regional or Minority Languages: 39(III)/93;
- the U.N. Convention on the Political Rights of Women: 107/68;
- the Equal Treatment (Racial or Ethnic Origin) Law No. 42(I)/2004 and the Equal Treatment in Employment and Occupation Law No. 58(I)/2004 as amended, were enacted for harmonisation purposes with European Union Council Directives (2000/43 the former and 2000/78 and 2000/43 the latter);

- Law No. 42(I)/2004 provides protection from discrimination on racial or ethnic grounds in the public and private sectors in matters of social protection, health treatment, social services, training, and access to goods and services;
- Law No. 58(I)/2004 as amended provides protection from discrimination specifically in the spheres of employment and occupation on any of the above grounds, and also on the grounds of religion, belief, sexual orientation, disability and age.

3.1 Rules for dealing with conflicting rights

Cyprus legislation does not explicitly provide for rules which prioritise any of the conflicting rights that are the subject of this report.

According to Article 146 of the Constitution, the Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse demand made to it regarding a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority, is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

Upon such recourse demand the Court may, by its decision –

- (a) confirm, either in whole or in part, such decision or act or omission; or
- (b) declare, either in whole or in part, such decision or act to be null and void and of no effect whatsoever, or
- (c) declare that such omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed.

In 2004, the Ombudsman was appointed as the national equality body, empowered:

- to combat racial discrimination as well as discrimination forbidden by law and generally discrimination on the grounds of race, community, language, colour, religion, political or other beliefs and national or ethnic origin;
- to promote equality of enjoyment of rights safeguarded by the Constitution or by the Conventions ratified by Cyprus (which include Protocol 12 of the ECHR and the Convention for the Elimination of All Forms of Racial Discrimination) irrespective of race, community, language, colour, religion, political or other beliefs, national or ethnic origin; and
- to promote equality of opportunity irrespective of the aforesaid grounds plus the grounds of special needs and sexual orientation.

3.2 Conformity with EU law

According to Article 5 of the Draft Treaty concerning the establishment of the Republic of Cyprus ‘The Republic of Cyprus shall secure for everyone within its jurisdiction human rights and fundamental freedoms comparable to those set out in Section 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on the 4th of November 1950 and the Protocol to that Convention signed at Paris on the 20th of March 1952’.

In July 2006, pursuant to the Cyprus Government's obligation to give supremacy to EU regulations and directives, the Constitution of the Republic of Cyprus was amended to give supremacy to EU laws. Until then, the Constitution was the supreme law of the country. Prior to this development, the anti-discrimination provision of Article 28 of the Cypriot Constitution was interpreted by the courts to mean that any positive measures taken in favour of vulnerable groups violated the principle of equality enshrined in the Constitution. The new amendment renders the positive

measure provisions of EU directives superior to the Constitution and thus unchallengeable on the basis of Article 28.

After the above developments there is conformity with EU Law.

4. Legal framework for deciding conflicts: case law

As mentioned above, there have been no complaints before the courts or the Ombudsman on ground of religion.

4.1 Case law on selected issues

There have been no cases before the Supreme Court or complaints to the Ombudsman. Also there have been no cases before the criminal or civil courts or complaints to the Ombudsman on ground of religion relating to headscarves or burkas in private or public employment and relating to the shaking of hands regardless of sex in private or public employment.

4.1.1 Employment

There is no case law on employment; see 4.1.

4.1.2 Goods and services

There is no case law on goods and services; see 4.1.

4.2 Probable outcome of case law on selected issues

Our national courts or equality bodies have the obligation to apply EU and national laws and take into account judgments of the European Court of Human Rights.

4.3 Case law on other relevant issues

There is no case law on other relevant issues.

5. Good practices/solutions

Social partners must try to resolve problems that may arise with respect to these matters while keeping in mind the national law, the *acquis communautaire*, the workplace environment, the requirement to respect public safety and public order, public health or public morals.

6. Further comments

In the case of occupational activities of churches or other public or private organizations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination when, due to the nature of the context of these activities, religion or belief is a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos.

There is no provision in the Cypriot legal order for multiple discrimination and no plans for the adoption of laws or regulations to deal with situations of multiple discrimination as yet.

The influx of immigrants and workers from many countries with Muslim populations call for the need to offer services that are culturally sensitive and offer options that do not clash with the individual's culture and value system (e.g. female gynaecologists to attend to Muslim women, health professionals who speak the person's native language).

In my opinion, any person who comes to Cyprus of his/her own free will to live or work, must respect the laws and morals of the country. This means that any person must behave in a way that does not violate the laws of the country, especially those which safeguard public safety, public interest and public health.

CZECH REPUBLIC – *Kristina Koldinská*

1. General situation regarding tension between gender equality and the freedom of religion

This report from the Czech Republic will be rather short, as the conflict between gender equality and the freedom of religion is not a real issue in this country yet. There is no real social, or even legal, debate on this topic and there are no cases in this area to be reported.

1.1 General picture

There are no tensions or conflicts between gender equality and the freedom of religion, and it is not a real issue to start with in the Czech Republic.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

There are no concrete cases reported by the media and no real cases decided by any court. However, in the hypothetical case of a headscarf-wearing female who applied for a job at an employer who enforces a dress code, there is a very high possibility that she would not be hired if she did not want to remove her headscarf or to shake hands with men. There might not be much difference between public and private employment in such a situation. It would also be very interesting to see the possible reaction of the court in a case that such a woman would bring before court. There is a high probability that she would not win the case. All these reflections are, however, highly speculative, as there have been no real cases yet.

There might be some tension among people from different religious orders, e.g. in the education system, but again, no actual cases have been reported yet.

1.2.2 Goods and services

Again, there are no actual cases to be reported regarding healthcare services or social services. According to general information on the organisation of integration courses for immigrants or social counselling, both are run on a non-segregated basis.

1.3 Tension or conflicts: other issues

There are no other issues to be reported.

1.4 No issue?

The main reason why the Czech Republic has no issues to report is quite simple: there are only a few Muslims in the Czech Republic and only a few Muslim women apply for jobs or use integration services. There is still no real Muslim minority and therefore no problems have occurred yet (the same applies e.g. to Sikhs). The main group of immigrants to the Czech Republic comes from Slovakia (some 70 000 people) and Ukraine (some 130 000 people), which are Christian countries, who have no real problems as regards their religion. The same applies to another big group of

foreigners, from Vietnam (some 61 000 people),³⁵ who are not Muslim either. The above-mentioned groups are facing problems of integration (e.g. Vietnamese communities are very isolated, without any real contact with the majority population). These problems, however, are not gendered.

2. National approach

2.1 Selected issues

The general legal framework regarding the selected topical issues can be found in Act No. 198/2009 Coll., the Antidiscrimination Act, and in some special Acts, especially in Act No. 262/2006 Coll., the Labour Code and Act No. 245/2004 Coll., the Employment Act. There is, however, no piece of Czech legislation which would specifically address any of the topical issues.

2.1.1 Employment

As regards the requirement to respect a dress code, there might be some situations in the private sphere where the employee represents his/her employer, for example in the process of establishing a very important commercial agreement. The employer might require his commercial representative to come appropriately dressed when attending such a meeting, according to the dress code. If the employee refuses, in such a situation this might be seen as breaching work discipline. It is, however, doubtful whether the same would apply to not observing a dress code or not shaking the hands of commercial partners because of one's religion.

No direct answer to this question can be found in the Czech legislation, and the issue awaits a court decision.

2.1.2 Goods and services

There is no real legal framework regarding the supply of segregated healthcare services. The general legal framework for providing healthcare services is based on Act No. 20/1966 Coll. on healthcare, which does not provide any regulation in this regard. Not even the Bill on healthcare services, which is to replace this very old piece of legislation, provides any regulation in this regard. It only defines a general right of the patient to respectful treatment and dignity, and to respecting his/her privacy while providing health services.³⁶

The same applies to social services for immigrants. In the current Act No. 498/1990 Coll., on refugees, nothing in this regard is mentioned.

The only possibility is to apply general rules included in the Antidiscrimination Act.

2.2 Other issues

There are no other issues to be mentioned.

³⁵ Recent statistical data can be found on [http://www.czso.cz/csu/cizinci.nsf/t/0700414C61/\\$File/c01t01.pdf](http://www.czso.cz/csu/cizinci.nsf/t/0700414C61/$File/c01t01.pdf), accessed 16 April 2010..

³⁶ See the Bill on healthcare services, available on <http://www.psp.cz/sqw/text/tiskt.sqw?O=5&CT=688&CT1=0>, accessed 12 April 2010.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The Czech legislation only includes general procedural rules for applying individual rights in civil proceedings. There is no legislation which explicitly provides for rules which prioritise any of the conflicting rights that are the subject of this report, and there are not even any special procedural rules to decide such cases.

The Czech legislation is silent on what to do if the rights that are the subject of this report conflict.

The Antidiscrimination Act only provides a general shifting of the burden of proof.

3.2 Conformity with EU law

The Czech legislation provides general protection in cases of discrimination based on gender or religion. The legislation is quite general, but in my opinion it could provide legal tools to successfully defend individual rights in the case of discrimination based on gender and religion in cases concerning the topical issues of this report. On the other hand, there is no certainty as to how the Czech courts would decide a case of, for example, denying a woman wearing a headscarf access to employment.

In short, there might not be inconformity of Czech law with EU law; relevant directives have been transposed into the Czech legislation, even if in a very general way.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

There is no case law in the Czech Republic that would provide at least some idea of the trends in national case law regarding the selected issues.

4.2 Probable outcome of case law on selected issues

It is very hard to predict the probable outcome of possible case law on the selected issues.

Employment

Regarding access to employment in the case of a dress code, case law might differ according to the type of work. Where the dress code is necessary to show respect towards a commercial partner or a customer, the employer might have the right to establish a dress code. By contrast, if the employee does not normally meet clients or partners of the employer, the employer may be not permitted to establish a dress code, as it is not connected with the fulfilment of the employee's duties to their employer.

As regards the requirement to shake hands with the members of the opposite sex, it may be even more likely that the employer would be allowed to require such behaviour, as up to a certain point the employee acts as the employer's representative and if the employee does not shake hands with the employer's partners this may create a problem for the employer.

Goods and services

In the area of access to and supply of goods and services, the answer to a question about probable results of a possible legal dispute is even more difficult. There is no proper legislation that provides any idea as to a possible decision to be taken by a

court. Healthcare service providers only have the obligation to respect the dignity and privacy of their patients, which, however, probably does not include the obligation to provide segregated healthcare services, which would increase the costs for the healthcare provider.

As regards social services, these are normally provided to immigrants by public authorities and public authorities finance the provision of such services. There are no rules regarding segregation in these social services and it is possible that a court would decide in favour of a social service provider who does not want to provide segregated services, as this could be seen as an element of integration into Czech society, where it is normal for social services to be provided in a non-segregated way.

4.3 Case law on other relevant issues

There is no case law on other relevant issues.

5. Good practices/solutions

Unfortunately, I do not know of any good practices in this respect.

6. Further comments

I have no further comments from the Czech perspective.

DENMARK – Ruth Nielsen

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

In my view tensions or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion are not a real issue in Denmark.

There is a political party (*Dansk Folkeparti*, Danish People's Party) that has attracted the support of around 12-13 % of the electorate which is very critical of immigration, in particular the Muslim immigration to Denmark that has increased considerably over the last 40 years. Before 1970 there were practically no Muslims in Denmark, today there are around 250 000 (in a population of around 5.5 million). The Muslim minority is very visible in the public debate and the media, but not in the labour market. Muslims' employment rate is significantly lower than the Danish average. The Muslims who are in employment tend to adapt to Danish norms, including dress codes. Most women wearing Muslim headscarves in Denmark live as housewives and/or social welfare beneficiaries.

There has been a public debate about prohibiting burkas. Last year, the Danish Conservative Party proposed a burka ban, but the Ministry of Justice ruled it unconstitutional. Officials were asked to draft a report on the burka issue in Denmark. The final report does not differentiate between those wearing burkas or niqabs (face veil) and estimates the total to be between 200 and 300 nationally. Leaks of the report had suggested that only 3 persons wear the burka in Denmark. At a press conference³⁷ in January 2010 the Danish Prime Minister said that Danish society relies on being a positive society 'where we meet each other at eye level, where we can see each other

³⁷ See <http://www.denmark.dk/en/servicemenu/news/domesticpoliticalnews/pmoneniqabtoomany.htm>, accessed 19 April 2010.

and where we use gestures. ‘So neither the burka nor the niqab have a place in Danish society,’ he added. While the figures on how many women wear the full burka in Danish society has caused a rift between political parties, the Prime Minister said it was the principle that mattered. ‘If there was a situation in which my son was being taught in a Danish public school by a teacher in niqab, I couldn’t care less whether this was a fate he shared with three, or three hundred classes in Denmark. It is one niqab too many.’

The Prime Minister’s abovementioned example is probably unrealistic in the Danish context. There are probably no women in employment in Denmark wearing burkas or niqabs.

1.2 Tension or conflicts: selected issues

There are no considerable tensions.

1.3 Tension or conflicts: other issues

No issues falling under the scope of application of any of the EU directives on equal treatment regarding race/ethnic origin, religion or belief and sex are particularly topical in Denmark. From a strictly legal perspective, age discrimination and disability discrimination is (much) more controversial.

1.4 No issue?

The subject is no real issue, probably because the problem only directly affects small groups which are mainly outside the labour market. If there are only three women wearing burkas in Denmark, their way of dressing has sparked a disproportionately big public debate. Media talk about something that hardly exists in real life does not mean there is an actual issue. The Danish People’s Party used posters with pictures of women in burkas some years back in their propaganda against what they consider Islamisation of the Danish culture, but since the publication earlier this year of the report showing that only 200 to 300 women in Denmark wear burkas/niqabs (half of them ethnically Danish women who have changed religion), the lack of proportion in the burka debate has become more visible. The conservative proposal for a burka ban has been ridiculed as being totally out of proportion with Danish reality and the burka debate has given rise to satirical songs and cartoons.

Most Danes (including Muslim Danes) have a relaxed and pragmatic attitude to dress codes. In workplaces where a majority of the staff thinks it is best to prohibit political and religious symbols most members of staff (including Muslim members) accept this.

2. National approach

2.1 Selected issues

2.1.1 Employment

Non-discriminatory access to employment irrespective of sex is governed by the Equal Treatment Act, non-discriminatory access to employment irrespective of race, skin colour, religion, political views, sexual orientation, age, disability, or national, social or ethnic origin is governed by the Discrimination Act (*Forskelsbehandlingsloven*).

Under the Danish Discrimination Act, the protection for employees against discrimination is exactly the same for political views as for religious views (and

largely similar to the protection against discrimination on the other grounds mentioned in the Discrimination Act).

In Denmark, there is wide discretion for anyone to choose any political or religious views. Political and religious parties or associations that are unlawful in some European countries are lawful in Denmark. This applies for example to the Danish Nazi party and *Hitzb-ut-Tahrir*. Their members enjoy exactly the same protection against direct and indirect discrimination on grounds of their views as anyone holding any particular religious view, for example a Muslim woman expressing her religious conviction by wearing a veil. If for example an employer prohibited the showing of Nazi symbols at his workplace but allowed the wearing of the Muslim veil, this would be direct discrimination against an employee with Nazi sympathies. In the public debate, it is sometimes argued that it is an insult against Muslims to compare them with Nazis, but under Danish labour law it is not allowed for an employer to treat expression of a religious (for example a Muslim) view better than expression of a political (for example a Nazi) view. Different treatment of different religions, for example a prohibition of the Muslim veil and permission to wear Jewish or Christian symbols would be clearly unlawful. Danish headscarf cases are not about prohibitions specifically targeted at Muslim symbols but about general bans on showing religious and political symbols in the workplace.

Since 2009, Section 56 of the Danish Administration of Justice Act reads:

A judge must not appear in hearings in a manner that is likely to be perceived as a statement concerning any religious or political affiliation or a statement on his or her position on religious or political issues in general.

In the preparatory works, the Ministry of Justice on behalf of the Danish Government explained that the ban will include cases where the judge during the hearing visibly wears a Christian cross like a Dagmar Cross or a crucifix, where the judge wears Muslim headgear like the hijab, or where the judge wears a Jewish calotte (kippa). Also, at hearings, the judge must not express support or criticism of any specific political parties, visibly wear a party badge or anything similar, or show expressions of his/her personal political position on other important community issues, regardless of whether they are international, national or local issues. In the preparatory works, the Ministry of Justice states that the proposal is in accordance with the Danish Constitution, Article 9 and 10 ECHR and the Employment Framework Directive.³⁸

2.1.2 Goods and services

Non-discriminatory access to goods and service irrespective of sex is governed by the Equality Act, non-discriminatory access to goods and services irrespective of racial or ethnic origin is governed by the Ethnic Equal Treatment Act. Discrimination on other grounds (for example age, disability or religion) in the access to goods and services is not the subject of legislation at the present stage of development.

2.2 Other issues

There are no other topical issues.

³⁸ 2000/78/EC.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

Danish legislation does not explicitly provide for rules which prioritise any of the conflicting rights that are the subject of this report and it does not provide for procedural rules to decide cases of conflicting rights that are the subject of this report or in any other way for rules on how to balance the conflicting rights that are the subject of this report. Legislation is silent on what to do if the rights that are the subject of this report conflict.

3.2 Conformity with EU law

I consider this legislation in accordance with the relevant EU law.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

The Gender Equality Complaints Body (which existed from 2000 to the end of 2008; it was replaced on 1 January 2009 by the Equality Complaints Board which has competence in relation to discrimination on all prohibited grounds, including religion) decided a case in 2007³⁹ where a woman wearing the hijab complained that her job application was rejected because she wore the hijab. The employer contested. He claimed that the reason why she was not offered the job was that the employer had imposed a recruitment stop. The Complaints Body found that the complainant had not rendered it probable that her wearing of a headscarf was the reason why she did not get the job.

In the first Muslim veil case to reach the Danish Court of Appeals,⁴⁰ a school girl brought a religious discrimination claim when a department store, *Magasin*, refused to admit her as a trainee in school practice for a week because she came to the workplace wearing a headscarf. The department store justified its actions by reference to its guidelines for employees' dress. The guidelines were vague. They required the staff to be neatly dressed. The Court of Appeals held that the department store had violated the Discrimination Act's prohibition against discrimination on the basis of religion and required the store to pay compensation.

The next veil case⁴¹ concerned a chocolate factory's, *Toms*, refusal to hire a Muslim woman wearing a veil to work in their production department because she could not fit her veil entirely under a net hat which the factory required the staff to wear for hygienic reasons. The Court found that hygienic and safety reasons justified the factory's policy. The claimant appealed the judgment before the Supreme Court, but the parties reached a settlement while the case was still pending.

The third and most important case, the *Føtex* case,⁴² was decided by the Supreme Court in 2005. It is the leading Danish case and seems to have put an end to litigation on this issue in Denmark because Danish law now is fairly clear.

In the *Føtex* case, a supermarket, *Føtex*, fired a young Muslim woman when she began to wear a headscarf at work four years after she had begun her employment at

³⁹ Case no. 6/2007.

⁴⁰ U 2000, 2350.

⁴¹ *Toms Fabrikker*, 18 *afdeling sag* B-0877/00, judgment of 5 April 2001.

⁴² U 2005, 1265H.

Føtex. This violated the employers' dress code which prohibited the wearing of all kinds of political or religious symbols at work for all staff irrespective of sex, religion, ethnicity or any other criteria. The claimant in this case claimed compensation for unlawful indirect discrimination on grounds of religion in violation of the Discrimination Act (which does not apply to gender equality). The Danish Supreme Court held that Føtex's dress code indirectly discriminated against Muslim women, but that the dress code did not violate the Discrimination Act's prohibition against discrimination on grounds of religion because it was justified by a legitimate and neutral objective and the principle of proportionality was complied with.

The employer, Føtex, had a dress code which had been agreed with representatives of the staff in accordance with Danish collective labour law on collaboration. The Court in its reasoning underlined that the contested dress code was not an expression of a unilateral employer decision but was accepted by the staff at collective level. The claimant in the *Føtex* case was thus not just in opposition to her employer but also to her fellow workers. That is probably the typical situation in Danish headscarf cases. Few employers make unilateral decisions on such issues, but they leave them to be decided by the workers' collective at workplace level. Dress codes are laid down at workplace level – typically in collaboration between the employer and the workers, most often probably mainly by the workers. Dress codes vary from workplace to workplace.

The Føtex dress code prescribed that staff with jobs with direct customer contact were obliged to wear a uniform and were not allowed to display any religious or political symbols.

The claimant in the *Føtex* case worked in a bakery's department of Føtex. The dress code did not apply to certain jobs with low visibility. After the claimant was fired for refusing to remove her headscarf she was offered a low-visible job in another part of Føtex where she would be allowed to wear the hijab. She refused to accept such a change in her working conditions and regarded herself as dismissed and claimed compensation for unlawful indirect discrimination on grounds of religion in violation of the Discrimination Act.

She could also have claimed unlawful discrimination on grounds of sex under the Equal Treatment Act and unlawful discrimination on grounds of ethnic origin (she was of Moroccan origin) under the Discrimination Act. The claimant did not include gender and ethnic origin in her claims, maybe because she had been successfully employed for four years before she began to express her religion in a way that violated the dress code. The Court did not discuss sex discrimination.

The Supreme Court did, however, consider the facts as indirect discrimination against Muslim women. The Court did not compare the impact of the dress code on all Muslims or all women, but recognised that Muslim women were disadvantaged by the dress code as compared with Muslim men and as compared with non-Muslim women. In the view of the Supreme Court this disadvantage was, however, justified by legitimate aims and the ban on religious and political symbols was appropriate and necessary to achieve these aims.

The purpose of the dress code was, according to the material distributed by the employer to explain it, to ensure that the employees had a neutral and uniform appearance in order to avoid potential conflicts between sub-groups in the staff and between members of staff and customers. The purpose was thus to promote 'peace at the workplace'. That is clearly a legitimate aim. It is for example contrary to the interests of a Danish employer to have the Palestinian-Israeli conflict reproduced in his workplace in the interaction between Jewish and Palestinian members of staff. In

Denmark most violence against Danish Jews is committed by sub-groups of Muslims. Many Jews refrain from displaying the Star of David in public to avoid provoking emotional reactions. It was the same method of trying to avoid open conflict by keeping a low profile in religious and political matters that was employed in the *Føtex* dress code. The employer and the staff representatives had in collaboration reached the opinion that the dress code was appropriate and necessary to achieve peace at the workplace. The Court did not go far in reviewing the discretion exercised by the employer in collaboration with the staff at collective level. This is in accordance with the Danish collective labour law tradition.

The employer treated expressions of religious and political opinions in the same way. That has been criticised.⁴³ It is, however, in accordance with the Danish Discrimination Act, which gives the same protection against discrimination on grounds of political opinions as on grounds of religious beliefs (see above).

4.1.2 Goods and services

There have been no relevant cases. As appears from Section 2, religious discrimination in access to goods and services is not prohibited unless it is unjustified indirect ethnic discrimination. The aforementioned report about the small number of women in Denmark who wear a burka or niqab showed that around half of them are Danish women who have converted to Islam. The Muslim veil probably is also more popular among Danish women who have converted to Islam than it is among Muslim women of non-Danish ethnic background.

4.2 Probable outcome of case law on selected issues

The *Føtex* case described above is likely to serve as a model for future case law if any cases are brought before the courts. There is no reported case law after the *Føtex* case, probably because the law is now considered clear.

4.3 Case law on other relevant issues

There is no case law on other relevant issues.

5. Good practices/solutions

I do not know of any ‘good practices’ on the issues in this report. Most employers probably let their staff decide at collective level. This works well in most workplaces.

6. Further comments

I have no further comments.

⁴³ See in particular L. Roseberry ‘Religion, ethnicity and gender in the Danish headscarf debate’ in: D. Schiek & V. Schrege (eds.) *European Union Non-Discrimination Law: Comparative Aspects on Multidimensional Equality Law*, London 2008.

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

The issues concerning gender equality and freedom of religion are not particularly topical in Estonia. Estonia is not a religious country. The largest national minority group is the so-called Russian-speaking minority, who stayed in Estonia after Soviet occupation. The Muslim community is very limited in numbers in Estonia.

According to the population and housing census of 2000, the figures concerning religious affiliation were as follows: 37.0 % of the respondents had no religious affiliations; 31.8 % were followers of a particular faith; 15.8 % were unable to identify their affiliation; 8.7 % refused to answer and 6.7 % were atheists.⁴⁴ The population by religious affiliation and ethnic nationality was divided as follows: 26 % of Estonians and 44 % of non-Estonians were followers of a particular faith; 41 % of Estonians and 29 % of non-Estonians had no religious affiliation.⁴⁵ The main religious groups are the following: 46.4 % Lutherans (around 150 000 persons), 43.8 % Orthodox (144 000), 1.8 % Baptists (6 000), 1.7 % Catholic (5 700), 1.2 % Jehovah's Witnesses (3 800), 0.4 % Muslims (1 400).⁴⁶ The population of Estonia is approximately 1.4 million.

Among the Lutherans, around 92 % were Estonians, 2 % Russians, 6 % other; among the Orthodox, 70 % were Russians, 15 % Estonians, 15 % others; among the Baptists, 78 % were Estonian, 15 % Russian, 7 % other; among the Pentecostals, 65 % were Estonian, 23 % Russians, 12 % other; and among Jehovah's Witnesses, 48 % were Estonian, 34 % Russians, 18 % other.⁴⁷

Although the data could be somewhat out of date, and during the last 10 years the figures concerning the religious affiliation may have changed to a certain extent, overall the issues concerning religious affiliation remain of limited importance in the Estonian society. The next population census will be carried out in 2011.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

There are no evident tensions concerning access to employment with regard to religion and gender, and particularly Islamic women's dress. In practice, there are no Islamic women wearing headscarves or burkas in the public scene of Estonia (including the capital Tallinn).

There is also no information available that in practice there would have been any problems with the requirement to shake hands regardless of sex.

⁴⁴ Statistical Office of Estonia. *2000 Population and Housing Census. – Education. Religion*. Tallinn, 2002. Available online: <http://www.stat.ee/20348>, accessed 18 April 2010. The information is also provided in English. Diagram 12, p. 40.

⁴⁵ Statistical Office of Estonia. *2000 Population and Housing Census. – Education. Religion*. Tallinn, 2002. Available online: <http://www.stat.ee/20348>, accessed 18 April 2010. The information is also provided in English. Diagram 13, p. 41.

⁴⁶ Statistics Estonia, Data concerning population census 2000.

⁴⁷ Statistical Office of Estonia. *2000 Population and Housing Census. – Education. Religion*. Tallinn, 2002, Diagram 14, p. 41.

1.2.2 Goods and services

There is no information indicating any need for the supply of segregated healthcare services for men and women because of religiously inspired demands of clients or the supply of segregated social services for men and women because of religiously inspired demands of clients.

1.3 Tension or conflicts: other issues

Media have reported cases concerning the appointment of female clerks to religious positions. For example, a female clerk worked in a Lutheran church for four years as a teacher, but her supervisor refused to support her ordination as a full-time teacher. The woman believed that her ordination was refused because of her sex.⁴⁸ On the other hand, there is no formal ban against women serving in such positions.

1.4 No issue?

As pointed out above, the largest national minority groups are the so-called Russian-speaking minorities whose cultural and religious traditions are similar to those of the Estonians. The Islamic community is very small in Estonia.

2. National approach

2.1 Selected issues

As pointed out above, these questions are not topical in Estonia and therefore have not been addressed in practice from the legal perspective.

These issues are regulated by the Gender Equality Act⁴⁹ (GEA) and the Equal Treatment Act⁵⁰ (ETA). The key notions for addressing these issues could be the concept of indirect discrimination on the grounds of gender, ethnic origin or religion, taking into account the particular circumstances.

The purpose of the GEA is to ensure equal treatment arising from the Constitution of the Republic of Estonia and to promote gender equality of men and women as a fundamental human right and for the public good in all areas of social life (Article 1(1) of the GEA). The GEA applies to all areas of social life. However, the law sets forth two exemptions. Accordingly, the requirements of the GEA do not apply to professing and practising faith or working as a minister of a religion in a registered religious association (Article 2(2)(1) of the GEA). Indirect discrimination based on sex occurs where an apparently neutral provision, criterion, practice or activity would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion, practice or activity is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary (Article 3(1)(4) of the GEA).

The purpose of the ETA is to ensure the protection of persons against discrimination on the grounds of nationality (ethnic origin), race, colour, religion or other beliefs, age, disability or sexual orientation (Article 1(1) of the ETA). However, the scope of the application of the principle is differentiated under the ETA, taking into account the grounds of discrimination as regulated in the respective EU directives.

⁴⁸ See <http://www.delfi.ee/news/paevauudised/eesti/naiskirikuopetaja-ulemused-joid-ja-nilbitsesid.d?id=25482513>, accessed 18 April 2010.

⁴⁹ RT I 2004, 27, 181; 2009, 48, 323.

⁵⁰ RT I 2008, 56, 315; 2009, 48, 323.

Accordingly, Article 2(1) of the ETA stipulates that discrimination of persons on the grounds of nationality (ethnic origin), race or colour is prohibited in relation to employment-related issues, social protection, including social security and healthcare, and social advantages; education and access to and supply of goods and services which are available to the public, including housing. Article 2(2) of the ETA provides that discrimination of persons on the grounds of religion or other beliefs (but also age, disability or sexual orientation) is prohibited only in the field of employment. According to Article 3(4) of the ETA indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons, on the basis of an attribute specified in subsection 1(1) of the ETA, including religion, at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Therefore it is possible to consider particular issues concerning gender (women) and religion (in particular headscarves and burkas; requirement to shake hands) under the respective provisions of the GEA and ETA. The respective rules can constitute indirect discrimination on the grounds of gender or religion, as apparently neutrally provided: in practice, they may have negative effect on the situation of women with particular religious beliefs. As pointed out above, statistics reveal that there are some differences on the grounds of ethnic background of persons following a particular faith. Thus it may be possible in some cases to also raise the question of indirect discrimination based on ethnic origin.

2.1.1 Employment

According to Article 2(1) of the GEA and Articles 2(1) and 2(2) of the ETA, the prohibition of discrimination applies to employment-related issues. This includes the prohibition of discrimination on the grounds of gender, race or ethnicity and religion or other beliefs. These principles apply both to the employment in the public and in the private sector (Article 3(2) of the GEA and Article 4 of the ETA).

The particular issues concerning the wearing of headscarves or burkas or the requirement to shake hands regardless of sex have not yet been addressed in practice.

2.1.2 Goods and services

Prohibition of discrimination on the grounds of sex and race or ethnicity are prohibited with regard to the provision of goods and services (Article 2(1) of the GEA and 2(1)(7) of the ETA). However, the prohibition of discrimination on the grounds of religion does not apply to the provision of goods and service under the ETA.

2.2 Other issues

Article 2(2)(1) of the GEA stipulates that the requirements of the GEA do not apply to professing and practising faith or working as a minister of a religion in a registered religious association. Although this provision provides an exception to the principle of gender equality taking into account the autonomy of religious associations, the above-mentioned example of a female church clerk raises the question whether the scope of this exemption ought to be reconsidered.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The ETA provides a general clause for balancing different interests and conflicting rights. Article 9(1) of the ETA stipulates that the ETA does not prejudice the maintaining or adopting of specific measures which are in accordance with the law and are necessary to ensure public order and security, prevent criminal offences, and protect health and the rights and freedoms of others; such action shall be proportionate to the objective being sought.

According to Article 5(2)(4¹) of the GEA, the differences in treatment of persons on the grounds of sex in the case of provision of goods and services exclusively or primarily to members of one sex is not deemed to constitute direct or indirect discrimination based on sex, if it is justified by a legitimate aim and the means of achieving that aim are proportional to the aim.

Further, the GEA and the ETA define the concept of indirect discrimination, which also requires balancing, taking into account the purpose of restricting the rights and assessing the proportionality of the restrictions.

3.2 Conformity with EU law

The concepts of indirect discrimination as defined in the GEA and ETA are stipulated in line with the definitions provided in the respective EU directives. This is also the case for the exception concerning the provision of goods and services, which was stipulated in Estonian law when implementing Directive 2004/113/EC.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

There is no case law available on this issue, and in any event unlikely to exist in the country for now.

4.1.2 Goods and services

There is no case law available on this issue, and in any event unlikely to exist in the country for now.

4.2 Probable outcome of case law on selected issues

The concrete cases have to be decided in the light of the general legislative framework as described above.

4.3 Case law on other relevant issues

There is no case law available on other relevant issues.

5. Good practices/solutions

No information is available about any good practices or solutions regarding the issues concerned; the issue has very limited relevance in Estonian public and legal discourse.

6. Further comments

One issue that is beyond the scope of regulation of the EU directives but that has arisen in Estonia is the use of burkas or other means to cover one's head on official

document photos, such as passport and identity card photos. According to the legislation on such documents, the photo must show the person's full face (from the top to the bottom of the head and both ears). On such official photos, a religious head cover may be used by religious persons, provided that wearing such a head cover is mandatory in that religion; however, the above conditions of visibility of the face must nonetheless be fulfilled. The Ministry of Home Affairs is to issue a written opinion to confirm that a head cover is indeed required in the relevant religion. The Ministry may require from the relevant religious association the details confirming a person's membership of such an association.

FINLAND – Kevät Nousiainen

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

The relation between gender equality and discrimination on the ground of gender and religious freedom and discrimination on the ground of religion has mostly been considered in the context of women's access to offices of the main religious community in Finland, the Lutheran Church. More than 80 % of the population are members of the Lutheran Church. As to the rest of the population, persons who are not members of any religious community are the biggest group.

The number of immigrants in Finland is still lower than in most European countries. The numerically largest group of immigrants are Russians and Estonians, and either Christians or non-members of any religious group. The number of Muslims in Finland is estimated at about 40 000. Muslim Somali refugees are a relatively big (and visible) minority, but there is also a small 'old' Islamic minority (Tatars) and some other 'new' Islamic groups (mainly from former Yugoslavia, or Kurds). There are about 20 registered Islamic communities in Finland, but far from all Muslims are formally registered members of these communities.

The Somali women mostly wear hijabs; the use of niqab or burka is exceptional. Other Islamic groups, especially the fully integrated Tatars, often do not even wear headscarves. A small number of Finnish women have embraced Islam, usually when marrying a Muslim. The topic of Islamic dress codes has mainly been discussed in the context of the Somali, and so far mainly in the media by references to the issue elsewhere in Europe. For example, the biggest daily newspaper *Helsingin Sanomat* in its foreign news section referred to the situation in various EU Member States, where prohibitions against wearing the veil are either in effect or under discussion.⁵¹ The opinions expressed in Finnish internet discussion groups are often tinged with outspoken racism. In those discussions, the right to wear burkas is often criticized on similar grounds as are expressed elsewhere in Europe (namely, that the burka is a mark of suppression of women, and that it is a risk to public order by preventing identification and allowing the wearer to carry illegal weapons or bombs).

⁵¹ *Helsingin Sanomat*, 15 April 2010.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

The requirement of giving up a dress code has traditionally been discussed in the context of the Roma, because the Roma women in Finland remain faithful to their specific dress code, which among other things requires a very heavy full-length dress usually made of black velvet. Their dress code has been claimed unsuitable for reasons of safety at work, but in practice also due to discrimination. The various Islamic dress codes have mainly been discussed in the tabloids and on the Internet, and even then mainly by reference to cases abroad.

A study of experiences of 21 Finnish women converted to Islam⁵² gives an idea of the problems experienced by women wearing Islamic dress. Two of these women wore burka, 14 hijab and 5 did not follow the dress code (among the non-convert Islamic women, the burka is rarely worn). Many of these women said that their employers would not accept their wearing a veil, and therefore they only followed the Islamic dress code in private, or when visiting the mosque or at other Muslim meetings. At work, the converts met prejudice, especially after starting to wear the hijab. One of the women was discriminated against to the extent that she asked for the trade union to interfere. The discrimination experienced by converts to Islam may differ from that against Muslim immigrants, but the converts may be assumed to be in a better position to defend themselves against discrimination than immigrant women.

Muslim immigrant women in Finland seldom work outside the home; much more seldom than the majority of women, and also less than other immigrant women. Muslim Somali families are generally large, and mothers tend to be home makers. When the group of immigrant Muslim women which follows a strict dress code usually stays at home, access to employment is not very often tested. There are, however, also Somali women who wear a headscarf at work, such as the Somali refugee who has been successful in politics, the midwife Zahra Abdullah.

I have not been able to find instances where the requirement to shake hands regardless of sex would have prevented a person's access to employment. The only indication of the issue I have found is a discussion on an internet site in an exchange on why persons professing Islam wish to be treated by medical personnel of the same sex. In that context, a participant brought up a case where a Finnish nurse who had converted to Islam had refused to shake hands with the male partner of a woman giving birth; the refusal had caused bad feelings and another nurse had been invited to monitor the delivery.⁵³ In many occupations, shaking hands does not play a prominent part, but healthcare professionals are expected to shake hands with their clients, and a refusal to do so may be received negatively.

1.2.2 Goods and services

Generally, the cases of discrimination in access to services that receive most attention in Finland concern access to restaurants. Often, restaurants maintain some form of dress code when selecting customers. While an ethnic or religious dress code is not a legally acceptable ground of selection, it is often *de facto* a ground on which e.g. Roma women are denied access to a restaurant. The problem of selective access to restaurants is commonly acknowledged. Women wearing headscarves for religious reasons seldom visit night restaurants. Access to cafés and restaurants that do not

⁵² F. Issakainen (2005) *Life beyond the Veil* Diaconia Polytechnic, Kauniainen (in Finnish).

⁵³ http://www.perhe.fi/keskustelut/alue/20/viestiketju/165829/_kysymys_naismuslimeille_mieslaakareista, accessed 16 April 2010.

serve alcoholic beverages gets much less attention. Therefore, the question of Muslim women's dress code excluding them access to restaurant services has not been much discussed.

Concerning other types of services, the special services required and received by the Muslim population have given rise to criticism. Bigger Finnish cities, such as Helsinki and Tampere, have established women-only hours especially meant for Muslim women at the municipal swimming halls. These 'special rights' have been criticised, but the municipalities defended them as necessary for the purpose of providing a much-needed opportunity for learning swimming skills, which can be considered necessary for the inhabitants of a country with tens of thousands of lakes and plenty of seaside. In small municipalities, reserving special hours for segregated groups would be difficult, as there usually is only one swimming hall.

Municipal healthcare and hospital services in the bigger cities mostly try to take into account the wish to provide doctors that are of the same sex as the patient. Gynaecology services especially are perceived as sensitive issues, and mostly public services try to take into account that male service providers are not acceptable to female Muslim patients. In cases of emergency, however, this code of conduct is put aside, if it causes delay in necessary medical care. I have found no legal guidelines, even of the soft-law type, on the issue.

1.3 Tension or conflict: other issues

The dress code at schools has received less attention than the dress code in the labour market. Mainly, the issue of headscarves or burkas at school has been discussed on the basis of media attention elsewhere in Europe. In Finland, schools have not required that pupils refrain from following a religiously motivated dress code, including one that requires veiling. There are no school uniforms, and in general, the dress code is very free in Finnish schools. Following a dress code, such as wearing a hijab, may cause harassment by other pupils. Harassment and bullying of pupils who dress differently is common. The manner in which schools try to prevent harassment and bullying varies, some schools being quite vigorous in attempts to reduce harassment, others paying little attention.

1.4 No issue?

The relatively scarce presence of immigrants – the number of refugees and immigrants first started to rise in the 1990s – partly explains why the topical issues of this report have received little legal attention. It may also be due to the fact that there has been little emphasis on discrimination as a social problem. Inequalities have been discussed in other terms, such as marginalisation. There was no proper anti-discrimination law for protection against discrimination on other grounds than gender until 2004, and even at that point the Non-Discrimination Act (2004/21) was motivated by the need to implement EU law on discrimination.

2. National approach

2.1 Selected issues

The Islamic dress code seems to be interpreted in the context of religious freedom and gender equality, rather than ethnic discrimination. This is somewhat surprising, as the traditional case law on dress code discrimination against Roma women has been considered as an issue of ethnic discrimination. Like the 'old' Roma minority, the Islamic Somali group is a very visible ethnic minority, in addition to being a religious

minority. So far, the Islamic dress code has led to very few legal cases. A recent study on the discrimination cases handled by the occupational safety officials shows that cases of religion-based discrimination are rare. The occupational safety and health officials are responsible for monitoring the prohibition of discrimination in employment on the grounds covered by the Non-Discrimination Act (21/2004), including religion and other convictions. The study material consisted of 198 cases monitored in four occupational safety and health districts, concerning discrimination in employment and harassment. Only 3 of these cases concerned discrimination on the ground of religion. Most of the cases dealt with by the occupational health officials concerned discrimination at work, and not in access to employment. Two of the reported cases of discrimination on the ground of religion concerned dismissal and one was about career development; in two cases the victim was male.⁵⁴

2.1.1 Employment

In public employment, at hospitals or schools, the wearing of hijabs seems to be acceptable. Schools have not prohibited teachers from wearing headscarves or other type of veiling. Recently, a head of Helsinki basic education saw no problem in employing teachers who wish to veil their face in Helsinki schools, and thus even approved of teachers wearing a burka. The city of Helsinki had not given any instructions on wearing headscarf or burka at schools – but the principle has not been tested in practice. The lack of guidelines has not caused any problems in Helsinki. As municipalities are responsible for basic education, some municipalities may have given instructions on the matter.⁵⁵

2.1.2 Goods and services

The services connected to the integration policies under the Act on the Integration of Immigrants and Reception of Asylum Seekers (493/1988) have been considered problematic for women and even discriminatory by the CEDAW Committee.⁵⁶ The Act on Integration charges the municipalities with a general responsibility to develop, plan and monitor integration of immigrants, and organise services promoting and supporting integration. Such services are to provide, among other things, information about the Finnish society, teaching in the Finnish and Swedish languages, instruction in reading and writing, and other teaching to supplement basic education. The fact that these services are often offered in connection to employment or to job seekers, makes them *de facto* indirectly discriminatory against women. Here, it may be added that binding the provision of such services to employment is more problematic for the Somali women than for many other immigrant women, e.g. for women of Estonian or Russian origin, who usually actively seek employment and thus come into contact with the said services. The fact that Finnish integration policies, including language tuition, have been connected to employment policies have tended to exclude the Somali and other ‘home making’ immigrant women, and the ensuing lack of language skills in Finnish makes it difficult for them to enter the labour market even if they wish to do so at some later point.

⁵⁴ M. Aaltonen et al. ‘Syrjintä työelämässä – pilottitutkimus työsuojelupiirien aineistosta’, *Sisäasianministeriön julkaisu* No. 43 (2009).

⁵⁵ Interview of Marjo Kyllönen, *Helsingin Sanomat*, 29 October 2009.

⁵⁶ *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Finland*, United Nations, Convention on the Elimination of All Forms of Discrimination against Women, Advanced unedited version, CEDAW/C/FIN/CO/6, 18 July 2008.

2.2 Other issues

The Basic Education Act (628/1998) requires all municipalities to arrange for religious education. Since 1985, education other than Lutheran and Orthodox Christian education is to be provided when required by the parents of three pupils. However, the number of pupils attending education in other religions than the Christian one was merely 1.6 % in 2008.⁵⁷ In Helsinki, the number of pupils attending Islamic education at primary school was higher: 5.8 %.⁵⁸ Only families registered as members of a religious community may require that religious education is provided for their children, but if such education is already provided, even non-registered pupils may participate. Only about 20 % of Muslims in Finland are registered as members of a religious community, and the rest are thus not in a position to require religious education for their children in compulsory education. An amendment of the Basic Education Act connected to the Act on Religious Freedom 2003 (Amendment 454/2003) defined religious education in schools to be objective, instructive and not a part of religious practice. The teachers are not required to be members of the religious community in question, but they are to be pedagogically competent. In practice, teachers with theoretical and pedagogical competence have not been available in the 2000s for the smaller religious teaching groups.⁵⁹ Different Christian denominations (in practice Lutherans and Orthodox) receive separate teaching, and various Islamic groups could in principle also require specialised teaching. In practice, the municipalities have employed suitable persons to teach various religions, and offered them education and counselling.⁶⁰ The Ombudsman for Minorities has paid attention to the varying standards that are *de facto* applied in the field of religious education in compulsory education, and noted that some teachers may rely on doctrines not accepted by all members of a religious denomination.⁶¹ The teaching of religion may in practice have an impact on how the topical issues of this report are considered, depending on the religious orientation it is based on.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The Constitution, Section 6 contains the provisions on equality. The provision consists of four subsections, the first referring to equality before the law, the second containing the prohibition of discrimination, the third a clause on equal treatment of children, and the fourth a provision on gender equality. Under Subsection 6(4), 'Equality of the sexes is promoted in social activity and working life, especially in the determination of pay and other terms of employment, as provided in more detail by an Act'. The list of prohibited grounds of discrimination is an open one, listing sex as well as religion, conviction and opinion.

Section 11 of the Constitution contains provisions on freedom of religion and conscience. Such freedom, which everyone is entitled to, 'entails the right to profess and practice a religion, the right to express one's convictions and the right to be a

⁵⁷ Statistics Finland 2009: *Opetushallituksen raportointitietokanta ROPTI*.

⁵⁸ A. Koikkalainen 'Uskonnonopetus ja ihmisoikeudet', *Ihmisoikeusliitto*, 49 (2010).

⁵⁹ Finnish National Board of Education, 16 December 2009 (Pekka Iivonen).

⁶⁰ T. Sakaranaho *Pienryhmäisten uskontojen opetus*, Teologia.fi 10 January 2007, http://www.teologia.fi/index.php?option=com_content&task=view&id=60&Itemid=16, accessed 17 April 2010.

⁶¹ Former Ombud for Minorities Johanna Suurpää in a seminar on the CEDAW Convention organised by the Faculty of Law in Turku, 9 April 2009.

member of or decline to be a member of a religious community'. Under the provision, all religious communities and convictions are to be treated equally. However, the preparatory works state that other basic rights are to be taken into account when interpreting the protection of religious freedom. The preparatory works expressly refer to female circumcision and polygamy as practices that are in conflict with Finnish fundamental rights. The fundamental rights of other persons are to be taken into account when the protection of religious freedom is interpreted and the concept of religious practice is limited. The preparatory works of the provision refer to the UN International Covenant on Civil and Political Rights, Articles 4 and 18, in explaining to what extent religious freedom may be limited.⁶²

The Act on Religious Freedom (453/2003) contains provisions on how religious communities are to be registered. Under Section 7(2), a registered religious community is to respect fundamental and human rights when fulfilling its aims. The preparatory works of the Act state that most issues concerning religious freedom are not regulated under the Act, but that the constitutional principle of freedom of religion is to be taken into account in all legislation that may have an impact on the practice of religious freedom, such as legislation on education, employment, healthcare and military service.⁶³

Section 6(4) of the Constitution on gender equality refers to an Act, in practice to the Act on Equality between Women and Men (1986/609). The material scope of the Act on Equality is general, but the scope is limited where religious communities and their religious practices are concerned. Under Section 2(1) of the Act, the provisions of the Act on Equality do not apply to the activities associated with the religious practices of the Evangelical Lutheran Church of Finland, the Orthodox Church of Finland or other religious communities. The most debated aspect of the relation of gender equality and freedom of religion has been the attitude of the biggest religious community, the Evangelical Lutheran Church of Finland, to women as ministers of the church. The first Finnish female theologian who asked to be ordained made her request in 1955, and already in 1963 the majority of the general synod would have allowed women to be ordained. Because a qualified majority was needed, it took until 1986 to make the decision. By demand of the opponents, the synod also accepted the principle that the opponents would not be required to go against their conviction by, for example, performing the religious rites together with female ministers. Only very recently, the Diocesan Chapter of Turku decided that a candidate minister who refuses to cooperate with female ministers is not qualified as minister under Finnish church legislation, and the Supreme Administrative Court has upheld decisions by the Church (also see 4.3).

Discrimination on the ground of religion is prohibited under the Non-Discrimination Act. At present, the material scope of discrimination on the ground of religion is much narrower than that of gender discrimination. Section 2(1) of the Act limits the scope to activities in the context of access to self-employment or means of livelihood, and support for business activities, recruitment conditions, employment and working conditions, personnel training and promotion, and access to training and vocational guidance, as well as trade union membership. The personal scope of the Non-Discrimination Act is based on an open list of personal characteristics; religion, belief and opinion are explicitly mentioned.

⁶² Government Bill 309/1993.

⁶³ Government Bill 170/2002, also see 1.1.

3.2 Conformity with EU law

Finnish law is not clear as to the potential conflicts between gender equality and freedom of religion/non-discrimination on the ground of religion. I cannot identify any case law which would explicitly deal with the conflict of rights in the context of access to employment or access to the supply of goods and services involving Islamic women's dress code or a refusal to shake hands. Where access to employment is in question, an applicant should be protected both against discrimination on the basis of equality and on the basis of religion, but there is no rule as to which type of discrimination would be in question if a person is denied employment due to the Islamic dress code. Finnish law does seem to satisfy the requirements of EU law, however, as EU law seems to be similarly unclear on this point

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

Islamic women's dress has not really been considered in the legal context of access to employment. In an early case, the Finnish Insurance Court decided that a Muslim woman was not obliged to refrain from wearing a headscarf at work at the request of the employer, as wearing a headscarf is a religiously motivated custom among Muslim women, who have a right to practise their religion. Thus, the woman in question had not herself been the cause for being unemployed because she had refused to comply with the request, and she was entitled to unemployment benefit.⁶⁴

4.1.2 Goods and services

Among the few legal decisions may be mentioned the opinion by the Equality Ombudsman on hours exclusively for women in a Tampere swimming hall (*Hervanta Hall*). The facility in question was reserved exclusively for women during certain hours of the week, mainly so that Islamic immigrant women would find it convenient to use the service. The Equality Ombud considered that the practice did not violate the Act on Equality between Women and Men, because for religious and other reasons (for example on post-surgery cosmetic grounds) such sex-segregated services were needed, and because there were other similar services available for men in other facilities, also during time slots exclusively offered for women. Thus, the segregated service promoted equality in a manner that was in proportion to the inconvenience caused to men. If men presented similar acceptable grounds for requiring all-male hours, they should be arranged by the municipality.⁶⁵

4.2 Probable outcome of case law on selected issues

Wearing clothes prescribed by a religious dress code would probably be considered as an expression of a religious conviction and thus protected under Section 11 of the Constitution. The preparatory works of the said provision do not explicitly discuss the relation between gender equality and religious freedom, except by stating that female circumcision and polygamy are not protected. The scope of the prohibition of discrimination under the Act on Equality is limited concerning religious practice. In other employment than that involving religious practice, in my opinion it would be

⁶⁴ Insurance Court decision 16 January 1997, No. 1718/96/108.

⁶⁵ Equality Ombudsman, opinion Dnro TAS/75/2008.

considered that an employee would have the right to follow the Islamic dress code, and the refusal to allow such a code could be considered either as discrimination on the ground of religion, or as indirect sex discrimination, or both – provided occupational safety requirements were not violated. My assessment is partly based on the experience of ethnic discrimination of Roma women wearing the traditional dress code, although the dress code is followed for ethnic and not religious reasons. Women's dress code issues do not easily surface in the work of the Equality Ombud, who concentrates on gender discrimination, because the comparator in these cases is a man. Ethnic discrimination is monitored by the occupational safety officials, and the specific dress worn by adult Roma women has often been seen as an occupational safety hazard. The Minority Ombudsman has no competence in employment-related discrimination, but as there have been claims that certain chain stores do not allow female personnel to wear headscarves, the Ombud has inquired whether these employers have banned scarves, and on what grounds. The present monitoring system of ethnic and religious discrimination tends to turn dress code issues into matters of occupational safety. The case law concerning the limitation to the material scope of the Act on Equality regarding women's access to the offices of the Lutheran Church is discussed later (see 4.3). On the basis of these cases, it seems that where access to employment is in question, the courts would assess the limitation strictly as to what the religious practice consists of. Jobs that do not involve religious practice even where the employer is a religious community would be outside the limitation. Thus, the Islamic dress code could not be required of those not involved in religious practice, but it could be required of persons performing tasks which involve religious practice.

4.3 Case law on other relevant issues

The candidate for a minister's office who was recently refused by the Diocesan Chapter of Turku (see 3.1) brought his case, based on the right to religious freedom and freedom of conscience, to the Supreme Administrative Court. The Court decided on the basis of the equality clause in the Finnish Constitution (Section 6), the Act on Equality and church legislation that the church legislation contains no provisions that would allow a church employee not to perform tasks that are a part of his/her office on the basis of religious freedom or freedom of conscience. The constitutional provision on freedom of religion and conscience (Section 11) was not applicable.⁶⁶ In another case, the Court also upheld the decision of the Diocesan Chapter on a sanction of temporary dismissal of a chaplain who had refused altar service with a female minister.⁶⁷

The Supreme Administrative Court has also interpreted the relation between gender equality and religious freedom in a case concerning gender quotas. The Court stated that the Act on Equality as such applies to parish committees, but that a committee on education partly concerned religious practice which lies outside the material scope of the Act on Equality, while some other tasks of the committee were not a part of religious practice. However, the quota rule only applies to state and municipal committees, not to those of the church.⁶⁸

In 2001, the Supreme Court decided that the limitation in the material scope of the Act on Equality concerning the Lutheran Church was to be interpreted taking into account gender equality and religious freedom, as well as the right of the church to

⁶⁶ KHO:2008:8.

⁶⁷ Supreme Administrative Court decision 26 November 2009, 3485/08.

⁶⁸ KHO:2001:13.

decide on its own matters. Religious freedom involves the right to practise religion, including the right of the parish to nominate its ministers. In the preparatory works of the Act on Equality,⁶⁹ the limitation was still to be applied to the Lutheran Church. The Church must, however, follow the Constitution and respect gender equality, which is a principle adopted by the Church itself. Thus the limitation of the scope of the Act on Equality could be interpreted as not applicable to appointments to church offices, without a violation of religious freedom. Since the Church had opened the church offices to women, appointments were removed from the limitation. The Act on Equality is to be applied to religious communities when the community in question acts as an employer, and the limitation of the scope of the Act is to be interpreted narrowly.⁷⁰

These cases concerning the limitation of the scope of the Act on Equality seem to allow religious communities wide immunity to non-discrimination on the basis of sex. However, the immunity seems to refer to registered religious communities and their religious practice in a relatively narrow sense. On the other hand, the material scope of the Act on Equality is also limited so that the Act is not applied to relations between family members, or other relations in private life (Section 2(2)2). Conflicts between gender equality and religious freedom in family or private life have not been tested so far in court practice.

5. Good practices/solutions

So far, schools have been quite neutral regarding the dress code chosen by both pupils and teachers, and school officials in the big municipalities with large immigrant populations seem to follow the same line. Also, the healthcare seems to have adopted a pragmatic approach to religiously based requirements.

6. Further comments

I have no further comments.

FRANCE – Sylvaine Laulom

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

In France, there have been significant tensions and conflicts between gender equality and the freedom of religion since the beginning of the debate about headscarves at schools in 1989. In 2004, a Bill on *laïcité* was adopted.⁷¹ This law prohibits the display of visible religious signs in public schools but it does not apply to universities and other schools of higher education. If a legal solution were defined for public schools, discussions and tensions would have been going on mainly regarding headscarves at work, in public services and as a condition for access to good and services. From time to time, there have also been some tensions on the supply of segregated services (e.g. to allow specific hours for women in public swimming

⁶⁹ Government Bill 57/1985 vp.

⁷⁰ KKO:2001:9.

⁷¹ *Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenus manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.*

pools). For a few months, there has been much discussion on the ban of burkas and the niqab in the public sphere: Is it necessary? Where? When? etc.

A French specificity is the importance given in public services to the principle of *laïcité*, a principle which has a constitutional nature.⁷² *Laïcité* is based on respect for freedom of thought and freedom of religion. The absence of a state religion and the separation of the State and the Church is considered a prerequisite for such freedom of religion. Thus, *laïcité* relies on the State's neutrality. The application of this principle has important consequences in public employment.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

There is an important difference in France between public employment and private employment. Concerning public employment, civil servants are expected to stay neutral with respect to politics or religion when discharging their duties. More generally, they are expected to keep a certain reserve and not make comments or demonstrations that may be interpreted as political, religious, or of any other bias in the course of their duties or as an endorsement of particular religious or partisan political views by the Government. The principle of neutrality intends to protect the public servants from their employer. But it also intends to protect the users of public services who have the right of the neutrality of the State. As a consequence of this principle of neutrality, it is prohibited for civil servants to wear overt religious symbols and thus to wear a headscarf, and sanctions are possible if they do not abide by these rules. Workers who are working under a private contract but for public services are subject to the same obligations.

Concerning private employment, the situation is different as it is possible to wear religious symbols in enterprises. The principle of neutrality and *laïcité* does not apply in private enterprises.

Thus employers must respect the religious beliefs of her/his employees who should be able to wear what they want. There are two exceptions where the employer can ask workers to respect a dress code. First, employers can and must oblige workers to wear certain clothes for health and security reasons. Second, employers can adopt a dress code when it is justified by the interest of the enterprise and when the limitation is proportionate.

Until now, there have been no real debates concerning a possible requirement to shake hands.

1.2.2 Goods and services

There is no supply of segregated healthcare services for men and women because of religiously inspired demands of clients. From time to time, newspapers report on incidents in hospitals because a woman refused to be examined by a man or her husband forbade it.

The general principle is that the patient should be free in choosing the hospital and the doctor.⁷³ The choice has to be made by the patient himself and not by a member of her/his family. This principle of free choice allows women to be treated by women. However, this choice could be limited when there is an emergency or when the organisation of the service does not allow such a choice. There is another

⁷² Article 1 of the Constitution, 'France shall be an indivisible, *secular*, democratic and social Republic' (emphasis added).

⁷³ Article L. 1110-8 of the Code of public health.

exception: a patient cannot refuse to be treated by a doctor because of the religious belief of the doctor. These principles have been laid down in two Charters: the Charter of *laïcité* in public hospitals⁷⁴ and the Charter of hospitalised patient.⁷⁵ The aims of these Charters are to inform the patients of their rights and obligations and to avoid conflicts.

The supply of segregated social services for men and women because of religiously inspired demands of clients does not seem to be a source of tension or conflicts.

1.3 Tension or conflicts: other issues

There are currently strong debates in France on the need for a law prohibiting women from wearing the niqab or burka in public places. A parliamentary commission of inquiry on the wearing of niqabs and burkas, set up in July 2009, published its report on 26 January 2010.⁷⁶ After six months of fierce debates on the burka, the commission considers that wearing a niqab or a burka is a practice which contradicts the fundamental values of the French Republic, especially freedom and dignity for women. The report mainly proposes measures to protect women and stresses the importance of education. It proposes educational programmes to prevent radicalisation and measures to discourage the stigmatisation of Muslim communities. However, the commission reached no consensus on the need to adopt a law specifically prohibiting the wearing of the full Islamic veil in public places. Three days after the publication of the report, the Prime Minister François Fillon asked the *Conseil d'Etat* for its opinion on how a law could prohibit the wearing of niqab or burka.⁷⁷ The *Conseil d'Etat* in its report considers that a general prohibition will not be constitutional (see below). However, some MPs still argue that a law is necessary because wearing a niqab contradicts the fundamental values of the French Republic and a law should prohibit women from wearing it in public spaces.

1.4 No issue?

This section is not applicable in France.

2. National approach

2.1 Selected issues

2.1.1 Employment

In public employment, the requirement not to wear headscarves is viewed as a consequence of the principle of neutrality. The issue is thus framed in terms of discrimination on the ground of religion. Public servants shall not be discriminated at any moment on the grounds of their religion, but the principle of neutrality requires them not to express their religious beliefs to protect the users of public services.

In private employment, the issue is also framed in terms of possible exceptions to the prohibition against discrimination on the ground of religion. Under Article

⁷⁴ *Circulaire n°DHOS/G/2005/57 du 2 février 2005 relative à la laïcité dans les établissements de santé.*

⁷⁵ *Circulaire n° DHOS/E1/DGS/SD1B/SD1C/SD4A/2006/90 du 2 mars 2006 relative aux droits des personnes hospitalisées et comportant une charte de la personne hospitalisée.*

⁷⁶ http://www.assemblee-nationale.fr/13/dossiers/voile_integral.asp, accessed 18 May 2010.

⁷⁷ *Conseil d'Etat, Etude relative aux possibilités juridiques d'interdiction du port du voile intégral, Rapport adopté par l'Assemblée générale, 25 mars 2010.*

L.1121-1 of the Labour Code, no one may restrict individual or collective rights of employees if such restriction is not justified by the nature of the task performed or is proportional to the objective sought. The prohibition against wearing headscarves is thus analysed as a discrimination on the ground of religion which can be justified by an objective and justified aim if the means of achieving it are proportionate.

2.1.2 Goods and services

Concerning the supply of segregated healthcare services for men and women, the conflict is avoided by the principle according to which each patient is free to choose the doctor and the healthcare institution where they want to be treated (if the organisation of the relevant institution allows such a choice).

Concerning the supply of segregated social services, there have been no tensions reported concerning this issue. If there were any, I think they could be framed in terms of discrimination on the ground of religion or in terms of sex discrimination.

2.2 Other issues

It is interesting to note that where legally the issue of headscarves has mainly been framed in terms of discrimination on the ground of religion (even if the comments of case law or laws could have underlined the gender perspectives), current debates regarding the possibility to adopt a general law banning burkas in public life are framed in terms of gender equality. From that perspective, the burka is not considered as a religious symbol, but as a sign of women's submission, or according to the French President Nicolas Sarkozy 'a sign of subservience and debasement', contrary to the principle of sex equality.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The French legislation does not explicitly provide for rules which prioritize any of the conflicting rights or for procedural rules. In public employment, the application of the principle of neutrality is given priority but not really by the law itself. It has more to do with the interpretation by the courts.

The Labour Code (Article L1121-1) provides that employers must not restrict individual or collective rights of employees if such restriction is not justified by the nature of the task or is proportional to the objective sought. It could be analysed as a rule on how to balance the conflicting rights (see below in 4.1).

3.2 Conformity with EU law

The conformity of the principle of neutrality with EU law could be an issue of debate. If its application generates indirect discrimination on the ground of religion, it should be analysed if there is a legitimate aim and if the means of achieving that aim are appropriate and necessary. I think the legitimacy of the principle of neutrality is not in question, but its proportionality could be an issue of debate. The case law of the ECHR on this issue should also be taken into consideration.⁷⁸ I think it is also important to take into consideration that the principle of *laïcité* is a very sensitive issue in France.

⁷⁸ See Nicolas Kada, 'Service et public et religion: du renouveau du principe de neutralité', *AJFP* (2004) p. 249.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

In public employment, the *Conseil d'Etat* strictly controls the application of the principle of neutrality. In its famous opinion, regarding Melle Marteaux,⁷⁹ it states that public servants have the right to the freedom of conscience which forbids any discrimination on the ground of religion. However, the principle of *laïcité* impedes them to benefit from the right to express their religious beliefs. If a public servant wears a religious sign, this constitutes a breach of her/his professional obligations. The case was about a public servant working at a school who refused not to wear a headscarf. The *Conseil d'Etat* also states that no distinction was to be made according to the job/tasks of the public servant in the school and in particular for the fact that he/she was not a teacher. Sanctions could apply depending on how visible the religious sign is, and also depending on the circumstances of the refusal not to wear this religious symbol. The opinion was about public education, but administrative judges have applied the same principle in other public services. For example, in a case where a labour inspector refused not to wear her headscarf, the Administrative Court of Appeal found the sanction justified.⁸⁰ Thus the prohibition against wearing any religious signs is general: it applies in all public services and it does not depend on the job of the public servants. Sanctions for not respecting the principle of neutrality are possible but their intensity will depend on all circumstances of the fact: how visible the religious sign is, the job of the public servant, if the public servant was asked not to wear the religious sign, etc.

Concerning the requirement to shake hands, to my knowledge they have been no judgments on this issue. If the refusal could be analysed as an expression of a religious belief, it is likely that the same sanction will apply. However, a distinction might be made. If a public servant refuses to shake hands with a public service's user, it could constitute a violation of the principle of neutrality. A different position could be taken if the situation regards the relationship between two public servants, i.e. relationship between colleagues.

The situation is different in private employment, where the principles of neutrality and *laïcité* do not apply. They have been no decisions of the *Cour de Cassation* regarding the issue of headscarves and it is very likely that the conflict would be resolved by the *Cour de Cassation* by applying Article L. 1132-1 of the Labour Code (prohibiting direct and indirect discrimination notably on the ground of religion) and Article L.1121-1 of the Labour Code. The *Cour de Cassation* would analyse if the prohibition against wearing the headscarf is justified by a legitimate aim (the interest of the enterprise) and is proportionate. Thus a general prohibition against wearing headscarves or religious symbols in an enterprise would be considered as disproportionate. Courts must analyse the jobs of the workers, to check if the ban is admissible. The ban will be possible for health or security reasons or to protect the interest of the enterprise. In these cases, courts analyse the job of the relevant worker to see if the prohibition is justified regarding her job. For example, the Court of Appeal of Saint-Denis de la Réunion⁸¹ in 1997 found the dismissal of a sales assistant

⁷⁹ *Avis du Conseil d'Etat*, 3 mai 2000, Melle Marteaux, n°2170171, Rec. P. 169, concl. Schwartz.

⁸⁰ CAA Lyon 27 novembre 2003, AJDA, 2004, p. 154.

⁸¹ CA, ch.soc. 9 sept. 1997, Juris-Data n°1997-703306 ; D. 1998, J. p. 546, comments by S. Farnocchia.

in a clothes shop justified because her clothes (she was wearing a headscarf and long clothes) did not reflect the spirit of the enterprise. There was a contradiction between her clothes and the clothes she was supposed to sell. Thus the employer can impose a dress code to his/her employees corresponding with the 'image of the enterprise' for the workers who have customer contact. In another decision, a labour tribunal⁸² considered that the dismissal of a woman was justified because the employer informed her when he hired her that she should respect the dress code of the enterprise which prohibited visible religious or political signs. The decision could be criticized, as the prohibition seems too general and does not to respect the individual rights of the workers. In these situations, case law also seems to consider if workers wearing headscarves have customer contact or not and have contact with people from outside the enterprise. This distinction could be criticized, as courts do not analyse if the opinions of the customers themselves might be discriminatory and should then be taken into account to justify the sanction.⁸³

However, some decisions seem to adopt a stricter approach. The Court of Appeal of Paris considered the dismissal of a woman who refused not to wear a headscarf as discriminatory on the ground of religion because she started wearing a headscarf when she got engaged and her job (she was an operator) did not justify the prohibition against wearing the headscarf.⁸⁴ In this case, the fact that the worker had customer contact did not seem sufficient for the Court of Appeal to justify the decision of the employer. As a consequence, the dismissal was null and void.

The *HALDE*, the French equality body, has also delivered some decisions regarding the issue of the ban of headscarves at work, following the same analysis. One case was about a woman hired for one week as a youth leader. She had to work with autistic children and refused not to wear a headscarf and, more importantly, to swim with the children. Considering her job and the fact that she was working with autistic children who need strict control, the *HALDE* considered that the dismissal was justified for safety reasons.⁸⁵ Another argument of the employer was that wearing the headscarf could be analysed as an act of proselytism forbidden by the company rules. For the *HALDE* this argument was not acceptable, as the simple wearing of a religious symbol could not be analysed as proselytism. As she was working with autistic children, she could not try to influence them to impose her religious beliefs. Thus the *HALDE* insists on the necessity to analyse each case for its specific circumstances, and also on the fact that the principles of neutrality and *laïcité* do not apply in enterprises and cannot justify restrictions on workers' freedom of conscience and religion.⁸⁶

4.1.2 Goods and services

This section is not applicable in France.

4.2 Probable outcome of case law on selected issues

To my knowledge there has been no case law on the supply of segregated social services for men and women because of religiously inspired demands of clients. If there were, I think courts will analyse whether the supply of segregated services is

⁸² CPH Lyon, 16 janvier 2004, n° 02-03.452.

⁸³ See Claire Brisseau, 'La religion du salarié', *Droit Social* (2008), p. 969.

⁸⁴ Paris, 19 juin 2003, D. 2004, S. 175.

⁸⁵ *Délibération* n°2006-242, 6 November 2006.

⁸⁶ *Délibération* n°2009-117 of 6 April 2009.

justified and proportionate. If it helps the integration of women in the society, it could be justified.

4.3 Case law on other relevant issues

There have only been a few cases regarding the issue of headscarves, but outside the scope of employment relationships or the supply of segregated services.

The *Conseil d'Etat* approved a decision denying French citizenship to a woman on grounds of being insufficiently integrated. The *Conseil d'Etat* said that the woman's way of life did not reflect 'French values', particularly the goal of gender equality. The judgment claimed she lived in 'total submission' to the men in her life because she wore the niqab.⁸⁷

Very recently the *Conseil d'Etat* was asked by the Government for its opinion on how a law could prohibit wearing a niqab or a burka in public spaces.⁸⁸ The *Conseil d'Etat* in its report considers that a general prohibition will not be constitutional. The *Conseil d'Etat* considers that the principle of sex equality could not justify a general prohibition as it would be contrary to the individual freedom of each woman. A limited prohibition for security reasons or in specific spaces could be possible, but not a general one.

Some deliberations of the *HALDE* also concern headscarves in a context of the refusal to access to goods or services. For example, the *HALDE* has had to state its opinion on whether veiled mothers should be allowed to be among the accompanying parents on public school field trips.⁸⁹ For the *HALDE*, the principle of *laïcité* and neutrality in public services prohibit civil servants but not users from stating their religious beliefs. As volunteers, accompanying parents may not be recognised as public civil servants. Thus the *HALDE* found that they could not be automatically excluded, unless there were circumstances that might be construable as acts of pressure or proselytising. Another case was about a woman wearing a headscarf. She was excluded from the ceremony organised by the prefecture for the presentation of her naturalisation decree. The investigation showed that she had been asked to remove her veil for the occasion due to the secular, unifying nature of the ceremony. The *HALDE* considered this treatment as discriminatory.⁹⁰ In another case, the *HALDE* states that hotel rules, according to which 'any ostentatious symbol of affiliation with a political party or a religion is prohibited in common areas of the hotel premises, (...), any such conduct will result in immediate exclusion and no form of compensation will be made', were discriminatory.⁹¹ The *HALDE* has declared several times that the principles of neutrality and *laïcité* do not apply to users of public services and generally outside public services. Thus, the refusal to provide goods or services on the grounds of religion because a woman is wearing a veil constitutes a forbidden discriminatory practice.

However, the position of the *HALDE* is slightly different concerning the wearing of a burka.⁹² The National Agency for the Welcoming of Foreigners and Migrations (*ANAEM*) requested an opinion from the *HALDE* about the compatibility of prohibiting the burka with the principle of non-discrimination with respect to

⁸⁷ CE, 27 juin 2008, n° 286798.

⁸⁸ *Conseil d'Etat, 'Etude relative aux possibilités juridiques d'interdiction du port du voile intégral', Rapport adopté par l'Assemblée générale, 25 mars 2010.*

⁸⁹ *Deliberation n°2007-117 of 14 May 2007*

⁹⁰ *Deliberation n° 2006-131 of 5 June 2006.*

⁹¹ *Deliberation n° 2006-133 of 5 June 2006.*

⁹² *Deliberation n°2008-193 of 15 September 2008.*

attendance to compulsory training under a welcoming and integration contract. The *HALDE* found that public safety requirements, with regard to the identification of individuals, as well as the protection of the rights and freedoms of others could be considered as legitimate aims, provided for under the law, justifying the prohibition of the wearing of the burka in access to compulsory language training. Moreover, the burka was considered as conveying an idea of female submission beyond its religious scope and violating the national values that govern France's integration process and, in particular, the principle of equality between men and women. Consequently, the *HALDE* judged that the requirement that individuals participating in language training as part of the welcome and integration contract remove their burka could be justified.

5. Good practices/solutions

This section is not applicable in France

6. Further comments

I have no further comments.

GERMANY – Beate Rudolf

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Tensions or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion are a subject of political and legal debate in Germany.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

Religiously motivated headscarves have been at issue both in private and public employment, either as a reason for rejecting a job application or for dismissing a person. In public employment, such cases concerned teachers and social workers in schools.

In private employment, courts have had to deal with the dismissal of women for wearing a religiously motivated headscarf that the employer explained as being unavoidable because clients would not want to be served by a saleswoman wearing a headscarf.

Burkas have not been at issue in public or private employment.

No judgments concerning access to employment have been reported in which the requirement to shake hands was at issue.

1.2.2 Goods and services

The supply of segregated healthcare services for men and women because of religiously inspired demands of clients has not been an issue before German courts so far.

Some social services are supplied to women separately to respond to religiously inspired demands for sex segregation. This holds true for language courses (for integration purposes), and, in some cities, for public swimming pools, which offer

separate hours for women. There are no comparable offers for men (for religious reasons).

1.3 Tension or conflicts: other issues

The main other area, in which conflicts have arisen, is education. There, numerous cases concern the religiously motivated requests of parents to have their daughters exempted from physical education, swimming classes, or participation in school excursions with overnight stays.

1.4 No issue?

The lack of cases in healthcare can be explained by the fact that such services have traditionally been respectful of a person's sense of decorum and have respected the wish to be treated by a person of the same sex. Hence, healthcare employees do not investigate whether the motive for such a request is a religious one, which may explain the absence of such cases before courts.

A case concerning the refusal to shake hands was reported in newspapers, but was settled out of court.

2. National approach

2.1 Selected issues

2.1.1 Employment

All issues listed above are dealt with as cases of (possible) direct discrimination based on religion.

2.1.2 Goods and services

The provision of language courses and of the use of public swimming pools to women only is framed as a case of differential treatment based on sex. It is considered to further migrant women's integration (in the case of language courses) or to ensure that religious women (mostly of migrant background) have an actual opportunity of making use of the State's social service.

2.2 Other issues

Exemptions for girls in public schools are framed in terms of religious freedom, reinforced by the parents' right to education of their children according to the parents' religious convictions.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) contains explicit rules for dealing with conflicting rights (cf. Section 8 for the area of employment and Section 20 for access to goods and services). According to Section 8 (pertaining to employment), different treatment based on religion is permissible if the characteristic constitutes a genuine and determining occupational requirement by reason of the type of the particular occupational activities concerned or of the context in which they are carried out. In addition, the objective must be legitimate and the requirement proportionate.

Although Section 8 AGG applies, *mutatis mutandis*, to employment in the public sector (see Article 24 AGG), it is of little relevance because that norm requires a respect for the ‘particular legal status’ of public servants (*‘unter Berücksichtigung ihrer besonderen Rechtsstellung’*). This caveat obliges courts to take into account school laws, which prohibit the display of religious symbols likely to disturb the peace at school. It also points to the State’s constitutional duty of neutrality in religious matters, which also governs the conduct of public servants.

With respect to the provision of goods and services, Section 20(1) AGG provides that different treatment based on sex is justified in the provision of goods and services if there is an objective reason. Relevant examples of such reasons are the prevention of danger or harm to others (no. 1), the need to protect a person’s privacy or personal security (no. 2), or the granting of special advantages when there is no legitimate interest in enforcing equal treatment (no. 3). Other reasons may be put forward as a justification but must be comparable in their significance to the examples given. It is generally acknowledged that this justification for ‘objective reasons’ includes the requirement that the different treatment in question is proportionate. This follows from a systematic interpretation of the law, as well as its drafting history and an interpretation in light of Article 4(5) of Directive 2004/113.

With respect to education (which is not covered by the General Equal Treatment Act), rules on prioritization and on balancing rights are contained in the school laws of the different states (*Länder*). Such laws usually permit exceptions from school activities ‘for important reasons’. Moreover, under constitutional law, there is an unwritten obligation to balance the freedom of religion, the parents’ right to education of their children in conformity with their own religious convictions, and the children’s right to education. Since these rights are considered to be all of equal value, the duty to balance them means to bring them into harmony (*praktische Konkordanz*), i.e. to find a solution that allows for the most extensive realisation of all of the rights involved. All these rights have to be realised to the maximum level possible, and no right may be completely ignored in the solution. This duty to balance the conflicting fundamental rights and the principle of proportionality that guides this balancing process are considered to be implicit in the fundamental rights as laid down in the German Constitution.

3.2 Conformity with EU law

Article 8 of the General Equal Treatment Act is, almost *verbatim*, taken from the European Directives and hence does not raise any issue of conformity with EU law. In contrast, the specification of occupational requirements through the state school laws is not compatible with EU law because their interpretation by courts does not meet the requirement of proportionality. Instead of holding that an abstract danger to school peace is sufficient for a sanction, proportionality would require an assessment in each individual case. A proportionate determination of the danger to school peace can only be found if the teacher in question acted in violation of the State’s duty of neutrality, e.g. by promoting her religion or by negating fundamental constitutional principles, such as equality of men and women.

Article 20 of the General Equal Treatment Act as generally interpreted is in conformity with EU law, although it would have been better to expressly list the requirement of proportionality. In particular, the reasons in numbers 1 and 2 of Article 20 reflect objectives that are contained in Consideration 16 of Directive 2004/113.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

Courts have upheld refusals to hire or dismissals of women wearing a headscarf (or a cap instead of a headscarf) for religious reasons. Refusal and dismissal were considered to be justified interferences with the women's freedom of religion. The decisive argument was the State's obligation of neutrality in religious matters and the students' (and their parents') negative freedom of religion. These two reasons permit the State to prohibit teachers from displaying religious symbols so as to prevent a conflict with the students' and/or parents' religious convictions. The 'abstract danger' of such conflict suffices as a justification; it is not necessary that students or their parents complain about a conduct of the teacher in violation of their negative freedom of religion.⁹³ This understanding is based on a leading decision of the Federal Constitutional Court rendered in 2003, which held the abstract danger to peace at school to be a sufficient justification for the interference with a public servant's freedom of religion.⁹⁴

One higher court expressly held that different treatment (between Muslims and members of other religions that do not set up requirements for a person's attire) was justified by occupational requirements, in particular the State's educational obligations, thus justifying a distinction based on a person's religion.⁹⁵ German courts do not discuss these cases as cases of indirect discrimination on grounds of sex. The justification based on the State's neutrality in religious matters and on students' and their parents' negative freedom of religion applies irrespective of whether the employment relationship between a teacher and a public school falls under administrative law or civil law.

The refusal of a private employer to hire an applicant as a saleswoman wearing a headscarf is also treated as a case of discrimination based on religion.⁹⁶ The decision was taken before the General Equal Treatment Act came into force, and hence the reasoning does not include the terms of that Act (and the Framework Directive). The Court held that the dismissal was unlawful because wearing a headscarf did not render the woman in question incapable of fulfilling her contractual obligations as a saleswoman, in particular because she could be employed in a different department of the store. The Court left open whether the clients' discriminatory expectations could be relevant, but its reference to the lack of proof that the employer would suffer a monetary loss if the saleswoman continued to work indicates that it would give the argument some weight. In addition, the Court pointed out that the employer's economic freedom and the applicant's religious freedom had to be balanced and that religious freedom would prevail because of its importance. Again, the proof of economic damage for the employer may tip the scale in favour of the employer, who would, however, remain obliged to find a different position for the saleswoman in the enterprise.

⁹³ See e.g. Higher Administrative Tribunal (*Verwaltungsgerichtshof, VGH*) Baden-Württemberg, decision 4 S 516/07 of 14 March 2008 (prohibition against wearing a cap replacing an Islamic headscarf).

⁹⁴ Decision 2 BvR 1436/02 of the Federal Constitutional Court of 24 September 2003.

⁹⁵ State Labour Court (*Landesarbeitsgericht, LAG*) Düsseldorf, 5 Sa1836/07 of 10 April 2008 (prohibition against wearing a beret replacing an Islamic headscarf).

⁹⁶ Federal Labour Court (*Bundesarbeitsgericht, BAG*), judgment of 10 October 2002, 2 AZR 472/ 01.

4.1.2 Goods and services

There is no case law available.

4.2 Probable outcome of case law on selected issues

The provision of sex-segregated services for women is justified in legal debate by the State's constitutional duty to ensure women's *de facto* equality because it ensures that women can, in fact, make use of the State's offer of social services.

4.3 Case law on other relevant issues

With respect to parents' requests to have their daughters exempted from school activities for religious reasons, courts have rendered different solutions depending on the type of activity for which exemption was requested. In applying the principle of proportionality (to strike a balance between religious freedom and the child's right to education), courts have asked whether there were other solutions possible which would ensure the girl's right to education without forcing her to act in ways incompatible with her religious feelings.⁹⁷ In this vein, courts have permitted exemptions from swimming classes, but not from physical education classes, where girls could wear clothes fully covering their bodies.

5. Good practices/solutions

In the above-mentioned school cases, headmasters and parents are encouraged to enter into a dialogue to develop solutions that harmonize religious freedom with the right to education.

6. Further comments

I have no further comments.

GREECE – *Sophia Koukoulis-Spiliotopoulos*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Tensions or conflicts between gender equality and freedom of religion/non-discrimination on grounds of religion do not seem to be an issue in Greece. There may be problems in practice, but they do not seem to have been brought before courts or other competent authorities or to have come up in public debate or the media.

There is an important Greek Muslim minority in Thrace (Northern Greece), which numbers around 100 000 persons, and several other smaller Greek Muslim communities in Athens and some other parts of Greece.

Moreover, in the 1980s, Greece changed from a country of emigration to a country of immigration. According to official data, in 2007, foreigners made up 7.9 % of the whole population; 1.4 % of them were EU citizens and 6.5 % third-country nationals. The official number of third-country nationals legally residing in Greece

⁹⁷ Example: Federal Constitutional Court (*Bundesverfassungsgericht*, *BVerfG*, decision (of the 3rd Chamber of the 1st Senate) of 21 July 2009, 1 BvR 1358/09 (concerning Baptists who withdraw their children from a sexual education class at school).

was 481 500 in 2007. However, as there are many undocumented third-country nationals, their real number surpasses official figures.

The bulk of immigrants come from neighbouring Albania (60 % in 2007), with many Albanians entering the country illegally. Another big group of immigrants comes from former communist countries, either EU members, in particular Bulgaria, Romania and Poland, or third countries, such as Georgia, Russia and Ukraine; many of the third-country nationals enter the country illegally, while an important number of women from all these countries are the victims of trafficking.⁹⁸

There is also a growing flow of undocumented Asians coming to Greece, by sea or across the Greek-Turkish border, in particular from Pakistan, Afghanistan, Iraq, Iran, Kurdish areas, India and Bangladesh, most of whom are Muslims. Albanians are either Christian or Muslim, but most of the latter are not religious, due to the atheistic policy of the communist regime. Lately, immigration from African countries, such as Nigeria, Somalia, Sudan, Eritrea, has also been growing; several African groups have the Voodoo religion. Many of the Asians and Africans are the victims of trafficking. There is also a considerable community of Filipinos who have resided in Greece for many years.

Immigration is increasingly 'feminizing'. Until some years ago, women came with their husband/family. Now more and more of them are autonomous immigrants fleeing their countries, in several cases with their children, due to bad economic conditions and/or warfare or oppressive governments, in search of a safer environment and work; at the same time, they escape oppressive family structures.⁹⁹

Many immigrant women are domestic workers (cleaners and/or carers for children and other dependent family members). An important number work in hospitals as nurses or cleaners or as cleaners in private or public companies and apartment buildings, under atypical working conditions, as 'indirect' employees. This means that they are hired and employed by a 'temporary employment company' (direct employer) and temporarily 'lent' to other (indirect) employers. Although the setting up and activity of such companies and their obligations, along with the indirect employers' obligations are regulated by law (Act 2956/2001), control is inadequate and working terms and conditions are very bad.¹⁰⁰

⁹⁸ On the networks and channels of trafficking, see in particular I. Emke-Poulopoulos *The Migration Challenge* Athens, Papazissis 2007, pp. 316-324 (based on several studies).

⁹⁹ On all the above subjects, see in particular, I. Emke-Poulopoulos *The Life of Migrants in Greece* Athens Greek Society of Demographic Studies (EDIM) Athens, Voyatzis 2009, pp. 46, 93-140; Labour Institute of the General Confederation of Labour & the Civil Servants Federation (INE GSEE/ADEDY) Athens, Bulletin *Enimerossi* (Ενημέρωση) 154/2008: <http://www.inegsee.gr>, accessed 15 April 2010 (elaboration of 2007 data from the National Statistic Service of Greece (ESYE)); D. Vaiou & M. Stratigaki (eds.) *The Gender of Migration* Athens, Metaichmio 2009; A. Lyberaki and L. Alipranti-Maratou Papers at the panel 'Prospects of the 21st Century: the Challenge of the Multicultural Society' in E. Calliga & E. Valassi-Adam (eds.) *National Council of Greek Women 1908-2008 Extraordinary General Assembly and Other Events on the Occasion of the Anniversary* pp. 38-46 and 48-56, respectively, Athens, National Council of Greek Women 2009.

¹⁰⁰ See INE GSEE/ADEDY: *Labour relationships in the cleaning sector – Results of an empirical research* Athens 2009; <http://www.inegsee.gr>; Greek National Commission for Human Rights *Suggestions regarding workers' rights and working conditions in the framework of agreements with contractors*: http://www.nchr.gr/category.php?category_id=176, accessed 9 April 2010.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

There are no formal requirements or bans regarding dress codes or handshaking regardless of sex, in either private or public employment, and no indications of problems in this respect in practice.

1.2.2 Goods and services

There do not seem to be segregated healthcare services for men and women. When they visit a hospital, Muslim women are usually accompanied by male family members who demand that they be examined by female doctors. This demand usually seems to be satisfied, unless it is not feasible (e.g. if there is no female doctor of the required specialty on duty, or in emergency cases). However, according to a study in public hospitals of the Attica area (Athens, Piraeus and suburbs), 20 % of the questioned hospital personnel did not consider it necessary to fulfil such demands.¹⁰¹ It seems, anyway, that Greek Muslim women in Thrace (in particular those of the younger generation) often visit health centres alone and do not formulate such demands, in particular those whose husbands work abroad most of the year.

Health and social services are offered to immigrants and Greek minorities free of charge by several hospitals, state health centres and social services and NGOs,¹⁰² but they do not seem to be segregated according to the clients' sex.

1.3. Tension or conflicts: other issues

There are no other topical issues.

1.4 No issue?

There are many studies regarding immigrants and Muslim minorities, an important number of which are based on field work. They are mostly limited to certain minority or immigrant groups (from certain countries or in certain areas). We have found no reference to discrimination against Greek minorities or immigrants related to dress codes or other customs based on religion or cultural traditions (such as handshaking with persons of the other sex), even in studies dealing exclusively with women. Several social workers we have spoken to are not aware of such problems either.¹⁰³

¹⁰¹ National and Capodistrian University of Athens, Faculty of Medicine, Laboratory of Hygiene, Epidemiology and Statistical Medicine *Report on the Health of Migrants in Greece* March 2009, p. 29, referring to European Commission (2006b) *Equality in Health: Greek National Report*. Edition of Directorate-General for Employment, Social Affairs and Equal Opportunities: http://www.syn-eirmos.gr/Sub_vavel/pdfs/Ekthesi_ugeias_metanaston_gr_03_2009.pdf and www.mighealth.net/el, accessed 18 April 2010.

¹⁰² National and Capodistrian University of Athens, Faculty of Medicine, Laboratory of Hygiene, Epidemiology and Statistical Medicine *Report on the Health of Migrants in Greece* March 2009, p. 29, referring to European Commission (2006b) *Equality in Health: Greek National Report*. Edition of Directorate-General for Employment, Social Affairs and Equal Opportunities: http://www.syn-eirmos.gr/Sub_vavel/pdfs/Ekthesi_ugeias_metanaston_gr_03_2009.pdf and www.mighealth.net/el, accessed 18 April 2010.

¹⁰³ In particular, social workers and psychologists in counselling and health centres, such as the centre of the NGO KLIMAKA for Greek Muslims residing in Athens (Gazi area) (<http://www.klimaka.gr>, website currently under reconstruction); the NGO Doctors of the World (*Médecins du Monde*, <http://www.mdmgreece.gr>, accessed 19 April 2010); the Paedopsychiatric clinic of the Sismanogleio Hospital in the Athens area; the state health centre of the Xanthi area (Thrace, Northern Greece).

Moreover, there is no mention of such problems in the reports of treaty bodies, such as the CERD,¹⁰⁴ the ECRI,¹⁰⁵ the HRC¹⁰⁶ or the CEDAW. CEDAW expresses its concern ‘that women from ethnic minority groups, in particular Roma and Muslim women, continue to face multiple forms of discrimination with respect to access to education, employment and healthcare’ and calls on the Greek State ‘to implement effective measures to eliminate discrimination’ against these women and ‘enhance the enjoyment of their human rights’. However, it does not refer to gender discrimination linked to religion or cultural traditions, such as dress codes or handshaking.¹⁰⁷

There are several probable reasons for the lack of issues, or for their non-surfacing, such as the following: Greek and immigrant Muslim women often wear a headscarf, which does not seem to cause any adverse reactions, while burkas or other dresses covering the woman’s body and face are scarcely, if ever, seen in public. It must be noted that a headscarf is not a rarity in Greece. It is often worn by women, irrespective of their religion, in particular in villages, in the fields, on islands, for practical reasons, as a protection against adverse weather conditions (strong sun, wind, dust etc.) or by older women as a sign of mourning.

Moreover, Muslim women do not often seek salaried employment. In Thrace, they are financially dependent on their husbands; they are either exclusively housewives or employed in seasonal agricultural work; a small number of them are in the civil service.

It seems that minority and immigrant women are discriminated against in several ways. However, this is not due to their dress or other specific customs, but to their inferior position in the labour market and in society at large. Important factors for this situation are their low educational level, little or no knowledge of the Greek language or even illiteracy, or the fear of being expelled or not granted a residence permit, which lead to their exploitation by employers and traffickers.

As a researcher points out, ‘the social visibility of migrant women is limited’.¹⁰⁸ This seems to be due to the oppression of their family or of their community or to one or more of the factors mentioned in the two previous paragraphs. Many immigrant women are working in households and they prefer to seek a job through friends or NGOs rather than newspaper ads or the Manpower Employment Agency (*OAED*), a state service.¹⁰⁹ Moreover, as an experienced lawyer underlines,¹¹⁰ there are female

¹⁰⁴ UN Committee on the Elimination of Racial Discrimination (CERD) 75th session 3-28 August 2009, *Consideration of Reports submitted by States parties under Article 9 of the Convention Concluding Observations Greece* CERD/C/GRC/16-19, 14 September 2009: <http://www2.ohchr.org/english/bodies/cerd/cerds75.htm>, accessed 15 April 2010.

¹⁰⁵ European Commission against Racism and Intolerance *ECRI Report on Greece Fourth monitoring cycle* adopted on 2 April 2009 published on 15 September 2009 CRI(2009)31: http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/Greece_CBC_en.asp, accessed 19 April 2010.

¹⁰⁶ UN Human Rights Committee 83rd session *Consideration of Reports submitted by States parties under Article 40 of the Covenant, Greece* 25/04/2005 CCPR/CO/83/GRC: <http://www2.ohchr.org/english/bodies/hrc/sessions.htm>, accessed 17 April 2010.

¹⁰⁷ Committee on the Elimination of Discrimination against Women 37th session 15 January-2 February 2007 *Concluding Comments: Greece* CEDAW/C/GRC/CO/6: <http://www.un.org/womenwatch/daw/cedaw/37sess.htm>, accessed 17 April 2010.

¹⁰⁸ K. Vassilikou *Female Migration and Human Rights* Athens, Academy of Athens, 2007, pp. 108-109.

¹⁰⁹ K. Sklavou *Domestic Violence and Social Inclusion of Foreign Women* Athens, Ant. Sakkoulas 2008, pp. 107-109.

¹¹⁰ F. Stergiopoulou: Intervention as part of the debate ‘Prospects of the 21st Century: the Challenge of the Multicultural Society’ in: E. Calliga & E. Valassi-Adam (eds.) *National Council of Greek*

migrants in several quarters/suburbs of the Athens area, whom nobody ever sees or talks about – women and girls who are incarcerated in their homes, are kept away from school and/or gainful employment and often suffer domestic violence.¹¹¹

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

There are no rules which explicitly prioritize any of the conflicting rights that are the subject of this report. The procedural rules, on the basis of which possible cases of conflict would be judged, are the same as for any other cases relating to employment or to access to goods and services. There are no other specific rules regarding the balance of possibly conflicting rights which are the subject of this report.

Cases of gender discrimination must be judged in accordance with the EU procedural rules, which are included in the legislation transposing the gender equality directives (Act 3488/2006 transposing Directive 2000/73¹¹² and Act 3769/2009 transposing Directive 2004/113;¹¹³ the Recast Directive (2006/54) has not yet been transposed). Cases involving discrimination on other grounds mentioned in Article 13 TEC (now Article 19 TFEU) must be judged in accordance with the EU procedural rules included in Act 3304/2005 transposing Directives 2000/43 and 2000/78. Cases involving multiple discrimination must also be judged in accordance with the same rules. These rules concern the *locus standi* of unions and other organisations to bring aggrieved workers' cases to the courts or to other competent authorities or to support those who have already brought their case to the courts or to other authorities, as well as the burden of proof in courts and other competent authorities.

3.2 Conformity with EU law

The rules relating to the burden of proof, as well as the requirements regarding the *locus standi* of trade unions and other organisations for bringing aggrieved workers' cases before the courts and other competent authorities, have been transposed in a way that fails to create the legal certainty required by the ECJ.¹¹⁴ Regarding the burden of proof, although amendments to the Code of civil procedure and the Code of administrative procedure were necessary, as the Council of State had recommended,¹¹⁵ the provisions of Directive 97/80¹¹⁶ were merely copied in Decree No. 105/2003, with the result that the EU burden of proof rule remains virtually unknown to judges, lawyers, workers and trade unions. The same inadequate method of transposition was repeated in Act 3488/2006 transposing Directive 2000/73, regarding both the burden of proof rule and the *locus standi* rule, so that the latter also remains virtually unknown. This same method was also applied one year earlier

Women 1908-2008 Extraordinary General Assembly and Other Events on the Occasion of the Anniversary p. 61 Athens, National Council of Greek Women 2009.

¹¹¹ See K. Sklavou *Domestic Violence and Social Inclusion of Foreign Women* Athens, Ant. Sakkoulas 2008.

¹¹² Directive 2002/73/EC amending Directive 76/207, OJ L 269, of 5 October 2002, p. 15.

¹¹³ Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, of 21 December 2004, p. 37.

¹¹⁴ See e.g. ECJ Case C-187/98 *Commission v Greece* [1999] ECR I-7713.

¹¹⁵ Council of State Opinion No 348/2003 on the legality of the draft Decree transposing Directive 97/80.

¹¹⁶ Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ L 14, of 20 January 1998, p. 6.

regarding the same rules in Act 3304/2005, which transposed Directives 2000/43 and 2000/78.¹¹⁷

Since these rules may be seen as acting counter to well-established national principles and may, consequently, continue to be ignored, they must be clearly formulated and incorporated into the procedural codes, concerning both gender and other grounds of discrimination. Moreover, judges, lawyers and trade unions must be informed about the content and scope of these rules according to EU law and ECJ case law. In any event, the courts must apply these rules, even *proprio motu*, without waiting for their proper transposition,¹¹⁸ something that Greek courts do not do.¹¹⁹

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

There is no case law on the issues that are the object of this report.

4.2 Probable outcome of case law on selected issues

4.2.1 Employment

I do not know for sure how the selected issues *would* be dealt with by Greek courts or equality bodies under the applicable legislation. I think that regarding access to employment, they *should* be dealt with in the light of genuine occupational requirements. However, a possible ban on headscarves would be compatible with such a requirement in borderline cases. Thus, for example, for doctors or nurses, a sterilized headscarf would in most cases fulfil hygienic requirements. On the contrary, however, a burka would in most cases be inappropriate. I do not think that there should be any difference between the public and the private sector. The only criterion should be the nature/content of the particular job or post.

The requirement to shake hands regardless of sex should also be judged in the light of genuine occupational requirements, regardless of whether the employment is private or public.

4.2.2 Goods and services

The supply of segregated healthcare services for men and women because of religiously inspired demands of clients would be very difficult in Greece, due to the current overburdening of hospitals and health centres. However, the demand that women be examined by female doctors should be fulfilled, unless this is not feasible for insurmountable reasons.

The supply of segregated social services for men and women because of religiously inspired demands of clients would also be very difficult to achieve. It seems that immigrants and minorities are aware of that; this is why they do not seem to formulate such demands. They usually demand the existence and accessibility of

¹¹⁷ Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, of 19 July 2000, p. 22 and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, of 2 December 2000, p. 16.

¹¹⁸ See Case C-109/88 *Danfoss* [1989] ECR I-3220, Paragraph 14, where the ECJ called upon Member States – hence upon all their authorities, including the courts – to make ‘adjustments to national rules on the burden of proof’.

¹¹⁹ On these problems, see S. Koukoulis-Spiliotopoulos ‘Greece’, *European Gender Equality Law Review* No. 1 (2008) pp. 72-74: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 18 April 2010.

such services for all of them, something which, unfortunately, is not always the case, due to their large number and constant flow, in particular from Asian countries. Dedicated doctors, social workers, teachers in state and private services, and all kinds of dedicated volunteers, mostly within the framework of NGOs, constantly struggle in order to substitute for failing or insufficient state infrastructures.

5. Good practices

I do not know of any ‘good practices’, except those mentioned under 4.2.2, regarding social services.

6. Further comments

There is no doubt that dress codes and avoidance of handshaking with persons of the other sex are expressions of a subordinate position of women in their family and community. I think, however, that these issues are very delicate and should be dealt with very cautiously. I do not think that absolute and rigid bans regarding dress codes or handshaking promote gender equality. They may even have boomerang effects and bring about religious fanaticism. It is the underlying factors that must be eradicated. A flexible approach and efforts towards education of parents and children in human rights, a direct and indirect strengthening of the independence and self-esteem of women, indeed their empowerment, are more appropriate.

Furthermore, we cannot allow practices such as domestic or other kinds of violent and barbarous acts (genital mutilation, stoning etc.), even where they are inspired by cultural and religious traditions, nor other kinds of degrading treatment of women, such as forced marriages, child marriages, marriages by proxy, polygamy, gender inequalities related to marriage or divorce and children’s custody or restricted inheritance rights. We cannot expand on these issues in the framework of this report. Suffice it to note that, by virtue of treaties of the first quarter of the 20th century, Muslims in Northern Greece have the option to choose between the application of the *Shari’a* and the Greek Civil Code and between the Mufti and civil courts in family matters. Civil courts can overturn the Mufti’s decisions if they consider them contrary to the Constitution and public order. The CEDAW Committee and the UN Human Rights Committee consider this competence of the Mufti contrary to the CEDAW and the Covenant on Civil and Political Rights, respectively. The problem of child marriages and marriages by proxy has been dealt with by the Greek National Commission for Human Rights, which has considered them a breach of the Constitution and human rights treaties.¹²⁰

HUNGARY – Csilla Kollonay Lehoczky

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

So far, the issue has not emerged in Hungary. Tensions or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion are not

¹²⁰ See S. Koukoulis-Spiliotopoulos ‘The limits of cultural traditions’ in: *Annuaire International des Droits de l’Homme vol. III* (2008) pp. 425-427, 431-432, Ant. N. Sakkoulas/Bruylant.

an issue. The reason for this might be that Hungary has not welcomed a major group of Muslim residents yet.

1.2 Tension or conflicts: selected issues

In Hungary no considerable tensions or conflicts regarding the freedom of religion and sex equality exist

1.2.1 Employment

No formal dress code requirements prohibiting Islamic women's dress or requirements to shake hands regardless of sex are known in Hungary.

1.2.2 Goods and services

Apart from general separation of sexes with regard to healthcare services corresponding to the overall social culture and traditions, no further segregation of sexes is known.

In the provision of services no need has emerged for separate services in general, or in respect of immigrants. The number of Muslim immigrants is small, and part of them are illegal immigrants or just temporarily in the country.¹²¹

1.3 Tension or conflicts: other issues

If anything, something that can be considered as a cultural difference, possibly but not necessarily on a religious ground, creating a barrier in women's access to work, could be the tone: rough language, obscene style and similar habits dominant at the workplace, which can exclude women with a certain culture or taste – considered as 'different from the average' – from the workplace. There has been one such case before the Equal Treatment Authority, where it found a violation of equal treatment, see below in 2.2.

1.4 No issue?

The reason of the lack of considerable tensions or conflicts is that in Hungary there is no significant Muslim population in the country, and the dress codes and codes of conduct for women of other religions (Jewish or Christian) do not raise compliance problems with overall workplace rules and standards. In spite of the more traditional relationships (rule of male over female family members) within the Roma community, their rules do not include a dress code or code of conduct potentially preventing employment in itself.

2. National approach

Since there are no considerable tensions or conflicts, no specific legal framework seems to be required.

2.1 Selected issues

2.1.1 Employment

No specific legal norms address the issue.

¹²¹ In immigration camps, the cultural rules of the immigrants are observed as much as possible, which occasionally makes the provision of services difficult. E.g. the required permanent presence of a male family member prevents the investigation of possible violence or other cases. Separate male-female language and integration courses are planned, but not always viable due to budgetary limits. The lack of separate courses more frequently results in the absence of women from the courses.

2.1.2 Goods and services

No specific legal norms address the issue.

2.2 Other issues

The above-mentioned issue of offensive and rough language and obscene style at the workplace that might be hard to cope with for women with a certain cultural or religious background can be remotely associated with the issues concerned. It can be treated within the framework of existing legal arrangements, using the norms on harassment. There has been one case where a woman was exposed to the continued obscene style of her boss in spite of her repeated protests against the situation. After a while the employee took sick leave and then quit the workplace. She was considered different from the ‘average’ employee at the workplace. Nevertheless, the authority handling the case found that the manager’s style was not appropriate for the communication with regular employees and found a violation of equal treatment on the ground of sex (violating the dignity of the woman), without establishing that there had been harassment. It has to be added that the Equal Treatment Authority did not impose a fine considered as a sufficient deterrent to prevent such behaviour for the future.¹²² Bawdry and obscenity are a frequent test for ‘manhood’ or ‘manly stamina’ at the workplace.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

Hungarian legislation is entirely silent on the possible conflicts that are the subject of this report.

3.2 Conformity with EU law

I do not see any conflict between Hungarian legislation and EU law in this respect, partly because the tensions and conflicts that are studied here are non-existent and therefore their treatment does not require any special legal framework, and partly because existing EU legislation itself, with which Hungarian law has had to be harmonized, includes no requirements for special treatment of the problems raised in the questionnaire for this report.

4. Legal framework for deciding conflicts: case law

There is no case law on the conflict between religious freedom and sex equality.

4.1 Case law on selected issues

4.1.1. Employment

There is no case law on this issue.

4.1.2 Goods and services

There is no case law on this issue.

4.2 Probable outcome of case law on selected issues

It is hard to say what the outcome will be. Simplifying the answer to a ‘yes/no’ style regarding the expected ‘sympathy’ or ‘reluctance’ on the side of the law enforcement

¹²² Case no. 26/2009 of ETA.

authorities, I can give two opposite answers, which are both not unlikely, to the basic question studied here.

I can say 'yes', meaning that the law enforcement authorities (ETA, courts) would be receptive to sex discrimination claims on the ground of complying with Muslim dress and behavioural rules. First, because this would also be seen as a primarily religious and racial issue and the already high sensitivity to treat anti-Roma discrimination properly might also work here. Furthermore, there are continued efforts in the Hungarian courts to comply with EU standards, if they know such standards. The positive answer is also motivated by the parallel existence of gender stereotypes in Hungary that might facilitate perceiving those women, worth of protection, being subordinated to gender discriminatory dress and behavioural codes, as voluntarily opting for the situation that they are in.

I can also argue in favour of an expected 'no': The overall gender and racial prejudice permeating the mind of the majority of Hungarian society could prompt a reluctant attitude, declining protection to women insisting on wearing their Muslim dresses with the justification that they contravene standard Hungarian norms and values. Many believe that people who want to find a home in Hungary have to comply with Hungarian standards. Very soon, the question of permitted departure from European marriage norms would be raised. Here, contradictorily again, the rejection of the minority and unusual culture might get confirmation from reference to gender equality – like elsewhere in the EU.

With strong reservations about the correctness of such 'presumptions', I will try to respond briefly to the selected issues raised.

Employment

Surely burkas would not be accepted, for workplace discipline, work safety and security reasons. Headscarves might be accepted, but also depending on the physical and social character of the workplace (some forms of head coverings are already accepted). Acceptance could probably be more controlled and regulated (and spread) in public employment than in private employment. It would be interesting to see how the exception rules (which are more lenient than EU norms) would operate. Of course, hidden and smart discrimination could prevail.

If the handshake were an issue (never heard of so far), perhaps the formal exception would be extended to occupations where the occasional handshake is inevitable, if any, on the ground of overall acceptance of female Muslim standards.

Goods and services

This would probably be left to the automatic choices regarding demands based on Muslim rules that the market services would find easy to satisfy, including health services. All this with special regard to the significantly deteriorated, almost dire conditions of health services in Hungary at the moment.

Separate language and integration courses for male and female immigrants or separate social counselling for male/female ethnic minorities might be set up. This may depend on financial means as well, thus showing the limits of human rights considerations.

4.3 Case law on other relevant issues

It is difficult to forecast case law on other relevant issues

5. Good practices/solutions

Depending on the workplace and work environment as well as the location and the local relationships between the majority and the minority population, good practices might develop and many good solutions can be imagined, supported by some movements, trade unions and civil organizations. It is highly probable that good experiences with religious Muslim women at the workplace will ensure that their ‘accompanying’ dress and conduct might be considered of secondary importance with respect to hiring, promoting and firing decisions.

6. Further comments

I agree with those who have strong doubts about whether gender equality can be promoted and defended by confirming gender discriminatory cultural habits, especially when they are extreme, going beyond what is required by the standard religious rules.

While opposing any form of religious discrimination, including the rejection of employment (or promotion) on the ground of Muslim clothing and conduct, I have difficulty in considering such practices as sex discrimination. Acknowledging our limited knowledge of local and traditional cultures and with full respect for the religious beliefs of all Muslim women, in my view this issue should only be treated as a freedom of religion issue. I see a *contradictio in adiecto* in advocating the wearing of a headscarf (especially a burka) in the name of gender equality. Even if in some cases they are worn truly voluntarily, as an ‘institution’ these rules in themselves and also together with the ideology behind them, deprive women as a group from their freedom, and so do the rules controlling women’s social conduct.

ICELAND – *Herdís Thorgeirsdóttir*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Iceland was for a long time and still is one of the most homogenous societies in the world. Most of the population is Lutheran and religion has never been a cause of real conflict within Icelandic society. Freedom of religion is guaranteed by the Constitution of the Republic of Iceland No. 33/1944. Article 63 states that: ‘All persons have the right to form religious associations and to practise their religion in conformity with their individual convictions. Nothing may however be preached or practised which is prejudicial to good morals or public order.’¹²³

According to Article 62 of the Constitution, ‘the Evangelical Lutheran Church shall be the State Church in Iceland and, as such, it shall be supported and protected by the State.’

About 83 % of the population belongs to the State Church. Other denominations are the Evangelical Lutheran Free churches (4.7 %), the Roman Catholic Church (2.4 %), the Pentecostal and Charismatic Congregations (1.0 %) and others (5.5 %). 2.6 % of the population is non affiliated.¹²⁴

¹²³ Constitution of the Republic of Iceland No. 33, 17 June 1944, as amended on 30 May 1984, 31 May 1991, 28 June 1995 and 24 June 1999.

¹²⁴ <http://www.iceland.is/people-and-society/Religion/>, accessed 20 April 2010.

As religion is not a traditional source of conflict in Icelandic society, immigrants are faced with other forms of discrimination than direct prejudice on religious grounds, based on their ethnic origin, lack of language skills and poor social class.

The population is roughly 317 000 (1 January 2010). Immigration has been growing in recent years from 2 % of the population in 1996 to 8.6 % of the population on 1 January 2008, when there were 22 265 immigrants living in Iceland. The proportion of immigrants is now the same in Iceland as it is in Norway and Denmark. The proportion of second-generation immigrants, however, is lower in Iceland than in the other countries. In 1996, 0.1 % of the population were second-generation immigrants and 0.5 % of the population in 2008.¹²⁵ Immigrants are mostly in the age group of 20-39 and the proportion of children is lower than in the neighbouring countries. Second-generation immigrants are mostly under the age of 10, which is a clear indicator of the short story of immigration in Iceland. Until the turn of the millennium most immigrants were from the other Nordic countries. It was not until after 1990 that the number of immigrants from other parts of the world increased. In 1996, 30 % of all immigrants were from the Nordic countries. In recent years the number of immigrants from Eastern Europe has been growing and the bulk of immigrants in Iceland are now from Poland. The number of Polish immigrants in 2008 was 9 082.

The number of immigrant women from Asia and Africa is rather low in comparison with immigrants from Eastern Europe. Female immigrants from outside the EEA are particularly vulnerable to discrimination not directly in relation to religion but rather because of their ethnic origin which carries with it prejudice caused by the fact that they do not speak Icelandic and/or are in the lowest paid jobs requiring no skills and even are subject to severe oppression by their often Icelandic husbands. Furthermore the prejudice is enhanced due to the fact that these women are a high proportion of those seeking shelter in the women's shelter. About as many as 40 % of women staying in the women's shelter in Reykjavík are immigrant women who are victims of domestic violence. The situation of women who are not from the EEA area is particularly difficult according to a report from the women's shelter at the end of 2009.¹²⁶ If a woman (from outside the EEA treaty area) with a residence permit on grounds of marriage or cohabitation leaves her partner within three years of being granted the permit, she loses her residence rights. As a result, many women are reported to have endured violent relationships in order to avoid being deported.¹²⁷

1.2 Tension or conflicts: selected issues

1.2.1 Employment

Women of Asian and African origin do not seek employment in the commercial sector where they must at least speak English. The Asian and North African women are mostly unskilled workers in the fisheries industry, cleaning and other jobs not requiring special skills.¹²⁸ There have been no reports on complaints concerning

¹²⁵ <http://www.hagstofa.is/?PageID=95&NewsID=4172>, accessed 21 April 2010.

¹²⁶ A proposal for a parliamentary recommendation was presented at the 138th Session of Parliament 2009-2010 (þskj. 467 – 329. mál) on the appointment of a working group on marital violence against women outside the EEA area.

¹²⁷ See also European Commission against Racism and Intolerance: Third report on Iceland, adopted on 30 June 2006, (Strasbourg 13 February 2007), p. 21.

¹²⁸ According to a woman active in the rights campaign for immigrant women, employers are tolerant of clothing, not least as they ??.

headscarves of workers in public employment or private employment. There are of course dress codes in certain sectors of public service like hospitals, the police, customs etc. but these apply indiscriminately to all members of the staff. There are no *rules* prohibiting Islamic women's dress, but then again these women are not found among the specialized staff in public service.

There are no reported incidents of conflict with regard to Islamic women working in the private sphere being banned from wearing headscarves. If an employer opposed such clothing it is doubtful that it would be reported as such an employer is not obliged to hire anyone that he does not want.

There are no reports of incidents of women working in public employment being banned from wearing headscarves. The general conditions for qualifying for an appointment to a post or for an employment contract with the Government, set forth in Article 6 of the Government Employees Act no. 70/1996, would not be met by Islamic women who rarely speak the language. If they work in the public sector they do unskilled work and are not banned from wearing headscarves.¹²⁹

There are no Afghan women wearing the traditional burka in Iceland. An Afghan woman that went to the swimming pool in Iceland was not prevented from entering the public pool in jogging pants and a shirt as she did not want to reveal her body. The staff of the pool did not press the strict requirement of wearing a swimsuit; exhibiting tolerance for a woman wearing a burka publicly would probably be met with much scepticism as the costume is strongly associated with the condemned Taliban oppression.

There are no codes of conduct on the labour market requiring women who do not want to shake hands with men for religious reasons to do so. A requirement to shake hands regardless of sex is non-existent except perhaps in the higher echelons of public servants where it is part of the protocol.

It seems that public authorities in Iceland are concerned with meeting the special demands of people of other religions. A few years ago an Islamic pilot died in an accident and the staff at the hospital not familiar with the rituals involving bathing and shrouding the body asked the family for assistance. Subsequently a brochure was produced with guidelines in this respect.¹³⁰

1.2.2 Goods and services

There are no segregated healthcare services for men and women because of religiously inspired demands of clients. According to the healthcare centre in Reykjavík, there have hardly been any instances of clients requesting female doctors but if that has been or would be the case such demands would be met with understanding. Another source from the women of multicultural ethnicity network¹³¹ confirms this, yet points out that sometimes this is not possible, e.g. for women in rural areas where there may only be a male doctor.

¹²⁹ According to the chief of staff of the largest public employer – the state hospitals – Erna Einarisdóttir.

¹³⁰ To gather information for writing this report, as there is no exact information on the topic of gender and religion, the author has had informal discussions with Amal Tamimi, a former spokesperson of W.O.M.E.N (the Association of women of foreign origin), with staff at the Reykjavik healthcare centre and with the chief of staff of the state hospitals.

¹³¹ <http://www.womeniniceland.is/> (W.O.M.E.N), accessed 1 December 2010.

1.3 Tension or conflicts: other issues

After the financial collapse in Iceland in the autumn of 2008 many more families and individuals are seeking help from food pantries like the family aid, which is a private enterprise founded by women to help those in need. When there is limited stock of food for donations and people are standing in a queue to get food, tension occurs in who gets what first. Recently there have been reports about the organizers of the family aid discriminating against foreigners and giving food to elderly Icelanders first and to the foreigners last. The organizers maintained that many of the foreigners were taking advantage of this aid as they were working and not in desperate need, like the jobless or the elderly. On that occasion, the Association of women of foreign origin 'W.O.M.E.N' issued a declaration condemning the alleged discrimination against foreigners and praising at the same time the reaction of the local authorities and that of the Minister of Social Affairs who declared that such discrimination and violation of human rights would not be tolerated.¹³²

As this issue is broader than the topic of this report it is only tackled here as an example of potential racism or prejudice often associated with financial crisis. In this respect another point may be raised as a sign of unusual tolerance, which is the recruitment of staff in supermarkets, mostly of Polish origin, who do not speak Icelandic and often very broken English.

1.4 No issue?

The fact that there are no major conflicts may partly be explained by the fact that Iceland was for the most part of its history an isolated, homogenous country. Foreigners were hence looked upon with curiosity and excitement, even admiration. When there is a shift in such opinion, the most probable explanation is that when matters are no longer a novelty they are tainted with the same prejudice as would be true for common matters. Immigrants become a threat when there is competition for work or goods. Women of Islamic religion are discriminated against because they are poor, uneducated and oppressed or abused by their partners or other males just like poor and unskilled or abused women everywhere.

Stereotypes are standardized and simplified conceptions of groups, based on some prior assumptions characterising particular groups that fear less with regard to material and financial means and influence. Stereotyping and stigmatising remarks on members of minority groups have been reported to be made sometimes in broadcasts by private media. On some occasions, material portraying immigrants in a negative or stereotypical way has also appeared in the press.¹³³ These incidents of stereotyping have also been criticized within the journalistic community.

2. National approach

2.1 Selected issues

Sex and gender discrimination is strictly prohibited by the non-discrimination clause of the Constitution, as are other forms of discrimination listed in Article 65, which states:

¹³² <http://www.visir.is/article/20100325/FRETTIR01/690531711>, accessed 1 December 2010.

¹³³ ECRI: European Commission against Racism and Intolerance, third report on Iceland, adopted on 30 June 2006 (Strasbourg 13 February 2007).

‘Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status. Men and women shall enjoy equal rights in all respects.’

The prevailing ideology towards immigrants and hence women of different religious backgrounds is integration without demanding that people of different religious and ethnic background become part of the dominant culture. The emphasis is on enabling immigrants to hold on to their particularities so that they do not lose touch with their cultural background and language but will be able to contribute to the multicultural society. The acceptance of multiculturalism will in turn strengthen society and enrich it. Enlightenment is seen as the best method of a viable multicultural society. The media is recognized as one of the major tools in eliminating prejudice and discrimination by not portraying stereotypical images of immigrants.¹³⁴

Learning the language is essential in order to be an integral part of society. The legislator has emphasized the need for immigrants to learn Icelandic. Law No. 66/1995 on elementary schools stipulates in Article 36 that pupils with another native tongue are entitled to special classes to learn Icelandic. There is an exemption clause permitting these pupils not to take co-ordinated exams in the 4th and 7th grade if they have been living in the country for less than a year. The objective of this Law is to enable these pupils to become bilingual citizens with roots in two cultural worlds and in this respect enrich Icelandic society.

Law on secondary education No. 80/1996 includes a similar clause on special language classes for pupils with another native tongue. Regulation No. 297/1997 includes further permission on the establishment of centres with language courses for adults, partly funded by the Ministry of Education, Science and Culture. That Ministry recently published an information booklet for people moving to Iceland and a booklet on the education system in ten languages.¹³⁵

2.1.1 Employment

The non-discrimination clause in the Constitution applies in the public service as well as in the private sphere. There are no rules prohibiting headscarves in private or public employment although there are certain requirements with regard to e.g. the clothing in surgery rooms of hospitals, which apply equally to all.

The Icelandic Confederation of Labour (*ASÍ*) has issued a booklet about labour rights in nine languages.¹³⁶ Access to the labour market is more difficult for non-EU citizens. They are not authorized to work in Iceland without work or residence permit unless the exemption provisions of law allow it. According to Icelandic law, wages and other terms of employment as negotiated by the social partners shall be minimum wages irrespective of gender, nationality or employment period for all employees in the relevant field of work in the area covered by the agreement. This also means that if employees are employed on worse terms of employment than stated in the collective agreements, these terms are invalid and not binding for the employee.¹³⁷

¹³⁴ <http://www.humanrights.is/mannrettindi-og-island/hopar/utlendingar/a>, accessed 1 December 2010.

¹³⁵ http://eng.menntamalaraduneyti.is/media/MRN-PDF-Althjodlegt/Fyrstu_skrefin_-_enska.pdf, accessed 1 December 2010

¹³⁶ http://www.asi.is/Portaldata/1/Resources/documents/Kjarasamn_enska_isl_2008_HQ.pdf, accessed 1 December 2010.

¹³⁷ http://www.asi.is/Portaldata/1/Resources/documents/Kjarasamn_enska_isl_2008_HQ.pdf, accessed 1 December 2010.

It is the role of the union's shop steward at the workplace to see to it that the collective agreements that have been made are honoured in respect of foreign workers.¹³⁸ The shop steward has the responsibility to ensure that the workers' social or civil rights not be curtailed. This provision does not, however, extend to agricultural workers or the crews of vessels or boats for whom it is not compulsory to have an official contract.

As soon as a shop steward receives a complaint from a worker or he considers himself to have sufficient reason for assuming that the right of a worker or a trade union at his work station has been infringed by the employer or his representative, he must forthwith investigate the matter. If he comes to the conclusion that the complaints or his suspicion are substantiated, he is to approach the employer or his representative with a complaint and demand improvement. Trade union shop stewards have to render a report to the trade union as soon as possible, having informed them about workers' complaints. They furthermore have to render a report to the union relating to matters regarding which they consider an employer or his representatives to have violated workers' and their unions' rights.

The principal rule in Iceland is that employers and employees are equally authorized to cancel employment contracts without stating the reason for this. Employees are generally hired without time limits, in which instance the employment contract is cancelled with a termination notice period as stated in the collective agreements.

There are no laws on codes of conduct requiring women to shake hands with men in the workplace.

2.1.2 Goods and services

Apart from the non-discrimination clause in the Constitution, there are no rules on segregated healthcare services for men and women because of religiously inspired demands of clients.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

In case of conflict, the applicable legal framework would be the one regarding the conflicting constitutional rights, such as freedom of religion, freedom of expression, right to respect for family life, rights which may be restricted for public order. These rights are furthermore entrenched in the European Convention of Human Rights which is incorporated into domestic law by Law No. 62/1994.

There are no rules which explicitly prioritise any of the conflicting rights or explicitly provide for procedural rules to decide cases of conflicting rights in this respect.

3.2 Conformity with EU law

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services still has not been incorporated into Icelandic law. Directive 2006/54/EC has not been incorporated. Directives 76/207/EC and 2002/73/EC have been incorporated in Act on Equal Status and Equal Rights of Women and Men No. 10/2008 and in Act on working terms and pension rights insurance No. 55/1980. The exemption clause of

¹³⁸ Act on Trade Unions and Industrial Disputes, Law No. 80/1938.

Article 14 Section 2 of the Recast Directive (2006/54/EC) is not in the new version of Gender Equality Act No. 10/2008, adopted a few months prior to the incorporation of the Recast Directive into the EEA agreement. The incorporation of the Goods and Services Directive is currently being studied and exemptions from non-discrimination justified by legitimate aims are being looked into.

4. Legal framework for deciding conflicts: case law

There is no case law on this subject.

4.1 Case law on selected issues

There is no case law on these issues.

4.2 Probable outcome of case law on selected issues

See 3.1 above.

4.3 Case law on other relevant issues

There is no case law on other relevant issues.

5. Good practices/solutions

The Association of women of foreign origin W.O.M.E.N is an outstanding example of good practice in fighting prejudice.¹³⁹ A leading spokesperson of Palestinian origin has described the situation of women of foreign origin (i.e. from outside the EU area) as being in conflict with Icelandic men, Icelandic women and men of foreign origin. W.O.M.E.N is active in writing about this issue and contributing to the public debate, and the association has its own homepage and takes part in the overall fight for gender equality.

6. Further comments

Religion is not a traditional source of conflict in Icelandic society. Immigrants are faced with other forms of discrimination than direct prejudice on religious grounds, based on their ethnic origin, lack of language skills and poor social class. Women from outside the EEA area seem particularly vulnerable, irrespective of their religion (i.e. Islamic or Buddhist). Their vulnerability is caused by the fact that they lack financial independence and education.

IRELAND – Frances Meenan

1. General situation regarding tension between gender equality and freedom of religion

1.1 General picture

The population of Ireland is predominantly Roman Catholic. The Census of 2006 showed a population of 4,172,013¹⁴⁰ with 87 % (50 % men and 50 % women) being Roman Catholic. The next largest group (4.2 %) stated that they had no religion; 2.9 % are members of the Church of Ireland (Anglican) and there are small groups of

¹³⁹ <http://www.womeninireland.ie/>, accessed 1 December 2010.

¹⁴⁰ <http://www.cso.ie/statistics/popnclassbyreligionandnationality2006.htm>, accessed 17 April 2010.
The percentages were calculated by the author.

other Protestant denominations. Muslims comprise 0.8 % of the population. There is protection for the ‘unborn’ and with due regard to the equal right to life of the mother guarantees to defend the life of the unborn.¹⁴¹ There is now a right to remarriage within the State for divorced persons. The main issues concerning religious matters over the last decade have been issues of child abuse in industrial schools run by religious orders. The judicial Commission to Report into Child Abuse reported in 2009,¹⁴² there is also the allied Residential Institutions Redress Board where persons who have been abused in industrial schools¹⁴³ receive compensation for the abuse.¹⁴⁴ The issue of child abuse by Catholic diocesan clergy has also been and remains a very significant issue.¹⁴⁵

While some tensions can be identified in areas such as codes of dress, admission policies and recruitment policies in schools, there does not appear to be any significant tensions between the principles of gender equality and freedom of religious belief. Whilst not a gender issue, approximately 90 % of primary schools are under Roman Catholic patronage; however, given the increasing requirement by parents to have non-denominational education, inter-denominational education and increases of immigrants in certain areas (especially Dublin), there will in time be a reduction in Catholic-managed schools.¹⁴⁶ Another current issue is the Civil Partnership Bill 2009 which is presently being debated in the *Oireachtas* (Parliament) which will provide for registered partnerships of same sex couples and certain rights for co-habiting couples.¹⁴⁷

Protocol No. 17 of the Treaty of the European Union signed in Maastricht provides that nothing in the Treaty on the European Union or in the Treaties establishing the European Communities or in the Treaties or in the Acts amending the Treaties shall affect the application of Article 40.3.3 of the Constitution of Ireland. More recently prior to the second referendum on the Lisbon Treaty in Ireland, a guarantee was given to the Irish people *inter alia* that the Charter of Fundamental Rights shall not affect the Irish Constitution in respect of abortion, the family and education.¹⁴⁸

¹⁴¹ Article 40.3.3^o provides for the Right to Life of the Unborn which states
‘The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

This subsection shall not limit freedom to travel between the State and another state.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to the services lawfully available in another state.’

¹⁴² <http://www.childabusecommission.ie/rpt/>, accessed 17 April 2010.

¹⁴³ Teenagers were sent to such schools if they were needy and not being looked after by their parents or else reformatories if the child was guilty of an offence.

¹⁴⁴ <http://www.rirb.ie/aboutus.asp>, accessed 17 April 2010.

¹⁴⁵ Report by the Commission of Investigation into the Catholic Archdiocese of Dublin.

<http://www.justice.ie/en/JELR/Pages/PB09000504>, accessed 17 April 2010.

¹⁴⁶ <http://www.irishtimes.com/newspaper/ireland/2010/0306/1224265709425.html>, accessed 17 April 2010.

¹⁴⁷ <http://www.oireachtas.ie/viewdoc.asp?DocID=12249&&CatID=59&StartDate=01%20January%202009&OrderAscending=0>, accessed 17 April 2010. See *Zappone and Gilligan v The Revenue Commissioners and Others* [2008] 2 I.R. 417 where a Canadian same-sex marriage was not recognised by the Irish courts.

¹⁴⁸ <http://www.dfa.ie/uploads/documents/EU%20Division/legal%20guarantees%20and%20assurances%20on%20the%20lisbon%20treaty.doc>, accessed 19 April 2010.

The Preamble¹⁴⁹ to the Constitution of Ireland has a religious dimension. Mr Justice Walsh of the Supreme Court¹⁵⁰ said the Constitution ‘reflects a firm conviction that we are a religious people, because *inter alia*, the Preamble acknowledges that we are a Christian people’.

The first source of protection for gender equality or freedom of religious belief is the Constitution of Ireland 1937. Article 40, Section 1 provides that:

‘All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactment have due regard to differences of capacity, physical and moral, and of social function.’

Article 44, Section 2 provides for religious freedom and states:

- ‘1°. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen;
- 2°. The State guarantees not to endow any religion;
- 3°. The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.
- 4°. Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school (...)

The duty of the State is to respect and honour religion though no specific religion is identified. The Constitution also guarantees freedom of conscience and the free profession and practice of religion ‘subject to public order and morality’ to every citizen.

According to Dr Glendenning ‘(...) the Muslim community in Ireland do not appear to have experienced the same difficulties relating to integration as their co-religionists in some other Western European countries. Rather, they have achieved, over five decades or so, a considerable degree of integration, religious freedom and representation in practice (...). One likely reason for what appears to be the greater accommodation of the Muslim community in Ireland arises from the fact that the Constitution includes a number of protective provisions relating to religious denominations and denominational education (...)’.¹⁵¹

¹⁴⁹ ‘In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred. We, the people of Eire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial. Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, An seeking to promote the common good, with due observance of Prudence, justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact and give to ourselves this Constitution.’

¹⁵⁰ *Quinn’s Supermarket v Attorney General* [1972] I.R. 1.

¹⁵¹ Dymna Glendenning *Religion, Education and the Law*, p. 291, Dublin, Tottel Publishing 2008.

1.2 Tension or conflicts regarding selected topical issues

1.2.1 Employment

Religious values

‘Religious belief’ is defined in the Employment Equality Act 1998 as including ‘religious background or outlook’. It is the area of the protection of religious ethos which causes the most controversy. Section 37(1) of the Employment Equality Act 1998 gives powers to religious institutions to discriminate in order to protect their ethos. However, this section does not apply to the gender ground. Therefore, for example, a Roman Catholic girls’ school under the trusteeship of a religious order may not deny employment to male teachers or dismiss an unmarried female teacher on grounds of pregnancy, for example. The sub-section provides:

‘A religious, education or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person (...) if –

(a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or

(b) it takes action which is reasonably necessary to prevent an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution.’

This section has been the most controversial of all the sections in the Act and it has been heavily criticised by the teachers’ unions. The Irish National Teachers Organisation (INTO – primary teachers) consider Section 37(1) unnecessary as potentially 95 % of schools in the country could claim this protection. In particular the INTO said that (matrimonially) separated teachers and gay teachers could be affected by this provision.¹⁵² However, when the original Employment Equality Bill 1996 was referred to the Supreme Court¹⁵³ in order to consider the constitutionality of the Bill, the Court considered that the section provided a fair balance between the right to profess one’s religion and the right to earn one’s livelihood on the other hand. However, the Court stated that each situation must be on a case-by-case basis.

A genuine occupational requirement

Section 25 provides that a genuine occupational requirement on the gender ground in respect of access to employment shall not constitute discrimination provided it is a genuine and determining occupational requirement for the post, the objective is legitimate and the requirement is proportionate. Section 37(2) provides that a difference of treatment which is based on a characteristic related to any of the discriminatory grounds (except the gender ground) shall not constitute discrimination where, by the reason of the particular occupational activities concerned or of the context in which they are carried out –

¹⁵² <http://www.into.ie/ROI/InformationforTeachers/TeacherSpecialInterestGroups/LesbianGayBisexualTeachersGroup/Section371/INTOSubmission/>, accessed 19 April 2010.

¹⁵³ [1997] 2 I.R. 321.

- ‘(a) the characteristic constitutes a genuine and determining occupational requirement and
- (b) the objective is legitimate and the requirement is proportionate’

There are no considerable tensions concerning access to employment regarding the prohibition of Islamic women’s dress or a requirement to shake hands regardless of sex. Whilst not specifically relating to dress, there was a recent survey completed entitled *Discrimination in Recruitment – Evidence from Field Experiment* where it was found that persons who applied for jobs with Irish names were more than twice as likely to obtain job interviews than those with identifiably non-Irish names. The Report stated that it was clear that in spite of discrimination legislation, discrimination in recruitment against minority groups is relatively high.¹⁵⁴

Additionally, there are a number of pieces of legislation which enable discrimination by religious institutions in order to safeguard their ethos. An example of one such provision is section 12(4) of the Employment Equality Act 1998 which provides that ‘for the purposes of ensuring the availability of nurses to hospitals and teachers to primary schools which are under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values, and in order to maintain the religious ethos of the hospitals or primary schools, the prohibition of discrimination (...), insofar as it refers to discrimination on the religion ground’ shall not apply. For example, there are special exclusions for the Church of Ireland (Protestant) in respect of places in a particular nursing school¹⁵⁵ and a teacher training college.¹⁵⁶

1.2.2 Goods and services

There are no considerable tensions regarding the supply of segregated health or social care services due to the religiously inspired demands of clients.

1.3 Tension or conflicts regarding other issues

An area in which tensions between the principles of gender equality and freedom of religion are in evidence is school uniform policy. After queries from school principals with regard to the wearing of a *hijab* by students, the Minister for Education along with the Minister for Integration Policy jointly agreed recommendations on school uniform policy,¹⁵⁷ which were issued on 23 September 2008. The recommendations

¹⁵⁴ <http://www.equality.ie/index.asp?locID=105&docID=794>, accessed 17 April 2010. The survey used job applicants with identifiable non-Irish names namely African, Asian and European (German) names. There was not a great difference in discrimination between the two groups.

¹⁵⁵ The nomination of persons for admission to the School of Nursing pursuant to clause 24(4)(a) or (c) at the Adelaide Hospital Charter as substituted by paragraph 5 (s) of the Health Act 1970 (s.76) (Adelaide and Meath Hospital, Dublin, incorporating the National Childrens’ Hospital) Order 1996.

¹⁵⁶ Places in a vocational course specified in an Order. The Employment Equality Act 1998 (s. 12) (Church of Ireland College of Education) Order 2008¹⁵⁶ further provides that 32 places shall be reserved in the Church of Ireland College of Education in respect of vocational education courses leading to the degree of Bachelor of education of the University of Dublin up to and including 2012/2013 being such number of places as seem reasonably necessary to meet the purposes as set out in s. 12(4) of the 1998 Act. The purpose of this Order is to reserve 32 places where students are members of the Church of Ireland or belong to the Protestant tradition. This is to ensure that schools under Protestant ownership will have a sufficient number of teachers who come from a Protestant background and are trained by an institution with a Protestant ethos.

¹⁵⁷ <http://www.education.ie/robots/view.jsp?pcategory=10861&language=EN&ecategory=10876&link=link001&doc=42160>, accessed 15 April 2010.

stated that the current system whereby schools choose their uniform policy at a local level is 'reasonable, works and should be maintained'. The recommendations went on to say, however, that no policy should have the effect of excluding a student from seeking enrolment or continuing enrolment in a school. The recommendations do, however, allow for a policy which prohibits the wearing of clothing which obscures a facial view of the student as it is felt that such clothing would create an artificial barrier between the teacher and student and hinder proper communication. Uniform policy is decided by the school (board of management) and therefore schools may not ban headscarves. The recommendations conclude by pointing out the schools' duties under the Equal Status Acts 2000-2008 and the Education Act 1998 in formulating uniform (dress) policies and in particular its duties under Section 15 2(e) of the Education Act 1998 to 'have regard to the principles and requirements of a democratic society and have respect and promote respect for the diversity of values, beliefs, traditions, languages and ways of life in society'. In the same statement, the Minister for Education stated on the issue of these recommendations 'While 92 per cent of schools in the country are under the patronage of one religion, it is clear that this fact has not operated to exclude pupils of different religions from these schools or from schools operating under other patronage arrangements. It seems clear that, where schools have permitted the wearing of the hijab in a colour similar to the school uniform, no problems have been encountered. The important consideration here is that all parties involved are clearly aware of the position.' Glendenning notes that the majority of schools at secondary level are voluntary or confessional schools which are Catholic and were established in the eighteenth century with the objective of providing Catholic children with a Catholic education. The school's trustees undertake to ensure that the school will be administered in accordance with the Catholic ethos. Voluntary secondary schools (approximately 56 per cent of all schools) respect the diversity of cultures and traditions and the only issue with the Islamic headscarf appears to be in relation to the colour to complement the school uniform.¹⁵⁸ In the event that a student was suspended from a school where there was a refusal to enrol a student then there may be an appeal to the Director-General of the Department of Education and Science.

There was a controversy when a Sikh trainee member of the reserve of *An Garda Síochána* (the police force) was prohibited from wearing the turban whilst on duty. There is a standard requirement to wear standard uniform which includes a cap as it is considered that religious symbols could lead the public to believe that they are not acting impartially.¹⁵⁹ It is understood that a claim was lodged with the Equality Tribunal in 2008 in relation to the turban matter and is due for hearing.

1.4 No issue?

The key reason why there is no great tension is that there is in the main religious tolerance and the numbers of non-Catholics are very small. Furthermore, most schools are faith-based so they derive their own policies.

¹⁵⁸ Dymna Glendenning *Religion, Education and the Law*, at pp. 288 - 290, Tottel Publishing, Dublin, 2008.

¹⁵⁹ <http://news.bbc.co.uk/2/hi/europe/6966535.stm>; http://www.integratingireland.ie/userfiles/File/Database/Press%20release_Sikh%20Turban%20in%20Gardai%20Uniform.pdf; <http://www.independent.ie/national-news/sikh-member-of-the-reserve-is-banned-from-wearing-turban-1057548.html>; <http://www.rte.ie/news/2007/0821/turban.html>; <http://metro.ieireann.com/article/sikh-blasts-garda-double-standard.2320>, all accessed 14 June 2010.

2. National approach

2.1 Selected issues

2.1.1 Employment

While there is no significant tensions on the issue of wearing headscarves in private or public employment, the manner in which the wearing of such clothing in relation to access to education is framed in terms of religious discrimination. Accordingly, it is likely that any such controversies with regard to access to employment would be framed in a similar manner. As the question of whether an employee can be compelled to shake hands regardless of sex has not given rise to any significant tensions there is no legal or general public source for how such an issue would be framed.

2.1.2 Goods and services

As the question of whether segregated health or social care service has not given rise to any significant tensions there is no legal or general public source for how such an issue would be framed.

2.2 Other issues

Commentaries on issues regarding the wearing of the *hijab* and face-covering veils in schools have tended to frame the issue as being a question of religious discrimination as opposed to gender equality. There is no commentary where face-covering veils are assessed independent of *hijabs*. Face-covering veils do not appear to have given rise to any controversies in terms of sex equality. In this regard the joint recommendations issued by the Minister for Education and the Minister for Integration Policy explicitly precludes uniform policies which have the effect of excluding a student from a particular religious background from seeking enrolment or continuing their enrolment in a particular school. Tom Hickey in his article *Domination and the Hijab in Irish Schools*¹⁶⁰ applies the republican concept of freedom as non-domination to the questions of students in Irish schools wearing the Islamic *hijab*.¹⁶¹ Whilst it would seem that no student has been excluded on such basis from Irish schools, nonetheless there can be such exclusion on the basis of not allowing the *hijab* should the schools so wish. Hickey argues that there is domination given the prevalence of schools under Catholic patronage. He states: ‘The local school ultimately holds what amounts to unchecked power over the fate of non-Catholic families in a manner strikingly at odds with the republican account of freedom. Even in the absence of actual interference; the absence, that is, of exclusion of non-Catholics from Catholic schools, the freedom of citizens in our Republic is violated, where that freedom is conceived of in republican terms.’

¹⁶⁰ (2009) 16 (1) DULJ 127.

¹⁶¹ Following a controversy concerning the wearing of the *hijab* in Gorey Community School, the largest school in the Irish state in 2008. The principal wrote to the Minister for Education and Science requesting national guidelines on the matter. As stated above in the text a recommendation was subsequently issued by the Minister stating that each school can decide its own rules. See E. Daly ‘Restrictions on Religious Dress in French Republican Thought: Returning the Secularist Justification to a Rights-based Rationale’ (2009) 16 (1) DULJ 154. This article does not refer to the position of the *hijab* in Ireland.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

Section 37(1) of the Employment Equality Act 1998 as discussed above in effect prioritises the gender ground as it enables a religious, medical or educational institution under the control of a religious body to give more favourable treatment on the religion ground in order to maintain the religious ethos of the institution. The provision further excludes actions taken by an institution which are reasonably necessary to prevent an employee or prospective employee from undermining the ethos of the institution. Accordingly, Section 37 has the effect of prioritising the religious freedoms of institutions under the control of religious bodies over the protections provided under the discriminatory grounds in the Act where it is necessary to protect the ethos of the institution. However, this exclusion of discrimination on the religion ground does not mean that there can be gender discrimination (see 1.2.1 above).

Additionally, the Equal Status Act 2000-2004 provides further exceptions to the prohibition of less favourable treatment on discriminatory grounds to educational establishments. Section 7(2)(c) provides that where a primary or post-primary establishment having the objective of providing education in an environment which promotes certain religious values it shall not be deemed to be discriminating by virtue of admitting a person of a particular religious denomination in preference to others or it refuses to admit a person not of that denomination. In the case of a refusal the onus is, however, on the school to show that the refusal is essential to maintain the ethos of the school.

3.2 Conformity with EU law

The exceptions provided under Section 25 of the Employment Equality Act 1998¹⁶² would appear to be in conformity with the ‘genuine and determining occupational requirement’ exception allowed for by article 14, section 2 of the Recast Directive for Equal Treatment of Men and Women¹⁶³ and Section 37(1) in relation to Article 4(2) of the Framework Directive on Equal Treatment.¹⁶⁴ Article 4(2) also allows Member States to take into account their constitutional provisions. The requirement that each case would have to be considered on a case-by-case basis would suggest that the application of the section would have to be for a legitimate objective and is proportionate.

Section 7(2) of the Equal Status Act 2000 would also appear to be in conformity with article 4, section 5 of the Goods and Services Directive.¹⁶⁵ The requirement is that a person not of the school’s denomination can only be refused where preference is given to a person of that denomination or where it can be shown that it was ‘essential’ to the maintenance of the school’s ethos. This would appear to be sufficiently restrictive in its application as to satisfy the requirement of proportionality set down in the Directive.

¹⁶² As amended by s. 16 of the Equality Act 2004.

¹⁶³ 2006/54/EC.

¹⁶⁴ 2000/78/EC.

¹⁶⁵ 2004/113/EC.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

There is no case law regarding prohibitions on female Muslim dress or compulsory shaking of hands at the workplace.

4.1.2 Goods and services

There is no case law regarding the provision of segregated health or social services due to religious convictions.

4.2 Probable outcome of case law on selected issues

With regard to prohibitions on female Muslim dress the matter is likely to be framed in terms of discrimination on the gender or religion or race ground. A claim would be initiated under each ground. Accordingly, an employer would likely be found to have indirectly discriminated against a Muslim employee on the religion ground unless he can show such a prohibition was objectively justified by a legitimate aim and the means of achieving that aim were appropriate and necessary. Even if the claimant was successful on each ground, compensation may only be awarded on one ground and up to a maximum of two years' remuneration (unless application is brought on the gender ground only to the Circuit Court where there is no jurisdictional limit on the amount of compensation that may be awarded). As regards any possible claim relating to a requirement to shake hands,¹⁶⁶ it is likely that an employer would be able to show objective justification provided they can show the requirement is in pursuit of a legitimate aim and the means of achieving that aim were appropriate and necessary (perhaps good business practice). This matter has not been argued before any tribunal and good business practice would be a likely justification which employers would seek to rely upon.

It is likely that should a claim be brought with regard to segregated health or social care services such discrimination could be objectively justified by virtue of the Health Service Executive's objectives and functions as set down in Section 7 of the Health Act 2004.

4.3 Case law on other relevant issues

With regard to the freedoms provided by Sections 12 and 37(1) of the Employment Equality Acts 1998-2004 the relevant provisions were referred to the Supreme Court by the President pursuant to Article 26 of the Constitution. In *In the matter of the Employment Equality Bill, 1996*¹⁶⁷ the Supreme Court tested its constitutionality. The Supreme Court as regards Section 37(1) held that while it is generally impermissible to make any discrimination between people on religious grounds, the use of the words 'reasonable' and 'reasonably necessary' connoted an objective test which could be assessed by the courts on a case-by-case basis. In upholding the constitutionality of the provision the Court concluded that the final decision would rest with the court which would be 'conscious of the need to reconcile various constitutional rights involved'.¹⁶⁸ With regard to the constitutionality of Section 12 the court stated in upholding its constitutionality that 'Section 12 represents a reasonable balancing

¹⁶⁶ The author has never heard this as being at issue in Ireland.

¹⁶⁷ [1997] 2 I.R. 321.

¹⁶⁸ On p. 359.

between the principle of equality before the law on the one hand and the principle of the free profession and practice of religion on the other hand'.¹⁶⁹

An example of a case where a dismissal was upheld as being necessary to maintain the Catholic ethos of a school was the case of *Flynn v. Sister Mary Anna Power and The Sisters of the Holy Faith*.¹⁷⁰ It must be noted, however, that this case was decided prior to the passing of the Employment Equality Act 1998. The appellant schoolteacher was employed by nuns in a convent school in a country town. In the course of her employment she became involved in an affair with a married man and subsequently became pregnant. She was asked to end the affair by the nuns who were concerned about the example she was setting for the students. Having failed to end the affair she was dismissed from her employment. The appellant brought a claim against the respondents claiming that her private life was her own and that she had not openly undermined the ethos of the school.

Costello J. identified two important issues. First, he noted that the appellant/employee had been employed by a religious school with long-established and well-known aims and objectives. Secondly, he pointed out that the appellant had been dismissed not for a breach of the school's code of conduct but rather an assessment of the impact of that continued breach on the school. With regard to that assessment he pointed out:

'In making their assessment the respondents were, it seems to me, entitled to take into account that the appellant's association was carried on openly and publicly in a country town of quite a small population; that within a short period of time it would have been common knowledge in the town (a) that the appellant was associating on a regular basis with a member of the town's business community whose wife had recently left him, (b) later, that she had commenced to live with him as man and wife, and (c) that she had a child by him. But what is more to the point, the respondents were entitled to conclude that these facts must have become known to many if not all the pupils in the school, and that they would regard her conduct as a rejection of the norms of behaviour and the ideals which the school was endeavouring to instil in and set for them. I do not think that the respondents over emphasised the power of example on the lives of the pupils in the school and they were entitled to conclude that the appellant's conduct was capable of damaging their efforts to foster in their pupils norms of behaviour and religious tenets which the school had been established to promote. In these circumstances they had substantial grounds for dismissing her.'

Other than *Flynn v Power*, there is no useful case law where one sees the interaction between gender and religion. Whilst not having a gender ground aspect the recent case of *An Employee (Mr. M) v A State Authority*¹⁷¹ highlighted the interaction between Church and State in an employment context. The claimant was a Roman Catholic priest employed as a chaplain in an institution under the aegis of the State. He claimed that he was treated less favourably than other personnel employed by the State in respect of his terms and conditions of employment and access to promotional

¹⁶⁹ On p. 360.

¹⁷⁰ [1985] 1 IR 648.

¹⁷¹ DEC-E 2006/015. In *Thornton v Cheeverstown House* DEC – E2006/022 the claimant, a member of the Church of Ireland, claimed that they were discriminated against, harassed and victimised on grounds of religion. She alleged that various derogatory comments about her religion were made to her. The claim was dismissed.

outlets. He claimed he was appointed by the relevant minister of state but his appointment was contingent upon the personal nomination from his Bishop which could be withdrawn at any stage. The other employees were not subject to this process where an outside body suggested their appointment or removal. He claimed the filling of the position as head chaplain which was also determined by an outside body and which was not advertised or subject to normal selection processes also placed him at a disadvantage. The Equality Officer examined the definition of 'religious belief' and held that if one was to follow the claimant's argument, a person could arguably claim a different religious belief to another person on the basis that he was more devout in practising his religion. It was noted that all chaplains were excluded from such terms and conditions of employment regardless of their religious belief. The claimant also asserted that he was penalised in circumstances amounting to victimisation. Documentation personal to the claimant and also the fact that he had referred an equality claim were released to the head chaplain and it was agreed that the bishop should be informed of the situation. Subsequently the claimant was informed by the bishop that he would be removed from his chaplaincy and reassigned. The equality officer found that by releasing the information to the head chaplain without any restriction whatsoever the respondent contributed significantly to the decision made by the claimant's bishop to withdraw his nomination and remove the claimant from his chaplaincy. The claimant was awarded EUR 40 000 in respect of his claim for victimisation.

In *Davis v Dunnes Stores, Dublin*,¹⁷² the claimant who was an Irish national and a practising Muslim alleged she was treated in a discriminatory manner by a shop assistant as she attempted to enter the fitting rooms. The claimant was wearing a headscarf and Islamic dress and was accompanied by her mother who did not wear Islamic dress. On the facts the equality tribunal considered that there was no *prima facie* case on the religion ground. However, more interestingly the equality officer considered that the store should consider reviewing its customer complaints policy and in particular equality-related complaints.

In *Ahmed v ICTS*,¹⁷³ an issue arose under the race ground when the claimant (a black African Muslim) said he had been asked to indicate his ethnic or national origin on a form which, while marked optional and separate from the application form, was to be handed to the interviewer. The form was not available at the hearing, and no *prima facie* case of discrimination was established. However, the equality officer was critical of the respondent's selection procedures, and made a number of non-binding recommendations including that any optional or statistic data of this nature sought from job applicants should be kept entirely separate from the selection process.

¹⁷² DEC-S 2005/022.

¹⁷³ EDA043. The claimant was a black African Muslim who had applied for a job as a security officer at Dublin Airport. He alleged that the interviewer asked him a number of discriminatory questions including asking almost immediately whether he was a Muslim, about his residency status in Ireland, extensive questioning about whether he remembered the Lockerbie incident, and a number of questions about Islamic terrorist groups in Sudan. The respondent denied that he had asked the claimant if he was Muslim, and stated that there was no reason why he would be asked about his religion. It was the respondent's practice to start the interview by explaining to the applicant why the job is being done, and the emphasis placed on airport security following incidents such as Lockerbie. The equality officer noted that there was a conflict of evidence about the questions at the interview. She was critical of the respondent for taking no notes at the interview but found that there were also some inconsistencies in the claimant's evidence. She held that a *prima facie* case of discrimination had not been established but made a number of non-binding recommendations to the respondent to ensure fair and transparent selection procedures.

5. Good practices/solutions

Given that Ireland has a small population, there do not appear to be major issues in relation to other cultures and religions. All schools (whether fee paying or not, and faith-based or not) receive subsidies from the State and have the entitlement to determine their own uniform policy. This seems to be working well. In time, there will be more multi-denominational schools but again they will determine their own school uniform. Also in employment, there appears to be few issues. For example, there is nothing preventing a Muslim doctor from wearing the scarf in the course of her employment, of course except where there may be safety issues involved. On a practical note, given the very deep recession in Ireland, there is less likelihood of such issues arising as there will be less immigration.

6. Further Comments

In the main because Ireland is predominantly Roman Catholic and an island nation, the issues do not appear to have caused major controversy and mediated solutions were found.

ITALY – Simonetta Renga

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

In Italy, where 6.7 % of the population are immigrants,¹⁷⁴ there are tensions between gender equality and freedom of religion, which are often linked to tensions based on race/ethnic origin and nationality. Tensions caused by race/nationality, religion and gender are often interconnected and have come up in debates on the wearing of burkas in public or of headscarves at school, as well as on the female genital mutilation. In particular, during the last decade, discrimination on the various grounds of race/nationality, religion and gender and the conflicts between fundamental values that are constitutionally recognised have been focused on the groups that are linked to the Islamic religion, whether in real terms or in the collective imagination. The debate focuses on the incompatibility between our democratic principles and values and those of Islamism, on the ‘obscurantist’ treatment reserved to women and on the clash with the Catholic religion. Islam or the Muslim culture, therefore, by definition represents an obstacle to the social integration of the population involved, which is a discriminatory standpoint by itself.

As far as the above-mentioned grounds of discrimination are concerned, it would be correct to state that Italy currently has problems of multiculturalism, which also emerge in debates about removing the crucifix from public offices, schools and polling stations,¹⁷⁵ in creating separate primary school classes for children of third-country nationals, in the request to reserve time for Muslim religion at primary school or for an Islamic menu in refectories and canteens, or in refusing to provide services

¹⁷⁴ *Dossier Statistico Immigrazione Caritas Migrantes - XVIII Rapporto* (2008).

¹⁷⁵ See European Court of Human Rights, Case No. 30814/06, *Lautsi v. Italy*. See on the issue of the crucifix the website of OLIR (*Osservatorio delle libertà e istituzioni religiose*) on <http://www.olir.it/areetematiche/75/index.php> and <http://blog.panorama.it/italia/2009/11/09/sindaci-salva-crocifisso-eccoli-anche-nelle-regioni-rosse/>, both accessed 17 April 2010.

in pubs, restaurants or discos to non-EU citizens because of their ethnic origins or the way they dress.¹⁷⁶

The media widely report on multicultural problems and very often contribute to the creation of stereotypes and prejudices, causing confusion, for example, between the issues of terrorism or criminality and immigration, and also making terminological mistakes (such as confusion between headscarf and burka, or clandestine and irregular immigrants, or Roma and Romanian), which engender confusion in the public perception of facts.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

We have about 1 500 000 non-EU workers regularly employed; in some production categories they represent 10 % of the total workforce.¹⁷⁷ Moreover, many employers have dress codes and forbid women to wear headscarves at work.¹⁷⁸

Despite this, and in contrast with other sectors of life, our workplaces seem to have no problems at all as regards gender and religion conflicts: we do not have any case law on access to employment and no debate at all in the media; in literature, there are very few papers on these subjects. The only record we have on the issue of headscarves is in the newspaper *La Repubblica* of 31 May 2009, which reports on a letter of complaints sent by a woman to the newspaper *La Stampa*, where she criticised that the ticket office of the *Reggia of Venaria* of the House of Savoy employed an Islamic woman wearing a headscarf: the letter caused great indignation among the *Reggia's* employees, who all went to work wearing headscarves and keffiyeh for a few days.¹⁷⁹

The reasons of this quietness probably rest on several factors: in the first place, many immigrant workers regularly employed come from cultures that do not clash with ours; then, a large number of immigrants are employed in the agricultural sector and in care work within the family, which are sectors where discriminatory issues are traditionally kept concealed, also because trade unionism is very weak; and finally, many immigrant workers are employed in the black economy, i.e. in irregular work, where most elementary workers' rights are blatantly violated and workers have no instruments to react.¹⁸⁰

It should also be noted that many collective agreements already grant Muslim workers the right to pray, to respect Ramadan or celebrate religious festivities.

1.2.2 Goods and services

We have no segregated healthcare or social services for men and women because of religiously inspired demands of clients.

¹⁷⁶ See *Tribunale Roma* 16 July 2008, in *Responsabilità e risarcimento* No. 9 (2008) p. 31.

¹⁷⁷ *Dossier Statistico Immigrazione Caritas Migrantes - XVIII Rapporto* (2008).

¹⁷⁸ See on this T. Giacobelli 'La presenza islamica in Italia' on <http://www.bibliografie.net/giacobelli.htm>, accessed 17 April 2010.

¹⁷⁹ See on this M. Ranieri 'L'abbigliamento nei luoghi di lavoro: dalla tuta blu al velo usa e getta', *Working Paper Centro Studi di Diritto del Lavoro Europeo Massimo D'Antona, Università di Catania, Facoltà di Giurisprudenza*, No. 100 (2010), on http://www.lex.unict.it/eurolabor/ricerca/wp/it/ranieri_n100-2010it.pdf, accessed 17 April 2010.

¹⁸⁰ See on these issues M. Ranieri 'L'abbigliamento nei luoghi di lavoro: dalla tuta blu al velo usa e getta', *Working Paper Centro Studi di Diritto del Lavoro Europeo Massimo D'Antona, Università di Catania, Facoltà di Giurisprudenza*, No. 100 (2010), on http://www.lex.unict.it/eurolabor/ricerca/wp/it/ranieri_n100-2010it.pdf, accessed 17 April 2010.

Many public services, such as health and assistance services, schools and prisons, have started to allow the saying of Islamic prayers and the celebration of Ramadan, and to provide special menus in refectories.¹⁸¹

1.3 Tension or conflicts: other issues

As far as gender and religion/nationality/ethnic origins are concerned, we have two topical issues. One of them is female genital mutilation, which is linked to cultural rather than to religious backgrounds. In this field, we have criminal-law Act No. 7/2006, which stipulates prison sentences for those who cause genital mutilation. Before and after its enactment, it sparked a debate among constitutional-law scholars on the appropriateness of this piece of legislation. Some scholars stressed that this law, which specifically declares relevant to criminal law a practice that is culturally rooted in particular groups of immigrants, was enacted without due consultation, at the parliamentary and political level, with the minority groups involved; and this may contribute to making them feel stigmatized and marginalized because of their cultural identity. According to other scholars, criminal sanctions may end up increasing the phenomenon of the clandestine practice of genital mutilation, making it much more risky and much less controlled than it would be through prevention, education and information. On the other hand, it is widely argued that this practice goes against important constitutional values and principles of Western countries, such as the rights to human dignity, to health and to gender equality.¹⁸²

The other relevant issue is that of wearing the burka in public. This issue has received much attention in the media, because a number of mayors of small towns in the north of Italy forbade the wearing of burkas in public places.¹⁸³ The opposition to burkas is mainly based on the legal arguments that they make the identification of persons difficult¹⁸⁴ and that they may cause security problems. The *Prefetto* of Treviso, however, in 2007 allowed the wearing of burkas in public places on the condition that, when required, identification is made possible; while the ordinance of

¹⁸¹ See on this T. Giacobelli 'La presenza islamica in Italia', on <http://www.bibliografie.net/giacobelli.htm>, accessed 17 April 2010.

On the other hand, in 2008, there was an attempt, by an MP of Lega Nord, at introducing temporary separate primary school classes for children of immigrants, based on the level of knowledge of the Italian language; children would have been admitted to ordinary classes upon having reached the same level as the Italian ones. Fortunately, the Bill, which could be regarded as discriminatory on grounds of race/nationality, but not on that of gender, was never presented. The Minister of Education, however, issued a note on 8 January 2010 that limits the presence of foreign children in primary and secondary school classes to 30 % of the total (see <http://www.istruzione.it/web/ministero/cs080110>, accessed 17 April 2010).

¹⁸² See on this issue: G. Brunelli 'Identità culturale e diritti: una prospettiva di genere', *Atti del Seminario "Cittadinanza, identità e diritti: il problema dell'Altro nella società cosmopolitica"*, Università di Roma La Sapienza, Facoltà di Giurisprudenza, (May 2008); A Guazzarotti *Giudici e minoranze religiose* Milano, Giuffrè 2001.

¹⁸³ See the ordinances of the Mayors of Drezzo (Como), Azzano Decimo (Pordenone), Montegrotto Terme (Padova), Codognè (Treviso), but also that of the Mayor of Treviso (2004), on: <http://mattinopadova.gelocal.it/dettaglio/montegrotto-terme-no-al-burqa-per-le-strade/1730640>, http://iltempo.ilsole24ore.com/interni_esteri/2009/10/01/1076140-tutti_copricapi_sono_solo_viso_scoperto.shtml, <http://www.ilmattino.it/articolo.php?id=95337>, http://www.padaniaoffice.org/pdf/amm_pubbliche/entitocali/Ordinanza Pubbl sicurezza.pdf, all accessed 17 April 2010.

¹⁸⁴ See Article 5 of Act No. 152/1975. The Home Office (*circolare* 14 March 1995 of General Direction of Civil Administration, and *circolare* 24 July 2000 of the Department of Public Security) authorizes the wearing of veils and similar in photographs on documents, provided that the face is uncovered (see http://iltempo.ilsole24ore.com/interni_esteri/2009/10/01/1076140-tutti_copricapi_sono_solo_viso_scoperto.shtml, accessed 17 April 2010).

the Mayor of Azzano Decimo prohibiting burkas in public was declared void by the *Prefetto* of Pordenone.¹⁸⁵ The issue of the burka is very controversial and the debate covers the most disparate opinions, even by members of the same political party: apart from the security/identification arguments, the main clash here is between freedom of religion, human dignity and gender equality. At least 4 Bills have been presented to Parliament on burkas: one was proposed by *Lega Nord*, considering the wearing of the burka in public places as a criminal offence punishable by imprisonment; another Bill was proposed by the MP of the *Popolo della Libertà* (PDL) Souad Sbai, prohibiting the wearing of burkas in public places or places open to the public; finally, the *Partito Democratico* presented two contradictory Bills to Parliament, one regarding the wearing of burkas in public as illegal and punishing it by a fine, and the other allowing the wearing of burkas in public places, provided that identification is made possible when required.¹⁸⁶

1.4 No issue?

See the above sections.

2. National approach

At the constitutional level, sex, religion and race are mentioned as part of the general equality clause contained in Article 3.

The situation, however, is quite complicated as far as the religion ground is concerned. In particular, the Constitution establishes that ‘All religious beliefs are equally free before the law’ (Article 8), and that all ‘shall be entitled to profess their religious beliefs freely in any form, individually or in association with others, to promote them, and to celebrate their rites in public or in private, provided that they are not offensive to public morality’ (Article 19). On the other hand, however, the Constitution states that ‘The State and the Catholic Church are both, each one within its own order, independent and sovereign’ (Article 7); the same Article establishes that the relationship between the State and the Catholic Church is regulated by the Lateran Treaty (*Patti lateranensi*) with the Holy See of 1929; some of the rules of the 1929 *Patti lateranensi* established privileges for the Catholic religion, which were difficult to harmonise with the Constitutional Chart.¹⁸⁷ With regard to religions other than the Catholic faith, the Constitution states that they can ‘organise themselves according to their own charters, provided that these are not in conflict with the Italian legal system’ and that their ‘relations with the State are regulated by the law on the basis of agreements with their representative bodies’ (Article 8), thus allowing for more favourable treatment for religious associations that have signed such

¹⁸⁵ See along the same lines a *circolare* of the Policy Department of December 2004, on http://iltempo.ilsole24ore.com/interni_esteri/2009/10/01/1076140-tutti_copricapi_sono_solo_visto_scoperto.shtml, accessed 17 April 2010.

¹⁸⁶ See the following websites: http://www.ilgiornale.it/interni/legalizziamo_burqa_italia_la_proposta_pd_fa_subito_flop/17-03-2010/articolo-id=430126-page=0-comments=1; http://www.unita.it/news/96872/burqa_cosa_dice_la_legge_in_italia_e_in_europa; http://www.asca.it/news-BURQA_PD_PRESENTA_PROPOSTA_LEGGE_PER_DIVIETO_NEI_LUOGHI_PUBBLICI-907068-ORA-.html; <http://www.ilsussidiario.net/Approfondimenti/Societa/2010/1/28/DIBATTITO-Sbai-il-burqa-discrimina-noi-donne-musulmane-e-non-c-entra-col-Corano/2/63892/>; <http://forum.politicainrete.net/radicali/1172-gli-articoli-di-emma-bonino-4.html>; http://www.corriere.it/cronache/09_ottobre_06/legge-divieto-burqa-poli-divisi_f3022400-b27b-11de-9355-00144f02aabc.shtml, all accessed 17 April 2010.

¹⁸⁷ The revised Lateran Treaty of 18 February 1984 (implemented by Act 25 March 1985, No. 121) and its protocols corrected the main inconsistencies with the Constitution.

agreements.¹⁸⁸ Religions that were not able to sign such agreements are still regulated by the 1929 act on ‘accepted cults’.¹⁸⁹ Within the scope of application of Directive 2000/78, it is therefore clear that employers enjoy wider discretion to refuse taking into consideration the specific needs related to a religion or belief when the employee concerned is a believer of a religion without agreement. The Islamic faith is one of the beliefs who were not able to sign an agreement: the lack of agreement with one of the largest religious communities of Italy is generally explained by the non-existence of unified representation of the Islamic communities.

2.1 Selected issues

2.1.1 Employment

This issue can be dealt with based on general anti-discrimination legislation. There are no specific provisions on headscarves or burkas or on the requirement to shake hands, neither in private nor in public employment.

In particular, the key legislative provisions in relation to religion and racial or ethnic origin are Legislative Decree No. 215/2003, which implemented Directive 2000/43/EC and Legislative Decree No. 216/2003, which implemented Directive 2000/78/EC.¹⁹⁰ The two Decrees basically follow the wording of the Directives. The Decrees, however, did not abolish the pre-existing anti-discrimination rules in the 1998 *Immigration Act* and in Article 15 of the *Workers’ Act* of 1970, nor did they unify them. They just added a further legal regime, and as a result we have now a rather confusing overlap of provisions.¹⁹¹

In relation to gender, the topical issues can be dealt with in the framework of Decree No. 198/2006, a consolidation Act called *Code of Equal Opportunities between Men and Women*, which combines all anti-discriminatory provisions regarding gender that were issued to implement EC directives or which already conformed with them.

Both the issues of the burka and the headscarf would most probably be interpreted as problems of freedom of religion or gender discrimination. It is difficult, however, to predict whether the religion or the gender-discriminatory aspects would prevail, as we have not had any cases so far. The headscarf is more likely to be tolerated at work than the burka, as it presents fewer problems as regards identification and safety and it is much more accepted by public opinion.

2.1.2 Goods and services

In relation to the access to and the supply of goods and services, segregated healthcare or social services grounded on gender can be dealt with based on Decree No. 196/2007, which implements Directive 2004/113/EC and adds ten articles to the Code of Equal Opportunities. The Decree literally repeats the text of the Directive. The material scope of the Decree is the same as that of the Directive. Article 1 of the Code of Equal Opportunities determines – as a general provision – the material scope

¹⁸⁸ Agreements have been signed with the Adventists, the Waldensian movement, the Jewish Communities, the Assemblies of God, the Baptist movement and the Lutheran Church.

¹⁸⁹ Act 24 June 1929, No. 1159, *Disposizioni sull’esercizio dei culti ammessi nello Stato e sul matrimonio celebrato davanti ai ministri dei culti medesimi*, published in OJ No. 164 of 16 July 1929.

¹⁹⁰ Legislative Decree 9 July 2003, No. 215, published in OJ No. 186 of 12 August 2003; Legislative Decree 9 July 2003, No. 216, published in OJ No. 187 of 13 August 2003.

¹⁹¹ Legislative Decree 25 July 1998, No. 286, published in OJ No. 191 of 18 August 1998, Ordinary Supplement No. 139. Act 20 May 1970, No. 300, published in OJ No. 131 of 27 May 1970.

of the Code, which expressly includes in the definition of gender discrimination all the differences of treatment which give rise to, or are aimed at, hampering the enforcement of fundamental rights in the political, economic, social, cultural and civil fields and in all other fields; but we lack any detailed provisions covering social protection or social benefits. For healthcare the situation is different, as the National Health Service expressly follows the principles of universal and equal care and its scope includes all the citizens and foreigners residing in Italy.¹⁹²

Decree No. 215/2003 (implementing Directive 2000/43/EC) can also be used in cases of discrimination grounded on religion/gender, as Article 1 states that its purpose is to lay down the provisions on the implementation of equal treatment between persons irrespective of racial or ethnic origin, also from a perspective which takes into consideration both the disparaging impact that these forms of discrimination can have on men and women and the existence of forms of racism based on cultural and religious reasons.

As far as we can find, we have no examples of legislation on segregated healthcare or social services for men and women linked to clients' religious beliefs.

2.2 Other issues

The other two issues that are topical in Italy, which are female genital mutilation and the wearing of burkas in public places, can be dealt with based on two pieces of legislation. Female genital mutilation is regulated by criminal law, i.e. Act 9 January 2006, No. 7, which stipulates prison sentences for those who cause genital mutilation. The Act also includes an attempt at organizing, through the Ministry of Equal Opportunities, programmes of information and prevention of this practice.¹⁹³

The wearing of burkas in public places is not yet regulated in Italy. The mayors of the towns who declared it illegal by issuing ordinances to that end, placed this subject under Article 5 of Act 22 May 1975, No. 152.¹⁹⁴ Article 5 states that it is forbidden to wear crash helmets or any other device that makes someone's identification difficult, in public places or places open to the public, without a justified reason. Offenders are sentenced to imprisonment of 1 to 2 years and paying a fine. However, we need to recall here that the *Prefetto* of Treviso and that of Pordenone declared void the mayors' ordinances based on this rule, recognizing the religious justification for this practice, on the condition that identification, when required, is made possible. On this issue, as we shall see further on, there also is some case law opposing the application of Article 5 to burkas.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

Our legislation does not explicitly provide for rules dealing with conflicting rights, neither at a material nor at a formal level.

A general Constitutional rule, which can be used in order to limit the employer's directive power, as regards dress codes for instance, is Article 41, Paragraph 2 of the Constitution: it states that any public or private economic activity has to be balanced with social aims, within which the workers' freedom and dignity can be encompassed (and thus the respect for individual religious rights). In particular, the protection of

¹⁹² Act No. 23 December 1978, N. 833, published in OJ No. 360 of 28 December 1978, and following legislation.

¹⁹³ Published in OJ No. 14 of 18 January 2006.

¹⁹⁴ Published in OJ 24 May 1975, No. 136.

workers' freedom and dignity is governed by Title I of the Workers' Act of 1970, which includes Article 8: this stipulates a prohibition for the employer to make inquiries, in relation to access to employment or during the working relationship, about workers' political and religious opinions and about other facts which are irrelevant to define their professional attitude. Some scholars find another restriction as regards dress codes in Article 2087 of the Civil Code, which imposes on the employer an obligation to take all the measures necessary to protect the workers' health and moral personality, and the respect for moral personality may encompass the right to wear religious clothing or to behave according to religious commandments.¹⁹⁵

Other rules that we believe may somehow be useful in prioritising conflicting rights are those on the exceptions to the principles of non-discrimination on grounds of religion or gender, such as the genuine and determining occupational requirement, or the legitimate aim and appropriate and necessary means as regards indirect discrimination.¹⁹⁶ Article 10 of Decree No. 276/2003 provides for an even wider occupational requirement exception clause in favour of private temporary employment agencies in relation to access to employment: it justifies exceptions to the equality principle when the discriminatory feature is 'a characteristic that concerns the carrying out of working activities'.

From this perspective, another relevant piece of legislation is Article 3.5 of Decree No. 216/2003, transposing Directive 2000/78, which establishes that 'differences in treatment based on religion or belief and enacted within churches and other public or private organisations, do not constitute discriminatory acts where, by reason of the nature of the particular occupational activity carried out by such entities or organisations or of the context in which they are carried out, such religion or belief constitutes a genuine, legitimate and justified occupational requirement' (ethos organizations). With arguments partly based on the existence of this legislative provision and on constitutional grounds, courts and scholars have granted a discretionary power to the employer on whether to hire or dismiss, or otherwise discriminate. The exceptions to the equal treatment principle as developed by case law are, however, more limited than those foreseen in the Decree transposing Directive 2000/78: any discretion is excluded when the duties of the individual worker have no actual link with the ideology of the organisation.¹⁹⁷ In the religious field, the limits of such discretionary power have been discussed primarily with regard to Catholic schools, as regards the contracts of teachers and other staff who were accused of not respecting the moral code of a Catholic institution (for example, requiring religious marriage rather than civil marriage, or legal rather than *de facto* families). For example, Catholic universities enjoy the discretion to hire or dismiss for reasons linked to the respect for the Catholic moral code.

Article 55bis of Decree No. 196/2007, implementing Directive 2004/113/EC, as regards the access and supply of goods and services, also provides for the exception to

¹⁹⁵ See on these issues M. Ranieri 'L'abbigliamento nei luoghi di lavoro: dalla tuta blu al velo usa e getta', *Working Paper Centro Studi di Diritto del Lavoro Europeo Massimo D'Antona, Università di Catania, Facoltà di Giurisprudenza*, No. 100 (2010), on http://www.lex.unict.it/eurolabor/ricerca/wp/it/ranieri_n100-2010it.pdf, accessed 17 April 2010.

¹⁹⁶ Articles 3.3 and 3.6 of Decree No. 216/2003, implementing Directive 2000/78/EC and Articles 3.3 and 3.4 of Decree No. 215/2003, implementing Directive 2000/43/EC; Articles 25.2 and 27.3,5,6 of Decree No. 198/2006, Code of Equal Opportunities.

¹⁹⁷ See *Cassazione* 16 May 1994, No. 5832, published in *Rivista Italiana di Diritto del Lavoro* II (1995) p. 381; *Cassazione* 8 July 1997, No. 6191, published in *Massimario Giurisprudenza del Lavoro* (1997) p. 887; *Cassazione* 6 November 2001, No. 13721, published in *Rivista Italiana di Diritto del Lavoro* II (2002) p. 633.

the gender equality principle for legitimate aims and appropriate and necessary means as regards both direct and indirect discrimination.

3.2 Conformity with EU law

The legislation mentioned above appears to be in accordance with the relevant EU legislation. The sole exception is Article 10 of Decree No. 276/2003, which provides for an occupational requirement clause as an exception to the equality principle that is wider than that authorized by EU anti-discriminatory legislation.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

Despite the fact that we have about 1 500 000 non-EU workers regularly employed and that many employers have dress codes which forbid women to wear headscarves at work, we do not have any case law on the issue. In 2003, for example, a woman was dismissed by a supermarket in the province of Bologna because during the month of Ramadan she had worn a chador at work.¹⁹⁸ As far as we know, however, this case never reached the courts. The main reasons for this silence are probably linked to the negative aspects confronting the victims: fear of adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment; difficulties and costs of legal proceedings; and loss of confidence caused by interiorising the stigma and the prejudices. Moreover, often the first generation of immigrants takes a certain level of inequality for granted.¹⁹⁹

4.1.2 Goods and services

We have no case law on the issue. However, as far as we know, there are no segregated healthcare or social services for men and women because of religiously inspired demands of clients.

4.2 Probable outcome of case law on selected issues

A dress code or any other employer's code prohibiting Islamic clothing or customs, which would put persons of one sex at a particular disadvantage compared to persons of the other sex, can be assessed both in terms of indirect gender discrimination and of indirect discrimination on ground of religion, according to our anti-discrimination legislation. The discrimination aspect would not apply if the employer manages to prove a genuine and determining occupational requirement or a legitimate aim and appropriate and necessary means, as regards indirect discrimination. For example, the employer could justify prohibition as regards religious clothing by invoking reasons of health and safety at work, reasons linked to the quality of the products or the necessity to wear a uniform in order to identify the link with the service offered by the company. In a religious school, the employer could justify the prohibition against teachers wearing headscarves with the religious objectives pursued by the institution,

¹⁹⁸ P. Bellocchi 'Pluralismo religioso, discriminazioni ideologiche e diritto del lavoro', *Argomenti di Diritto del Lavoro* (2003) p. 186.

¹⁹⁹ See on these issues I.-Leader, 'Glossario di termini sulla discriminazione e indicatori sulla discriminazione sul lavoro' (Ottobre 2005), on http://www.leadernodiscriminazione.eu/testi/Discriminazioni_Concetti_chiave.pdf, accessed 17 April 2010.

which is an ethos organization. At any rate, a balancing of rights should be achieved, also taking into account Article 41, Paragraph 2 of the Constitution and Title I and Article 8 of the Workers' Act, which require the respect for workers' freedom and dignity: thus, the prohibition of religious clothing for marketing reasons linked to the possible irritation of clients would probably not fall into any of the justification clauses allowed.²⁰⁰

The same goes for the access to and supply of goods and services. Here, the balancing of rights should also be based on the exception clauses to the principles of gender equality and of religious equality. Decency, for example, justifies separate health services between men and women, so we should analyse whether religious reasons could amount to decency arguments for women and men with a particular cultural background.

4.3 Case law on other relevant issues

A problem assessed in case law on several occasions is that of religious teachers in state schools as they must have an authorization from the bishop, which can be denied or cancelled if the person does not fully comply with the moral standards of a Catholic believer. As a consequence of this legislation, for example, *Cassazione 24 febbraio 2003*, No. 2803 accepted as valid a dismissal following the pregnancy of an unmarried female teacher of religion.²⁰¹

Thanks to the exception rule for ethos organizations (Article 3.5 of Decree No. 216/2003) and to the constitutional principles of Articles 19 (freedom of profession of religious beliefs) and 33 (freedom of teaching arts and sciences), as stated above, Catholic universities enjoy a discretion to hire or dismiss for reasons linked to the respect for the Catholic moral code. Indeed, this has been the subject of long and complex litigation: some cases reached the Constitutional Court and the Supreme Administrative Court and both courts decided in favour of the discretionary power of the institutions. This means that the conflict between individual and collective freedom of religion and of teaching arts and sciences, both constitutionally recognised, was solved in favour of the collective freedom.²⁰²

On the issue of the prohibition of burkas in public places, there is some case law opposing the application of Article 5 of Act No. 152/1975 to the issue. In particular, *TAR Friuli-Venezia Giulia Trieste, Sezione I* of 16 October 2006, No. 645 and *Consiglio di Stato, Sezione VI* of 19 June 2008, No. 3076 both confirmed the decision of the *Prefetto* of Pordenone, which had declared void the ordinance of the Mayor of Azzano Decimo on the prohibition of burkas in public places based on Article 5 of Act No. 152/1975. The *Consiglio di Stato* made it clear that burkas are not a means to

²⁰⁰ See on these issues M. Aimò 'Le discriminazioni basate sulla religione e sulle convinzioni personali' in: M. Barbera (ed.) *Il Nuovo diritto anti-discriminatorio* p. 54 Milano, Giuffrè 2007.

²⁰¹ The case was published in *Rivista Giuridica del Lavoro* II (2003) p. 520. The legal ground for such discretionary power lies in the revised Lateran Treaty of 18 February 1984 (implemented with Act 25 March 1985, No. 121) and its protocols and in Act 18 July 2003, No. 186, in OJ No. 170 of 24 July 2003. In case the authorisation is cancelled, the law includes, however, in Article 4, a system allowing the person – on certain conditions - to move to another employment within the educational system.

²⁰² See: *Corte Costituzionale* 29 December 1972, No. 195 (Cordero case), in *Foro Italiano* I (1973) p. 6; *TAR Lombardia* 26 October 2001, No. 7027, in *Quaderni di Diritto e politica Ecclesiastica* (2002) p. 806, confirmed by *Consiglio di Stato* 18 April 2005, No. 1762 (Vallauri case), in *Ius* (2005) p. 598. See on this issue also M. Manco 'La libertà dei docenti dell'Università Cattolica del sacro Cuore', on http://www.olir.it/areetematiche/73/documents/Manco_Vallauri.pdf, accessed 17 April 2010.

prevent personal identification without good reason, as the choice to wear a burka is either has cultural or religious reasons; the *Consiglio* stated that security requirements are satisfied by taking the burka off when required to allow identification and by its prohibition during demonstrations. In another case, the *Tribunale of Cremona* 27 November 2008 stated that the wearing of burkas in public places is allowed, provided that if required, identification is made possible.

5. Good practices/solutions

We have not yet developed a culture of good practices in general; even less so as regards conflicts between gender equality and religious freedom.

However, some scholars have suggested imposing on employers a type of obligation to take appropriate measures to avoid any disadvantages for groups of workers involved in conflicts such as these, i.e. to provide certain reasonable measures to accommodate the religious commitments of employees. In other words, employers could change their codes as regards clothing or timetables etc. For example, rather than shaking hands, a nod could be acceptable; special headscarves complying with production requirements could be designed; also, a disposable headscarf could be introduced in order to reconcile the firms' sanitary necessities with the religious traditions of the employees; and working hours could be organised in such a way as to allow employees to say their daily prayers.²⁰³

6. Further comments

I have no further comments.

LATVIA – Kristine Dupate

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

The general picture in Latvia regarding issues on Islamic women's rights differs from that of 'old' Member States. The main reasons are the different ethnic/religious composition of the population, different historical circumstances of formation of the Muslim community in Latvia and its own historical background.

The ethnic composition of the permanent residents of Latvia in 2009 constituted 59.3 % Latvians, 27.8 % Russians, 3.6 % Byelorussians, 2.5 % Ukrainians, 2.4 % Poles, 1.3 % Lithuanians, 0.4 % Jews, 0.4 % Roma, 0.2 % Germans and 0.1 % Estonians. The remaining 2 % belongs to other ethnicities which are not specified by official statistical data.²⁰⁴ The specified ethnic groups belong to the major religious organizations: Catholic, Lutheran and Orthodox. Muslims most likely may be part of the remaining 2 % of the population belonging to other ethnicities. For this part of the population, official statistics do not specify ethnic origin in detail. It follows that proportionately, the Muslim population of Latvia is very small. This fact is supported

²⁰³ M. Aimo 'Le discriminazioni basate sulla religione e sulle convinzioni personali' in: M. Barbera (ed.) *Il Nuovo diritto anti-discriminatorio* p. 54 Milano, Giuffrè 2007.

²⁰⁴ Central Statistical Bureau of Latvia: <http://data.csb.gov.lv/Dialog/varval.asp?ma=IE0170&ti=IE17%2E+PAST%C2V%CEGO+IEDZ%CEVOT%C2JU+NACION%C2LAIS+SAST%C2VS+GADA+S%C2KUM%C2&path=../DATABASE/Iedzoc/Ikgad%E7jie%20statistikas%20dati/Iedz%EEvot%E2ji/&lang=16>, accessed 14 April 2010.

by research on small minorities in Latvia.²⁰⁵ The author of the research has provided the following data. In 1996, the following numbers of persons with ethnic origin were thought to have a probable link with the Muslim religion: Tatars 3532, Azerbaijani 1709, Bashkir 312, Uzbek 328, Cossack 273, Chechens 107. The number of Muslim immigrants from Asia and Africa after the restoration of Latvia's independence presumably is exceptionally small due to the very restrictive immigration policy. Therefore, the Muslim minority in Latvia is formed by immigrants from the ex-Soviet Union Republics.

Due to the atheist policy in the Soviet Union, many Muslims along with other religions lost the greatest part of their traditions, including the wearing of traditional clothes. However, after the collapse of the Soviet Union, the activism of religious organisations, including Muslims, grew considerably. At the same time, the impact of religions on everyday life and the general population is to be considered as low.²⁰⁶

In 2008, 16 Muslim religious organizations were registered officially in Latvia.²⁰⁷

Due to the very small number of Muslims residing in Latvia there have been no public debates on their actual situation in Latvia in general. However, the lack of any public debates and legal regulations does not necessarily mean that this small Muslim community does not suffer from discrimination on the grounds of sex, ethnic origin and religion.

It should be taken into account that the aforementioned report is predominantly based on assumptions of the author and personal opinions of the members of the Muslim community. The author personally has not met anyone wearing Islamic headscarves or burkas in Riga, nor in companies or in the street, while women of the Muslim community claim that they wear headscarves but rarely the niqab in public places, including the workplace.²⁰⁸

1.2 Tension or conflicts: selected issues

1.2.1 Employment

Employers are not precluded explicitly by law from applying internal company rules regarding dress code and behaviour.²⁰⁹ Internal company rules are not publicly available, thus there is no information available on what kind of rules they impose on employees. Taking into account the very small number of Muslims in Latvia, most probably internal rules do not pay any attention to Islamic women's dress or the obligation to shake hands.

1.2.2 Goods and services

There are no legal provisions requiring or granting rights to segregated service provision. The author does not possess any information on whether such services are provided in practice.

²⁰⁵ V. Ščerbinskis *Entrance from afar*, available in Latvian on http://www.politika.lv/temas/sabiedribas_integracija/3973/, accessed 14 April 2010.

²⁰⁶ V. Ščerbinskis *Entrance from afar*, available in Latvian on http://www.politika.lv/temas/sabiedribas_integracija/3973/, accessed 14 April 2010.

²⁰⁷ Central Statistical Bureau of Latvia: <http://data.csb.gov.lv/Dialog/Saveshow.asp>, accessed 14 April 2010.

²⁰⁸ Interview with women from the Muslim community of Latvia on 16 April 2010.

²⁰⁹ *Labour Law*, OG No. 105 (6 July 2001).

1.3 Tension or conflicts: other issues

There is quite a high level of intolerance towards persons from Asia and Africa. International human rights organisations (the UN, the ODEC) have drawn the attention of the Latvian Government to the number of hate crimes committed on account of victims' race and/or ethnic origin which were qualified under criminal law as ordinary crimes without them being identified as discrimination. The Criminal Law²¹⁰ qualifies as hate crimes those crimes committed on the grounds of race, ethnic origin²¹¹ and religion.²¹² It is most probable that hate crimes in Latvia may be committed against immigrant women who look different plus because they wear traditional clothes.

1.4 No issue?

The issues of Islamic women's rights are not topical in Latvia because of the very small number of persons belonging to the Muslim community. The author assumed before having interviews with women from the Muslim community that it is most probable that Muslim women are afraid of claiming their rights (for example, to wear a headscarf at the workplace). Such a situation may be due to two reasons: first, the lack of information on their rights not to be discriminated against on the grounds of sex/gender/ethnic origin/religion and, second, due to the lack of effective remedies in discrimination cases.

The interviews with women from the Muslim community confirmed the author's assumptions. There have been cases where women wearing a headscarf at the workplace were respected by employers and colleagues. At the same time, there were more cases where women were not allowed to wear a headscarf or even worse. After they disclosed their religious conviction, their employers created working environments that were such that they did not allow performing their work normally, in other words women were subjected to mobbing and bossing around aimed at them terminating the employment relationship 'voluntarily'. Such cases have occurred even with regard to schoolteachers. In some schools, pupils have been prohibited from wearing headscarves.

One Muslim woman was attacked in the street because she was wearing a niqab. A man approached her and tried to tear the niqab off. She did not report this to the police.

The reasons why Muslim women who have suffered discrimination at the workplace and public places do not claim their rights coincide with those mentioned by the author: litigation is costly and stressful, and they lack belief in justice.²¹³ With regard to the lack of belief in justice, it is worth mentioning a case where a woman was denied daily guardianship over her child, which was then given to the father of the child. The true reason of the decision why the court took such a decision was stereotyping. The court was 'impressed' seeing the mother in the courtroom dressed in traditional Muslim clothes. The court even expressed concern about her coming to court in such 'strange' clothes.

²¹⁰ OG No.199/200 (8 July 1998).

²¹¹ Article 78.

²¹² Article 150.

²¹³ Interview with women from the Muslim community of Latvia on 16 April 2010.

2. National approach

2.1 Selected issues

The legal framework of Latvia protects persons for each discrimination ground separately.²¹⁴ Since there is no national case law on multiple discrimination on the grounds of gender/ethnic origin/religion, it is impossible to say anything about the practical application of the legal provisions.

2.2 Other issues

Criminal law defines a crime as hate crime if it is based on race, ethnic origin or religion. Consequently, if a woman became the victim of a hate crime because of wearing Islamic clothes, most probably this would not be considered as based on race, ethnic origin or religion but as an ordinary crime, because it is committed on the grounds that she wears 'strange clothes'.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

Latvian law does not provide for any regulations for the solution of conflicts of rights. Latvian law is limited to the resolution of conflicts of law with respect to their hierarchical position in the legal system.

3.2 Conformity with EU law

According to Point 14 of Directive 2000/43, Latvian law must be amended with respect to the definition of multiple discrimination allowing discrimination claims on the grounds of gender and ethnic origin.

4. Legal framework for deciding conflicts: case law

There is no case law of national courts or the Ombudsman office (equality body) on gender equality and freedom of religion.

4.2 Probable outcome of case law on selected issues

The most probable outcome in the employment sector would be that the requirement of a particular dress code or behaviour is a genuine and determining occupational requirement.

The most probable outcome with regard to access to and supply of goods and services in the private sector would be that each entrepreneur is allowed to organise service provision in a traditional way, i.e. in the way that is traditional and generally accepted in Latvia. In other words, since it is generally acceptable in Latvia (as a cultural tradition) that there is no special requirement of society in general to provide services separately, there will be no violation of rights. In the public sector, the most probable outcome would be that since Latvian legislation does not entitle anyone to special treatment on the grounds of gender/religion and civil servants may only act within the limits of normative legislation, there will be no violation of rights.

It is most likely that in cases like this, even the identification of indirect discrimination on one of the grounds which is justified would be very problematic.

²¹⁴ See for example, *Labour Law* OG No.105 (6 July 2001); *Law on the Protection of the Rights of Consumers*, OG No.104/105 (1 April 1999).

4.3 Case law on other relevant issues

There is no case law available on other relevant issues.

5. Good practices/solutions

There is no information available on good practices or solutions.

6. Further comments

No further comments.

LIECHTENSTEIN – *Nicole Mathé*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

According to my research work and information confirmed by the Office for Equal Opportunities²¹⁵ tension or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion are no real issue in Liechtenstein. Since there is no specific legal framework nor any legal literature and no case law at all concerning the topic, it is not possible to make any assessment of a probable outcome of case law on the selected issues.

Therefore the following questions cannot be answered as foreseen. Any hypothetical assumptions seem speculative and do not reflect the current situation in Liechtenstein.

1.2 Tension or conflicts: selected issues

This section is not applicable in Liechtenstein.

1.3 Tension or conflicts: other issues

This section is not applicable in Liechtenstein.

1.4 No issue?

The topic is not (yet) relevant in Liechtenstein and even the media hesitate to tackle the issue. Only very rarely, articles in the media, mainly inspired by the international discussion, cover e.g. girls wearing headscarves at school. Directives 2006/54/EC and 2004/113/EC are particularly relevant but have not yet been implemented in national law; this is planned for the coming year. Perhaps during this procedure a discussion will arise concerning the topic.

2. National approach

This section is not applicable in Liechtenstein.

3. Legal framework for deciding conflicts: legislation

This section is not applicable in Liechtenstein.

4. Legal framework for deciding conflicts: case law

This section is not applicable in Liechtenstein.

²¹⁵ Personal telephone conversation on 19 April 2010.

5. Good practices/solutions

This section is not applicable in Liechtenstein.

6. Further comments

I have no further comments.

LITHUANIA – Tomas Davulis

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

There have been no real tensions or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion in Lithuania.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

There are no tensions or conflicts regarding access to employment.

1.2.2 Goods and services

There are no tensions or conflicts regarding access to and supply of goods and services.

1.3 Tension or conflicts: other issues

There are no tensions or conflicts in other areas.

1.4 No issue?

Freedom of religion is guaranteed in Lithuania by the Constitution and by special laws. However, the non-existence of tensions or conflicts should be attributed to the homogeneity of Lithuanian society. Christianity clearly is the dominant religion, since 84 % of Lithuanians is Christian. The minorities are also mostly Christians (6.1 % of the population are Polish, 4.9 % are Russians and 1.1 % Byelorussians).²¹⁶ The Jewish minority constitutes only 0.1 %, Roma 0.1 % and Tatars also 0.1 %. The hypothetical tensions in employment may arise with regard to Roma people, but no religion would be involved here. During the Soviet regime, religious attitudes were strongly banned by the authorities. That is why the tradition of religiously inspired actions does not exist in current employment practices.

2. National approach

2.1 Selected issues

Legally speaking, if an employer prohibited the wearing of the headscarf, this would not be compatible with the principle of equal treatment (Section 2(1) No. 4 of the Labour Code,²¹⁷ Section 2 of the Equal Opportunities Act²¹⁸). Since both the Labour

²¹⁶ Lithuanian Statistics, available on <http://www.stat.gov.lt/lt/pages/view/?id=2420>, accessed 16 April 2010.

²¹⁷ State Gazette, 2002, no. 64-2624.

²¹⁸ State Gazette, 2008, no. 76-2998.

Code and the Equal Opportunities Act explicitly mention religion and belief as prohibited grounds of discrimination, it looks as if such a prohibition would be treated as direct discrimination on the ground of religion. However, these norms have not been applied in practice yet, even in similar situations.

2.1.1 Employment

On 18 July 2008, the Lithuanian Parliament adopted the new version of the Equal Opportunities Act, which deals with the transposition of the EU equality directives. The new version of the Act established the new scope of application with regard to discrimination on the ground of religion or belief. In particular, the provisions of Section 3 Nos 2-8 of the Act exclude from the scope of application of the non-discrimination principle all enterprises, institutions and other bodies whose ethos is based on religion or belief, and a difference of treatment based on a person's religion or belief shall not constitute discrimination 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 (Section 4(2) of the Directive). Officially, the legislator took the position that such a list of exceptions with regard to religion is in conformity with the Directive, since the latter allows taking into consideration the particularities of activities of religious organizations. However, Section 4(2) of the Directive stresses certain practices existing on the day of adoption of the Directive, but these discriminatory practices were not so widely allowed or exercised in Lithuania.

2.1.2 Goods and services

No facts are available on this issue. The above-mentioned principle of non-discrimination would apply.

2.2 Other issues

The first case involving a question of discrimination based on ethnic origin in employment reached the court only in 2008. The Court of the First Instance in Vilnius announced its decision on 30 June 2008 in the landmark case on the discrimination against an employee of Roma origin (Case No. 2-1189-545/2008). The café that had refused to employ the candidate based on her Roma origin was ordered to pay her the minimum wage for the period from the day of unlawful refusal to employ until the day of her actual employment by another employer, plus compensation of non-material damages. This decision of the Court confirmed that complaints arising from discriminatory refusal to employ are to follow the procedure established by Section 96 of the Labour Code. The general principle of non-discrimination (Section 2(1) No. 4 of the Labour Code) was also mentioned here, as was the Equal Opportunities Act which explicitly prohibits discrimination on the grounds of ethnic origin. In the event that the refusal to employ is established by the court to be unlawful, the employer must be obligated by court order to employ this person and to pay her/him compensation in the amount of the minimum wage for the period from the day of refusal to employ to the day of the execution of the court order (Section 96 Labour Code). In this particular case, the Court awarded compensation of non-material damages suffered by the victim of discrimination in the amount of EUR 580 (LTL 2 000). The question of possible indirect discrimination was not raised in these proceedings.

3. Legal framework for deciding conflicts: legislation

No legislation exists stipulating how to decide potential conflicts between gender equality and freedom of religion/non-discrimination on the ground of religion.

3.1 Rules for dealing with conflicting rights

There is no legislation that explicitly provides for rules, including procedural rules, which prioritise any of the conflicting rights or help to solve the conflict of rights. The legislation remains silent on what to do if the rights that are the subject of this report are in conflict.

3.2 Conformity with EU law

The legislation that defines the exceptions to the principle of equal treatment for religious organizations does not meet the requirements of Section 4(2) of Directive 2000/78/EC.

The practical (non)application of the equality legislation is a common problem of the transposition of EC equality directives.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

There is no case law on these issues

4.2 Probable outcome of case law on selected issues

Since the legislator gives no instructions, courts would employ the principles established by the Constitutional Court. First of all, the Court underlines the interdependence of the freedom of religion and other constitutional rights, and the right to non-discrimination was the first to be mentioned of these rights.²¹⁹ The exercise of this right must not limit the rights of other individuals.

In many rulings, when dealing with conflicting constitutional values, the Constitutional Court tries to find the right balance. There is a general opinion that any restriction of the consolidated right of the individual must pursue a legitimate objective and must be appropriate (suitable and necessary measure) and proportionate. However, the Court does not differentiate between restrictions supported by public interests and private interests, or between restrictions imposed by statutes and contracts. Furthermore, there is no indication on whether the right to freedom of religion (Sections 26, 27 of the Constitution) will be ranked differently compared to the principle of non-discrimination in employment. The latter is consolidated in the Labour Code and the Equal Opportunities Act, but is still considered as having been derived from Section 29 of the Constitution where religion is also mentioned among other prohibited grounds of discrimination.

In public employment, restrictions on the freedom of religion would be much more acceptable for the courts because of the vague notion of public interest. Stating that the 'legal norms (...) must not create legal preconditions to coerce persons into adopting or professing any religion or faith',²²⁰ the Constitutional Court cancelled the possibilities of religious organisations to influence the recruitment of staff in state and municipal schools. At the time, the question concerned teachers of non-religion

²¹⁹ Ruling of 13 June 2000 of the Constitutional Court of the Republic of Lithuania, available on <http://www.lrkt.lt/dokumentai/2000/r000613.htm>, accessed 15 April 2010.

²²⁰ Ruling of 13 June 2000 of the Constitutional Court of the Republic of Lithuania, available on <http://www.lrkt.lt/dokumentai/2000/r000613.htm>, accessed 15 April 2010.

courses in state and municipal schools. The question of what kind of restrictions would be allowed today remains unanswered.

4.3 Case law on other relevant issues

There is no case law on other relevant issues.

5. Good practices/solutions

I do not know of any good practices/solutions.

6. Further comments

I have no further comments.

LUXEMBOURG – *Anik Raskin*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Luxembourg has a high percentage of foreigners. About 43 % of its inhabitants do not have the Luxembourg nationality. The majority of foreigners are Catholic.

Luxembourg is a secular State, but the State does support some religious institutions. This support is materialized by a convention signed by the Government and the religious institution concerned. Currently, the State recognises Roman Catholicism, Judaism, Greek and Russian Orthodox Christianity and Protestantism as officially mandated religions. The State is in negotiation with Islam regarding the same status.

As it is illegal to collect statistics on religious beliefs or practices, one has to rely on estimates regarding the percentages of the different religious communities. According to the CIA Factbook, about 87 % of the population is Roman Catholic. The remaining 13 % are Protestants, Eastern Orthodox Christians, Jews, Muslims or atheists.

Until now, there has been no real public debate on possible or existing conflicts between gender equality and the freedom of religion. Papers do report on the debates which take place in other countries, such as France or Germany. NGOs sometimes address the subject also.

1.2 Tension or conflicts: selected issues

This section is not applicable in Luxembourg.

1.3 Tension or conflicts: other issues

This section is not applicable in Luxembourg.

1.4 No issue?

Nearly all religious inhabitants are Christians. The topical issues that this report focuses on could appear regarding Muslim rules. The Muslim community in Luxembourg grew during the Balkan war, because war victims were offered shelter in Luxembourg and part of them stayed in Luxembourg, conforming to immigration legislation. Nowadays, it is said that the Muslim community is growing mainly because of conversion.

One can assume that conflicts will arise when the community becomes more representative and will start trying to claim its rights.

Another possible explanation could be that the material situation in Luxembourg has been very high until now. Conflicts often appear in socially critical circumstances.

2. National approach

2.1 Selected issues

2.1.1 Employment

Regarding access to employment, a difference in treatment based on a characteristic related to sex or religion does not constitute discrimination within the meaning of the law when, because of the nature of the particular activities concerned or their framework, such a characteristic constitutes an essential and determining professional requirement. The objective has to be legitimate and the requirement proportional. The law explicitly provides for an exception regarding religious groups in the area of employment.

2.1.2 Goods and services

Discrimination between women and men is prohibited in the access to and the supply of goods and services which are available to the public and which are offered outside the area of private and family life. This also applies regarding discrimination on the ground of religion. But this prohibition does not apply to the content of media and advertising or to education regarding gender.

The Government has announced an adaptation of the legal frame on gender discrimination in order to create the same protection regardless of the ground of discrimination. No Bill has been presented to Parliament until now.

2.2 Other issues

This section is not applicable in Luxembourg.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The legislation does not explicitly provide for rules which prioritize any of the conflicting rights that are the subject of this report nor for procedural rules. The national equality body has no rules regarding this topic either.

3.2 Conformity with EU law

Luxembourg law complies with EU law. It even goes beyond it, as the fields of education and media were included by the implementing law of Directive 2000/78/EC.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

This section is not applicable in Luxembourg.

4.2 Probable outcome of case law on selected issues

As there is no real debate about these issues in Luxembourg, it seems difficult to presume what the outcome could be. Regarding dress codes, there are city policy rules which prohibit covering the face because of security reasons. This could be a source of conflict, but it has not been until now.

There are also Catholic nuns and priests who work as teachers in private schools. These schools have financial support of the State and they teach the same official programme as public schools. If ever a conflict would appear regarding Islamic dress code, the fact that the Catholic dress code is allowed would have to be questioned as well. This partly also applies to social and health services where Catholic nuns work.

4.3 Case law on other relevant issues

This section is not applicable in Luxembourg.

5. Good practices/solutions

This section is not applicable in Luxembourg.

6. Further comments

Even if Luxembourg is a secular State, religion is very present and the Roman Catholic institutions do influence the public debate.

As mentioned in 1.1, the State supports religious institutions. In order to get this financial support, the religious institution concerned and the Government sign a 'convention' containing practical rules regarding the financial aspects and also arrangements aiming at respect for the secular State. In the frame of the negotiations regarding a possible convention with Islam, the general opinion seems to be in favour of such a convention, on the condition that it includes a specific provision regarding 'respect for human rights'. This expression could include dress code and code of conduct.

FYR of MACEDONIA – *Mirjana Najcevska*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

From the formal (legislation) perspective, there are no tensions or conflicts between gender equality and the freedom of religion. As Islam has been present in Macedonia for centuries and the Muslim community represents more than 35 % of the population, the tolerance toward Muslim customs is well developed and specific recognition of the particular requirements connected with Muslim women is present. There has only been one bigger (and publicly visible) case where several Albanian women (of the Islamic religion) were exposed to inappropriate behaviour during police action in the village of Sopot (which is a case of interest of the Standing Commission on human rights of the Parliament). The symbols of Islam (special clothing of women) were not very widely spread in socialist days. Usually, Muslim women who wore a headscarf or burka lived in isolated surroundings in the villages and had very rare contacts concerning goods and services. The social and health services have never been restrictive on the basis of religion.

1.2 Tension or conflicts: selected issues

In practice, so far, there are no publicly known cases on the issue of access to and supply of goods and services. The one case where a secondary school student was forbidden to attend the lessons because she wore a headscarf, ended with the removal of the director of the school and allowing the wearing of the headscarf.²²¹

Specific demands are only made regarding the sex of gynaecologists. Muslim women prefer female gynaecologists.

1.2.1 Employment

This section is not applicable in the FYR of Macedonia.

1.2.2 Goods and services

This section is not applicable in the FYR of Macedonia..

1.3 Tension or conflicts: other issues

The so-called 'religious rule' not to marry a person of non-Muslim religion applied to both male and female Muslims. However, family pressure on women was and is much stronger than it is on male Muslims. The outcome is that Muslim women are denied the right of their own choice concerning their matrimonial partner.

The development in the direction of factual co-existence instead of integrated life of the Christian and Muslim community in Macedonia put this issue aside, since there is a significant decrease in mixed marriages.

1.4 No issue?

The issue is not applicable, due to:

1. the large Muslim community whose members belong to different ethnic groups;
2. the multi-confessional society (with 23 officially registered religious communities and religious groups);
3. long-lasting joint existence and well-developed tolerance and recognition; and
4. 50 years of socialism that contributed toward weakening of religious conflicts.

2. National approach

2.1 Selected issues

2.1.1 Employment

There are no prohibitions in national laws. There are no such requirements in any legal Act.

2.1.2 Goods and services

There are no legal provisions on the possible supply of segregated healthcare services for men and women. Such demands are only made in some cases in practice regarding the choice of gynaecologists.

There are no segregated social services.

Still, in some of the bylaw regulations there are explanations which go beyond the law. For example, the Regulations of the Ministry of the Interior from 2007 on the

²²¹ This was a decision of the Mayor of the municipality. After the reaction of the Ministry of Education, the Mayor returned, and wearing a headscarf was still allowed:
http://www.bbc.co.uk/macedonian/news/story/2009/02/090209_shamii09.shtml;
<http://www.islamski-centar.org/forum/showthread.php?t=1724&page=3>, accessed 1 April 2010.

application for ID cards prescribed that in the picture for ID cards, passports or driving licenses, the person should not have any material on the head.²²² In practice, Muslim women were usually asked to have pictures taken without headscarf. Concerning this issue, several claims were submitted by the Islamic community²²³ with the Ombudsman office. Under the pressure of public opinion, the Regulations were changed and photographs for ID cards could be taken with headscarf.²²⁴

2.2 Other issues

Legally, sex/gender discrimination, discrimination on the ground of racial or ethnic origin and discrimination on the ground of religion are prohibited and there are formal procedures to start a case on the basis of discrimination on any of these grounds.

In practice, there is a very peculiar situation regarding the freedom of religion: according to the Law on the legal position of the church, religious communities and religious groups²²⁵ for one religion, only one religious community can be officially registered. This has created a problem for the registration of the Serbian Orthodox Church, the separate Macedonian Orthodox Church and the Beacteshy Religious Community.

In practice, discrimination on the ground of sex/gender is very much present in everyday life. However, it is not tackled by any real proactive state policy. The promotion of the patriarchal model and religious values by the right-oriented Government has worsened the position of women compared to previous decades. Women are losing their place in politics (for example: among the 84 mayors in the municipalities, there is not a single woman) and they are mainly associated with the care for family and children.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The legislation does not provide for rules which prioritize any of the conflicting rights that are the subject of this report, or for procedural rules to decide cases or in any other way for rules on how to balance the conflicting rights that are the subject of this report.

The legislation is absolutely silent on what to do if the rights that are the subject of this report conflict.

3.2 Conformity with EU law

The legislation mostly complies with the relevant EU law.

In the new Law on prevention of and protection from discrimination,²²⁶ there is a small number of exceptions, such as: absence of sexual orientation from the possible grounds for discrimination, shifting of the burden of proof only for cases before civil

²²² <http://www.mvr.gov.mk/Uploads/izmenuvanje%20i%20dopolnuvanje%20na%20pravilnikot%20za%20obrasnite%20na%20patnite%20ispravi%20i%20vizi.pdf>, accessed 19 April 2010.

²²³ <http://www.utrinski.com.mk/?ItemID=48E0B72C916FD640A309C05CBF82953B>; <http://www.nvoinfoentar.org.mk/event.asp?site=nvo&menu=&lang=mak&id=858>, accessed 1 December 2010.

²²⁴ <http://www.mvr.gov.mk/Uploads/izmenuvanje%20i%20dopolnuvanje%20na%20pravilnikot%20za%20obrasnite%20na%20patnite%20ispravi%20i%20vizi.pdf>; <http://www.utrinski.com.mk/?ItemID=3B91441FA67C8247B5201EB42945C323>, accessed 1 December 2010.

²²⁵ Official Gazette No. 113/2007.

²²⁶ Official Gazette No. 50/2010.

courts, and a lack of easily accessible mechanisms for protection of the victims of discrimination.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

There is no case law on these issues.

4.2 Probable outcome of case law on selected issues

This section is not applicable in the FYR of Macedonia.

4.3 Case law on other relevant issues

The Law on prevention of and protection from discrimination entered into force on 20 April 2010 and it will be implemented on 1 January 2011.

So far, there have not been any cases of discrimination on any ground.

5. Good practices/solutions

In the mid-nineties, the Turkish private school ‘Jahja Kemal’ requested approval for opening a secondary school in Macedonia for boys only, based on religious reasons. The approval was not granted, on the basis of sex discrimination. The applicant reapplied for a mixed school. This seems to be a viable solution for all fields of services.

After the headscarf case in the secondary school described above, there have not been any situations where students were forbidden to wear a headscarf. At university faculties, there are many students who wear a headscarf and this has caused neither formal nor practical problems.

6. Further comments

Most probably, in the past, the overall atmosphere of ‘religion as part of private life’ created the proper conditions for self-restriction on the part of the Muslim community regarding requesting religious rules to be respected in public life. This includes the issue of identification: there are no records of any requests for wearing a headscarf or burka in the process of issuance of identification documents or in the process of identification as such.

Furthermore, wearing a headscarf or burka in public was treated as an obsolete and somewhat shameful custom, meaning that this cluster of problems was dealt with on the level of public opinion and not as a legal issue. The transitional period involved reconsideration of many issues, including certain regress in the area of wearing headscarves or burkas.

MALTA – *Peter G. Xuereb*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Tensions or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion have not become manifest in the sense of activating legal procedures. There are no court judgments that bear on the issue of

possible conflict between gender equality and freedom of religion. The Maltese Constitution protects freedom of religion, as also does the European Convention Act of 1988, which incorporated the European Convention for the Protection of Human rights and Fundamental Freedoms of 1950, just as they protect the principle of equal rights of men and women. Matters involving religion are likely to be treated as discrimination on grounds of religion, rather than sex. For example, the public discussion, such as there has been in relation to an Italian case before the European Court of Human rights on the display of the crucifix in Italian classrooms, and on the question of the wearing of the hijab in France or Belgium, has focused on the religious aspect. The burka is never seen, presumably due to the nature of the Muslims in Malta or out of choice on the part of Muslims here. It is impossible to know, in the absence of complaints or legal actions being brought whether the wearing of religious clothing has been an issue. For example, there is no documented instance of a woman wearing a hijab being refused employment on that ground, nor have allegations been recorded by the National Commission for the Promotion of Equality (the national equality body, henceforth NCPE). Should such a case arise, the ground on which it would be treated would most likely be the ground of religious discrimination rather than sex discrimination in the case of a Maltese Muslim, but might well be treated as a racial issue in other cases. It might however be that in a religion-conscious society such as ours the aspect of religion would overshadow any other possible ground. Of course, there may well be multiple grounds at work in such a case (the hijab could be an excuse for ethnic and/or sex discrimination) and it is difficult to say that a court or tribunal is likely to fasten on the religious aspect rather than the grounds of race or sex. The issue of religious discrimination is often associated with racial issues. The annual reports²²⁷ issued by the NCPE appear to conflate religion with race, containing no separate section on religion, but this may simply be because no case has arisen calling for any need to prioritise or categorise precisely.

Another point is that many Maltese-born Muslims either do not display their religion or restrict themselves to the hijab, which in social terms goes without comment (at least) in the more civilised and politically correct circles. Immigrant Muslims, once released from detention, soon adapt, mostly out of choice, to Western dress, especially if they are seeking employment and are able to afford to buy western clothes. This is not to say that many are successful in finding proper employment.

My conclusion is that if there are serious tensions between gender equality and the freedom of religion, they are not manifest. There are no court judgments that can cast light on the question. Nor would any complaints appear to have been lodged with the NCPE. It is most likely that various grounds of discrimination will combine. The Maltese are officially 95 % Catholic. But there are signs that faith in general has declined, and may not go so deep as the official figures indicate in any case. It may even be that religious discrimination can be regarded as institutionalised. Subconscious fear and discriminatory thinking is perhaps even part of the culture and may even be to some extent present within the main social institutions. In the collective memory in historical terms, and therefore in the national psyche, the 'Arab' (a vague term denoting a deeper skin colour than that of the Maltese combined with adherence to Islam) is still feared and perceived as a threat by many.

²²⁷ Available on www.equality.gov.mt, accessed 16 April 2010.

1.2 Tension or conflicts: selected issues

It would appear at this stage that there are no considerable tensions or conflicts, but I will comment briefly nevertheless.

1.2.1 Employment

There is no hard evidence (cases or official complaints) of problems having arisen because of any requirement to respect dress codes, more specifically dress codes prohibiting Islamic women's dress such as headscarves or burqahs in private or public employment.

The amended Employment and Industrial Relations Act of 2002²²⁸ does prohibit discrimination in employment on the basis of religion or religious belief, as well as on the basis of sex. However, some NGO workers will tell you that women wearing Muslim headaddress will have trouble finding employment. Dress, as well as colour, are the indicia of different ethnic origin (as well as of religious affiliation), so that a mix of religious and racial discrimination would be involved, and quite possibly be combined with sex discrimination. There are no hard comprehensive empirical studies on this score. There is no evidence of problems having arisen because of any requirement to shake hands regardless of sex in private or public employment.

1.2.2 Goods and services

There is no hard evidence of any problem arising in the supply of segregated healthcare services for men and women because of religiously inspired demands of clients. I am informed that immigrant women regularly ask to be treated by a female doctor and female attendants and that, as there is no shortage of female doctors and nurses, their request is in fact anticipated or invariably complied with. I am also informed that such a patient would not be involved in teaching sessions where male professors and medical students were present.

There is no record of any legal action or official complaint being made in relation to the supply of segregated social services for men and women because of religiously inspired demands of clients (e.g. separate language and integration courses for immigrants or separate social counselling for ethnic minorities).

Going beyond these two types of cases, while there is no hard evidence from case law, a Eurobarometer survey of 2008²²⁹ showed that 13 % of the Maltese believed that religious discrimination in the supply of goods and services is common.²³⁰ It has been said, probably rightly, that while instances of religious discrimination are not directly evident, it may be the case that differential treatment on the basis of religion may well be to some degree part of the embedded culture and carried forward into the unofficial workings of the institutions.²³¹

²²⁸ Chapter 452 of the Laws of Malta and the Equal Treatment in Employment Regulations of 2004, made under the 2002 Act, (Legal Notice 461 of 2004, as amended. Henceforth referred to as the ETE Regulations of 2004). Websites: The Laws of Malta (Acts of Parliament) can be accessed on http://www2.justice.gov.mt/lom/chronological_index.asp while subsidiary legislation (Regulations) can be accessed on <http://www.doi.gov.mt/EN/bills>, accessed 18 April 2010.

²²⁹ Eurobarometer, *Discrimination in the European Union*, 2008.

²³⁰ A. Abela *Values of Women and Men in the Maltese Islands: A Comparative European Perspective*, Commission for the advancement of Women, Ministry for Social Policy, Malta (2000).

²³¹ *Research Report, Voice for All*, National Commission for the Promotion of Equality, ISBN 978-99909-89-33-5.

1.3 Tension or conflicts: other issues

An inverse problem faced by many Maltese women is the culture that undoubtedly places pressure upon them to stay at home and look after the family rather than seek employment or a career, at least after childbirth.²³² The Catholic Church is often blamed for encouraging, indeed allegedly demanding, this philosophy and practice from women. There have been two recent allegations, which attracted the attention of the press due to the high profiles both of the employer and the employee in one case, and that could yet come to Court, where women claimed that they were dismissed on account of their pregnancy. The relevance here is that there is a culture that prevails among many (mostly male) employers that demands the full loyalty of employees, both male and female (and which the latter are prepared to give) but who see pregnancy as disloyalty. Again the perception here may well be that it is not only culturally correct, but also dictated by religious tenets, for the woman to focus on the family, so that the presumption is that a Maltese mother will, also on 'religious' grounds, focus far more on family than on work. Here we have a hard-to-define mix of sex discrimination with strong 'religious' connotations, in my view.

Why should a Catholic mother in Malta not feel free to comply with her Catholic conscience as to family duties and still have equal access to and retention of employment? Now this really is a serious problem for the Maltese working mother or mother-to-be. Equally, a mother-to-be or mother should be able to invoke the Church's teachings *in support of better* (such as a longer period of maternity leave) rights for pregnant mothers, mothers who have recently given birth, and women with family responsibilities, as this enables them to fulfil their obligations 'as wives and mothers' (linked to her partner's cooperation and his taking his share of the burden and enforcing his rights to leave and so on). It is only in the last few years that the 'either you work or you have a family, and if you have a family you should not work' culture has started to change, and this among those under 35 years of age, as it becomes clear that the modern costs of living, and the national economy, require women to work, and government policy has shifted in this direction. This has heralded a shift to the lessening or reformulation of the religious influence and the categorising of this issue fundamentally as an issue of sex discrimination, with the Church lending support to better measures to enable women to balance work and family responsibilities, as is happening already.

Another hidden issue regarding maternity leave is that, while Muslims tend to keep a low profile (or have been forced to keep one), one Muslim collaborator at the university has argued during the course of a project of which I was coordinator that Muslim women are in duty bound to breastfeed for two years and should therefore have the right to (unpaid) leave for up to two years after childbirth.

1.4 No issue?

It is not that there are no issues, therefore, but as far as immigrants are concerned, the matters referred to are not a 'considerable' issue at this time (although serious for any victim) for a number of reasons, although they may become so in the near future. Malta has only recently become an immigration country. It is only for the last few years that we have seen significant immigration from countries where there are Muslim majorities or minorities, and this appears to be slowing down considerably. Integration into Maltese society after release from detention is a very recent and slow process in the absence of any true integration policy, and many irregular immigrants

²³² See in general S. Rizzo, *The Dual Worker Family in Malta*, Centre for Labour Studies (2006).

return or are returned to their countries of origin. In any case, a large number of irregular immigrants are not Muslim, and are often of the Christian faith, so that any discrimination would then be largely on the basis of race, or a mix of race and sex, and rooted in fear of the growing numbers of persons of different racial or ethnic origin on a small and otherwise rather European island.

Furthermore, the phenomenon of illegal immigration is very largely a male phenomenon, as the hazardous sea crossing across the Mediterranean in unsafe boats is very rarely attempted by women. There are a small number of women among the immigrants (around 12 %), and sometimes these are accompanied by husband and children, and in a few cases give birth after arrival.

One other factor worth mentioning is that it is only recently, in April 2007, that other grounds of discrimination were added to the brief of the NCPE. However, religion is not one of them, and for the NCPE to become involved the complaint would need to be made on the ground of sex or racial or ethnic origin.

It is also the case that several of the immigrant women who are released from detention (for which there is an 18-month limit) and then asked to leave the open centres (which cater for their transition into society for a period of one year) end up in prostitution (general clientele or one client, mostly also of immigrant origin), but there is no official information as to whether this is because of inability to secure employment due to discrimination (or on which ground) as opposed to other reasons such as lack of qualifications or, even, their own choice.

2. National approach

2.1 Selected issues

2.1.1 Employment

Any requirement to respect dress codes, more specifically dress codes prohibiting Islamic women's dress such as headscarves or burkas in private or public employment as well as any requirement to shake hands regardless of sex in private or public employment would in my view be framed as discrimination on grounds of religion (rather than sex) if a Maltese were involved but most probably on the ground of race if a non-Maltese (say an immigrant) were involved. This assumes that one single ground needs to be fastened upon for the purposes of the bringing of proceedings. However, we have had no cases on these matters and a court or tribunal might well be persuaded to approach the case on a gender basis, or perhaps on multiple grounds. The wearing of Islamic dress is common in schools, and all other educational establishments including the university, as well as (though perhaps less so) in public and private places of employment, entertainment and so on. I am of the opinion that any attempt to openly prohibit such dress (hijab) would, if attacked, probably be considered for unlawfulness or otherwise on the ground of religious discrimination rather than on any other possible ground, including sex. With regard to handshaking, I know of no circumstance in which such has been required of a Muslim woman in circumstances affecting her employment or access to goods and services. In my view any such requirement would equally be treated, most likely, as discrimination on grounds of religion rather than sex.

2.1.2 Goods and services

Any difficulty in the area of supply of segregated healthcare services for men and women because of religiously inspired demands of clients would in my view be

regarded as based on religion in a case involving a Maltese or European victim but on race in other cases.

Any difficulty in the area of supply of segregated social services for men and women because of religiously inspired demands of clients (e.g. separate language and integration courses for immigrants or separate social counselling for ethnic minorities) would in my view be based on religion for a Maltese but on race in other cases.

2.2 Other issues

There is no doubt that the secular authorities would today frame the non-employment or dismissal of a woman on grounds of pregnancy as discrimination on grounds of sex. The Employment and Industrial Relations Act of 2002 (Chapter 452 of the Laws of Malta) clearly frames it thus. Unfortunately, the law was not so clear before this Act. However, the Act is clear and the relevant provisions were inspired directly by the need to implement the relevant EU directives. This can be seen as one example of over-riding national needs, namely joining the European Union, dictating the passage of legislation to which there was and still is a measure of cultural (religion-aided) resistance. It might explain how some employers have not assimilated the women's rights message and still think in terms of women's duties, feeling that rights are on their side even when they breach certain fundamental women's rights.

Some Muslims in Malta would certainly frame the lack of segregated facilities in restaurants, gyms and other place of leisure and entertainment as offending their freedom of religion. Maltese law does not cater for this sentiment at all. This is not a topical (high profile) issue, admittedly, but that is not to say it is not a hidden one. Our Muslims simply live with it.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The legislation, whether the Employment and Industrial Relations Act of 2002 or the Equal Treatment in Employment Regulations of 2004, is silent on what to do if the rights that are the subject of this report conflict. However, fundamental rights are sacrosanct under the Constitution of Malta. It is inconceivable that any commercial or industrial or other interest of, say, an employer could trump any fundamental right.

3.2 Conformity with EU law

The Constitution of Malta is in perfect synchrony with EU law in the widest sense, including general principles of EU law and the Charter of Fundamental Rights, as well of course as the European Convention for the Protection of Human rights and Fundamental Freedoms of the Council of Europe. In the broadest sense, Maltese law reflects the dictates of these sources of law and our courts will be guided by these sources.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

There is neither court case law nor published decisions of the equality body dealing with the question of how conflicts between the rights at issue should be resolved.

4.2 Probable outcome of case law on selected issues

For reasons given above, my view at the present times is that, in an employment context, if the victim is Maltese, or otherwise white, the matter will be categorised as religious discrimination, whereas in cases involving a non-Maltese, non-white victim, the matter will probably be categorised as a racial discrimination issue. Fundamental rights will be given priority as per the Constitution and Malta's obligations under EU law and the European Convention. It is not possible to speculate precisely on outcomes in particular cases, but the context may matter and it is possible that the margin of appreciation permitted any State would influence the outcome in what is officially a Catholic country with a measure of 'constitutional preference or privilege' accorded the Roman Catholic religion.

4.3 Case law on other relevant issues

There is no case law at present.

5. Good practices/solutions

The NCPE has worked hard to promote diversity training in Maltese enterprises and other spheres. Diversity management has been the subject of various initiatives. The Voice for All Project identified a number of good practices. One of the most important is good diversity education in schools and then good diversity training in all workplaces. Clear, positive messages about the value of diversity are a key tool to be used in all spheres. This must be supplemented by a zero tolerance attitude to discrimination or hate speech everywhere but especially and vitally in the school or work environment. Religious groups have also been actively reinforcing the teaching of their religions as to the need to have respect for those of other faiths, insofar as they need any prompting to do so. Prevention through a publicised zero tolerance approach, accompanied by good training for supervisors, followed by swift managerial action against offenders but also against lax enforcers such as teachers (schools) and supervisors (shop floor) is a far better focus. If these fail, an equality body should be available, and this for all grounds of discrimination, including religious discrimination.

6. Further comments

No further comments.

THE NETHERLANDS – *Rikki Holtmaat*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Tensions or conflicts between gender equality and the freedom of religion and/or the principle of non-discrimination on grounds of religion is an important (and much debated) issue in the Netherlands. Although other religions are sometimes at stake, the topic is highly related to the increase in (publicly visible) people with an Islamic belief. However, conflicts between religion and gender equality may also arise in relation to certain orthodox Christian or Jewish segments of the population. The topics that we are asked to address in this report (the requirement to adhere to dress codes / to shake hands) are very much 'Islamic' topics. (A 'Christian' topic, highly debated in

the Netherlands, is the exclusion of women from an orthodox Christian political party; a Jewish topic – very prominent in the 1990s – was the exclusion of non-Jewish pupils from the Jewish Maimonides school in Amsterdam.)

The evaluation of this debate should be placed in the light of the general political climate in the country, especially since the 9/11 Twin Towers attacks and the murder of the film maker Theo van Gogh in 2004 by an Islamic fundamentalist. As for the general political climate, the rise of several anti-immigration and anti-Islamic political parties since 2002 is significant. At this moment in time (2010) we have one party in particular that is openly advocating a severe restriction on the rights of Islamic people, e.g. by prohibiting all headscarves from all public areas, or even by suggesting a special taxation for women wearing headscarves. (The party in question is the PVV, led by Mr Geert Wilders.)

A general observation, important for understanding the situation in the country, is that the Netherlands is generally considered to be a ‘moderately secular’ country. Not an absolute separation of religion and the public sphere or the State (*laïcité*), but a policy of guaranteeing religious freedoms for all, and enhancing religious and cultural diversity (even by means of subsidising religious organisations) is the main feature of this type of secularism. For example: in the Netherlands, schools of a particular religious or ethical or pedagogical denomination receive the same amount of funding as secular (‘public’) schools, provided that they conform to certain legal standards as regards e.g. housing, the expertise of the teaching staff, and the curriculum and examinations. This means that Christian or Islamic schools, although they are free to determine their own policies as regards e.g. the hiring of personnel or the acceptance of pupils – provided they stay within the boundaries of the law on non-discrimination, are subsidised on an equal basis by the government. This equality of all schools was constitutionally guaranteed in 1919. However, in the last few of years there has been an increase in voices calling for the abolition of certain parts of this policy and advocating a change to the Constitution on this point, since it is said to enhance ‘multiculturalism’ and to stand in the way of the complete integration (or assimilation) of certain groups of immigrants (meaning: Islamic immigrants). Religious diversity is therefore an important leading principle. A stricter approach to ‘religious neutrality’ may be indicated in other spheres, like e.g. in the area of public services or within the realm of a judicial review (by the Courts).

Cases in the area of gender and religion that have been brought before the courts / the Equal Treatment Commission (ETC) and that have aroused a great deal of political and public debate concentrate on three issues: (1) the desire to wear religiously prescribed clothing or other religious symbols, (2) the desire not to shake hands with someone of the opposite sex, and (3) the wish to be provided with sex-segregated provisions or services. However, the overall impression is that all three issues are regarded primarily as an issue of religious freedom and/or (direct or indirect) discrimination on the ground of religion, and not so much as an issue of discrimination on the ground of sex. That is: religious freedom / discrimination on the ground of religion is very much in the foreground; the question whether a certain practice constitutes sex discrimination plays a far less important role in the considerations, at least when dress codes in general are concerned. Sex equality does sometimes come into play when regulations concerning the wearing of the burka or niqab are under discussion.²³³

²³³ This is illustrated by the fact that in the yearly Volume with comments on the work of the ETC, this issue is discussed under the heading of religious discrimination and not (or hardly ever) under the

The question whether there is sex discrimination in relation to the three wishes mentioned above can, in theory, play a role in two main ways. First, it can be argued that a certain religiously inspired conduct or practice (e.g. the prescription that women should wear a headscarf, or the prohibition on shaking hands with someone of the opposite sex) is in itself discriminatory, because it makes a direct distinction on the ground of sex. Thus, it can be argued that women who are obliged (by their religion/religious leaders or by their fathers/brothers/husbands) to wear a headscarf or niqab or burka are the victims of sex discrimination because similar dress requirements are not imposed on men. Or it can be argued that a woman who refuses to shake hands with a man thereby discriminates against men, or that a man who refuses to shake hands with a woman thereby discriminates against women. This line of reasoning (as will be discussed in this report) is sometimes followed. However, the test whether such religiously-inspired conduct or practices are (un)acceptable in the light of the non-discrimination principle is not often the main legal issue. The accent mostly lies on deliberations about the freedom of religion and the right to non-discrimination on the ground of religion.

The second line of reasoning with respect to sex discrimination could be that – considering the fact that in most cases only one of the two sexes is affected by a certain religiously-inspired or prescribed conduct or practice – prohibiting such conduct or practice would boil down to direct or indirect discrimination on the ground of sex. Since there is often an ‘inherent’ or ‘intrinsic’ link with one particular sex (like with pregnancy), one could argue that a certain prohibition leads to *direct* discrimination on the ground of sex. E.g.: a prohibition on growing a beard will automatically lead to discrimination against men (belonging to the religious group that prescribes the growing of a beard), a prohibition on wearing a headscarf will lead to discrimination against women (*idem*). This line of reasoning is even rarer than the first. As said, the issue is mainly approached from the perspective of religion. The question then becomes whether such a prohibition leads to inroads into the freedom of religion or to direct or indirect discrimination on the ground of religion. In that framework, the question may arise whether ‘other interests’ (like e.g. the right not to be discriminated against on the ground of sex) may justify inroads into the right to religious freedom / the right not to be discriminated against on the ground of religion. The issues concerning dress codes, codes of conduct or sex-segregated services are hardly ever approached as an issue of (direct or indirect) racial or ethnic discrimination.

In other words: the main perspective or angle from which the issue of gender and religion is approached in the Netherlands is that of religion, not that of gender equality. In the view of the present author, this general picture in the Netherlands results in not enough justice being given to the fundamental principle of equality between the sexes, as laid down not only in EU law, but also in numerous international human rights documents, most notably in the CEDAW Convention.

The explanation for the perspective that is chosen may be that the persons who take the initiative to instigate a legal procedure in the area of gender and religion often feel that they are being obstructed as regards one of the three wishes described above. That is, they see themselves as victims of an obstruction/prohibition that affects their right to live according to their religious beliefs or that makes it impossible for them to obey certain religious prescriptions. The principle of sex equality (be it in the first or

heading of gender discrimination. The same argument is made in T. Loenen ‘Gezichtsbedekkende sluiers: toestaan of beperken?’, *NJCM-Bulletin* 31No. 7 (2006) pp. 984-996, p. 986.

in the second way) in those cases is mostly raised as a *defence* against allegations about inroads into religious freedoms or violations of the principle of non-discrimination on the ground of religion. This defence may result in sex discrimination not being given the attention that religious freedom/discrimination receives.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

1. The requirement to respect dress codes, more specifically dress codes prohibiting Islamic women's clothing such as:
 - a) headscarves or b) burkas
 - in private employment
 - in public employment
2. The requirement to shake hands regardless of sex
 - in private employment
 - in public employment

All of the issues listed above are topical in the Netherlands and have given rise to a great deal of heated debate, even as far as arguing in favour of abolishing the Equal Treatment Commission (since this organisation is seen as too lenient towards religious 'particularities' in this respect). Above (under 1.1), I have already described some main features of the debate / the legal approach. I do not have any figures to demonstrate how often these issues arise in practice and/or lead to legal actions. The main tension, it seems, is between the right of an employer to select people whom it finds suitable for a job, and the right of a person with a certain religious conviction to behave according to the rules/practices of that religion. The issue of sex discrimination hardly comes into play in these cases. Some difference can be seen between the possibilities of private employers and public employers to 'set their own standards' as to how their (future) employees should dress or behave. In the area of public employment, the employer may maintain that it is of crucial importance that the public office / public service is seen as completely neutral as regards religion or that the principle of sex equality is being respected by persons who represent the organisation. Also, an employer may use the argument that it has to adhere to the principle of sex equality. In the section on the relevant case law (below, under 4) I will give examples of cases that have been decided by the ETC and the courts in this area.

1.2.2 Goods and services

1. The supply of segregated healthcare services for men and women because of religiously inspired demands by clients.
2. The supply of segregated social services for men and women because of religiously inspired demands by clients (e.g. separate language and integration courses for immigrants or separate social counselling for ethnic minorities).

Both of these topics have given rise to some public debate, though not as much as the issues under 1.2.1. There have been some discussions about separate integration courses for men and women in which politicians and public administrators have expressed different opinions about how (un)desirable this is. Arguments for separate courses are mainly along the lines that this will facilitate the participation of women,

who would otherwise not be allowed to participate. The main argument against such a policy is that this contravenes the general principle of gender equality and that immigrants should learn that gender equality is the standard in the country. The ETC has issued advice about separate facilities for female and male patients to the Royal Dutch Medical Association (*Koninklijke Nederlandse Maatschappij tot bevordering der Geneeskunst, KNMG*) in which it has given as its opinion that the policy of the KNMG in allowing patients a free choice concerning a doctor is in accordance with the relevant equal treatment legislation. However, free choice does not mean that patients may demand that a doctor of a certain sex is always assigned to him/her.²³⁴ As far as I am aware, there have not yet been any cases in which a hospital or doctor was asked to deliver separate healthcare services and refused to do so, as a consequence of which the person who requested this service then resorted to the ETC or to the Courts.

As far as *social services* in the form of official state-provided social advantages (social security, welfare, etc.) are concerned, discrimination in this area is only prohibited when it concerns discrimination on the ground of race/ethnicity. In that case, the applicant would have to frame the complaint as such, or else would have to refer to international law (e.g. Article 26 ICCPR) instead of the GETA. Other social services may fall under ‘goods and services’ (Article 7 GETA), but are only protected when they are not in the form of unilateral governmental acts (e.g. granting permits or subsidies), which are excluded from the scope of the GETA. Nevertheless, in the Netherlands there has been some debate on the issue whether a local council (responsible for the implementation of legislation on welfare benefits) has the right to refuse/withdraw a benefit to/from a woman who – as a consequence of wearing a burka or niqab – does not succeed in finding paid work. According to this legislation and the case law, welfare recipients have an obligation to do everything in their power to put an end to welfare dependency and to obtain paid employment. (See also the section on case law, below under 4).

1.3 Tension or conflicts: other issues

The issue of religious dress codes emerges quite often in the area of education, i.e. regarding pupils or parents (but not employees). In the Netherlands education as a whole is covered by the General Equal Treatment Act (*AWGB*); on that basis, the issue is very often brought to the attention of the ETC. The ETC has not only given opinions in individual cases, but has also given advice to school boards that wanted to know whether their policies in this regard were in accordance with the law.

1.4 No issue?

This section is not relevant. See above.

2. National approach

2.1 Selected issues

Formally – i.e. according to the provisions in the relevant Equal Treatment Laws (most notably the General Equal Treatment Act, GETA), the issues mentioned in this questionnaire can be seen as direct or indirect discrimination on the ground of religion or an inroad into religious freedom, as well as an issue of direct or indirect sex

²³⁴ ETC Advice 2007-10. The text of this advice can be downloaded from http://www.cgb.nl/webfm_send/379, accessed 13 May 2010.

discrimination. Viewing the issues as an instance of discrimination on the ground of racial or ethnic origin is also possible, but this hardly (openly) comes into play. However, as was stated in the introduction to this report, in most instances persons who feel that they have been discriminated against in this respect tend to frame the issue as a case of religious discrimination. Whether the case is framed as direct or indirect discrimination depends on the question whether the contested decision, rule or practice in any way openly refers to a particular religion (or sex, or race/ethnicity). In most cases the rule or practice will be ‘neutral’, but in effect will have mainly exclusionary effects for persons of a certain religion, sex or race. Therefore, the case is often brought as an instance of indirect discrimination.

The *legal framing* of these issues (in terms of discrimination) is the same for the dress requirements and the requirement to shake hands. The framing is also the same for private and public employment. Also, as regards the supply of and access to goods and services, the law makes it possible to view the issue in many different ways. There is no legal provision that compels applicants to frame their complaints as either religious, sex, or racial/ethnic discrimination, be it direct or indirect.

Apart from framing the issue as a matter of direct or indirect discrimination (on various possible grounds), dress codes or codes of conduct can also be framed in terms of legal (criminal) prohibitions. To date, in the Netherlands there is no general legal prohibition on wearing headscarves or face-covering veils. Although several attempts to legislate in this area (also at the initiative of Members of Parliament) have been made, none of these have yet resulted in a legal prohibition.²³⁵

Although, to date, there is no *general* prohibition on wearing headscarves or face-covering veils, there are several laws and regulations that require the possibility of identification, e.g. regulations concerning the customs authorities and the general identification law. These give authorities the possibility to require, for example, a *burka* or *niqab* be removed in order to identify the person in question.²³⁶ In August 2006, new requirements for passport photographs²³⁷ were introduced by way of implementing EC Regulation 2252/2004.²³⁸ The head and the face should be uncovered, unless there are medical or religious reasons for an exception. However, institutions or employers (e.g. schools and healthcare institutions) may have their own specific individual regulations prohibiting the burka. Whenever these regulations are contested, the ETC or the courts will have to examine whether these regulations breach the equal treatment legislation.

General laws in the field of health and safety in employment require that, while working with certain machinery, the hair or beard should be cut short or covered and that workers do not wear loose-fitting garments. This can mean that certain religious ‘outfits’ (e.g. the *galabiyya* for men or the *niqab* for women) must be removed. Although there have been no court cases on these rules and regulations, in general it is expected that – as far as they constitute indirect discrimination on the ground of religion – there is an objective justification for this (i.e. public security and health and safety).

²³⁵ See for an overview: H. van Ooijen ‘Boerka of bivakmuts: Verbod in de openbare ruimte? Het wetsvoorstel Wilders en Fritsma en het wetsvoorstel Kamp nader onder de loep genomen’ *NJCM-Bulletin* 33 No. 2 (2008) pp. 160-176.

²³⁶ The *Compulsory Identification (Extended Scope) Act (Wet op de uitgebreide identificatieplicht, Stb. 2004, 300)* officially requires only identification papers to be shown, not the removal of one’s clothing. This is an omission in the law.

²³⁷ *Fotomatrix Model 2006*; www.paspoortinformatie.nl, accessed 1 July 2010.

²³⁸ Council Regulation (EC) No. 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States.

In the remaining part of this report, I will concentrate on the (implementation of) the Equal Treatment Laws (most notably the GETA).

2.2 Other issues

As far as issues concerning education are concerned, according to the law they may also be framed as direct or indirect sex discrimination or as direct or indirect religious or racial discrimination.

In 2003, the Ministry of Education, Culture and Science issued a *Guideline on clothing in schools*.²³⁹ In principle, schools and educational institutions can issue dress codes for students or staff members, provided that:

- the requirements are non-discriminatory;
- the requirements do not affect freedom of expression;
- the requirements are included in the school guide, the statute for students/staff, the general provisions of an educational contract or labour conditions;
- the sanctions are not disproportionate.

To explain the legal situation, the Guideline extensively refers to ETC advice concerning face-covering veils and headscarves in schools.²⁴⁰ In every case, the Commission will assess (I) whether or not the educational institution is a privately-funded (religiously-denominated) school, (II) the necessity of the means for the realization of its foundation and (III) whether the means are based on a consistent policy. These criteria apply to students as well as to staff members.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

– The legislation does not explicitly or implicitly provide for rules which prioritise any of the conflicting rights that are the subject of this report. There is occasionally some debate about the significance of Article 1 of the Constitution (prohibiting discrimination on grounds of inter alia sex, religion and race) and the provision that guarantees religious freedom (Article 6 Constitution). However, most commentators are of the view that Article 1, being positioned as the first article, does not mean that this provision has prevalence. There are also no judicial decisions in which this prevalence has been assumed to exist.

– The legislation does not explicitly or implicitly provide for procedural rules to decide cases of conflicting rights that are the subject of this report.

– The legislation does not provide in any other way for rules on how to balance the conflicting rights that are the subject of this report. The only rule (if one can call it that; perhaps it is more of a juridical practice!) is the rule that any infringement of basic rights (including the non-discrimination principle and the right to religious freedom) should be legitimate and proportional (i.e. appropriate and necessary and not infringing other rights in an unbalanced way). This test guarantees that judges take all possible interests and (fundamental) rights into consideration.

– Indeed, the legislation is silent on what should be done if the rights that are the subject of this report conflict with one another.

²³⁹ <http://www.minocw.nl/documenten/onderwijs-download-kledingleidraad2003.pdf>, accessed 2 July 2010.

²⁴⁰ *Advies Commissie Gelijke Behandeling* 2003-01 inzake ‘Gezichtssluiers en hoofddoeken op scholen’, 6 April 2003.

3.2 Conformity with EU law

Yes, I do consider this legislation to be in accordance with the relevant EU law.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

A small *selection* of cases²⁴¹ that illustrate the diversity of the approaches will be presented here.²⁴²

4.1.1 Employment

1. The requirement to respect dress codes, more specifically dress codes prohibiting Islamic women's dress such as headscarves or burkas

Such requirements *in private employment* have been tested against the equal treatment legislation in many cases that have come before the Equal Treatment Commission (ETC) during the last 14 years.²⁴³ In many such cases, the ETC has ruled that dress codes that *generally* prohibit the wearing of a headscarf (without specifically mentioning the Islamic headscarf) amounts to indirect discrimination. This is often defended for security reasons or the employer's policy of appearing to be 'modern' or 'neutral'. Security may sometimes offer an objective justification, provided that the requirement is appropriate and necessary;²⁴⁴ neutral representation does not generally count as such.²⁴⁵ There are also cases where the dress code did refer explicitly to the Islamic headscarf, or where in an individual case a woman wearing the scarf was treated differently (e.g. has not been appointed to a job or has not been given a permanent contract). Such decisions may amount to direct discrimination on the ground of religion.²⁴⁶ An appeal by a school board against the exception that schools may require personnel to act in accordance with the school's religious denomination was rejected by the ETC in a case where an Islamic school required a female teacher to wear the headscarf.²⁴⁷ The school apparently did not require this of all female staff, only for Islamic women. In this area, there are also a few cases that have been decided by the courts. In a judgment by the Subdistrict Court of 's Hertogenbosch in 2009,²⁴⁸ the Court held that a nurse who, for religious reasons, refused to wear a dress with short sleeves which was prescribed by the hospital for health and safety reasons, had been lawfully dismissed. The hospital had succeeded in proving that the requirement was indeed necessary, and therefore there was an objective justification for this instance of (potential) indirect discrimination on the ground of religion.

In *public employment* there are only cases that have been decided by the ETC. There are no differences as compared to how the ETC decides such cases in private employment. When the prohibition is phrased in general terms (e.g. 'any head-covering garments') the regulation may be considered to be indirect discrimination

²⁴¹ ETC = Equal Treatment Commission. The ETC gives Opinions, not binding judgments. All ETC Opinions can be found at www.cgb.nl and are not referenced here in any detail.

²⁴² For this overview I have derived summaries of the case law from earlier reports, also written for the European Commission's Network of Legal Experts in the Non-Discrimination Field, notably the reports by Marcel Zwamborn in 2004 and by Guido Terpstra & Rikki Holtmaat in 2006.

²⁴³ The earliest case we found was ETC 1996-85.

²⁴⁴ See ETC 1996-85, which did not pass this test.

²⁴⁵ See e.g. ETC 2002-123/125; see also ETC 2004-164/165.

²⁴⁶ See e.g. ETC 2001-137 and 2001-79.

²⁴⁷ See ETC 2005-222.

²⁴⁸ LJN: BJ2840.

when there is no objective justification therefor. When the prohibition is directed at an individual wearing the headscarf for religious reasons, this is considered as direct discrimination on the ground of religion.²⁴⁹ The cases mostly concern teachers at public schools,²⁵⁰ public officials, like e.g. a clerk at a district court²⁵¹ or police officers.²⁵² In the latter cases, the ETC recommends a restrictive use of the requirement of wearing a police uniform, especially in cases when there is no contact between a police officer and the general public.

2. The requirement to shake hands regardless of sex

The requirement to shake hands *in private employment* has only been contested in one case before the ETC concerning a male employee in a reproduction department of a school for secondary education who did not want to shake hands with female colleagues and pupils.²⁵³ In this case, the ETC attached a great deal of weight to the argument raised by the school that a refusal to shake hands amounts to direct discrimination on the ground of sex and is therefore not acceptable behaviour.²⁵⁴

In public employment, the first case concerned a Muslim man who was denied a job as a customer manager at the Social Services Department of the city of Rotterdam because of his refusal to shake hands with women. The municipality stated in defence that they had to protect women against sex discrimination by a civil servant. At first instance, the ETC decided that the protection of women against discrimination constituted a legitimate aim, but that the municipality had failed to seek alternative ways of showing respect to both male and female clients equally, as the applicant had offered not to shake hands with both men and women.²⁵⁵ The District Court of Rotterdam, however, judged that a customer manager is an important contact person between the local authorities and their citizens.²⁵⁶ The Court ruled that the city of Rotterdam has the right to choose ‘to observe the usual rules of etiquette and of greeting customs in the Netherlands’. As a result, the Court considered it necessary and proportional to reject a candidate for the specific position who is not willing to observe those rules of etiquette.

A second case concerned a female teacher in a public school who decided that she would no longer shake hands with males and was subsequently dismissed. In its opinion the ETC stated that this constituted indirect discrimination on the ground of religion.²⁵⁷ At first instance the dismissal by the school was accepted by the District Court of Utrecht.²⁵⁸ The District Court stated that the case should not be judged on the basis of the Equal Treatment Law, but only on the basis of general labour law, since

²⁴⁹ E.g. ETC 1999-18.

²⁵⁰ E.g. ETC 1999-18.

²⁵¹ See ETC 2001-53. The Ministry of Justice has openly rejected this outcome of the ETC procedure and has announced that it will enact new, restrictive dress codes for the judiciary; however, these new regulations have not yet been adopted. See also Titia Loenen ‘Gezichtsbedekkende sluiers: toestaan of beperken?’, in 31 *NJCM-Bulletin* (2006), no. 7, pp. 984-996, on p. 986.

²⁵² See ETC 2006-30 and ETC 2008-123.

²⁵³ See ETC 2002-22.

²⁵⁴ This is contrary to ETC 2006-220, discussed below in the context of the judgment of the District Court of Rotterdam.

²⁵⁵ See ETC 2006-220.

²⁵⁶ LJN BD9643. To be found on: http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije_tekst=hand+schudden, accessed 2 December 2010.

²⁵⁷ ETC 2006-220.

²⁵⁸ District Court of Utrecht, 30 August 2007, LJN BB2648. To be found on: <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BB2648>, accessed 2 December 2010.

there had been a breach of confidence between the employer and the employee, which was caused by the careless manner in which she announced her decision that she would no longer shake hands. In the last instance, the Central Appeals Tribunal (*Centrale Raad van Beroep*)²⁵⁹ decided that the fact that there was a prima facie case of indirect discrimination on the grounds of religion/belief in this case could not be set aside by simply applying general labour law norms. However, the Central Appeals Tribunal stated that the school had a legitimate aim in demanding that their teachers shake hands with persons irrespective of their sex, as they wanted to comply with prevailing customs in Dutch society. This was deemed particularly important, as the school had many pupils and teachers who were of multi-ethnic descent. Pupils have to be prepared for a society in which shaking hands is the prevailing custom for greeting and showing respect. The dismissal of the teacher was considered to be lawful as it pursued a legitimate aim and the dismissal was deemed necessary and proportional.

4.1.2 Goods and services

1. The supply of segregated healthcare services for men and women because of religiously inspired demands by clients.

I am not familiar with any case law or ETC judgments in this area

2. The supply of segregated social services for men and women because of religiously inspired demands by clients (e.g. separate language and integration courses for immigrants or separate social counselling for ethnic minorities).

In one case the ETC decided that a public organization, which offers to help citizens in the field of rent subsidies, maintenance payments, study costs, taxes and debts, may not require that their (female) clients remove their face-covering veil during conversations with social workers so to facilitate communication and eye to eye contact²⁶⁰. The Commission concluded that this request involves indirect discrimination because the measure particularly concerns women who wear face-covering veils because of their religious beliefs. No objective justification existed, because these women can also be assisted by female social workers in which case they will remove the veil. Although segregated services were not explicitly required by the defendant, the ETC's Opinion seems to suggest that these are a proper solution to her wish to wear a face-covering veil.

A second case concerns the decision by the Local Bureau for Welfare Benefits of the city of Amsterdam, which had withdrawn the benefit of a Muslim woman for a period of three months because she had refused to apply for jobs without wearing a burka.²⁶¹ The only job that she had been required to apply for was selling lottery tickets. The court found that the requirement to apply for this job was not a suitable requirement because it was general knowledge that Muslims are not allowed to participate in lotteries. Otherwise, the Local Bureau had not shown that there were no possibilities for the woman to get a job while wearing a face-covering veil. Therefore, the punishment in this particular case was disproportionate. However, it must be noted that here the judge took into account the fact that the woman had only been rejected for a job on four occasions because of practical problems due to wearing the burka.

²⁵⁹ *Centrale Raad van Beroep* 11 May 2009, LJN BI2440. To be found on: http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BI2440&u_ljn=BI2440, accessed 2 December 2010.

²⁶⁰ See ETC 2005-86.

²⁶¹ District Court of Amsterdam 24 May 2007, LJN: BA6917.

Therefore, it may be argued that the Court was not yet convinced that it was generally too difficult to become employed while wearing a burka.

4.2 Probable outcome of case law on selected issues

Not applicable.

4.3 Case law on other relevant issues

There are several cases concerning goods and services where the owner had determined dress codes or other requirements affecting women with certain religious beliefs. These cases concerned, for example, a restaurant²⁶² or a bar,²⁶³ a fitness centre²⁶⁴ and a swimming pool.²⁶⁵ In each case the ETC decided that there had been indirect discrimination on the ground of religion, for which there was no objective justification since the means (the prohibition) were neither appropriate nor necessary. Another case concerned a day-care centre, where a mother was not allowed to deliver her young child to the centre while wearing a face-covering veil.²⁶⁶ Here the ETC found that there was an objective justification for the requirement to remove the veil because pursuing didactical and pedagogical aims by observing non-verbal communication constituted a legitimate aim, and this policy was also deemed to be necessary and proportional. However, in a case where a mother wore a niqab while registering her child at a primary school, the school's refusal to admit this child was not accepted by the ETC.²⁶⁷ In cases concerning pupils in schools who are required to remove their headscarf, the ETC almost always concludes that there is indirect discrimination, for which no objective justification exists.²⁶⁸ An exception is the case where dress requirements during gymnastics were deemed justifiable because of safety reasons.²⁶⁹ When a school prohibits students from wearing face-covering veils, like the burka or niqab, objective justifications are sometimes also accepted.²⁷⁰ The ETC stated that the prohibition amounted to indirect discrimination on the ground of religion and accepted the following three arguments by the school as an objective justification. First, wearing a face-covering veil was considered to be at odds with the need for open and good communications between people involved in the education process. Second, the school stated that it was necessary to be able to identify any pupil at any time. And third, the school stated that it was its responsibility to prepare pupils to function properly in Dutch society. In another case where a group of Christian schools had adopted a new dress code in which 'extraordinary' clothing such as the niqab, chador or burka were prohibited, the ETC concluded that this was direct discrimination on the ground of religion.²⁷¹ The ETC considered that a school that is based on a certain religious denomination may in such a case invoke an exception to the prohibition of direct discrimination (Articles 5 (2) sub. c and 7(2) of the GETA), but in the case at hand it had not done so. Invoking this exception is only possible when a number of requirements are met, inter alia the requirement that the ethos of

²⁶² See ETC 2004-112.

²⁶³ See ETC 2004-129.

²⁶⁴ See ETC 2007-173.

²⁶⁵ See ETC 2009-15.

²⁶⁶ See ETC 2009-36.

²⁶⁷ See ETC 2004-95.

²⁶⁸ See e.g. ETC 2000-63.

²⁶⁹ See ETC 1997-149.

²⁷⁰ See ETC 2003-40.

²⁷¹ See ETC 2004-138.

the school requires such a prohibition and that the school has a consistent policy in this respect.²⁷²

One final case concerned a pupil's refusal to shake hands. The school's refusal to accept this pupil amounted to indirect discrimination for which there was no objective justification.²⁷³ The ETC held that, by means of focusing on the behavioural codes of Dutch society, the school excluded pupils from minority cultures. There are other ways of showing respect than by means of shaking hands. The argument, raised by the school board, that equality between men and women is a central value which needs to be transmitted to pupils, was rejected. The Commission was of the opinion that this fundamental principle can be upheld by requiring the applicant to shake hands with neither men nor women.

An interesting case concerning other public services was decided by the District Court of Zwolle, where the Court itself refused to allow a woman wearing a *niqab* to appear before the court to be heard in a family law case concerning the guardianship of her children because her face-covering veil substantially obstructed the assessment of the facts of the case and the interests of the parties. According to the Court, the freedom of religion does not extend to the power of the parties to hinder or restrict judicial functions or regulations. The woman's decision not to remove her *niqab* was her own choice and constituted a risk which could not set aside procedural rules.

5. Good practices/solutions

One could probably call it good practice that more and more employers and institutions (like schools and hospitals) take it upon themselves to clarify previously implicit 'normal' dress codes or codes of conduct for their employees or for their employees and others (e.g. pupils or patients). The construction of such dress codes or codes of conduct compels all parties involved to make explicit what they expect from each other and what is considered to be 'normal' dress or conduct. It may provide room for more diversity in this respect. The ETC regularly receives requests to evaluate such regulations in the light of the Equal Treatment legislation.

6. Further comments

The yearly Volume 'Gelijke Behandeling, Oordelen en Commentaren'²⁷⁴ includes comments on the most important Opinions of the Equal Treatment Commission. Comments made on cases concerning gender and religion (headscarves, codes of conducts) are mostly dealt with in commentaries on the issue of religious discrimination. The titles of each of these comments are not included in this overview.

²⁷² See for cases where this exception was applicable and therefore there was no direct discrimination: ETC 2007-61 and 2008-121.

²⁷³ See ETC 2006-51.

²⁷⁴ Editors of the so-called 'Oordelenbundel' change regularly. The Volume was published by Kluwer Deventer until 2004 and now by Wolf Legal Publishers, Nijmegen. All Volumes can be ordered from the Equal Treatment Commission (*Commissie Gelijke Behandeling*: www.cgb.nl).

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Tension between the gender equality principle and freedom of religion first materialised in a case before the Equality and Anti-Discrimination Tribunal in 2001.²⁷⁵ In this case the Tribunal concluded that a ban against wearing headscarves at work for chambermaids at a hotel was in fact a rule that was indirectly discriminatory and in violation of the Gender Equality Act Section 3, second paragraph. In 2001, gender was the only discrimination ground that was within the Tribunal's jurisdiction. In 2006 the Act on Prohibition against Discrimination on basis of ethnicity and religion went into force, extending the Ombud's and Tribunal's jurisdiction. The few cases regarding religion at the Ombud/Tribunal so far concern the wearing of headscarves. There is only one case decided by the Oslo Municipal Court (court of first instance). Many of the cases have received the attention of newspapers. The issue that received the most attention so far was when the Police Directorate/management proposed in February 2009 that headscarves should be allowed as part of the police uniforms. After a major debate in the media at national level, it was decided not to allow headscarves in the police force. This debate triggered the National Courts Administration²⁷⁶ to initiate a hearing process in 2010 regarding the question of whether or not judges should be allowed to carry religious symbols. So far, there have not been any cases regarding people refusing to shake hands because of religious reasons.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

Concerning the requirement to respect dress codes, more specifically dress codes prohibiting Islamic women's dress such as headscarves or burkas, in private employment and in public employment, the same rules apply for public and private employment. The legal evaluation for a dress code's legality is that the employer needs to pass the proportionality test as stated in the Anti-Discrimination Act Section 4 third paragraph, which reads that 'Differential treatment that is necessary in order to achieve a legitimate aim, and which does not involve a disproportionate intervention in relation to the person or persons so treated is not regarded as discrimination'.

Concerning the requirement to shake hands regardless of sex, there have not been any cases yet, neither in private nor in public employment.

The potential conflict does exist under the surface but has not yet been a major issue in a legal action. One Municipal Court decision regarding the validity of a termination of an employment contract briefly mentions that a female Muslim refused to shake hands with a male colleague who tried to welcome her as a new employee at the workplace. Neither the court, nor any of the lawyers described or stressed how the male colleague felt about this. The employer indicated that the male employee had harassed the female employee by telling her that she was now in a free country and

²⁷⁵ See the Tribunal's case LKN-2001-8 (*SAS Plaza Hotel*).

²⁷⁶ <http://www.domstol.no/default.aspx?id=3104&epslanguage=NO>, accessed 10 April 2010.

did not have to wear the hijab. He had further said that all strict religious fundamentalist Muslims were to blame for all wars currently going on. The male colleague was an immigrant from Iran and not a Muslim. The Court found the termination not valid based on the principle of freedom of speech.²⁷⁷

1.2.2 Goods and services

As far as I have been able to uncover, no guidelines/regulations have been developed as regards segregation of health services. The policy followed by the National Directorate of Health is to focus on equality-based healthcare services: healthcare services should be individualized, and each patient to be treated with respect. Medical doctors I have spoken to have informed me that these issues are solved on a practical basis from case to case. If a person for religious reasons does not want to be treated by a person of the opposite sex, this wish is either accommodated as far as possible, or a selection of family members of the patient are allowed to follow the examination procedure as far as possible. No cases or formal complaints have been lodged according to information from the Directorate of Health.

As far as I have been able to find, there is no segregation of social services, apart from some integration/language classes to refugees. These courses are not segregated due to religious attitudes, but seen as a measure for providing the women with a network since many of them tend to be rather isolated as housewives.

1.3 Tension or conflicts: other issues

On 26 February 2010, the Ministry of Education and Research asked the Ministry of Justice and Police to carry out an evaluation of the legality of a possible ban of the wearing of the hijab for students in the school system (grades 1-13). The conclusion was that a ban would most likely infringe on the fundamental right of freedom of religion.²⁷⁸ This is to a great extent due to the fact that Norway does not have a clear division between state and religion (protestant/Lutheran), although there is freedom of religion. A possible ban would call for an amendment in the Act on Education (*Opplæringslov*).²⁷⁹ The Ministry of Justice and Police performed a similar evaluation regarding the legality of a prohibition of the wearing of the niqab and burka at schools in 2007.²⁸⁰ The conclusion was that such a prohibition would not violate freedom of religion under human rights legislation and national legislation. Decisive weight was put on the pedagogical motives for the prohibition, which were that the teachers need to see their students' facial expression in an educational setting, so that they can see if they understand the purpose of the lesson. No considerations of sex equality were made other than one sentence which states that a prohibition of the niqab or burka will affect female citizens more than male, and thus may be indirectly discriminatory.

²⁷⁷ See TOSLO-2007-51533 (*IKEA*), <http://www.lovdatab.no/>, accessed 10 April 2010.

²⁷⁸ See the Ministry of Justice and the police, evaluation of the legality of a possible ban of using the hijab in the school system: <http://www.regjeringen.no/nb/dep/jd/kampanjer/tolkningsuttalelser/forvaltningsrett/opplæringsloven/-2-9-og-3-7---Forbud-mot-hijab-i-skolen.html?id=598628>, accessed 10 April 2010.

²⁷⁹ See *Lov om grunnskole og vidaregåande opplæring (Opplæringslova)* LOV-1998-07-17-61: <http://www.lovdatab.no/cgi-wift/ldles?doc=/all/nl-19980717-061.html>, accessed 10 April 2010.

²⁸⁰ <http://www.regjeringen.no/nb/dep/jd/kampanjer/tolkningsuttalelser/forvaltningsrett/opplæringsloven/-2-9-og-3-7---bruk-av-hode--og-ansiktspl.html?id=480738>, accessed 10 April 2010.

2. National approach

2.1 Selected issues

From the first case in 2001, the hijab (and the burka) were perceived as problematic from the perspective of sex equality. With the extension of discrimination legislation, the use of religious symbols is equally perceived a 'religious' issue and as linked to ethnic origin and/or gender. The legal framing of these types of discrimination issues offers a variety of 'shopping opportunities' as regards the choice of law and angle. The GEA offers a prohibition against indirect discrimination because of gender (see Section 3). The Anti-Discrimination Act offers protection against discrimination against ethnic and religious discrimination, see Section 4. And the Working Environment Act Section 13-1 bans discrimination on the basis of ethnic and religious reasons in working life with reference to the Anti-Discrimination Act. All discrimination grounds share the same basis for exceptions to the prohibition of discrimination based on the principle of proportionality.

Since 2006, the Ombud and the Tribunal have had the competence to evaluate the situation where many different grounds of discrimination meet in the same case. However, the Tribunal has so far decided cases based on the rules for one of the discrimination grounds, while at the same time pointing at the other grounds of discrimination present.²⁸¹ Only in two cases has the Tribunal performed a 'common evaluation' of two grounds at the same time, a case of age and gender²⁸² and a case of ethnicity and gender.²⁸³ The case regarding ethnicity and gender was about two women with an ethnicity other than the Norwegian one. They had no luggage with them, only shopping bags, when they arrived at a hotel. The women were denied a room with reference to the hotel guidelines. The receptionist chose to turn away the two women, and stated that the background for the guidelines were that guests resident in Oslo and its environs could be prostitutes or drug addicts who gained access to the hotel in order to cause trouble. The two women were turned away in spite of the fact that there was nothing to indicate that they could be linked to these risk groups against which the hotel in its guidelines wished to protect itself. Against this background, the Tribunal found that there were circumstances that gave grounds to believe that the hotel attached negative importance to the women's gender and ethnicity when they were refused a room at the hotel, where the combination of gender and ethnic background was the basis for turning them away. The Tribunal concluded that the hotel acted in violation of Section 3 of the Gender Equality Act and Section 4 of the Anti-discrimination Act when it refused the two women a room at the hotel.

There are no legislative extras, such as additional compensation stated in the law in case more than one discrimination grounds has been violated at the same time. This may, however, be a point in relation to the amount of compensation that may be awarded by the courts when the entire situation is taken into account. There are no court cases regarding this issue yet.

2.2.1 Employment

Concerning the requirement to respect dress codes, more specifically dress codes prohibiting Islamic women's dress such as headscarves or burkas, in private

²⁸¹ See the Tribunal's case 1/2008 regarding the grounds of gender and ethnicity (not religion) (case in English text) <http://www.diskrimineringsnemnda.no/wips/1529714557/>, accessed 10 April 2010.

²⁸² See the Tribunal's case LKN-2001-8 (*SAS Plaza Hotel*): Case 8/2008.

²⁸³ See the Tribunal's case LKN-2001-8 (*SAS Plaza Hotel*) : Case 1/2008.

employment and in public employment, the same rules apply for public and private employment. The legal evaluation for a dress code's legality is that the employer needs to pass the proportionality test as stated in the Anti-Discrimination Act Section 4 third paragraph which states that 'Differential treatment that is necessary in order to achieve a legitimate aim, and which does not involve a disproportionate intervention in relation to the person or persons so treated is not regarded as discrimination'.

In practice, the hijab is worn by many women in various parts of the employment market, shops, hospitals, pharmacies etc. A few complaint cases were presented to the Ombud and a few cases to the Tribunal. The huge public debate regarding the use of hijab in certain professions did not occur until 2009 when the need for certain professions to appear value neutral become topical.

During the winter of 2009, the *Politidirektoratet*²⁸⁴ proposed to allow the wearing of the hijab as part of the police uniform. The issue came up after a Muslim woman who considered applying at the Police Academy asked whether or not she could wear her hijab. The proposal of the *Politidirektoratet* sparked a major debate in all national media; the Union for Policemen (*Politiets Fellesforbund*) opposed the proposal stressing the need to act as a neutral instance in the service of the entire society. Some Muslim female policewomen also went public saying that they were against allowing the hijab as part of the uniform, as their work in the force was not about stating religious or political views, but performing their job on a neutral platform. The debate was hard and intense and went all the way up to discussions at government level. On 20 February 2009 it was decided not to implement the proposal from the *Politidirektoratet*.

As a consequence of the debate regarding the hijab as part of the police uniform, the National Courts Administration (*Domstolsadministrasjonen*) initiated an evaluation for the possible need for banning religious and political symbols in the courts.²⁸⁵ A proposal to amend the regulations regarding the use of court robes (uniform) in the courts banning the use of religious and political symbols for judges when the court is in session was presented in a hearing on 28 September 2009.²⁸⁶ The arguments for such a ban is the need to appear as a neutral instance as well as the public's trust in the courts' impartial judgments. Most instances support the proposal from the National Courts Administration. The one institution that is critical about the hearing not being thorough enough is the Norwegian Center for Human Rights (*Norsk Senter for Menneskerettigheter*) which claims that the issue was not sufficiently evaluated. This is especially significant when considering that Norway at present may not be described as a society having pressing needs to introduce such a ban in a democratic society.²⁸⁷

Regarding the requirement to shake hands regardless of sex, there have been no cases yet, neither in private nor in public employment.

²⁸⁴ https://www.politi.no/kontakt_oss/kontakt_politidirektoratet/, accessed 10 April 2010.

²⁸⁵ See *Domstolsadministrasjonen*, letter of hearing and responses to the hearing, on http://www.domstol.no/DAtemplates/Article_21541.aspx?epslanguage=NO, accessed 10 April 2010.

²⁸⁶ http://www.lovdato.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/for/sf/jd/jd-19950623-0577.html&emne=rettskappe*&, accessed 10 April 2010.

²⁸⁷ http://www.domstol.no/DAtemplates/Article_21541.aspx?epslanguage=NO, accessed 10 April 2010.

2.2.2 Goods and services

With respect to the supply of segregated healthcare services for men and women because of religiously inspired demands of clients, there have been no cases yet.

Regarding the supply of segregated social services for men and women because of religiously inspired demands of clients (e.g. separate language and integration courses for immigrants or separate social counselling for ethnic minorities), there have been no cases yet.

2.2 Other issues

Conflicting rights have so far been discussed in feminist theory,²⁸⁸ but as shown above, few cases have been lodged before relevant national authorities. Relevant issues have also been raised by feminist groups such as the *Mira* resource centre for migrant women.²⁸⁹

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

Norwegian legislation does not provide for rules to decide potential conflicts between gender equality and freedom of religion/non-discrimination on the ground of religion that this report focuses on. It appears to be a choice of the party to select the ground or name all the grounds that form the basis for the claim that is the subject of the discrimination case. And in turn, it is the Tribunal or the Court who chooses one or all of the grounds as the discrimination ground that is to be evaluated.

3.2 Conformity with EU law

As far as I can evaluate, I see no apparent conflict with EU law. The only issue that I may point at as problematic is that the Tribunal is not competent to award compensation, which is the sole discretion of the courts according to legislation.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

The Tribunal has handled a few cases deciding potential conflicts, a few regarding headscarf and gender, a few regarding gender and age and a few regarding gender and ethnicity. In all cases, the Tribunal seems to choose one of the grounds as the main evaluation topic, but includes the other discrimination ground as additional argument in the overall assessment.

4.1.1 Employment

Concerning the requirement to respect dress codes, more specifically dress codes prohibiting Islamic women's dress such as headscarves or burkas, in private

²⁸⁸ See for example the recent research project on gender equality, cultural diversity and religious pluralism led by professor Hege Skjeie, at the University of Oslo (UiO), presented on <http://www.statsvitenskap.uio.no/forskning/plureq/index.html>, in collaboration with a project on democratisation, freedom of religion and women's human rights at the department of women's law at the Faculty of law, UiO, <http://www.jus.uio.no/ior/forskning/prosjekter/demrok/>, accessed 10 April 2010.

²⁸⁹ http://www.mirasenteret.no/www/index.php?option=com_content&view=article&id=7&Itemid=46, accessed 10 April 2010.

employment and in public employment, the same rules apply for public and private employment. There have been no cases regarding burkas.

There have been several cases regarding the headscarf/hijab:

Tribunal case LKN-2001-8 (SAS Plaza Hotel); described in 1.1 above.

Tribunal case LDN- 14/2007: A woman claimed to be the victim of discrimination because of language, ethnicity and that she was wearing the hijab as she did not receive a certain job offer. A unanimous Tribunal found that no discrimination had taken place since the language requirement was objective, reasonable and necessary according to the circumstances for the position. No violation was found of Anti-discrimination Act Section 4.

Tribunal case LDN- 26/2009: A unanimous Tribunal found that the employer had discriminated against an employee by asking the employee not to wear the hijab at work, since the rest of the employees felt uncomfortable when she wore that religious symbol. Since the employee did not meet the employer's request, the employer asked her to leave the keys at the end of the day. Violation was found of Anti-discrimination Act Section 4 as well as Gender Equality Act Section 3 (prohibition against indirect discrimination).

Oslo Municipal Court Case²⁹⁰ (IKEA): this case directly regards a case of termination of employment, but touches upon both shaking hands as well as the wearing of the hijab. The case is mentioned in 1.2 above.

In the period between 1 January 2006 and 20 February 2009, the Ombud received 13 questions regarding various issues on the wearing of hijabs.²⁹¹ The number of cases where young women lose their jobs because they wear the hijab appears to be increasing.

See for instance the Ombud's case 09/526 of 8 March 2010.²⁹² A woman claimed to have been promised a trainee position at a medical doctor's office, but that she had been refused the position when the doctor realized she wore a hijab. The doctor denied that he had promised her the position and stated in addition that he had a patient group of a variety of ethnic and religious backgrounds. The Ombud did not find that the woman had been discriminated against, neither on grounds of gender nor on religion.

Regarding the requirement to shake hands regardless of sex, there have been no cases yet.

4.2.2 Goods and services

Regarding the supply of segregated healthcare services for men and women because of religiously inspired demands of clients there have been no cases yet.

With respect to the supply of segregated social services for men and women because of religiously inspired demands of clients (e.g. separate language and integration courses for immigrants or separate social counselling for ethnic minorities), there have been no cases yet.

4.2 Probable outcome of case law on selected issues

Where case law on the selected issues is lacking, it is my assessment that cases would be dealt with by the national courts or equality bodies, applying the relevant

²⁹⁰ See TOSLO-2007-51533 (IKEA), <http://www.lovdato.no/>, accessed 10 April 2010.

²⁹¹ <http://www.ldo.no/no/Aktuelt/Nyheter/Arkiv/2009/Usakleg-oppseing-pa-grunn-av-hijab/>, accessed 10 April 2010.

²⁹² <http://www.ldo.no/no/Klagesaker/Arkiv/2010/Ikke-diskriminering-pa-grunn-av-bruk-av-hijab/>, accessed 10 April 2010.

legislation including the same evaluation of the proportionality test as regards indirect discrimination.

4.2.1 Employment

Concerning the requirement to respect dress codes, more specifically dress codes prohibiting Islamic women's dress such as headscarves or burkas, in private employment and in public employment, the same rules apply for public and private employment.

For the requirement to shake hands regardless of sex, the same rules apply for public and private employment.

4.2.2 Goods and services

For this section, I have no specific information.

4.3 Case law on other relevant issues

There is no case law on other relevant issues.

5. Good practices/solutions

This section is not applicable in Norway.

6. Further comments

CEDAW is the human rights convention which is most specific in its description of the relationship between gender equality, cultural and religious values, see Article 5. All new EU Directives on discrimination (2000/43, 2002/73) refer to CEDAW, making it clear that these Directives must be interpreted in the light of CEDAW. It is an obvious challenge to be brave enough to question the behaviour which claims to be religious tradition and ask how this fits in with the principle of equal rights and equal opportunities of men and women. In Norwegian society, it appears that most people tend to let the principle of freedom of religion be a little more holy than the principle of equality of men and women.

POLAND – Eleonora Zielińska

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

The situation in Poland is specific in comparison to many other countries. On the one hand, some problems known in other countries are not an issue in Poland (headscarves, religion-motivated sex-segregated services, etc.), mainly because the size of the local Muslim minority is insignificant. On the other hand, the very intensive relationship between the Catholic Church and the State in Poland is of crucial importance for broader understanding of gender equality. Article 25 of the Polish Constitution²⁹³ stipulates that the relationship between the State and churches and other religious organizations shall be based on the principle of respect for their

²⁹³ Law of 2 April 1997, *Dziennik Ustaw Rzeczypospolitej Polskiej* (Journal of Laws of Polish Republic: hereafter JoL) 1997, no. 78, item 493 with amendments. English text available on: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>, accessed 15 April 2010.

autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good and that churches and other religious organizations shall have equal rights. However, the Catholic Church in Poland, although formally separated from the State, is one of the most important actors in Polish socio-political life, constantly attempting to exert substantial influence in different fields of the lives of the Polish people, including the position of women in society. It directly and indirectly influences most issues relevant to the equality of women and men, thereby provoking a great deal of tensions and conflicts in society. Results of this interference are, among other things, an extremely restrictive antiabortion law, the presence of Catholic religion lessons and the absence of sexual education in Polish public schools, influence of the episcopate on draft laws regulating in-vitro fertilization, the inevitable voice of priests acting as moral authority in the public debate (particularly related to sexual ethics and reproductive rights), as well as the role of women in the family. The special interest of the Catholic Church in sex and reproduction, when viewed from a feminist perspective, simply means that it is mainly interested in controlling women.²⁹⁴ In Western European countries, e.g. Germany, teachers wearing headscarves may be perceived as displaying behaviour advertising a conservative role model for women.²⁹⁵ Similarly, in Poland, the omnipotent presence of Catholic symbols (crucifixes)²⁹⁶ in all possible public places, from schools and local public offices to Parliament, as well as the ubiquitous presence of priests, participating in all official state events and in everyday life of schools, army, police etc., may be perceived as displaying (imposing) restrictive Catholic moral views on family, sexual and reproductive rights, as well as specific gender patterns, on everyone regardless of their religion, belief or non-belief.²⁹⁷ 'Catholicism in Poland is not merely a faith, but a way of being and perceiving the world, a criterion for classifying others, an object of fashion, fascination, snobbery, an explicit vehicle of power and an implicit vehicle of censorship (at least self-censorship)'.²⁹⁸

It is not necessary to explain how the restrictions on reproductive rights may influence women's opportunities to enjoy other rights, including the right to work, as well as how e.g. the excessive use of the conscientious objection clause by medical professionals may limit the access of women to medical services. It is also obvious

²⁹⁴ A. Graff 'Quagmire Effect. On the Special Role of the Catholic Church in Poland', *Law & Gender, Women's Rights Centre* (December 2009) p.92.

²⁹⁵ D. Schiek 'Just a piece of cloth? German Courts and Employees with headscarves', *European Development*: [http:// ilj.oxfordjournals.org/egr/33/1/68/pdf](http://ilj.oxfordjournals.org/egr/33/1/68/pdf), accessed 17 April 2010.

²⁹⁶ The only reaction of Polish officials to the ECtHR decision considering that the display of crucifixes in state schools was incompatible with the State's duty of neutrality in the exercise of public services particularly in the field of education and that it violated Article 2 of Protocol no. 1 in conjunction with Article 9 (*Lautsi v. Italy*, judgment of 3 November 2009 application no. 30813/06) was a public declaration that they will ignore this verdict. This was the sign for Catholics that they need not remove crucifixes from public spaces in order to recognise and show respect for the constitutional principle of the separation between Church and State as well as state neutrality. In order not to be blamed for reopening the debate, which is always considered a priori as a sign of confrontational tendencies, non-Catholics continue to act as silent dissenters, in a spirit of compromise, meaning that they continue to pretend that the crucifixes are not there. As has been rightly stressed, the term 'compromise' has made a surprising career in this context: A. Graff 'Quagmire Effect. On the Special Role of the Catholic Church in Poland', *Law & Gender, Women's Rights Centre* (December 2009) p.91.

²⁹⁷ M. Dziewanowska et al. 'Airing the Dirty Laundry: Exploring the Challenges of Domestic Violence in Poland', *Law & Gender, Women's Rights Centre* (December 2009) pp.71-72.

²⁹⁸ M. Środa 'Kobiety Kościoła, Katolicyzm' (Women, Church Catholicism) in: C. Ockrent (ed.) *Czarna Księga Kobiet* Warszawa, WAB 2007.

that the factual privileged position given by the State to a single religion may constitute an important factor facilitating the discrimination of non-Catholic persons on the ground of religion or belief in employment and access to goods and services. When considering religion and equality, those aspects of the problem should not be overlooked.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

My research has not identified any tensions or conflicts relating to the problem of headscarves or burkas (nor any other religion-motivated dress code). Also the requirement to shake hands regardless of sex is not an issue in Poland, neither in public nor in private employment.

1.2.2. Goods and services

No cases of religiously inspired demands, either for segregated healthcare services for men and women, nor for sex-segregated social services, have been noted or discussed in Poland.

1.3. Tension or conflicts: other issues

Religion instruction in schools

In Poland, religion lessons in public schools are an issue that has provoked many tensions and conflicts for more than two decades, in which equal treatment issues are also raised. The religion lessons in public school were introduced in the early nineties²⁹⁹ and, because of controversies as to its constitutionality, received confirmation in the Constitution of 1997³⁰⁰ as well as in ordinary law.³⁰¹ Every church or religious organisation registered in Poland³⁰² may conduct religious lessons in public schools. Alternatively, for pupils not willing to take part in religious lessons, a course on ethics should be organized. However, in Polish reality in most public schools children are not able to participate in lessons in ethics or religion other than the Catholic one, for obvious reasons.³⁰³ Due to the small number of participants, schools tend not to organize such courses and the public authority is fully aware of the

²⁹⁹ Based on the Decisions of the Minister of Education on conditions and ways of organizing courses on religion in public schools of 3 August 1990, 24 August 1990 and 31 August 1991, substituted later by the ordinance of 14 April 1992 (JoL 1992, no. 36, item 155 with amendments).

³⁰⁰ Pursuant to Article 53(4) of the Constitution, the religion of a church or other legally recognized religious organization may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed thereby.

³⁰¹ Law of 7 August 1991 on the system of education (unified text: JoL 2004, no. 256, item 2572 with amendments).

³⁰² The Act of 17 May 1989 on Guarantees of the Freedom of Conscience and Religion (unified text: JoL 2005, no. 231, item 1965 with amendments) sets the criteria for registering churches or other religious organizations and regulates the procedure of their registration. Those criteria include an application for registration filed by of a minimum of 100 persons and information on the name, goals etc. of the new church.

There are currently 174 registered churches or other religious organizations in Poland. The list is published on the website of the Ministry of Internal Affairs and Administration:

http://www.mswia.gov.pl/portal/pl/92/223/Koscioly_i_zwiazki_wyznaniowe_wpisane_do_rejestru_kosciolow_i_innych_zwiazkow_wy.html, accessed 17 April 2010.

³⁰³ In less than 1% of all public schools, courses in ethics are available. Information cited in judgment of the Constitutional Tribunal of 2 December 2009.

problem, tolerating such situations (several cases regarding this issue have already reached the ECtHR and have been communicated to the Polish Government³⁰⁴).

The issue of unequal treatment of pupils on the ground of their religion, belief or non-belief became more serious, when the legal regulation of 1997 introduced notes for religion (in the same way as for other subjects taught), and the Ministerial Order of 2008 ordered them to be included in the average of notes indicated on school certificates. This average may have decisive influence on the decision on admission of pupils to schools of higher level (grammar school), for granting them scholarships etc. In other words, it may have an important impact on the pupil's educational career (access to education interpreted as goods and services, and future employment). It puts Catholic pupils in a privileged situation, while discriminating others on the ground of their religion or belief.

*Conscience-related objections as a factor limiting women's access to medical services*³⁰⁵

Some professions (physicians, nurses) have a legal right to refuse to provide medical services contrary to their conscience. Other professions (e.g. pharmacists) aim at obtaining the same legal guarantees. The provisions dealing with the conscience clause (provided in particular professional regulations³⁰⁶) are formulated in a neutral way (without reference to religion or belief). However, in practice, refusals are mainly based on religion/belief. In most cases the refusal concerns medical services contrary to the Catholic Church's teachings (e.g. abortion, prenatal diagnosis for confirming pathological embryo development, prescription for contraceptives). The problem arising here mainly concerns the question whether the constitutional or human rights guarantee of freedom of religion or belief also covers the conscience clause³⁰⁷ and, should the answer to this question be positive, how to balance the religious freedom of professionals against everyone's right to medical services. Given that most cases of such refusal concern gynaecological services, it is impossible to ignore its relevance for the gender equality issue. Thus, the refusal constitutes limitation of the access of women to medical services guaranteed by law. Therefore the recognition of the right

³⁰⁴ Application no. 7710/02, *Grzelak against Poland* (Lack of suitable alternative arrangements for pupils opting out of religious instruction in state primary schools), communicated to the Government, is still pending. For two other cases, namely *Nowak* and *Krynicky* (Application no. 32932/02 by Danuta Nowak and Michał Krynicky against Poland, lodged on 23 August 2002, communicated to the Polish Government on 1 February 2008) the ECtHR in the decision of 29 June 2009 decided to strike the application, since the applicant failed to reply, after being informed about the obligation to be represented by a lawyer. In this case, the claimants complained that they had been discriminated against by the authorities on account of convictions, since after having ceased to attend religious lessons, they were harassed by teachers and obtained lower notes, as a result of which they were ostracized by their fellow pupils.

³⁰⁵ Although Article 10 of the Charter of Fundamental Rights of European Union 2007/C 303/01) recognizes the right to conscientious objection, in accordance with the national laws governing the exercise of this right, since Poland refused to sign the Charter, the question of conformity of this clause with equality directives remains topical.

³⁰⁶ Article 39 of the Law on the Profession of Physicians.

³⁰⁷ This is given that, pursuant to Article 53(2) of the Constitution, the freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include the possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the rights of individuals, wherever they may be, to benefit from religious services.

to the conscience clause, without sufficient limitations,³⁰⁸ may be perceived as indirect discrimination of women.

Sex discrimination in employment in church-related institutions (limited access to employment)

The media have reported on a number of cases of discrimination of Catholic women in church-related institutions. The problem here is not the refusal of access of women to priesthood, nor their exclusion from active participation in liturgy (which is permitted by the Vatican and largely exercised in Western countries³⁰⁹). The problem rather is that in all institutions related to the church, of which there are thousands in Poland, women only occupy simple, service-related posts (like housemaids, cooks, secretaries). Well-educated women have minimal chances of obtaining more prominent positions in dioceses' *curias*, seminaries for priests, peregrinate houses and Catholic universities.³¹⁰

The autonomy of churches and religious organizations in Poland is also understood (contrary to 'common' associations) as being completely outside the control of state organs.³¹¹ Therefore they do not need to have transparent rules regarding the ways of recruitment of personnel in church-related institutions and it also seems as if they believe that they are not bound by the prohibition of discrimination in employment. It should be stressed that this problem also concerns religion teachers in public (state) schools, who are appointed by the school management only if they have an appropriate permit from the relevant authorities of a church or religious organization. This means that those authorities also decide who may be selected, hired and dismissed. For the Catholic Church, such possibility is provided for explicitly on the basis of the international agreement concluded by the Republic of Poland with the Holy See, as well as on the basis of ordinary laws.³¹² In practice, it happens that the main criterion of choice is not religion and belief (which might be justified on the basis of the Labour Code regulations cited below), but exclusively or additionally the person's sex. State tolerance for such discrimination exercised by the Catholic Church has a demoralizing effect on the employment market and diminishes the significance of the equal treatment rule and the constitutional gender equality principle. Nevertheless, it seems that chances of success

³⁰⁸ Polish law provides for some limitations, e.g. the prohibition of refusal in emergency situations and the obligation to refer to another physician, who may provide women with the expected medical service. However, lack of information makes the second requirement illusory. In addition, it happens that women have to pay twice for medical services since there is no information in advance which physicians on the ground of religion refuse to provide certain medical services. It also happens that practitioners invoke conscientious objection to refuse to provide certain services in public hospitals and then provide it in their private practice.

³⁰⁹ Only in two dioceses in Poland has it been accepted for girls to serve in liturgy; <http://my.opera.com/pracuj/blog/show.dml/3088687>, accessed 15 April 2010.

³¹⁰ Only one woman in Poland is a diocesan speaker, two women are directors of museums, and 57 theologians, with only 20 having the post of professor. If women are employed in seminaries as priests, they exclusively teach foreign-language classes; <http://my.opera.com/pracuj/blog/show.dml/3088687> and http://wyborcza.pl/1,76842,7138664,Niewygodna_lekcja_Wandy_Poltawskiej.html#ixzz0IBMMSch0, accessed 15 April 2010.

³¹¹ <http://www.medianet.pl/~kip/arch/dyskusja55.htm>, accessed 2 December 2010.

³¹² Article 12.3 of the *Concordat* of 28 July 1993 (ratified in 1998 JoL 1998 no. 12, item 42) provides that teachers of religion need a permit from the bishop (*mission canonica*) in order to be appointed. The employment contract for teachers of religion has a double character: it is a lay contract (state schools pay the salary) but it also mirrors the autonomy of particular beliefs. In the event that the permission is withdrawn by the relevant religious organization, the teacher automatically loses the right to teach religion.

in having this controversy scrutinised by the Constitutional Tribunal are rather low, since among its members there is a strong representation of judges proposed by conservative parties enjoying Catholic Church support and some other judges have previously voted in favour of the position of the Catholic Church (in cases related to religion in public schools). However, the Constitution, as interpreted by the Constitutional Tribunal, gives - in my opinion- ground for positive recognition of hypothetical claims of discrimination in employment in church institutions which cannot be reconciled with the Constitution.³¹³

1.4 No issue?

This section is not relevant in Poland.

2. National approach

2.1 Selected issues

This section is not applicable in Poland.

2.2 Other issues

The religion lessons in state schools have been interpreted as violation of the neutrality of the State, violation of the right not to reveal one's belief or religion,³¹⁴ discrimination of individuals on the ground of religion, belief or non-belief, or as violation of the principle of equal treatment by the State of all religions and religious organisations.

The conscientious objection clause has been challenged in Poland only in respect of physicians' right to refuse to give women confirmation of the existence of an indication for abortion. This may be interpreted as indirect gender discrimination in access to medical service, which is in conflict with the freedom to exercise a profession or the freedom of religion and belief.

Gender discrimination in church-related institutions may be perceived as abuse of the principle of independence of the church from the State and an unlawful exception to the principle of equal treatment, provided in labour law, motivated by religious concerns.

³¹³ Such conclusion may be drawn from the judgment of Constitutional Tribunal of 11 May 2005 (K 18/04), in which the Tribunal decided that the Constitution has priority over EU treaty law while analyzing Article 8 of the Constitution (which stipulates the superiority of constitutional provisions over other laws) in relation to Article 91(3) of the Constitution (which stipulates that if an agreement, ratified by the Republic of Poland and establishing an international organization, so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws). From this judgment, the logical conclusion (derived from *argumentum a maiori ad minus*) may be drawn that such priority should be given to the Constitution also in case of its conflict with 'common' international agreements, despite of the existence of Article 91 (2) of the Constitution, which stipulates that 'an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes'. A German summary of the judgment of 11 May 2005 is available on http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_DE.pdf, accessed 17 May 2010.

³¹⁴ The Tribunal did not recognize this argument by stating that the registration of a child for religious classes does not necessarily reveal somebody's religion, given that non-believing parents may enrol their children for such lessons as well. As to the other arguments see below.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The Constitution provides for two provisions relevant to resolving conflicting rights. The more general Article 31(3) refers to all rights and freedoms, whereas a special regulation is provided for in Article 53(4).

Article 31(3) of the Constitution stipulates that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights. Article 54(5) of the Constitution stipulates that the freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of state security, public order, health, morals or the freedoms and rights of others. The difference between the above provisions is in: 1) the scope of rights and freedoms which may be subjected to limitations (limited in Article 54(5) to freedom to publicly express religion); 2) the legitimate ground for limitations (in Article 54(5) the protection of environment is not listed); and 3) the omission in Article 54(5) of references to: the democratic state, as well as the principle that limitations shall not violate the core of freedoms and rights. In the case law of the Constitutional Tribunal it has, however, been stressed that Article 54(5), despite the omission of direct reference, does not exclude the application of the principle of proportionality provided for in Article 31(3). This is particularly important when establishing the boundaries of possible limitations.³¹⁵ While describing the mutual relations of the above provisions, it is stressed that the latter is a *lex specialis* with regard to the first. This means that e.g. limitations may be applied only as to the freedom to publicly express religion. Any other limitations, e.g. as to the freedom to profess or to accept a religion of personal choice or to manifest such religion in private, by worshipping, praying, or participating in ceremonies, are not allowed. However, the question remains which religiously motivated behaviours may be considered as public expression of religion.³¹⁶

The Labour Code (Article 18^{3b}(4) stipulates that different treatment of employees on the ground of religion or belief does not amount to violation of the principle of equal treatment in employment, if the employee's religion or belief constitutes a significant and justified occupational requirement in relation to the type and character of the activity carried out within the church or other religious associations, as well as organizations whose activities are directly related to religion or belief.³¹⁷

3.2 Conformity with EU law

The provision of Article 53(4) is in conformity with international law e.g. with Article 9(1) of the European Convention on Human Rights and Fundamental Freedoms, Article 18 of the UN International Covenant on Civil and Political Rights and with Articles 10 and 52 of the Charter of Fundamental Rights of the European Union.

³¹⁵ Judgment of 16 February 1999, SK 11/98. See also B. Banaszek *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Constitution of the Republic of Poland. Commentary) C.H. Beck, Warszawa 2009, p. 276.

³¹⁶ P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej* (Commentary on the Constitution of the Republic of Poland) Liber, Warszawa 2000, p. 74.

³¹⁷ Article 18^{3b}(4), Labour Code, Law of 26 June 1974, unified text JoL 1998 no. 21, item 94 with amendments.

The provision of Article 18^{3b}(4) of the Labour Code constitutes the transposition of Article 4(2) of Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, stating that a difference of treatment based on a person's religion or belief shall not constitute discrimination if, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos. It cannot, however, be considered as a proper transposition, since the final statement of the above-mentioned Directive's provisions has been omitted. This final provision of the Directive provides for the reservation that exceptions connected with religion and belief should not justify discrimination on another ground.

The Service Directive (2004/113/ EC) has not been implemented in Poland yet.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

This section is not applicable in Poland.

4.2 Probable outcome of case law on selected issues

Dress code

Although there is no reference in Polish literature to the wearing of headscarves, it seems that they might be considered as religiously motivated behaviour, and might therefore, in situations of conflict, be subjected to certain limitations, according to Article 54(5) of the Constitution.

Sex-segregated services motivated by the requirements of religion

The lack of implementation of the Service Directive makes it impossible to give any information on this topic.

4.3 Case law on other relevant issues

As to the religion lessons, the Polish Constitutional Tribunal as well as the ECtHR³¹⁸ have already taken position several times. The first Constitutional Tribunal judgment concerned the constitutionality of the introduction of religion lessons in public schools as such.³¹⁹ Twice the Constitutional Tribunal has taken position on the issue of the introduction of notes for religion/ethics,³²⁰ and once on including them in the average listing of notes.³²¹ The most recent judgment of 2 December 2009 is worth special attention. The proceedings were initiated by a group of deputies, alleging that the Regulation of 13 July 2007 issued by the Minister of Education, which stipulated that the notes for religion/ethics lessons should be included in the average of notes indicated on the annual or graduation school certificate, violates the principle of the neutrality of the State and the principle of equality guaranteed by the 1997 Constitution of Republic of Poland. In particular, the claimants argued that one of the indicated goals of this regulation was to encourage pupils to participate in those lessons, which a neutral State should avoid, and that the law discriminates against children who do not participate. The claimants also raised the problem that, for

³¹⁸ *Saniewski v. Poland*, judgment of 21 June 2001, application no. 40319/98.

³¹⁹ Judgment of 30 January 1990, K 11/90.

³²⁰ Judgment of 20 April 1993, U 12/92 and judgment of 5 May 1998, K 35/97.

³²¹ Judgment of 2 December 2009, U 10/07.

religion lessons, the criteria of evaluation were different from those applied in other lessons, since the basis for the evaluation reflected in the note for religion was not only the level of acquired knowledge but also actual religious practice (e.g. participation in Sunday masses or sacraments). In the opinion of the Tribunal (given with one dissenting vote) the recognition of the constitutionality of the challenged Law constituted a simple consequence of the recognition of the constitutionality of the introduction of religion in public schools,³²² with the obligation to indicate the notes for religion lessons on every school certificate. The principle of neutrality of the public authority in this case means the non-influence on the curriculum of religion lessons. The alleged violation of the principle of equal treatment of citizens in the field of education on the ground of religion or belief was not recognised by the Constitutional Tribunal, because of the claim did not include sufficient justification that a violation of the Constitution had occurred. However, arguments based on discrimination on the grounds of religion were presented in the dissenting opinion regarding this verdict. The dissenting judge agreed with the claimants that the inclusion of notes for religion in the average of notes indicated on the school certificate has great consequences for pupils in their further educational career. Therefore, the deprivation of such opportunities for some pupils, due to the lack of access to religious education of their belief in the schools attended by them, may be considered as violation of the principle of equal treatment. The dissenting judge also drew attention to another aspect of violation of the principle of equal treatment: by issuing the Regulation permitting to include notes in the average of notes, the State had reinforced the dominant position of the Catholic Church in the educational market, since in Polish reality only the dominant (Catholic) religion is likely to provide religion lessons in the majority of public schools. Therefore, such Regulation violates the State's obligation to ensure equal treatment of all churches and religious organisations.³²³

By confirming the constitutionality of the inclusion of notes for religion (or ethics) in the average of notes indicated on the annual or graduation school certificate, the Constitutional Tribunal seems to pursue its line of tolerance for such unequal treatment.

In 1990, the Constitutional Tribunal took position on the problem of the conscientious objection clause³²⁴ which had been introduced by ordinance of the Ministry of Health of 30 April 1990,³²⁵ issued on the ground of the liberal abortion law of 1956³²⁶ then in force. The claimant (Ombudsperson for Civil Rights) alleged that this ordinance's Regulation disregarded the statutory blanket permission to be fulfilled by administrative authorities, since the authorisation referred exclusively to the regulation of qualifications required from physicians who provide certificates on the existence of indications for abortion and those who are authorized to perform it (according to the law two different physicians should be involved) and did not refer to the right of physicians to refuse to perform abortion. In addition, the question was posed whether physicians may refuse, on the ground of conscientious objection, to

³²² Laicism and neutrality of the State may not be understood as prohibiting the introduction of religious lessons in response to wishes of the citizens.

³²³ E. Łętowska, dissenting opinion to the judgment of 2 December 2009, U 10/07, <http://tribunal.gov.pl>, accessed on 14 April 2010.

³²⁴ Judgment of 15 January 1991, U 8/90.

³²⁵ JoL 1990, no. 12, item 61.

³²⁶ Law 27 April 1956, JoL 1956 no. 12, item 61, repealed by the Law of 7 January 1993 on family planning, protection of the foetus and conditions for permissibility of abortion, JoL 1993, no. 17, item 78 with amendments.

issue the certificate confirming the existence of medical indications for abortion (if the continuation of pregnancy may endanger a woman's health and life³²⁷) since it is the evidence of objective medical knowledge, having nothing to do with the physician's conscience. The problem was also interpreted as a limitation of the access to legal abortion, since physicians have the monopoly on deciding on and performing abortions. In the opinion of the Constitutional Tribunal, the Regulation was constitutional since the conscientious objection clause is incorporated into other regulations as well, such as the constitutional guarantee of freedom of religion. Physicians' confirmation of the existence of grounds (indications) for abortion always encompasses an element of ethical judgment (and never has a purely medical character), and therefore the conscientious objection clause may apply to it.

5. Good practices/solutions

My research did not allow identifying any good practices.

6. Further comments

I have no further comments.

PORTUGAL – *Maria do Rosário Palma Ramalho*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

In Portugal, tensions or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion are not a real issue. As far as we could investigate, no actions have been brought before the courts concerning this issue,³²⁸ and questions related to these topics do not arise at company level in relation to employment, nor in relation to the access to and supply of goods and services.

The Portuguese Constitution considers both gender and religion as possible grounds for discriminatory practices and the general principle of equality establishes that no one can be privileged, favoured, exempted or deprived of any right or duty due to these factors, among other sources of discrimination (Article 13 No. 2 of the Constitution). The Constitution also recognizes freedom of religion as a fundamental right (Article 41).

The constitutional right to freedom of religion is developed by the Law on Religious Freedom (Law No. 16/2001, of 22 June 2001).

Gender equality rights are developed by several Laws, mainly in relation to employment in the private sector (Labour Code, approved by Law No. 7/2009, of 12 February 2009 - Articles 23 *et seq.*, and Articles 30 *et seq.*), in relation to employment in the public sector (Law No. 59/2008, of 11 September 2008 – Articles 13 *et seq.*, and Articles 18 *et seq.*) and in relation to the access to goods and services

³²⁷ Such a right was not objected to in emergency cases (direct danger for a woman's life).

³²⁸ Of course, there have been actions regarding freedom of religion as such, dealing with problems like freedom of religion in education, in public and in private schools or concerning the right to object to certain procedures in the course of a labour contract or the right to refuse military service, on religious grounds. However, we could not find any actions establishing a link between freedom of religion and gender equality.

(Law No. 14/2008, of 12 March 2008, which transposed Directive 2004/113/EC, of 13 December 2004).

Following the Constitution, both the Labour Code and the legislation regarding civil servants contemplate gender and religion as sources of discrimination: in Article 24 No. 1 of the Labour Code and Article 13 No. 2 of Law No. 59/2008, of 11 September 2008, respectively. However, the law establishes no link or hierarchy between these two sources of discrimination.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

In access to employment and in the course of a labour contract, in private employment or in public employment, we have no knowledge of conflicts between gender equality and freedom of religion, neither in relation to the requirement to observe dress codes (more specifically dress codes prohibiting Islamic women's dress such as headscarves or burkas), nor in relation to the requirement to shake hands regardless of sex. We underline that Portugal has a strong Catholic tradition, so, even if they arise, these situations would be rare.

1.2.2 Goods and services

We have no knowledge of situations regarding the supply of segregated healthcare or social care services for men and women because of religiously inspired demands of clients. In hospitals and in other care facilities, services are often divided according to the sex of patients and attendants, but this division does not have a religious ground but relies on the right to privacy and intimacy.

Concerning educational services and institutions, some schools are still reserved for girls and others for boys: in some cases, and only in the private sector, this separation may be partially based on religious tradition (for instance, some Catholic schools admit only girls or only boys); in the public sector, this division still exists in schools for the sons and daughters of the military, in a tradition that goes way back and whose ground is uncertain.

In the private sector, there are of course facilities and services reserved to persons of one sex (for instance, services related to sports, hairdressers, clubs, etc.), but as far as we know these sex-segregated services do not rely on religious demands of their clients but on other reasons related to the kind of services offered connected with the fundamental right to privacy.

1.3 Tension or conflicts: other issues

In Portugal, several questions could arise in this area, with or without the link between religious discrimination and gender discrimination.

On the one hand, problems related to freedom of religion may arise in the course of a labour contract: for instance, the right of an employee of a non-Christian belief to stop working on a day of the week other than Sunday, which is the general rule in the Labour Code (Article 232),³²⁹ the employer's right to impose some limits on the

³²⁹ Regarding this situation, Article 14 of the Law on Religious Freedom (Law No. 16/2001, of 22 June 2001) establishes that this employee has the right to take his weekly time to rest on a different day on certain conditions: the worker must work on flexible working-time conditions; the religious institution to which the worker belongs must indicate the dates of the relevant feast days to the authorities in advance; the employer has the right to be compensated for the working time lost due to the specific resting periods of the employee.

employee's freedom of expression at the workplace (including the rights of the employee regarding his/her personal appearance);³³⁰ or the right of the employee to object to performing certain tasks in the course of the contract, based on his/her religious beliefs (e.g. the extension of the right of a doctor to refuse to perform a legal abortion procedure, based on his/her religious belief³³¹).

However, these questions are not addressed in relation to gender discrimination.

On the other hand, the two grounds of discrimination could, in practice, be opposed in some situations related to labour relations: for instance, the need of the husband's consent for the wife to have a professional career, which may have a religious ground, would certainly go against the gender equality principle in access to employment. However, we have no information regarding this kind of situations or of any debate regarding these issues.

1.4 No issue?

We think that in Portugal there are no considerable tensions or conflicts between the gender equality principle and freedom of religion for two reasons: partially because Portugal is still strongly anchored in the Catholic tradition and therefore possible conflicts in this area are rare, and partially because Portugal is known to be very tolerant towards ethnic minorities and has a strong tradition in integrating these minorities, and thus the cultural differences between different social or ethnical groups tend to diminish over time.

Also, I think that even at a professional and specialised level (meaning lawyers, judges, professors, etc.) there is no great awareness of multi-discrimination problems and of the possible interaction between several grounds of discrimination. The lack of awareness regarding this issue makes it difficult to make the necessary connections in order to identify these problems and to tackle the complexity of these discriminatory practices.

2. National approach

2.1 Selected issues

In my opinion, the legal frame applicable to the topical issues addressed in this report would be different when you address situations related to employment and situations related to the access to goods and services. Also the questions would be addressed in a different way when dealing with public services or public employment or when dealing with private employment and with private services and facilities.

2.1.1 Employment

In Portugal, concerning the access to employment and practices in the course of a labour contract, practices like the requirement to observe dress codes, more specifically dress codes prohibiting Islamic women's dress such as headscarves or burkas, would certainly be addressed as religious discrimination (and not as gender discrimination) and maybe also as a violation of the right to freedom of expression of the worker at the workplace (which includes the right to a freely composed personal appearance) and of the right to privacy.

³³⁰ This right may involve dress codes, but only if they have an objective justification, since employees' appearance at work is considered a personality right and, as such, is more strongly protected than other individual rights.

³³¹ In practice, the extent of this objection would differ under circumstances such as the private or the public nature of the hospital, and the possible replacement of the doctor.

Under this framework, these practices might fall under the legal provision that prohibits discriminatory practices on religious grounds (Article 24 No. 1 of the Labour Code), under the scope of the legal provision that protects the freedom of expression of the worker at the workplace (Article 14 of the Labour Code), and under the legal provision that grants the worker the right to privacy, since religious beliefs are considered as part of the right to privacy (Article 16 No. 2 of the Labour Code). The same framework would apply in public employment, since the applicable legislation has similar provisions - prohibition of discrimination on religious grounds, freedom of expression and right to privacy (Law No. 59/2008, of 11 September 2008 – Article 14 No. 2, Article 6 and Article 7 No. 2).

However, this general framework is not absolute in the sense that it includes several limitations, which relate to the possible conflict of freedom of religion with other fundamental rights. If we introduced a hierarchy in these limitations, we would possibly arrive at the following results:

- a) In the public sector, the legislation is stronger in the sense of respecting freedom of religion, since the Law on Religious Freedom (Law No.16/2001, of 22 June 2001) expressly states that the State is neutral with regard to religion (Article 4) and must therefore avoid all discriminatory practices based on religion and generally respect religious rights. Having a general nature, these provisions apply to labour relations in the public sector.
- b) In the private sector, conflicts may arise between freedom of religion and the fundamental right of free economic initiative (Article 61 of the Portuguese Constitution). This right allows the employer to pursue and organize his business as he sees fit, and this organisation may include the imposition of rules of conduct, for instance regarding dress codes or the way to address a client. From this perspective, some limits could then be imposed on freedom of religion, provided they could be objectively justified.
- c) Finally, in the private sector, more limitations on freedom of religion could be allowed in religious organisations, for instance religious schools or institutions, regarding their own employees' conduct or appearance at the school.

2.1.2 Goods and services

The topic of the supply of segregated healthcare services or social services for men and women because of religiously inspired demands of clients would be addressed differently in the public and in the private sectors.

In the public sector, due to the religious neutrality of the State (Article 4 of Law No. 16/2001, of 22 June 2001, on Religious Freedom), these services are provided to people of both sexes, and sex-segregated services can only be justified for the right to privacy and not on other counts.

However, the Law on Religious Freedom states that the religious neutrality of the State does not prevent it from collaborating with institutions that represent different religions and this cooperation must be in accordance to the effective representation of these religions in society (Article 5). Nevertheless, maybe because of the weak presence of non-Christian confessions in Portugal, we have no knowledge of public services having been asked to provide healthcare services or social services separately to women and men for religious reasons.

In contrast, in the private sector, the fundamental right of free economic initiative (Article 61 of the Portuguese Constitution), would, in principle, allow the employer to pursue and organize his business as he wants and therefore to propose his services

exclusively to men or to women, for religious reasons or for other reasons (e.g. the right to privacy, which is often the case).

Anyway, we think that the question of gender would not arise in any case.

2.2 Other issues

In the course of a labour contract, the problems related to freedom of religion that may arise as described above (for instance, the right of an employee of a non-Christian belief to stop working on a day of the week other than Sunday, or the employer's right to impose some limits on the employee's freedom of expression at the workplace, including the rights of the employee regarding his personal appearance, or the right of the employee to object to performing certain tasks in the course of the contract, based on his/her religious beliefs), are addressed as religious discrimination, falling under the scope of Article 24 No. 1 of the Labour Code.

Although the general principle in this area is the respect for these rights in the course of the contract, limits could be imposed when, in exercising these rights, other rights would be at risk. In Portugal, this situation would most certainly be treated as a conflict of rights, and the right considered of greater importance in the concrete context would prevail.

More difficult to solve would be the conflict between gender discrimination and freedom of religion, if it arises in a labour context (for instance, the conflict, referred to above, between the need of the husband's consent for the wife to have a professional career, on religious grounds, as opposed to the gender equality principle in access to employment), because there is no hierarchy in the several sources of discrimination mentioned in the equality principle, both in the Constitution and in the Labour Code. However, in this case we personally think that the gender equality principle would prevail over freedom of religion, since the gender equality principle has a reinforced value in the Portuguese Constitution, in the sense that it is not only viewed as a fundamental right (Article 13 of the Constitution), but also as a fundamental objective of the Portuguese State (Article 9h) of the Constitution).

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The Portuguese legislation does not explicitly provide for rules which prioritise any of the conflicting rights based on the several sources of discrimination, because both in the Constitution and in the Law, the various sources of discrimination are presented together and have no hierarchy among them. Also, there are no specific procedural rules to decide these cases of conflicting rights.

However, the general rule of the Civil Code concerning the conflict of rights (Article 335 of the Civil Code, approved by Decree-Law No. 47344, of 25 November 1966), can be a useful tool to decide these conflicts. This rule determines two solutions for a conflict of rights: if the rights are of the same value, both of them must give way to the same extent, so that both of them can be pursued equally; and if one of the rights in the conflict is superior to the other one, the superior one prevails over the other.

When applying these rules to a potential conflict between the gender equality principle and the freedom of religion, and taking into account the utmost importance of gender equality in the Portuguese Constitution (not only as a fundamental right but also as one of the fundamental tasks of the Portuguese State – Article 9h) of the

Constitution), in case of a conflict there would be a material basis to make the gender equality principle prevail.

3.2 Conformity with EU law

The Portuguese legislation is generally in accordance with the relevant EU law.

4. Legal framework for deciding conflicts: case law

We have no information regarding how the potential conflicts between gender equality and freedom of religion/non-discrimination on the grounds of religion are dealt with in case law of national courts and by equality bodies, because we have no knowledge of case law regarding these issues, nor of equality bodies' decisions on the same issue.

4.1 Case law on selected issues

There is no case law on these issues.

4.2 Probable outcome of case law on selected issues

Since there is no case law on these issues, I can only presume that if they arise, cases would be dealt with according to the legal framework that we have described above (2.1.1, 2.1.2 and 2.2, as well as 3.1.).

5. Good practices/solutions

I am not aware of any 'good practices' in this respect, aimed at solving potential conflicts between gender equality rights and freedom of religion.

6. Further comments

In my view, the most important issue in this area is to directly address the links between gender discrimination and other sources of discrimination or other fundamental rights (mainly the right to freedom of religion) and, eventually, the establishment of priority rules, should a conflict of rights occur regarding these topics. Without addressing this matter, this problem will never be solved.

ROMANIA – Roxana Teşiu

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Although Romania has issues concerning the freedom of religion, there are no real issues, conflicts or tensions between gender equality and the freedom of religion/non-discrimination on grounds of religion. The two main issues related to freedom of religion are represented, on the one hand, by the restitution of properties confiscated before December 1989 to religious groups other than the Orthodox Church and, on the other hand, by keeping religion as an optional course in the primary and secondary school curricula.

The vast majority of the population is Orthodox. According to the 2002 census, Romanian Orthodox believers constitute 86.8 % of the population, Roman Catholics 4.7 % and Greek Catholics less than 1 %.

The Romanian Constitution provides for freedom of religion. According to the legal provisions of Article 29(1) of the 1991 Romanian Constitution, ‘freedom of thought, opinion and religious beliefs shall not be restricted in any form whatsoever. No one shall be compelled to embrace an opinion or religion contrary to his own convictions.’ Furthermore, the same Article provides that all religions shall be free and organized in accordance with their own statutes, under the terms laid down by law. Any forms, means, acts or actions of religious enmity shall be prohibited in the relationships among the cults. Religious cults shall be independent from the State and shall enjoy support from it, including the facilitation of religious assistance in the army, in hospitals, prisons, homes and orphanages.

The 2009 US Department of State Report on religious freedom states that Romania still faces issues with regard to avoiding ‘adoption of legislation regarding the restitution of Greek Catholic churches by the Orthodox Church, which had received them from the Communist state in 1948. According to a spokesperson for the Orthodox Church, the Greek Catholic Church has received, either through negotiation or in court, 152 of the 2,600 churches and monasteries it owned in 1948.’³³² The matter of the restitution of properties to churches, other than the Orthodox Church, is one of the critical aspects that adversely affect the rights of religious groups other than the Orthodox.

The Government exercises considerable influence over religious life through laws and ordinances. Government registration and recognition requirements continue to pose obstacles to minority religious groups. According to the legal provisions of Article 134(1), Christmas, Orthodox Easter and Pentecost are declared national holidays. Furthermore, according to the provisions of Article 134(2), members of other recognized religious groups that celebrate the mentioned religious days on a different date are entitled by law to have an additional holiday. There is no law against proselytising.

1.2 Tension or conflicts: selected issues

There are no significant tensions or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion.

1.2.1 Employment

With regard to access to employment in Romania there are no specific requirements to respect dress codes in public or private employment, more specifically the dress codes prohibiting Islamic women’s dress. Related to the requirement to shake hands regardless of sex in either private or public employment, there are no specific requirements either. Shaking hands is simply perceived as a matter of social communication and practices are widespread in the country with regard to accepting it as part of social communication. According to everyday practice, the shaking of hands is much more common in the southern area of the country.

1.2.2 Goods and services

Related to the supply of segregated healthcare services for men and women because of religiously inspired demands of clients there is no specific evidence to be found for any widespread form of discrimination.

Regarding the supply of segregated social services for men and women because of religiously inspired demands of clients there is not enough evidence either for such

³³² Available on http://romania.usembassy.gov/2009_irf_en.html, accessed 19 April 2010.

differences to be based on mixed grounds of gender equality and religious freedom. Discrimination in the availability of social services might be found in the Roma community. However, that is not due to the different religious clothing and accessories of Roma citizens.

1.3 Tension or conflicts: other issues

This section is not applicable in Romania.

1.4 No issue?

The absence of significant tensions or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion in Romania might be explained by the fact that the vast majority of the population are Romanian Orthodox believers. There are several other themes that are important in the Romanian public space and represent cross-cutting themes of heated debate in Romania, such as poverty and the increasing level of poverty in Romanian society. Even the importance of the topic of gender equality, which was a much more topical issue on the Romanian public agenda between 2000 until 2007, very much decreased after Romania became an EU Member State.

On the other hand, I should mention Law no. 489 of 2006 on religious freedom and the general status of religious denominations. Article 5(5) of Law no. 489 prohibits the processing of personal data concerning religious beliefs or membership of denominations, except for a national census as sanctioned under the law or the situation where the individual concerned has explicitly agreed to it. Law no. 489 of 2006 also provides that ‘it is hereby forbidden to compel an individual to declare their religion, in any relationship with public authorities or private legal entities.’

2. National approach

The broad and general constitutional provisions are implemented in practice by specific anti-discrimination legislation adopted in August 2000.³³³ The 2000 Anti-discrimination Law was subsequently amended to facilitate transposition of Directive 2000/43/EC and Directive 2000/78/EC. The 2000 Anti-discrimination Law is supported by relevant provisions in the legislation on equal opportunities for men and women, the relevant provisions from the legislation on the protection of persons with disabilities and in the Labour Code. In case of conflicting provisions of different relevant pieces of legislation, the 2000 Anti-discrimination Law would prevail as *lex specialis*.

Article 2(1) of the 2000 Anti-discrimination Law defines discrimination as ‘any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, chronic disease, HIV-positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life’. The Romanian 2000 Anti-discrimination Law or other specific pieces of legislation do not define racial or ethnic origin, religion or belief, age or sexual orientation. The Romanian Constitutional Court referred to the interpretation of the European Court of Human Rights in deciding cases involving religious education.

³³³ Governmental Ordinance no. 137 of 2000 on preventing and sanctioning all forms of discrimination, republished in Official Gazette no. 99 of 8 February 2007.

Multiple discrimination is included by the 2000 Anti-discrimination Law as an aggravating circumstance. Article 2(6) of the Law stipulates that any distinction, exclusion, restriction or preference based on two or more of the criteria foreseen in Paragraph 1 shall constitute an aggravating circumstance in establishing liability, unless one or more of its components is not governed by criminal law.

There are very few decisions issued by the National Council on Combating Discrimination (NCCD) with regard to religion-based discrimination cases. In its decision in *D. vs N. and Șofronea*³³⁴ regarding the denial of access to a swimming pool to a Muslim woman wearing a swimming costume appropriate for her religious beliefs, but perceived by the owners of the pool as casual clothing, the NCCD invoked the provisions of Article 2 Paragraph 3 under its previous wording by sanctioning ‘any active or passive behaviour which, through its consequences, favours or prejudices in an unjustified manner or subjects an individual, a group of individuals or a community to an unjust or degrading treatment, in relation to other individuals, groups of individuals or communities, shall trigger liability, unless it falls under the incidence of criminal law.’ In the mentioned 2005 decision, the NCCD did not closely study the question of legitimate aims which might justify discrimination and did not develop any kind of test in assessing the aims and the methods used to reach a particular legitimate aim. The NCCD mentioned the constitutional provisions on restriction of rights and freedoms.³³⁵ The NCCD concluded that by requesting the Muslim woman to leave the swimming pool, the owners of the club had restricted her fundamental rights on account of her religious practices. The NCCD sanctioned the owner of the swimming pool by imposing a fine of RON 1 000.

2.1 Selected issues

This section is not applicable in Romania.

2.2 Other issues

This section is not applicable in Romania.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The Romanian legislation currently enforced does not explicitly provide for rules aimed at prioritising any of the conflicting rights related to gender equality and the freedom of religion/non-discrimination on grounds of religion. Also, the Romanian legislation does not explicitly provide for procedural rules to decide cases of conflicting rights or for rules on how to balance conflicting rights.

3.2 Conformity with EU law

There is no information on this point.

4. Legal framework for deciding conflicts: case law

There is no case law regarding how potential conflicts between gender equality and the freedom of religion/non-discrimination on the ground of religion are addressed by the national courts and equality bodies. It is not possible to assess how such cases of conflicting rights would be dealt with by the national courts and/or the NCCD.

³³⁴ Case no. 221 of 21 September 2005.

³³⁵ Article 53 of the Romanian Constitution.

5. Good practices/solutions

No good practices/solutions can be described for Romania.

6. Further comments

I have no further comments.

SLOVAKIA – Zuzana Magurová

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

According to the 2001 census, Roman Catholics constitute 68.9 % of the population and Augsburg Lutherans 6.9 %. Smaller religious groups include Greek Catholics, the Reformed Christian Church, Orthodox Christians, Jehovah's Witnesses, various Protestant groups, Jews, Baha'is, and Muslims. No official state religion exists; however, because of the number of adherents, Roman Catholicism is considered the dominant religion.

The freedom of religion is guaranteed by the Constitution,³³⁶ in Article 24. The legislation does not define the terms of 'religion' and 'belief'.

Discrimination on grounds of religion or belief is prohibited by the Constitution, in Article 12(1) and (2), by the Labour Code,³³⁷ in Section 13, as well as by the Anti-discrimination Act,³³⁸ in Article 6(1).

A 2001 concordat with the Holy See³³⁹ provides the legal framework for relations between the country's Catholic Church, the Government, and the Holy See. Article 7 of this Treaty recognizes the right to invoke conscientious objection with respect to the teachings and moral principles of the Catholic Church.

Act No. 308/ 1991 Coll. on Freedom of Religious Belief and the Status of Churches and Religious Societies was amended by Act No. 201/ 2007 Coll., in effect from 1 May 2007. The amendment restricted the conditions for registration of churches and religious societies. The number of 20 000 signatures of church supporters is no longer sufficient now. A church applying for registration has to submit a statutory declaration of each of its 20 000 adult members, who have the Slovak nationality and permanent reside in Slovakia, stating confirmation of his/her adherence to the church concerned.

The registered churches and societies (as legal entities) are legally entitled to subsidies from the state budget for salaries of their church staff as well as to an allowance for operation of their headquarters. They are also entitled to found church schools and to teach the religion at state schools. Registered churches also have the right to provide spiritual service in hospitals, social establishments, military corps or prisons and the right to conduct legal marriage ceremonies. Buildings of registered churches that serve for prayer service are exempted from tax. They are entitled to

³³⁶ Act no. 460/1992 Coll. Constitution of the Slovak Republic, as amended, effective from 1 October 1992.

³³⁷ Act no. 311/2001 Coll. Labour Code, as amended, effective from 1 April 2002.

³³⁸ Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination, Amending and Supplementing Certain Other Laws, as amended, effective from 1 July 2004.

³³⁹ Act no. 326/2001 Coll. of Laws, Basic Treaty between the Slovak Republic and the Holy See.

exemptions from the Labour Code and from the principle of equal treatment, have the right to set up their own media channels, and are entitled to secrecy of their church staff.

At the beginning of 2008, the General Prosecutor claimed unconstitutionality of the said amendment before the Constitutional Court. However, in February 2010, the Constitutional Court dismissed the motion of the General Prosecutor to declare the non-compliance of certain provisions of the Act on Freedom of Religious Belief and the Status of Churches and Religious Societies with the Constitution and with international conventions. According to the Constitutional Court, the currently valid Act does not include any obstacles to the free operation of churches and registration is not a necessary condition for their activity. The Constitutional Court also stated that the rights of fugitives and children were not affected and hence the Act was in compliance with the Constitution as well as with international conventions. The freedom of religion is an individual right, so there was no reason to consider the Act as contradictory to this right, where this Act stipulates the rights of churches or religious societies as collective entities, the ruling of the Constitutional Court states.

Tensions or conflicts between gender equality and freedom of religion are not a real issue in Slovakia.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

In Slovakia, the issue of Islamic women's dress at work and in the access to and supply of goods and services is only known from other countries and the social situation indicates that it will take a long time before it becomes a subject really deserving attention.

1.2.2 Goods and services

One exception are health services that are provided in spas, where Muslim women from abroad are frequent patients. On the basis of personal interviews with the medical staff, the author concluded that all spas adapted their services to the requirements of their patients. This applies particularly to the provision of separate services for men and women, provision of special pool clothes, etc. Also, facilities where immigrants live respect their specific requirements for separate services resulting from their religion.

1.3 Tension or conflicts: other issues

In this context, a specific issue of Slovakia is the application of conscientious objection³⁴⁰ that creates an obstacle to the access to sexual and reproductive health services. A significant majority of reproductive health services is used by women. The legal regulation of the possibility to invoke conscientious objection, without adopting sufficient guarantees in the form of regulatory mechanisms focusing on securing effective access to those services, constitutes a disproportionate burden for women and girls and thus discriminates against them in the access to reproductive health services. The Shadow Report³⁴¹ for the CEDAW Committee for the year 2008 refers to this fact.

³⁴⁰ According to Article 7 of Act no. 326/2001 Coll. of Laws, Basic Treaty between the Slovak Republic and the Holy See.

³⁴¹ The Shadow Report was prepared by the coalition of women's and human rights NGOs.

According to the Report, conscientious objection is invoked not only by healthcare staff, but it is also often abused by the top management of state-funded hospitals, who frequently prohibit performing certain interventions (usually abortions or sterilizations) regardless of the opinion of the healthcare staff. These hospitals thus violate the very essence of conscientious objection, which can be invoked only by a natural person. In the capital city Bratislava, for instance, out of five public hospitals only one performs abortions. In the large regional capitals Trnava and Nitra none of the hospitals performs abortions. Apart from that, instances of gynaecologists refusing, primarily for religious reasons, to provide counselling in the field of family planning or prescribe contraception and pharmacies refusing to sell contraception including emergency contraception are occurring more frequently.

1.4 No issue?

According to the study conducted by the *Milan Šimečka Foundation*, approximately five to seven thousand Muslims live in Slovakia. This number is only an estimate, actual statistics are not available. Immigration and Islam in Slovakia are subjects that have not received sufficient attention in public discourse. On the one hand, these subjects are considered irrelevant to Slovakia, on the other hand, when they are discussed, the discussion is conducted in a distorting, simplifying and disapproving manner. Most of the Muslims in Slovakia live in the capital city, with a smaller portion living in the cities with universities. Many of them came to Slovakia to study here. Most of those who were studying in former Czechoslovakia in communist days, have already left the country, but some stayed and quite successfully entered the labour market and established themselves in Slovak society. Many of these people with a university education found jobs in the health sector and in technical disciplines. A very important characteristic of Muslim immigrants is that nearly all of them are men, with a very low representation of women. Slovakia also has a small number of Slovak-born women who converted to Islam before marriage.

The Muslims living in Slovakia are mostly well-educated and financially stable. Unlike the general notion of immigration of poor, uneducated and often dangerous individuals and their families, who after their arrival become dependent on the social system of the target country to the detriment of the original majority population, the Muslim immigrants living in Slovakia have a relatively high social status and are able to provide for themselves and their family. In this regard the conditions for them to succeed on the labour market are good too.

Secondly, in Slovakia we have a first generation of immigrants, somewhat of a second generation, but certainly not a third or fourth generation, as in the older EU Member States. In Slovakia there are no 'quarters' or 'suburbs' characterised by almost exclusive representation of the Muslim population. The Muslims living in Slovakia are scattered throughout the city without increased concentration – with the exception of student hostels.

Thirdly, most of these immigrants do not have Slovak state citizenship. As many of them probably will not stay in the country for a long time, they do not even apply for it and stay in Slovakia on the basis of student or work visa. In most cases, those who cannot return to their country of origin because of the political situation there stay in Slovakia.

Moreover, Muslim customs are limited to the area of religion, because Slovakia does not offer a sufficiently developed infrastructure to cover their spiritual and secular needs. The capital city has two Muslim houses of prayer. Neither of them can

be designated as a mosque, because this status could not have been granted to them yet.

Following the change of the Act stipulating the registration of churches in Slovakia, the Muslims lost the possibility to register Islam as an official church recognised by the State for a long time. According to the current wording, registration requires 20 000 signatures of adult members permanently residing in the territory of the Slovak Republic and who have Slovak state citizenship, supporting the registration of the church. In view of the current number of Muslims with Slovak state citizenship, this target is difficult to achieve. The presenters of the proposal of the amendment argued that it was important that, as they put it, ‘absurd groups’ should not receive financial resources from the State. As they presented the proposal at the time that the signature campaign of Muslims aimed at registration of the Islamic belief was about to start, their decision was designated by many as a decision preventing Muslims from registering, which eventually became true.

2. National approach

The Slovak legislation does not include any exceptions for racial discrimination at all. The *Anti-discrimination Act* in Article 8(2) allows different treatment, not being discrimination, for registered churches and religious societies as well as for legal entities whose activity is based on religion or faith. These are allowed to require that persons employed by them or carrying out certain work for them should act in accordance with their religion or belief, or in accordance with rules and principles of their religion and belief.

From the reports of the Centre³⁴² it results that one single case of gender discrimination in the area of access to employment is known in Slovakia. In the year 2004, a member of a religious society registered in Slovakia claimed violation of the equal treatment principle from the viewpoint of gender equality in access to employment, specifically regarding the position of preacher in the religious society concerned. She was employed by one of the bodies of this church as an administrative worker and graduated from a theological faculty after part-time studies; the study programme was recommended to her by her employer. After asking for an opportunity to practice the profession of preacher, the employer answered her application negatively due to the fact that she was a woman. In the substantiation, the employer referred to the ‘(...) prevailing understanding of women in church coming from the Bible (...)’ despite the fact that the activities of a preacher could be performed by both men and women in this particular religious society. The claimant provided the Centre with written and oral documentation to analyse the potential discrimination. The Centre stated that in this case direct discrimination based on gender had occurred. The claimant filed a complaint to a court since her employer refused to satisfy her complaint asking to correct the condition caused by discrimination. Reports of the Centre from the following years do not mention this case at all and the author does not have any information on whether the action was filed and whether the court decided the case.

The Slovak legislation does not define the individual prohibited grounds of discrimination at all. The content of the individual prohibited grounds of discrimination has to be defined on the basis of the relevant rulings of the ECJ and ECHR.

³⁴² The Slovak National Centre for Human Rights is the body designated for the promotion of equal treatment and shall annually publish a report on the observance of human rights in the Slovak republic.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The Slovak legislation does not contain any rules for the resolution of potential conflicts between the individual grounds of discrimination.

3.2 Conformity with EU law

The Antidiscrimination Act that stipulates the grounds of discrimination is in accordance with the individual directives, but the formulation of the Act on Freedom of Religious Belief and the Status of Churches and Religious Societies creates discriminatory conditions, and in the author's opinion it does not comply with EU law. Consequently, the State, by determining the increased registration requirement discriminates against persons who profess a religion of a church that is not registered in Slovakia, compared to other worshippers who are members of a registered church. The former group cannot fully practise their religion or religious belief because of the number of worshippers fulfilling the requirement of permanent residence in the territory of Slovakia and the condition of Slovak state citizenship.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

No cases are known for these issues.

4.2 Probable outcome of case law on selected issues

In view of the lack of case law, it is difficult to predict reasoning and final rulings of the courts. However, they may use certain analogies with nun's habits. The only known 'visible' manifestation of the membership of a church in Slovakia based on clothing is the nun's habit. The nun's habit may be considered comparable with Islamic headscarves, because it does not cover the face, but only the hair. Nuns teaching religion at schools wear the 'ordinary' habit. Those who work in healthcare wear a 'special', usually white, habit during their work in hospital, as an equivalent to the protective clothing of nurses. The wearing of a special habit as protective clothing at work is regulated by internal regulations of the hospitals.

Another basis for judicial reasoning may be the requirement for ID card photographs as laid down by the law. 'Scanning of the face will be performed in civil clothing, without head cover and without dark-lensed glasses. In justified cases, for health or religious reasons, the face with head cover can be scanned. This cover must not hide the face in a way preventing identification.'³⁴³ Nuns are allowed to have their ID card photograph taken while wearing their habit. By analogy, Muslim women should be allowed to have their photograph taken while wearing their headscarf. However, clothes covering the face, whether fully or partially (burkas) are not acceptable.

5. Good practices/solutions

There are no good practices or solutions worth mentioning.

³⁴³ Section 5, Article 4 of Act no. 224/2006 Coll. on identity cards.

6. Further comments

In view of the fact that an increase of the Muslim population in the territory of Slovakia cannot be expected in the coming years, the issues addressed in this report do not seem to be topical.

SLOVENIA – *Tanja Koderman Sever*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion are not an issue in Slovenia.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

Neither in the private nor in the public sector are there any dress codes prohibiting Islamic women's dress such as headscarves or burkas. In addition, there are no requirements such as shaking hands. But there are some dress codes in the private and public sector for uniforms that employees have to wear (in the army, police, customs, hospitals and other healthcare services, banks and savings banks etc.) where Islamic women and men for example are treated equally to others. So far these issues have not become topical yet and nobody wants to discuss them in public. Everyone is waiting for a particular case to arise.

1.2.2 Goods and services

There are no segregated healthcare services for men and women or segregated social services for men and women because of religiously inspired demands of clients. Slovene residents, refugees and people from the ex-Yugoslav republics and other ethnical groups (such as the Roma) are not recognized as a national minority according to our Constitution and therefore their languages (Croatian, Serbian, Bosnian, Macedonian, Albanian, Romani language etc.) are not officially recognized. This issue is not topical either. In addition, there is no public debate on this issue.

1.3 Tension or conflicts: other issues

There are no other topical issues.

1.4 No issue?

Most of the Muslims in Slovenia are Bosnians, originally from Bosnia and Herzegovina, who have started to practise or re practise Islam following the Islamic moral code, practice and rituals based on Bosnian tradition. They do not expose themselves visually by covering their heads or wearing a beard and practise Islam in a very casual and adaptable manner. And since there are very few women fully covering themselves who, in addition do not usually work in such posts where uniforms or special dress codes are required, conflicts have not arisen yet. In addition, people are afraid for their jobs and rather than complaining and fighting for their rights, they subordinate themselves to the traditional Slovene environment which is not in favour of Muslims and wearing of Islamic women's dress.

2. National approach

2.1 Selected issues

2.1.1 Employment

Since there is no legal prohibition against wearing Islamic women's dress neither in private nor in public employment, I cannot provide information on the legal framing of the selected topical issues in terms of sex/gender discrimination, discrimination on the ground of racial or ethnic origin, discrimination on the ground of religion or any other ground.

2.1.2 Goods and services

Since there are no segregated healthcare services for men and women or segregated social services for men and women because of religiously inspired demands of clients, I cannot provide information on the legal framing of the selected topical issues in terms of sex/gender discrimination, discrimination on the ground of racial or ethnic origin, discrimination on the ground of religion or any other ground.

2.2 Other issues

There are no other topical issues.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The Slovene Constitution and relevant laws, such as the Religious Freedom Act and the Employment Relationship Act, prohibit discrimination on various grounds such as national origin, race, sex, language, religion, political or other conviction, material status, birth, education, social status, disability or any other personal circumstance, but do not prioritize any of the conflicting rights or provide any rules on how to decide cases of conflicting rights.

3.2 Conformity with EU law

Since the legislation is silent, I cannot discuss conformity with EU law.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

There is no case law on this issue.

4.1.2 Goods and services

There is no case law on this issue.

4.2 Probable outcome of case law on selected issues

Most probably, courts would base their decisions on the freedom of religion.

4.3 Case law on other relevant issues

There is no case law on other relevant issues.

5. Good practices/solutions

There are no good practices/solutions to report.

6. Further comments

I have no further comments.

SPAIN – Berta Valdés de la Vega

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

There are not many conflicts connected with the freedom of religion and/or non-discrimination on grounds of religion that finally reach the public media or the courts. From a legal point of view, only a small number of cases are decided by the various courts, but there is almost no relation with gender equality.³⁴⁴ Nevertheless, at the moment a conflict related to the wearing of headscarves by female students at school is receiving much attention in the Spanish public media.³⁴⁵

1.2 Tension or conflicts: selected issues

1.2.1 Employment

Wearing headscarves at work is not always accepted and this could be because of rules about wearing a specific uniform in an enterprise or, probably more often but less known, because it is rejected as a symbol of a religion (which is not the Catholic one).³⁴⁶ In general, situations of discrimination in access to employment are not often brought before court, but this does not mean that there is no such discrimination. In fact, some real cases are described in information given by the media in reports about the prohibition of wearing a headscarf as a condition to get a job.³⁴⁷

The first enterprise to introduce headscarves as a part of the uniform was *Agromediterránea S.L.*, located in Murcia, where there are 150 female Muslim

³⁴⁴ Some of them are dismissals of teachers of religious education, as a result of their private behaviour, 'not suitable' for a Catholic teacher (such as getting divorced). The dismissals (declared null and void) were by the Catholic diocese, but the teachers were paid by the Minister of Education based on an agreement between the Minister of Education and the Conference of Catholic Bishops (Constitutional Court 38/2007 of 15 February 2007). Some other conflicts regarded blood transfusion to persons belonging to Jehovah's Witnesses (*Testigos de Jehová*), as it is forbidden for them to receive blood. In the relevant case (Constitutional Court 154/2002 of 18 July 2002) the parents did not allow the minor to receive a blood transfusion in the hospital which resulted in his death.

³⁴⁵ The wearing of headscarves also caused difficulties for women when trying to renew identity documents, as this requires a photo. Some public offices ask for a photo without headscarf and others do not, so Muslim associations have complained to the *Dirección General de Policía*. The rule given by the *Dirección General de Policía* is that the photo must only show an oval face.

³⁴⁶ The mandate to wear a specific uniform has been connected with gender discrimination in several cases but the High Court did not appreciate any discrimination on grounds of gender when trousers were forbidden for women who had to wear short skirts at the level of the knee or over it, and although men working in the same company had trousers as a uniform (Sentence of High Court of 23 January 2001, RJ 2001/2063).

³⁴⁷ News on <http://www.abcdesevilla.es/20100317/sevilla-sociedad-/velo-islamico-201003101521.html>, accessed 20 April 2010.

employees on a total of 850 employees. The women made the request and the enterprise decided to modify the uniform in order to reconcile employment and religion.³⁴⁸

There is no news about tension because of the requirement to shake hands regardless of sex or the prohibition of burkas in Spain, as far as I know.

1.2.2 Goods and services

There is no news about tension regarding the supply of segregated healthcare services or segregated social services for men and women because of religiously inspired demands of clients in Spain, as far as I know.

1.3 Tension or conflicts: other issues

In April 2010 there was a social debate in Spain about the wearing of headscarves by female students at school. The debate was sparked by a specific case of a minor (female of 16 years old) who decided to start wearing a headscarf, but the internal rules of her secondary school prohibited covering the head with caps or in any other way. The minor wearing the headscarf was not allowed to go into the classroom and follow the lessons together with other students. She was placed in a different room (visiting room) for several days and, eventually, she was expelled from the secondary school. At the moment of writing (last week of April 2010) she has been accepted by another secondary school in the same city (Madrid) and can continue her studies.

Schools have the right to set their own internal rules about clothing and in Madrid 40 % of secondary schools prohibit covering the head. No cases have yet been brought before the High Court or the Constitutional Court, although this is not the first case about the wearing of headscarves at school. In February 2002, Fátima Elidrisi, a girl of 14 years old at the time, was expelled from school for the same reason and at that moment the social debate was also intensive. Nevertheless, the legal situation has not changed.

1.4 No issue?

From my point of view the main reason why it is not a very great issue is the relevant social influence of the Catholic religion in Spain, and the privileged relation of the Catholic Church with the State, compared with other religions.³⁴⁹ The population in Spain is around 76 % Catholic and only 1.9 % is from other religions, although nowadays this number is increasing mainly because of immigration.³⁵⁰ On the one hand, the homogeneous social/religious culture has caused little tension on this issue. On the other hand, in real life discrimination happens but immigrants and minorities have fewer options to react against it, especially in the access to employment or in the conditions of it as many have unstable employment or are in seasonal agriculture jobs, often in an illegal situation.

2. National approach

2.1 Selected issues

This section is not applicable in Spain.

³⁴⁸ News on <http://www.20minutos.es/noticia/312499/0/>, accessed 20 April 2010.

³⁴⁹ Spain is a non-confessional State, but has signed important agreements with the Catholic Church.

³⁵⁰ Polls from the *Centro de Investigaciones Sociológicas*: http://www.cis.es/cis/openem/ES/2_barometros/depositados.jsp, accessed 23 April 2010.

2.2 Other issues

The debate in Spain about the wearing of headscarves by female students at school has been focused on two fundamental rights: freedom of religion and the right to education.³⁵¹ The possibility for individuals to show the religion that they believe in or to dress in accordance with it is part of the fundamental right to freedom of religion. This might be restricted by reasons of public order or fundamental rights of other persons. At the same time, the right to primary and secondary education is basic and compulsory for all minors of up to 16 years old. The prohibition against girls wearing the headscarf at school has not been framed in terms of gender equality.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The specific exception clauses of the Recast Directive (Article 14, Section 2) and of the Goods and Services Directive (Article 4, Section 5) are correctly transposed in Law 3/2007 on effective equality between women and men (Articles 5 and 69 Section 3) and in Law 62/2003 on *medidas fiscales, administrativas y del orden social*.

Apart from these exception clauses, there is no legislation providing rules which prioritize or balance the conflicts between the two fundamental rights. In case of conflict, the Constitutional Court doctrine should be applied about limitations of fundamental rights based on the core content of these rights and the related surrounding area or additional content.

3.2 Conformity with EU law

This information is given in 3.1.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

This section is not applicable in Spain.

4.2 Probable outcome of case law on selected issues

Dress codes prohibiting headscarves or burkas in employment imposed by the enterprise as part of a uniform could be analysed as indirect discrimination on grounds of gender. The enterprise or the Public Administration should prove that the internal rules of clothing/uniform have an objective which is legitimate and the ban is proportionate.

4.3 Case law on other relevant issues

This section is not applicable in Spain.

5. Good practices/solutions

An example of good practices could be the following recommendations on how to make enterprises more inclusive with respect to religious diversity:³⁵²

1. Communicate the existence of the enterprise's diversity policy that explicitly covers not only religious beliefs but also religious expression. This involves that

³⁵¹ The debate is a social and political one, and the information is found in the public media.

³⁵² See <http://diversidadcorporativa.wordpress.com/2010/01/03/diversidad-religiosa-en-el-trabajo/>, accessed 25 April 2010.

negative comments or overtly offensive statements regarding religion will not be tolerated in the workplace, but also setting some boundaries (not allowing proselytizing activities, for example). Employees are entitled to believe whatever they want but cannot use those beliefs to treat differently, or be openly hostile to, other employees or customers. The best antidote is to remember that the company values all its employees and proactively seeks to create an inclusive work environment for everyone.

- 2.. Include religion as part of the training programme in diversity and non-discrimination.
3. Enterprises can be flexible in accommodating religious needs of employees. Some examples: ensuring the presence of proper food in company meetings, excluding the dates marked with a religious character, and flexible dates for holidays.

6. Further commentes

I have no further comments.

SWEDEN – Ann Numhauser-Henning

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

Are tensions or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion any real issue in Sweden to start with? This is quite doubtful. Sweden is basically a secularised country, which might explain why there have been no – or at least very few - debates on religious symbols. Although until recently (2000) the (Lutheran) Church of Sweden was a State Church and thus linked to the State,³⁵³ religious symbols connected to the Church have been viewed upon as cultural rather than religious expressions in Swedish society. To some extent, however, and due to an increased number of immigrants of the Islamic religion some debate has lately surfaced on the acceptance of religious symbols such as the wearing of headscarves/burkas and the refusal to shake hands within the Swedish society. In both these debates, the conflicting interests of sex equality and freedom of religion can be said to have been articulated in the general debate, although not necessarily in related legal disputes. The burka debate occurred in January 2010 (see, however, also 4.3 below). In a debate on the radio³⁵⁴, Prime Minister Reinfeldt, inspired by the French example, pronounced himself vaguely positive about a prohibition against wearing a burka in Swedish society since ‘this is a threat towards equality for women’. In the same debate, the Social Democrat leader Mona Sahlin took a stand against such a prohibition arguing that it could be contra-productive, provoking Islamic women to withdraw from social life. In a later interview³⁵⁵, Reinfeldt distanced himself from the idea of a prohibition for the same reason. In this debate the religious rights to wear a burka were questioned from the perspective of equal treatment of men and women.

³⁵³ It is now basically a religious community like all other religious communities in Sweden. However, it has, also formally, a privileged position through a number of special legislative arrangements, inter alia regarding taxation and religious ceremonies such as weddings and funerals.

³⁵⁴ SVR P1 2010-01-27.

³⁵⁵ SVT Agenda 2010-01-31.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

The requirement to observe dress codes, more specifically dress codes prohibiting Islamic women's clothing such as headscarves or burkas, in private or public employment, has not really been an issue lately. Most public service employers, such as the police or transport companies, have adapted their dress codes so as to meet the requirements of 'demographic change'. Some debate concerning headscarves and other symbols such as kippas and Sikh turbans took place earlier on in relation to these decisions in the Swedish police as well as in some local public transport companies to develop/design headscarves etc. as integrated parts of the uniform to wear in the respective profession. The respective debates have been rather minimal, however, and, to the author's knowledge, no campaigns have been organised taking a stand on the respective issue. The forum for debate has mainly been TV news programmes, radio channels and newspapers. As regards public service professions, the arguments against wearing headscarves etc. have been safety risks (i.e. the risk of misunderstandings as regards the legitimacy of the public servant concerned) and the fact that these public servants, especially if a policeman/woman, represent public power and not themselves and their religion when at work. The arguments in favour of admitting such religious symbols are the usual ones: respect for human rights, religious rights and ethnic-cultural rights. To some extent, however, lately there has also been public discussion on the wearing of such religious symbols in certain professions such as television and childcare facilities (the debate connected to the media, on whether it is acceptable for news reporters etc. to wear headscarves, took place some years ago), and in relation to various educational situations (see 4.3 below). The requirement to shake hands regardless of sex was the subject of a recent debate due to a case brought to court by the Equality Ombudsman, see 4.1 below.

1.2.2 Goods and services

No debates have occurred in these areas. However, there are express exception rules – see 2.1.2 below – allowing differential treatment on the grounds of sex. To my knowledge, however, no such practices have received public attention.

1.3 Tension or conflicts: other issues

As regards schools, the arguments have varied. The wearing of the burka, for instance, has been questioned as being offensive to other pupils. It has also been argued to be an obstacle in relation to school activities such as examinations. There are also the arguments connected to equality rights of women and the purpose to protect young women against patriarchal attitudes and values. Opposed to these arguments are the ones concerning the individual's freedom of worship and other choices. The French debate on the secularised civil society has also caught attention in Sweden, see 1.1

1.4 No issue?

As was indicated above, Sweden is basically a quite secularised country and this might explain why there have been no vigorous debates on religious symbols. Religious symbols have been viewed upon as cultural rather than religious expressions in Swedish society and do not necessarily provoke strong emotions.

2. National approach

2.1 Selected issues

The current bans on discrimination are found in the (2008:567) Discrimination Act which entered into force on 1 January 2009 and then replaced all former Swedish Acts on non-discrimination such as the former (1991:433) Equal Opportunities between Men and Women Act (*Jämställdhetslagen*), the (1999:130) Act on Measures against Discrimination in Working Life on grounds of Ethnicity, Religion or other Belief (*lagen om åtgärder mot etnisk diskriminering i arbetslivet*) and the Prohibition of Discrimination Act (2003:307). The 2008 Discrimination Act is a ‘single non-discrimination act’ and covers seven different grounds of differential treatment, among them gender and ethnicity as well as religion and other belief, in various areas of society.

2.1.1 Employment

The ban on discrimination in working life is included in Chapter 2 Section 1 of the 2008 Discrimination Act. It is a general prohibition for both private and public employers to discriminate against employees, applicants, trainees and temporary agency workers covering – in a tacit way – any ground and all kinds of employers’ decisions. According to Section 2, this ban does not prevent differential treatment based on a characteristic associated with one of the grounds of discrimination if, by reason of the nature of the work or the context in which the work is carried out the characteristic constitutes a genuine and determining occupational requirement that has a legitimate purpose and the requirement is appropriate and necessary to achieve that purpose.

There are no specific legal rules dealing with special problems such as dress codes (including headscarves and burkas) or a requirement to shake hands. The ban on discrimination is thus very general, tacitly covering all grounds and types of decisions. This legal setting gives room for all types of ‘framing’ of an *in casu* case in related case law, case law being very scarce until now.

2.1.2 Goods and services

The bans on discrimination regarding goods, services and housing, on the one hand, and health and medical care and social services, on the other, are included in Chapter 2, Section 12 and 13, respectively, of the 2008 Discrimination Act. As regards sex discrimination specifically there are explicit exceptions of relevance in both these provisions. According to Section 12, third paragraph, the prohibition ‘associated with sex does not apply to the supplying of insurance services, nor does it prevent women and men being treated differently with regard to other services or housing if there is a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose’. Section 13, third paragraph, states that ‘the prohibitions applying to health and medical care and other medical services or social services activities do not prevent women and men being treated differently if there is a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose’. Therefore, there are no explicit exceptions related to religion and other belief nor ethnicity.

The supply of segregated healthcare services for men and women – also because of religiously inspired demands of clients – is provided for by the exception for differential treatment of men and women, as is the supply of segregated social services for men and women because of religiously inspired demands of clients. It has

not been possible for me to obtain any information as to the existence of such segregated practices, however.

2.2 Other issues

There is no information of relevance on other issues. However, concerning education, see 4.3 below.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

Swedish legislation is silent on what to do if the rights that are the subject of this report conflict, to the extent that such conflicts cannot be dealt with as part of the express exceptions to the bans on discrimination referred to above, in 2.

3.2 Conformity with EU law

In my opinion, Swedish legislation - containing very general bans on discrimination and exceptions adapted to EU law - is in accordance with the relevant EU law. Any discrepancies will surface only through case law, which traditionally is very scarce, and its interpretations.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

There is no recent case law on requirements to observe dress codes actually prohibiting Islamic women's clothing such as headscarves or burkas. There is, however, one case presented to the Swedish Labour Court concerning discrimination in access to employment on the grounds of the applicant wearing a headscarf: Labour Court Case 2003 No. 63 (judgment 10 September 2003), the *Equality Ombudsman v. DemÅplock*.

This judgment from the Labour Court concerned a woman who for religious reasons wore a headscarf and who applied for a job at a company that demonstrates food products in food stores. In a telephone call between the woman and the company it was not said or asked what religion the woman had or if she wore a headscarf. The parties agreed to meet the following day. On this occasion, the company representative explained that the woman could not wear a headscarf when demonstrating food products, because she is supposed to be the 'face of the company in contact with its customers'. The representative furthermore said that it will 'take a hundred years before people will accept' that kind of clothing in public. She also ensured the woman that she had nothing against people from other parts of the world or against any other religion. The Labour Court concluded in its decision that the action by the company was not discriminatory because the employment procedure was terminated because the company, on the day before the meeting between the representative and the woman, had employed another person who had better skills. Even though the company, before the representative met the woman, might have considered employing her occasionally in the future, this does not mean that there was an employment relationship between the parties. Neither was the woman to be regarded as an employment seeker. Furthermore there is no requirement in Swedish Law for the employer to notify employment seekers who are not accepted for the job

they applied for. – The case was assessed as a case of alleged multiple discrimination on the grounds of both sex and ethnicity/religion. Since discrimination was exempted on ‘technical’ grounds, the Labour Court had no reason to elaborate on these grounds and their interrelation.

Another recent case related to our issues is Labour Court Case 2010 No. 21. This case concerned alleged harassment on the grounds of both sex and religion. The case was brought to court by the Equality Ombudsman. Two Muslim women, wearing headscarves and working for a sports club on fixed-term employment contracts claimed that they had been harassed by their supervising manager, commenting on their style of clothing as well as other religion-related habits. The Labour Court, however, did not find harassment to be proven in these particular cases and had no reason – if ever – to enter into arguments on where to draw the line between sex and religious discrimination.

The Equality Ombudsman, as was already indicated, brought both these claims before the Labour Court. With respect to litigation in general presented to the Equality Ombudsman, the 2009 Year Report gives the following overall picture.³⁵⁶ In 2009, 766 cases concerned ethnicity, 389 sex and only 64 religion and other belief. Among alleged multiple discrimination cases, ethnicity and female sex were the most frequent combination. As for the other areas of society, the majority of the allegations concerned employment (738 cases), followed by goods, services and housing (353 cases), healthcare services (179 cases) and social services (102 cases). There is no information that any of the cases related to the issues of special interest to this report, however.

As concerns the requirement to shake hands regardless of sex there is one recent and strongly debated case in Sweden presented to the Stockholm District Court, Case T 7324-08 (judgment 8 February 2010). The case did not concern actual access to employment but rather social services in the area of employment support measures. The Equality Ombudsman claimed discrimination on the grounds of religion when the Employment Board withdrew the assignment to support employment for a Muslim man having refused to shake hands with the female manager of his potential employer. The legal claim was assessed as direct, alternatively indirect, discrimination in labour market policy activities on the grounds of the man’s religion banned in Chapter 2, Section 9 of the 2008 Discrimination Act. The Court found direct discrimination to be at hand, since the Employment Board could not prove that there had been any reason for the withdrawal of the assignment/employment support other than the refusal to shake hands with the potential female employer. Indemnification was set at approximately EUR 6 000 (SEK 60 000). The Court just concluded that there was a case of detrimental treatment on the grounds of religion, i.e. the refusal to shake hands based on religious motives. There was no appeal against the judgment of the Stockholm District Court.

The case, as was already indicated, sparked a debate in Sweden. It has been lamented that there was no appeal, a judgment from a local district court being a weak precedent. The question of the refusal to shake hands implicating a discriminatory act against women, i.e. constituting sex discrimination/harassment of the female manager, was an issue in this debate, but was not part of the legal assessment of the case itself. Nor did the case really concern whether a refusal to shake hands can be a reason to deny employment as such. In the debate it was argued that there are good reasons to make such behaviour towards clients and even colleagues a reason to deny

³⁵⁶ www.do.se, accessed 16 March 2010.

employment.³⁵⁷ An earlier judgment from the Labour Court, Case 2005 No. 21, supports the argument that refusal to perform certain tasks at work out of religious reasons may constitute reason to discharge the employee from his position. The case concerned a Nonconformist Lutheran nurse whose refusal to participate in certain activities caused her dismissal from her position, something which – according to the Court – did not amount to discrimination ‘as the employer would have been expected to have treated a hypothetical comparator who refused to carry out the same tasks for other reasons than religion in a similar way’. From a scholarly point of view it has also been argued that a refusal to shake hands is not within the area of protected religious rights as guaranteed in the European Convention.³⁵⁸

4.1.2 Goods and services

The Equality Ombudsman recently reported a claim on discrimination in municipal social services, which was settled out of court.³⁵⁹ It concerned a Muslim woman taking in-house training at a café, paid for by a municipal ‘activity support’. When during her internship she started wearing a headscarf she was told to ‘take it off or leave the workplace’. The Equality Ombudsman represented the woman, argued discrimination on the grounds of religion and reached a settlement with the municipality, which paid the woman approximately EUR 4 000 (SEK 40 000).

4.2 Probable outcome of case law on selected issues

4.2.1 Employment

See the case law information presented above.

4.2.2 Goods and services

In this area there are no cases to refer to. Nor do I have any information about practices of differential treatment in this area. However, as was indicated above, in 2, there are express exceptions providing a scope for differential treatment on the grounds of sex. Such practices have, to my knowledge, not raised any claims of alleged discrimination, neither on the grounds of sex nor on the grounds of religion.

4.3 Case law on other relevant issues

As was already indicated in 1.2.1, the wearing of religious symbols such as headscarves or burkas has been an issue – also in legal terms – in the educational system. This debate mainly took place in relation to the two decisions by the Swedish National Board of Education (*Skolverket*).³⁶⁰ – One is the decision *and guideline* concerning two girls wearing a burka/niqab in Swedish schools (Decision No. 58-2003:2567). A high school/grammar school (grade 10 to 12) decided that two pupils, aged 16 and 19, were not allowed to wear a burka at tests or national tests. This

³⁵⁷ *Möjligt neka den som inte tar i hand jobb*, article by Flemström, Gabinus Göransson, Slorach and Stranberg (all labour lawyers) in *Aftonbladet* 9 March 2010.

³⁵⁸ *Vägrat handslag faller inte under religionsfrihet*, article by R. Fahlbeck in *Svenska Dabladet* 24 February 2010.

³⁵⁹ www.do.se/Om-DO/Stamningar-och-forlikningar/Forlikning-Skovde-kommun/, accessed 16 March 2010.

³⁶⁰ The National Board on Education has the competence to adopt guidelines for all schools in the country. The Board can furthermore answer questions from schools, such as this one concerning the two girls, on general matters. These answers are normative. The Board’s decision sets the standard for all schools in Sweden and is thus binding. However, the decision as such involves no sanction or remedy. See www.skolverket.se, accessed 1 December 2010.

decision was taken after a conversation with the two girls. The school then submitted the issue to the National Board on Education, asking whether or not it is acceptable to demand that they are identifiable by showing their face at certain occasions. The Board decided that it is acceptable for schools to prohibit the burka, but not without education and dialogue about the common values, equality between gender and democracy, on which the Swedish educational system relies. In its motivation, the Board said that it is possible with the existing legal statutes and the Constitution to prohibit the wearing of the burka at schools if they cause danger and disorder at school, if they offend others by constituting offensive religious manifestations, or if they cause pedagogical problems. The prohibition applies on the local level. The Board never argued discrimination, but only considered children's right to schooling. The other and more recent case is the Board's decision of 22 May 2006 (Dnr 52-2006:689). A young girl started her first year of compulsory primary education in the private – but state-funded - school *Minervaskolan* in Umeå. From the start, and for religious reasons, she wore a headscarf. This was against the general school rules prohibiting the use of any type of hat etc. during school hours. The principal made it clear that she had to abide by the rules or change school. As a result of the denial of her right to wear a headscarf the girl changed school. The Swedish National Board of Education concluded that a prohibition against wearing a headscarf at school was contrary to the requirement of providing a school 'open to all pupils' according to Chapter 9 Section 2 of the School Act. According to the Board, the choice of clothing is a personal choice normally not to be influenced by school rules. Prohibitions are only acceptable if there are order or safety reasons for doing so. To prohibit a pupil from wearing a headscarf in accordance with general school rules is to deny such a pupil access to schooling for religious reasons. The right to wear a headscarf is thus considered a part of the freedom of religion and would now – after 1 April 2006 – also amount to discrimination.³⁶¹

Neither of the two school cases was argued in terms of discrimination, whether sex or ethnicity/religious discrimination. Instead, the focus was on the general rights to schooling/education of every child. In the 2003 case, the National Board of Education relied on cases from the European Court of Human Rights and the UN Convention of the Rights of the Child.

5. Good practices/solutions

Examples that I would like to mention are the decisions in the Swedish police as well as some local public transport companies to develop/design headscarves etc. as integrated parts of the uniform to wear in the respective profession.

6. Further comments

I have no further comments.

³⁶¹ The Board's decision sets the standard for all schools in Sweden and is thus binding. The decision as such involves no sanction or remedy. If the girl would like to, she can apply again to *Minervaskolan*, which will no longer be able to maintain its rules as regards the headscarf. Disobedience on the part of the *Minervaskolan* can, ultimately, result in a prohibition for it to provide schooling within the Swedish education system. Since 1 April 2006, pupils also have the possibility to claim discrimination resulting in damages being paid.

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture

In Turkey, the headscarf is a political and ideological issue. So far, the hard-line secularist circles (the so-called ‘hardcore Kemalists’), including the high courts have not viewed the wearing of headscarves as part of an expression of religious belief but merely as a political symbol and attack on secularism, refusing to treat the issue as a subject of legal discourse relating to human rights and equality.

Turkey is a predominantly Muslim country. Problems related to religious outfits and symbols do not arise from religious pluralism, as the vast majority of the population are adherents of the Islamic religion. There are those who want to manifest their religion and those who want to be spared such manifestations. The Muslim headscarf is the most controversial issue. The headscarf at universities has been at the centre of the struggle for the last thirty years.

Islam, sectarianism, and separatist nationalism are considered as divisive forces by the uncompromisingly secular forces, which support and applaud the headscarf ban as a protection of secularism. Manufactured public apprehension serves as a basis for military and/or judicial coups/interventions.³⁶² University students desiring to wear headscarves are considered ‘subversive’ and ‘disloyal’ to the secularist principle around which the unitary state is centred. For religious women, the headscarf symbolizes mobility and independence.³⁶³ The modern trend of veiling in Turkey may well have emerged for reasons quite distinct from veiling in traditional Turkey, but it is by no means a flag of religious fundamentalism.³⁶⁴

Pandora’s box was opened by both the election of the new President of the Republic and the attempts of the government party, *AKP*, to allow the wearing of headscarves at universities. The alarmed ‘state forces’ intervened and the boiling point was reached with the atavistic dissolution suit against *AKP* considered to have confronted the State’s definition of secularism. These developments reveal a conviction that a ‘common identity’ must take precedence over any divergent religious or cultural aspects of an individual’s identity.

1.2 Tension or conflicts: selected issues

1.2.1 Employment

Women who want to pursue their chosen profession in the public sector may do so by abiding by the dress codes: no Islamic outfits (headscarf and Islamic clothing, e.g.

³⁶² The 1960, 1980 and the 1997 coups took place because the military determined that the policy of secularism was under threat. On 27 April 2007, the military declared, in the form of a late-night posting known as e-ultimatum, its opposition to the nomination of Abdullah Gul as the government party’s presidential candidate. It did not only remind the Turkish Government of the military’s role as ‘staunch defender of secularism’ but also warned it that it would display its ‘position and attitudes where necessary’ (<http://www.tsk.mil.tr>), accessed 19 April 2010.

³⁶³ ESI (European Stability Initiative) *Sex and Power in Turkey, Feminism, Islam and the Maturing of Turkish Democracy*, Berlin – Istanbul 2 June 2007, p. 11. (<http://www.esiweb.org>), accessed 1 December 2010.

³⁶⁴ N. Göle *The Forbidden Modern: Civilization and Veiling*. Ann Arbor: Univ. Of Michigan Press 1996.

hijab (face uncovered), niqab (eyes uncovered) or burka (face covered).³⁶⁵ The prevalent idea is that the staff has to represent the State's neutrality. State neutrality in religious matters takes precedence over religious manifestations. This view also covers staff who do not typically represent the State, such as the cleaning, catering or delivery workers. Public personnel are prohibited from wearing religious garments and signs, including all prayer-leaders and preachers in mosques nationwide, as they are all public officials paid by the Department of Religious Affairs. Another argument is that Muslims wearing religious outfits can pressure those Muslims who choose not to. Those who provide public services are bound by the dress codes whereas those who receive these services are free from such restrictions, with the exception of university students.

There is a detailed By-law on the Garments of the Public Personnel,³⁶⁶ according to which clothing has to be contemporary, clean, plain, and appropriate for the services provided (Article 1). Both males and females have to work bareheaded (Article 5). The relevant public body determines the type, model, and colour of clothing for those employed in health-related institutions, mines, ateliers, construction areas, landscape and similar places (Article 7). No badges, emblems, or signs other than those indicating the place of work, the school graduated from, or a token produced by the Government for special days, can be worn by public personnel (Article 9). There are separate by-laws for the staff and students in schools attached to the Ministry of Education and those who have to wear uniforms. Religious manifestations by teachers are out of the question in the Turkish context. The ECtHR has upheld the legality of the headscarf ban in certain places such as schools and state-run hospitals. It found applications of two female high-school teachers wanting to wear headscarves inadmissible.³⁶⁷

In the private-law sphere, selection is part of the employer's mandate. The Labour Act does not impose a duty of non-discrimination on employers in selection procedures. Applicants are not protected against discrimination in selection procedures. This contradicts the EU *acquis*. There is also no duty for employers to make reasonable accommodation for the needs of religious staff. The exception with regard to selection procedures covers job advertisements. *ISKUR*, the Turkish Employment Office,³⁶⁸ issued a notice in April 2006 outlawing discriminatory job advertisements. Employment offices must not include statements or specifications in job notices or advertisements regarding preferences and limitations constituting

³⁶⁵ So far, only the headscarf has been a controversial issue. This is because it is only women wearing headscarves challenging the legal rules on entry into universities, jobs and professions.

³⁶⁶ *Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetine Dair Yönetmelik*, Official Gazette, 25 October 1982.

³⁶⁷ In *Karaduman and Tandogan v. Turkey* (nos. 41296/04 and 41298/04, 3 July 2008), the applicants, Fatma Karaduman and Sevil Tandogan, contested before the ECtHR administrative proceedings relating to their dismissal from their posts as high-school teachers on account of their persistent refusal to remove Islamic headscarves during lessons, contrary to the clothing rules in force at the time. Relying on Article 6 § 1 (right to a fair trial), they complained that they had not been allowed to respond to the opinion of Principal State Counsel at the Council of State. The Court referred to previous cases in which a complaint similar to that of the applicants had been submitted and it had found a violation of Article 6 § 1. It accordingly held, unanimously, that there had been a violation of Article 6 § 1 on account of a breach of the rights to adversarial proceedings before the Council of State, and found that the finding of a violation provided in itself sufficient and just satisfaction for the non-pecuniary damage sustained by the applicants. Claims for wearing Islamic headscarves during lessons were found inadmissible. See <http://cmiskp.echr.coe.int> for further information, accessed 1 December 2010.

³⁶⁸ Law no. 4904, Official Gazette, 5 July 2003.

discrimination. In practice, large companies in the private sector generally opt for a central examination system. In small- and medium-sized enterprises, selection is done through interviews by the employer or his representatives. Although Article 5 of the Labour Act does not prohibit discrimination on the basis of race, language, religion and sect, political opinion, or philosophical belief at the time of recruitment, according to Article 122 of the Criminal Code³⁶⁹ on discrimination, anyone who makes employment or non-employment conditional on discrimination on the basis of language, race, sex, disability, political opinion, philosophical belief, religion, sect, and similar aspects shall be sentenced to six months to one year of imprisonment or a fine. In practice, rejected job applicants do not apply to the courts with a claim of discrimination most probably due to the widespread belief that employers have absolute discretion as to such decisions. Applicants choose to apply to those workplaces where they can freely wear their religious or non-religious outfits. However, legal protection does apply during the employment and at its termination.

In employment procedures, excluding selection, acts of discrimination involving religion and belief discrimination are reasons to justifiably claim wrongful treatment or termination. Proof of discrimination shall suffice, evidence of consequent loss or suffering shall not be sought. A worker who considers himself discriminatorily treated during the employment or discriminatorily dismissed may pursue his claims and demand compensation amounting to four months' basic wages. This is the so-called 'discrimination pay.' Introduction of a ceiling to the amount of discrimination pay contradicts the EU *acquis*. The last paragraph of Article 5 of the Labour Act prescribes a *prima facie* case of discrimination in compliance with the Recast Directive. Apart from these special rules, the general rules on employment termination shall be applied.

1.2.2 Goods and services

From the legal point of view, there is complete gender equality as regards access to and supply of goods and services, but in practice people or public officials swayed by their political beliefs and ideology come up with self-created powers and deny these rights. Below are examples of such behavioural patterns.

From time to time, there is news in the media about doctors refusing to perform a medical check on patients wearing a headscarf or about female doctors refusing to perform a medical check on male patients above the age of puberty. Such news is marginal and denied by the accused doctors. The laws do not permit such practices. If sued by the patient concerned, such a doctor may even be dismissed from the profession. Where the medical check or treatment involves sexual organs, some patients prefer doctors of their own sex but these are not religiously inspired demands.

The Turkish Armed Forces Pension Fund (*OYAK*), established in 1961, has gained financial power over time. Fifty-one percent of Renault's Bursa plant is owned by *OYAK*, while the rest is owned by Renault. Turkish-French carmaker *OYAK*-Renault has banned women wearing headscarves from entering a company facility in Bursa where its employees can shop. An employee at a Bursa plant wanted to go shopping at the Renault facility with his wife, mother and father on 27 February 2010. While the worker and his wife were allowed entry to the facility, his mother, who was wearing a headscarf, was not allowed in. The security guards at the gate told the worker that the company's management ordered them not to allow anyone wearing a headscarf into the facility. When employees of the Bursa plant contacted the metal

³⁶⁹ Law no. 5237, Official Gazette, 12 October 2004.

sector workers' union Türk Metal about the incident, the union officials said the decision was the company management's choice; hence, they could do nothing to change the situation. The management of the Renault facility in Bursa said management made such a decision due to repair work at the facility. The workers later received an e-mail from the human resources department telling them not to bring their family members to Renault's shopping facility in the weekends.

On 24 March 2010, students protested in front of the Izmir Municipality which did not grant them discount bus passes because they were wearing headscarves in their application photos.

On 26 March 2010, pupils of a pre-school class were taken to visit the Toy Museum, part of the Faculty of Education of Ankara University. Women wearing a headscarf who planned to accompany their children were told they would not be allowed to enter the museum.

Girls wearing headscarves are not allowed to take the matriculation exam (university entrance exam). Female students of all levels cannot enter their schools/universities wearing headscarves. There are laws for primary and secondary school pupils, but no such legal prohibitions for tertiary education students.

Vocational school graduates face problems if they want to enter universities. The real objective is to bar graduates of prayer-leader and preacher schools from entering university but the graduates of other vocational schools also suffer. The prayer-leader and preacher school students are considered a threat to secularism. There is a coefficient system created by an administrative decision taken by the then Higher Education Council following the 1997 military coup to please the military. In 2009, the Higher Education Council lifted this decision but the Council of State annulled this, stating that it would continue annulling it if the same coefficient was not reintroduced. It may be ironic to note that the Council of State once rejected an application against the decision envisaging the coefficient system on the basis that the authority on this issue belonged to the Higher Education Council and not to the Council of State.

There is a closed circuit as regards the promotion of judges to high judges. It is mostly hard-core Kemalists who are promoted.

1.3 Tension or conflicts: other issues

So far, the refusal to shake hands has not appeared as a controversial issue.

1.4 No issue?

This section is not applicable in Turkey.

2. National approach

2.1 Selected issues

2.1.1 Employment

The headscarf is an indicator of the disparity between liberal and non-liberal groups of Turkish secularism. Such issues have been polemicized, politicized and ideologized and are at the centre of the ongoing struggle between bureaucratic and political powers. Therefore, the discussions are usually blown out of proportion. Those who believe that religious manifestations are not an attack on the secular nature of the State defend freedom of clothing on the basis of legal discourse relating to human rights, freedom of religion and equality. It is usually the liberal secularists coming up

with such arguments but they rely more on human rights and freedom of religion than on sex equality.

2.1.2 Goods and services

This section is not applicable in Turkey.

2.2. Other issues

This section is not applicable in Turkey.

3. Legal framework for deciding conflicts: legislation

The By-law on the Garments of the Public Personnel only covers those employed in the public sector. For the private sector, Article 5 of the Labour Act is the most extensive provision on the prohibition of discrimination. This Article regulates the principle of equal treatment prohibiting discrimination on the basis of race, sex, language, religion and sect, political opinion, philosophical belief, or any such considerations.

3.1 Rules for dealing with conflicting rights

Women wearing headscarves as a result of oppression are protected against gender discrimination. In such a case, the gender equality principle will have precedence over religious traditions.

3.2 Conformity with EU law

The Turkish high courts, especially the Constitutional Court and the Council of State do not have a rights-based approach but an ideology-based approach to the problem. These issues have to be discussed and treated as a subject of legal discourse relating to human rights and equality. Secularism became the instrument used to quash basic rights, e.g. the right to a university education. This is true especially since the Constitutional Court's decision³⁷⁰ defining secularism as the 'guiding principle of social and cultural life' taking priority over all other constitutional principles and that 'no one may assert any right to individual liberty that is incompatible with the principle of secularism.'³⁷¹ The lower courts, mainly concerned about not having their decisions quashed by the higher courts, tend to follow these decisions.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

Whenever the Government adopts a law or an administrative Act to break the deadlocks, the high judicial bodies act in close coordination and cooperation with the strictly secular forces and annul such initiatives.

The *Aytaç Kılınç* case is a typical example of competing ideologies. Aytaç Kılınç was a teacher wearing a headscarf outside school premises. She aced the state exam for aspiring principals and was appointed as principal of a nursery school on the grounds of military garrisons in Ankara where most students were children of army personnel. On 5 July 2001, on her first day at her new school, she was asked for

³⁷⁰ Decision no: 1989/12, Official Gazette, 5 July 1989, no. 20216.

³⁷¹ N. Kadritzke *Headscarves, generals, and Turkish democracy*, <http://www.eurozine.com/articles/2008-02-01-kadritzke-en.html>, accessed 10 April 2010.

identification by the soldiers at the military checkpoint. Although she had taken off her headscarf before arriving, her ID photograph showed her with her head covered. She was denied entry for three consecutive days. Informed of the incident, local education authorities demoted her back to the position of regular teacher. She filed a lawsuit and won her case at the 6th Ankara Administrative Court, but the Council of State, the highest administrative court in Turkey, annulled the decision of the lower administrative court. On 8 February 2006, the Court ruled that her demotion was lawful and quoted a constitutional passage: ‘No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence (...)’ The judges also argued that her headscarf was particularly worrisome because her students were impressionable toddlers.

Another example would be the Council of State’s decision of 24 February 2006. Abdullah Yılmaz reached the second best score in the exam to select teachers to be appointed abroad. He was not appointed by the Ministry of Education because an *MIT* (Turkish Intelligence Service) report submitted to the ministerial committee stated that his wife, also a teacher at the same school, wore a wig to school to cover her hair and a headscarf outside school. Abdullah Yılmaz applied to the Administrative Court to have this decision against him annulled. The Council of State approved of the decision, making a ‘wife’s headscarf’ an (illegal) criterion for appointments.

4.1.2 Goods and services

In 1988, an Article was added to the Act on Higher Education³⁷² and headscarves that covered the hair and neck were allowed. This was challenged at the Constitutional Court. The Court emphasized the necessity of confining religion to individual spirituality and annulled the rule in 1989 on the basis that in a secular state, legal rules cannot apply to religious rules.³⁷³ In 1990, additional Article 17 was added.³⁷⁴ This Article, which is still in effect, covers freedom of clothing. The request for its annulment was rejected by the Constitutional Court in 1991. This rejection did not mean freedom for the headscarf because the Court, in its reasoning for this judgment, clarified that ‘freedom of clothing’ cannot be interpreted as making the wearing of the headscarf permissible.³⁷⁵ Despite the fact that restrictions and prohibitions cannot be created by courts but only by laws, the justification for the 1991 decision serves as the sole basis of the headscarf ban. From the legal point of view, the headscarf ban is actually non-existent.

The judgment of the ECtHR, in *Şahin v Turkey*, largely drew on the 1989 decision of the Turkish Constitutional Court.³⁷⁶ The ECtHR, in *Şahin v Turkey*, ruled that the

³⁷² Law no. 2547, Official Gazette, 6 November 1981.

³⁷³ Decision no. 1989/12 of 7 March 1989, AMKD p. 133.

³⁷⁴ Law no. 3670, Official Gazette, 25 October 1990.

³⁷⁵ Decision no. 1991/8 of 9 April 1991, Official Gazette, 31 July 1991.

³⁷⁶ Application no. 44774/98 Judgment of 18 May 2005 (<http://cmiskp.echr.coe.int/>). This is the first case where the wearing of headscarves at universities was found admissible and analyzed under Article 9 of the EHRC. Previously, two cases in which the applicants’ requests for degree certificates were rejected by the university administrations due to university regulations requiring identity photographs with heads uncovered were found inadmissible (*Karaduman v. Turkey*, Application no. 16278/90, Decision of 3 May 1993 and *Bulut v. Turkey*, Application no. 18783/91, Decision of 3 May 1993) (<http://cmiskp.echr.coe.int/>). In a country such as Sweden, where people can wear religious garments in photos on official documents like passports and driving licences, it might very well be considered a violation of freedom of religion if a state university required photographs without them (R. Fahlbeck (2004) ‘Ora et Labora – On Freedom of Religion at the

headscarf ban in the Turkish university concerned did not violate the ECHR.³⁷⁷ The justification to the decision rendered in *Şahin v Turkey* is weak and superficial. The decision argues that ‘having regard to the Contracting States’ margin of appreciation’, the Court found that ‘the interference in issue was justified in principle and proportionate to the aims pursued, and could therefore be considered to have been necessary in a democratic country.’ Such an argument might have served for the headscarf ban in primary and secondary schools but there are no justifiable foundations for such a ban at universities. University students are older and are free to decide whether or not to wear the headscarf in all Contracting States. It is stated that wearing the headscarf at the universities can put those of the same faith without headscarves under pressure³⁷⁸ by referring to the decision of the Turkish Constitutional Court, but this is not an argument upheld therein. The Court also states that the headscarf is a political symbol and that there are extremist fundamentalist political movements in Turkey assuming a relationship between students with headscarves and fundamentalist movements. What about the freedoms of religion and conscience? Is it the job of the courts to interpret the meaning of women’s actions for them? These issues were not discussed by the Court. Moreover, a Turkish university cannot issue a rule banning headscarves unless it is authorized to do so by law. Such a law is non-existent. Therefore, allowing universities to introduce such a rule, using the law as a legal basis of interference, was a major mistake according to the ECtHR.

The government party, *AKP*, amended the Constitution³⁷⁹ with the political support of two oppositional parties, to overcome the Constitutional Court’s decisions. Students with headscarves would not be deprived of their right to university education. The main opposition party, *CHP*, applied to the Constitutional Court contesting the constitutionality of these amendments approved by 411 out of 550 deputies. The Constitutional Court can examine a constitutional amendment only with regard to form,³⁸⁰ not substance (Article 148). However, the Constitutional Court exceeded its authority making an analysis of substance and ruled for annulment. This decision was a severe limitation to the powers of the legislature and at the same time a powerful stroke to constitutional order and democracy.

4.2 Probable outcome of case law on selected issues

There is no case law trying to balance freedom of religion and entrepreneurial freedom in private workplaces. There is entrepreneurial freedom in selection procedures. Workers are not protected against discrimination in selection procedures, but they are during of their employment and at its termination. For the time being, we do not know whether courts are going to ask private employers to justify clothing

Work Place: A Stakeholder cum Balancing Factors Model’, *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 20/1, 27-64, p. 33).

³⁷⁷ L. Vickers (2007) *Religion and Belief Discrimination in Employment – the EU Law*, thematic report, p. 49, http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07relbel_en.pdf, accessed 10 April 2010.

³⁷⁸ The majority–minority dichotomy was applied earlier to the *Karaduman* case (also see note 11): ‘manifestations of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students that do not practise that religion or who adhere to another religion’ (p. 108).

³⁷⁹ Law no. 5735, Official Gazette, 23 February 2008.

³⁸⁰ The verification of constitutional amendments is restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the amendment proposal was debated twice or not.

guidelines (if any) or give precedence to employers' intentions to create a religiously neutral workplace.

Where a woman is dismissed for wearing/not wearing a headscarf, the Turkish courts will probably try to arrive at a decision based on Article 5 of the Labour Act on the principle of equal treatment, dismissal rules, *ultima ratio* principle, relevant EU directives, and the high courts' notion of secularism. The court has to find out whether the headscarf ban constitutes religious discrimination or indirect sex discrimination or not. It has to balance competing interests, mainly a woman's freedom to wear a headscarf and entrepreneurial freedom. Taking into consideration the general approach of the high courts on the question of religious outfits, the desire by the employer to have a politically and religiously neutral workplace for substantiated reasons will probably have precedence over freedom of clothing.

4.3 Case law on other relevant issues

According to the Constitution, where internal regulations, programmes and activities of a political party are found to be in conflict with the secular character of the State, the chief prosecutor is to file a dissolution suit before the Constitutional Court (Article 68/4, 69). Political parties that confronted the State's definition of secularism have been suppressed or banned under the Turkish Constitution. The last dissolution suit was against *AKP*, which received 47 % of the votes in the last general election held in July 2007. The lawsuit was based on *AKP* being the centre of activities against secularism. The main accusation was that *AKP* opted for the freedom of wearing headscarves at universities and that this revealed its 'hidden intention' of establishing a theocratic state. According to the indictment prepared by the chief prosecutor, the headscarf is merely a political sign and in no way should it be interpreted as a human right and be allowed at universities. Of eleven members of the Court, six voted for dissolution (where seven are required for dissolution), four voted for a fine (return of half of last year's state financial aid), and only one (the president of the Court) voted against dissolution. The Court added six votes for dissolution to the four for a fine and imposed a fine with ten votes.

5. Good practices/solutions

Believers should not be forced to choose between their faith and modernity. Turkey needs to reintegrate Islam into public life in a manner consistent with modernity and democracy. Today, Turkey is in a period of painful transition from military and judicial tutelage to a fully democratic system. The ultra-secularist hype is being discussed more than ever and attempts are being made to amend the Constitution and the laws to end bureaucracy's primacy over popularly elected Governments. Today, attempts to amend the composition of the high judiciary to undo juristocracy are underway.

6. Further comments

The USCIRF (US Commission on International Religious Freedom), in its May 2009 and May 2010 reports,³⁸¹ decided to place Turkey on its Watch List. Both reports emphasize the headscarf problem. The following excerpt is from the 2010 report:

Turkish secularism bans religious clothing as well as the wearing of headscarves in state buildings, including public and private universities, the Parliament, courts, and

³⁸¹ http://www.uscirf.gov/index.php?option=com_content&task=view&id=2216&Itemid=1, accessed 21 May 2010.

schools. Women who wear headscarves, and those who advocate on their behalf, have lost public-sector jobs such as nursing and teaching. Students wearing headscarves officially are not permitted to register even for classes at private institutions. In December 2008, authorities charged five members of the military with 'lack of discipline' for allowing their wives to wear headscarves or for performing Muslim prayers. In 2006, a court upheld a school's decision to fire a teacher who wore the headscarf outside of school hours. More recently, in March 2009, the Supreme Election Committee declared that workers at polling stations could not wear the headscarf during work hours.

The 'headscarf issue' (*turban*) has long been the focus of political debate in Turkey. In 2005, the European Court of Human Rights (ECtHR) ruled that in view of Turkey's constitutional legal definition of secularism the headscarf ban by a Turkish university did not violate the European Convention on Human Rights, even though it contravened standards of freedom of religion. In February 2008, the Turkish Parliament overwhelmingly voted in favour of changing the 1982 Constitution (written by a military-led caretaker government following the military coup of 1980) to guarantee all citizens the right to attend university, regardless of clothing. Under the amendment, only traditional scarves - tied loosely under the chin - would be allowed. Headscarves that cover the neck, as well as the full veil, would still be banned. In June 2008, however, the Turkish Constitutional Court ruled that these amendments were unconstitutional because they violated the Turkish requirement of secularism. As a result, the headscarf ban remains in effect, and only 'uncovered' women are permitted access to public and private universities in Turkey.

In February 2010, the ECtHR ruled that a Turkish court violated the rights of 127 members of an Islamic group, *Aczimendi tarikaty*, by convicting them for wearing religious clothing in public. According to the ECtHR, the convicted persons had been punished for wearing these traditional clothes in the street as they walked to a mosque, not in public institutional buildings, where religious neutrality is permitted and can override the right to express one's religion. The ECtHR also ruled that the Turkish authorities had not proven that the convicted person's clothing constituted a danger to public order or that they had proselytised en route to the mosque, putting inappropriate pressure on passers-by. The ban on public religious clothing is more extensively targeted at non-Muslim groups, as all Christians (Orthodox, Catholic, and Protestant) and Jews are prohibited from wearing clerical garments in the public sphere in general, not only in state buildings.

In the recommendations, as regards clothing the Report states that Turkey should be urged to:

- allow women the freedom to express their religious or nonreligious views through clothing so as to respect their beliefs as well as the secular status of the Turkish republic, while ensuring a lack of coercion for those choosing not to wear headscarves and protecting the rights and freedoms of others, and providing access to public education and to public sector employment for those choosing to wear a headscarf;
- remove restrictions on the ability of leaders of majority and religious minority communities to wear clerical garments in public areas, state institutions, and public and private universities, and remove additional restrictions on leaders of the minority Christian, Jewish, or other communities on wearing clerical garments in the public space.

The UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) has declared itself to be far less certain than the ECtHR on the issue of whether the ban is valid and whether the above political concerns justify the restriction. In discussing the matter in its report about Turkey, it expressed concern that the ban has resulted in discrimination against female students wearing headscarves, particularly in restricting their access to education, and it recommended that Turkey carefully consider the effects of the ban and propose a solution on the matter by 2009.³⁸²

In Turkey, interpretation of secularism does not only contribute to an undermining of the democratic process but also initiates and justifies a vicious circle of military and judicial interventions. Turkey has to leave behind the desire for a uniform society and its symptomatic behavioural patterns and continue its attempts at establishing a harmonious multicultural society.

THE UNITED KINGDOM – *Aileen McColgan*

1. General situation regarding tension between gender equality and the freedom of religion

1.1 General picture / 1.2 Tension or conflicts: selected issues

There has not been a great deal of concern in the UK about the possible tension between gender equality and religious freedom. There have been isolated examples of controversy over, for example, the wearing of full-face veils, but these are the exception rather than the rule. A newspaper report in February 2010, however, indicated that one in three Britons would support a ban on the wearing of full-face veils in public, and two in three a ban on their wear in places such as banks and airports. In 2006 the–then Home Secretary Jack Straw caused some controversy when he suggested that he would ask women to remove full face-veils were they to come to him for support in his capacity as a Member of Parliament, though he subsequently made it clear that this would be a request only in order to improve his communication with them, and he would not refuse to deal with a woman whose face was covered. In February 2010 Jack Straw, by this time Minister of Justice, said he would strongly oppose any ban on public face coverings. In January 2007 there was a brief flurry in the London press when a Muslim female police officer refused, on religious grounds, to shake hands with the Chief Officer of Police on her passing out parade. For the most part, however, informed public debate on these matters is relatively limited.

The public demand that exists for sex-segregated healthcare services is not generally regarded in the UK as being motivated by religious concerns. The Sex Discrimination Act 1975, soon to be replaced by the Equality Act 2010, recognises that the provision of separate services to men and women may be appropriate and the general public view is that, for example, the continued existence of mixed-sex wards in hospital is entirely inappropriate. Many women accessing reproductive health services, and general healthcare in particular, prefer to be treated by a woman and such a request would generally be accommodated, although it may not be possible to

³⁸² CEDAW (Committee on the Elimination of Discrimination Against Women) (2005) ‘Combined Fourth and Fifth Periodic Reports on Turkey’, <http://www.un.org/womenwatch/daw/cedaw/reports.htm> as cited in E. Wiles *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41 L. & SOC’Y REV. 699 (2007).

do so in an emergency situation. I am not aware that separate language and integration services are commonplace, but it is clear that the women's movement in the UK would regard the provision of women-only courses to be an important tool in furthering gender equality where women might be unable or unwilling to access 'generic' service provision. This may result in the provision of *de facto* male courses where women do not access the 'general' services or, in a case in which men have special needs in relation to the service, male courses could be provided. The focus in the UK would be less on the reason (cultural or religious) why men and women might be reluctant to access sex-integrated services, and more on the question whether the actual need for such services to be delivered in a practically accessible way is being met. In the case of language or integration classes it is likely that most men and women will be open to integrated services, in which case specific needs for sex-segregated services can be addressed as and when they arise. It may be, for example, that a particular woman's concern about being in a mixed group is caused by her experience as a recent victim of sexual or other gender violence, rather than because of cultural or religious concerns.

Social counselling may be provided to persons of specific ethnic groups, and/or to men or women, or to persons of particular sexual orientations or religious beliefs, where such counselling addresses the specific needs of persons of that particular group. So, for example, some counselling services are provided specifically to female victims of rape, or to Asian female victims of domestic violence. Again the focus would not be on the *particular* reason why a woman feels it necessary (as most do) to attend a woman-only rape crisis centre, or on the particular reason why an Asian woman might wish to seek support from a grassroots Asian women's organisation, but rather on meeting the actual need for counselling in the context in which it arises (see, for example, *R (Kaur & Anor) v Ealing LBC*).³⁸³

1.3 Tension or conflicts: other issues

The UK is in my view generally tolerant of difference and ready to accommodate special needs whether they arise in relation to religion, 'culture' or, to a significant degree, 'choice'. The long history of immigration into the country and the way in which British culture has been enriched by 'otherness' (the nation's favourite dish has long been Indian, rather than indigenous) means that there is a reasonable degree of openness. That is not to say that this does not suffer strain from time to time, rather than the general background.

1.4 No issue?

See 1.3.

2. National approach

2.1 Selected issues

2.1.1 Employment

Any ban on headscarf or burka wearing, or any requirement for hand-shaking, would be considered in the UK as a potential case of discrimination on grounds of religion, the prohibition on such discrimination extending beyond the employment sphere to

³⁸³ [2008] EWHC 2062 (Admin), [2008] All ER (D) 08 (Oct), www.bailii.org/ew/cases/EWHC/Admin/2008/2062.html, accessed 1 December 2010.

cover access to goods, facilities and housing, education and the exercise of public functions. Similarly, the provision of services in a form which made them inaccessible in practice to categories of people by reason of factors associated with race or religion could be challenged accordingly. Insofar as the religious issues concerned are related to Islam, a claim of race discrimination would be of the indirect variety at most: whereas Sikhs and Jews are recognised as ethnic groups for the purposes of the Race Relations Act, Muslims are not because they cannot be identified with a particular geographical area of origin.³⁸⁴ Having said this, a ban on headscarf wearing may in a particular case amount to indirect discrimination against women from the Asian sub-Continent, or women of Bangladeshi origin, etc., and so would also amount (subject to justification) to indirect race discrimination.³⁸⁵ It would also be possible to challenge bans on headscarf etc. wearing as a form of sex discrimination, where men were not subject to dress codes of broadly equivalent nature, although difficulties with the case law in this area mean that a challenge based on religion and/or race is more likely to succeed. A ban on the wearing of a burka or similar garment might also be regarded as amounting to sex, race or religious discrimination, albeit probably only of the (potentially justifiable) indirect form, and arguments about the promotion of gender equality by means of such a ban are unlikely to be accepted where applied to adult women.³⁸⁶

2.1.2 Goods and services

The public demand that exists for sex-segregated healthcare services is not generally regarded in the UK as being motivated by religious concerns. The Sex Discrimination Act 1975, soon to be replaced by the Equality Act 2010, recognises that the provision of separate services to men and women may be appropriate and, as mentioned above, the general public view is that the continued existence of mixed-sex wards in hospital is unacceptable. Many women accessing reproductive health services, and general healthcare in particular, prefer to be treated by a woman and such a request would generally be accommodated, although it may not be possible to do so in an emergency situation. Important here also are the obligations of public authorities to promote equality on the protected grounds (in the case of religion, from October 2010).

2.2. Other issues

There are no other topical issues.

3. Legal framework for deciding conflicts: legislation

3.1 Rules for dealing with conflicting rights

The legislation does not contain express rules as such for balancing conflicts between gender equality and freedom of religion/non-discrimination on the ground of religion. Special provision is made for religious organisations to discriminate in relation to employment and the provision of services on grounds, inter alia, of religion and sex when this is required as a matter of doctrine or because of the deeply held convictions of significant numbers of religious adherents. Where, however, what is at issue is whether a non-religious employer or service provider can prohibit particular manifestations of religious or cultural belief, or may be obliged to provide single-sex

³⁸⁴ See *Mandla v Dowell Lee* [1983] 2 AC 548, *Seide v Gillette Industries* [1980] IRLR 427.

³⁸⁵ *Walker v Hussain* [1996] ICR 291.

³⁸⁶ See *R (Begum) v Governing Body of Denbigh School* [2006] UKHL 15, [2007] 1 AC 100, www.bailii.org/uk/cases/UKHL/2006/15.html, accessed 1 December 2010.

services in order to accommodate religious or cultural beliefs, the answer lies in the normal rules regulating direct and indirect discrimination. Thus, for example, whether an employer may ban the wearing of a headscarf will turn on whether this practice does or is likely to place Muslim women (or any group of women defined by reference to ethnicity, national origin, nationality etc.) at a disadvantage compared with other women; whether it placed the woman or women mounting the challenge at that disadvantage; and whether the ban is nevertheless necessary and proportionate to the pursuit of a legitimate aim. It is clear from the case law, considered below, that the answer to the final of these questions would generally be 'no' in the case of the headscarf.

As far as the burka is concerned, and on the assumption that the question can be taken to refer to clothing which covers the face and body, in a case in which a uniform of general application (as distinct from a burka-specific ban) was concerned, the justification would be more easily made out. Even here, however, the question would be whether the prohibition on unjustified indirect discrimination required the employer to make an accommodation to religiously-inspired clothing. The adoption of a policy prohibiting the covering of employees' faces, or the wearing of loose, enveloping floor-length clothing designed to hide the form runs the risk of being regarded as a deliberate policy directed against conservative Muslim women, in which case it may be regarded as directly discriminatory on grounds of religion and therefore unlawful. If, on the other hand, the policy is motivated by considerations of health & safety, or the importance of maximising communication, or the need for ready identification of staff, or similar reasoning, it may be justified as was the policy in *Azmi* (considered below).

Because domestic anti-discrimination law is at least as protective of religious expression as is Article 9 of the Convention, there is no difference between employment in the private and public sector. Certainly it is not at all unusual to see police officers, customs officials and other state employees and office holders wearing religious clothing such as the hijab or, in the case of men, a turban.

Turning to hand-shaking, again the legal analysis would depend on whether there was any evidence that such a requirement was intended to target Muslims, in which case it would be unlawful. Certainly, it is customary for people in the UK to shake hands by way of a greeting. There are many reasons, however, why individuals would be reluctant or unable to make such physical contact (physical disability, fear of contamination, anxiety about an unsightly or uncomfortable skin condition). Hand-shaking being a gesture of politeness, a refusal or reluctance, on religious grounds, to shake hands could generally be expected to be accommodated as a matter of politeness. In my view, the adoption of a rule requiring all employees to shake hands would be likely to be seen as a 'gate-keeping' mechanism by which persons of particular religious faiths could be excluded, and to be regarded as unlawful in the same way as would, for example, a requirement that a potential employee hold a football season ticket or have a history of competitive rugby playing. Again, in my view the prohibition on discrimination on grounds of religion or belief would have the result that there would be no material difference between public and private employment.

As far as the provision of sex-segregated services is concerned, the demand for such services is not generally regarded in the UK as being motivated by religious concerns (see above). As above, the Sex Discrimination Act 1975, soon to be replaced by the Equality Act 2010, recognises that the provision of separate services to men and women may be appropriate for many reasons among which might be cultural or

religious concerns about the mixing of sexes. I am not aware that separate language and integration services are commonplace, but it is clear that the women's movement in the UK would regard the provision of women-only courses to be an important tool in furthering gender equality where women might be unable or unwilling to access 'generic' service provision. This may result in the provision of *de facto* male courses where women do not access the 'general' services or, in a case in which men have special needs in relation to the service, male courses could be provided. The focus on the UK would be less on the reason (cultural or religious) why men and women might be reluctant to access sex-integrated services, and more on the question whether the actual need for such services to be delivered in a practically accessible way is being met. In the case of language or integration classes it is likely that most men and women will be open to integrated services, in which case specific needs for sex-segregated services can be addressed as and when they arise. It may be, for example, that a particular woman's concern about being in a mixed group is caused by her experience as a recent victim of sexual or other gender violence, rather than because of cultural or religious concerns.

3.2 Conformity with EU law

In my view the domestic approach is in conformity with EU law.

4. Legal framework for deciding conflicts: case law

4.1 Case law on selected issues

4.1.1 Employment

In *Azmi v Kirklees MBC*,³⁸⁷ the Employment Appeal Tribunal ruled that a requirement that a teaching assistant work without a full-face veil was lawful because, in the circumstances of the case, it was necessary for the children for whom she provided language support to see her face in order to learn effectively.

In *R (Begum) v Headteacher and Governors of Denbigh High School*,³⁸⁸ the House of Lords ruled that a school could insist on a uniform policy which prohibited the wearing of a jilbab (a full-length body covering), this because the school made significant efforts to accommodate religious views (permitting the wearing of hijabs and shalwar kameez (loose, form-covering garments) and because the dress code operated in part to protect children from any community pressure to adopt very conservative dress codes.

In *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School*,³⁸⁹ on the other hand, the Court ruled that a school which prohibited a Sikh girl from wearing a metal bangle (kara) discriminated against her on grounds of race by so doing. This analysis would not apply directly to the hijab, since Muslims do not form a distinct racial or ethnic group for the purposes of domestic law.

The general approach which would be adopted under the Equality Act 2010 (previously the Employment Equality (Religion and Belief) Regulations 2003) would be similar. The question would be, in a case in which the application of a dress code

³⁸⁷ [2007] ICR 1154, [2007] IRLR 484, www.bailii.org/uk/cases/UKLAT/2007/0009_07_3003.html, accessed 1 December 2010.

³⁸⁸ [2006] UKHL 15, [2007] 1 AC 100, www.bailii.org/uk/cases/UKHL/2006/15.html, accessed 1 December 2010.

³⁸⁹ [2008] EWHC 1865 (Admin), [2008] ELR 561, www.bailii.org/ew/cases/EWHC/Admin/2008/1865.html, accessed 1 December 2010.

served to disadvantage a group of people defined by reference to religion, whether the application of the code was justifiable. It is clear from the case law that, in the domestic context, a commitment to ‘secularism’ would not suffice, and that health & safety arguments (which were put forward in *Watkins-Singh*) will be strictly scrutinised.

4.1.2 Goods and services

See 4.2

4.2 Probable outcome of case law on selected issues

Employment

In *Ladele v London Borough of Islington* the Court of Appeal ruled that a Registrar of Births, Marriages, Civil Partnerships and Deaths was not entitled, on religious grounds, to refuse to participate in civil partnership services (Ms Ladele argued that such participation was inconsistent with her religious belief that same-sex sexual relationships were wrong).³⁹⁰ The gist of the decision was that the requirement to provide such services was indirectly discriminatory, but that the indirect discrimination was justified by the equality interests of those seeking such partnerships. She herself was a public official who was prohibited by law from discriminating on grounds of sexual orientation, and her refusal to engage in the partnership services amounted to direct sexual orientation which was incapable of justification. If they allowed Ms Ladele to discriminate, her employers would be assisting her act of unlawful discrimination, which would be unlawful. Even if this were not the case, the employers were entitled to take the view that their provision of a non-discriminatory service required that all their Registrars participated in civil partnership as well as marriage services.

The underlying point in *Ladele* was that the religious employee’s actions themselves discriminated directly on a protected ground. The issue would be more complex if, for example, a female employee took the view that she could not shake hands with a male colleague or client (or a male employee with women). It would be possible to assert that the refusal to shake hands amounted to discrimination on grounds of sex. But in my view, given that such physical contact will not be central to any service likely to be provided, analysing this as discriminatory would be analogous to stating that a woman who declined to engage in semi-clothed contact with male colleagues or clients, when she would be prepared to do so with women (by using mixed-sex changing rooms, for example), was thereby discriminating on grounds of sex. The courts would in my view find that a religious or culturally based taboo on such physical contact did not impose any detriment on the person with whom physical contact was declined, when this physical contact is not connected with the service being provided and consisted in no more than the expression of the cultural norms of the dominant religious or ethnic group.

Goods and services

As discussed above, the question which would be addressed by the courts is whether a refusal to provide sex-segregated services amounted to indirect discrimination on grounds of sex (most probably), race or religion.

³⁹⁰ www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html, accessed 1 December 2010.

In *R (Kaur & Anor) v Ealing LBC*³⁹¹ the High Court ruled that a public authority had breached its positive obligations regarding race equality by failing properly to consider, prior to withdrawing funding for the provision of domestic violence services from a grassroots Black women's organisation (the Southall Black Sisters), the impact this would have on race equality. The local authority had taken the view that the funding, which was used by the SBS to provide domestic violence services to an exclusively female and predominantly South Asian clientele, should be provided to a domestic violence service which would cater to all women in the area. It suggested in the course of litigation that the provision (or funding of provision) targeted at particular ethnic groups would amount to unlawful race discrimination.

The High Court ruled:

- (1) that the provision of such services was lawful where it was designed to meet the special needs of particular racial groups (here the evidence was that South Asian women did not access 'generic' domestic violence service providers, and would so be denied services in the absence of specialist providers);³⁹²
- (2) that the equality duties imposed on the public authority required a proper impact assessment to be carried out by it before it reached the decision to withdraw funding.

The implication of this case is that the provision of sex-specific services may be lawful where it is based on the special needs of those targeted, and that the equality obligations imposed on public authorities will require them properly to take into account those needs in determining service provision. Private providers may also target special needs (as did SBS here) but are not themselves bound by the positive obligations unless they are performing public functions.

4.3 Case law on other relevant issues

There is no case law on other relevant issues.

5. Good practices/solutions / 6. Further comments

I have no further comments.

³⁹¹ [2008] EWHC 2062 (Admin), [2008] All ER (D) 08 (Oct), www.bailii.org/ew/cases/EWHC/Admin/2008/2062.html, accessed 1 December 2010.

³⁹² The Race Relations Act 1976, soon to be replaced by the Equality Act 2010, allows 'discrimination' in the provision of welfare etc. services where this is based on the special needs of the targeted group.

Annex I

Tables

	TOPICAL ISSUES IN THE COUNTRY ¹						RULES
	(Access to) Employment			Access to and supply of Goods and Services		Other Issues	Are there rules for dealing with conflicting rights in national law
	<i>Public discussion about dress codes</i>		<i>Public discussion about the refusal to shake hands</i>	<i>Public discussion about segregated healthcare services</i>	<i>Public discussion about segregated social services</i>		
	<i>Headscarves</i>	<i>Burqas</i>					
AT	yes	yes	no	no	no	no	yes
BE	yes	no	no	yes	yes	yes	no (ECHR rules)
BG	no	no	no	no	no	no	no
HR	no	no	no	no	no	yes	no
CY	no	no	no	no	no	no	no
CZ	no	no	no	no	no	no	no
DK	no	no	no	no	no	no	no
EE	no	no	no	no	no	yes	yes
FI	yes	yes	yes, 1 example	yes	yes	yes	yes
FR	yes	yes ²	no	yes	no	yes	not explicitly
MK	no	no	no	no	no	yes	no
DE	yes	yes	no	no	no	yes	yes
EL	no	no	no	no	no	no	yes, but not explicitly
HU	no	no	no	no	no	yes	no
IC	no	yes ³	no	no	no	yes	no
IE	no	no	no	no	no	yes	yes
IT	no	no (see other issues)	no	no	no	yes	yes, but not explicitly
LV	no	no	no	no	no	yes	no
LI	no	no	no	no	no	no	⁴
LT	no	no	no	no	no	no	no
LU	no	no	no	no	no	no	no
MT	some	no	no	no	no	yes	no
NL	yes		yes	yes	yes	yes	no

¹ This is a rough estimate as it is not always easy to determine whether a public discussion concerns also the specific issues mentioned.

² A law has just been adopted on this issue.

³ This is a recent development, not yet mentioned in the report.

⁴ No information available.

	TOPICAL ISSUES IN THE COUNTRY ¹						RULES
	(Access to) Employment			Access to and supply of Goods and Services		Other Issues	Are there rules for dealing with conflicting rights in national law
	<i>Public discussion about dress codes</i>		<i>Public discussion about the refusal to shake hands</i>	<i>Public discussion about segregated healthcare services</i>	<i>Public discussion about segregated social services</i>		
	<i>Headscarves</i>	<i>Burqas</i>					
NO	yes	no	no	no	no	yes	no
PL	no	no	no	no	no	yes, catholic church	yes
PT	no	no	no	no	no	yes	yes, but not explicitly
RO	no	no	no	no	no (except in Roma community)	no	no
SK	no	no	no	no	no	yes	no
SI	no	no	no	no	no	no	no
ES	yes	no	no	no	no	yes	no
SE	yes	yes	yes	no	no	yes	no
TR	yes	no	no	yes	yes	no	yes
UK	no ⁵	yes	no ⁶	no ⁷	yes	no	no

⁵ It is not a subject which inspires great interest at present.

⁶ There is little or no public discussion on this.

⁷ It is not a subject which inspires great interest at present.

	CASE LAW IN THE COUNTRY					EXAMPLES OF GOOD PRACTICES
	Access to Employment			Access to and supply of Goods and Services		
	<i>Case law about dress codes</i>		<i>Case law about the refuse to shake hands</i>	<i>Case law about segregated healthcare services</i>	<i>Case law about segregated social services</i>	
	<i>Headscarves</i>	<i>Burqas</i>				
AT	yes	no	no	no	no	yes
BE	yes	no	no	no	no	yes
BG	no	no	no	no	no	yes
HR	no	no	no	no	no	no
CY	no	no	no	no	no	yes
CZ	no	no	no	no	no	no
DK	yes	no	no	no	no	no
EE	no	no	no	no	no	no
FI	yes	no	no	no	yes	yes
FR	yes	no	no	no	no	no
MK	no	no	no	no	no	yes
DE	yes	no	no	no	no	yes
EL	no	no	no	no	no	yes
HU	no	no	no	no	no	yes
IC	no	no	no	no	no	yes
IE	no	no	no	no	no	yes
IT	no	no	no	no	yes	yes
LV	no	no	no	no	no	no
LI	no	no	no	no	no	no
LT	no	no	no	no	no	no
LU	no	no	no	no	no	no
MT	no	no	no	no	no	yes
NL	yes	yes	yes	no	yes	yes
NO	yes	no	no	no	no	no
PL	no	no	no	no	no	no
PT	no	no	no	no	no	no
RO	no	no	no	no	no	no
SK	no	no	no	no	no	no
SI	no	no	no	no	no	no
ES	no	no	no	no	no	yes
SE	yes	no	yes	no	yes	yes
TR	yes	no	no	no	yes	yes
UK	no	yes	no	no	yes	no

Annex II

Report on Gender and Religion by the European Network of Legal Experts in the Field of Gender Equality

Questionnaire

Background and purpose

In many European countries, debates on potential tension and conflicts between gender equality and religion make the headlines almost every day. Quite a lot of these controversial issues seem to fall squarely under the scope of application of the EU gender equality directives.¹ Probably the most familiar example regards employment dress codes involving headscarf and/or burka bans that are often motivated, among other things, by notions of sex equality. But quite a number of other controversial issues have surfaced. Both in Sweden and in the Netherlands, courts have had to deal with Muslim workers complaining of being denied employment opportunities because of their religiously inspired refusal to shake hands with persons of the opposite sex. In addition, several countries increasingly face religiously inspired demands for segregated facilities for men and women, e.g. separate male/female integration courses, health services or social counselling.²

All these issues raise fundamental questions, which so far have only received highly contested answers. Firstly, the question is whether sex equality is actually at stake, to start with, or rather: in which way? The diverging approaches of the Norwegian *Ombud* and the European Court of Human Rights (ECrHR) regarding headscarf bans are telling. The ECrHR regards wearing a headscarf as ‘hard to square with’ the principle of sex equality, whereas the Norwegian *Ombud* held an employer’s prohibition of wearing a headscarf at work to constitute indirect discrimination on the basis of sex.³ If we assume that in the examples mentioned above sex equality is indeed at stake, the second fundamental question needs answering: should the right to gender equality prevail over freedom of religion and/or the right not to be discriminated against on the ground of religion?

For the purposes of this report, we will look at these questions from the perspective of the gender equality directives.⁴ Both the Recast Directive

¹ See S. Burri, Discussion paper *Discrimination on grounds of gender and religion: a case of conflict between grounds?* (paper for the Legal Seminar of 6 October 2009 on the implementation of EU law on equal opportunities and anti-discrimination), available on <http://www.regonline.co.uk/builder/site/tab2.aspx?EventID=733822>, accessed 4 March 2010.

² Religion-based segregation was also touched upon, though not extensively dealt with, in the network report on sex-segregated services, see S. Burri & A. McColgan *Sex-Segregated Services. European Network of Legal Experts in the Field of Gender Equality*, 2008, available on: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 4 March 2010.

³ See S. Burri, Discussion paper *Discrimination on grounds of gender and religion: a case of conflict between grounds?* (paper for the Legal Seminar of 6 October 2009 on the implementation of EU law on equal opportunities and anti-discrimination), available on <http://www.regonline.co.uk/builder/site/tab2.aspx?EventID=733822>, accessed 4 March 2010.

⁴ Taking the gender directives as the starting point is not to say of course that we cannot also consider the Framework Directive (2000/78/EC), which provides protection against discrimination on the ground of religion in employment.

(2006/54/EC)⁵ and the Goods and Services Directive (2004/113/EC) are particularly relevant. Both generally allow for two ways to balance conflicting rights regarding gender equality and religious freedom. Firstly, through the specific exception clauses of Article 14, Section 2 of the Recast directive (regarding genuine occupational requirements) and Article 4 Section 5 of the Goods & Services Directive (which provides for a general exception to non-discrimination if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary). Secondly, through the objective justification test to see if indirect discrimination on the ground of sex is or may be at stake.

The specific purpose of this report is threefold:

- to identify the types of issues involving conflicts or tension between the right to gender equality and freedom of religion/non-discrimination on the ground of religion that raise discussion in the Member States, if any;
- to clarify the various ways in which such issues are approached in the Member States, focusing on *legal* approaches;
- to clarify how these legal approaches could or should be assessed under the Recast Directive (2006/54/EC)⁶ and the Goods and Services Directive (2004/113/EC).

As this endeavour may be too broad to handle in a single report, we will focus on a selection of topical issues which have surfaced in several Member States over the past years and which affect the position of women in key areas such as (access to) employment and access to and supply of goods and services:⁷

(Access to) employment:

1. The requirement to observe dress codes, more specifically dress codes prohibiting Islamic women's dress such as:
 - a) headscarves or b) burkas
 - in private employment
 - in public employment;
2. the requirement to shake hands regardless of sex
 - in private employment
 - in public employment.

Access to and supply of goods and services:

1. The supply of segregated healthcare services for men and women because of religiously inspired demands of clients;
2. the supply of segregated social services for men and women because of religiously inspired demands of clients (e.g. separate language and integration courses for immigrants or separate social counselling for ethnic minorities).

⁵ According to Article 34(1) of the Recast Directive, Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC were repealed on 15 August 2009.

⁶ According to Article 34(1) of the Recast Directive, Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC were repealed on 15 August 2009.

⁷ We will not go into exceptions on the principle of sex equality regarding employment of women as priests or other clearly religious functions. So far all Member States accept such practices and the directives never intended to prohibit them.

The report covers the following countries: the 27 Member States of the European Union and Iceland, Norway, Liechtenstein, Croatia, the FYR of Macedonia and Turkey.

Questions and guidelines for the national reports

1. General situation regarding tension between gender equality and the freedom of religion

In this section please provide information regarding your country on the following topics:

1.1 General picture

Are tension or conflicts between gender equality and the freedom of religion/non-discrimination on grounds of religion a real issue in your country to start with?

1.2 Tension or conflicts regarding selected topical issues

If considerable tension or conflicts exist, please provide information on whether the selected topical issues below are also topical in your country:

1.2.1 (Access to) employment

1. The requirement to observe dress codes, more specifically dress codes prohibiting Islamic women's dress such as:
 - a) headscarves or b) burkas
 - in private employment
 - in public employment;
2. the requirement to shake hands regardless of sex
 - in private employment
 - in public employment.

1.2.2 Access to and supply of goods and services

1. The supply of segregated healthcare services for men and women because of religiously inspired demands of clients;
2. the supply of segregated social services for men and women because of religiously inspired demands of clients (e.g. separate language and integration courses for immigrants or separate social counselling for ethnic minorities).

1.3 Tension or conflicts regarding other issues

Which other issues are topical in your country, if any?

(You can limit yourself to issues that would, in your view, fall under the scope of application of any of the EU directives on equal treatment regarding race/ethnic origin, religion or belief and sex).

1.4 Why no issue?

If no considerable tension or conflicts exist: can you explain why this is different from many other EU countries?

2. National approach

As the example of the headscarf shows, perceptions of what is at stake in terms of gender equality may differ profoundly. In Norway, a prohibition for women to wear it at work was considered as indirect sex discrimination, whereas the European Court of

Human Rights accepted the opposite argument that notions of sex equality can support a headscarf ban. Yet in other countries, headscarf bans may be perceived primarily as (indirect) discrimination on the ground of race or ethnic origin. Which approach is followed is particularly important in view of possible exceptions to discrimination. The exceptions for racial discrimination are much narrower than those allowed in case of religious discrimination.

2.1 Selected topical issues

Please provide information on how the selected topical issues are legally framed in your country in terms of:

- sex/gender discrimination;
- discrimination on the ground of racial or ethnic origin;
- discrimination on the ground of religion;
- any other way.

Please focus on the legal framework. If applicable, you can also provide information on the role of the general public/the public media. The selected topical issues to address here are the following:

2.1.1 (Access to) employment

1. The requirement to observe dress codes, more specifically dress codes prohibiting Islamic women's dress such as:
 - a) headscarves or b) burkas
 - in private employment
 - in public employment;
2. the requirement to shake hands regardless of sex
 - in private employment
 - in public employment.

2.1.2 Access to and supply of goods and services

1. The supply of segregated healthcare services for men and women because of religiously inspired demands of clients;
2. the supply of segregated social services for men and women because of religiously inspired demands of clients (e.g. separate language and integration courses for immigrants or separate social counselling for ethnic minorities).

2.2 Other topical issues in your country

Please provide information on how other issues, if any, are framed in terms of sex/gender discrimination, discrimination on the ground of racial or ethnic origin, discrimination on the ground of religion or any other ground.

3. The legal framework for deciding (potential) conflicts I: legislation

Please provide information on whether legislation in your country provides for rules to decide the potential conflicts between gender equality and freedom of religion/non-discrimination on the ground of religion that this report focuses on. More specifically, please pay attention to the following topics:

3.1 Rules for dealing with conflicting rights

- Does legislation explicitly provide for rules which prioritise any of the conflicting rights that are the subject of this report?

- Does legislation explicitly provide for procedural rules to decide cases of conflicting rights that are the subject of this report?
- Does legislation provide, in any other way, for rules on how to balance the conflicting rights that are the subject of this report?
- Or is legislation silent on what to do if the rights that are the subject of this report conflict?

3.2 Conformity with EU law

Do you consider legislation in your country to be in accordance with the relevant EU law?

4. The legal framework for deciding (potential) conflicts II: case law

Please provide information on how potential conflicts between gender equality and freedom of religion/non-discrimination on the ground of religion that this report focuses on are dealt with in the case law of national courts and equality bodies. More specifically, please pay attention to the following topics:

4.1 Case law on the selected issues, if any

4.1.1 (Access to) employment

1. The requirement to observe dress codes, more specifically dress codes prohibiting Islamic women's dress such as:
 - a) headscarves or b) burkas
 - in private employment
 - in public employment;
2. the requirement to shake hands regardless of sex
 - in private employment
 - in public employment.

4.1.2 Access to and supply of goods and services

1. The supply of segregated healthcare services for men and women because of religiously inspired demands of clients;
2. the supply of segregated social services for men and women because of religiously inspired demands of clients (e.g. separate language and integration courses for immigrants or separate social counselling for ethnic minorities).

4.2 Where such case law is not available: assessment of probable outcome of case law on the selected issues

Where case law on the selected issues is lacking in your country, please give an assessment of how you think they would be dealt with by your national courts or equality bodies under the applicable legislation:

4.2.1 (Access to) employment

1. The requirement to observe dress codes, more specifically dress codes prohibiting
 - a) headscarves or b) burkas
 - in private employment
 - in public employment;
2. the requirement to shake hands regardless of sex
 - in private employment
 - in public employment.

4.2.2 Access to and supply of goods and services

1. The supply of segregated healthcare services for men and women because of religiously inspired demands of clients;
2. the supply of segregated social services for men and women because of religiously inspired demands of clients (e.g. separate language and integration courses for immigrants or separate social counselling for ethnic minorities).

4.3 Case law on other relevant issues

5. Good practices/solutions in your view

Probably most conflicts between gender equality and religious freedom will not end up before a court of law or equality body, but will be resolved one way or another on the shop floor.

Do you know of any ‘good practices’ in this respect which, in your view, provide satisfying, out-of-court solutions?

6. Other: please include any further comments which you think may be relevant for this report

Annex III

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