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Religion and Employment: the European Legal Challenge

'Religion and Productive, Decent Employment'
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Abstract

This paper will focus on the legal dimension of the European effort to manage a positive relation between religion and the employment. The paper largely draws on the proceedings of the annual meeting of the European Consortium for Church and State Research (see at http://www.churchstate.eu), which took place at the University of Alcalà de Henares in Spain shortly before the G20 Interfaith Summit, on November 12-14, 2015. The assumption of this paper is that by improving the legal dimension of the encounter between religion and employment, the general contribution of religion to 'productive, decent employment' is fostered.

My presentation is twofold. First, I will present the four categories of framework under which the encounter between religion and the employment has challenged European law. Second, I will discuss the eight factors upon which depends a sensible and viable legal management of conflicting claims in the field of religion and the employment, both in litigation and in the framing of public policies. I will argue that scholars, in legal studies and otherwise, need to considerably improve expertise in both the four categories and the eight factors. Hopefully, this will assist the grassroots, the religious organizations, and the State articulations, at the judicial, legislative and administrative level.

In his conclusions to the above mentioned meeting in Alcalà de Henares, Mark Hill set out the following four categories of framework for the encounter of religion and the employment: (i) a person of faith employed by a private company; (ii) a person of faith employed by the State; (iii) employment by an organization with a religious ethos;

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and (iv) ministers of religion. The paper will briefly present the challenge arising from each of the four categories.

In the second part, I will then move on to present the eight factors upon which depend improvements in the approach to disputes in this area as well as in the design of public policies. I will argue that in depth analysis and elaboration is needed with regard to the following: (i) accurate assessment of circumstances (the ECtHR's decision on the case of Fernandez Martinez v Spain will be taken as an example of problematic fact finding and understanding of the specific legal features of the case); (ii) the difference and interaction of the public and the private, and the complex intertwinement between those and religion (I will use as an example the US Supreme Court's decision on the case of Hobby Lobby, which extended to a for profit corporation the right to be protected in tis religious freedom); (iii) extent, limits and implications of the heightened duty of loyalty (again, the Fernandez Martinez case will be used as an example); (iv) the ministerial exemption as an implication of religious organizations' right to autonomy (the US Supreme Court's decision on the case of Hobby Lobby will be the reference for this point); (v) the drafting and application of employment contractual clauses, with regard in particular to (1) change over time of fundamental circumstances affecting the religious implications of the job (eg in the ECtHR's decision on Ladele); and (2) anticipation of possibly disputable situations in the job description (eg the French case of Baby Loup); (vi) grounds for dismissal, in particular on the difference between religiously inspired conduct objectively affecting the work performance and issues of image and perceptions (such as in the wearing of the headscarf case, eg in the US Supreme Court's Abercrombie case) and grounds related to personal matters pertaining to private life; (vii) the position of the employee in the organization and the possibility to differentiate his or her protection based on his or her proximity to the ethos of the organization (eg ECtHR's decisions on Schuth and Obst); (viii) the necessity of due process and fair trial in disciplinary or dismissal procedures for employees of an organization with a religious ethos (eg ECtHR's decision on Lombardi Vallauri).

I will argue in conclusion that it is necessary to improve the expertise on the four categories and eight factors, both in their phenomenology and in their conceptualization. This will hopefully assist the grassroots, the religious organizations, and the judiciary, the legislator and the administration, for the sake of a better articulation of religion and the employment.