

Il principio di laicità nel rapporto di lavoro alla luce della giurisprudenza nazionale ed europea.

The principle of laicism in the employment relationship from the perspective of national and European jurisprudence.

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ABSTRACT

Il presente contributo affronta il problema riguardante l'impatto del principio di laicità sul rapporto di lavoro. L'analisi si sviluppa intorno a due temi. Il primo, relativo al diritto all'obiezione di coscienza e ai suoi effetti sul rapporto di lavoro. Il secondo, inerente all'incidenza dei precetti religiosi sul luogo e sull'orario di lavoro, nonché sulle modalità della prestazione lavorativa.

Parole chiave: laicità – obiezione di coscienza – precetto religioso – prestazione lavorativa

This essay aims to tackle the issue concerning the impact of laicism in the employment relationship. The analysis delves into two themes. The first, concerning the right to conscientious objection and the consequences of its exercise on the employment relationship. The second concerns the incidence of the religious precept on the working place and time, as well as on the working performance.

Keywords: Laicism – conscientious objection – religious precept – working performance

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1. *Introduction.*

How do the principle of laicism and the freedom of religious beliefs impact on the employment relationships? It is well known that the principle of laicism is a milestone of our legal framework, even though it does not find an explicit normative provision neither within the Constitutional Charter, nor in the supra-national sources binding for our system, such as the ECHR and the Charter of Nice². Consequently, the empirical approach to this topic appears essential. After a brief introduction regarding the aforementioned principle, this essay aims to deeply analyse the effect of laicism on the labour law field, from the perspective of the national and European jurisprudence.

The Constitutional Court has clarified that laicism might be defined as a “supreme principle” of the constitutional order and represents “one of the profiles of the form of State” outlined by the Italian Constitution³.

Unlike the French system, which is neutral with respect to the different religious beliefs, the Italian, on the contrary, has accepted, at least ideally, a positive approach, in accordance to which the State has the task of removing all obstacles to the free manifestation of the religious belief and to promote confessional pluralism, in a framework of values with equal dignity.

Strictly connected to the laicism is the principle of tolerance, in the light of which the respect and the will to understand the cultures, philosophies and religions of others, is even more important than the conviction of personal ideas⁴. Sometimes this dialogue between different values might be difficult, especially when the field in which the different ideals emerge and, often, collide, is the employment relationship.

² S. SICARDI, *Il principio di laicità nella giurisprudenza della Corte Costituzionale (e rispetto alle posizioni dei giudici comuni)*, in *Dir. Pub.*, 2, 2007, 503. With specific regard to the principle of laicism, see in particular: R. BIN, G. BRUNELLI, A. PUGIOTTO, P. VERONESI (a cura di), *La laicità crocifissa? Il nodo costituzionale dei simboli religiosi nei luoghi pubblici*, Torino, 2004; G., CALOGERO, *Il principio del laicismo*, in AA.VV., *A trent'anni dal Concordato*, Firenze, 1959, 67 ss., F. FINOCCHIARO, *Alle origini della laicità statale*, in *Dir. eccl.*, 2002, 1257 ss.; S. LARICCIA, *Laicità dello Stato e democrazia pluralista in Italia*, in *Dir. eccl.*, 1994, I, 383 ss.

³ Constitutional Court., 12th April 1989, n. 203.

⁴ G., CALOGERO, *Il principio del laicismo*, in AA.VV., *A trent'anni dal Concordato*, Firenze, 1959, 67.

By adopting the point of view of national and European jurisprudence, this contribution aims to deeply analyse the applicative implications of the principle of laicism and the difficult balance between opposing interests, those of the worker, on the one hand, those of the employer on the other, both of them surrounded by the need of the State to guarantee the constitutional legal framework.

The analysis delves into two themes, which represent a practical development of the principle of laicism. The first, concerning the right to conscientious objection and its consequences on the employment relationship. The principle of laicism is, in fact, closely linked to the freedom of conscience, which should be particularly protected in the constitutional system, as it might be considered as the deepest reflection of human dignity⁵.

The second, linked to the first, concerns the incidence of religious precepts on working place and time, as well as on working modalities. In particular, the worker might call for the respect of those rules in order to justify the refusal to fulfil his or her duties.

2. The right to conscientious objection.

In the perspective of a positive approach to laicism, it is necessary to find a right balance between opposing interests, which are recognised and protected by the constitutional legal framework. This is what happens, for instance, when the right to health and to self-determination meets the right to conscientious objection. Which right must prevail?

As known, the latter allows to refuse a duty in case it collides with ethical convictions. It is possible to identify two components of this right. A negative one, consisting in the rejection of a rule set by the State and a positive one, the personal adhesion to moral, ideological or religious values⁶.

The topic involves different areas of the legal framework, from the field of military service⁷ to the medical care system, according to which the aforementioned right must be balanced with the fundamental protection of health, as emerges from Art. 32 Italian Constitution and Art. 8 ECHR.

⁵ Constitutional Court, 19th December 1991, n. 467.

⁶ A. PUGIOTTO, *Obiezione di coscienza nel diritto costituzionale*, in Dig. Disc. Pubbl., X, Torino, 1995, 251 ss.

⁷ In 1972, the legislator intervened with the Law n. 772/1972 for the discipline of conscientious objection in the matter of military service, for the solution of the conflict between freedom of conscience and the duty to serve the Fatherland also by providing military service pursuant to Article 52 of the Italian Constitution.

According to the Law n. 194/1978 (rules for the protection of maternity and the voluntary interruption of pregnancy), no person shall be coerced, held liable or discriminated in any manner because of his or her refusal to perform an abortion (Art.9). The application of this provision might be problematic, since it involves two opposing interests. From the one side, the right of the women to legally interrupt her pregnancy and, from the other, the freedom, granted to medical personnel, to refuse to provide abortion due to personal beliefs.

How might these two opposing interests be balanced? Therefore, it is primarily necessary to tackle the issue regarding the position of conscientious objection within the legal framework, in order to understand whether it has a constitutional foundation. As pointed out by some scholars, despite the lack of a specific constitutional norm, conscientious objection might have its roots in freedom of conscience. Consequently, in accordance to a systematic interpretation of Articles 2, 13, 19, 21 of the Italian Constitution, it should be considered as an inalienable right of every man. From this perspective, the conscientious objection has been defined as a “fourth generation constitutional right”⁸.

From the other side, other authors highlight that this right has no direct recognition in the Italian Constitution. There is no norm within the constitutional framework, which establishes the right to conscientious objection, differently to others States⁹. Moreover, the absence of a clear expressed norm might have a specific meaning, as it could be interpreted as an express will of the Italian Constituent. Consequently, conscientious objection must be explicitly authorized by law, according to Art. 54 of the Italian Constitution, in light of which “all citizens have the duty to be faithful to the Republic and to observe its Constitution and laws”. In other words, the overmentioned right exists (and as such it assumes the rank of law) only in case the legislator explicitly establishes it¹⁰.

⁸ R. BERTOLINI, *L'obiezione di coscienza moderna. Per una fondazione costituzionale del diritto di obiezione*, Torino, 1994,

⁹ On the contrary, the constitutional experience of other European countries leads to the full recognition of the right of conscientious objection (so, for instances, Art. 9, paragraph 3 of the Austrian Constitution, Art. 99 of the Dutch Constitution, Art. 41 paragraph 5 of the Portuguese Constitution and Art. 30 paragraphs 2 and 3 Spanish Constitution).

¹⁰ I. PELLIZZONE, *Obiezione di coscienza nella legge 194 del 1978: considerazioni di diritto costituzionale a quarant'anni dall'approvazione della legge n. 194 del 1978*, in *BioLaw Journal*, 3/2018, 118; D. PARIS, *Obiezione di coscienza. Studio sull'ammissibilità di un'eccezione dal servizio militare alla bioetica*, Firenze, 2011, 263

The Constitutional Court has ruled that the right to conscientious objection is strictly linked to the freedom of conscience and, as an expression of the principle of laicism, is protected by Articles 2, 19 and 21 of the Constitution¹¹. Since it is connected to the human dimension of every person, it has to be protected. Nevertheless, in any case it has to be ensured a balance between opposing constitutional interests.

The analysis of the right to conscientious objection has necessarily to be completed by considering the interaction between Italian and European Union frameworks. Shifting the focus to it, an important provision of the freedom of conscience is enshrined in Art. 10 of the Charter of Fundamental Rights of the European Union (CFR). The norm explicitly recognises the right to conscientious objection. However, it specifies that national laws have to rule the exercise of this right. As it clearly appears, even if the overmentioned right has found its citizenship within the European Union legal framework, each member State has to provide for a specific regulation and has to find the right balance between the overmentioned right and opposing interests, which is not easy in particular when in this balancing process the right to health and to self-determination meet the right to conscientious objection.

3. The right to conscientious objection in the employment relationship.

As previously pointed out, one of the maximum expressions of the right to conscientious objection could be found in Law n. 194/1978, concerning the protection of maternity and the voluntary interruption of pregnancy. According to Art. 9, in fact, no person shall be coerced, held liable or discriminated in any manner because of his or her refusal to perform an abortion.

What does it happen when the right to conscientious objection becomes the general rule instead of an exception? The large exercise of it may have a negative impact on the abortion service and its regular provision, if medical personnel increase its use.

In Italy, in the last years and in particular in 2017, the number of gynaecologists who exercise the right to conscientious objection amount to the 68,4% at the national level, with significant differences between north and south of Italy, with the risk of a discrimination on the ground of territorial differences and socio-economic status¹² in the access to this service. In some Italian regions the

¹¹ Constitutional Court, 19th December 1991, n. 467

¹² See the Annual Report (December 2018) of the Minister of Health to the Parliament on

gap between abortion providers and conscientious objector is even more significant¹³.

The issue has an impact also on employment relationships and on working conditions. These topics will be deeply analysed in the following paragraphs (see paragraphs 3.1., 3.2).

It is possible to highlight that abortion providers' working conditions are worse than conscientious objectors' ones, since they are required to perform more duties and to replace their colleagues. Because so few medical personnel is performing abortion procedures, the number of patients to care for is increasing, with a lack of proper work organization and a risk of delay in performing abortive procedures (see paragraph 3.1.).

This problem could be tackled by organising a direct selection of abortion providers. At this specific regard, the second aspect we will focus on concerns the practical response which has been adopted by some medical clinics, such as "San Camillo Forlanini" Hospital in Rome (see paragraph 3.2). Main issues to be analysed are the alleged violation of the right to conscientious objection as enshrined in Art. 9, Law n. 194/1978 and the consequences of the right to conscientious objection on the employment relationship.

The essay will then move on the analysis of the exercise of the right to conscientious objection in other fields, outside the boundaries of the Law n. 194/1975. At this regard, the focus will be shifted on other applications of the right to conscientious objection and its impact on employment relationships.

3.1. Differences in treatment between non-objecting and objecting medical personnel. The decision of the European Committee of Social Rights.

As anticipated, abortion providers have to replace colleagues whose refuse to the service is based on personal beliefs.

the state of implementation of the law on social protection of maternity and voluntary interruption of pregnancy (http://www.salute.gov.it/imgs/C_17_pubblicazioni_2807_allegato.pdf). It also reports some data from previous years. See I. PELLIZZONE, *Obiezione di coscienza nella legge 194 del 1978: considerazioni di diritto costituzionale a quarant'anni dall'approvazione della legge n. 194 del 1978*, in *BioLaw Journal – Rivista di BioDiritto*, 3/2018; M. D'AMICO, *La legge n. 194/1978 fra adeguamenti scientifici, obiezione di coscienza e battaglie ideologiche*, in *BioLaw Journal – Rivista di BioDiritto*, 3/2018.

¹³ See, in particular, the overmentioned annual report, page 48.

The increase number of such procedures performed by non-objecting practitioners, their gradually repetitive character as well as working conditions involving overtime or work isolation affect the physical and mental health of such doctors. In addition, non-objecting practitioners are required to exclusively carry out abortion procedures and are unable therefore to carry out other procedures, for which they have been trained and thereby negatively affecting the non-objecting medical practitioners' possibility to develop their professional competencies.

The problem has a national echo and for this reason in 2013 the CGIL submitted a complaint before the European Committee of Social Rights¹⁴. According to the complainant organisation, abortion providers would suffer a discrimination, whether compared to the others. The unjustified difference would result, in particular, in the workload (abortion providers are required to perform additional tasks), in career opportunities, as well as in the protection and safety in the workplace, with a violation of Articles 1 (the right to work), 2 (the right to just conditions of work), 3 (the right to safe and healthy working conditions) and 26 (the right to dignity at work) of the European Social Charter¹⁵.

The European Committee of Social Rights has recognized a violation of the right to work, enshrined in art. 1 of the above-mentioned Charter¹⁶. As highlighted by the Committee, Italy has to ensure an adequate protection for doctors and nurses who concretely guarantee the effectiveness of the Law n. 194/1975. In particular, the Committee notes the existence of a discrimination depending on the fact that some doctors (now the majority) exercise the right to conscientious objection. As clearly highlighted by the Committee, « (...) this difference in treatment (the disadvantages suffered by non-objecting personnel) between non-objecting medical personnel and objecting personnel arises simply on the basis that certain medical practitioners provide abortion services in accordance with the law, therefore there is no reasonable or objective reason for this difference in treatment. Consequently, the Committee holds that the difference in treatment between the objecting and non-objecting medical practitioners amounts to discrimination in violation of Article 1, paragraph 2 of the Charter».

¹⁴ Complaint n. 91/2013, CGIL vs. Italy. See B. LIBERALI, *Prime osservazioni a margine della decisione sul merito del reclamo collettivo n. 91 del 2013 Diritti Sociali*, in *BioLaw Journal – Rivista di BioDiritto*, 2, 2016, 417.

¹⁵ L. BUSATTA, *Insolubili aporie e responsabilità del SSN. Obiezione di coscienza e garanzie dei servizi per le interruzioni volontaria di gravidanza*, in *Rivista dell'Associazione Italiana dei Costituzionalisti*, n. 3/2017, 6.

¹⁶ European Committee on Social Rights, 11th April 2016.

Of course, since the Law n. 194/1975 is not properly applied in practice, there is also a violation of art. 11 of the European Social Charter (the right to health).

At this regard, the Committee notes that the difficulties of access to abortion procedures are due to the particularly high number of medical personnel exercising the right to conscientious objection and the fact that the measures taken by the competent authorities under Article 9, paragraph 4 of Act No. 194/1978, in order to cope with this phenomenon, are not sufficient.

For this reason, to allow the effective exercise of the right to freely access to abortion services, some hospitals have planned to select only abortion practitioners.

3.2. *Selecting procedure for abortion providers.*

In order to ensure women's right to the interruption of pregnancy, some hospitals have reserved few work positions for the abortion service, in accordance of the Law n. 194/1978¹⁷.

This is what happened, in particular, in Rome at the "San Camillo Forlanini" Hospital¹⁸ which decided to hire some medical personnel specifically for the abortion service. The competition announcement did not explicitly reserve job positions to doctors who are not objectors. It only referred to the abortion service. In other words, there was an implicit commitment to refrain from exercising conscientious objection.

¹⁷ See in particular TAR Puglia, 14th September 2010, n. 3477. The decision concerns the selection of doctors to be addressed to the application of the Law n. 194/1975 within family counseling. See D. PARIS, *Medici obiettori e consultori pubblici. Nota a T.A.R. Puglia (Bari)*, sez. II, 14 settembre 2010, in *Stato, Chiese e pluralismo confessionale*, maggio 2011; M.P. IADICICCO, *Obiezione di coscienza all'aborto ed attività consultoriali: per il T.A.R. Puglia la presenza di medici obiettori nei consultori familiari è irrilevante, ma non del tutto*, in *Giur. Cost.*, 2, 2011, 2000. The topic has been deeply analysed by M. D'AMICO, *Sui bandi di concorso per medici non obiettori: l'obiezione di coscienza è regola o eccezione in uno stato laico?*, in *Quad. cost.*, 2017, II, 350 ss.; D. PARIS, *Sui bandi di concorso per medici non obiettori: portata dell'obiezione di coscienza e problemi di attuazione della legge*, in *Quad. cost.* 353 ss.; A. BURATTI, *Interruzione volontaria di gravidanza e obiezione di coscienza: spunti a partire da un recente bando per "non obiettori"*, in *Forum di Quaderni Costituzionali Rassegna*, 28 marzo 2017; A. BURATTI, *Sui bandi di concorso per medici non obiettori: problemi applicativi e ricadute sul rapporto di lavoro*, in *Quaderni costituzionali*, 2017, 2, 357 ff.; B. LIBERALI, *Per l'applicazione esclusiva della legge n. 194: una clausola che viola il diritto di obiezione di coscienza o che attua gli obblighi organizzativi di ospedali e Regioni*, in *Osservatorio costituzionale*, 1, 2017;

¹⁸ B.U.R Lazio 24th November 2015.

The case raises two issues. The first, concerning the compatibility of the selection procedure with Art. 9, Law n. 194, which protects the right to conscientious objection. The problem concerns the difficult balance between opposing individual rights. On the one hand, that of the woman to interrupt her pregnancy, which comes from Art. 32 of the Constitution. On the other, that of the doctor to exercise conscientious objection to abortive practices, which might be traced back to Art. 2, 13, 19 and 21 of the Constitution in order to protect individual beliefs and sensibility.

What is the possible solution? It seems to be preferable to adopt a literal interpretation of the mentioned Art. 9, which leads to make the woman's right prevailing over the conscientious objection. At this regard, Art. 9 admits the right to conscientious objection, but at the same time it establishes that "the hospital is required in any case to ensure (...) the execution of the required interruptions of pregnancy"¹⁹.

The second issue is related to the consequences of the eventual exercise of the right to the conscientious objection during the employment relationship. At this regard, it is possible to outline two hypotheses²⁰. The first, according to which the right to objection is exercised during the trial period. In this case, the medical clinic may withdraw from the contract. In fact, according to Art. 15 of the National Collective Agreement for Medical Staff in the NHS, the trial period lasts six months and "once the half of the trial period has expired, each party may withdraw from the relationship at any time (...)". However, the same National Collective Agreement states that "The withdrawal of the medical clinic must be justified". This profile could certainly be problematic, although it could be possible to consider that the impossibility of using the doctor in that particular place is in itself not sufficient to legitimize the choice to interrupt the employment relationship, since this doctor could be moved to other job positions.

More obstacles are encountered if conscientious objection is exercised after the trial period. In principle, in fact, the employment contract could not prevent the doctor from expressing conscientious objection, since it would be contrary to the aforementioned provision of the Law n. 194/1975. Nor the objection that

¹⁹ This solution has been confirmed by TAR Emilia Romagna, sez. Parma, n. 289/1982. On the contrary, according to TAR Liguria, n. 396/1980 and TAR Campania, n. 78/1989 these procedures are against the right to conscientious objection. See A. BURATTI, *Sui bandi di concorso per medici non obiettori: problemi applicativi e ricadute sul rapporto di lavoro*, in Quaderni costituzionali, 2017, 2, 358.

²⁰ L. BUSATTA, *Insolubili aporie e responsabilità del SSN. Obiezione di coscienza e garanzia dei servizi per le interruzioni volontarie di gravidanza*, in Associazione Italiana dei Costituzionalisti, 2017, 3, 19 ff.

occurred could lead to the doctor's automatic dismissal. If the contract signed between the hospital and doctors envisaged such automatism, it would be illegitimate due to a violation of the law, since it would damage the right to conscientious objection. In fact, according to the Law n. 194/1975 there is no term within which it is possible to exercise the aforementioned right. However, from the labour law point of view, it could be possible to assume that the doctor could be directed to another work positions.

3.3. The decisions of the European Court of Human Rights on the right to conscientious objection.

As anticipated, the right to conscientious objection does not only concern the medical care, since it involves different areas of the legal framework, not only on a national level, but also on a European one, as it clearly emerges from the European jurisprudence's decisions. At this regard, it has to be highlighted that the European Court of Human Rights rules in favour of the exercise of such right within the limits of national legal frameworks. It points out that each member State has the freedom to balance opposing interests, as it clearly expressed in two decisions, *Ladele vs. United Kingdom* and *Mc Farlane vs. United Kingdom*²¹.

In particular, in the case *Ladele vs. United Kingdom*, the European Court of Human Rights has ruled in favour of the legitimacy of an Officer's dismissal, who refused to celebrate ceremonies between homosexual persons and to register their unions after the enter into force of the Civil Partnership Act in 2004, because of her adhesion to the catholic faith. The employer institution (the London Borough of Islington) did not consider admissible the conscientious objection she expressed, as in contrast with the specific code of conduct²². Nevertheless, to meet her personal needs, she was exempted from the celebration of civil unions and assigned to the management of the registers and to the fulfilment of administrative formalities. However, she refused those duties and was therefore

²¹ Case *Eweida and others vs. United Kingdom*, ECHR, 15th January 2013, in European Court of Human Rights Database (HUDOC).

²² According to the Islington Code of conduct: «Islington is proud of its diversity and the council will challenge discrimination in all its forms. 'Dignity for all' should be the experience of Islington staff, residents and service users, regardless of the age, gender, disability, faith, race, sexuality, nationality, income or health status. [...]. The council will promote community cohesion and equality for all groups but will especially target discrimination based on age, disability, gender, race, religion and sexuality. [...]

dismissed. As highlighted by the European Court of Human Rights, in the balance between the right of a homosexual couple to register its union and that of the employee to manifest her or his faith, the United Kingdom can choose to primarily protect the first. This, in particular, in order to ensure the respect of non-discrimination principles against homosexual couples, an aim that each State achieves with a wide margin of discretion. However, the Court does not pay particular attention to the issue of conscientious objection, barely mentioning the fact that the woman should have exercised her right to conscientious objection at the beginning of her employment relationship. On the contrary, she had never shown to be against homosexual unions. At this regard, the decision has been criticised since it has been highlighted that the right to conscientious objection could be exercised only after the enter into force of the overmentioned Civil Partnership Act²³, which allows homosexual unions. In addition, the worker could have been replaced by other colleagues, instead of been directly dismissed.

The European Court of Human Rights reaches a similar solution also in the case *Mc Farlane vs. United Kingdom*, in which it was asked to rule on the case related to the dismissal of a catholic consultant who worked for a Couple Therapy Centre. Although the employee was against homosexual relations due his religion, he carried out his consultancy to homosexual couples. However, he refrained from performing his activity when the required service concerned the matter of sexual relations, because of his religious belief.

The Court has confirmed the legitimacy of the dismissal, pointing out that the worker has freely chosen to work in a company dedicated to psychological and sexual couple therapy, which has always highlighted to welcome every kind of union. Even in this case, however, the European judges quickly settle the matter by asserting that each member State is responsible in ensuring the right balance between opposing interests.

4. The refusal to work based on religious grounds.

Once examined in detail the different consequences that conscientious objection has on employment relationships, the research - based on national and

²³ E. Sorda, Lavoro e fede nella Corte di Strasburgo: Note a margine della sentenza *Eweda e altri c. Regno Unito*, in *Forum di Quaderni Costituzionali*, 14 novembre 2013,

supranational jurisprudence – aims to deeply analyse the incidence of religious precept on working place and time, as well as on the ways to perform the work²⁴.

This analysis draws from the multiple consequences that religious beliefs and liturgical rules have on workplace and on individuals' daily life style²⁵. This topic has actual and delicate features, since it is situated in the European social and political context, namely a framework where Europe is struggling to integrate and regulate an unprecedented migratory flow.

Today, more than ever, religious freedom thus requires balancing different interests to avoid limiting certain individuals' liberty. In the work place, there are certain typical cases as the display of religious symbols²⁶, the connection between the observance of religious festivities and when weekly rest is scheduled, the respect of specific diets²⁷, the availability of spaces devoted to religious worship and the opportunity or not to wear specific clothing.

The debate about how to balance individuals' religious beliefs and working requirements is a topic highly disputed²⁸, since the latter play a significant role in the quality of individuals' dignity and access to economic means²⁹.

²⁴ For more information on German case see R. SANTAGATA, *Discriminazioni nel luogo di lavoro e "fattore religioso": l'esperienza tedesca*, in *Riv. it. dir. lav.*, II, 2011, 353 et seq.

²⁵ S. Ferrari, *Lo spirito dei diritti religiosi. Ebraismo, cristianesimo e islam a confronto*, Bologna, 2002.

See also G.M. FLICK, *Minoranze ed uguaglianza: il diritto alla diversità ed al territorio come espressione dell'identità nel tempo della globalizzazione*, in *Pol. Dir.*, 2004, I, 3 et seq.; L. SAPORITO-F. SORVILLO-L. DECIMO, *Lavoro, discriminazioni religiose e politiche d'integrazione*, in *Stato, Chiese e pluralismo confessionale*, n. 18/2017, 5 et seq.; N. DELENER, *Religious contrasts in consumer decisions behavior patterns: Their dimensions and marketing implications*, in *European Journal of Marketing*, 1994, 28, 36 et seq.; E. SIGALOW-M. SHAIN-M.R. BERGEY, *Religion and Decisions about Marriage, Residence, Occupation, and Children*, in *Journal for the Scientific Study of Religion*, 51, 2012, 304-323; A. FUCCILLO, *Il cibo degli dei. Diritto, religioni mercati alimentari*, Torino, 2015, 6.

²⁶ There is a large literature on religious symbolism. *Ex multis*, see N. COLAIANNI, *Diritto pubblico delle religioni. Eguaglianza e differenza nello Stato costituzionale*, Bologna, 2012, 79 et seq.

²⁷ L. SAPORITO-F. SORVILLO-L. DECIMO, *Lavoro, discriminazioni religiose e politiche d'integrazione*, cit., 29 et seq.

²⁸ See also C. DE MARCO, *Simboli religiosi e prestazione di lavoro*, in *Massimario di Giurisprudenza del Lavoro* n. 12/2016, 820 et seq.

²⁹ L. SAPORITO-F. SORVILLO-L. DECIMO, *Lavoro, discriminazioni religiose e politiche d'integrazione*, cit., 5.

See also C. SALAZAR, *Le "relazioni pericolose" tra libertà di espressione e libertà di religione: riflessioni alla luce del principio di laicità*, in *Stato, Chiese e pluralismo confessionale*, 2008, 38 et seq.

Eventually, a certain religious belief³⁰ impacts on the people's working performance, both regarding the selection of the job its actual practice³¹.

Yet, due to the complexity of this topic, it will be only considered the incidence of the religious precept on the working place and time, as well as on the working modalities, which could provoke the worker's refusal to fulfil his or her duties due his or her religious beliefs.

4.1. Religious Precepts and Work Place.

The European Court of Human Rights (ECHR) has a large jurisprudence regarding the debated issue of the display and usage of religious symbols in the work place, even though it misses a univocal direction on the balance of interests between the right to express one's beliefs through religious symbols (i.e. hijab³² or tattoos³³) and other constitutional rights such as other employees' right to work in a "neutral"³⁴ environment or other health and economic rights. The discussion about the display of religious symbols as means to be individually and socially recognized as devoted to a specific faith has increased³⁵, so

³⁰ Religious precepts may forbid certain behaviours and the use of certain assets in a way similar to legal principles. The former may thus lead the individual to avoid certain jobs. For example, Islam prohibits pork and alcohol, since it deems *haram* manufacturing and selling these products. Hence, these religious precepts may have a significant impact on those who follow them, since observants may choose not to work where such products are served and/or sold (Pubs, restaurants, etc.). In this way, an infringement of the principle of equality may result.

³¹ See also A. DE OTO, *Precetti religiosi e mondo del lavoro*, Roma, 2007, 110 et seq.; S. COGLIEVINA, *Festività religiose e riposi settimanali nelle società multiculturali*, in *Riv. it. dir. lav.*, 2008, 3, 375 et seq.; A. OCCHINO, *Orari flessibili e libertà*, in *Riv. it. dir. lav.*, 2012, 1, 169 et seq.

³² V. NIGRO, *Il margine di apprezzamento e la giurisprudenza della Corte europea dei diritti dell'uomo sul velo islamico*, in *Diritti umani e diritto internazionale*, 2008, 71 et seq.; see also M. PERUZZI, *Il prezzo del velo: ragioni di mercato, discriminazione religiosa e quantificazione del danno non patrimoniale*, in *Riv. it. dir. lav.*, 4, 2016, 827 et seq.

³³ In this regard, the "*Direttiva sulla regolamentazione dell'applicazione dei tatuaggi da parte del personale dell'Esercito*" includes laws to prevent situations that hinder the decorum of the uniform and the image of the Army. This may infringe individuals' ability to perform certain job requirements and it may also have repercussions on health issues: A. FUCCILLO-R. SANTORO, *Giustizia, diritto, religioni. Percorsi nel diritto ecclesiastico civile vivente*, Torino, 2014, 107.

³⁴ See the case "*Dahlab v. Switzerland*" (ECHR, Judgment of the 15 February 2001, Appl. nr. 42393/98).

³⁵ A. FUCCILLO-R. SANTORO, *Giustizia, diritto, religioni. Percorsi nel diritto ecclesiastico civile vivente*, Torino, 2014, 98 et seq.

laws must find a way to defend religious' liberty in any context and, above all, in the work place³⁶.

For what concerns the Italian case, the display of religious beliefs became an issue highly debated in the case of the exposure of the crucifix in polling stations, courts and schools.

The debate concerned the fact that the display of the crucifix (Christian symbol) could hinder both the right to one own's individual liberty and other pivotal principles such as the one concerning the people's equality (Article 3 of Constitution) and the secularity of the state (Articles 2, 3, 7, 8, 19, 20 of Constitution)³⁷.

It is possible to find two main cases where a judge had to evaluate if work place's rules hindered individual's religious liberty up to the point that the worker had the right to legitimately end the employment contract.

In particular, it was emblematic the case of a Jew judge that refused to work in courts that displayed the crucifix, since he claimed that this infringed not only the principle of secularity of the state, but also of religious freedom, equality and of non-discrimination. This judge asked either for the removal of the crucifix or for the exposure of other religious symbols - such as the Jewish *menorah* – and he refused to work even after the president of the court decided to assign him a court free from any religious symbol.

This behaviour led the Court of Cassation³⁸ to confirm the removal from the magistrate order of the judge, already order by the CSM (Judiciary Superior Council), since this judge continued to refuse to work not only in a court that displayed the crucifix, but also in a specific court free from any religious symbol. This decision of the CSM was due to the fact that the judge's decision exceeded his private interests, thus hindering others' rights and interests that must not be infringed by a single individual's decisions. That is, this decision acknowledged a judge's right to work in a room with no crucifix, but not to

³⁶ In the famous case "*Kokkinakis v. Greece*" (ECHR, Judgment of the 25 May 1993, Appl. nr. 14307/88, A 260-A) it was acknowledged that religious freedom is a constitutive feature of democratic societies and it thus must be considered as such in any field of the jurisprudence.

³⁷ For more information on religious freedom in the Italian constitution see B. MARCHETTI, *Libertà religiosa e CEDU – Report annuale 2011 Italia*, in www.ius-publicum.com.

³⁸ Court of Cassation, nr. 5924/2011, approved the judgment of the Court of Cassation, nr. 20601/2008 stating: «*inammissibile il ricorso di un magistrato verso la sentenza della sezione disciplinare del Consiglio Superiore della Magistratura, con la quale gli è stata inflitta la sanzione disciplinare dell'ammonizione, essendo stato riconosciuto responsabile per aver rifiutato di prestare il suo servizio per la presenza del crocifisso*».

remove this religious symbol from all Italian courts, since the latter would compromise the internal organisational norms of the judicial offices. Hence, according to the Court of Cassation, the exposure of the crucifix does not imply a direct infringement of religious freedom, since it did not impose the judge to work in a court with a religious symbol opposed to his beliefs³⁹.

For what concerns the display of the crucifix in schools, it is interesting the decision of the Court of Terni⁴⁰, which dealt with the conflict between a request to display the crucifix posed by a students' class deliberation and a lecturer who asked for the respect of her freedom of thought. In this case, school director imposed the professor not to remove the crucifix during her lectures. The judge did not deem as discriminating the decision taken by the director, since secularity and teaching liberty are based on freedom of expression, thought and religion, namely on the mutual respect of all individuals regardless their religious beliefs and ideals. Following this latter principle, Tribunal' judges thus decided that the school director did not discriminate against the professor.

4.2. *Religious precepts and working time.*

The second topic that has to be analysed is working time⁴¹ and its coincidence with religious holidays, days when observants cannot work because they have to worship their religion. An increasing part of the population does not give a significant meaning (religious or cultural) to religious holidays (often Christian ones) formally recognized by law, but they ask instead to be able to attend the holidays of the religion they belong to⁴². Acknowledging these requests entails not only resolving practical problems related to how to reconcile these holidays with firms' organizational necessities, but also deciding on issues related to recognizing the diverse religions' demands.

For the first time, already in 1976 in the famous case *Prais* (C-130/75), the European Court of Justice argued in favour of individuals' religious freedom in the matter of religious holidays⁴³. More recently instead, Court of Cassation –

³⁹ A. DI LALLO, *Il crocifisso: simbolo religioso in chiesa, simbolo civile a scuola e nei tribunali*, in *Diritto e Giustizia online*, 2011, 63 et seq.

⁴⁰ Court of Terni, Judgment of the 24 June 2009.

⁴¹ See A. OCCHINO, *Orari flessibili e libertà*, cit., 169 et seq.

⁴² For example, Islam holidays do not coincide with those Christian ones acknowledged by law: L. MUSSELLI, *La rilevanza civile delle festività islamiche*, in S. Ferrari (a cura di), *Musulmani in Italia: la condizione giuridica delle comunità islamiche*, Bologna, 2000.

⁴³ S. COGLIEVINA, *Festività religiose e riposi settimanali nelle società multiculturali*, cit.

with the judgment nr. 3416/2016 – dealt with the case of a catholic worker who refused to work on Sundays so as to be able to worship his religious beliefs, but that accepted to recover this shortcoming on his midweek resting day. Hence, judges had to decide whether or not the right to worship and the one to entrepreneurship were equivalent.

The Court did not give a clear answer. Nevertheless, it considered more important the religious right, since it deemed unacceptable the sanctions imposed to the employee by the management. Even though the firm may have to function on Sundays, shifts have to be organized complying with the basic fundamentals of the law. Hence, even though multiculturalism, globalization and economic crisis require an organization of the work more flexible, this does not imply that flexibility can alienate individuals hindering their rights⁴⁴.

4.3. Religious precepts and working performance.

Finally, religious precepts can affect the way individuals perform at work. For example, it is emblematic the judgment of the Appeals Court of Venice – April 2019⁴⁵ - that dismissed an imam that for his religious beliefs had refused to touch and transport alcoholic beverages, a substance prohibited by the Quran⁴⁶.

Moreover, the same religious symbolism aforementioned also poses the problem of compatibility with the right to health of the worker himself⁴⁷ and with the freedom of economic initiative.

Regarding this latter, the goal is to reconcile religious liberty and entrepreneurship one. On the hand, employees must be granted the right to worship their beliefs. On the other hand, entrepreneurship rights imply that both employees and clients must be treated equally and neutrally.

The European Court of Human Rights (ECHR) legislated on the right of religious freedom, protected by the Article 9 CEDU and by the ban on discrimination of the Article 14 CEDU (15 January 2013), analysing four similar cases

⁴⁴ V. AMATO, *Il diritto al riposo tra religione e organizzazione del lavoro*, in *Lav. giur.*, 6, 2016, 565 et seq.

⁴⁵ This judgment has not yet been published.

⁴⁶ This problem is not new, since A. VISCOMI (in *Immigrati extracomunitari ed autonomia collettiva: un breve appunto su parità e differenza*, in *Dir. rel. ind.*, 2, 1992, 117) already analysed how to evaluate the refusal of an employer to accept his Muslim employee's request to pray during the working time or to avoid touching impure objects.

⁴⁷ M. RANIERI, *L'abbigliamento nei luoghi di lavoro: dalla tuta blu al velo usa e getta*, in *WP C.S.D.L.E. "Massimo D'Antona" n. 100*, 2010.

in the United Kingdom regarding the refusal of an employee to fulfil to what requested by the employer. These cases concerned a refusal of the employee to work so as to be able to worship, a refusal to perform what requested by the employer and a decision to display religious symbols despite the internal rules of the firm asking otherwise (*Case “Eweida and others v. The United Kingdom”*)⁴⁸.

Even though the Court gave some leeway to the European states on the issues concerning the restriction of religious liberty in the working place - reserving for itself the control over the conformity of laws and judicial decisions to the principles of the CEDU (above all, to the principle of proportionality) - the UK cases interestingly underline that the Court modified its former orientation for which limitations on religious symbols posed by employer were not illicit because the employee has the opportunity to resign and to look for another job⁴⁹.

For what concerns the European Court of Justice, this body has instead faced for the first time the issues concerning religious symbols in the working place only with the cases *Achbita e Bougnaoui* (C-157/15 e C-188/15)⁵⁰.

The case *Achbita* concerns the layoff by a Belgian firm (working in the security field) of a Muslim worker who refused to remove her hijab while she was working, despite the fact that the firm prohibited to wear religious and political symbols so as to maintain its image of an ideologically neutral firm.

The case *Bougnaoui* regards instead a firm in France that prohibited the display of religious symbols in the work place, but that dismissed an employee that wore the hijab only after the complaints of a client for the fact that this employee displayed this religious symbol.

These two cases, similar but not identical, thus encompassed two fundamental problems. First, whether or not the employer can forbid a Muslim employee

⁴⁸ L. SAPORITO-F. SORVILLO-L. DECIMO, *Lavoro, discriminazioni religiose e politiche d'integrazione*, cit., 34 et seq.; C. DE MARCO, *Simboli religiosi e prestazione di lavoro*, cit., 823 et seq.; E. SORDA, *Eweida and others v. The United Kingdom, ovvero quando fede e lavoro non vanno d'accordo e il “margine di apprezzamento” non aiuta a chiarire le cose*, in www.diritticomparati.it; for more information on the french case see S. TARANTO, *Il simbolismo religioso sul luogo di lavoro nella più recente giurisprudenza europea*, in *Stato, Chiese e pluralismo confessionale*, n. 1/2014, 4-6.

⁴⁹ ECHR, 3 December 1996, *Konttinen s. Finland*, Appl. nr. 24949/94.

⁵⁰ L. SALVADEGO, *Il divieto per i dipendenti di imprese private di esibire simboli religiosi all'esame della Corte di Giustizia dell'Unione Europea*, in *Rivista di Diritto Internazionale*, 3, 2017, 808 et seq.; V. NUZZO, *Verso una società multiculturale. Gli inediti conflitti tra libertà di vestirsi secondo la propria fede e l'interesse datoriale al profitto*, in *WP C.S.D.L.E. “Massimo D'Antona” n. 324*, 2017.

to wear the hijab in the working place. Second, if the employer can dismiss the employee if she refuses to remove the hijab in the work place.

These two cases are analysed more in depth in other works⁵¹, but the newness of these verdicts is that the European Court of Justice decided that the layoff of a Muslim employee who refuses to remove her hijab in the working place is a potential direct discrimination.

5. *Final Remarks.*

Although the positive approach to laicism allows to promote different values and ideals, it exposes to the risk of large conflicts between opposing interests. The right to conscientious objection and the freedom of beliefs, expressions of such idea of laicism, often collide with other constitutional principles. In this scenario, boundaries between opposing interests are blurred, as emerges from the analysed decisions.

Therefore, it is necessary to rethink on integration policies in order to identify concrete solutions, in particular whether the exercise of the freedom of personal beliefs might have a negative impact on the others and compromise constitutional rights.

In the employment relationships, the overcoming of conflicts raised by different religions and by multiculturalism could be mitigated thanks to collective bargaining.

Differently to national laws, in fact, collective bargaining is not limited to general statements, but it provides specific and concrete forecasts (on a national, local or a company level), finding a better compromise between employers' needs and employees' religious beliefs. Those rules, especially on a company level, might be able to offer more suitable solutions.

⁵¹ C. DE MARCO, *Simboli religiosi e prestazioni di lavoro*, cit., 826 et seq.; R. COSIO, *Le sentenze della Corte di Giustizia sul velo islamico*, in *Lav. giur.*, 5, 2017, 443 et seq.; R. ANTUONI, *Il velo islamico nei luoghi di lavoro tra libertà religiosa dei lavoratori e libertà d'impresa*, in www.filodiritto.com.