

Religious belief *versus* health and safety at work: Labour Law as a Guarantor of Respect for fundamental rights

Precetti religiosi *versus* salute e sicurezza: il Diritto del Lavoro quale garante del rispetto dei diritti fondamentali.

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ABSTRACT

Il saggio analizza la rilevanza assunta dalla Religione nel Diritto del lavoro e, in particolare, la crescente conflittualità che emerge, anche a livello di contrattazione collettiva, tra i precetti religiosi e l'integrale rispetto della normativa prevenzionistica posta a tutela della salute e sicurezza dei lavoratori. Segue l'approfondimento dell'ampia giurisprudenza sviluppatasi a livello internazionale e comunitario in funzione antidiscriminatoria e della sua possibile applicazione nell'ordinamento italiano.

Parole chiave: Salute e sicurezza sul lavoro – Precetti religiosi – Discriminazione – Accomodamenti ragionevoli – Illiceità

The essay analyzes the growing relevance of Religion in Labour Law with a particular attention to health and safety regulations, in view of the (true or assumed) incompatibility of the same legislation with religious precepts. In an anti-discrimination perspective, it also highlights European and international case law and its implications for the judicial power and collective bargaining in the Italian scenario.

Keywords: *Health and safety at work – Religious precepts – Discrimination – Reasonable adjustments – Unlawfulness*

SOMMARIO:

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1. *The dichotomy between Religion and (Labour) Law: a current problem.*

Law is the locus where different cultures of work, based on different histories, traditions and ideologies, find ground for confrontation, not infrequently for conflict and, occasionally, reconciliation.

This can happen in the case of contrast between fundamental rights equally protected by the Constitution and when the "reciprocal integration" of the values at stake makes it necessary to reach a reasonable balance in order to avoid "the unlimited expansion of one of the two rights, which would become a 'tyrant' towards the other constitutionally recognized and protected juridical situations" (1).

This situation affects Religion, which, erroneously considered a "cultural" variable whose influence is in decline in a Eurocentric perspective, instead plays a central role in the dynamics of social and economic development, impacting both company activities and worker interests (2).

Given the variety of religious precepts that can be identified in an increasingly fluid, multicultural and fragmented society, and the equally extended interpretation – for identity purpose – of the so-called "new rights" linked to citizenship, the integration of foreigners and civil coexistence (3), religion has been a motivating factor in a significant number of labor law disputes (e.g. clothing required in the workplace, limits on access to employment, regulation of working hours, permits and holidays, etc.) (4).

¹ Constitutional Court's ruling n. 85 of 9 May 2013.

² L. SAPORITO, F. SORVILLO, L. DECIMO, *Lavoro, discriminazioni religiose e politiche d'integrazione*, in *Stato, Chiese e pluralismo conf.*, n. 18/2017, p. 5.

³ L. LACROCE, *Cronaca legislativa*, in *Quad. dir. politica ecclesiastica*, n. 2/2008, pp. 357-358 and A. ZOPPOLI, *Azioni positive e Corte di Giustizia: dal genere alle nuove identità nella prospettiva multiculturale*, in R. SANTUCCI, G. NATULLO, V. ESPOSITO, P. SARACINI (edited by), *"Diversità" culturali e di genere nel lavoro tra tutele e valorizzazioni*, Franco Angeli, Milano, 2009, II, pp. 288-289.

⁴ See, for a general overview, A. VISCOMI, *Diritto del lavoro e fattore religioso: una rassegna delle principali disposizioni legislative*, in *Quad. dir. pol. eccl.*, 2001, p. 375; A. TAMPPIERI, *Un esempio di "secolarizzazione" del diritto del lavoro? Osservazioni sul diritto al riposo domenicale*, in *Studi in memoria di Matteo Dell'Olio*, Torino 2008, II, p. 1672; A. PERULLI, *Le discriminazioni per motivi religiosi*, in A. POSSENTI (edited by), *Libertà religiose e non discriminazione*, Rubettino, Roma, 2009, p. 296; R. SANTUCCI, *La work-life balance per la valorizzazione delle diversità culturali e di genere tra tempi di lavoro e di riposo nel contratto collettivo di lavoro*, in R. SANTUCCI, G. NATULLO, V. ESPOSITO, P. SARACINI (edited by), *"Diversità" culturali*, cit., pp. 341 and 370; M. PERUZZI, *Il prezzo del velo: ragioni di mercato, discriminazione religiosa e quantificazione del danno non patrimoniale*, in *Riv. it. dir. lav.*,

Despite the numerous claims that have already emerged (especially in terms of anti-discrimination), the growing socio-cultural pluralism and the equally epochal migratory phenomenon in progress make it necessary to consider the Religion-Law (also, Labor Law) dichotomy as a persistently current problem ⁽⁵⁾ that can bring to the surface contrast profiles that were unthinkable up until a few years ago.

An example is the relationship between religion, health and safety at work in relation to which, when confronted with situations of potential conflict, it becomes of the essence to understand whether and to what extent it is possible to reconcile accident prevention legislation with freedom of worship, also guaranteed by Articles 3 and 19 of the Italian Constitution and envisaging equal treatment before the law without any distinction of religion and the right for all to profess their faith freely in any form, propagate it and worship in public (except for rites contrary to public mores).

What is certain is that the traditional Religion-Law relationship models – based on the assumption of the inevitable reduction of religion to an (exclusively) private fact and on the weak political use of the same – are apparently inadequate for the current social situation and of little use in addressing new emerging issues that will increasingly dominate the public debate in the future years.

2. Religious precepts before health and safety at work: the Italian scenario.

In Italy, the protection of health and safety in the workplace is legally based in the Constitution, which recognizes health as a fundamental right of every individual (Article 32 of the Constitution) ⁽⁶⁾, imposing private economic initiatives, equally free and protected, to develop without harming human safety and dignity (Article 41, paragraph 2, of the Constitution).

2016, II, p. 827; V. NUZZO, *La Corte di giustizia e il velo islamico*, *ivi*, 2017, II, p. 436; M. R. PICCINI, *Il tempo della festa tra religione e diritto*, Cacucci, Bari, 2013 and G. PACELLA, *Velo islamico della lavoratrice e corporate image: corte europea e bilanciamento degli interessi*, in *Dir. lav. merc.*, n. 3/2017, p. 645.

⁵ M. RUSCIANO, *Il valore della diversità (culturale e di genere) nel diritto del lavoro*, in R. SANTUCCI, G. NATULLO, V. ESPOSITO, P. SARACINI (edited by), *"Diversità" culturali*, cit., p.143.

⁶ See Constitutional Court's ruling n. 45 of 9 June 1965, in *Riv. giur. lav.*, 1965, II, p. 155; Constitutional Court's ruling n. 88 of 26 July 1979, in *Giur. cost.*, 1979, p. 2542 and Constitutional Court's ruling n. 559 of 18 December 1987.

In this regard, the general obligation to the charge of the employer to guarantee safety in the workplace pursuant to Article 2087 of the Italian Civil Code applies along with any more specific provisions envisaged by Legislative Decree no. 81 of 9 April 2008 (and other sector-specific regulations) with a view to implementing – through "the necessary set of provisions or measures also according to the specific nature of the occupation, experience and expertise" – an effective "prevention-based organization" in the workplace that is effective in preventing or reducing the risks of accidents and occupational illnesses.

On the other hand, freedom of religion includes the freedom to practice and express one's worship, ensuring - as far as is relevant here - the protection, in private and in public, of those behaviors considered to be the expression of religious duties (⁷).

In this perspective, the religious precepts that directly or indirectly prohibit certain behaviors or the use of specific goods represent 'obligations' for the worshipper (⁸). These "obligations", in fact, do not limit their influence to extra-work conduct alone, but can either operate as independent risk variables (eg. stress and work-related factors) or represent an obstacle to the complete and correct application of prevention and protection measures provided for by law or identified by the employer (⁹).

Yet, Italian Legislative Decree no. 81/2008 does not include any explicit reference to "religion" and the religious factor is never expressly mentioned, both in relation to the political-institutional coordination system of the regulation and in relation to the rights and duties of the individual figures responsible for safety and, finally, in relation to the organizational activities aimed at preventing accidents and occupational illnesses mentioned therein (both in the text and in the relevant annexes).

In other words, there are apparently no differentiation criteria that the accident prevention legislation referred to hereinabove takes into account in relation to the belonging of workers to a certain religion, except - perhaps – for very few (and indirect) cases.

⁷ J. VRIELINK, E. BREMS, S. OULD-CHAIB, *Il divieto del burqa nel sistema giuridico belga*, in *Quad. dir. pol. Eccl.*, n. 1/2012, p. 180.

⁸ A. OCCHINO, *Libertà religiosa e rapporto di lavoro*, in M. CORTI (edited by), *Frontiere della libertà religiosa*, Giuffrè, Milano, 2014, p. 111.

⁹ A. DE OTO, *Precetti religiosi e mondo del lavoro*, EDiesse, Roma, 2007, p. 110.

In fact, even if religion has never formally been considered a delegation criterion, it can be regarded as partially included in at least two of the "cross-functional criteria" used in risk measurement, that include legislative delegation, i.e. Article 1, paragraph 1, of Law No. 123/2007, stressing the need for worker protection to take into account gender differences and the condition of immigrant female workers and Article 1, paragraph 2, letter c), no. 1, hinting at measures of special protection guaranteed to certain categories of male and female workers and to specific jobs⁽¹⁰⁾.

These principles are confirmed by Article 28, paragraph 1 of Italian Legislative Decree no. 81/2008, according to which risk assessment should comprise all risks related to worker safety and health, including those concerning groups of workers exposed to specific risks, "and those related to gender differences, age, ethnic origin and those related to the specific type of contract based on which the work is accomplished".

In other words, the legislator envisages the circumstance that workers come from "other countries" as one of the peculiar characteristics by virtue of which their exposure to occupational risks is measured for the purpose of identifying and implementing measures that are adequate to eradicate or minimize the probability of accidents and occupational diseases. If, on the one hand, it is reasonable to believe that the intent of the law is mainly to raise awareness, with reference to the term "origin", of the possible risks arising from a difficult linguistic understanding of the directives and training given to immigrant foreign workers⁽¹¹⁾, it should not be excluded that the foregoing may also be subject to a broader consideration, such as to include cultural factors (and religion, too) among the elements that can influence the development of an effective model of corporate prevention⁽¹²⁾.

As is well known, in accordance with the principle of inclusiveness, risk assessment - with a few exceptions concerning, for example, the type of contract - must be

¹⁰ P. PASCUCCI, *Una carrellata, tra luci e ombre, sull'attuazione delle deleghe della L. n. 123/2007 nel Titolo I del D.lgs. n. 81/2008*, in *Riv. infortuni e mal. prof.*, n. 2/2017, p. 122-123.

¹¹ See, also, art. 37 c. 13 Legislative decree no. 81/2008.

¹² See E. GRAGNOLI, *Sub artt. 28-30*, in L. MONTUSCHI (edited by), *La nuova sicurezza sul lavoro*, vol. I, *Principi comuni*, edited by C. ZOLI, Zanichelli, Roma-Bologna, 2011, p. 397 and R. NUNIN, *Salute e sicurezza sul lavoro: quali tutele per i lavoratori migranti?*, in *Riv. giur. lav.*, n. 4/2017, I, pp. 618 and 622.

considered from a subjective perspective ⁽¹³⁾. This is why cultural and religious differences, together with worker-specific characteristics normally protected through prohibitions against discrimination, are aspects that gain, or rather should gain, special relevance when dealing with prevention. The ‘special’ risks associated with ethnic origin from other countries should be measured both individually and in their reciprocal relationship. In practice, they have been considered as a factor frequently associated with precarious jobs, conditions of emotional fragility and stress connected with the uprooting from the place of origin, low level of education and lack of awareness of one’s rights along with the importance of pursuing a "culture of safety" ⁽¹⁴⁾ in the workplace, to the point of assuming a real risk of ‘culture clash’ in the workplace ⁽¹⁵⁾.

It is undoubtedly clear that the assumption of Article 28 of Italian Legislative Decree no. 81/2008 has such wide scope that it also includes (the risks connected with) religious precepts, but - in the author’s opinion - the question posed in this way only partially grasps the underlying concept and must therefore be differently formulated.

In fact, regardless of the general principle of non-discrimination, the problem of assessing and managing the occupational risks arising "from a religious precept" is connected both to the perception of the danger and to the examination of the particular risks to which workers are exposed (regardless of the culture of origin), and to the potential contrast that the religious obligation poses to full compliance with the preventive regulations by the worker (and, partially, by the employer).

In the first case, the question mainly refers to lack of information and training in the employer-worker relationship. This can be resolved through a process of integration of the reciprocal cultural knowledge (and, extending the concept, religious knowledge), by probably using better communication strategies (for example, through cultural mediators) or, if deemed appropriate, by revising the health and

¹³ G. NATULLO, *Differenze di genere e di culture nella prospettiva della sicurezza sul lavoro*, in R. SANTUCCI, G. NATULLO, V. ESPOSITO, P. SARACINI (edited by), *"Diversità" culturali*, cit., p. 258.

¹⁴ C. FALERI, *Il lavoro ai tempi dell'agricoltura 4.0 tra esigenze di stagionalità e fabbisogno di nuove professionalità*, in *Dir. lav. merc.*, n. 3/2018, p. 671.

¹⁵ F. DE PASQUALE, *La percezione e rappresentazione del rischio: studio ed analisi di gruppi di lavoratori di diverse nazionalità e culture occupati in edilizia*, in *Quaderni AiFOS*, n. 3/2012, p. 61 and C. DI CARLUCCIO, *Salute e sicurezza sul lavoro del lavoratore migrante tra conferme e sviluppi*, in *Dir. sic. lav.*, 2017, pp. 54-55.

safety prevention and protection system with a view to recovering that social dimension of work that places the individual and respect for his/her identity / diversity front and center.

Even so, in any case, the legal importance of this consideration should not be over-emphasized because, on the practical level, it does not refer to compliance with the regulation but rather to the implementation of an 'inclusive' diversity management strategy by the company on a voluntary basis, as an example of a private compliance initiative⁽¹⁶⁾.

This process of loyalization of human resources can also facilitate – through an inclusive work environment (not only from a religious point of view) – better organizational management of prevention, greater growth and individual empowerment as well as greater awareness and responsibility for one's own health on the part of each worker. However, this does not exclude the fact that the corporate and promotional outlook is very different from the issue of the possible exemption from the accident prevention regulation when it comes to complying with a religious obligation.

The real question, therefore, is different and arises when the religious precept is in conflict with the law, resulting in a possible conflict between two fundamental rights. As mentioned in the introduction, this conflict requires a re-balancing of the constitutional values, the solution to which, in relation to health and safety at work, is not facilitated by any specific law provision.

3. Historically relevant religious practices: examples of conflict and (possible) resolutions in health and safety legislation.

As an example, while we can say that it is generally accepted that religious freedom also extends to *exterior* manifestations of faith⁽¹⁷⁾, an initial conflict between accident prevention legislation and religious obligation is found in precepts – common to many religions – that envisage an obligation for men to have long beards and hair according to specific style criteria.

This does not allow, during some work procedures or in case of emergency or first aid situations that require immediate reaction times, a correct and functional use of

¹⁶ R. SANTUCCI, *La work-life balance*, cit., pp. 337-338.

¹⁷ S. SCARPONI, *L'appartenenza confessionale delle donne lavoratrici davanti alla Corte di Giustizia dell'Unione Europea*, in *Quad. dir. pol. eccl. (Fasc. spec.)*, 2018, p. 222-223.

personal protective equipment (PPE) or other equipment (for example, not allowing the full adherence of the oxygen mask to the face), which is why directives designed to protect health and safety at work usually include an obligation to shave with a certain frequency (¹⁸).

Other, and historically better known, situations of conflict relate to religious precepts that impose specific dress codes.

To mention a few, we can just think of the Sikh male worshippers, who are obliged to wear (in addition to the Kirpan, a traditional knife) a special turban that makes it problematic if not impossible to wear protective helmets, both those compulsory for driving motorcycles in compliance with traffic laws and those falling under the category of PPE to be used when performing numerous work activities (e.g. in the sector of construction, shipbuilding, excavation, etc.) (¹⁹).

With regard to these cases, it is important to note that, from a comparative perspective, there are divergent interpretations.

The compatibility of religion-driven clothing with the provisions of worker physical safety has been, for example, discussed in important decisions in the United Kingdom, which, further submitted to the ECHR, led the latter to rule on the case (²⁰).

In this respect, the Court stated that the obligation to wear a helmet is a necessary measure for the safety and health (on that occasion, of motorcyclists) even if it prevents compliance with an ascertained and historically relevant religious practice (²¹).

¹⁸ See *Pannu v. Skeena Cellulose Inc.* (2000), of the Tribunal of British Columbia (Canada).

¹⁹ M. CIRAVEGNA, *Abbigliamento religioso, tutela dell'identità ed ordine pubblico*, in *Quad. dir. pol. eccl.*, n. 1/2010, pp. 300-301. See, also, *Toor v. Finlay Forest Industries* (1984), of the Tribunal of British Columbia (Canada), where the Board of Inquiry found that the requirement to wear a hard helmet is a legitimate safety concern and no accommodation was possible, thus the complaint was dismissed.

²⁰ See the Case of *X c. United Kingdom*, 12 July 1978, decided by the ECHR Court on 5 November 1981.

²¹ See *K.S. Bhinder and the Canadian Human Rights Commission v. Canadian National Railway Company* (1985) of the Supreme Court of Canada where the Supreme Court decided that the rule to wear a hard hat was *a bona fide* occupational requirement, with no exceptions.

Although it does not define the meaning of ‘ascertained’ religious practice (for example, by whom?) and ‘relevant’ (for example, for whom and based on what parameters?), this decision has the merit of establishing how, in an attempt of balancing values between religious freedom and health protection, the latter must prevail, because all the measures provided for by national legislation on health and safety at work are to be considered necessary measures for the preservation of fundamental rights. These can in no event be reduced in order to compensate for possible disadvantages related to the profession of a religious faith.

In any case, in clear contrast to the aforementioned ruling, the British regulator subsequently intervened and, clearly in disagreement with the principle of law indicated, not only did the regulator not confirm any prevalence of the rules underlying the protection of safety at work over religious precepts (in the matter of clothing), when potentially in conflict, but it also provided for an express legislative derogation for Sikh members, exempting them from wearing safety helmets⁽²²⁾.

On a systematic level, this rule is meant to recall the articulated regulation prepared by the international and community legislator in order to repress (in the labor market and in the employment relationship) discriminatory phenomena to the detriment of workers belonging to ethno-religious minorities and which justifies positive interventions aimed at compensating for the condition of “disadvantage”.

Therefore, in Great Britain, this has resulted in the approval of a positive and specific measure in favor of members of a given religion, with the aim of ensuring – derogating from general discipline – dignity and equal treatment in their professional life as well as preventing or compensating for the disadvantages (or rather, discrimination) correlated to their declared profession of a religion⁽²³⁾.

In the light of these different interpretations, we may ask whether the Italian prevention law, which does not envisage any rule aimed at preventing “an unreasonable disparity of treatment to the detriment of one or more religions”, can be considered to be in contrast both with international and Community law and with Articles 3, 8 and 19 of the Constitution, especially insofar as the protection of religious

²² See Section 11 “Exemption of Sikhs from requirements as to wearing of safety helmets on construction sites” of the Employment Act 1989 (confirmed in Section 26 of the Employment Equality (Religion of Belief) Regulations 2003.

²³ C. DI CARLUCCIO, *Salute e sicurezza*, cit., p. 50.

freedom should require special care and attention to the right of freely manifesting one's faith *ab externo*.

In fact, on a practical level, difficulties (administrative, financial and logistical) may arise from the fact that there is no mention of religion, especially with regard to the manifestation of one's creed, resulting in unreasonable discrimination among stakeholders with identical interests, thus limiting and hindering the exercise of the right to religious freedom and, in particular, the freedom to profess one's faith in public and private form.

4. Collective bargaining, reasonable adjustments and freedom of worship: limits and opportunities.

Any worker – whatever religion s/he professes - is in the first place an individual who has rights guaranteed not only by Italian law, but also by international and Community law, like any other.

For instance, at the international level, reference should be made to Article 18 of the Universal Declaration of Human Rights, Articles 9 and 14 of the ECHR, and Articles 18 and 27 of the International Covenant on Civil and Political Rights (ICCPR). These provisions recognize and recommend (to all and without distinction) the protection of the right to freedom of opinion and religion, including the freedom to manifest it in public, subject to certain limitations and differences in treatment pursued through appropriate and necessary means ⁽²⁴⁾.

At the Community level, the Treaty on the Functioning of the European Union (TFEU) aims to combat, *inter alia*, religion-based discrimination (Article 10), reaffirms the identity and contribution of churches, associations and religious communities (Article 17) and empowers the Council to take measures to combat discrimination based on religion (Article 19).

The latter provision was also the basis for the adoption of Directives 2000/43/EC (relating to equal treatment irrespective of racial or ethnic origin) and 2000/78/EC on equal treatment in the matter of employment and working conditions.

²⁴ L. LAZZERONI, *Eguaglianza, lavoro, regole di parificazione*, Giappichelli, Torino, 2011, pp. 202-203 and A. GARILLI, *Immigrati e diritti sociali: parità di trattamento e tutela multilivello*, in *Dir. lav. merc.*, n. 1/2017, p. 18.

In particular, the latter directive aims to establish a general regulatory framework to combat direct or indirect discrimination based, *ex multis*, on religion and personal beliefs, with particular attention to the protection of employment, work conditions and respect for equal treatment ⁽²⁵⁾.

Also with regard to religion, direct discrimination occurs when, in relation to any reason for discrimination, an individual is treated less favorably than another individual in a similar situation; conversely, indirect discrimination occurs when "an apparently neutral provision, criterion or practice" is adopted (and thus not contrary to the formal principle of equal treatment) but it places the members of a given category in a "position of special disadvantage" ⁽²⁶⁾.

The European legislator's notion of indirect discrimination is rather broad (as it does not include *animus discriminandi*), but it nevertheless allows the court to assess the legitimacy of a conduct when "the criterion or the practice are objectively justified by a legitimate scope and the means deployed to achieve it are appropriate and necessary". In particular, the measures provided for in the national laws remain unaltered, which, in a democratic society, are necessary for "public security, the protection of public order, the prevention of criminal offences and the protection of the health, rights and freedoms of individuals" ⁽²⁷⁾.

The prohibition of any discrimination on grounds of religion or personal beliefs is therefore imperative as a general principle of European Union law, which is also enshrined in Article 21 of the Charter of Fundamental Rights of the European Union and confers on the private individual a right which may be relied on in legal proceedings and allows the court - in the case in which the national provisions cannot be interpreted in a manner consistent with Directive 2000/78 - to nullify any discriminatory national provision, regardless of the legislation passed.

That being said, the events described above are unlikely to occur with reference to the regulation for the protection of health and safety at work, since specific reference is made to Article 4 of Directive 2000/43/EC, which provides that Member

²⁵ M. AIMO, *Le discriminazioni basate sulla religione e sulle convinzioni personali*, in BARBERA M. (edited by) *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Giuffrè, Milano, 2007, pp. 50-51 and A. LASSANDARI, *Le discriminazioni nel lavoro. Nozione, interessi, tutele*, Cedam, Padova, 2010, pp. 67-68.

²⁶ S. SCARPONI, *L'appartenenza confessionale*, cit., p. 224.

²⁷ CGUE sent. Prigge et al., 13 settembre 2011, (especially, par. 55).

States may envisage that a certain difference of treatment does not result in discrimination where, by reason of the nature of the work or of the context in which it is carried out, the allegedly discriminatory factor is an essential and determining occupational requirement and where inequality is objectively justified by a legitimate scope pursued by appropriate and necessary means.

“Protection of health” as mentioned in the previous passage is to be understood as an example of justification for a rule potentially limiting (or neutral) to the respect of precepts originating from the exercise of a fundamental right, such as freedom of religion, but also not questionable because it aims to achieve legitimate objectives, deserving of protection, all in rigorous compliance with the canons of strict proportionality, given that the sacrifices do not exceed what is necessary to ensure the pursuit of the interests at stake and the absence of measures less restrictive of individual rights.

With regard to health and safety at work, therefore, we must confirm that there is no work but ‘safe work’, for all and regardless of the religion professed or cultural identity claimed.

In addition, if it is true that it remains the task of the Republic to "guarantee" the conditions that favor the expansion of freedom to all, also on the religious level, maintaining respect for human dignity, recognized and considered inviolable by Article 2 of the Constitution (²⁸), it is necessary to also confirm that the Italian legal system remains anchored in the principle of secularism (²⁹) and, although this does not imply indifference to religion, there is no doubt that the safeguarding of "religion", from both an individual and a community perspective, must be ensured and expressed in the context of (and compliance with) other rights protected by law.

Since religion is not an absolute right, among the constitutional interests to be taken into adequate consideration in a democratic society in modulating the exercise of freedom of worship, it is necessary to include – in rigorous compliance with the canons of strict proportionality – those relating to security, public order and peaceful coexistence, which is the responsibility of the State pursuant to Article 117,

²⁸ Constitutional Court's ruling n. 334 of 30 September 1996.

²⁹ Constitutional Court's ruling n. 203 of 11 April 1989; Constitutional Court's ruling n. 329 of 14 November 1997 and Constitutional Court's ruling n. 508 of 20 November 2000.

second paragraph, letter h) of the Constitution, so as to reconcile the interests of the various groups present in the territory.

Moreover, it is not acceptable that national legislation treats differently, depending on religion, risk situations that are comparable to one another by abdicating its own *erga omnes* preventive function in view of the (true or assumed) incompatibility of the same legislation with religious precepts nor, indeed, has any employer ever dared to justify a failure to completely adopt the preventive legislation, risking criminal prosecution, by claiming a "conscientious objection" based on cultural and religious motives Corte Cost. 26 maggio 1981, n. 74).

Having ascertained the full legitimacy of Italian legislation, which does not provide for any religious exception regarding the inapplicability of the measures concerning the prevention and protection of worker safety, we must now ask whether and to what extent the same regulation can be subject to a 'reasonable adjustment'.

A few insights regarding the safety risks related to the performance of Muslim workers during the Ramadan month⁽³⁰⁾, when Muslim workers have an obligation to fast on specific days and/or time windows (as a rule, from dawn to dusk); this applies to all professing Muslims, except for certain categories of individuals or in certain circumstances (for example, in case of war). Even if other religions also contemplate periods of fasting, the criteria and duration of the Islamic precept assume specific importance and, especially with regard to sectors such as agriculture and construction, can result in as many possible risks in the performance of work (such as dehydration, hypoglycemia, fainting, etc.) with concurrent temporary physical incapacity to perform, under safe conditions, the tasks established by contract as well as in the determination not to comply with certain specific safety measures (work at certain times, obligation to drink frequently, etc.) because considered incompatible with the corresponding religious precepts.

It is therefore clear that this practice can have significant repercussions on the physical well-being or on the proper performance of work obligations and should also be considered in terms of accident prevention and organizational aspects in order to avoid exposing professing workers to situations of risk for themselves, for colleagues and other individuals affected by the activities they perform as a result of

³⁰ L. SAPORITO, F. SORVILLO, L. DECIMO, *Lavoro, discriminazioni religiose e politiche d'integrazione*, in *Stato, Chiese e pluralismo conf.*, n. 18/2017, p. 32.

the objective condition of physical and mental weakness in which they find themselves.

That said, when measuring risk, it is necessary to also consider the danger posed by heat in the performance of typical work activities carried out in an open environment during hot summer periods "in relation to differences in gender, age and ethnic origin in order to arrange, on the organizational, training and information level, for the most appropriate precautions (first and foremost, water to drink) and, in any case, provide for adequate health surveillance for all workers (including a medical check to ascertain their suitability in the presence of chronic diseases such as diabetes) and determine appropriate intervention measures in case of collapse during work (e.g. sugar, saline solutions, etc.).

Equally valid and necessary are the normal activities prepared for particularly tiring jobs, with the need to prepare a work plan that ensures an optimal distribution of workloads, promoting moments of psychophysical recovery during the working day and monitoring any situations of discomfort, so as to adopt strategies for improvement over time and targeted information initiatives.

In this respect, a fundamental role has been played by the trade unions, which have facilitated, primarily at the level of the company or regional agreement, the implementation of this religious practice also in the context of private work (31). This made it possible to agree on the possible recovery, without resorting to overtime, of uncovered working hours by placing a notice of individual availability on the company notice board, thus in any case favoring the requests of Muslim employees wishing to take advantage of their annual leave and weekly rest during the Ramadan period (32).

This approach of "inclusive" bargaining shows that there are margins of adjustment (also in *latere praestatoris*, as collaboration to favor security) in collective agreements that contain a specific focus on religion, ensuring management "flexibility"

³¹ See the Agreement between CGIL-CISL-UIL and Confindustria Monza-Brianza, signed on 25 July 2013.

³² F. BACCHINI, *La valutazione dei rischi lavorativi e la provenienza da altri Paesi*, in *Tutela e sic. lav.*, n. 2/2013, p. 62 and U. GARGIULO, *Identità culturale e tempo di lavoro: un'analisi della contrattazione collettiva*, in A. VISCOMI (edited by), *Diritto del lavoro e società multiculturale*, ESI, Napoli, 2011, p. 195.

so that the protection of the right to worker health, on one side, and the satisfaction of the company and entrepreneur's performance requirements, on the other, do not entirely suppress the exercise of freedom of religion altogether.

However, neither collective bargaining nor the employer can ever accept risky practices⁽³³⁾, i.e. derogate from safety rules that impose certain behaviors by law in order to ensure safe performance of work, such as, in this case, the obligation to drink water or to ingest substances (sugar or mineral salts) regularly to avoid risks associated with dehydration.

Also, any reasonably accepted adjustments – contrary to past suggestions (and criticism) contained in some *Vademecums* by the Chambers of Labor of Treviso and by INAIL of Perugia – may not in any case include any legitimate right to verify whether workers observe Ramadan.

These *vademecums*, aimed at promoting forms of adjustment, invited employers (and/or, on the latter's behalf, a competent physician) (*sic!*) to investigate the cultural and religious differences of the workers, in order to assess whether there were religious factors that would require the preparation of specific personalized health protocols and a corporate safety management plan including targeted information and training actions⁽³⁴⁾.

Although at first sight this may seem commendable, the recommendation to identify the workers who intended to observe Ramadan is an obvious violation of the privacy of the subjects concerned, protected by Italian Legislative Decree no. 196 of June 30, 2003⁽³⁵⁾ and by the investigation prohibition provided for in Article 8 of the Labor Code⁽³⁶⁾, according to which "it is forbidden", both at the time of recruitment and during the employment relationship, "to carry out investigations,

³³ F.R. CELSI, *Fattore religioso e lavoratori di religione islamica. Aspetti riguardanti la contrattazione collettiva e gli accordi sindacali*, in C. CARDIA-G. DALLA TORRE (edited by), *Comunità islamiche in Italia. Identità e forme giuridiche*, Giappichelli, Torino, 2015, p. 502.

³⁴ U. GARGIULO, *Identità culturale*, cit., p. 215.

³⁵ In a general perspective see P. CHIECO, *Il diritto alla riservatezza del lavoratore*, in *Giorn. dir. lav. rel. ind.*, 1998, pp. 23-24 and C. LAZZARI, *Diritto alla riservatezza e tutela del lavoratore*, in *Riv. giur. lav.*, 1998, pp. 539 ss.

³⁶ See, also, art. 10 d. lgs. 10 September 2013 n. 276.

even through third parties, on the political, religious or trade union opinions of workers" (³⁷).

Therefore, if, on one hand, the need to deeply understand the company organization in order to proceed with a risk assessment suitable for the identification of worker needs and expectations is more than understandable, on the other, Article 8 of the Workers' Charter of Rights remains applicable and there is no exception for "religious precept" or "personal convictions" (³⁸).

In fact, the determination to protect – as a preventive measure – the sphere of worker confidentiality (so-called privacy) should also exclude the latter's obligation to inform their employer not about their religious affiliation (which is absolutely to be excluded) but about their intention, justified by their religious beliefs, to avoid complying with a preventive rule as a result of its alleged incompatibility with a certain religious precept.

The illegitimacy of any decision by either the employer or the worker not to fully comply with the safety regulation makes it superfluous to consider such information subject to the obligation (also criminally punishable) of reporting under Article 20 of Legislative Decree no. 81/2008, especially when the same law requires the worker to "abide by the provisions and instructions provided by the employer", or by any of its managers.

5. Conclusions.

In conclusion, even if in principle there may be technical or organizational measures provided for by law that may entail structural disadvantages for workers professing a certain religion, the Italian regulator did not provide for any exception to the full and exhaustive application of the regulation in the matter of health and safety.

³⁷ U. ROMAGNOLI, Sub art. 8, in G. GHEZZI, G.F. MANCINI, L. MONTUSCHI, U. ROMAGNOLI, *Statuto dei diritti dei lavoratori*, Zanichelli, Bologna-Roma, 1972, p. 141 and A. TROJSI, *Il diritto del lavoratore alla protezione dei dati personali*, Giappichelli, Torino, 2013, p. 116.

³⁸ M. MAGNANI, *Diritti della persona e contratto di lavoro. L'esperienza italiana*, in *Quad. dir. lav. rel. ind.*, 1994, p. 54.

Since these rules are valid for all workers with characteristics of intrinsic "non-regression", "objectivity" and "proportionality", their generalized application excludes any direct or indirect discrimination against workers because the treatment – although characterized by uniformity across religions - is justified and proportionate on the level of the objectives pursued and reasonable on the level of the supporting arguments ⁽³⁹⁾.

This solution has the merit of avoiding an excess of claims justified on the religious level (but, potentially, also motivated by mere personal convictions) and, on the collective level, prevents attention to identifiable profiles from being used as an indirect instrument of social dumping "in exchange for a limited safety at work" ⁽⁴⁰⁾.

Based on the foregoing, the answer to the question of whether employers can resort to exceptions from the law, even if the regulation does not take into account needs justified by religious beliefs, is negative.

It is undisputable that freedom of religion is a fundamental right recognized at the national and Community level and that the notion of "religion" necessarily entails both freedom of conviction (personal and intimate) ⁽⁴¹⁾ and freedom of expression of one's religion in public (community and external) ⁽⁴²⁾, but in this regard it seems inconceivable, even only theoretically, to assume any level of "flexibility" of the regulation referred to herein nor any "reasonable adjustment" in broader terms than those described above (individual or collective).

³⁹ V. PACILLO, *Contributo allo studio del diritto di libertà religiosa nel rapporto di lavoro subordinato*, Giuffrè, Milano, 2003, p. 218 and L. ZOPPOLI, *Categorie giuridiche, diritto antidiscriminatorio e pari opportunità*, in R. Santucci, G. Natullo, V. Esposito, P. Saracini (edited by), "Diversità" culturali, cit., p. 147.

⁴⁰ U. GARGIULO, *L'identità culturale nella contrattazione collettiva sulla regolazione del tempo*, in R. SANTUCCI, G. NATULLO, V. ESPOSITO, P. SARACINI (edited by), "Diversità" culturali, cit., p. 336.

⁴¹ For a distinction between "Religion" and "personal convictions" see R. SANTAGATA, *Discriminazioni nel luogo di lavoro e "fattore religioso": l'esperienza tedesca*, in *Riv. it. dir. lav.*, 2011, I, p. 358.

⁴² CGUE sent. Bougnaoui, 14 March 2017 (especially, par. 30).

Religious customs, even if relevant to individual identity, can in no event cancel or limit a rule of law dictated to protect health ⁽⁴³⁾, which is a right that cannot be controlled by the individual alone, and a social duty of the entire community.

In a multi-ethnic society, the coexistence of different subjects necessarily requires the identification of a common nucleus shared by everyone, citizens and not. If, on one hand, integration does not obviously require that the individual abandons his/her culture of origin in compliance with Article 2 of the Constitution that stresses social pluralism, on the other, the insurmountable limit is represented by the respect for the principles of civil coexistence as expressed by the Constitution and the laws of the host society ⁽⁴⁴⁾. In other words, a multi-ethnic society could lead to the formation of conflicting cultural islands with different levels of protection, depending on the cultures and religions, but this hinders the uniqueness of the legal fabric of a country that identifies safety at work as an asset to be protected with a series of obligations and prohibitions that are also punishable at the disciplinary level ⁽⁴⁵⁾.

Therefore, the observation that a generalized application of the law on health and safety at work could result in a different treatment based indirectly on worker religion is unacceptable in relation to the Italian Constitution and worker safety legislation, as is the limited application of the same law, justified by the intention of avoiding any impact on workers' religious beliefs.

⁴³ Supreme Criminal Court's ruling n. 24084 of 31 March 2017.

⁴⁴ P. CALAMANDREI, *Non c'è libertà senza legalità*, Roma-Bari, Laterza, 2013, pp. 28-29.

⁴⁵ V. PACILLO, *Law and religion in the workplace. The Italian report*, in M. RODRIGUEZ BLANCO (edited by), *Law and religion in the workplace*, Comares, Granada, 2016, p. 253.