

# Religion and Discrimination Law in Cyprus

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## Introduction

Article 28 § 2 of the 1960 Constitution, implementing article 14 of the European Convention of Human Rights, ordains that every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his/her community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution. It should be noted, however, that article 28 is autonomous and its application is not dependent upon a finding of violation of another article of the Constitution, contrary to article 14 of the Convention.<sup>2</sup> The general and autonomous prohibition of discrimination provided for in Article 28 of the Constitution is therefore similar to the novel provision of Article 1 of Protocol 12 of the European Convention, which has been ratified by the Republic of Cyprus.

What is more, Article 18 § 3 provides that all religions are equal before the law and no legislative, executive or administrative act of the Republic shall discriminate against any religious institution or religion. There should in principle be no discrimination between newly established religions, or religions which represent religious minorities. The leading case with respect to discrimination between religions is the case of *The Jehovah's Witnesses Congregation (Cyprus) Ltd*<sup>3</sup>. The Minister of Interior had decided to omit marriage officers of the Jehovah's Witnesses Congregation from the annual list of officers authorized to conclude marriages, on the ground that such officers had ceased to be considered as such following the enactment of Civil Marriage Law 21/90. The Supreme Court held that according to article 18 of the Constitution, freedom of religion should not be violated, either directly, or indirectly, and that all religions whose rites are known, are equal before the Law. It further held that Law 21/90 should not have been interpreted in the manner in which the Minister of Interior had. Thus, it was held that the marriage officers of the Jehovah's Witnesses Congregation should not have been omitted from the relevant list of officers authorized to conclude marriages.

The issue of religious discrimination has not been part of political debate in Cyprus and has been considered within the wider framework of non-discrimination.

## The Duty not to Discriminate

A difference in treatment is considered to be discriminatory, if it has no objective and reasonable justification; thus, the courts will conclude that a law, or an act is

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<sup>2</sup> C. Tornaritis, 'The Right of Equality of Treatment and Absence of Discrimination' *Cyprus Law Tribune* 3 – 4 [1973]: 5 – 6, G. Pikis, 'Equality of Citizens before the Law as a Requirement of Safeguarding Rule of Law' in *Aspects of Cypriot Law*, v. II (Nicosia: Asselia, 1982): 217 – 239.

<sup>3</sup> *The Minister of Interior v. The Jehovah's Witnesses Congregation (Cyprus) Ltd* [1995] 3 CLR 78 (in Greek).

discriminatory, if a difference in treatment does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised; where the difference in treatment is based on grounds of religion, very weighty reasons are required in order to justify such differential treatment. The Republic of Cyprus has further enacted legislation in harmonisation with European Community law which prohibits discrimination. The Equal Treatment (Racial or Ethnic Origin) Law 59(I)/2004, harmonised Council Directive 2000/43/EC on the implementation of the principle of equal treatment irrespective of racial or ethnic origin, in both public and private sectors, in matters of social protection, health treatment, social services, education and access to goods and services. Further, the Equal Treatment in Employment and Occupation Law 58(I)/2004 harmonised Council Directive 2000/78/EC and prohibits discrimination, specifically in the spheres of employment and occupation.

A violation of fundamental rights is actionable and thus, an aggrieved person may file an action in civil courts against those perpetrating the violation, with the aim to recover just and reasonable compensation for any pecuniary, or non - pecuniary damage that such person has suffered because of the discrimination; such discrimination may be either direct, or indirect. The person may further demand that the Court holds that any discrimination inflicted upon him/her, on the basis of a Law, or an administrative act, is illegal and thus, should be declared invalid and with no effect. According to Article 35 of the Constitution, the executive, legislative and judicial authorities of the Republic are all bound to secure the efficient application of Part II of the Constitution, including Article 28 which safeguards the right of non - discrimination.

In addition to the right to have access in courts, the Combating of Racism and other Discrimination (Commissioner) Law 42(I)/2004 vests the Ombudsman, who is an independent officer of the Republic with special competences, duties and powers for combating and eliminating discrimination in both public and private sectors. Any person or group of persons may lodge a complaint to the Ombudsman for having been subjected to discrimination prohibited by any law of the Republic, including legal instruments of European Community origin, as well as the European Convention on Human Rights, the Framework Convention for the Protection of National Minorities, the International Convention for the Elimination of all forms of Racial Discrimination, the Covenant for Civil and Political Rights, the Convention against Torture and Inhuman and Degrading Treatment or Punishment, the European Charter for Regional or Minority Languages, as well as any other international or religious human rights instrument ratified by the Republic.<sup>4</sup>

The Ombudsman is therefore authorised with the supervision of the implementation of the human rights instruments which the Republic has ratified. Discriminatory provisions or terms found in contracts of employment, collective agreements, articles of association of legal persons, bodies, or institutions, contracts for the supply of goods and services, as well as terms of membership of organisations, including professional ones, may be declared by the Ombudsman as discriminatory. In case of finding an incident of discrimination, the Ombudsman is empowered to order the

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<sup>4</sup> See Second Report submitted by Cyprus pursuant to article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities, 27 October 2006, para. 22.

person or authority responsible for such discrimination to take specific practical measures for ending and not repeating such discriminatory conduct or treatment, not only with respect to the complainant, but also with respect to other persons who may find themselves in a similar situation in the future. The Ombudsman may also carry out investigations *ex proprio motu*, into incidents of discrimination, prepare codes of practice concerning specific public authorities or persons in the private sector, obliging them to follow practical measures aimed at promoting non – discrimination and equality of treatment, irrespective of, *inter alia*, religion.

Difference in treatment between religions might be justified, when there are objective and reasonable grounds on the basis of which the difference is based. The extent to which the exception to the principle of non-discrimination is applied has not been sufficiently developed by courts. It is expected, however, that the Courts would apply the general case-law principles concerning such exception; the criterion is solely whether the difference in treatment is based upon an objective and reasonable justification.

An interesting case which might illustrate the reluctance of Cypriot authorities to recognise exceptions in the principle of non-discrimination between religions is a 2006 Opinion of the Cypriot Ombudsman, who held that the decision of the Council of Ministers to exclude the members of the three religious groups of the Republic, namely the Maronites, the Roman Catholics and the Armenians, from the obligation to serve in the National Guard, violated the principle of equal treatment and constituted discrimination on grounds of religion. Following the Ombudsman's decision, the Council of Ministers decided that members of the three religious groups now have an obligation to serve in the National Guard.<sup>5</sup>

### **The Transposition of the Equal Treatment in Employment and Occupation Directive**

The European Directive establishing a general framework for equal treatment in employment and occupation (Council Directive 2000/78/EC) has been implemented into Cypriot law with Law 58(I)/2004 concerning equal treatment in employment and occupation.<sup>6</sup> The purpose of Law 58(I)/2004 is, according to section 3 of the Law, to set out a framework in order to prevent discrimination on grounds of, *inter alia*, religion or belief, in the area of employment and occupation, so that the principle of equal treatment might be effected. Section 4 of Law 58(I)/2004 provides that the scope of such Law extends to all public and private sector bodies, including public authorities, local administration authorities, as well as public or private organisations.

Thus the scope of Law 58(I)/04 extends also to churches and other religious organisations. Indeed section 2 of Law 58(I)/2004 clarifies that the term 'employer' covers, for the purposes of this Law, the Government of the Republic of Cyprus, local administration authorities, as well as every natural or legal person in the public or private sector or with respect to any other activity which entails occupying, or having occupied employees. For the purposes of Law 58(I)/2004 an 'employee' is defined as any person who is employed, or apprenticed, either full – time, or part – time, for a

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<sup>5</sup> Council of Ministers Decision 65.732 of 19 June 2007.

<sup>6</sup> See A. Emilianides, 'Age Discrimination in Cyprus' in Van Kempen, Von Steinau and Ryley, *Age Discrimination in Europe* (The Hague: Kluwer Law International, 2009, forthcoming).

defined, or undefined period of time, continuously or not, irrespective of the place where such person is occupied and including persons who work at home; however, the notion of an 'employee' does not include self - employed persons.

Discrimination on grounds of religion or belief is unlawful with respect to access to employment, self - employment, or occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion. Discrimination on grounds of religion is further prohibited with regard to access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, employment and working conditions, including dismissals and pay, membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

Discrimination on grounds of religion exists if a person is treated less favourably on grounds of religion than another person is, has been or would be treated in a comparable situation. The assessment as to whether a less favourable treatment exists must be based on a comparator; hence, the notion of a 'comparable situation' is quite important; it should be proved that the claimant is treated less favourably than another person performing the same, or essentially similar or comparable work as the claimant. In order to conclude whether the claimant is treated less favourably, an overall comparison of all types of work to be performed under the contract should be undertaken. The mere fact that the claimant is treated less favourably with respect to one aspect of the contract will thus not suffice if the claimant is treated more favourably with respect to other aspects; it is rather the overall assessment and comparison of the contract which is important. In the absence of a current comparator, comparators formerly employed have to be used for the comparison, before an assessment can be made.

Section 6 of Law 58(I)/2004 further prohibits indirect discrimination on grounds of religion; section 2 of Law 58(I)/2004 provides that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion, at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Indirect discrimination may occur where there is failure to treat different individuals or groups differently, without any objective justification, in such a manner so that an apparently neutral provision which theoretically applies to everybody, in essence constitutes a disguised discriminatory provision which discriminates between the claimant and other persons.

On the other hand, the aforementioned provisions are subject to certain exceptions, with respect to religious organisations. Section 7 of Law 58(I)/2004 provides that in the case of occupational activities within churches and other public or private organisations, whose ethos is based on religion or belief, a difference of treatment rooted from a person's religion or belief shall not constitute discrimination, provided that the nature of such an activity or treatment constitutes a genuine, legitimate and justified occupational requirement, with regard to the ethos of the organisation. Hence section 7 of Law allows a requirement that a person should be of a particular religion

or belief in order to be employed in churches or other religious organisations; the application of the principle of non - discrimination with respect to employment loosens in favour of the application of the principle of organisational religious freedom.<sup>7</sup>

Moreover, section 5 of Law 58(I)/2004, which corresponds to Article 4 of Council Directive 2000/78/EC, clarifies that a difference of treatment on any ground shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. It could be well argued that section 5 of Law 58(I)/04 covers the cases where a church refuses to employ women as members of the clergy; in the latter cases it is indisputable that a difference of treatment on the ground of sex is strictly related to the nature of the particular activities concerned and the context in which they are carried out, in view also of the principle of organisational religious freedom. However, whether the exemption could also apply with respect to other employees of the religious organisation besides religious ministers is debatable; the church or the religious organisation in question would have to prove that hiring a female layperson in order to perform certain duties might be problematic, for instance due to the fact that this might be scandalising for the male religious ministers who would have to work with the female employee. Whether in such case the criteria of the existence a genuine and legitimate occupational requirement or the principle of proportionality are fulfilled, is quite doubtful.

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<sup>7</sup> See in general R. Ahdar, I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005): 305ff.