

Religion and Discrimination Law in the European Union: Finland

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I. Historical, Cultural and Social Background

(1) How historically has your national law dealt with religious discrimination?

In the Nordic context, the ties between the Evangelical Lutheran Church and the state run deep. Lutheran thinking has influenced Nordic and Finnish culture in multiple ways, for example the manner in which church-state relationships have been conceptualized in law.¹ In Finland, Lutheran theology has tended to support ‘the attempt by modern Nordic countries to separate state and church’². It is a fact, however, that the system historically put in place, while separating the spiritual and temporal realms in one sense, has simultaneously in and of itself reinforced an understanding of how to divide powers that is shared by both the state and the dominant church. Church and state have agreed on how to rule, and the system reaffirms the status as well as the theology of the Evangelical Lutheran Church.

The fact that Finland has historically had a state church that has left its mark on both the institutional culture and societal structures must therefore be kept in mind, in order to understand the present-day realities and how Finnish national law deals with issues of religious freedom and religious discrimination. Firstly, it explains why the legal status of churches and religious communities has been regulated in a twofold way in Finland both prior to and after entry into the European Community and the ratification and incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Secondly, it helps explain why certain issues of religious discrimination are likely to arise in the Finnish context, of which we give examples in this report.

“One of the peculiar characteristics of Finland’s ecclesio-political situation is the fact that two churches, Lutheran and Orthodox, have a legal and economic status which differs from that of the other churches and religious communities in Finland.”³ The legal status of the Evangelical Lutheran

¹ For a new comprehensive study of historical and present-day church-state relationships in the Nordic countries, see Lisbet Christoffersen et al. (eds.), *Law & Religion in the 21st Century – Nordic Perspectives* (Djøf Publishing, 2010).

² Tage Kurtén & Ville Päivänsalo, ‘Legitimacy and Religion in a North European Perspective’, in Lars Hertzberg – Tage Kurtén (eds.), *Legitimacy: The Treasure of Politics* (Peter Lang Verlag, forthcoming 2011).

³ Juha Seppo, ‘Finland’s Policy on Church and Religion’, in Lisbet Christoffersen et al. (eds.), *Law & Religion in the 21st Century – Nordic Perspectives* (Djøf Publishing, 2010), 90.

Church and the Orthodox Church are regulated in separate laws, the Church Act [*kirkkolaki* (1054/1993)] and Order of the Church [*kirkkojärjestys* (1055/1993)], as well as the Act on the Orthodox Church [*laki ortodoksisesta kirkosta* (985/2006)], respectively, and in parts one and three of the Act on Freedom of Religion [*uskonnonvapauslaki* (453/2003)]. The special legal status of the Evangelical Lutheran Church is referred to in section 76 of the Finnish Constitution [*perustuslaki* (731/1999)]. Other religious communities are afforded protection under the Act of Freedom of Religion if they duly register in the manner prescribed in the Act.

Moreover, before the reform of the basic rights and liberties enshrined in the Constitution Act in 1995, the Constitution Act of 1919 [*Suomen hallitusmuoto* (94/1919)] of the newly independent Finnish state (1917) enshrined the principle of religious freedom in section 11. Freedom was guaranteed as long as it was practiced within the boundaries of the law and of accepted mores [*hyvät tavat*]. In practice this limitation was interpreted as requiring that the exercise of religious freedom could not infringe on the religious freedom of others. In addition, section 9 of the Act stated that all citizens, independent of their religious affiliation, enjoyed equally the rights laid down in the Act. Although this section was not a straightforward prohibition of discrimination, it granted formal religious and conscientious equality to all Finnish citizens.

The Finnish legal approach could therefore be interpreted as expressing both the idea of equality and the idea of religious freedom of individuals and groups. Section 9 of the Constitutional Act granted formal equality and section 11 freedom of religion and conscience to all citizens, and the Act on Freedom of Religion [*uskonnonvapauslaki* (226/1922)] expressed the idea of religious freedom and equality for religious communities. However, the understanding of what the ideas of freedom and equality mean in practice have evolved and broadened over time.⁴

Generally speaking, revisions concerning religious protection have been the result of a change in consciousness influenced by socio-political transformations. Finnish law has historically protected religious minorities by way of acknowledging a religious group's sense of being detrimentally affected by the majority culture as an issue of religious freedom – as noted, the principle of religious freedom was enshrined in the Constitution Act of 1919 – and additionally by providing for

⁴ In line with this, the new Act on Freedom of Religion [*uskonnonvapauslaki* (453/2003)] also emphasizes freedom *from* religion (the freedom to neither confess religion nor be subjected to another faith) and the duty to not violate the freedom of religion or belief of others. However, it also puts more emphasis on the positive freedom *to* religion. This can possibly be read as signalling a change in terms of greater efforts to facilitate diversity.

exceptions in general law, for example in law on education. Hence, minority groups have been granted freedoms: freedom ‘to’ religion, such as freedom to worship in one’s own home, and freedom ‘from’ religion, such as the freedom to not take part in majority religious instruction in public schools. This has naturally been dependent on public recognition as a religious community. Such recognition has over time become more inclusive. Historically, it was first afforded to other Protestant communities, then other Christian churches and Mosaic faith (Jews), and so forth. The position of being non-religious was also acknowledged in law as a legitimate position.⁵ Issues of registration are, however, still a concern today.

As stated, the particular nature of Finnish church-state relationships helps to explain why certain issues of religious discrimination are likely to arise in the Finnish context. The Church Act of 1869 afforded the Evangelical Lutheran Church of the Grand Duchy of Finland considerable freedom to regulate its own internal matters. This is often taken as one of the signs of today’s Finland having no state church in a strict sense.⁶ However, given the historically close affinity between the Evangelical Lutheran Church and the Finnish state and the modes of co-existence and co-operation that this has given rise to and that still in some forms exist in different areas today, many of the issues that emerge with regards to religious discrimination concern situations where the folk or state church forms part of public policies and action.

In addition, issues that arise also pertain to the fact that the continuing ties between the dominant church and society and the Finnish state may be problematic from a minority perspective. Secularized Protestantism, present in law and public institutions in ‘a secularized or symbolic form’, can become confused with neutrality. From a minority perspective, however, we are dealing with ‘religion’ rather than merely ‘culture’.⁷ Moreover, the status of the Evangelical Lutheran Church has remained a recurring theme of debate. Does it enjoy unwarranted privileges, such as with regard to tax revenues, and does its preferential status negatively affect the status of other religious communities as well as the lives of the ‘religiously unconcerned’? Issues of presumed discrimination are therefore often framed in terms of majority-minority issues.

⁵ Pamela Slotte, ‘A Little Church, a Little State, and a Little Commonwealth at Once: Towards a Nordic Model of Religious Instruction in Public Schools?’ in Lisbet Christoffersen et al. (eds.), *Law & Religion in the 21st Century – Nordic Perspectives* (Djøf Publishing, 2010), 256.

⁶ However, sociologically speaking, given that a large majority of the Finnish population still belongs to the Evangelical Lutheran Church, it is fitting to call it a ‘folk church’. Seppo 2010, 91.

⁷ Slotte 2010, 253, citing Martin Scheinin, ‘Secular Human Rights Perspectives: As a Challenge to Nordic Law & Religion Solutions’, in Lisbet Christoffersen et al. (eds.), *Law & Religion in the 21st Century – Nordic Perspectives* (Djøf Publishing, 2010), 548.

Thus it is not surprising that changes to the church-state relationship were the object of both larger societal debate and political efforts throughout the 20th century. Noteworthy is the 1977 report by the Parliamentary Committee on Church and State [*Kirkko ja valtion -komitean mietintö* (KM 1977:21)]. However, the report's recommendations on how to increase the internal autonomy of the Evangelical Lutheran Church, for example, were never implemented. At various later stages such ideas were nevertheless appropriated at governmental level by the Ministry of Education, and within the Evangelical Lutheran Church.⁸ The Church Act was renewed at this time and came into effect in 1994. It affirmed and in various ways strengthened the internal autonomy of the Evangelical Lutheran Church. Among other things, several administrative tasks formerly carried out by state authorities were now transferred to it. The old Church Act's stipulation that the state have final authority over the church was dropped, and the highest authority came to rest with the administrative bodies of the Evangelical Lutheran Church itself.⁹

(2) What effect, if any, have UN instruments on religious discrimination and Article 14 ECHR had on you national law both before and after their ratification/incorporation? What if any political debate accompanied these developments? What was the contribution of religions to this debate?

Of the UN instruments relevant to religious discrimination, Finland has ratified the International Covenant on Civil and Political Rights (ICCPR) in 1976 (SopS 7-8/1976), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1970 (SopS 37/1970) and the Convention on Discrimination in Education in 1971 (SopS 59/1971). Also relevant is of course the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, as proclaimed by General Assembly resolution 36/55 of 25 November 1981. The ratification of the UN instruments has not aroused major political debate in Finland. In the government bill on the ratification of the ICCPR, no specific attention was paid for instance to the implications which freedom of religion as prescribed in article 18 of the convention might have for the traditional Finnish church-state arrangement.¹⁰

Finland joined the ECHR system in May 1989 and the Convention became binding on the part of Finland a year later in May 1990. Joining the ECHR marked a significant shift in Finnish Human Rights law and was a major reason for the revision of the Basic Rights and Liberties enshrined in

⁸ Seppo 2010, 97–98

⁹ Seppo 2010, 92–93.

¹⁰ Martin Scheinin, *Ihmisoikeudet Suomen oikeudessa* (Suomalainen Lakimiesyhdistys 1991), 157.

the Finnish Constitution in 1995. Joining the ECHR did raise political debate in Finland, but mostly from the point of view of national sovereignty and only marginally from the perspective of the possible implications that the actual rights enshrined in the Convention might have on Finnish legislation. This is clearly demonstrated by the fact that the preamble of the government bill on the ratification of the Convention, despite the various conflicts between national law and the Convention's requirements, consisted of only 12 pages.¹¹

(3) What was your government's view on the EU Directives 2000/43/EC and 2000/78/EC when they were in draft form? What national debate (including debate in your national legislature) was there prior to implementation of the Directives in your law? What role did religions play in this debate?

The government was mostly supportive of these directives and found them to be a valuable addition in combating discrimination. However, some hesitation was evident in the government's views on the proposed shared burden of proof.¹² Concerns about the implications that the directives might have on the ability of the Evangelical Lutheran Church to require membership of its employees were also voiced by the government.¹³ It supported the amendments that were made to article 4(2) during the drafting process of Directive 2000/78/EC to improve the article's clarity. However, it voiced concern regarding the Directive's potential adverse effects on religious communities that do not accept female priests.¹⁴

The Evangelical Lutheran Church voiced its principled support for Directive 2000/78/EC, stating that it is of utmost importance to fight all forms of discrimination.¹⁵ Of special concern to the church, however, was article 4(2) of the draft directive.¹⁶ The church issued official statements to

¹¹ Scheinin 1991, 165.

¹² Government brief to Parliament on the proposal for the council directive on the general framework for equal treatment in employment and occupation (U 4/2000vp - valtioneuvoston kirjelmä eduskunnalle ehdotuksesta neuvoston direktiiviksi yhtäläistä kohtelua työssä ja ammatissa koskevista yleisistä puitteista (työ syrjintädirektiivi), available in Finnish at: <http://www.eduskunta.fi/valtiopaivaasiat/U+4/2000>

¹³ Government brief to Parliament on the proposal for the council directive on the general framework for equal treatment in employment and occupation (U 4/2000vp - valtioneuvoston kirjelmä eduskunnalle ehdotuksesta neuvoston direktiiviksi yhtäläistä kohtelua työssä ja ammatissa koskevista yleisistä puitteista (työ syrjintädirektiivi), available in Finnish at: <http://www.eduskunta.fi/valtiopaivaasiat/U+4/2000>

¹⁴ EU-perusmuistio/ohje, Työministeriö, 12.10.2000, on file with the authors.

¹⁵ Kirkkohallituksen hallinto-osaston lausunto ehdotuksesta työ syrjintädirektiiviksi, Työministeriön EU-työoikeusjaostolle nro 28, 14.2.2000, 1.

¹⁶ The Evangelical Lutheran Church found the original formulation of draft article 4(2) to be too narrow in scope. The church held the view that it should be possible to demand church membership as a precondition for positions within the church other than those only involving spiritual work, without this being viewed as discriminatory. Kirkkohallituksen hallinto-osaston lausunto ehdotuksesta työ syrjintädirektiiviksi, Työministeriön EU-työoikeusjaostolle nro 28, 14.2.2000, 1-4.

the *EU-työoikeusjaosto nro. 28* of the Ministry of Labour (*Työministeriö*¹⁷) and the parliamentary Committee on Work and Equality (*työ- ja tasa-arvoasiain valiokunta*¹⁸), cooperated intensely with governmental bodies and ministries, and made its views known in the months leading up to the adoption of the Directive.¹⁹ In addition, the Evangelical Lutheran Church and the Finnish Orthodox Church consulted with each other on the matter. The Evangelical Lutheran Church also actively participated in the work of the Conference of European Churches/Church and Society Commission CEC/CSC and co-operated with the Evangelical Lutheran Church of Germany (EKD) with regard to Directive 2000/78/EC.²⁰ In contrast, Directive 2000/43/EC did not give rise to any debate or explicit activity within the Evangelical Lutheran Church of Finland.²¹

The interpretation and implications of article 4(2) caused some debate in Parliament prior to the implementation of the directives. MPs from the Green League [*Vihreä liitto*] and Left Alliance [*Vasemmistoliitto*] parties criticized the interpretation of the scope of the article 4(2) adopted in the government bill, fearing that it might enable religious communities to set religious or conscientious requirements that would go beyond mere membership in employment situations.²² This eventually also led to these parties voting against the Non-Discrimination Act [*yhdenvertaisuuslaki* (21/2004)] which implemented the directives into Finnish law.

II. The Duty not to Discriminate: The Prohibition against Discrimination

(1) What discrimination authority (e.g. an equality commission) is charged in your state with oversight of religious discrimination? How is it appointed? What is its membership? What are its functions? What roles if any do religions have in its work?

¹⁷ On 1 January 2008 the former Ministry of Labour became part of the new Ministry of Employment and the Economy (*Työ- ja elinkeinoministeriö*).

¹⁸ On 1 March 2003 the name of the committee was changed to Employment and Equality Committee (*Työelämä- ja tasa-arvovaliokunta*).

¹⁹ PM työsyryntädirektiivi 28.6.2000, on file with the authors; E-mail correspondence with Pauliina Hirsimäki Labour market representative (*Työmarkkina-asiamies*), Labour market institution of the Church / Labour market unit of the Church Council (*Kirkon työmarkkinalaitos/Kirkkohallituksen työmarkkinaosasto*) of the Evangelical Lutheran Church of Finland, on file with the authors.

²⁰ E-mail correspondence with Lena Kumlin, Legal Adviser on EU Affairs, at the Church Council of the Evangelical Lutheran Church of Finland, on file with the authors; Kirkkohallituksen hallinto-osaston lausunto ehdotuksesta työsyryntädirektiiviksi, Työministeriön EU-työoikeusjaostolle nro 28, 14.2.2000, 2.

²¹ E-mail correspondence with Lena Kumlin, Legal Adviser on EU Affairs, at the Church Council of the Evangelical Lutheran Church of Finland, on file with the authors.

²² Objection of MP Heidi Hautala to the memorandum of the parliamentary Committee on Work and Equality on the government bill for an act to ensure equality and to amend certain acts relating to it (*Vastalause työ- ja tasa-arvolautakunnan mietintöön hallituksen esityksestä 44/2003vp laiksi yhdenvertaisuuden turvaamisesta ja eräiden siihen liittyvien lakien muuttamisesta*), available in Finnish at: <http://www.eduskunta.fi/valtiopaivaasiakirjat/tyvm+7/2003> (11.5.2011)

Finland has two watchdog authorities that deal with discrimination: the Ombudsman for Minorities [*vähemmistövaltuutettu*] and the National Discrimination Tribunal [*syrjintälautakunta*].²³ Although their explicit area of focus is discrimination based on ethnicity, in practice their work can also be considered to encompass religious discrimination, especially concerning religious minorities.

The basic task of the Ombudsman for Minorities is to advance the status and legal protection of minorities and foreigners as well as promote equality, non-discrimination and good ethnic relations in Finland. The Council of State appoints the head of the authority, the Ombudsman. The office of the Ombudsman for Minorities works as an independent organ under the Ministry of the Interior and consist of several officials appointed by the Ombudsman. The Ombudsman for Minority Rights has no actual judicial powers, and therefore does more work in areas such as counselling and monitoring.

The National Discrimination Tribunal of Finland is an independent organ promoting legal protection in the area covered by the Non-Discrimination Act. The tribunal may examine cases of discrimination based on ethnic origin, except those involving supervision of the prohibition of discrimination in employment and public service. The tribunal is appointed by the Council of State and as with the Ombudsman for Minorities works as an independent organ under the Ministry of the Interior. A decision by the National Discrimination Tribunal of Finland has the same legal effect as a judgment by a general court of law. Religions have no specific role in the work of either the National Discrimination Tribunal or the Ombudsman for Minorities.

(2) What are the key instruments or sources of law on religious discrimination in your country? What are the key elements of this law? Are the prohibitions civil or criminal? How is religion defined? Are non-religious beliefs protected?

Current anti-discrimination legislation in Finland can be characterized by a certain dualism, as well as inconsistency and fragmentation caused by the many amendments to this legislation over an extended period of time. The older parts of the legislation, in particular the Constitution and Criminal Code [*rikoslaki* (39/1889)], prohibit discrimination in rather general terms and explicitly cover a high number of grounds of discrimination, in addition to which the respective lists of

²³ Finnish legality control as practiced by the Chancellor of Justice [*valtioneuvoston oikeuskansleri*] and the Parliamentary Ombudsman [*eduskunnan oikeusasiamies*] also plays a key role in the prohibition of religious discrimination. Although the two entities cannot be seen as discrimination authorities in a narrow sense, their efforts to ensure that public authorities and officials observe the law and fulfil their duties are important with respect to the prohibition of religious discrimination in the exercising of public powers.

grounds are open-ended. The more recent parts of the legislation, in particular the Non-Discrimination Act and the Act on Equality between Women and Men [*laki naisten ja miesten tasa-arvosta* (609/1986)], contain more detailed provisions with regard to the definition of discrimination, for instance.

Religious and conscientious equality and the prohibition of religious discrimination are enshrined in sections 6 and 11 of the Finnish Constitution. According to section 6 everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from others on the basis of sex, age, ethnic origin, language, religion, conviction, opinion, health, disability or other reason that concerns one's person. The list of grounds is not exhaustive, and covers others of broadly similar nature as well.²⁴ Section 11 compliments the requirements of section 6 from the point of view of religious and conscientious discrimination, as it protects the equal right of everyone to freedom of religion and conscience.

The Non-Discrimination Act puts the requirements set in the Constitution into more specific terms. Under section 6 of the Act nobody may be discriminated against on the basis of age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability, sexual orientation or other personal characteristics²⁵. The prohibition provided in the Non-Discrimination Act is civil in nature, and prescribes that a party that commits an infringement of the prohibition is to pay the injured party compensation for the suffering caused by an act of discrimination or victimization.²⁶ As prescribed by EU Directives 2000/43/EC and 2000/78/EC, Section 17 of the Non-Discrimination Act contains a provision on the shared burden of proof between parties involved.

In addition to the civil prohibitions of discrimination the Criminal Code of Finland also includes criminal prohibitions of discrimination. The Criminal Code features two main criminalizations in this sense, namely a general prohibition of discrimination [*syrjintä*] in section 11 of chapter 11 of the Criminal Code (885/2009) and a prohibition of work discrimination [*työsyrjintä*] in section 3 of chapter 47 of the Criminal Code (885/2009). Both explicitly include religion as one of the

²⁴ All three main anti-discrimination provisions (constitution, Non-Discrimination Act, criminal code) feature an open-ended list of prohibited grounds of discrimination.

²⁵ The prohibition of discrimination based on gender is covered by the provisions of the Act on Equality between Women and Men (609/1986).

²⁶ This compensation shall not exceed 15,000 euros, depending on the severity of the infringement. The payment of compensation under the Non-Discrimination Act does not preclude an injured party from claiming damages under the Tort Liability Act [*vahingonkorvauslaki* (412/1974)] or other legislation.

prohibited grounds for discrimination. The punitive scale for both offences extends from a fine to imprisonment for up to six months.

Although religion and belief are specifically mentioned as prohibited grounds for differential treatment, Finnish law does not contain specific definitions of either religion or belief²⁷. However, the Act on Freedom of Religion defines a ‘religious community’²⁸ [*uskonnollinen yhteisö*] for the purposes of that act. The concept of religious community can in some cases be of relevance when assessing whether something could be considered as religion under Finnish law. As Finnish law does not require it, not all communities that could be considered religious have registered. Some Pentecostal congregations, for example, have registered themselves as associations instead. Neither has registration been granted to all communities (e.g. Scientology and Wicca) that have applied for it.²⁹

(3) What are the fields in which the prohibition is operative (e.g. employment, the provision of goods and services, education, housing and public authorities)?

The general prohibition of religious discrimination as enshrined in the Constitution is generally applicable to all use of public powers. Furthermore the constitutional prohibition may have a bearing on relationships between private parties in some situations.

The scope of application of the Non-Discrimination Act corresponds to the scope of application prescribed in Directives 2000/43/EC and 2000/78/EC. According to section 2 of the Act, it applies to all natural and legal persons carrying out both public and private activities, with respect to 1) *conditions for access to self-employment or means of livelihood, and support for business activities;* 2) *recruitment conditions, employment and working conditions, personnel training and promotion;* 3) *access to training, including advanced training and retraining, and vocational guidance;* and 4) *membership and involvement in an organization of workers or employers or other organizations*

²⁷ ‘Belief’ is not defined through legislation, preparatory works or case law. In the light of legal writings, it is clear that belief as used e.g. in the Constitution [*omatunto*] covers not only religious beliefs but other convictions as well.

²⁸ According to section 2 of the Act of Freedom of Religion, the term ‘religious community’ refers to the Evangelical Lutheran Church, the Orthodox Church and communities registered under the Act. Section 7 of the Act lays down the criteria for religious communities eligible to be registered as follows: the purpose of a religious community shall be to support and arrange individual, communal and public activities related to the practice or other expression of religion, and these activities must be based on holy scriptures or other established sources regarded as holy; a religious community must respect human rights and fundamental freedoms in all its activities; the purpose of a religious community shall not be to accrue financial gains, and its activities shall not be primarily of an economic nature; if a community does not meet all of the above-mentioned criteria it cannot be registered as a religious community.

²⁹ These cases were decided under the old Act on Freedom of Religion [*uskonnonvapauslaki* (226/1922)], which, however, set requirements rather similar to the current Act.

whose members carry out a particular profession, including the benefits provided by such organizations.

The scope of application of the general prohibition of discrimination in section 11 of chapter 11 of the Criminal Code differs somewhat from the scope of the Non-Discrimination Act. The Criminal Code prohibition is operative in: 1) *profession*, 2) *service of the general public*, 3) *exercise of official authority or other public function* 4) *the arrangement of a public amusement or meeting*. The prohibition is not applicable to contractual relations between private persons. Neither does the prohibition cover the arrangement of amusements or meetings that are made public only to a limited group of people such as members of an association.³⁰

The prohibition of work discrimination is applicable to *employers or representatives thereof when advertising for a vacancy or selecting an employee or during employment*. The provision covers all aspects of working life from the advertising of a vacancy to the termination of an employment contract.³¹

(4) What does the prohibition cover (e.g. direct or indirect discrimination, incitement to discriminate, victimization, harassment)? What defence or other justifications are available? What remedies are available and how have these been used in practice?

The prohibition of discrimination in section 6(2) of the Constitution is rather general in scope: it prohibits both direct and indirect discrimination, and its field of application is not limited in any way. The provision does not use the concept of discrimination as such but speaks instead of differential treatment without an acceptable reason. A reason is acceptable if it serves an objectively justifiable end that is in accordance with the objectives of the fundamental rights system, and if the means used are proportionate to the ends. If an acceptable reason for differential treatment exists, the differential treatment of persons can be justified.

³⁰ The *travaux préparatoires* mentions meetings organized by religious communities as one of the examples of such meetings. Government bill for an act to ensure equality and to amend certain acts relating to it (*HE 44/2003vp laiksi yhdenvertaisuuden turvaamisesta ja eräiden siihen liittyvien lakien muuttamisesta*), available in Finnish at: <http://www.eduskunta.fi/valtiopaivaasiat/HE+44/2003> (10.5.2011).

³¹ Finnish labour law also includes provisions on the prohibition of discrimination. According to section 2 of Chapter 2 of the Employment Contracts Act [*työsopimuslaki* (55/2001)] an employer shall not unjustifiably discriminate against employees on the basis of age, health, disability, national or ethnic origin, nationality, sexual orientation, language, religion, opinion, belief, family ties, trade union activity, political activity or other comparable circumstance. The employer must observe this prohibition also when recruiting employees. To define discrimination, prohibition of sanctions and burden of proof, the Act refers to the Non-Discrimination Act.

The Non-Discrimination Act provides more precise definitions of the prohibited forms of discrimination. Section 6 of the Non-Discrimination Act prohibits four different forms of discrimination: 1) *direct discrimination* (the treatment of a person less favourably than the way another person is treated, has been treated or would be treated in a comparable situation), 2) *indirect discrimination* (an apparently neutral provision, criterion or practice that puts a person at a particular disadvantage compared with other persons), 3) *harassment* (the deliberate or de facto infringement of the dignity and integrity of a person or group of people by the creation of a intimidating, hostile, degrading, humiliating or offensive environment) and 4) *incitement to discriminate* (an instruction or order to discriminate). In addition, section 8 of the Act prohibits *victimization* (someone being placed in an unfavourable position or treated in such a way that they suffer adverse consequences because of having complained or taken action to maintain equality).

Section 7 of the Non-Discrimination Act prescribes two justifications for discrimination relevant from the point of view of religious discrimination.³² Firstly, discriminatory practice can be justified if it is based on an equality plan [*yhdenvertaisuussuunnitelma*], and this practice is intended to implement the intention of the Act in practice. Secondly, the Act permits justified differential treatment, in due proportion, that is founded on a genuine and determining requirement relating to a specific type of occupational activity and the performance of that activity. Justifiable under section 7 of the Non-Discrimination Act are also specific measures aimed at achieving genuine equality in order to prevent or reduce negative consequences of discrimination (*positive discrimination*).

The forms of prohibited discrimination as prescribed in the Criminal Code differ somewhat from the forms prescribed in the Non-Discrimination Act. The prohibited forms of discrimination are (1) refusing *someone service in accordance with the generally applicable conditions*, (2) refusing *someone entry to the amusement or meeting or ejecting him or her*, or (3) placing *someone in an unequal or an essentially inferior position*. The prohibition of work discrimination prohibits putting *an applicant for a job or an employee in an inferior position*.

The prohibitions of discrimination in the Criminal Code do not entail specific justifications for discrimination. The general prohibition provides that the discriminatory action must have taken place without a justified reason [*hyväksyttävä syy*]. Therefore practices that entail justified reasons are not punishable under the prohibition. According to the *travaux préparatoires* such reasons

³² The Non-Discrimination Act also prescribes a third justification concerning age-based discrimination, which is not discussed in this context.

which cannot be exhaustively listed could be based on Finnish law or the established concept of justice held by citizens.³³ The prohibition of work discrimination provides an even higher standard, prescribing that differential treatment is justifiable only if an important and justifiable reason is given. The provision implies a strengthened need for protection in this domain of life. In most cases such an important and justifiable reason must be somehow related to the occupation in question.³⁴

The available remedies depend on the nature of the case. Civil and criminal cases (such as those concerning discrimination under the Criminal Code and Non-Discrimination Act) are tried before the District Courts [*käräjäoikeus*], with the exception of cases concerning ethnic discrimination under the Non-Discrimination Act, which can also be tried before the National Discrimination Tribunal. The decisions of the District Courts can be appealed in the general Courts of Appeal [*hovioikeus*] and further in the Supreme Court [*korkein oikeus*]. Administrative actions of public officials can be contested in the Administrative Courts [*hallinto-oikeus*]. Decisions made by the National Discrimination Tribunal of Finland as well as some actions of the Evangelical Lutheran Church can also be appealed/contested in the Administrative Courts. The Supreme Administrative Court [*korkein hallinto-oikeus*] forms the final appellate level in these cases.

(5) What case law has developed on these matters? Giving examples, are the decisions of the discrimination authority binding or otherwise important?

Case law under the new equality legislation has recently begun to emerge. Still, only few precedents from the Supreme Courts are available with regard to discrimination based on religion or belief. This means that it is hard to draw general conclusions concerning case law here.

In a published Supreme Court decision of 22 October 2010 [KKO:2010:74] the court found both a priest who was visiting a Lutheran congregation and the head of a local branch of the Lutheran Evangelical Association of Finland, which operates inside the Evangelical Lutheran Church of Finland, guilty of discrimination under the Criminal Code, because they had refused to conduct a

³³ Government bill for the amendment of the Criminal Code and certain acts relating to it covering the second phase of the overall reform of the criminal legislation (*HE 94/1993 laiksi rikoslainsäädännön kokonaisuudistuksen toisen vaiheen käsittäviksi rikoslain ja eräiden muiden lakien muutoksiksi*), available in Finnish at: <http://www.eduskunta.fi/valtiopaivaasiat/HE+94/1993> (10.5.2011).

³⁴ In the *travaux préparatoires* the requirement of membership for recruiting by religious communities is mentioned as an example of such a justifiable reason. Government bill for the amendment of Criminal Code and certain acts relating to it covering the second phase of the overall reform of the criminal legislation (*HE 94/1993 laiksi rikoslainsäädännön kokonaisuudistuksen toisen vaiheen käsittäviksi rikoslain ja eräiden muiden lakien muutoksiksi*), available in Finnish at <http://www.eduskunta.fi/valtiopaivaasiat/HE+94/1993> (10.5.2011).

service together with a woman priest of that congregation. The court ruled that the actions of the accused could not be considered justified from the point of view of freedom of religion and conscience, as they had agreed to conduct the service in a congregation of the Evangelical Lutheran Church which as a church had accepted female priesthood as an official part of its creed. Therefore the accused could not merely by appealing to their own conscience discriminate against someone at a service conducted in the church in question.

The Vaasa Administrative Court in its decision of 27 August 2004 [Ref. No. 04/0253/3] annulled the decision of the Cathedral Chapter of the Evangelical Lutheran Church that an applicant was not eligible to be appointed as a chaplain (assistant vicar), as she was publicly living in a same-sex relationship and had announced that she would officially register the said relationship. The decision was found to be against the law because of its discriminatory nature. The decision of the Cathedral Chapter might have been justified had there been an applicable legal basis for it in the form of an exception to the applicability of non-discrimination norms. However, no such exception was provided by the Church Order (which lays down rules for appointing vicars and chaplains) or by the Church Act.

Although decisions made by the National Discrimination Tribunal of Finland have the same binding effect as decisions made by the general courts, the decisions of this authority have not gained significant importance.

III. The Right to Discriminate: Exceptions to the General Prohibition

(1) On what grounds does the law permit discrimination (e.g. religion, sex)?

Probably the most important exception to the general prohibition of discrimination from the point of view of religions in Finnish law is to be found in the aforementioned section 7 paragraph 2 of the Non-Discrimination Act. This provision prescribes that justified differential treatment, in due proportion, that is founded on a genuine and determining requirement and a justifiable objective relating to a specific type of occupational activity and the performance of that activity is not to be considered discrimination. In accordance with the article 4(2) of Directive 2000/78/EC, it grants religious communities the right to require that an employee or office holder who is engaged in

practicing or teaching a religion, or whose duties include representing a religious community outwards, hold the particular religious beliefs of that community.³⁵

The legal status and the duties of the Evangelical Lutheran Church mean that some of its employees are employed as functionaries comparable to state officials. This requires that the conditions for an appointment to such an office be prescribed in law. However, because of the obvious religious nature of the Evangelical Lutheran Church, it can set membership requirements for its employees that under different circumstances could be considered discriminatory. Section 1 of Chapter 6 of the Church Act prescribes that a person employed by the Evangelical Lutheran Church, whose regular duties include teaching, diachonic work or involvement in worship and church services, must be a member of the church.³⁶

The scope of application of The Act on Equality between Women and Men also forms an exception to the prohibition of discrimination as prescribed in the Act. In section 2 the scope of application of the Act is prescribed as not applicable to the religious activities of the Evangelical Lutheran and Orthodox churches or to other registered religious communities. This provision, however, only concerns the scope of application of the said act, and does not as such make discrimination between sexes justifiable within religious communities. Such practices can still be punishable under the criminal prohibitions of discrimination prescribed in the Criminal Code.

(2) Who may discriminate (e.g. religious organizations)?

As stated in the *travaux préparatoires* on the Non-Discrimination Act, the exception to the prohibition of discrimination prescribed in section 7 paragraph 2 applies to religious communities.³⁷ The concept of religious community in Finnish law usually refers to the use of this concept in the Act on Freedom of Religion. However, as the procedure of registration prescribed in that Act is not compulsory for religious communities, it remains unclear whether section 7 paragraph 2 could be interpreted to also apply to religious communities not registered under the Act on Freedom of Religion.

³⁵ Government bill for an act to ensure equality and to amend certain acts relating to it (*HE 44/2003vp laiksi yhdenvertaisuuden turvaamisesta ja eräiden siihen liittyvien lakien muuttamisesta*), available in Finnish at: <http://www.eduskunta.fi/valtiopaivaasiat/HE+44/2003> (10.5.2011).

³⁶ Section 108 chapter 11 of the Act on the Orthodox Church contains a similar provision.

³⁷ Government bill for an act to ensure equality and to amend certain acts relating to it (*HE 44/2003vp laiksi yhdenvertaisuuden turvaamisesta ja eräiden siihen liittyvien lakien muuttamisesta*) is available in Finnish at: <http://www.eduskunta.fi/valtiopaivaasiat/HE+44/2003> (10.5.2011)

(3) What conditions must be satisfied (e.g. to avoid violation of religious doctrine, alienating followers)?

The exception prescribed in section 7 paragraph 2 of the Non-Discrimination Act pertains to employment situations where if the occupational activity genuinely and decisively so requires, differential treatment can be justified. According to the *travaux préparatoires* attention must be paid to freedom of religion and conscience, and to the autonomy of religious communities that this implies, when assessing these requirements.³⁸ Therefore, and also as established in case law, the importance of the occupation for fulfilment of freedom of religion and conscience is an important factor when evaluating whether these requirements can be interpreted as being fulfilled. *E contrario* occupations that are not central to the religious functions of the community are not as likely to fulfil these requirements.

(4) What case law has developed in the area of exceptions?

In a published Supreme Court decision of 19 January 2001 [KKO:2001:9] the Supreme Court evaluated the applicability of the aforementioned section 2 of the Act on Equality between Women and Men in an employment situation concerning the employment of a chaplain of the Evangelical Lutheran Church. The question here was whether the office of a chaplain (assistant vicar) could be considered to belong to the kinds of religious activities that fall within the meaning of section 2. The court found that the work carried out in the office of chaplain could not be considered a religious activity of the church in the narrow sense of this concept. The court also justified its stance by the fact that after the Act on Equality between Women and Men had been enacted the church had opened priesthood to women. Therefore the court found that the application of the Act in this context could not constitute a violation of freedom of religion.

In a published Supreme Administrative Court decision of 8 February 2008 [KHO:2008:8] the court ruled that under the Church Order a candidate for the office of vicar was not eligible for this position because he had publicly stated that he would not conduct a service with a woman priest. As the conducting of services was part of the duties of the vicar, the applicant could be ruled out as not capable of performing these duties under the Church Order.

³⁸ Government bill for an act to ensure equality and to amend certain acts relating to it (*HE 44/2003vp laiksi yhdenvertaisuuden turvaamisesta ja eräiden siihen liittyvien lakien muuttamisesta*), available in Finnish at: <http://www.eduskunta.fi/valtiopaivaasiat/HE+44/2003> (10.5.2011)

To conclude, in 2007 the Ministry of Justice assigned a committee the task of renewing Finnish non-discrimination legislation, to make it comply better with the equality and non-discrimination requirements laid down in the Constitution. In December 2009 the committee delivered its report (*mietintö*) for a new Non-Discrimination Act as well as proposals for other accompanying revisions of the legislation. The report proposed that the Act's scope of application be expanded to make it applicable to all public and private activities, and that all discriminatory grounds be made subject to the same legal remedies. Further, more specific provisions on exceptions to the scope of application were proposed for inclusion in the Act. Several statements expressing dissenting views accompanied the report. In 2010 various bodies, the Evangelical Lutheran Church among them, commented on the proposal.³⁹ However, this process has now come to a standstill and it is difficult to predict when and how it will proceed under the new government.

³⁹ Lausunto Yhdenvertaisuuslainsäädännön uudistamista koskevan toimikunnan mietinnöstä (Oikeusministeriön komiteamietintö 2009:4), Asiannumero 2008-00301, 15.4.2010.