

RELIGION, TOLERANCE AND DISCRIMINATION IN MALTA

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Discrimination Based on Religion or Belief

Political legitimacy is a central issue. Since religion can be a powerful legitimizing force for society, the likelihood of achieving religious liberty, and therefore non-discrimination on the basis of religion is often reduced to the extent that the regime's political legitimacy is weak. Such a regime is likely to exploit the legitimizing power of the dominant religion with the corresponding risks of oppression for dissenting groups.

A State which is confessional, or has a dominant religion may be a democracy in its own right, and may also embrace human rights guarantees, but to what extent is the fundamental right to freedom of conscience safeguarded when the State decides how far and to what extent a ruling religion or the religion of the state determines or interferes with the political life of the country? It would appear that in situations like these the majority or the ruling class can determine the religious rights of everyone including the dissenting minority, which does not identify itself with the State religion. In such a case religion or the state religion interferes with, if it does not determine the political agenda.¹

Article 2 of the Constitution of Malta provides:

- 2 (1) The religion of Malta is the Roman Catholic Apostolic Religion.
- (2) The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong.
- (3) Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.

¹ An example of how religion can become a legitimising force and how far an established Church can be determining in the political arena are the Politico-religious contestations of the recent past Maltese political history. The Catholic Church had imposed the "interdiction" sanction and in cases even "excommunication" on those who voted for the Labour Party in the 1962 and 1966 elections. But a recent version of this penchant, although drawn on different lines, is the campaign of the Interior Ministry to include the prohibition of and therefore the crime of abortion among the Constitutional provisions. Although ostensibly careening on a Pro-Life lobby group, the whole rhetoric rests upon the deep-seated Catholic notions and the teachings of the Roman Catholic Apostolic Church.

This article of the Constitution could be interpreted as giving the Catholic Church the monopoly in religious affairs. In the interrelationship of law and morality, the ethical and the legal, which are both necessary for the State to maintain law and order, it would appear that only the Roman Catholic Apostolic type of morality could be enforced in this country, to the exclusion of all other.

It is very obvious that this article of the Constitution is incompatible with religious liberty and non-discrimination provisions of article 21 of the European Charter of Fundamental Rights. Article 2 of our Constitution contrasts very heavily for example with Constitutions of other States aspiring to membership of the EU, like Turkey, whose Constitution provides in its preamble that “as required by the principle of secularism, sacred religious feelings shall in no way be permitted to interfere with state affairs and politics”. Article 24 of the same Constitution grants all people freedom of religion but prohibits the “exploit [ation] or abuse of religion or religious feelings For the purpose of personal or political influence, or for even partially basing the fundamental social, economic, political, and legal order of the State on religious tenets”.

One may very well be over simplistic about it and say that a Constitution that embraces a certain dominant religion is also an expression of the democratic will of the majority. But the argument about human rights and non-discrimination starts from the recognition of the basic assumption that a democracy is not only about the will of the majority but also, and more importantly, about the promotion of safeguards of individual and minority rights in a pluralistic society including a multicultural one. In that context it may become offensive for the majority (even if an overwhelming one) to embrace a religion as a Religion of the State. It becomes even scandalous then, if that established religion becomes the measuring stick with which the moral standards of a given society are measured. What is right and what is wrong should never be the prerogative of a dominant class or religion. The state cannot accept moral values that tend to discriminate in favour of a predominant or accepted religion or ideology. That prohibition is of the very essence of the respect for basic human rights and human dignity of which the freedom of conscience and religion are but fundamental facets of the whole edifice.

One predominantly facile argument brought forward by those who would turn their shoulders at the very suggestion that a confessional Christian State is an anomaly in terms of strict secularisation and liberal thought especially as far as the human rights discourse goes, comes in the form of a justification that human rights are the embodiment of Christian thought and the Christian religion is the best guarantee for the safeguard and maintenance of those basic rights. The argument goes that Christianity after all, has all to do about human dignity, and the “salvation” of the human being. What is human at the end becomes also divine. But this argument is question-begging. Embracing universal values, values that point ultimately towards the maintenance of human dignity under all circumstances and in all situations, such as the talk about human rights, is not the same thing as allowing the majority in a state to decide what sort of religious outlook or influence or indeed intervention should be allowed in the political life of the nation. The necessary consequence of article 2 of the Maltese Constitution is exactly to do that. It would appear that the best way to safeguard against religious discrimination is if the State remains neutral towards the

different denominations that might exist within its confines. The Constitutions of most European countries refrain from “confessing” any religion.

The “Forum Internum”

In a democratic society, the State has the obligation to protect vulnerable members of society from intrusion in the “forum internum” and indoctrination. It is generally agreed that using a school for religious or moral indoctrination is abhorrent and could become a tool of a totalitarian government. A basic norm in the Constitution of a State such as article 2 of our Constitution is evidence of a monolithic society and an intolerant State, which although not so much evident in this day and age is certainly a relic of past experience.

The other side of the coin, of course is the stance usually taken by the liberal or pseudo liberal orthodoxy installed in a country which embraces the values of “western” democracies, but which itself has some fundamental principles, values and norms for its foundation. How far and to what extent should religion remain at the centre of public life? If we say that all religions should be treated with equal respect and that the State should not prefer one religion for another, in the sense the state should not declare before what is the religion of the state, what we will be saying in the end is, that religion should not matter at all for public life. That would obviously mean that religion should not be taken into consideration for the purposes of enacting laws and formulating policy and that it should remain a matter of private concern. How can the legislator or the Executive prefer one type of morality over another in the sphere of normative evaluation? Therefore should religious reasoning form the basis of a political decision?

Even a secular state will in the end face the problem of religious freedom and the question of discrimination no matter how liberal and even-handed it will try to be or by simply declaring itself to be secular. Multicultural societies have to face the dilemma of accepting within them those cultural and religious groups that do not want to adopt the dominant form of cultural model of the multicultural societies in which they are living. Instead they opt for cultural (including religious) diversity and to preserve their own distinct identity as a minority of which religion is only but one manifestation of that identity. These minority groups simply refuse integration within the existing or dominant culture and therefore even when the secular state would mete out fairly and squarely the various forms of social welfare and assistance, there are barriers to be overcome and difficulties to be sorted out. Some religious minorities may even want to assert their own particular cultural distinction, and then no matter how secular the state professes to be, it is not enough.

Therefore a situation of equivalence of the strict separation between Church and state would not be enough to guarantee social harmony and cohesion where certain minority groups, even where offered, refuse social integration.

But the State can proclaim to be liberal more than patronising² and start financing religious propagation in the act of accommodating religious institutions that are at the very core and within the very fabric of any particular society. This sort of financing can take the form of state budgets providing for religious denominations, which is common in a number of European countries such as in Spain, Italy, Greece, Belgium and Luxembourg. We have a similar situation in our country. Act IV of 1992 entitled, “Att ta’ l-1992 Dwar Proprietà u Entitajiet Ekkleżjastiċi” provides for the issue in favour of the Roman Catholic Church in Malta of a Stock in favour of the Foundation for Church Schools. The Stock issued in favour of this foundation was the result of the ceding in favour of the State of Malta of the ecclesiastical property mentioned in the relative schedules to the Agreement between the State of Malta and the Vatican annexed as a Schedule to the abovementioned Act. A situation of this sort has been tested before the European Court of Human Rights in Strasbourg in the famous case of “Iglesia Baudista, El Salvador and Ortega Moratilla v. Spain” where the Commission held that there had been no breach of article 14 (non-discrimination) of the ECHR because there was “objective and reasonable” justification for the difference in treatment. There was such justification because of the existence of a Concordat, which placed an obligation on the Catholic Church to place its historical, artistic, and documentary heritage at the service of the Spanish people, in return for benefits from the State, in this case, tax exemptions. But one thing that that judgment does not address is the issue whether the state is therefore obliged to enter into similar agreements with “churches” of other religious denominations. One would presume that there would be no such right, because indeed if all religions had to be given the same privileges as the State Church the whole notion of State Church would be undermined.

State support and financing of religious institutions or religious propagation may be one way of integrating cultural or religious minorities especially if such needed support is offered to the least affluent or indeed the poorer of the lot. In that case that sort of support, even if it were deemed discriminatory could represent a factor of social integration through religion. Religion may represent an integrating factor in a multi-ethnic society. The state may need the collaboration of the religious groups whether dominant or otherwise in a given society to penetrate the social strata especially those that remain marginalized or hostile to the Public Administration. Because the State remains far removed from the reach of immigrants, and other ethnic minorities, it would require the persuasive influence of the religion of that group to help materialise the social assistance and social programme which the state may have for one and all.

² The modern democratic State tends to be patronising whenever it imposes rules or restrictions, even rules of conduct which normally should not interest the state at all. Traditionally, the State (or good government) was only interested in the keeping of law and order. The Welfare State has gone further and tried to provide minimum standards where otherwise marked contrasts in social well-being supposedly lacerated the common good. The modern State has gone even further. Why should for example the State interfere and provide for my own personal safety, in the form of ordering me to put on a crash helmet if I ride a motor-bike, and a safety belt when driving a motor car. These are added precautions that I like a lot of other ordinary citizens have not asked or requested. I should assume that I, like the average grown up member of any society can take care of that sort of personal safety without the “patronising” state interfering with certain rules and regulations.

The Long Shadows of a Dominant Religion

Article 17 of the Marriage Act 1975 as amended in 1995 provides for the recognition of marriages according to the rights and customs of a church or religion recognized by the Minister responsible for Justice. But Act No I of 1995 introduced a whole section relating to Catholic Marriages. Articles 21 and 22 lay down the procedure for the recognition of a marriage celebrated according to canon law rites. The subsequent provisions go into great detail to provide for the recognition and registration of a judgment of annulment delivered by an Ecclesiastical Tribunal in Malta. These provisions have the combined effect of rendering the Ecclesiastical Tribunal at the same level of competence as the civil courts in questions of annulment of marriage. But the most draconian provision is article 30, which gives precedence to the Ecclesiastical Tribunal over the Civil Courts. In fact when the Ecclesiastical Tribunal accepts a petition for annulment, the relative decree of acceptance is communicated to the registrar of the Civil Courts. According to subsection 2 of that article, “(2) Malli ssir ir-reġistrazzjoni msemmija fis-subartikolu (1) ta’ dan l-artikolu, il-qorti tiegħaf milli tkun iktar kompetenti li tittratta l-kwistjoni; u meta jkun hemm pendenti quddiem il-qorti azzjoni għad-dikjarazzjoni ta’ nullità ta’ żwieg li dwaru jkun intbagħat ċertifikat lir-Registatur skond is-subartikolu (1), il-qorti għandha tissospendi s-smiegħ tal-każ pendenti quddiemha, u ma tistax terġa’ tibda tisma’ l-każ u, f’kull każ, ma terġax issir kompetenti sakemm il-każ ikun skond il-proċeduri tat-tribunal irtirat minn quddiem it-tribunal jew ikun ġie dikjarat deżert”³. A more discriminatory provision on the basis of religion can hardly be imagined. It gives preference to that party who professes the Catholic religion or who opts for the Ecclesiastical Tribunal as an edge over the other party. Besides, it almost gives rise to forum shopping in the case of annulment of marriage in Malta. It should be pointed out that in a recent judgment of the European Court of Human Rights, it was decided that the proceedings before the Ecclesiastical tribunal infringed the fundamental right of a fair hearing enshrined in article 6 of the Convention, most importantly the right of a party to a case to be present during the deposition of witnesses and the right to cross examine.

The Established Church and the Question of Tolerance - Some Observations

The question to be asked here is whether irrespective of the high degree of tolerance that there is in this country, one should become uneasy when one considers the traditionalist and close-knit society that we have in Malta. It is all a question of tolerance, and then again, the question of how far we are ready to tolerate religious expressions, symbols and manifestations of other creeds when these can “offend” our deep-seated religious sentiments. *It all boils down to a question of tolerance, simply because religion is also external manifestation.*

We like to think and believe that we are quite an evolved multi-cultural society. But, how much, and how far, are we prepared to tolerate other religious expressions and

³ (2) Upon the registration as is referred to in sub-article (1), the court shall cease to be competent to deal with the matter; and where an action is pending before the court for the declaration of nullity of a marriage in relation to which a certificate has been delivered to the Registrar in accordance with sub-article (1), the court shall suspend the hearing of the case before it, and may not resume hearing the case and, in any case, shall not again be competent until the said case has, in accordance with the procedures of the Tribunal, been withdrawn from before the Tribunal or been declared abandoned.

manifestations that do not concur with our beliefs, or are considered a threat? How tolerant are we and how far are we prepared to allow the idea of a multicultural society to pose any threat to those beliefs that have held together the social fabric in the past?

The problem of those who profess a liberal form of politics and who would want to accept religion in public life run the risk of contradicting themselves, the minute they start excluding, in the interest of stability and the maintenance of tradition, culture and identity some form of religion or religious belief that is considered fundamentalist. If the religion or religious belief does not conform with the democratic process, a process requiring dialogue and corrective reasoning, then such a religion or religious belief becomes fundamentalist, dangerous and breaks the fundamental precepts of secular thought or belief. The minute a secular and liberal position considers “right” or “wrong” a religion that does not conform to accepted liberal and secular way of thought they are taking the fundamentalist stand that is probably called liberalism or reasonableness but which is in itself exclusionary of other beliefs, other ways of seeing the world and arriving at truth.

Religious beliefs, religious mores and customs also influence the culture and folklore of society. Roman Catholicism has laid down the rules for the whole structure of Maltese society starting with topography (the Village churches at the centre of all thoroughfares) and ending with the type of folklore and entertainment e.g. the village festas and other types of festivities tied up and connected with Roman Catholic symbols. We can say also that the Roman Catholic Church remains one of the strongest, if not the strongest, influences in shaping the Maltese political status and still has a lot to say as to what is politically correct or otherwise.

An instance of this is the fact that Malta, together with The Philippines, remains one of only two nations in the world that have not admitted divorce. Time and again politicians of every party have grappled with the question of introduction of divorce and have fought shy of the question, because of the Roman Catholic Church’s absolute and fundamentalist stance.

The converse of this argument is of course that if we were to consider this country’s orthodoxy as a liberal one and that religious beliefs of whatever kind have to be admitted into the public life and possibly public institutions, are all religions and religious beliefs of whatever denomination to be admitted and accepted as part of the social fabric whatever the consequences may be? Admittedly liberal theorists would accept religious beliefs with which they feel comfortable and would exclude fundamentalist and other beliefs that tend to be exclusionary or imprint and impose their own views on public institutions. This sort of treatment will evidently marginalize strong religious beliefs instead of being tolerant to them. The established orthodoxy, therefore, however liberal it professes to be will necessarily discriminate against any strong religious belief (Islam if you find yourself in a “western” democracy, Christianity or any other denomination if you happen to be in an Islamic country). Rather than taking the other religions into account it is easier to dismiss or discriminate against them. This sort of phenomenon is present in secular countries (e.g. France and The Netherlands) where strong religious convictions and beliefs, including certain type of manifestations are simply dismissed and not tolerated, while at the same time the secular and non confessional regime manages to appear to be taking into account the

religious sentiments of everyone. Here strong religious sentiments and manifestations are simply dismissed if they appear too strong and fundamentalist.

Constitutional Provision and Other Legislation

As already pointed out above, the importance of the Roman Catholic faith in Malta is reflected in the Constitution of the Republic of Malta. Article 2 is the result of the religious influence and pressure before the granting of Independence. One may also say that the fact that the state pronounces itself to be a confessional state in favour of a certain religion may create the suspicion that religious diversity is not respected and that there is a very strong imbalance in favour of that religion.

It would also appear that Malta is not the only member state of the EU with some form of an established state church. Like Malta, none of these states have an official policy of persecution or intolerance towards other religions. But most of these states like Malta, give privileges and benefits to the “state church” vis-à-vis other religions or churches. One has to see how far this sort of treatment could be characterised as discriminatory towards other religious denominations. It would appear that the United Nations instruments dealing with religious freedom tend to avoid the issue. The Draft Declaration on the Elimination of Intolerance or Discrimination on the Basis of Religion and Belief of 1967 states in Article I (d) that neither the establishment of a religion nor recognition of a religion or belief by a state should itself be considered a form of intolerance or discrimination. However, this has sometimes been considered as an “unfortunate departure from the conventional wisdom that the establishment or recognition of an official religion may promote intolerance of other beliefs”.⁴ It has been held by the European Commission of Human Rights that a State Church system cannot in itself be considered to infringe Article 9 of the European Convention on Human Rights; “However, a State church system must, in order to satisfy article 9, include specific safeguards for the individual’s freedom of religion”⁵.

The mere fact that an established Church exists can raise questions about how much assistance the state can give the Church before it becomes actively involved in promoting one religion in a way that puts inappropriate pressure on those outside the Church to become actively involved in the Church, or improperly penalises those who are not members. Sometimes the mere existence in a country of an Established Church or of a State Religion may bring about severe discrimination, and sometimes even outright persecution directed against ‘dissenters’. This however is not always the case, because an Established Church in some countries to day is more of a historical value than a threat to religious freedom.

One can also note the amount of state support when it comes to taxation and financial contributions to a Church. It has been said already that Church and State support each other for the common good, and very often the presence of a dominant religion in a country does not necessarily result in predominantly negative results, although it is true that in such a

⁴ McDougal, Lasswell and Chen: “The Right to Religious Freedom and World Public Order”, 74, Michigan Law Review, 868, 869-9 (1976).

⁵ “Darby vs. Sweden”, 187, Eur. Ct.H.R [Ser.A] (1990) Annex to the Decision of the Court.

situation the dominant religion or morality of a country tends to stifle all the others. The presence of religion in a state can help the State's function and mission as far as public order and the distribution of welfare benefits is concerned. It is a known fact that a large part of a religion's communal activity runs parallel with that of the State in social welfare and social assistance. But to what extent should all the churches or religions in any given society merit the same equivalence and the same treatment in this regard. And here is the point of equality or the need, the commitment, to avoid discrimination between one religion and another. Some would of course say that equality among religions should not mean treating all religions in a state on the same level. This assertion in terms of eligibility for funds and other assistance carries a lot of weight. The importance, the content and the calibre in terms of the number of adherents is to be taken into consideration. The argument goes that in the same way as the state should not treat all minorities within its confines and subject to its jurisdiction in the same manner, so must it deal with the various churches. The point of equality becomes one of justice and equity, if not reasonableness and proportionality: each according to his due. One has to consider the social relevance of the religion and on this basis to portion out the assistance and finance of that religion. In the same way that the state recognises the importance of private organisation and non-governmental organisation, so in like manner it should also give assistance to each and every religion within its territory.

The influence of a state Church could also be seen in the ease of prosecution and Laws forbidding blasphemy against only one religion. Even when the Maltese state takes it upon itself to punish crimes against the religious sentiment, it does so discriminately. Punishing crimes against the Religious sentiment, should, also in a secular state become relevant only, and insofar as, the maintenance of law and order is concerned, and for no other reason. But Article 163 of the Criminal Code⁶, provides expressly that:

“Whosoever by words, gestures, written matter, whether printed or not, or pictures or by some, other visible means, publicly vilifies the Roman Catholic Apostolic Religion which is the religion of Malta, or gives offence to the Roman Catholic Apostolic Religion by vilifying those who profess such religion or its ministers, or anything which forms the object of, or is consecrated to, or is necessarily destined to Roman Catholic worship, shall, on conviction, be liable to imprisonment for a term from one to six months.” A more fundamentalist approach towards the Roman Catholic Apostolic Religion than this one cannot anticipate. But is this a relic of the past,⁷ a dead letter, or a reality in today's Maltese experience capable of being used whenever it is convenient for the powers that be.

To be fair and objective, one must also mention here the provisions of the following section, which punishes vilification of any cult tolerated by law, but the punishment in this case is reduced to half of that mentioned in the previous section. The question to be decided by any prosecutor who decides to prosecute any of these crimes, and by a court of law, if and when the question arises before it, is what is to be meant by “cult tolerated by law.” Section 165 provides against the disturbance of the performance of any function, ceremony or religious service of the Roman Catholic Apostolic Religion or of any other religion tolerated by law,

⁶ Cap 9 of The Revised Edition Of the Laws of Malta.

⁷ This section was introduced by Act XXVIII of 1933.

which is carried out with the assistance of a minister of religion or in any place of worship or in any public place.

Should there be a distinction of a “cult” or religion “accepted” by the law and those that are not? And what is the criterion? Is this a distinction between a religion and a sect or are we referring to something more fundamental than that, such as those cults or small communities practising deviant, sinister and eccentric rites that are also detrimental to the members of the community? The terminology used is significant in a way, and yet any religion or belief comes under the notion of a cult. But “cult” means something less than established religion, and very often the term includes sects within the same or established religion. A cult that is not tolerated by the law should therefore be one that violates fundamental social values both as a matter of belief as well as a matter of actual practice. And then how does a cult *become* accepted or tolerated by the law? What would be the case for example, when a sect such as the Jehovah Witnesses, embracing most of the Judeo-Christian philosophy and teaching, but then prohibiting blood transfusion even when such an intervention can save lives? Such a practice obviously offends human dignity guaranteed by the law.

It would appear that the Catholic Church has the authority under the constitution to teach its principles and diffuse its morality among the Maltese population. However several religious groups have become physically present in Malta, and evidence of their activities does not only come from the numerous buildings, such as mosques and synagogues that have appeared. It would appear that persons of different religious denominations are allowed to practice their faith freely so long as the religious practice and manifestation does not infringe upon the public order.

The third paragraph of Article 2 of the constitution would require the State to include as part of a compulsory curriculum the teaching of the Roman Catholic religion. However, in practice students of a different creed are allowed to opt out of religious studies and classes.

Article 2 (1) of the Maltese Civil Code reflects the Roman Catholic concept of marriage in requiring the essential elements of Unity, Fidelity and Indissolubility. It also embodies the canon law principles as regards essential validity and consequential grounds for nullity. It would appear therefore, that if a particular faith allows either of the spouses to marry more than one spouse such a marriage could never be recognised under Maltese Law as the “*Lex Loci actus*”. But would Maltese Law recognise as valid such a marriage considered valid by the law of the place where the marriage was celebrated? The problem therefore is the result of our civil code’s adoption of the concept and notion of marriage according to our particular religion - The Roman Catholic Religion.

The Question of Religious Symbols

The presence of the crucifix that is the symbol of the Roman Catholic religion in the classrooms of state schools has been the subject of some polemic. It has been suggested that the presence of the crucifix to the exclusion of any other religious symbol is discriminatory. To what extent a religious symbol offends the sentiments of other religions is debatable. It is however, true that the presence of a religious crucifix in state school classrooms is evidence of the predominance and importance of Catholicism over any other religion in this country.

On the other hand, the presence or otherwise of the crucifix does not hinder the student of a different faith from practising his religion. It would be another matter when religious festivals recognised as public holidays interfere with important appointments in the calendar of other religious denominations.

The State should not legislate under pressure or in a situation of panic on matters touching the religious sentiments of the various religious groups within its territory. It is true that the amount of freedom to manifest one's religion in most western states would not be duplicated in an Islamic state, and this primarily because of the very theological structure of the Islamic religion itself.

It is argued, that the western democracies should not defend the rights of people coming from countries where very often multiculturalism is denied, and where there is no freedom of religion. Why should the West guarantee the freedom of religion or freedom from religious discrimination to people whose religions are themselves not tolerant of other religions in their midst?

However the way to defend freedom, freedom of religion, freedom from religious discrimination, is not to shut the door to freedom, but to let freedom be the instrument of persuasion, the beacon in the midst of the darkness. Case law has supported this stand. For example the Italian Constitutional Court in a judgment of 1996 decided that the oath taken in a court of law is not a religious manifestation it assumed a religious meaning that violated the freedom of conscience of the unbelieving witness. To respect the freedom of conscience, the formula of the oath must be neutral, the content of the value that the oath assumes can also be religious, but it remains a matter of conscience for the person who swears. The same Constitutional Court in 1984 had affirmed the principle that in public schools students should not be forced to take up religion classes. Such students cannot be obliged to attend alternative lessons because such an imposition would offend against the freedom of religion.

In 1989 the French Conseil d'Etat had decided that the wearing of veils by some Muslim students did not violate a school's principles of secularity, because there are certain signs of membership to a religious community which are actually the manifestation of belonging to a certain ethnic group, and against which, therefore, the state should not intervene.

It is therefore surprising how Muslim headscarves and other religious symbols were banned from French schools and public buildings after a specially appointed commission told the government that legislation was needed to defend the secular nature of the state. The 20-member group, appointed by President Jacques Chirac and headed by the national ombudsman, Bernard Stasi, recommended that all "conspicuous" signs of religious belief - specifically including Jewish skullcaps, oversized Christian crosses and Islamic headscarves - be outlawed in state-approved schools. The report also recommended that the laws should include a clause requiring "the strict neutrality of all public service employees".

The question of whether a "secularism law" is desirable or necessary - particularly to deal with the steadily increasing number of Muslim girls wanting to wear headscarves at school - may seem abstract, or even absurd, to those used to British or American notions of multiculturalism. In France, where secularism is a constitutional guarantee and everyone, in

the eyes of the republic, is supposed to be equally French regardless of ethnic or religious differences, the issue has dominated media, public and political debate for several months.

The origin of the debate, which has split French society along unfamiliar lines, is considered to be the radicalisation of French Islam. Mr Stasi acknowledged as much, saying the law aimed to preserve constitutional secularism and counter, “forces trying to destabilise the republic”, a clear reference to Islamic fundamentalism. But he stressed that the law was not directed at France's mainly moderate Muslim community of 5 million. Its aim was to give all religions a more equal footing.

It is now illegal to wear religious symbols in French state schools, which are considered the cornerstone of the republic and a place where its core values must be transmitted and enforced. In any case, head teachers can suspend or expel pupils wearing “ostentatious” religious signs that “constitute an act of pressure, provocation, proselytism or propaganda”. The commission agreed with most teachers that the rules have placed too great a burden on them. The main teachers’ union, the SNES, said recently that the proposals did not go far enough to promote secularism in schools. On March 15, 2005 Reuters reported, “A senior official declared France’s law against Muslim headscarves in schools a success, one year after the bill was passed, while a pro-veil group said the new line had claimed what it called 806 victims. Hanifa Cherifi, inspector general at the Education Ministry, said the law had eased tensions at state schools and reconfirmed the separation of church and state as an essential rule. After the stormy debate over the law, France now understood its Muslim population better and was more able to distinguish between radicals and moderates, she said. ‘In terms of the numbers, the result is quite positive,’ Cherifi told Radio France Internationale. ‘Beyond that, the general atmosphere is quite positive and satisfactory for all, both the schools and the pupils. We are quite pleased.’⁸

On April 19, 2005 *BBC News* reported, “A French court has upheld a school’s decision to expel three Sikh boys for wearing turbans to school. The tribunal said the boys’ continued wearing of an under-turban made them ‘immediately recognisable as Sikhs.’ Under a law passed amid protests in March 2004, French students are barred from wearing conspicuous religious symbols at school. The boys’ lawyers said they would appeal and if necessary take their case to the European Court of Human Rights. The boys, aged 15 to 18, were expelled from the Louise-Michel school in Bobigny, north-east of Paris, last November.” There must be many more examples of similar incidents.

But freedom of religion is not only the personal beliefs of the individual. It includes the right to religious manifestation as well. Some signs and attire are necessarily part of the way one manifests himself/herself to belong to a certain religion or religious group. To what extent is denying the manifestation of one religion in this form an infringement of the freedom of religion or discrimination against a religious group? On October 8, 2004 the *Associated Press* reported, “Pope John Paul II exhorted Christians on Friday to display signs of their faith more forcefully, contending the practice neither infringes on separation of church and state nor breeds intolerance. His comments appeared to be a clear reference to raging debates over laws such as France's recent ban on wearing Islamic headscarves, Jewish skull caps or large Christian crosses in schools. In Italy, a Muslim activist's efforts

⁸ March 15, 2005, *Reuters*.

last year to remove crucifixes from public school classrooms stirred widespread resentment in the overwhelmingly Roman Catholic country.”⁹

Religious Discrimination and Employment

Article 45 of the Constitution of Malta prohibits discrimination on the basis of race, place of origin, political opinions or creed. That article may be more extensive in its application than article 14 of the European Convention on Fundamental Human Rights and Freedoms 1950 which is the First Schedule of Act XIV of 1987. The non-discriminatory provisions of the Constitution would apply to a requirement made that the Roman Catholic Apostolic Religion shall be taught by a person professing that religion.¹⁰ A similar exception has not been made with regard to other denominations. This principle however seems to be enshrined in the new employment Directive namely: Article 4(2).

“Member States may provide that, in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim, a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification.”¹¹

Act I of 2003, The Equality for Men and Women Act, created a National Commission for the Promotion of Equality for Men and Woman. In fact the declared purpose of the act is to eradicate any existing gender-based discrimination in Maltese society. Article 3 thereof specifically provides that nothing in that Act shall be construed as affecting any rule relating to religious practice, access to priesthood or membership in any religious order or other religious communities. But the point to be made here is that there is no other similar legislation purporting to reduce religious discrimination in this country such as the Employment Equality (Religion or Belief) Regulations 2003 in the U.K. where there is:

Direct discrimination that is where there is less favourable treatment on grounds of religion or belief. This includes actual or perceived religion or belief and covers the complainant's association with someone of a particular religion or belief (meaning religion, religious belief or similar philosophical belief).

Indirect discrimination exists where there is a provision, criterion or practice applied equally to persons of a different religion or belief, which puts or would put persons of the same religion or belief as the complainant at a particular disadvantage when compared to other persons, which puts the complainant at a disadvantage, which the employer cannot show to be a proportionate means of achieving a legitimate aim. This is where a practice has the effect of disadvantaging people of a particular religion or belief, which cannot be justified by the employer.

⁹ October 8, 2004, *Beliefnet.com/AP*.

¹⁰ Subsection 9 thereof.

¹¹ Council Directive 2000/78/EC of 27th November 2000.

The Regulations protect job applicants, workers and others in relation to recruitment, employment terms, promotion, training, dismissal and any other detriment. There are some exceptions, for example where possessing a particular religion or belief is a genuine occupational qualification.

It has been stated that although the U.K. is signatory to the major International Instruments providing against religious discrimination, its existing anti-discrimination legislation is insufficient to provide any meaningful protection for some of its largest religious minorities. The Race Relation Act 1976, the most significant piece of anti-discrimination legislation in the UK for ethnic minorities, has limitations. First, it outlaws discrimination by the markers of colour, race, nationality, and national or ethnic origin, but not the grounds of religion or belief. And second, its case law definition of 'racial group' includes ethnic religious minorities like Jews and Sikhs, but excludes multi-ethnic religious groups. The result is a loophole in the law with a hierarchy of religion in terms of the protection given to adherents. It also means that some ethnic minority groups are left unprotected where the perpetrator claims that his discrimination is on the basis of religion even though it may actually have been racist.

The anomalies, loopholes and inequalities in the law are recreated and reinforced by the Race Relations (Amendment) Act 2000, which requires all public bodies to prohibit direct and indirect racial discrimination in the performance of their public duties, to take positive steps to eliminate such discrimination and to promote equality of opportunity for all irrespective of race. Whilst the protection and provisions of this new Act rightly extend to some religious minority communities, like Jews and Sikhs, once again, they do not extend to multi-ethnic religious groups.

Given this current lack of legal protection of such minority communities, the EU Framework Employment Directive (Council Directive 2000/78/EC of 27 November 2000) is a welcome start. It seeks to establish a general framework for equal treatment and requires member states to introduce legislation no later than 2 December 2003 to outlaw religious discrimination amongst other strands of discrimination.

However, the scope of the Employment Directive is restricted to areas of employment and occupation only, as opposed to its sister directive on race and ethnic origin, which is far more extensive. Thus, after the implementation of the Employment directive, minority faith communities will still NOT be protected from discrimination in areas of social security and health care; education; goods and services available to the public (including housing); and social advantages (e.g. housing benefit, student maintenance grants and loans, bus passes for senior citizens, etc).

A shop, restaurant, hotel or any other private sector provider could refuse service to a person because he or she is from a particular religion. In the case of a Muslim - if the victim is from an ethnic community in which Muslims are a majority, for example the Bangladeshi or Pakistani community, then they may be covered under indirect racial discrimination, but if they are a Chinese, English, African or Caribbean Muslim then they would not.

Even if they are covered by indirect racial discrimination, however, the offender may not have to pay any compensation if there was no 'racial' motivation. If the shop, restaurant or hotel was to say that the reason for not serving the Muslim customer was precisely because s/he was a Muslim and not because of his/her ethnic origin (“I have no problems with Pakistanis its them bearded Muslims that I don't like”), then it would have a defence to a claim for compensation, since his motivation was religious not racial discrimination.

In the U.S. the Civil Rights Act 1964 Title VII prohibits employers from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. The Act also requires employers to reasonably accommodate the religious practices of an employee or prospective employee, unless to do so would create an undue hardship upon the employer. Flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers are examples of accommodating an employee's religious beliefs.

Employers cannot schedule examinations or other selection activities in conflict with a current or prospective employee's religious needs, inquire about an applicant's future availability at certain times, maintain a restrictive dress code, or refuse to allow observance of a Sabbath or religious holiday, unless the employer can prove that not doing so would cause an undue hardship.

An employer can claim undue hardship when accommodating an employee's religious practices if allowing such practices requires more than ordinary administrative costs. Undue hardship also may be shown if changing a bona fide seniority system to accommodate one employee's religious practices denies another employee the job or shift preference guaranteed by the seniority system.

An employee whose religious practices prohibit payment of union dues to a labor organization cannot be required to pay the dues, but may pay an equal sum to a charitable organization.

Mandatory “new age” training programs, designed to improve employee motivation, cooperation or productivity through meditation, yoga, biofeedback or other practices, may conflict with the non-discriminatory provisions of Title VII. Employers must accommodate any employee who gives notice that these programs are inconsistent with the employee's religious beliefs, whether or not the employer believes there is a religious basis for the employee's objection.

It Remains a Question of Tolerance

The spate of terrorist acts prior to, and following 9/11 has triggered a high level of apprehension and anxiety in western countries hosting immigrant minorities. To what extent the democratic constitutional state can weather this delicate situation is not just a matter of conjecture. Anti-islamic feelings run high, and governments are then prone to interpret existing liberal and democratic laws in a different light, perhaps in a draconian and discriminatory manner. Western democracies have gone further, and with the excuse of providing security against terrorism have enacted laws and taken certain measures which are

restrictive and offensive to accepted standards in human rights law. Religion is usually the object and the excuse, because religion is probably the most significant characteristic of ethnic identity. Attitudes have changed and it may well be that the western secular state is falling back on itself to become introspective, questioning the very foundations and basic principles of its liberalism and its freedom. In those States which, like Malta, embrace a State Religion the ruling class will have every excuse to use religion as a tool of imposition on the rest because once the cinders of racism and xenophobia are fanned control of emotions and prejudice becomes a problem. This happens when democratic principles are forgotten, when the majority manages the guarantee of rights in its own way, according to its beliefs and usually against the minorities. The entrenched provisions in the Constitution or indeed any other instrument guaranteeing fundamental human rights and freedoms are not implemented on an equal footing and without discrimination. Then some become less equal than others.

The rejection by the French and Dutch electorates of the Constitution for Europe has certainly cast doubts on the whole process of European integration. The reasons for that rejection could be many and will long be debated. But there is a strong feeling that some of those reasons had something to do with the apprehension that the growing Islamic communities in Europe have disseminated. A misplaced fear and the wrong reaction, it is true, but a strong fear nevertheless. It would appear that it is becoming more and more unacceptable that the rights of Islamic communities living in the West should be guaranteed, when some Islamic movements challenge western culture and all that the West represents. After all, terrorism carried out in democratic countries like Spain is but a reminder of the fragility and insecurity of a system which however democratic and liberal itself rests primarily on the veiled use of force. The democratic and secular State should not withdraw within itself and operate in the same manner as a fundamentalist and monolithic State, that rejects cultural and political pluralism. Intolerance could only push the democratic organs of a free state to act under pressure and arbitrarily. Arbitrary powers are the negation of freedom and fundamental rights. Therefore eternal vigilance will always remain the price of freedom. Democracy has a right to defend itself, but only in a democratic and non-arbitrary manner.