Religious discrimination founded upon anti-discrimination laws: a now-global juridical risk

(Originally published in Italian: *La discriminazione religiosa fondata sulle leggi antidiscriminazione: un rischio giuridico ormai globale. Commento alla sentenza* Hosanna-Tabor v. EEOC*, Corte Suprema degli Stati Uniti,* 1.4.2012*, Ius Ecclesiae* 24 [2012], pp. 733-744 btcalb)

1. Introduction

Since the approval of Title VII of the Civil Rights Act of 1964[1] and of other laws (whether before or after) relating to workplace discrimination, United States appeals courts have consistently recognized the existence of a *ministerial exception* – an exception that precludes the application of these types of legislation in cases of work relationships between religious confessions and their ministers.[2] According to the established American jurisprudence in this area, to require a religious organization to accept or keep an undesired minister would be a type of intrusion depriving the organization of its control over the selection of its ministers, thereby going against the Religion Clauses contained in the First Amendment of the United States Constitution.[3]

The Supreme Court, for its part, had already recognized the applicability of the ministerial exception in various prior controversies related to the assets of religious organizations, in which there had been attempts on the part of civil authorities to

---

1 Cf. *Pub. L.* 88-352, Title VII, 78 *Stat.* 241, which entered into force on July 2, 1964.

2 Cf. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC et al.*, Opinion of the Court, II, C, p. 13, note 2, where the principal judgments on the subject by appeals courts are listed. In the United States, judicial districts are organized in circuits and regions, with an appellate court in each one. Each appellate court judges the appeals originating from the district courts belonging to its own circuit, as well as from certain federal administrative entities. The right to appeal applies to all lawsuits upon which a district court pronounced a definitive judgment. As a rule, the appeals courts are comprised of three judges.

3 As the Supreme Court recalls in the main body of the judgment that we are presenting, the Establishment Clause prevents the naming of ministers by civil authorities, while the Free Exercise Clause prevents interference by civil authorities in the choice of ministers for religious organizations (cf. *Hosanna-Tabor v. EEOC*, Opinion of the Court, II, A, p. 9).

interfere in the selection of religious ministers.[4] But it had never had occasion to rule on the application of the ministerial exception in a case of the termination of a minister where the laws regarding workplace discrimination might have applied.

The occasion arrived precisely with the case that we present in this article: *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission et al*. This judgment – because of both its content and the unanimity expressed by the nine members of the Supreme Court – is already considered among the most important decisions on religious freedom issued in decades by the highest court of the United States.[5]

We are certain that in the coming years commentaries on this judgment will multiply, which will help to expound upon the key points that are found in the text of the decision; these key points are not only juridical but also have to do with the history of religious liberty in the Anglo-Saxon and North American settings. In these pages we will seek to present the principal elements of the case and to offer some reflections that might aid in understanding possible future developments of the reasoning employed by the Supreme Court.

---

4 Cf. *Watson v. Jones*, 13 Wall. 679; *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94; *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696.

5 In fact, the two opposing positions in the case have been officially maintained by a great number of institutions and associations. Here we offer a list of legal opinions presented before the Court, which helps to give an idea of the importance of the case and of the large number of institutions interested in its outcome (all of the opinions, even those brought by the Federal Government against the application of the ministerial exception in this case, can be consulted online at http://www.scotusblog.com/case-files/cases/hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc). *Amicus Briefs Supporting Petitioner (Hosanna-Tabor Church and School)*: American Association of Christian Schools; American Center for Law and Justice and the Intervarsity Christian Fellowship/USA Urging Reversal; American Jewish Committee and the Union for Reform Judaism; American Bible Society et al.; Council for Christian Colleges and Universities; Evangelical Covenant Church et al.; International Center for Law and Religious Studies at Brigham Young University; International Mission Board of the Southern Baptist Convention et al.; Justice and Freedom Fund; Lutheran Church-Missouri Synod; Michigan and Seven Other States; Muslim-American Public Affairs Council et al.; Professor Eugene Volokh et al.; Religious Organizations and Institutions; Rutherford Institute; Jewish Educational Center et al.; Religious Tribunal Experts; Trinity Baptist Church in Support of Jacksonville; United States Conference of Catholic Bishops et al.; Wallbuilders, Inc. *Amicus Briefs Supporting Respondent (EEOC et al.)*: NAACP Legal Defense Fund et al. Urging Affirmance; People for the American Way; Law and Religion Professors; Bishopaccountability.org et al.; Antitrust Professors and Scholars; Anti-Defamation League; Americans United for Separation of Church and State et al.; American Humanist Association and American Atheists, Inc. et al.; National Employment Lawyers Association; Neil H. Cogan Urging Affirmance.

2. PRINCIPAL FACTS

Beginning in 1999, Cheryl Perich worked as a teacher at the Hosanna-Tabor Evangelical Lutheran Church and School (Redford, Michigan). After several years in the same school, and after having taken a course in specified theological formation, Perich was granted the title *called teacher* – that is, a person called by God to carry out not only her charge as teacher but also other roles as a religious guide in the school. The school's other teachers who did not have this position were called *lay teachers*.[6] Perich worked with fourth grade students; beyond teaching various secular subjects, she additionally taught religion and led daily prayers with her students. Two times a year she also led religious services in the chapel in the presence of all of the school's students.

Before the beginning of the 2004-2005 school year, Perich was diagnosed with narcolepsy, forcing her to request a year of sick leave. In January of 2005, Perich notified the school president that she would already be capable of returning to work toward the end of the first semester. The president informed her of the fact that they had already hired another teacher to cover her position for that academic year. Moreover, the school had doubts as to whether Perich would be able to return to her teaching activity there.

The Lutheran congregation then offered to pay a portion of Perich's health insurance premiums in exchange for her relinquishing the position of *called teacher*. Perich rejected the offer and threatened to take legal action against the school if she were not immediately reinstated. Following several meetings and exchanges of letters, the Lutheran congregation decided to revoke her *called teacher* contract; they cited as the basis for their decision her insubordinate behavior and the damage inflicted upon her relationship with the school due to her threatening of legal action.

At that point, Perich presented her case to the Equal Employment Opportunity Commission (EEOC), which, in view of the facts set forth, decided to bring suit against

---

6 These titles were commonly used in schools sponsored by the Lutheran Church—Missouri Synod (LCMS); *called teachers* at that time also received the formal title of *commissioned ministers* (cf. *Hosanna-Tabor v. EEOC*, Opinion of the Court, I, A, p. 2).

Hosanna-Tabor before the district court of Michigan.[7] According to the EEOC, Perich's termination had been decided in retaliation for her threat of lawsuit against the school and entailed a violation of the Americans with Disabilities Act, which forbids all form of discrimination based on disability.[8] Perich endorsed the claim.[9]

The Hosanna-Tabor school therefore invoked the ministerial exception, arguing that the case involved a work relationship between a religious institution and one of its ministers. The district court of Michigan agreed with the applicability of the exception to the case under examination.[10]

In contrast, the competent court of appeals (the Sixth Circuit), after having recognized in abstract the existence of the ministerial exception (based upon the First Amendment of the Constitution), arrived at the conclusion that such an exception did not apply to the case. According to the court, Cheryl Perich – even if she had formally received the title of *called teacher* – did not perform functions much different than those performed by other teachers of the school (*lay teachers*); therefore her role could not be understood as ministerial.[11]

3. Principal juridical themes

The subsequent intervention of the Supreme Court had its origin and ground precisely in the appellate court's affirmation, viz., that the ministerial exception did not apply to the case of Cheryl Perich's termination.[12]

---

7 District courts are the primary courts of first instance in the United States federal judiciary system. They have competence for almost all types of federal proceedings. Proceedings before district courts are ruled by a single judge, either alone or with the participation of a jury.

8 Cf. 42 U.S.C. §12101 et seq., 1990.

9 The EEOC, just like some state-sponsored Fair Employment Practices Agencies (FEPAs), provides services of inspection and arbitration; it can also bring legal action on behalf of workers, in connection with Title VII of the Civil Rights Act. Title VII additionally foresees the possibility of a citizen's pursuing private legal action.

10 Cf. U.S. District Court for the Eastern District of Michigan, No. 07-14124, October 23, 2008.

11 Cf. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 597 F. 3d 769, 777 (6th Cir. 2010).

12 The Supreme Court is the federal judiciary system's tribunal of final instance. In general, the Court agrees to judge only those cases to which appellate courts have given discordant judgments; it also

In its decision, the Supreme Court recognized anew the existence of a ministerial exception founded upon the Religion Clauses of the First Amendment. It also affirmed that, for a religious institution, the applicability of said exception must be decided on a case-by-case basis in situations of employee termination that potentially violated anti-discrimination laws. Such a decision should take into account the type of relationship that existed between the religious institution and the terminated individual.[13]

The Court additionally explained that the ministerial exception functions like a true positive safeguard, and not like a mere judicial exception. Which is to say, the application of the exception does not mean that the court declares itself incompetent for the case; rather, it means that the anti-discrimination laws, which in another type of work relationship might afford damages to the worker, are not applicable in cases of ministers in religious organizations. Therefore, in cases where a religious institution proposes the ministerial exception, it falls in the first place to the court to analyze the relationship between the religious organization and the worker, in order to verify the applicability of the raised exception. It does not, however, belong to the court to study the reasons for the termination, which should be analyzed only if the exception were not applicable to the concrete case.[14]

In any case, the Supreme Court underlined how, in cases of termination or non-selection of a minister, the ministerial exception protects the religious institution even when the reasons for the decision may not have been of a religious character. According to the Supreme Court, that which is to be protected – based upon the First Amendment of the Constitution – is the autonomy of religious denominations in selecting and supervising their own ministers.[15]

Coming to the concrete case under consideration, the Supreme Court decisively affirmed the applicability of the ministerial exception – not only because Cheryl Perich had received the formal title of *called teacher* from the Lutheran Church, but also because of the material content and the nature of her work in the Hosanna-Tabor

---

judges those cases that raise important questions relative to constitutional law or to the interpretation of federal laws for which clarification is necessary.

13 Cf. *Hosanna-Tabor v. EEOC*, Opinion of the Court, IV, p. 21.

14 Cf. *Hosanna-Tabor v. EEOC*, Opinion of the Court, III, p. 20, note 4.

15 Cf. *Hosanna-Tabor v. EEOC*, Opinion of the Court, III, p. 20. The Court affirms that, according to the Lutheran denomination, the primary motive for termination in this case was of a religious nature, given that the threat of taking legal action against the school went against the belief of the Lutheran faith, according to which members must resolve their own disputes within the denomination (cf. *ibid.*, Opinion of the Court, I, B, p. 15).

school. In the main body of the sentence it is explained how Perich, through her assignment to religious instruction, would have carried out an important role in the transmission of the Lutheran faith to successive generations;[16] moreover, she would have committed herself to fulfill such a role according to the Word of God and the confessional standards of the Lutheran Church derived from Sacred Scripture.[17]

The Court's argument here is one of the decision's principal points, given that it contains the ultimate reason for which the applicability of the ministerial exception was admitted to the case under examination: viz., the protection both of the religious confession's message and of the recipients of such message. With this reasoning, the Supreme Court clarifies how the ministerial exception is not only a means for safeguarding the autonomy of religious denominations in the selection of their own ministers; it is also a true and proper instrument for protecting the message of every single religious entity and the free transmission of that message. Any type of external interference in this area would deprive religious denominations of control over the selection not only of those who carry out its religious functions, but also of those who represent its beliefs.[18]

Even if the interest of the state and society in the observance of workplace anti-discrimination laws is important, no less important is the religious confessions' interest in the choice of who will preach their message, teach their faith, or carry forward their mission. According to the Court, this second interest must prevail in cases where the ministerial exception applies.[19]

This profound rationale concerning the protection of the doctrinal and moral patrimony of every religious confession, as one of the ultimate bases for the ministerial exception, is found even more prevalently in the particular opinions issued by Justices Thomas and Alito – and, in the case of Justice Alito, with Justice Kagan's endorsement as well.[20]

In the first place, according to Justice Thomas, is the importance of the court's decision not to offer a list of characteristics that the role of minister in a religious denomination must have in order to be able to confirm the applicability of the

16 Cf. *Hosanna-Tabor v. EEOC*, Opinion of the Court, III, p. 17.

17 Cf. *Hosanna-Tabor v. EEOC*, Opinion of the Court, III, p. 16.

18 Cf. *Hosanna-Tabor v. EEOC*, Opinion of the Court, II, C, p. 13.

19 Cf. *Hosanna-Tabor v. EEOC*, Opinion of the Court, IV, p. 21.

20 Cf. *Hosanna-Tabor v. EEOC et al.,* Concurring Opinions by Justice Thomas (pp. 1-2) , and Justices Alito and Kagan (pp. 1-10).

ministerial exception. Such a list, in itself, would entail a violation of the autonomy of religious entities, because it could compel them to adapt their ministerial standards to such characteristics.[21] Furthermore, according to Justices Alito and Kagan, in the process of determining the applicability of the ministerial exception, each court must analyze the functions carried out by the terminated individual within the religious organization. Such roles – as the explanation of the judgment already made clear – do not necessarily have to be religious functions of worship or spiritual guidance, but could simply concern the transmission of the confession's message.[22]

Going deeper into the reasons that establish the ministerial exception, Justice Alito explains in his opinion how, in the history of the United States (and not only), the autonomy of religious denominations was necessary precisely as a defense in the face of various civil laws that were oppressive of fundamental rights.[23] According to Alito, this contribution of religious denominations to the organization of different civil societies is one of the most profound reasons for establishing the protection of each denomination's doctrinal and moral patrimony by means of the application of the ministerial exception. Moreover (and again, according to Justices Alito and Kagan), the credibility of that which is transmitted by each religious confession depends in large part upon the character and the conduct of those who transmit it. Given this fact, the protection of doctrinal patrimonies through the application of the ministerial exception would be advantageous also in cases of the termination of persons who carry out religious teaching functions in social institutions attached to religious confessions.[24]

---

21 Cf. *Hosanna-Tabor v. EEOC*, Concurring Opinion by Justice Thomas, p. 2.

22 "The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith (…) The 'ministerial' exception should be tailored to this purpose. It should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith" (*Hosanna-Tabor v. EEOC*, Concurring Opinion by Justices Alito and Kagan, p. 2). "These include those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation" (*Hosanna-Tabor v. EEOC*, Concurring Opinion by Justices Alito and Kagan, p. 3).

23 *Hosanna-Tabor v. EEOC*, Concurring Opinion by Justices Alito and Kagan, pp. 2 and 3.

24 "When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on someone to be an effective advocate for

3. Evaluation of the judgment

As can be seen, the ministerial exception – as outlined by the Supreme Court in this, its first case on the matter – offers ample protection to the autonomy of religious institutions in cases that could involve the application of an anti-discrimination norm following the termination or non-selection of a worker.[25] Furthermore, the protection of the autonomy of religious entities by means of the ministerial exception, in the North American case, connects with the right to freedom of association that is offered by the law. According to the Supreme Court's jurisprudence, to force a group to accept certain members could damage its capacity to express its own viewpoints before

its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very 'embodiment of its message' and 'its voice to the faithful' (*Petruska v. Gannon Univ.*, 462 F. 3d 294, 306, CA3 2006). A religious body's control over such 'employees' is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world" (*Hosanna-Tabor v. EEOC*, Concurring Opinion by Justices Alito and Kagan, I, p. 4). "The 'ministerial' exception gives concrete protection to the free 'expression and dissemination of any religious doctrine'. The Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith" (*Ibid.*, Concurring Opinion by Justices Alito and Kagan, I, p. 5).

25 Recently, the European Court of Human Rights has also had to take various cases relating to the autonomy of religious entities in the selection and naming of their ministers. As can be verified by reading these decisions, the manner of protecting the autonomy of religious entities according to the framework of the ministerial exception in the United States differs from the other ways used in the European juridical framework. In similar cases, some European courts have declared the religious entity's autonomy only after analyzing – against the fundamental principles of the legal order (especially the principle of non-arbitrariness) – the congruity of the reasons put forth for letting go of one of its ministers or workers (cf., in this regard, the specific doctrine developed recently by the Federal Court of Germany, as described in a sentence of the Court of Strasbourg: *Baudler v. Germany*, application no. 38254/04; *Reuter v. Germany*, application no. 39775/04; *Müller v. Germany*, application no. 12986/04). On the contrary, American courts – as we have already pointed out – analyze, *in primis*, the type of relationship between the religious organization and the terminated individual, in order to verify the applicability of the ministerial exception. If the exception applies, the court does not base its decision on the legal legitimacy of the reasons given for the termination – whether they are religious reasons or not – but bases it precisely upon the religious organization's autonomy in pursuing this type of measure.

society.[26] Therefore, even in the protection of religious liberty through the right to free association, the high court (among its various arguments) gives priority to each group, especially religious ones, to express freely the viewpoints shared by its members.[27]

As we have already shown, in cases of the non-selection or termination of a person who carries out religious teaching functions in an organization, the ministerial exception finds its ultimate foundation in the protection of the religious confession's doctrinal patrimony, which is a true juridical good, shared by the entirety of each confession's members. This ensures that the ministerial exception can be equally applicable to cases of persons who, even if they are not ministers of the confession, nevertheless carry out religious teaching functions (i.e., transmitting the doctrinal patrimony) in an educational institution of any level: teachers of religion in schools, of theology in universities, etc. In particular, the relationship of religion or theology teachers of Catholic institutions with the ecclesiastical authority – as it is defined by the canonical legislation in force – would render the ministerial exception fully applicable in cases of the termination or non-selection of a teacher. Indeed, just as in the case examined by the Supreme Court, this type of teacher – even though they are not ministers – receives from the ecclesiastical authority a mandate to religious teaching, preceded by an obligatory period of formation.[28]

---

26 "Applying the protection of the First Amendment to roles of religious leadership, worship, ritual, and expression focuses on the objective functions that are important for the autonomy of any religious group, regardless of its beliefs. As we have recognized in a similar context, 'forcing a group to accept certain members may impair [its ability] to express those views, and only those views, that it intends to express' (*Boy Scouts of America v. Dale*, 530 U.S. 640, 648 [2000]). That principle applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals (…) Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith" (*Hosanna-Tabor v. EEOC*, Concurring Opinion by Justices Alito and Kagan, I, pp. 3-4).

27 In the legal brief presented by the U.S. Federal Government against the application of the ministerial exception to the Hosanna-Tabor case, it was affirmed that such an exception – in general terms – does not exist in the *Religion Clauses* of the First Amendment of the Constitution (*Brief for Federal Respondent*, pp. 14 and 48-54). According to the Federal Government, religious employers could defend their interests using possible exceptions rooted in the freedom of association, like any and all other types of associations (*Brief for Federal Respondent*, p. 31, n. 2). The Supreme Court's contrary affirmation – according to which the Religion Clauses can ground the ministerial exception – emphasizes, in our opinion, the associative peculiarities of religious organizations, which comply in great part with the organizing social values of their formative patrimonies.

28 Cf. CIC, cc. 804 § 2, 805 and 812.

In our opinion, however, the rationale concerning the protection of religious patrimony, which establishes the above-mentioned two ways for protecting religious freedom (the right to free association and the right to autonomy in the choice of those who hand on the religious patrimony), must play an important role in another type of case: a type which is becoming ever more common on the North American and worldwide social scene. Here we are referring to cases in which, by means of the application of anti-discrimination laws that do not admit of exemption, that which is damaged is not only the freedom of a religious institution to choose those who will hand on its doctrinal patrimony, but also the freedom to inspire with said patrimony institutions of different characters: educational, healthcare, charitable, social communication, etc.

This happens when, for example, by advancing the claim that an individual is being discriminated against, it is sought to impose the acceptance or non-termination of certain workers upon an institution of religious inspiration (educational, healthcare, social, etc.) – workers who have a lifestyle or type of professional practice that goes against said inspiration. What follows from this is damage to the religious liberty of the institution and of its beneficiaries, who are seeking precisely a type of social service that is in conformity with the institution's specific inspiration. In the educational field the most significant cases are those of teachers who do not work directly in religious teaching, but who carry out their teaching functions within schools of religious inspiration. Such teachers assume – at the beginning of their mandate and in a manner that is legally binding – the role of discharging their proper functions under the inspiration of the institution's message.[29]

In this regard, it is worth taking note of an Ohio district judge's affirmation in the judgment *Christa Dias v. Archdiocese of Cincinnati et al.*, drawing upon the Supreme Court's teaching in the Hosanna-Tabor case. The judge ruled that the ministerial exception would not apply to the case of a computer teacher (unmarried) in a Catholic school who became pregnant by means of artificial insemination.[30] In the text of the judgment, the same judge indicates that, on the contrary, the ministerial exception would apply in a case where the subject taught were that of religion, precisely for the

[29] We obviously do not wish to imply that the ministerial exception always applies in this type of case; rather, we wish to emphasize that the reasons for protecting religious freedom underpinning the ministerial exception must be kept in mind when examining this type of case.

[30] Cf. U.S. District Court for the Southern District of Ohio, Western Division in Cincinnati, No. 1:11-cv-00251, March 29, 2012.

fact that an official title and a formal mandate from the religious authority would be necessary, after having verified that the selected person possessed the necessary skills for the position.[31] The judgment is interesting because it is the first to take into account the principles of *Hosanna-Tabor* in the area of education.[32]

There are other situations of discrimination of religious institutions that occur on the basis of measures targeting potential individual discrimination. Such situations emerge when institutions of religious inspiration are obligated by civil authorities to undertake functions contrary to their inspiration, sometimes even making the concession of public financial assistance contingent upon the implementation of said functions. We find a recent example again in the United States, in the latest healthcare measures implemented by the Federal Government (expected to become effective in 2014). These measures foresee, even for Catholic organizations, the obligation of providing insurance to their employees for an array of healthcare services including abortion, sterilization, and contraception.[33]

The risk looms even larger in the case of anti-discrimination laws that have juridically-abstract presuppositions. Such was the case with the condemnation issued by the Delegation of the Holy See on December 18, 2008 at the 63rd Session of the General Assembly of the United Nations, in relation to the *Declaration on Human Rights, Sexual Orientation, and Gender Identity*. This declaration was promoted by the French presidency of the European Union, which had the objective – respected by so many countries and even by the Holy See – of condemning all forms of violence against homosexual persons, as well as of inciting states to take the necessary measures to

---

31 Cf. *Ibid.*, pp. 7-13.

32 On the one hand, the non-application of the ministerial exception in this case is not surprising. On the other, it is surprising how the judgment used the charge of sexual discrimination in order to force the school to re-hire a teacher whose behavior was not in conformity with the moral principles that inspire that school. According to the judge, even if the practice of artificial insemination goes against Catholic doctrine, the use of such means would be noticeable only with regard to female teachers (due to their pregnancy); thus there would result discrimination against male teachers. According to the judge, this would be a case of "pregnancy discrimination" (*Ibid.*, pp. 15-17).

33 Cf. Health Care and Education Reconciliation Act (2010, Public Law No: 111-152), which modifies various points of the Patient Protection and Affordable Care Act (2009, Public Law No: 111-148). As is known, in the first half of 2012 more than fifty Catholic and Protestant institutions – including various dioceses – brought suit against the Act because of its discriminatory nature. For updated information on the status and progress of these cases, consult the web site of the Becket Fund for Religious Liberty (http://www.becketfund.org), the same legal firm that defended Hosanna-Tabor Church and School in the present case that we are considering.

bring an end to all penal sanctions against such persons. But according to the intervention of the Permanent Observer of the Holy See, the formulation of the declaration went well beyond that intent, given that new categories of discrimination were introduced in the text, such as discrimination on the basis of sexual orientation and of gender identity. These categories found neither recognition nor a clear and agreed definition in international law, and thus could give rise to serious juridical uncertainty whenever they might be taken into consideration in the practical formulation of fundamental rights.[34]

The declaration promoted by the French presidency of the European Union was not approved at that time, but in the ensuing years the dangers indicated by the Delegation of the Holy See in its intervention were fulfilled exactly. One of the most notable cases took place in Great Britain after the anti-discrimination regulations of the Equality Act of 2010 entered into effect.[35] In conformity with those regulations, British adoption agencies that received public financing – regardless of what their inspiration might be (religious or otherwise) – cannot differentiate on the basis of sexual orientation between persons who seek to care for children. The proposal of Catholic agencies to be declared exempt from such regulations (supported also by the Anglican Communion) was met with the refusal of state authorities. In practice, this decision has resulted in the closure of many Catholic organizations that for years had provided social services such as adoption and foster care. Moreover, taking the anti-discrimination norms of the Equality Act as its basis, the High Court of Justice of England and Wales decided in 2011 to deny the entrustment of foster children to a Pentecostal Christian couple, due to their moral principles on sex education and homosexuality.[36]

As we said earlier in this section, we hope that the principles employed by the Supreme Court in the Hosanna-Tabor case can be used in the future. These principles,

---

34 Cf. http://www.vatican.va/roman_curia/secretariat_state/2008/documents/rc_seg-st_20081218_-statement-sexual-orientation_en.html : *Statement of the Holy See Delegation at the 63rd Session of the General Assembly of the United Nations on the 'Declaration on Human Rights, Sexual Orientation and Gender Identity'*, December 18, 2008. Cf. also *L'Osservatore Romano*, December 19, 2008 (Italian Edition), which adds the following commentary to the Holy See's intervention: "For example, religions could see their right to transmit their teaching limited when they maintain that free homosexual behavior by their faithful should not be civilly penalized, but at the same time, they do not consider [such behavior] morally acceptable" (our translation).

35 Cf. http://www.legislation.gov.uk/ukpga/2010/15/contents.

36 Cf. *Johns v. Derby City Council*, [2011] EWHC 375 [Admin], of February 28.

concerning the defense of the doctrinal and moral patrimony of different religious confessions, should be used not only to protect the transmission of said patrimony within an organization or in its activities *ad extra*; they should also protect the right of citizens who belong to religious denominations to inspire their civic action (personal and institutional) according to the doctrinal and moral contents of that patrimony. Conversely, if the right of religious freedom in connection with the doctrinal patrimony of each religious confession is limited merely to the protection of its transmission (without respecting the legitimate inspirational role that the patrimony can have in the personal and institutional conduct of its members as citizens), then that which is impeded is the right of each member of the various confessions to contribute – personally and corporately – to the organization of civil society according to their own values, legitimately shared with other citizens.

Once it has been established, on the one hand, that there is a lack of discord between a religious denomination's practices and values and the limits imposed by the fundamental principles of public order, and on the other hand, that its patrimony contributes positively to the harmonious development of the social order, then it becomes a subtle form of religious discrimination to limit unduly the right of the faithful to inspire their sphere of civic action according to such values: religious discrimination that is subtle, yet devastating. It is the risk – now global – of religious discrimination based upon anti-discrimination laws.

IÑIGO MARTÍNEZ-ECHEVARRÍA