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Religious Diversity in the Workplace

The Case for Alternative Dispute Resolution

Élise Rouméas

Abstract

The workplace is a focal point for debates about religion and public life. This paper examines the question of religion at work, and how to fairly resolve the conflicts it generates. Specifically, it advocates for the use of Alternative Dispute Resolution (ADR) to address these conflicts. ADR refers to a set of dispute processing methods, mainly arbitration and mediation. Unlike litigation, these procedures rely on the consent and cooperation of the parties involved. I argue that ADR is best conceived of as a desirable complement to the rule of law rather than a cheaper alternative. It conveys a distinctive approach to procedural fairness, which is attentive to individual circumstances, and it frames the relationship between disputants in a cooperative way. ADR is thus a valuable tool for the accommodation of religious diversity in the professional world.

Keywords

Religion, exemption, accommodation, workplace, mediation, arbitration

Introduction

The workplace is a focal point for debates about religion and public life. Following the European Court of Justice's ruling in March 2017, the topic of headscarves at work has become increasingly prominent in the media.¹ Samira Achbita was dismissed from her job as a receptionist at G4S, a private security firm in Belgium, for wearing a headscarf at work, which violated a newly-adopted workplace regulation prohibiting any visible signs of political, religious, or philosophical beliefs. The Luxembourg Court ruled that the workplace regulation did not discriminate against workers specifically on the grounds of religion, given that it required all workers to "dress neutrally".² Some commentators suggested that this decision could be associated with the rise of far-right populist movements in Europe and an anti-Muslim climate. "Far-right leaders surely would have pounced had the court ruled differently", speculated a *New York Times* journalist.³ While some workplace controversies involve religious dress or symbols, others concern daily prayers, holy days, conscientious objection to occupational requirements, proselytism, special dietary restrictions, and so on. The modern firm appears to have become, unwillingly, a laboratory of interfaith coexistence.⁴

The theme of religious diversity in the workplace has been addressed by political theorists examining the case for exemptions from laws and regulations (Barry, 2001; Jones, 2016; Laborde, 2017; Laborde and Bardon, 2017; Nussbaum, 2008; Patten, 2017; Quong, 2006; Rosenblum, 2000; Seglow, 2011), and by legal scholars who focus on religious freedom and nondiscrimination law (Ahdar and Leigh, 2013; McCrea, 2010; Vickers, 2016). Authors have distinguished between arguments for and against exemptions, they have clarified the competing interests of the parties involved, and offered innovative rationales to balance them. Some have argued that legal exemptions are better construed as “exercises in adhocery” (Jones, 2017: 173).⁵ The wide diversity of employers, ranging from small family businesses to large-scale multinational corporations, coupled with the multiplicity of religious claims, makes it difficult to design uniform regulations. Yet, “exercises in adhocery” should not be conducted without procedural safeguards. I suggest that we should go further than clarifying the interests and normative considerations at stake in religious accommodation, to investigate procedures that could challenge old arrangements and produce new ones.

This paper tackles the general question of how conflicts about religion should be fairly addressed by examining the specific setting of the workplace.⁶ When this type of conflict arises in a private firm, what is the best method to address it? In fact, procedures have been introduced to alleviate the burden on the legal system and to find mutually satisfactory solutions to employment conflicts more generally. These methods are commonly referred to as Alternative Dispute Resolution (ADR). ADR refers to a set of dispute processing methods other than litigation; mainly arbitration and mediation. They rely on the consent of the parties involved. Such tools are uncontroversial when applied to conflicts that do not involve the violation of a right. However, many workplace disputes involve a breach of rights. An employee may be refused a promotion because of age, race, gender, sexual orientation, religious belief, or any other protected characteristic. In such cases, the use of ADR appears more troubling. The risk is that alternatives to litigation would come at the expense of the protection of rights. An early conciliation might resolve an employment dispute to the detriment of workers’ rights.

Despite these drawbacks, this paper advocates for the use of ADR in addressing workplace disputes involving religious claims. It argues that ADR conveys a distinctive approach to procedural fairness, which excels at individualised judgments. ADR is best conceived of as a desirable complement to the rule of law rather than a cheaper alternative. It is also well suited to navigate the normative grey zone surrounding religion at work.

I begin by showing why dispute resolution is needed to accommodate religion in the workplace. The right to religious freedom at work is not absolute; not all demands of

accommodation are entitlements of justice. Religious claims face competing considerations, such as the employer's economic freedom or co-workers' interest in fair treatment. The right to resign is not a sufficient safeguard of religious freedom at work; leaving a job can be very costly. Dispute resolution is needed to fairly arbitrate between competing claims.

The second section articulates a defense of ADR. There are good reasons to endorse ADR as a complement to litigation. In particular, the procedural value of ADR lies in its production of individualised judgments, which make it particularly suited to navigating the complex landscape of religious freedom at work. ADR expresses and realises the norms of consent, reciprocity, and cooperation, and thereby frames the relationship between contending parties in a way that is less adversarial than litigation. Consequently, ADR is a valuable tool to negotiate the boundaries of religious freedom in the professional world.

§1. The Space for Dispute Resolution

Why is there a need for dispute resolution in regulating religious freedom at work? Shouldn't religious claims systematically trump other workplace claims? This section presents three reasons why dispute resolution mechanisms are much needed in workplace accommodation of religious claims.⁷ The first reason stems from the existing legal framework. Religious freedom in the workplace is *de jure* limited, but its proper scope remains largely undefined. The second reason arises from the nature of the contractual relationships. The right of exit is not a sufficient safeguard of religious freedom at work. The third reason lies in the presence of conflicting claims in the workplace environment. Clashing rights call for some form of resolution.

a) The largely undefined scope of religious freedom at work

Religious freedom— including freedom *of* religion and freedom *from* religion — is widely recognised as a fundamental human right by domestic and international law. The European Convention on Human Rights (ECHR) protects “the right to freedom of thought, conscience and religion”, which includes freedom to change religion or to manifest one's belief individually or collectively (article 9) (McCrea, 2010; Vickers, 2016).⁸ But religious freedom at work is *de jure* limited.⁹ The European Court of Human Rights (ECtHR) indicates that the right to religious freedom does not entail an entitlement to the accommodation of one's religious

identity in the workplace. Not all religious claims expressed in the workplace warrant protection.

In addition to human rights law, which seeks to protect the basic freedom of religion or belief, nondiscrimination law aims to protect individuals from being disadvantaged in employment opportunities or the provision of goods, on the basis of their religion or belief. A 2000 EU Council Directive provides general guidelines for equal treatment in employment.¹⁰ Specifically, the directive prohibits *direct* and *indirect* discrimination for a class of protected characteristics, including “religion or belief”. Direct religious discrimination refers to a situation “where one person is treated less favourably than another is, has been or would be treated in a comparable situation” on the grounds of religion or belief. Indirect religious discrimination occurs “where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief (...) at a particular disadvantage compared with other persons.” Whereas direct discrimination is deliberate — a person is being declined employment because she is Muslim, Jew or atheist —, indirect discrimination refers to the unintended consequences of particular arrangements on particular religious individuals. Some instances of disadvantage might not be prohibited by discrimination law if the arrangement (“provision, criterion or practice”) is “appropriate and necessary” in order to attain a “legitimate aim”. When an indirect discrimination claim is brought to trial, the judge must assess the proportionality of the means and the legitimacy of the aim.

There is a margin of appreciation in assessing what constitutes discrimination in particular circumstances. On 14 March 2017, the Court of Justice of the European Union ruled that “an internal rule of an undertaking which prohibits the visible wearing of any political, philosophical or religious sign *does not constitute* direct discrimination”.¹¹ Firms may be justified in prohibiting religious signs as long as they do not target a specific religious group. Yet, the Court acknowledged that such prohibitions might result in indirect discrimination. Some religious workers could be significantly burdened by an apparently “neutral” internal regulation. The CJEU recommended that national courts should assess whether potential cases of indirect discrimination are “objectively justified by a legitimate aim” and if the means to achieve this end are “appropriate and necessary”. The recent Court decision has been widely presented in the media as an open window for a ban on the Muslim headscarf in the workplace.¹² In fact, much will depend on whether national courts find such indirect discrimination justified, that is to say, to what extent the infringement on religious freedom is outweighed by the pursuit of other goals. This wide berth given to national courts means that

there are no clear guidelines for EU employers who wish to know how to respond to religious claims arising in the firm.

The boundaries of religious freedom in the workplace remain largely undefined. The law does provide general guidelines, but it is hard to apply them in specific cases. There is little guidance about the legality of particular regulations. Given this uncertainty, mechanisms of dispute resolution could play a key intermediary role in negotiating religious freedom in the workplace. Even if not all grievances boil down to entitlements of justice, it still might be appropriate to address them as a matter of workplace good practice.

Conflicts related to religion may also arise in areas that are simply not covered by law. Some grievances stem from unspoken rules or mere habits. For example, there is no legal rule requesting that workers shake hands with co-workers or clients from the opposite sex; it is rather a matter of custom or civility. The food offered at the company cafeteria often reflects the majority's gastronomic culture and preferences. Employment disputes may thus happen without violation of legal rules. Dispute resolution can help navigate this normative grey zone.

b) The insufficiency of the right to resign

The right to resign has been presented as the ultimate guarantee of religious freedom in employment (Vickers, 2016: 53-54). Employment functions on a contractual basis and supposes the voluntariness of entry and the right to exit. Indeed, no one should be coerced to engage in a professional activity, even less so a professional activity that one finds unconscionable. By securing the voluntariness of the contractual framework, the state ultimately guarantees that workers experiencing a breach of religious freedom can leave their job. However, in this section, I show why the right to resign is inadequate to protect religious freedom at work.

It is worth noting two analytically distinct ideas of freedom at play in asserting the right to resign as the guarantee of religious freedom. On the one hand, the right to resign, or to exit an association, relates to freedom of association and its corollary, freedom of dissociation. It refers to the ability to leave employment without excessive costs. A firm is a voluntary association that employees should join and leave as they wish. On the other hand, religious freedom refers, positively, to the ability to pursue one's deeply held religious commitments, the freedom to believe and to manifest one's beliefs; and it refers, negatively, to the freedom from undue interference, such as coercion or discrimination on religious grounds. Guarantying the right to resign could help protect both aspects of religious freedom. With regards to freedom of

association/dissociation, the possibility of exit can work as a proxy for the consent of employees. Employees who choose to remain are presumed to consent to the terms and conditions of employment. With regards to freedom from undue interference, the right to resign ensures that employees are not coerced into remaining in a profession that undermines their religious beliefs or practices. Call this the voluntariness argument.

The voluntariness argument was used by the European Commission of Human Rights in the famous case *Ahmad v United Kingdom* (1982). Iftikhar Ahmad, a British citizen and school teacher, requested time off work on Friday afternoons to attend a mosque for prayer while remaining in full-time employment. The European Commission of Human Rights claimed that Ahmad initially accepted “of his own free will” contractual obligations that conflicted with his religious practice.¹³ This has been referred to as the “specific situation rule”, which holds that individuals who voluntarily join an association that limits their religious freedom – for instance by signing a contract of employment – cannot claim undue interference under Article 9, providing they can manifest their beliefs elsewhere.¹⁴ However, the jurisprudence of the European Court of Human Rights has evolved. In *Eweida and Others v. United Kingdom* (2013), the Strasbourg Court held that the “right to resign” is no longer decisive but should remain instead one consideration among others in determining whether or not interference with religious practice is justified (Sandberg, 2014: 207-208).

Thus, from a legal standpoint, the right to resign is no longer considered to be sufficient to guarantee religious freedom at work. And from a normative standpoint, the voluntariness argument faces serious objections related to the non-ideal circumstances of the job market. Voluntariness presupposes a set of reasonable options. “Choosing between the devil and the deep blue sea” does not amount to real freedom. Declining or exiting a position can be very costly in a context of structural unemployment. In the case *Ahmad v United Kingdom* mentioned above, Ahmad decided to resign after his request was declined, and he refused an offer of part-time teaching. But his resignation was followed by months of unemployment and a prompt reapplication for the part-time teaching he had previously declined, because of “financial pressure”.¹⁵ The freedom to resign is practically impinged by the necessity of economic independence. For most people, the prospect of unemployment is gloomy, while for some it is disastrous, making the right to exit a mere formal possibility.

Furthermore, not all cases fit the voluntariness picture according to which individuals enter contractual relationships with full knowledge of the restrictions it will impose in terms of religious freedom. Workplace regulations evolve, workers convert or interpret their religion differently over time. While citizens of a democratic polity can influence the law, most firms do

not function democratically, leaving little possibility for employees to influence the rules that will constrain their working life. Firms are generally characterised by hierarchical relationships and unequal formal decision-making power. Although there is a wide diversity of management models, cooperatives and workplace democracy remain the exception rather than the rule. Religious freedom at work needs to be carefully protected by external regulation, to make up for employees' lack of control over their working conditions.

Voluntariness is not a sufficient safeguard of religious freedom in the workplace. Should the right to exit be protective enough of employees' freedom, there would be little need for adjustments and conflict-resolution tools. But given that the right to resign fails to properly guarantee religious freedom, this opens a space for conflict-resolution mechanisms. As I will argue below, alternative dispute resolution can function as a "voice" mechanism, to give workers who wish to remain in their jobs an opportunity to be heard.

c) The existence of conflicting claims

Finally, conflict-resolution is needed given conflicting claims arising in the workplace. Professional life inflicts costs on religious life, plausibly on some religious practices more than others. Religious workers may want the opportunity to combine their professional and their religious life.¹⁶

It might seem plausible to require religious workers to suspend some aspects of their religious freedom at work — say, the right to publicly profess their beliefs to clients or co-workers —, without violating their freedom of conscience altogether. After all, a great deal of employees' freedom is suspended during work hours; but this temporary restriction does not cancel the existence of this freedom altogether. During work hours, employees' freedoms of movement and of speech are limited; they cannot walk out of the office or openly criticise their company on social media without being at risk of sanctions (in severe cases, being fired or sued for compensation). Such restrictions are only provisional suspensions of the exercise of a right that remains protected in the wider society. Employees constrained in their office still enjoy their right to freedom of movement but in a limited fashion. The same goes for religious freedom. Employees who cannot engage in proselytism during work hours have not forsaken their religious freedom but have agreed to momentarily suspend its exercise in the framework of a contractual relationship.

This argument relies on a distinction between inner conscience and outer manifestation of faith, or between beliefs and practices, which is questionable.¹⁷ Some religious identities are

inextricably intertwined with religious practices. For example, some Evangelical Protestants believe that being a witness of one's faith is a constant duty, which involves sharing their religious beliefs with co-workers and offering to pray for them in situations of hardship. The impossibility to manifest one's religion in a certain way can pose thorny issues of conscience. As a result, religious freedom cannot always be temporally constrained to fit the working calendar. Religions focused on orthopraxy (correct conduct) and involving compulsory daily rituals, will arguably be more burdened than less demanding traditions.

One could argue that people are responsible for arbitrating between the weightiness of their pursuits, and they should bear the costs of demanding beliefs and commitments (Jones, 1994). Admittedly, the burdens of professional life affect many domains other than religion. For example, being an active member of a political party, having an electoral mandate in local politics, or taking part in demonstrations are part of the exercise of essential political rights, yet they can be difficult to combine with professional life. Intransigent religious believers and zealous political activists should find a way to navigate their dilemma themselves, for example by seeking part-time jobs or alternative sources of income. They should be flexible and adapt instead of requesting costly accommodations.

But even if individuals should have to bear some of this burden themselves, it is troublesome that existing arrangements can be unfairly biased against minority religions (Bader, 2007; Laborde, 2017; Maclure and Taylor, 2011). The working calendar in Western societies has been shaped to a large extent by Christian culture. Sundays are usually days off, and most Christian holidays are national holidays. Such a configuration is a source of unfairness towards newcomers and longstanding minorities. In this context, exemptions can aim at correcting an unequal state of affairs and ensuring equality of opportunity. Members of minority religions should be able to live according to their religious commitments while enjoying equal access to non-religious goods, such as employment opportunities (Jones, 2017).

Although professional life is a limited part of one's existence, it is arguably a very significant part, both quantitatively and qualitatively. A full-time job is time-consuming and many people derive not only their means of economic survival but also symbolic gratifications from their professional occupation, such as social status, and self-esteem. It is critical to ensure that the workplace is welcoming of individuals of diverse religious faiths and belongings. If firms do not properly accommodate religious differences, many religious workers will be significantly burdened by having to choose between professional and religious life. Ultimately, a non-accommodating workplace undermines equality of opportunity, and the adequate chance to

combine the pursuit of religious commitments with a professional career, for members of both the religious majority or religious minorities.

Another question of fairness arises in the coexistence of religious and nonreligious interests within the workplace. The pursuit of religious interests can clash with the employer's interest in economic profitability. When a worker takes some days off for a religious holiday, the employer may have to hire temporary staff members. This is the problem of burden-shifting (Jones, 2017; Laborde, 2017: 227-229). Similarly, a religious exemption can place an unfair burden on fellow employees. Some secular employees may have a strong claim for accommodation that has little to do with religion, such as taking care of a sick parent. Other religious workers who interpret their faith in a less stringent fashion, or who are willing to make compromises, might feel less well off than their coreligionists who are granted special treatment. They might deplore an environment in which intransigence is rewarded. Religious accommodation may lead to concerns about unfair treatment among the workforce.

In addition, there are instances where rights to nondiscrimination clash. In the United Kingdom, two famous cases illustrate the potential conflict between the rights of religious employees and those of the customers they are serving. In *Ladle v London Borough of Islington* (2009), a Christian civil registrar officer objected to officiate for civil partnership ceremonies of same-sex couples.¹⁸ In *McFarlane v relate Avon Ltd* (2010), a Christian relationship counsellor refused to provide counselling to same-sex couples.¹⁹ Both applicants lost in court. The courts prioritised the right not to be discriminated against on the grounds of sexual orientation over the demands of religious freedom.

Conflicting rights are especially prominent in cases of religious associations employing staff members. Religious collectives generally benefit from a degree of autonomy in recruitment, insofar as they tend to be exempted from nondiscrimination law, especially for positions of leadership.²⁰ The Catholic Church, for example, is permitted to recruit only male priests. Yet, this exemption can extend to staff members whose mission is remote from spiritual guidance, such as the porter or gardener. In the case *Corporation of the Presiding Bishop v. Amos* (1987), a janitor of a gymnasium owned by the Mormon Church was dismissed from his job because of a lack of religious devotion.²¹ The ruling of the United States Supreme Court was favourable to a wide latitude of religious discrimination by nonprofit religious organisations, even for jobs quite remote from core religious responsibilities. Here, the religious freedom of a collective body (the Mormon Church) clashes with the religious freedom of an individual. The right to discriminate granted to religious associations comes at the expense of the religious

freedom of employees, their right not to believe, to believe differently, or simply to be less devout in their conduct.

Workplace disputes involving religion are complicated matters. They involve different actors within the workplace, as well as third-parties, such as providers and costumers. They display competing claims, including employees' interest in combining their religious commitments with their professional career, employers' interest in economic profitability, and customers' interest in nondiscrimination on grounds other than religion. Whether religious claims should trump other claims may depend on contextual factors. In a case of burden-shifting, the significance of the burden may depend on the size of the firm or the type of undertaking. A shortage of staff on a Sunday will be less consequential in a retail store than in an emergency department. Circumstances matter; not all religious claims boil down to entitlements.

Dispute resolution is needed in the accommodation of workplace diversity. Religious freedom at work is limited, but its scope remains largely undefined. The right to resign is not a sufficient safeguard. And conflicting claims arise that call for some sort of resolution. The next section explores a procedural response, namely a set of methods called Alternative Dispute Resolution. I argue that there are good reasons, including reasons of fairness, to adopt these procedures.

§2. The Case for Alternative Dispute Resolution (ADR)

ADR refers to a set of dispute processing methods other than court litigation, mostly mediation and arbitration. *Mediation* is a process by which a third-party — the mediator — facilitates communication between the parties in dispute in order to reach an agreement. The mediator does not have adjudicative authority, but the outcome of a mediation may be binding if signed by the parties involved. *Arbitration* is a process by which a third-party, approved by the parties in dispute — the arbitrator — adjudicates a conflict. Arbitrators adjudicate a dispute based on their evaluation of each side's respective merit. The outcomes of arbitration can be binding for the parties. Other procedures include negotiation, which relies on bargaining techniques, and mini-trials, during which the parties present evidence before a panel gathering representatives of the parties and a neutral adviser. There are significant variations between ADR procedures, but what they have in common is that they are comparatively more informal and flexible than litigation, they emphasise parties' consent and participation, and they protect

confidentiality. In what follows I do not delve into the detail of each procedure, but I seek to make a case for the general idea of alternative dispute processing.

a) The pragmatic case for ADR

ADR is a prevalent practice in commercial and employment disputes but can also be used in a wide range of domains, outside or inside the Court system. In the United Kingdom, Acas (Advisory, Conciliation and Arbitration Service) is an independent public provider of ADR. Acas deals, among other things, with discrimination claims on grounds of “religion or belief”.²² Since 2014, employees wishing to submit a claim to an Employment Tribunal must notify Acas. Acas helps disputants to reach an arrangement via a process called “Early Conciliation”. It is only once this process fails that cases are subsequently submitted to an Employment Tribunal. According to the statistics released by Acas, “29,129 (27%) of [Early Conciliation] cases closed between April 2017 and March 2018 led to an Employment Tribunal. By the end of March 30% of these cases were settled by Acas conciliators or withdrawn with a further 60% still in progress (...)”.²³ The use of ADR is already well established in the domain of labour disputes, which are likely to include disputes involving religious claims, although the confidential nature of ADR makes it difficult to obtain data on their significance.²⁴

In the leaflet explaining what conciliation is about, Acas notes that “it saves time and money.”²⁵ ADR has indeed been presented as a remedy to the pitfalls of the litigation system, plagued with rising costs and increasing delays. In the United States, the Civil Justice Reform Act (CJRA) of 1990 led to the inclusion of ADR procedures in federal district courts. The hope was that court-annexed ADR practices could become an essential component of the effort to contain litigation costs (Peckham, 1994-1995). ADR promised to be cheaper and quicker than litigation, and to reduce the judicial caseload; in other words, to make litigation more efficient. The cost-saving argument holds undeniable appeal for multiple stakeholders, including the state, taxpayers, and disputants. One consideration is that if litigation is overpriced, the cost of a lawsuit might outweigh the expected benefits of compensation. What begins as a pragmatic worry — cost saving — turns into a question of fairness: overpriced justice is accessible only to the few. For the many, the legal path remains out of reach, or not worth the battle. By reducing the costs of dispute processing, ADR could allow more grievances to be addressed, including those of the less well-off.

The efficiency argument should not be overlooked, but it has not been empirically verified. There is mixed evidence as to whether ADR represents a significant cost-reduction opportunity. A 2017 study led by Micronomics showed that US district court cases typically take 12 months longer before trial than cases adjudicated by arbitration.²⁶ The total losses associated with trial delays were estimated at \$470 million per month between 2011 and 2015.²⁷ But previously, a major study provided statistical evidence challenging the claim that court-annexed ADR reduces litigation costs and delays (Kakalik, 1996).²⁸ It is also unclear whether mediated cases are necessarily quicker than average civil cases (Hartley, 2002).

At any rate, presenting ADR as “quick and cheap” only lays the ground for a half-hearted defence. Speediness is not necessarily the hallmark of an improved justice system. The slow tempo of the legal system has some value: time is necessary to properly gather the evidence and parties can benefit from a less-heated perspective on the matter under dispute. And if the costs of litigation are prohibitive, they should be addressed as a separate question of public policy and institutional reform. A justice system that remains accessible only to the few fails to accomplish its mission. The long-term goal should be the improvement of the justice system, not the use of a second-best dispute resolution mechanism. If the main advantage of ADR is to be “quick and cheap”, ADR would be made redundant by a more efficient litigation system.

ADR is celebrated for reducing an additional major cost, namely reputational cost. Crucially, confidentiality is preserved and no public records are kept. From the perspective of both plaintiff and defendant, confidentiality can be highly valuable. In this respect, ADR is less threatening than the adversarial process of litigation. The cost of having one’s religious beliefs or practices displayed in a tribunal, the media, and academic articles may dissuade many to seek justice. Businesses often share a similar interest as they very much value their reputation and are reluctant to risk it in a lawsuit. ADR provides a useful framework in which conflicts can be expressed and possibly resolved, without generating reputational damage.

But what maximises the interests of private parties can result in a public loss. Critics have argued that the turn to mere dispute resolution could threaten the judicial development of rights (Fiss, 1984; Luban, 1994; Edwards, 1986). There is a notable downside of confidentiality: the fact that ADR does not create legal precedents. Unlike litigation, the outcomes of ADR remain scattered decisions, largely invisible because of confidentiality rules. I come back to this worry in the last section. For now, suffice it to say that the pragmatic case for ADR remains insufficient; if ADR is presented as a mere potentially cost-effective, second-best approach to litigation, competing considerations, such as the public interest for precedents,

render it unattractive. A more positive case for ADR is needed, which focuses on its distinctive procedural qualities.

b) The procedural value of ADR

i. Individualised judgments

What is the added value of ADR in workplace disputes involving religion? ADR conveys a distinctive conception of procedural fairness that relies on individualised judgments as opposed to rule-bound judgments. I borrow this distinction from Cass Sunstein (2006). The first conception of procedural fairness – the rule-bound judgement conception – requires the enactment and application of general and abstract rules. Clear rules are established in advance to guide judgment in particular cases. This approach has the advantage of simplifying decision-making by giving clear guidelines. It aims at being impartial and at treating like cases alike, so as to reduce bias and discriminatory practices.

The other conception of procedural fairness values individualised judgment. Its main advantage lies precisely where the first approach fails: rules set in advance may induce unfairness in particular situations. While the blindness of the first approach aims at avoiding biases and arbitrariness, it may end up generating unfairness when it disregards individual circumstances. Cases differ, circumstances evolve, and a rigid set of rules may be unable to respond adequately to the diversity of contexts. Different cases may warrant different treatments. Decisions need to be well-informed by the facts of the cases, for instance through the participation of those affected or by the added expertise of the adjudicator. Individualised judgement reduces the likelihood of errors.

Sunstein presents the rule-bound conception of procedural fairness as akin to the ideal of the rule of law. To be precise, litigation is both about rule-bound and individualised judgment. Nondiscrimination law lays down clear rules prohibiting direct and indirect discrimination. Yet, some aspects of these rules require individualised judgment, for instance when it comes to assessing whether a rule with unequal impact is justified. Sunstein notes that the distinction between the two conceptions amounts to a continuum rather than a dichotomy. I see ADR as pervaded by the logic of individualised judgment; in the continuum of procedural justice, ADR mechanisms are much further down the individualised approach than litigation is. This is the reason why ADR can succeed where the rule of law fails, by reducing some of the

unfairness generated by standard rules. ADR excels at individualised judgments and is thus suited to deal with the complex landscape of religious diversity at work.

The flexibility of ADR procedures allows them to be context-sensitive. A multinational firm may have branches in very diverse cultural and religious contexts, with their own distinct challenges; a similar case might warrant differential treatment in a different context. For example, it may be appropriate to recognise sickness certificates from traditional healers in some contexts more than others. For instance, in South Africa, the Commission for Conciliation, Mediation and Arbitration (CCMA) recognised that employees could legitimately appeal to traditional healers to justify sick leave (Carrim, 2015: 130).²⁹ Given the influence of ancestral traditions in South African spirituality, the case for not relying exclusively on science-based medicine is compelling. Similarly, relying on informal procedures rather than on the enactment of rules set in advance is a more adequate approach to regulating religious freedom in the workplace, as context heavily influences the type of grievances that arise.

Further, ADR allows for careful attention to the facts of particular cases. Religious differences cut across religious traditions and communities of faith. Interpretations of religious requirements vary. In *Eweida v British Airways*, the British Court of Appeal heard testimonies from Christian witnesses explaining that wearing a cross was *not* a requirement of Christian faith and concluded that Ms Eweida's request to wear a small cross with her uniform was rather a matter of "personal choice".³⁰ A former employee at a French public transport operator won a court case against her employer after being dismissed for refusing to take a professional oath on the basis of her Catholic faith.³¹ Most Christians do not see the wearing of the cross or the prohibition of oath-taking as obligatory.

Mediation allows plaintiffs to express their requests — wearing a cross, finding an alternative to taking a professional oath —, while remaining key actors in the dispute resolution process. The process empowers the parties in dispute, who occupy a central position in the dispute settlement (Schwerin, 1995). The mediator merely acts as a facilitator to improve communication between the parties, and helps them to reach an agreement without imposing it upon them. An agreement is not binding unless a consensus is reached. In the case of the Catholic employee refusing to take an oath, an alternative wording could have been agreed upon, such as "I commit to" instead of "I swear", as the employee herself suggested.

In arbitration, the parties agree on an arbitrator, who can be selected for their experience in adjudicating similar cases. A specialised arbitrator could have accumulated a higher level of expertise in arbitrating labor disputes involving religion than a generalist judge. Interestingly, a recent ruling from the UK recognises the possibility of selecting arbitrators from

a particular religious community.³² In *Hashwani v Jivraj* (2011), a commercial dispute between two members of the Ismaili community could lawfully be arbitrated by another member of the Ismaili faith, as agreed in the arbitration clause. Thus, ADR could fare better in terms of religious literacy than the generalist court system.

The participation of those affected or the expertise of the adjudicator are conducive to informed decisions, congruent with the conception of procedural fairness I have presented. ADR is thus apt at producing tailored arrangements, flexible enough to adapt to the diverse and evolving character of religion at work. Harry Edwards notes that disputes between parents and schools about special needs children tend to be better resolved by mediation, because courts have little knowledge or expertise about special needs education (Edwards, 1986). Law does not teach us what constitutes a proper education; instead, it tells us what counts as mistreatment. Although the law has developed some useful tools to tackle employment discrimination and harassment, it does not come close to fully instructing employers about the proper management of religious diversity in the workplace. Rules function as useful safeguards but do not provide positive guidance for concrete situations. ADR can fill in this gap.

ADR mechanisms take different shapes — the adjudicative role of the arbitrator differs from the facilitating role of the mediator. Yet, they share in common a method to process disputes without resorting to the rule of law. My claim is that they rely on a distinct conception of procedural fairness, which is less rule-bound and more attentive to individual circumstances. Practically, this is translated into an institutional framework where the input and consent of the parties involved are decisive.

ii. Framing the relationship

The values and principles that a procedure expresses and realises matter. The normative framework of ADR revolves around three key elements: consent, reciprocity, and cooperation. Consent is what grounds mutual obligation: in mediation, parties consent to the outcome; in arbitration, they consent to the authority of a third-party. Reciprocity is the norm that regulates the framework of the procedure — I abide by the terms of the procedure insofar as you abide by them too. An outcome of ADR cannot be one-sided. Cooperation refers to the fact that parties involved in the dispute coordinate their behaviour within an agreed-upon procedure to find a common resolution to the conflict.

Consent plays a pivotal role in limiting the scope of ADR. ADR aims at settling or adjudicating disputes on the basis of parties' voluntariness. Mutual obligation stems from the

reciprocal consent of participants. Mediators act as facilitators to help parties seek an agreement, while arbitrators have been chosen by the parties to adjudicate their dispute. Consent appears *prior* to adjudication in arbitration, and *after* conciliation in mediation. ADR contrasts with court litigation which is binding in virtue of the legitimacy of the rule of law (which ultimately boils down to the democratic consent of the citizenry as a whole, as opposed to the consent of the parties in dispute). This means that unwilling parties can go to litigation instead. If plaintiffs are convinced that they have been seriously wronged and want to claim compensation, they can turn to litigation, even after a failed mediation. If defendants insist that they are not blameworthy and wish to justify the rightfulness of, say, a termination of contract, they can likewise resort to employment tribunals.

The constitutive norms of ADR result in a framing of the relationship between disputants which is less adversarial than litigation. The entire process is based on reciprocal consent and on cooperation — finding a mutually satisfactory solution, or selecting an appropriate arbitrator. Disputes are not static; they are constantly evolving, and are shaped by the way they are processed. Conflict-resolution methods can be greatly beneficial in intervening before disputes are fully-fledged.

Several steps lead to the shaping of a dispute (Sarat, 1988). Schematically, the first one is the acknowledgement of a problem, as opposed to mere denial. The second is the framing of the problem in terms of a wrong, which implies an attribution of fault to an individual or an institution. If the issue is framed in terms of fault (as opposed to mere “bad luck” or to self-blaming), this implies that the plaintiff believes that the situation could improve should the wrongdoing cease. In a third stage, the plaintiff voices the grievance to the accused individual or institution; this is a claim. Finally, a dispute arises when the other party resists the claim of the alleged victim. ADR techniques can intervene at different stages of the dispute-shaping process, before a disagreement becomes highly confrontational.

Whether ADR is necessarily more successful at ending disputes than litigation remains to be seen, but the choice of ADR makes sense where there is an ongoing relationship that parties wish to maintain (Fuller, 1971).³³ Many employees have a strong interest in remaining employed and they know that legal disputes harm good professional relationships. A rejected candidate who claims to have been victim of discrimination in recruitment is unlikely to resort to ADR. In contrast, co-workers who wish to remain in the same firm in spite of their grievance have good reasons to turn to ADR. These co-workers may value a mutually satisfactory solution, share common interests, have a history of good companionship, and perceive the disagreement as an unfortunate disruption of their working relationship. Mediation and

arbitration both aim at maintaining a cooperative relationship. They do so by using cooperation as a key part of the remedy itself.

c) Objections

Before concluding, it is worth briefly mentioning and responding to some of the critiques that have been made of the ADR movement. Many of the fears relate to the potential inegalitarian effects of ADR: the worry that unequal bargaining power between contending parties leads to distorted outcomes (Fiss, 1984). Under the umbrella of consent and conciliation, employers could cheaply take advantage of their workforce. In the context of workplace disputes, inequalities come in many guises. The resources of employers are often much greater than those of a single employee. The circumstances of the job market often make it easier for the employer to replace the employee than for the latter to find another job. What is more, the employer is more likely to be an experienced player; employers are repeatedly confronted with labour conflicts and may develop expertise in dealing with them. Employees and employers in dispute are scarcely in a situation of comparable bargaining power.

Equally worrisome is the objection that the development of ADR could have the adverse effect of distracting policy-makers from the general aim of democratising access to the justice system and developing the bundle of rights protecting workers (Edwards, 1986). ADR could attract both unapologetic wrongdoers and underprivileged victims. For the former, ADR could be perceived as a welcome bargain, for the latter, as the only accessible option. This unfortunate match between opportunism and necessity could have detrimental effects on the development of legal rights for disadvantaged groups. The extrajudicial processing of disputes would leave the legal status quo unchallenged. From a collective standpoint, this is regrettable, as it does not benefit public awareness and judicial development, and leaves ADR suspect of establishing some kind of “second-class justice”(Edwards, 1986) .

In response to these legitimate worries, three remarks are in order. First, ADR procedures could be designed so as to mitigate, if not alleviate, inequalities between contending parties. Publicly-funded ADR can make dispute resolution accessible to all. Employees can be represented by union members in ADR procedures. Trade unions have expertise in dealing with conflicts. A mediation does not have to occur between, say, a manager and its employee but between a representative of the firm and a representative of the worker. The participation of trade unions can contribute to correcting asymmetries between actors.

Second, although ADR is not in the business of interpreting publicly authoritative legal texts, as courts do, it may create some of its own norms and precedents. The ADR provider Acas produces guidelines for good workplace practices on religious diversity.³⁴ Menkel-Meadow (1995) writes that “repeat play arbitrations and mediations are sensitive (...) to the “norms” created by numerous repeat cases”. And Fuller (1971) argues that the process of mediation is about generating norms for regulating the relationship between disputants.

Finally, ADR is not meant to be a substitute for litigation. As some critics of alternative dispute resolution have rightly pointed out, public adjudication is a public good that cannot be replaced (Luban, 1994). The state remains the ultimate arbitrator of conflicts and ADR only complements the rule of law. ADR techniques can, and have been used, inside the court system. There need not be a trade-off between litigation and its alternatives. A portion of claimants ultimately chooses to go to court because they hold their case to be particularly serious or because they seek a legal change. If ADR creates a window of opportunity for more grievances to be raised, it is likely that cases sent to litigation will follow a parallel trend. In other words, more cases could be litigated as a result of the increase in grievances raised. If this is true, the hope that ADR will alleviate the court system is misguided. But perhaps the use of ADR can filter out the most difficult cases, those which are most susceptible to bring about crucial legal change, while the less tricky ones will find an early resolution.

What is, then, the proper realm of litigation and its “alternatives”? One could argue that the domain of litigation is to adjudicate claims of rights, while disputes that have little to do with rights should be processed in other ways. Following this line of thought, workplace disputes should be addressed by a two-tier system of dispute processing. Ideally, all cases should be simultaneously assessed by a court and go through a process of ADR. The court answers the question: “has a right been violated?” and decides if compensation is due or a sanction is required. The use of ADR helps to resolve the conflict and to work out a better arrangement that prevents a similar grievance from emerging in the future.

Such a division of labour remains wanting because it ignores the fact that the procedures to resolve disputes shape them to a considerable extent. The framework of the adjudicative institution frames the dispute in terms of rights and fault (Fuller, 1978). There are, therefore, good reasons to be wary of a theory of allocation that would argue that ADR is well-suited to mere conflicts of interests, whereas cases involving claims of right should be litigated instead (Menkel-Meadow, 1995; Sarat, 1988). The best way to resolve a dispute may not be set in advance, but different institutional paths bring specific procedural advantages. As I have argued, ADR does not sideline considerations of fairness. It can grapple with claims of rights

on a par with litigation. Yet what it offers is not the enactment and the application of binding legal rules, but the consensual and cooperative construction of *ad hoc* arrangements. While litigation protects legal rights, ADR negotiates their practicalities and explores their margins.

Conclusion

This paper has argued that ADR has a key role to play in negotiating religious freedom at work. In particular, ADR is conducive to individualised judgments, suited to the wide diversity of circumstances in religious disputes and the lack of pre-established rules in these cases. It provides a thin procedural framework revolving around consent, reciprocity, and cooperation, to navigate the complex landscape of religious diversity at work, and seeks fair arrangements. As a result, relationships between parties are framed in a more cooperative way than in an adversarial trial. Yet, ADR is not infallible. Should a mediation fail, litigation remains an option.

ADR can be useful for many types of conflicts, from commercial disputes to quarrels over child custody. This paper highlights one particular domain of relevance, namely the accommodation of religion at work. As I have argued, freedom in the workplace is, and should be, limited. Employees have the right to resign if they consider their job to be incompatible with their religious beliefs or practices. They also have to deal with the interests and rights of others (including the firm, their co-workers, providers, or clients). The fact that religious freedom is limited does not entail that the firm should be an area of *laissez-faire* in this domain. Religion is widely recognised by law as a protected characteristic. As such, employees are protected against discrimination or harassment on the basis of religion. Yet, many issues remain left to the appreciation of employers or courts when a case is brought up: for instance, when is it permissible for a firm to ban religious signs? Do businesses have the duty to accommodate special dietary requirements based on religion? Should they provide workers with prayer breaks and prayer rooms? Some complaints are brought to trial, but many grievances are not voiced given the material and immaterial costs of litigation.

In this respect, ADR techniques have a contribution to make. They excel in “exercises in adhocery”, with minimal but solid procedural safeguards.

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Notes

¹ Court of Justice of the European Union, press release n°30/17, Luxembourg, 14 March 2017, available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170030en.pdf> (accessed 17 October 2018).

² The Court acknowledged, however, that such a regulation could potentially result in indirect discrimination. I come back to this legal case later in the article.

³ Bilefski D (2017) Ban on Head Scarves at Work is Legal, E.U. Court Rules. *The New York Times*, 14 March.

⁴ Although I tend to speak about “firms” and “businesses”, my argument could well apply to branches of the public sector.

⁵ Jonathan Seglow (2017: 189) also writes: “Legal accommodation of deeply held religious and other convictions is too complex an issue to be settled by algorithms.”

⁶ My argument does not extend to other protected categories, such as gender, race or disability. Although such categories have been analogised for the sake of legal protection, they differ widely in their empirical and normative dimensions and need to be addressed separately.

⁷ I remain deliberately vague about the type of dispute resolution mechanism in this section, as I delve into a more detailed case for Alternative Dispute Resolution in the subsequent one.

⁸ European Convention on Human Rights. Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 17 October 2018).

⁹ I focus mostly on the EU legal context.

¹⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Available at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32000L0078> (accessed 17 October 2018).

¹¹ *Emphasis added.* Court of Justice of the European Union, press release n°30/17, Luxembourg, 14 March 2017, available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170030en.pdf> (accessed 17 October 2018).

¹² See for example: Bilefski D (2017) Ban on Head Scarves at Work is Legal, E.U. Court Rules. *The New York Times*, 14 March; Rankin J, Oltermann Philip (2017) Europe’s right hails EU court’s workplace headscarf ban ruling. *The Guardian*, 14 March.

¹³ Decision of 12 March 1981 on the admissibility of the application n°8160/78.

¹⁴ This rule was enforced by the British House of Lords in *Begum*, a case in which a teenage girl wore a headscarf against the rule of her school. It was also applied in employment cases, such as *Stedman v. United Kingdom* (1997) and the previously mentioned *Ahmad v. United Kingdom* (Sandberg, 2011: 84-85; Sandberg, 2014: 1-9).

¹⁵ Decision of 12 March 1981 on the admissibility of the application n°8160/78.

¹⁶ The combination between the pursuit of a conception of the good and the access to the basic opportunity of employment is, for Jonathan Quong (2006), a matter of “fair equality of opportunity”. Drawing on Jeremy Waldron, Quong also distinguishes between one’s adequate chance to pursue one’s conception of the good (the adequacy condition) and the compatibility between individuals’ pursuit of their conception of the good (the compossibility condition). These two aspects appear in this section.

¹⁷ On this topic, see what Cécile Laborde (2017: 21-24) calls the “Protestant critique”.

¹⁸ EWCA Civ 1357

¹⁹ EWCA Civ 880

²⁰ In the United States, the “ministerial exception” was upheld by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (2012). In the United Kingdom, there has also been a historical reluctance to regard ministers of religion as employees. From the case *Re Employment of Church of England Curates* (1912) to *Coker v. Diocese of Southwark* (1998), it was held that a curate of the Church of England was in office, rather than in a contractual relationship. There has been, however, a turning point in the 21st century following the case of sex discrimination *Percy v. Church of Scotland Board of Mission*. The exercise of a minister is no longer presented as necessarily precluding a contractual relationship. Yet, the Equality Act of 2010 (schedule 9) contains a number of controversial exceptions granted to “organised religions”, concerning laws forbidding discrimination on grounds of sex, sexual orientation, and religion (Sandberg, 2011: 117-130; Sandberg, 2014: 103-120).

²¹ 483 U.S. 327

²² Acas. A guide for employers and employees. Religion or belief and the workplace. Available at: http://www.acas.org.uk/media/pdf/d/n/Religion-or-Belief-and-the_workplace-guide.pdf (accessed 11 December 2018).

²³ Acas statistics are available at: <http://www.acas.org.uk/index.aspx?articleid=6479> (accessed 11 December 2018).

²⁴ A casebook of dispute resolution is available but does not include examples of employment disputes (Brunet et al., 2006).

²⁵ See Acas (2018) Conciliation explained. Available at: <http://m.acas.org.uk/media/pdf/7/c/Conciliation-Explained-Acas.pdf> (accessed 11 December 2018).

²⁶ Weinstein R, Edes C, Hale, J et al. (2017) Efficiency and Economic Benefits of Dispute Resolution, p. 2. Available at: http://www.micronomics.com/articles/Efficiency_Economic_Benefits_Dispute_Resolution_through_Arbitration_Compared_with_US_District_Court_Proceedings.pdf (accessed 18 October 2018).

²⁷ Weinstein R, Edes C, Hale, J et al. (2017) Efficiency and Economic Benefits of Dispute Resolution, p. 4.

²⁸ This study focused on mediation and neutral evaluation programs in six US district courts.

²⁹ *Ppwawu v. Nampak Corrugated Containers* ((1998) 3 LLD 48 (CCMA)).

³⁰ *Eweida v British Airways Plc* [2010] EWCA Civ 80. Available at: <https://www.employmentcasesupdate.co.uk/site.aspx?i=ed4639> (accessed 11 December 2018).

³¹ Decision available at:

<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000034003117>
(accessed 11 December 2018).

³² Hashwani v Jivraj (London Court of International Arbitration and other intervening) [2011] UKSC 40

³³ Fuller writes that mediation is appropriate for relationships of “heavy interdependence”.

³⁴ See Acas. A guide for employers and employees. Religion or belief and the workplace. Available at: http://www.acas.org.uk/media/pdf/d/n/Religion-or-Belief-and-the_workplace-guide.pdf (accessed 11 December 2018).

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