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Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publ'g 2008), 244 pages, ISBN 9781841136875.

Lucy Vickers' commendable book deals with the gray area of religious rights in the workplace. The relevance and timeliness of this book are exemplified by the fact that employment is one area of life where religious believers are most likely to face discrimination or harassment.¹ Vickers presents a comprehensive critical study of fundamental religious rights and issues of religious discrimination in the workplace and translates her findings into usable benchmarks and guidelines.

Human rights law concerns the relationship between the state and individuals; it identifies states as the principal duty-bearers and individuals as the rights

holders. This book addresses to what extent human rights norms extend to the workplace. This question can be subdivided into two key problems: does the state have a duty to guarantee freedom of religion or belief at work (which, if answered in the affirmative, could imply imposing certain norms and principles on employers), and to what extent do the norms of non-discrimination apply to the workplace (particularly considering the religious ethos of some organizations and employers)? If the latter two principles—freedom of religion or belief and the right to be free from religious discrimination—clash in practice, then which norm prevails? How does one balance these two norms appropriately?

For example, how does one judge an organization that, for religious reasons, solely hires persons of the same religion? If this policy can be considered a collective form of manifesting a religion (e.g., safeguarding a certain religious identity or certain religious precepts), it is not hard to see how two fundamental principles of human rights law can be at odds with each other in the context of work: the right to freedom of religion or belief versus the right not to be discriminated against on grounds of religion. Vickers describes this tension, noting that

the concepts of religious freedom and religious discrimination are clearly closely related: freedom of religion will be fettered with if its exercise leads to discrimination at work. Yet the right to religious freedom is not absolute, and limits placed on religious freedom in the context of work can be justified when necessary to protect the rights of others.²

57. *Id.* at 395–431.

58. *Id.* title page.

1. LUCY VICKERS, *RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE* 6 (2008) (referring to a UK governmental study).

2. *Id.* at 1.

Vickers begins the book by setting out the elements to make a convincing case for protection of religious freedom in the workplace. She does so in the context of the potent counterargument that the "right to religious freedom does not entail a right to be employed in the employment of the religious adherent's choice, or a right to demand that any religious practice be accommodated."³ Vickers advances arguments based on equality, autonomy, and human dignity to argue that religious interests indeed warrant special human rights protection in the context of work. She concludes that a right to resign should not be the starting point in this discussion, but rather considered a residual form of protection in the concrete case that religious interests can indeed not be accommodated without doing serious harm to other legitimate interests. To that effect, Vickers elaborates on the important interests that are at stake such as economic benefits and non-economic benefits like social status. One particularly convincing argument is based on "equal access":

The principle of equality demands that all people should have equal access to such benefits, and that life chances should not depend on holding a particular world view. Some people find it easy to access these benefits, because there is no incompatibility between their beliefs and employers' requirements. . . . The most obvious example of religious practices which may be easier or more difficult to reconcile with work is in days of rest and the requirement to attend work during the normal working week.⁴

This type of example shows that a right to resign does not necessarily offer equal protection of legitimate interests in this context. The right to resign perfectly protects the *forum internum*, inner beliefs, of religious believers, but not the *forum externum*, that is, the freedom to practice or manifest those beliefs.⁵ Religious believers cannot be expected to leave their religion at home; restricting religious freedom to the world outside work would seriously eviscerate the *forum externum* and is likely to result in economic harm and other disadvantages to religious believers. This is why Vickers postulates that the aim of any legal regulation on this issue must be to find "some compromise whereby religious individuals can work, where to do so does not disproportionately interfere with the rights of others."⁶

Accommodating religious interests in a way that does not disproportionately interfere with the rights of others, of course, presents the real challenge in this area. If we acknowledge that the scope of the right to freedom of religion or belief in principle extends to the workplace, we must at the same time acknowledge that exercising religious freedoms in this area could cause major conflicts with other rights and interests. One unresolved conflict is that granting the freedom of religion or belief in the workplace might imply granting exceptions to a fundamental norm of human rights law (in particular the non-discrimination principle). Another conflict is that granting rights for religious freedom or belief can interfere with other peoples' right to be free *from* religion.⁷

3. *Id.* at 45.

4. *Id.* at 50.

5. *Id.* at 88.

6. *Id.* at 10.

7. See *id.* at 8–10 for these and other conflicts arising from exercising religious freedom at work.

Focusing on recent EU⁸ and UK⁹ legislation, Vickers outlines different types of exemption schemes.¹⁰ The principal objective of this legislation is to prohibit religious discrimination at work. The legislation prohibits "direct discrimination" (less favorable treatment on grounds of religion or belief) as well as "indirect discrimination" (indirect discrimination takes place when a practice or criterion is applied equally to different people yet results in certain disadvantages for people belonging to a certain religion). However, as these laws simultaneously endeavor to offer a level of protection to religious interests, some leeway is given for granting exceptions to those same norms of non-discrimination (strictly speaking, these exemption schemes deem that certain *prima facie* discriminatory practices will not amount to discrimination under the law). Vickers inquires if these regulations have established the right balance.

The first type of legal exception to the duty not to discriminate on the ground of religion is based on genuine occupational requirements. If belonging to a certain religion can be considered to constitute "a genuine and determining occupational requirement,"¹¹ a difference of treatment may be justified. Vickers argues that the doctrine of genuine occupational requirement should be construed narrowly. Offering protection to certain religious in-

terests is clearly the underlying rationale here, but too generous a defense against charges of discrimination on grounds of religion would of course be detrimental to the norm of equality. It stands to reason that, if being a certain religion is absolutely essential to appropriately carrying out the tasks and responsibilities of a certain job, religious affiliation may be made a precondition for obtaining the job in question. In these cases there must be an evident link between the nature of the work and the religious affiliation in question. The nature of the work is thus decisive in judging whether religious occupational requirements may or may not be posed. As Vickers argues, a simple preference on the part of the employer for someone with a certain religion would clearly not suffice (e.g., a Jewish shop owner wishing to keep his shop "Jewish," a humanist director of a company wanting to recruit only atheists, etc.). When does belonging to a particular religion or holding certain beliefs constitute a genuine and decisive requirement for a job? Actual ecclesiastical positions naturally fall within this category (the appointment of religious leaders is also directly protected by the norms on freedom of religion). Any position that is not of a clear-cut clerical nature, however, would not automatically justify posing religion as an occupational requirement (the

8. Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16.

9. Employment Equality (Religion or Belief) Regulations, 2003, S.I. 2003/1660 (transposing the EU Directive into domestic law).

10. VICKERS, *supra* note 1, at 135–44.

11. Council Directive 2000/78/EC, *supra* note 8, art. 4(1); Employment Equality (Religion or Belief) Regulations, *supra* note 8, art. 7(2). Similar provisions for genuine occupational requirement schemes can be found in the Equality Laws of Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, Norway, Poland, Portugal, and Slovakia. (As far as the EU members are concerned, these provisions are mainly instigated by and modeled after the EU Directive.) The North American equivalent of this doctrine is the "*bona fide* occupational requirement" scheme, further elaborated upon by Vickers. See VICKERS, *supra* note 1, ch. 6.

easy cases, when it comes to positions that certainly do not merit a religious occupational requirement involve such positions as cleaning personnel, janitors, secretarial personnel, catering staff, etc.). Whenever occupational requirements are posed, they can and should be assessed carefully on a case-by-case basis.

The second type of exemption scheme that can be discerned in this field is the "religious ethos exception."¹² Religious ethos exemption schemes grant a certain type of employer far more flexible permission to discriminate on the basis of religion in their hiring policies. These exemptions are not granted because being of a certain religion is inextricably linked with the position at hand and is thus absolutely necessary to fulfill the tasks and responsibilities that come with the position, but rather because of a view towards accommodating those organizations that wish to maintain their "religious identity."¹³ Although Vickers labels this exemption as "controversial,"¹⁴ she misses a chance to elaborate in more detail about whether this exemption can be defended from the viewpoint of international human rights law or should actually be rejected from a human rights perspective. The question that emerges

is whether this exemption accurately weighs the accommodation of religious interests at the expense of the non-discrimination principle. It is certainly problematic that in some instances the religious interests of the collective outweigh the fundamental equality rights of the individual. First, it can be questioned from a human rights perspective whether the wish to preserve a religious ethos should ever trump the non-discrimination principle. Given the fairly abstract and subjective nature of the protection of a religious ethos, we wonder if derogations from the non-discrimination principle can ever be considered reasonable and objective. Even if we were to take this aspect for granted, it is doubtful that preserving such an ethos actually requires a religiously homogenous workplace. In other words, it is not at all clear whether these institutionalized forms of religious discrimination actually maximize the religious freedom of the collective (i.e., the staff that wishes to maintain the religious ethos of their organization). In short, it could be argued that the religious ethos exemption schemes open the door to religious discrimination.

A related contentious issue is whether discrimination, for religious reasons, on

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12. Council Directive 2000/78/EC, *supra* note 8, art. 4(2); Employment Equality (Religion or Belief) Regulations, *supra* note 8, art. 7(3).
 13. The religious ethos exemption is similar to the general genuine occupational requirement provision, with a crucial difference being that the word "determining" (before "occupational requirement") is omitted. Compare Council Directive 2000/78/EC, *supra* note 8, art. 4(1), with *id.* art. 4(2); compare Employment Equality (Religion or Belief) Regulations, *supra* note 8, art. 7(2), with *id.* art. 7(3).
 14. VICKERS, *supra* note 1, at 136. Vickers seems inclined to approve of this exemption. *Id.* at 79–80. Elsewhere, however, she criticizes the fact that some EU member states have not transposed the EU Directive's (optional) religious ethos exemption into domestic law (which, by implication, amounts to an approval of religious ethos exemption schemes): "As a result, it may be that some degree of religious freedom is denied to religious groups, as they are unable to impose religious requirements on staff unless they are determining features of the job." An alternative interpretation of this omission would be: these states have carried out their own balancing act and have decided to give more weight to the norm of equality/non-discrimination than to the accommodation of religious interests in this area. *Id.* at 215.

grounds *other* than religion (e.g., sex or sexual orientation) can be justified in the context of work.¹⁵ The 2000 EU employment equality directive explicitly excludes this possibility; it states that religious exemptions (from equality laws in the work context) granted to religious organizations “should not justify discrimination on another ground.”¹⁶ Discussing such instances of discrimination on other grounds, Vickers convincingly argues that “[a]ny attempt to justify such treatment will need to meet the high standards required to justify sex or sexual orientation discrimination. It is rarely going to be proportionate to allow such indirect discrimination.”¹⁷ However, Vickers appears to accept some minor leeway here:

[D]iscriminatory groups should at times be allowed to retreat from mainstream society to create “islands of exclusivity,” remaining free to enter into employment relationships with others of the same faith, and without being required to provide employment for those of other religions or lifestyles. Although others’ interests may be infringed by their practice, where this is not to a significant extent it may be proportionate to tolerate these infringements in order to maintain religious freedom for the group.¹⁸

It would appear that key in this debate is again the question of which norm is to be valued most: individual equality rights or the interest of a group to safeguard certain religious values. Vickers argues, in principle, in favor of the former though accepts that in very exceptional cases certain isolated religious groups should be able to operate in an exclusive fashion so as to ensure their collective freedom of

religion and a degree of religious organizational autonomy. The difficulty lies in that, on the one hand, the state is not in a position to assess whether a religious doctrine truly contains certain precepts that interfere with the full enjoyment of equality rights of, for instance, women or homosexuals. On the other hand, granting religious ethos to employers is a license to discriminate in their hiring policies and could clearly foster serious human rights abuses. The question of whether these types of discrimination in the name of religion can ever be considered to be based on reasonable and objective criteria is a hard one. Vickers mainly grounds the possibility of very limited exemptions in this field on the fact that only minor harm will be done, as these small isolated religious groups are exceptional. Although they are targeted by the discriminatory policies at stake, they are not likely to have an interest in joining hostile organizations when there are alternative employment opportunities. Vickers dismisses the offense that might be taken by those people in society who disagree with discriminatory practices as not being of sufficient weight to tip the balance. However, compliance with human rights law is above all a matter of principles; consistency is key.

Equality is one of the core principles of human rights law. Practicing a religion is not an absolute freedom; under certain circumstances, some practices may be limited if the rights of others are jeopardized. Thus the question is whether a liberal democracy should indeed allow some space for discrimination for religious reasons. Which

15. *Id.* at 138–42.

16. Council Directive 2000/78/EC, *supra* note 8, art. 4(2).

17. VICKERS, *supra* note 1, at 138.

18. *Id.* at 138–39 (drawing on a notion advanced by Alvin Esau and further elaborating on ideas postulated in *id.* at 79–80).

religious interests and practices can and should be accommodated by states and when can we deem accommodation to be unreasonable? Rigorously countering discriminatory practices in this area could interfere with the autonomy and internal organization of religions and thus be an obstacle to freedom of religion. Yet, as the state at the same time is obliged to uphold everyone's rights, it would appear that the least the state can do is to not actively sanction (and thereby encourage) religious practices that perpetuate patriarchal or homophobic attitudes. It is clear that the issue at stake will remain contentious because any possible outcome of the balancing act implies a sacrifice of certain interests.

Vickers' book sheds light on the issue of religious freedom and equality in the workplace by thoroughly identifying which religious interests are at stake in this context, and by determining to what degree such religious interests are to be upheld in the workplace. Ultimately, it establishes the proper interaction between the right to freedom of religion or belief and the right not to be discriminated against on grounds of religion or belief. The case studies in which Vickers applies the norms of religious freedom and non-discrimination to a range of issues in the workplace (e.g., time off for religious observance, the imposition of dress code, the display of religious symbols, lifestyle requirements, specific work tasks that are at odds with one's beliefs)¹⁹ are most illuminating. Though the incentive for writing this book is clearly the recent European legislation that deals with religious freedom and religious discrimination in the workplace, Vickers tackles the issues

at stake in such a comprehensive and comparative²⁰ manner that her account will also be of interest to non-European human rights scholars with an interest in employment matters. The book is commendable because it provides the first comprehensive and principled model on the proper interaction between the right to freedom of religion or belief and the right not to be discriminated against on grounds of religion or belief in the workplace. Though her model on one or two occasions gives arguably too much weight to the need to accommodate religious interests (possibly at the expense of other norms and principles), Vickers' case for a state duty to reasonable accommodation of religious interests in the workplace is well presented and convincing.

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19. *Id.* at 154–68.

20. See *id.* at 179–218 (elaborating on similar debates and issues regarding the equality and employment laws of the United States and Canada).