



Reasonable Accommodation beyond Disability in Europe?

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Reasonable Accommodation beyond Disability in Europe?

European Network of Legal Experts in the Non-discrimination field

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European Commission
Directorate-General for Justice

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William | 1992



Executive Summary

Reasonable accommodation is related to the quest for substantive equality. It is based on a fundamental observation: some individuals, because of an inherent characteristic (for instance, disability, sex, age, race, culture or language), face barriers to full participation in society on an equal footing. They might, for instance, be prevented from performing a task or from accessing certain spaces in conventional ways. Since society is organised primarily on the basis of the needs of people who do not share such characteristics or differences, those individuals are unable to access employment, services, or other activities. Hence, the interaction between an individual's characteristics and the physical, social or normative environment ultimately deprives him/her of the advantages of an employment opportunity or a service which, in principle, should be open to everyone. At times, it seems that an accommodation of that environment, i.e. its modification or adjustment, allows people possessing that characteristic to avoid such disadvantage when compared to other individuals.

From a conceptual point of view, the duty of reasonable accommodation is closely related to the concept of indirect discrimination. It is indeed based on the idea of substantive equality by recognising that a facially neutral provision, i.e. one that does not formally distinguish on the basis of a prohibited criterion, may be discriminatory in its effects when it disadvantages *de facto* a protected group of people. This corresponds precisely to the concept of indirect discrimination. However, indirect discrimination only enables a determination of whether a provision, criterion or practice has a discriminatory character. Should this be the case, such a provision, criterion or practice must be abandoned and replaced by a new, non-discriminatory, generally applicable measure. Yet, in certain cases, where the controversial measure seems the best way to achieve a certain legitimate objective even though it creates a disadvantage for a protected group, the adjustment of that measure by means of an exception for a disadvantaged individual may be the only way to eliminate the discriminatory character without compromising the measure's purpose. From this perspective, reasonable accommodation can be interpreted as a specific response that is more focused on individual characteristics.

In both the United States and Canada, the concept of reasonable accommodation first emerged in equality law as a means of handling religious diversity. It was then applied to other grounds of discrimination, most notably disability, but also, at least in Canada, to ethnic origin, age, family status, gender and pregnancy. In the European Union, the evolution of anti-discrimination law is following a different path: an explicit duty of reasonable accommodation was for the first time established by the Employment Equality Directive, but only with respect to disability. Nonetheless, the question of whether a right to reasonable accommodation can be derived from the prohibition of (indirect) discrimination based on other grounds laid down by the different equality directives or, alternatively, whether such a right should be recognised in future European legislation, is becoming increasingly salient.

This report discusses the merits and drawbacks of extending the duty to provide for reasonable accommodation beyond disability, with a focus on the discrimination grounds covered by the European network of legal experts in the non-discrimination field (race and ethnic origin, religion and belief, age and sexual orientation). It chiefly focuses on the question of whether the concept of reasonable accommodation is superfluous beyond disability because other tools are in place (e.g. good practices, dynamic interpretation of indirect discrimination, etc.). In addition, the report discusses whether there are specific characteristics related to disability which justify its status as the only ground giving rise to the reasonable accommodation duty under EU law. In other words, should other protected grounds be treated in the same way? The report builds upon the North American experience (Part I), the situation in the Council of Europe (Part II), the current state of the law in the European Union (Part III) and the law and practices in EU Member States (Part IV). In Member States, instances of reasonable accommodation reported by the European network of legal experts in the non-discrimination field chiefly relate to religion and belief and concern: (1) time off for religious festivals and flexible working hours, (2) dietary requirements and slaughtering of animals, (3) accommodation of employment or vocational training requirements, and (4) religious symbols and dress codes. The examples of reasonable accommodations relating to ethnic origin which emerge from the country reports are rare and concern principally the Roma. The application of the concept of reasonable accommodation to the criterion

of age presents a problem of demarcation from other notions, especially from measures designed to take into consideration the particular needs of certain categories of individuals or ensure special conditions for young workers.

In Europe, as in Canada and the United States, the concept of reasonable accommodation derives from the right to equality and non-discrimination. However, the concept's demarcation lines and field of application vary from one legal order to the other. While the United States recognise a right to reasonable accommodation for both disability and religion in employment statutory law, Canada goes beyond these two grounds to include, among others, ethnic origin, age and gender in areas other than employment (education, for instance). Indeed, it is in Canada where the right to reasonable accommodation has expanded most. This is due to the fact that the reasonable accommodation device is rooted in the implementation of the concept of substantive equality. The European Union has so far established an explicit duty of accommodation only in favour of disabled individuals in the employment context. And very few Member States have implemented an express general right to reasonable accommodation beyond disability.

Are there specific characteristics related to disability that justify its status as the only ground giving rise to a reasonable accommodation duty under EU law? Beyond the international consensus on the need to develop a society that is inclusive of persons with disabilities, one of the key points of the reasonable accommodation duty is that it requires an analysis of an individual's situation, which suits anti-discrimination disability law very well. In contrast to age and the specific needs of older workers (which may greatly vary from one person to another), when accommodation of religious beliefs or ethnic requirements is at issue, the focus very much shifts from the individual to the group. Such a focus causes difficulties when religious beliefs or cultural constraints go against gender equality or support differential treatment based on sexual orientation. In this line, one should not ignore how, both in Canada and the United States, the application of the reasonable accommodation tool to religion has generated very lively debates even outside of legal circles, as demonstrated by the work of the Bouchard-Taylor Commission (2007-2008) in Quebec. Indeed, the implementation of this concept in the field of religion touches upon a fundamental question for contemporary democracies, namely how to respond to religious diversity in a democratic State. It also raises the thorny issue of which values should be protected in a democracy. Is it more legitimate for employees to ask to be excused from work on Saturdays so that they can keep the Sabbath than so that they can participate in weekly meetings of a group which campaigns for the release of prisoners of conscience or to spend more time with their families? And, as stressed by some authors, implementing reasonable accommodation with respect to religious requirements tends to favour people who practise their religion in an orthodox manner. Of course, finding the right balance is not at all simple when religious minorities are facing exclusion. In this line, the wearing by Muslim women of the hijab is controversial as the issues of gender and racial equality are closely linked to religion, as the case law of some Member States shows. In this respect, the concept of "vulnerable" group developed by the European Court of Human Rights as regards the Roma might be useful in deconstructing social stigmas and stressing the fact that the overarching issue is not the same when a member of a minority is asking for reasonable accommodation as when the request comes from a member of the majority. In addition, it could help in addressing the issue of intersectional characteristics. At this stage, there is hardly any debate on whether the accommodation duty should be extended to protect people who are disabled but who may also require a specific accommodation because of another characteristic protected by equality law.

In Canada, courts and legislatures have expressed themselves in favour of reasonable accommodation, understood as an instrument leading to a transformation of rules and institutions of Canadian society so as to render them more welcoming to all. However, more recent Supreme Court decisions seem to put an end to this evolution by excluding the principle of reasonable accommodation on grounds of religion or culture when legislative measures of general application are concerned. And in the United States, a much higher standard of undue hardship is applied where disability is at issue in comparison with religion with the result that few religious requests are *de facto* accommodated as many do not pass the test of *de minimis cost*.

In Europe, the situation is less clear than it might appear at first glance. Undoubtedly, by adopting the Employment Equality Directive, European Union law has established the duty of reasonable accommodation only for employers and in favour of disabled individuals. No such duty is envisaged on the basis of religion, ethnicity or age. However,

the prohibition of indirect discrimination might be interpreted by the Court of Justice of the EU or by the jurisdictions of a Member State as requiring, in certain cases, that the author of a provision or a rule of general application adapt that measure in order to avoid discriminating indirectly against certain individuals because of their religion, ethnicity or age. A similar interpretation of the prohibition of discrimination has been developed by Canadian jurisdictions and finds support in a few Member States' case law. The EU Court of Justice implicitly employed similar reasoning in its decision *Vivien Prais* (1976) – admittedly a decision issued prior to the adoption of Directive 2000/78/EC and which remains unconfirmed. Besides, since the *Thlimmenos v. Greece* ruling (2000), the European Court of Human Rights has recognised that, in accordance with the principle of non-discrimination enshrined in Article 14 of the Convention, the legislator may, under certain circumstances, be asked to introduce appropriate exceptions into legislation to avoid disadvantaging people practising a certain religion. While the European Court of Human Rights usually tends to leave a wide national margin of appreciation when issues of religious accommodation are in question, its recent ruling in the *Eweida* case (2013) might pave the way for a stricter assessment of the proportionality test more in line with the one applied by the UN Human Rights Committee and the European Committee of Social Rights concerning the Roma.

However, developing the duty of accommodation as a corollary of the prohibition of indirect discrimination is problematic in Europe as the very concept of indirect discrimination is overlooked in many Member States. Indeed, national reports produced by the European network of legal experts in the non-discrimination field show to what extent the boundaries between legal concepts such as reasonable accommodation, indirect discrimination and positive action are blurred. Reasonable accommodation is also sometimes associated with measures implemented through legislation to take into account the special needs of a category of individuals (pregnant women, young workers, etc.). Although there is a similar philosophy behind these legal tools, they operate, as we have seen, in different ways.

Within the legal orders of Member States of the European Union, adaptations of certain general rules are sometimes allowed, in a few cases so as to take into account the way of life of Roma Travellers, but most often to avoid impairing indirectly the practice of a religion. The shapes these adaptations assume are comparable to certain applications of the concept of reasonable accommodation in Canada and the United States. However, these examples need to be distinguished from a situation in which the State recognises the general right to reasonable accommodation in the employment context or in other areas of social life. The recognition of such a broad right means that the accommodations which can be achieved are not limited in advance. It also implies that the believers of a minority religion benefit from the same protection as those belonging to the majority religion. And the duty bearer is compelled to consider any request for accommodation which is submitted and can only reject it under the conditions established by law or jurisprudence.

The American and Canadian experiences nevertheless highlight the difficulties which the practice of reasonable accommodation can pose when applied on a large scale. These are most prominently the risk of an increase in litigation as well as the delicate assessment of the limits to the duty of accommodation, in particular when the adjustment demanded raises issues of compatibility with other fundamental rights, such as gender equality. Furthermore, if adjustments come in the form of an exception to a generally applicable rule, they can enter into conflict with the concept of formal equality and the principle of the general application of laws. Additionally, the existence, whether objective or subjective, of the religious precept claimed may be a source of controversy.

One way to address the issue might be to foster different legal responses depending on whether pro-active measures are conceivable because a protected group is concerned as a group. In the same way as there are general rules to take into account the special needs of pregnant women or young workers, there could be comparable rules to make allowance for the traditional lifestyle of the Roma or Travellers or the need to allow minorities time off to celebrate religious festivals which do not correspond to public holidays, for instance. Additional issues might be addressed through application of the concept of indirect discrimination and a strict proportionality test. In this line, reasonable accommodation could be dedicated to situations where individual assessment is required. This mostly concerns persons with disabilities or aging persons whose situation might require ad hoc responses to their needs in order to allow them to carry out their jobs and more generally, to fully participate in society on an equal footing.

Introduction¹

Reasonable accommodation is related to the quest for substantive equality. It is based on a fundamental observation: some individuals, because of an inherent characteristic (for instance, disability, sex, age, race, culture or language),² face barriers to full participation in society on an equal footing. They might, for instance, be prevented from performing a task or from accessing certain spaces in conventional ways. Since society is organised primarily on the basis of the needs of people who do not share such characteristics or differences, those individuals are unable to access employment, services, or other activities. Hence, the interaction between an individual's characteristics and the physical, social or normative environment ultimately deprives him/her of the advantages of an employment opportunity or service which, in principle, should be open to everyone.³ At times, it seems that an accommodation of that environment, i.e. its modification or adjustment, allows people possessing that characteristic to avoid disadvantage when compared to other individuals. In this line, one could think of allowing guide dogs in shops and restaurants where animals are usually forbidden for reasons of hygiene, or permitting fireproof scarves or turbans in laboratories where a dress code is enforced on safety grounds. In other words, achieving equality and social inclusion in certain circumstances make it necessary to take account of individuals' specific features.

Accordingly, the laws of some countries hold that in such situations the principle of equality and non-discrimination imposes a duty of "reasonable accommodation", i.e. the obligation to take all appropriate measures so as to guarantee certain categories of people protection against discrimination by granting access to employment or other activities. However, this duty has a limit: it cannot impose a disproportionate burden on the party having to bear it, which can be an employer, any other private economic actor or a public authority.⁴

Academics do not agree on whether to qualify the refusal to provide reasonable accommodation as direct discrimination, indirect discrimination or as a third, *sui generis* type of discrimination.⁵ In any event, from a conceptual point of view, the duty of reasonable accommodation is closely related to the concept of indirect discrimination. It is indeed based on the idea of substantive equality by recognising that a provision that may be facially neutral, i.e. does not formally distinguish on the basis of a prohibited criterion, may be discriminatory in its effects when

- ¹ With respect to reasonable accommodation on religious grounds, some developments made in this report are based on previous (updated) work pursued in collaboration with Julie Ringelheim. See, for instance, E. BRIBOSIA, J. RINGELHEIM and I. RORIVE, "Aménager la diversité : le droit de l'égalité face à la pluralité religieuse", *Revue trimestrielle des droits de l'homme* (2009), 319-373; "Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?", *17/2 Maastricht Journal of European and Comparative Law* (2010), 137-161; "Reasonable Accommodation of Religious Diversity in Europe and in Belgium. Law and Practice", in S. BONJOUR, D. JACOBS & A. REA (eds), *The Construction of the Other in Europe*, Brussels (PUB, 2011), 91-116. See also E. BRIBOSIA and I. RORIVE (eds), *Accommoder la diversité religieuse. Regards croisés Canada/Europe/Belgique* (2014) forthcoming.
- ² K. HENRARD, "Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality", *5/1 Erasmus Law Review* (2012), 59-77, 62.
- ³ L. WADDINGTON, "Reasonable Accommodation", in D. SCHIEK, L. WADDINGTON and M. BELL (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Ius Commune Casebooks for the Common Law of Europe (Hart, 2007), 629-756, 631.
- ⁴ See the definition offered by P. BOSSET, "Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable", in M. JEZEQUIEL, *Les accommodements raisonnables : quoi, comment, jusqu'où? Des outils pour tous* (Yvon Blais, 2007), 3-28, 10. See also L. WADDINGTON, *op. cit.*, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (2007), 629 *et seq.*
- ⁵ On this controversy, see Ch. MCCRUDDEN, "Theorising European Law", in C. COSTELLO and E. BARRY (eds), *Equality in Diversity – The New Equality Directives* (Irish Centre for European Law, 2003), 1-38, 27-28 and WADDINGTON, "Reasonable Accommodation", *op. cit.* (2007) 740-754. On the relationship between the concepts of reasonable accommodation and discrimination, see also Ch. JOLLS, "Antidiscrimination and Accommodation", *115 Harvard Law Review* (2001-2002), 642-699.

it disadvantages *de facto* a protected group of people. This corresponds precisely to the concept of indirect discrimination. However, indirect discrimination only enables a determination of whether a provision, criterion or practice has a discriminatory character. Should this be the case, such a provision, criterion or practice must be abandoned and replaced by a new, non-discriminatory, generally applicable measure. Yet, in certain cases, where the controversial measure seems the best way to achieve a legitimate objective even though it creates a disadvantage for a protected group, the adjustment of that measure by means of an exception for a disadvantaged individual may be the only way to eliminate its discriminatory character without compromising the measure's purpose. From this perspective, reasonable accommodation can be interpreted as a specific response that is more focused on individual characteristics.

In both the United States and Canada, the concept of reasonable accommodation first emerged in equality law as a means of handling religious diversity. It was then applied to other grounds of discrimination, most notably disability, but also, at least in Canada, to ethnic origin, age, family status, gender and pregnancy.⁶ In the European Union, the evolution of anti-discrimination law is following a different path: an explicit duty of reasonable accommodation was for the first time established by the Employment Equality Directive⁷ but only with respect to disability. Nonetheless, the question of whether a right to reasonable accommodation can be derived from the prohibition of (indirect) discrimination based on other grounds laid down by the different equality directives (the Race Equality Directive with respect to race and ethnicity,⁸ the Employment Equality Directive with respect to age or religion and belief,⁹ the Goods and Services Equality Directive¹⁰ and the Framework Gender Equality Directive¹¹ with respect to gender and pregnancy), or, alternatively, whether such a right should be recognised in future European legislation, is becoming increasingly salient.

This report discusses the merits and drawbacks of extending the duty to provide for reasonable accommodation beyond disability, with a focus on the discrimination grounds covered by the European network of experts in the non-discrimination field (race and ethnic origin, religion and belief, age, sexual orientation). It chiefly focuses on the question of whether the concept of reasonable accommodation is superfluous beyond disability because other tools are in place (e.g. good practices, dynamic interpretation of indirect discrimination, etc.). In addition, the report discusses whether there are specific characteristics related to disability which justify its status as the only ground that gives rise to a reasonable accommodation duty under EU law. In other words, should other protected grounds be treated in the same way?

The report builds upon the North American experience (Part I), the situation in the Council of Europe (Part II), the current state of the law in the European Union (Part III) and the law and practices in EU Member States (Part IV). In conclusion, we shall see that the question of extending a reasonable accommodation duty beyond disability concerns presently, to a large extent, religious issues in these different legal orders.

⁶ L. WADDINGTON, "Reasonable Accommodation – Time to Extend the Duty to Accommodate Beyond Disability?" 36/2 NTMJNJCMBull (2011), 186-198, 189.

⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 2 December 2000, pp. 16-22.

⁸ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19 July 2000, pp. 22-26.

⁹ Sexual orientation is not mentioned here as, to our knowledge, it has never given rise to the issue of reasonable accommodation.

¹⁰ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Official Journal L 373/38, 21 December 2004.

¹¹ Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Journal L 204/23, 26 July 2006.



Wanda | 1975

Part I

North America: The origins of the concept of reasonable accommodation

The legal concept of reasonable accommodation, which is nowadays found outside of Europe in several legal systems influenced, to different extents, by the common law tradition of countries such as South Africa, New Zealand and Israel, is rooted in US law (1960s) and Canadian law (1980s) and was first implemented, in both countries, with respect to religious belief.

1. United States law

The United States was the first country to enact a duty of reasonable accommodation in statutory employment law and it did so on the grounds of religion before also covering disability.

Initially, in one of its guidelines, the Equal Employment Opportunity Commission – the federal agency responsible for enforcing the prohibition of discrimination in employment mandated by Title VII of the 1964 Civil Rights Act – provided that an employer who refuses to accommodate the religious practices of his/her employees violates federal anti-discrimination legislation, if such accommodation can be made without undue hardship.¹² This point of view was rejected by multiple federal jurisdictions, including the United States Supreme Court.¹³ However, in 1972, following an amendment introduced by Senator Randolph, a member of the religious community of the Seventh-day Adventists who consider Saturday to be the Sabbath, Congress modified Title VII of the 1964 Civil Rights Act to add a duty for private or public employers “to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business”.¹⁴

The Supreme Court clarified the extent of the duty in the case *TWA v. Hardison*¹⁵ which involved an employee of Trans World Airlines who was fired because of his refusal to work on Saturdays after he converted to the “Worldwide Church of God”. According to the Supreme Court, an employee alleging a violation of the reasonable accommodation principle must prove that a religious commandment in which (s)he genuinely believes conflicts with an employment regulation, that (s)he informed the employer of this situation, and that (s)he was sanctioned for not observing such a regulation. At this point, the employer, in turn, has to show that (s)he offered a reasonable accommodation which would allow the employee to follow the commandments of his or her religion, or that any reasonable accommodation would have led to an undue hardship on the employer’s business. While there is a consensus that an accommodation is not reasonable when it infringes on other employees’ rights, the extensive interpretation given to the concept of undue hardship by the Supreme Court has sparked some controversy. The judges held that “[t]o require TWA to bear more than a *de minimis* cost in order to give respondent [Hardison] Saturdays off would be an undue hardship”.¹⁶ This interpretation stands in contrast with the definition provided later, in 1990, in the Americans with Disabilities Act, which describes undue hardship when applied to the disability ground as an “action requiring significant difficulty or expense”.¹⁷ The latter enshrines a much more stringent standard than the *de minimis* cost applied with regard to religion and employment.

¹² *EEOC Guidelines on Discrimination Because of Religion*, 29 CFR §1605.1 (b) (effective July 10, 1967).

¹³ See R. L. CORRADA, ‘Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases’, *University of Denver Sturm College of Law, Legal Research Paper Series, Working Paper No. 07-12* (2007) 19; *Dewey v. Reynolds Metals Co.*, 402 US 689 (1971). Note that the Supreme Court was equally divided because one of its Justices did not take part in the decision.

¹⁴ Title VII Civil Rights Act, § 701 (j). On the origins of this amendment, see J. M. OLESKE, Jr., “Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation”, 6 *University of Pennsylvania Journal of Constitutional Law* (2004), 525-572, 532.

¹⁵ *Trans World Airlines v. Hardison*, 432 US 63 (1977).

¹⁶ *Ibidem*, p. 84. See the critique by K. ENGLE, “The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII”, 76 *Texas Law Review* (1997), 312-433, 387-406.

¹⁷ Americans with Disabilities Act (1990), 42 USC § 12111(10).

In the *Philbrook* case¹⁸ decided in 1986, the Supreme Court further clarified the extent of reasonable accommodation. A school teacher based in Connecticut was absent six school days a year to fulfil religious obligations while the collective bargaining agreement only allowed for an absence of three days per year. He was offered the three necessary additional days off from work, but without payment. Not satisfied with this arrangement, Mr Philbrook went to court but lost his claim before the Supreme Court, which ruled that the employer might fulfil his obligation without necessarily having to accept the solutions proposed by the employee.

In addition to refining the notions of undue hardship and the way reasonable accommodation should be implemented, federal courts had to draw the line between religious practices which fell under the scope of protection of Title VII of the 1964 Civil Rights Act and religious observance which did not deserve legal protection. The Supreme Court opted for an approach to the concept of religion based on the sincerity of the beliefs and a broad conception of religion. In this respect, the *obiter dictum* attached to the opinion of Justice Black in the *Torcaso* case is often referred to: “Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others”.¹⁹ In some cases, however, federal courts tried to avoid the issue. The *Cloutier v. Costco* case²⁰ involved Ms Cloutier, an employee of the Costco Wholesale Corporation and a follower of the “Church of Body Modification” which allegedly requires facial piercings to be visible. The company refused to accommodate its dress code on the ground of the proper and professional image promoted by the retail chain store. Without entering into the religious character of the employee’s beliefs, the First Circuit Court of Appeals ruled that, in any event, accommodation was crossing the threshold of undue hardship.

In a nutshell, the obligation to make a reasonable accommodation with regard to religion has been narrowly construed in the US. However, religious accommodation is not unheeded. Employers are required to provide some types of accommodation, such as exceptions to clothing rules, changes in working hours which do not entail the payment of overtime or the infringement of other employees’ rights (like exceptions to benefits tied to seniority in a company), or authorisations of selected absences for religious festivals.²¹ Still, religious lobbies have reacted to this restrictive interpretation and several bi-partisan bills have been submitted before the House of Representatives and the Senate in order to strengthen the requirements imposed on employers pursuant to Title VII of the Civil Rights Act.²² Amongst the critiques, the famous NGO American Civil Liberties Union strongly denounced the risk of an encroachment upon the rights and freedoms of others.²³

Besides anti-discrimination legislation, there is a lively debate in American constitutional theory on whether federal and state legislators have a duty of accommodation which can be derived from the right to freedom of religion as established by the First Amendment of the United States’ Constitution, known as the Free Exercise Clause.²⁴ Here, accommodation takes the form of an exemption from the application of a general legislative provision (for instance,

¹⁸ *Ansonia Board of Education v. Philbrook*, 479 US 60 (1986).

¹⁹ *Torcaso v. Watkins*, 367 US 488 (1961).

²⁰ *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. Mass. 2004).

²¹ On this jurisprudence, see K. ENGLE, 76 *Texas Law Review* (1997), 387-406; S.A. ROSENZWEIG, “Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation”, 144 *University of Pennsylvania Law Review* (1996), 2513-2536, 2517-2522; Ch. L. EISGRUBER and L. SAGER, *Religious Freedom and the Constitution* (Harvard University Press, 2007), 87-108.

²² C. CACERES, “Reasonable Accommodation as a Tool to Manage Religious Diversity in the Workplace: What about the ‘Transposability’ of an American Concept into the French Secular Context?”, in K. ALIDADI, M.-C. FOGLETS & J. VRIELINK (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Ashgate, 2012), 283-316.

²³ L. W. MURPHY & C. E. ANDERS, *ACLU Letter on the Harmful Effect of S. 893, the Workplace Religious Freedom Act, on Critical Personal and Civil Rights* (2004), on www.aclu.org.

²⁴ K. GREENAWALT, *Religion and the Constitution* (Princeton University Press, 2006), Vol. I, 15. See also B. NOVIT EVANS, *Interpreting the Free Exercise of Religion. The Constitution and American Pluralism* (University of North Carolina Press, 1997), 204-227.

exemption from the rule which requires availability for work to receive unemployment benefits, when unavailability on Saturday is due to religious reasons). The relevant test to circumvent this exemption in the name of freedom of religion has been highly debated: the Supreme Court has changed its position over the course of the years²⁵ and, at times, the issue has led to stormy debate before Congress and state parliaments.²⁶

2. Canadian law

The concept of reasonable accommodation first appeared in Canada during the 1980s.²⁷ This common law principle was developed by specialised courts in the interpretation of the Canadian Human Rights Act, before being applied by ordinary courts and eventually confirmed by the Supreme Court for the first time in *Ontario Human Rights Commission (O'Malley) v. Simpson-Sears Limited*, decided in 1985.²⁸ Ms O'Malley, a salesperson in a large department store, had been denied accommodation of her working hours, even though she had notified her employer that they were incompatible with her religion which imposed strict observance of the Sabbath. Hence, she felt she was a victim of indirect discrimination on the grounds of her religion. While the Ontario Human Rights Code did not make any reference to the concept of reasonable accommodation,²⁹ the Supreme Court drew on equality and non-discrimination principles to find that employers have such a duty to accommodate.³⁰

Under Canadian law, the notion of reasonable accommodation is conceived as a derivation of the equality principle and more specifically of the prohibition of discrimination resulting from the adverse impact of a facially neutral provision, practice or policy.³¹ The duty of accommodation, construed as a corollary of substantive equality, is incumbent upon the author of a provision, practice or policy which *de facto* penalises an individual on the basis of any prohibited ground of discrimination. It involves the use of all reasonable means to take into account the specific needs of that individual and to protect him or her from the discriminatory effects of such a provision, practice or policy. This duty to accommodate arises independently of an express reference in legislation, even though, after having been confirmed by case law, it has been enshrined in some human rights statutes.³²

²⁵ Three decisions have shaped this eventful history: *Sherbert v. Verner* 374 US 398 (1963), *Wisconsin v. Yoder* 406 US 205 (1972) and *Employment Division v. Smith* 494 US 872 (1990).

²⁶ On this issue, see, for instance E. BRIBOSIA, J. RINGELHEIM and I. RORIVE, "Aménager la diversité : le droit de l'égalité face à la pluralité religieuse", *Revue trimestrielle des droits de l'homme* (2009), 319-373, 331-332.

²⁷ On the origins and evolution of the concept see, in particular, J. WOEHLING, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse", 43 *Revue de droit de McGill* (1998) 325-401. For more recent contributions, see P. BOSSET, "Les fondements juridiques et l'évolution de l'obligation d'accommodation raisonnable", in M. JÉZÉQUIEL, *Les accommodements raisonnables : quoi, comment, jusqu'où ? Des outils pour tous*, Yvon Blais, Cowansville (Québec), Canada, 2007, 3-28; P. BEYER, "Religion and Immigration in a changing Canada: The Reasonable Accommodation of 'Reasonable Accommodation'", in L. G. BEAMAN, *Reasonable Accommodation. Managing Religious Diversity*, Vancouver, UBC Press, 2012, pp. 13-31; M. JEZEQUIEL, "The reasonable accommodation requirement: Potential and Limits", in *Trends in social cohesion*, No. 21, Council of Europe Publishing, 2009, pp. 21-36.

²⁸ *Ontario Human Rights Commission (O'Malley) v. Simpsons-Sears*, [1985] 2 SCR 536 (hereinafter *O'Malley*). See WOEHLING, *op. cit.*, 43 *Revue de droit de McGill* (1998) 329.

²⁹ The Ontario Human Rights Code was modified in 1986 to explicitly introduce the duty of reasonable accommodation (RSO 1990 (Ontario) c. H 19, art. 11, 24).

³⁰ *O'Malley*, [1985] 2 SCR, p. 554-555.

³¹ It is worth noting that under Canadian law, there is no rigid distinction between direct and indirect discrimination or equal treatment and disparate impact (See the *Meiorin* case, *British Columbia (Public Service Employee Relations Commission) v. BCGEU* (1999) 3 SCR 3 (Supreme Court of Canada)).

³² See, in particular, the provision introduced in 1998 into the Canadian Human Rights Act which recognises that based on the principle of non-discrimination all individuals have the right "to have their needs accommodated" (R.S., 1985, c. H-6, s. 2; 1996, c. 14, s. 1; 1998, c. 9, s. 9.).

Based on the principle of equality, the duty of reasonable accommodation has a large field of application under Canadian law. While the significant controversies that have surrounded reasonable accommodation for religious reasons in the last decade³³ may create the impression that this is the most prevalent form of accommodation, in reality disability³⁴ followed by gender,³⁵ national origin and age³⁶ are more frequent grounds for accommodation in Canada.³⁷ The fields in which the principle of reasonable accommodation regarding all the grounds can be applied are also very broad: employment, supply of goods and services, education,³⁸ and health.³⁹ Moreover, the duty to accommodate applies to private individuals as well as to public authorities.

However, in *Alberta v. Hutterian Brethren of Wilson Colony*, a four to three decision adopted in July 2009,⁴⁰ the Supreme Court limited the extension of the concept of reasonable accommodation in relation to public powers. While the Court acknowledged that reasonable accommodation can be a helpful concept when assessing the legitimacy of the impairment of a protected right by a government action or administrative practice,⁴¹ it held that this is not the case when a legislative measure of general application is involved. As opposed to the lower courts which had decided on the same matter, the Supreme Court found that the constitutionality of laws of general application must be determined with respect to criteria that are less stringent than those required by the duty of reasonable accommodation: the government is entitled to justify the law by establishing that the measure is rationally connected to a pressing and substantial goal, that it impairs the right to a minimal extent and that it is proportionate in its effects.⁴² In assessing the minimal impairment, the Court nevertheless gauges the availability of alternative solutions. In this specific case, the members of the Hutterian Brethren of Wilson Colony invoked their sincere belief according to which the second of the Ten Commandments prohibited them from having their photograph taken. They asked for an exception to the Province of Alberta's regulation which imposed the display of a photo on the driver's licence. The Court rejected the claim, holding that this measure aims at maintaining the integrity of the driver's

³³ What came to be called the "accommodation crisis" stemmed from the tremendous media attention generated by some instances of formal or informal accommodation granted for religious or cultural reasons in the province of Quebec. This "time of turmoil" led to the creation by Quebec's prime minister of an advisory Commission on the practices of accommodation relating to cultural differences (the "Bouchard-Taylor Commission"). On this crisis, see *Building the Future – A Time for Reconciliation*, G. BOUCHARD and Ch. TAYLOR, Consultation Commission on Accommodation Practices Related to Cultural Differences, Government of Quebec, 2008 (available at <http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>).

³⁴ See for instance, *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 (concerns the need for provision of sign language interpreters for deaf patients as part of the publicly funded health care scheme).

³⁵ See for instance: SCC, *British Columbia (Public Service Employee Relations Commission) v. BCGEU* [1999] 3 SCR 3 (concerns aerobic requirements for fire fighters that were shown to be sex discriminatory). See also, H. SHIPLEY, "One of these things is not like the other. Sexual Diversity and Accommodation", in L. G. BEAMAN, *Reasonable Accommodation. Managing Religious Diversity*, Vancouver, 2012, 165-186.

³⁶ See for instance: SCC, *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429, 2002 SCC 84 (concerns a Social Aid Regulation in Québec which differentiated on the ground of age).

³⁷ For case law concerning grounds of discrimination other than religion, see BOSSET, "Les fondements juridiques...", *op. cit.*, 2007, 13-14; L. BARNETT, J. NICOL & J. WALKER, *An Examination of the Duty to Accommodate in the Canadian Human Rights Context*, Background Paper, Publication No. 2012-01-E, Ottawa, Canada, Library of Parliament, 5-11, available at <http://www.parl.gc.ca/content/lop/researchpublications/2012-01-e.pdf>.

³⁸ In this field, a public report concerning the Province of Quebec highlights that the main requests for accommodation concern religion (78 %), followed by linguistic diversity (16 %) and ethno-cultural diversity (2 %): B. FLEURY, *Une école québécoise inclusive: dialogue, valeurs et repères communs*, Quebec, Ministère de l'Éducation, du Loisir et du Sport, 2007, p. 124.

³⁹ On the difficulties raised by the application of the concept of reasonable accommodation in the domain of public services, see A. SARIS, "L'obligation juridique d'accommodement raisonnable", in H. DORVILL (dir.), *Problèmes sociaux* (PUQ, 2007), Vol. IV, 385-425; M. JEZEQUIEL, "The reasonable accommodation requirement: potential and limits", *op. cit.*

⁴⁰ 2009 CSC 37.

⁴¹ *Ibidem*, [67].

⁴² *Alberta v. Hutterian Brethren of Wilson Colony*, [71].

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licensing system in a way that minimises the risk of fraud or identity theft and that no alternative solution could achieve that objective while avoiding taking the pictures of the plaintiffs.⁴³

Accommodations can assume various shapes.⁴⁴ They may be imposed by a court or negotiated amicably and may either consist of a mere exemption from the application of the indirectly discriminatory rule⁴⁵ or in the creation of a special regime.⁴⁶ The accommodation can also consist in the provision of infrastructures or particular services for those affected, such as specific meals in hospitals or prisons. The focus on contextualisation leads to a large variety of accommodations which are, most of the time, identified on a case-by-case basis. Yet, for the legal duty of accommodation to arise, a discrimination based on a prohibited ground must first be established.⁴⁷ This point is explored below in the context of employment.

The duty of accommodation only exists as long as it is “reasonable”. This requirement, and hence the arguments that can be raised to oppose a demand for accommodation, vary depending on the context (employment, supply of goods and services, education, etc.) in which the request is made and on whether the demand is addressed to a private or a public authority. The notion of “reasonableness”, which defines the limit of the obligation to accommodate, has been articulated most clearly in the employment field. In order to be discharged of his duty of accommodation the employer must first of all show the rational character of the policy or the provision generating the discrimination based on the protected ground (religion, ethnic origin, age, etc.) in view of the employment or the efficiency of the company.⁴⁸ If the rational character of the provision or the policy has been established, the employer still has to prove that he took all necessary steps to provide an accommodation⁴⁹ and that further measures in this direction would amount to undue hardship. The Supreme Court has interpreted this latter limitation in an open manner. Rather than defining this concept exhaustively, it prefers to enumerate certain factors which allow a better understanding of the concept, such as limited financial and material resources, the impairment of third party rights and the wish to ensure the efficiency of the company or the institution.⁵⁰ These factors must be considered in the context of each case and with flexibility. Moreover, the Court clearly rejects the *de minimis* standard which is applied in the United

⁴³ For a commentary on this decision, see S. WEINRIB, “An Exemption For Sincere Believers: The Challenge of *Alberta v. Hutterian Brethren of Wilson Colony* – Case Comment”, 56 *McGill Law Journal* (2011) 719-750.

⁴⁴ See the detailed description in the Bouchard-Taylor Report: *Building the Future*, *op. cit.*

⁴⁵ Thus, the Royal Canadian Mounted Police (the RCMP) authorised Sikhs to serve in their ranks and exempted them from the obligation to wear the traditional Stetson hat. This decision by the RCMP was challenged unsuccessfully before the Federal Court for being contrary to the religious freedom of members of the public (*Grant v. Canada (Attorney General)*, [1995] 1 FC 158).

⁴⁶ This solution prevailed in the famous *Multani* case with respect to the carrying of the *kirpan* (the ceremonial dagger worn by Sikhs) in a public school: *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 1 SCR 256, 2006 SCC 6 as described by J. WOEHLING, “La liberté de religion, l’obligation de neutralité religieuse de l’Etat et le droit à l’accommodement raisonnable : quelle place pour la religion dans les institutions publiques?”, *Revista catalana de dret public*, 2006, Vol. 33, 369-403, footnote 45; see also S. L. GRATTON, “Standing at the Divide: the Relationship Between Administrative Law and the Charter post-Multani”, 53 *McGill Law Journal* (2008) 477-514.

⁴⁷ This is precisely what allows a distinction to be made between reasonable accommodations and simple *adjustments* “of-fered or allowed to facilitate the integration of religious or cultural minorities or to promote amicable relationships between majority and minorities” (WOEHLING, *op. cit.*, 33 *Revista catalana de dret public* (2006), 20, our translation). Note that this is not necessarily the case under the Employment Equality Directive with regard to disability.

⁴⁸ If the rational character of the provision or policy cannot be shown the sanction will be the invalidity of the provision rather than its reasonable accommodation (WOEHLING, *op. cit.*, 43 *Revue de droit de McGill* (1998) 342).

⁴⁹ The obligation to negotiate in good faith is reciprocal, and the person asking for accommodation cannot refuse proposals made to her for the simple reason that they are not the ideal solution or precisely what she asked for (*Islamic Schools Federation of Ontario*, (1997) 145 DLR (4th) 659).

⁵⁰ Ch. BRUNELLE, *Discrimination et obligation d’accommodement en milieu de travail* (Yvon Blais, 2001) 248-251; L. BARNETT, J. NICOL & J. WALKER, *An Examination of the Duty to Accommodate in the Canadian Human Rights Context*, *op. cit.*, 1-5.

States in the context of religion.⁵¹ Concrete and material proof of the undue hardship must be submitted; mere hypotheses or speculations are not sufficient.

The development of the concept of reasonable accommodation raises some tricky issues in Canada. A specific question concerns the requirements to be fulfilled in order to demand an accommodation for religious reasons. Whether such a demand is based on the principle of equality or on the right to religious freedom, the claimant must show in which way the rule, provision or practice disadvantages her on the basis of religion, which means that one needs to demonstrate a conflict between the rule and a religious precept. However, what should judges decide when the religious obligation claimed is controversial within the faith community itself? Do they have to verify the objective existence of such an obligation in that religion or can they limit themselves to determining whether the plaintiff sincerely believes this is the case? In *Amselem*,⁵² a close five to four decision, the Supreme Court favoured an individualist conception of the freedom of religion.⁵³ This approach, preferred by the Court, has the advantage of enabling courts to avoid entering into the interpretation of religious dogmas or defining what religion is – a problem some deem almost impossible to solve. It also avoids the risk of courts marginalising minority religions or minority voices within a religious community, and it is in line with the contemporary evolution of religion towards individualisation.⁵⁴ However, on the down side, focusing the judicial review on the claimant's subjective point of view could facilitate opportunistic and fraudulent requests. Another difficulty arises in that the process of verifying the plaintiff's sincerity could enter into conflict with an individual's right to privacy.⁵⁵

Possibly aware of the pitfalls of an exclusively subjective approach, the Court slightly overruled the afore-mentioned decision in a more recent case dating from 2012, *Commission scolaire des Chênes*. Here, it stated that: “[a]lthough the sincerity of a person's belief that a religious practice must be observed is relevant to whether the person's right to freedom of religion is at issue, an infringement of this right cannot be established without objective proof of an interference with the observance of that practice”.⁵⁶

A tremendous challenge is posed by the potential conflict of rights resulting from certain accommodation requests. The legal duty of accommodation is not absolute; it can be limited by the need to protect other rights – such as non-discrimination based on gender or sexual orientation, right to life,⁵⁷ etc. In such a situation, courts undertake a balancing exercise aimed at finding a solution which may reconcile the conflicting rights. In the much publicised *R. v. N.S.* case, decided in 2012, the Supreme Court of Canada provided more precise guidance on how to deal with conflicting rights.⁵⁸ At issue was the following conflict: on the one hand, the freedom of religion of a witness in a

⁵¹ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR, p. 984.

⁵² *Syndicat Northcrest v. Amselem*, 2004 CSC 47 [2004] 2 SCR See J. WOEHLING, “Quelle place pour la religion dans les institutions publiques ?”, in *Le droit, la religion et le ‘raisonnable’*, J.-F. Gaudreault-DesBiens (ed.), Montreal, Éditions Thémis, 2009, pp. 115-168; R. MOON, “Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*, *Supreme Court Law Review* (2005), 29 S.C.L.R. (2d).

⁵³ For a critique of the Supreme Court's position, see A. SARIS, “La prise en considération des convictions religieuses par le droit positif au Canada”, *op. cit.*; M.-C. FOLETS, P. FOUCHER, M. GRAZIADEI, R. GTARI and J. VANDERLINDEN (eds), *Convictions philosophiques et religieuses et droits positifs* (Bruylant, forthcoming); S. LEFEBVRE, “Religion in Court, Between an Objective and a Subjective Definition”, in L. G. BEAMAN, *Reasonable Accommodation. Managing Religious Diversity*, Vancouver, 2012, 32-50.

⁵⁴ BOUCHARD and TAYLOR, *Building the Future*, *op. cit.*, 175-177.

⁵⁵ WOEHLING, *op. cit.*, 33 *Revista catalana de dret public* (2006), 390 *et seq.*

⁵⁶ *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 SCR, 235. In 2008, the Ethics and Religious Culture (“ERC”) Program became mandatory in Quebec schools, replacing Catholic and Protestant programmes of religious and moral instruction. L and J requested that the school board exempt their children from the ERC course, putting forward the existence of serious harm to the children within the meaning of s. 222 of the Education Act.

⁵⁷ *R. v. Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR, p. 315 (religious objection to blood transplant).

⁵⁸ *R. v. N.S.*, 2012 SCC 72.

criminal proceeding wishing to testify while wearing her *niqab*, and, on the other, the right of the defendants – the cousin and uncle of the witness, charged with sexual assault – to a fair trial, including the right to cross-examine witnesses. From the perspective of reasonable accommodation, the question was whether one could (or should) reasonably accommodate the rules of fair trial to protect the witness’s freedom of religion. The four judges of the majority rejected an “extreme approach” that would systematically make one right prevail over another and create a form of hierarchy between those rights. For the majority judges, “the answer lies in a just and proportionate balance between freedom of religion and trial fairness, based on the particular case before the court. A witness who for sincere religious reasons wishes to wear the *niqab* while testifying in a criminal proceeding will be required to remove it if (a) this is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the salutary effects of requiring her to remove the *niqab* outweigh the deleterious effects of doing so”. By rejecting a hierarchical approach, the Supreme Court seems to be in line with its traditional accommodating method, requiring an assessment on a case-by-case basis, taking into account all the factors in question and aiming at preserving the rights in conflict to the greatest possible extent.⁵⁹

⁵⁹ On the issue of conflicts of rights, see E. BRIBOSIA & I. RORIVE, *Towards a balance between the right to equality and fundamental rights* (European Commission, 2010), p.72.

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Although Article 14 of the European Convention on Human Rights on equality has been part of the Convention from the start and although the first equality case was decided in 1968,⁶⁰ it should be borne in mind that a significant body of case law based on this non-independent provision⁶¹ has only recently been built, chiefly influenced by developments in EU law. As a consequence, the idea that equality also means treating different situations differently and the concept of indirect discrimination are still very young in the jurisprudence of the European Court of Human Rights.

However, the ECtHR's jurisprudence on equality provides interesting cases in which the device of reasonable accommodation has been at issue without, most of the time, being named as such. As to the grounds dealt with by the European legal network of experts in the non-discrimination field, these cases mostly concern religion and, to a lesser extent, ethnicity and disability. With respect to the Roma and Travellers, some of the decisions delivered by the European Social Committee are also of tremendous importance. A review of this case law is essential to better grasp the development of the use of the reasonable accommodation device in the human rights arena. In the framework of this report we chiefly focus on cases related to religious and ethnic origin.

1. Religion and belief: The back and forth of the European Court of Human Rights

On a number of occasions, the institutions interpreting the European Convention on Human Rights have had to deal with cases in which a demand similar to a request for reasonable accommodation for religious reasons was at issue.⁶² For a long time these institutions have not looked favourably at the recognition of a “duty of reasonable accommodation” whether solely on grounds of freedom of religion (Article 9 of the Convention) or on grounds of Article 9 read in conjunction with Article 14 which prohibits discrimination with respect to any of the rights and freedoms guaranteed by the Convention. In the context of Article 9, this concept could nevertheless find support in the criterion of proportionality, which determines the compatibility of a measure impairing freedom of religion with the Convention. Article 9 § 2 provides that a restriction on religious freedom is only permitted if it is prescribed by law and is necessary in a democratic society to achieve one of the legitimate aims listed in the same provision. The concept of “necessary in a democratic society” has been interpreted by the Court as implying the requirement of proportionality between the means used and the ends envisaged. In a number of cases, the Court has held that the proportional character of a measure entails that amongst the various means of achieving a certain end the authorities should opt for those least impairing rights and freedoms.⁶³ Accordingly, one could argue that if a provision that is justified by a legitimate objective impairs the religious freedom of certain individuals and that an accommodation would allow the avoidance of such an impairment without at the same time compromising the intended aim, this second solution should be favoured because it represents the less restrictive solution to achieve the objective.

⁶⁰ ECtHR, *Belgian Linguistic case* (1968) 1 EHRR 252.

⁶¹ Most countries of the Council of Europe have not ratified Protocol No. 12 yet.

⁶² On the issue of reasonable accommodation on religious grounds in the ECHR's case law, see C. EVANS, *Freedom of Religion Under the European Convention on Human Rights* (Oxford University Press, 2001), 168-199; S. STAVROS, “Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from Across the Pond?”, 6 EHRLR (1997), 607-627; J. RINGELHEIM, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme* (Bruylant, 2006), 167-169 and 323-338; K. HENRARD, “Duties of reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality”, 5/1 *Erasmus Law Review* (2012), 59-7; E. BRIBOSIA and I. RORIVE, “Aménagement de la diversité religieuse et conflits entre droits fondamentaux. Les contextes juridiques européen et belge”, in E. BRIBOSIA and I. RORIVE (eds), *Accommoder la diversité religieuse. Regards croisés Canada/Europe/Belgique* (2014), § 4, forthcoming.

⁶³ See S. VAN DROOGHENBROECK, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme – Prendre l'idée simple au sérieux* (FUSL, 2001), 190-219.

Yet, to begin with, the Court and the European Commission of Human Rights refused entirely to follow that path when construing Article 9. For instance, in the case *X. v. United Kingdom* decided in 1981,⁶⁴ the applicant was a primary school teacher in a London state school who complained about the school authorities' refusal to accommodate his working hours so as to allow him to take 45 minutes off at the beginning of the afternoon on Fridays to go to pray at the mosque. While the Commission admitted that Article 9 may entail for the State "positive obligations inherent in an effective 'respect' for the individual's freedom of religion",⁶⁵ it nonetheless held that the facts before it did not reveal any interference with the applicant's freedom of religion. In the eyes of the Commission, the decisive element was that the applicant "of his own free will, accepted teaching obligations under his contract with the ILEA [the Inner London Education Authority], and that it was a result of this contract that he found himself unable to work with the ILEA and to attend Friday prayers".⁶⁶ This reasoning has been widely criticised by commentators for its formalism⁶⁷ and was recently reversed.⁶⁸ By deeming that the teacher's freedom of religion had not been impaired, the Commission was able to dodge the issue of whether such a measure is necessary in a democratic society. Such a determination would have meant verifying whether the authorities had a legitimate motive for refusing to accommodate the applicant's work hours to avoid a conflict with his freedom of religion, for instance because such an accommodation would have led to an infringement of other individuals' rights or because it would have excessively upset the functioning of the school. The Commission also rejected the complaint based on the violation of Article 14 (non-discrimination clause). The applicant argued that, as opposed to Muslims, Christian workers had no difficulty in reconciling their professional obligations with the practice of their religion since the dates of official holidays overlapped with the main Christian festivals. The Commission merely observed that "in most countries, only the religious holidays of the majority of the population are celebrated as public holidays".⁶⁹ Thus, the Commission seems to acknowledge, if implicitly, that the challenged regulation has a different impact on an individual's freedom of religion depending on whether this individual belongs to the majority religion or to a minority one. However, the Commission did not find it helpful to question the legitimacy of this difference and to ponder the possibility of putting accommodations in place which might mitigate the discrimination suffered by adherents of a minority religion just because this situation seems totally "natural" for the simple reason that it corresponds to the norm established in numerous countries.

A different point of view on the issue of accommodation emerged in an isolated decision *S. H. and H. V. v. Austria*, dated 13 January 1993.⁷⁰ The applicants were practising Jews and complained about the refusal by an Austrian court to accept their request to reschedule a court hearing that had been planned on an important Jewish holiday. The Commission insinuated that, had the applicants duly informed the court that the hearing date was problematic for religious reasons, the judges would have had to offer a new date. However, in this case the applicants had reacted too late because they only wrote to the court ten days before the hearing, while they had been informed of it four months earlier. Since the case was very complex, involved a great number of people and the request had been made late, the Commission considered that the court's decision had not been unreasonable – a reasoning which can be compared to that provided by the Court of Justice of the EU in *Vivien Prais*.⁷¹

⁶⁴ European Commission of Human Rights, *X. v. United Kingdom*, 12 March 1981, DR 22, p. 27. See also European Commission of Human Rights, *X. v. United Kingdom*, 12 July 1978, DR 14, p. 234.

⁶⁵ *Ibidem*, § 3, p. 33.

⁶⁶ *Ibidem*, § 9, p. 35.

⁶⁷ See note by J. VELAERS and M.-C. FOBLETS, "L'appréhension du fait religieux par le droit. – A propos des minorités religieuses", 30 *Revue trimestrielle des droits de l'homme* (1997), 273-307, 292-293; C. EVANS, *Freedom of Religion*, 130-131; T.J. GUNN, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in J.D. VAN DER VYVER and J. WITTE, Jr (eds), *Religious Human Rights in Global Perspective – Legal Perspectives (vol. 2)* (Martinus Nijhoff, 1996), 305-330, 312.

⁶⁸ See below, ECtHR (4th Chamber), *Eweida and Others v. the United Kingdom*, 15 January 2013.

⁶⁹ *X. v. United Kingdom*, § 28, p. 38.

⁷⁰ European Commission of Human Rights, *S. H. and H. V. v. Austria*, 13 January 1993.

⁷¹ See below, in Part III. See also European Commission of Human Rights, *X. v. United Kingdom*, 5 March 1976, DR 5, p. 8.

In any case, it was with the Grand Chamber decision *Thlimmenos v. Greece*, dated 6 April 2000, that a hint of the issue of reasonable accommodation found its way into the Court's jurisprudence on the basis of Article 14. Until then, the Court had held that the principle of non-discrimination enshrined in Article 14 only prohibited the State from treating people who were in analogous situations differently without any objective and reasonable justification. In *Thlimmenos*, the Court recognised for the first time that the non-discrimination principle had another facet: it also prohibited the State from failing to "treat differently persons whose situations are significantly different" without an objective and reasonable justification.⁷² In consequence, the Court ruled that it is "by failing to *introduce appropriate exceptions* to the rule barring persons convicted of a serious crime from the profession of chartered accountants"⁷³ that the Greek State violated the applicant's right not to be discriminated against on grounds of his religion.⁷⁴ Even though these terms are not explicitly used, this can be matched with the duty of reasonable accommodation.⁷⁵

Since *Thlimmenos*, the Court's case law has moved backwards and forwards on this issue, while, in the meantime, the Court has expressly recognised and developed the notion of indirect discrimination.⁷⁶ Only in *Glor v. Switzerland*,⁷⁷ a case concerning disability (more precisely chronic disease) has the Court fully developed the rationale of *Thlimmenos* along the lines of reasonable accommodation. Mr Glor, a diabetic, had been declared unfit for military service and ordered to pay a military-exemption tax because he only had a minor disability (diabetes). Persons who had a severe disability were not subject to this tax. The aim pursued by the Swiss law was "to re-establish a sort of equality between people who actually did military or civilian service and those who were exempted from it".⁷⁸ In order to conclude that the measure was disproportionate to the aim, the Court observed that, rather than forcing the applicant to pay the tax when he was actually willing to do his military service, it would have been possible to introduce particular forms of military service or alternatives for people in his situation. Hence, it was possible to achieve the objective with a measure that was less invasive of the applicant's rights.⁷⁹

In the field of religion, a number of decisions turn away from *Thlimmenos*. Thus, in *Kosteski v. the former Yugoslav Republic of Macedonia*, dated 13 April 2006, the Court seems to adhere to the precedents established by the Commission in matters concerning leave of absence.⁸⁰ The decision *El Morsli v. France*, dated 4 March 2008 and like the *Kosteski* decision based on Article 9 alone, also shows the Court's reluctance to infer a right to reasonable accommodation from the freedom of religion. Here, the Court declared inadmissible the application by a Muslim woman who complained that, when trying to submit her French visa application in order to be able to join her husband in France, she had been denied access to the French Consulate in Marrakech because she had refused to remove her veil for an identity check. The applicant stated that she had been willing to remove her veil in the presence of a female agent and that she could thus have been identified. However, the Court held that in any case,

⁷² ECtHR (Grand Chamber), *Thlimmenos v. Greece*, 6 April 2000, § 44.

⁷³ *Ibidem*, § 48 (our emphasis).

⁷⁴ Mr Thlimmenos's criminal record followed a conviction for having refused to do his military service on the basis of his religious beliefs (Jehovah's Witness).

⁷⁵ In this sense, O. M. ARNARDOTTIR, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff, 2003), 101; O. DE SCHUTTER, "Reasonable Accommodations and Positive Obligations in the ECHR", in A. LAWSON and C. GOODING (eds), *Disability Rights in Europe. From Theory to Practice* (Hart, 2005), 35-63, 53.

⁷⁶ See ECtHR (Grand Chamber), *D.H. and Others v. Czech Republic*, 13 November 2007.

⁷⁷ ECtHR (1st Chamber), *Glor v. Switzerland*, 30 April 2009, §§ 94-95. On reasonable accommodation for disability in the ECHR's case law, see O. DE SCHUTTER, "Reasonable Accommodations and Positive Obligations in the ECHR", *op. cit.* (2005), 35-63.

⁷⁸ *Ibidem*, § 81.

⁷⁹ Other cases regarding disability and accommodation are worth mentioning even though they were decided under Article 3 of the ECHR (prohibition of inhuman and degrading treatment) rather than under the prohibition of discrimination (Article 14 ECHR): *Price v. United Kingdom*, 10 July 2001; *Vincent v. France*, 24 October 2006.

⁸⁰ ECtHR (3rd Chamber), *Kosteski v. the former Yugoslav Republic of Macedonia*, 13 April 2006, § 37.

the refusal to provide a female agent for the identification of Ms El Morsli did not exceed the State's margin of appreciation in matters of security checks.⁸¹

The need to respect the national margin of discretion is also put forward by the Court as an argument to dismiss the issue of reasonable accommodation in six decisions dating from 30 June 2009⁸² concerning the exclusion of Muslim or Sikh students from high schools in France pursuant to the application of the 2004 Act prohibiting the wearing of ostentatious religious signs in public schools.⁸³ Some students affected by the measure proposed an alternative solution so as to be able to keep attending school, namely wearing a cap or a bandana instead of the headscarf or a *keski* instead of the Sikh turban. These signs, they argued, were discrete and had no religious connotation. The Court held that since the prohibition contained in the 2004 French Act did not violate the Convention's Article 9, it was within the State's discretion to determine whether the alternatives suggested by the students were "ostentatious" religious signs. Apart from that, this ECtHR case law does not bear a trace of the notion of indirect discrimination, nor of reasonable accommodation. There is no proportionality check verifying the existence of a less restrictive measure regarding exercise of the fundamental rights.⁸⁴ Judging from the perspective of the freedom of religion (Article 18 ICCPR), the Human Rights Committee adopted a radically different approach in December 2012.⁸⁵ It recognised that the French legislation had been adopted with a view to putting an end to certain incidents of proselytism and to guaranteeing security and public order but, contrary to the ECtHR, it performed a stricter proportionality check. The Committee judged that at no time had the applicant's behaviour itself corresponded to the considerations which had justified the enactment of the legislation and that his exclusion was solely based on his affiliation to a group of persons circumscribed by the expression of their religion. The argument invoking the need to simplify the administration of the wearing of religious signs in school by the enactment of a general rule was thrust aside by the Committee, unless it was demonstrated that the advantages of such a policy justified the sacrifice of certain persons' rights, which was refuted in this case.

The *Sessa* case is another illustration of reluctance by the European Court of Human Rights to adopt the rationale of reasonable accommodation in religious matters. According to the majority of the Court, the setting of a date for a hearing for the immediate taking of evidence on a day on which the counsel for one of the joint plaintiffs could not be present on grounds of a Jewish festival of a religious nature did not constitute an interference with Article 9 of the Convention. The Court continued: "even supposing that there was interference with the applicant's rights under Article 9 § 1, the Court considers that it was prescribed by law, was justified on grounds of the protection of the rights and freedoms of others – and in particular the public's right to the proper administration of justice and the principle

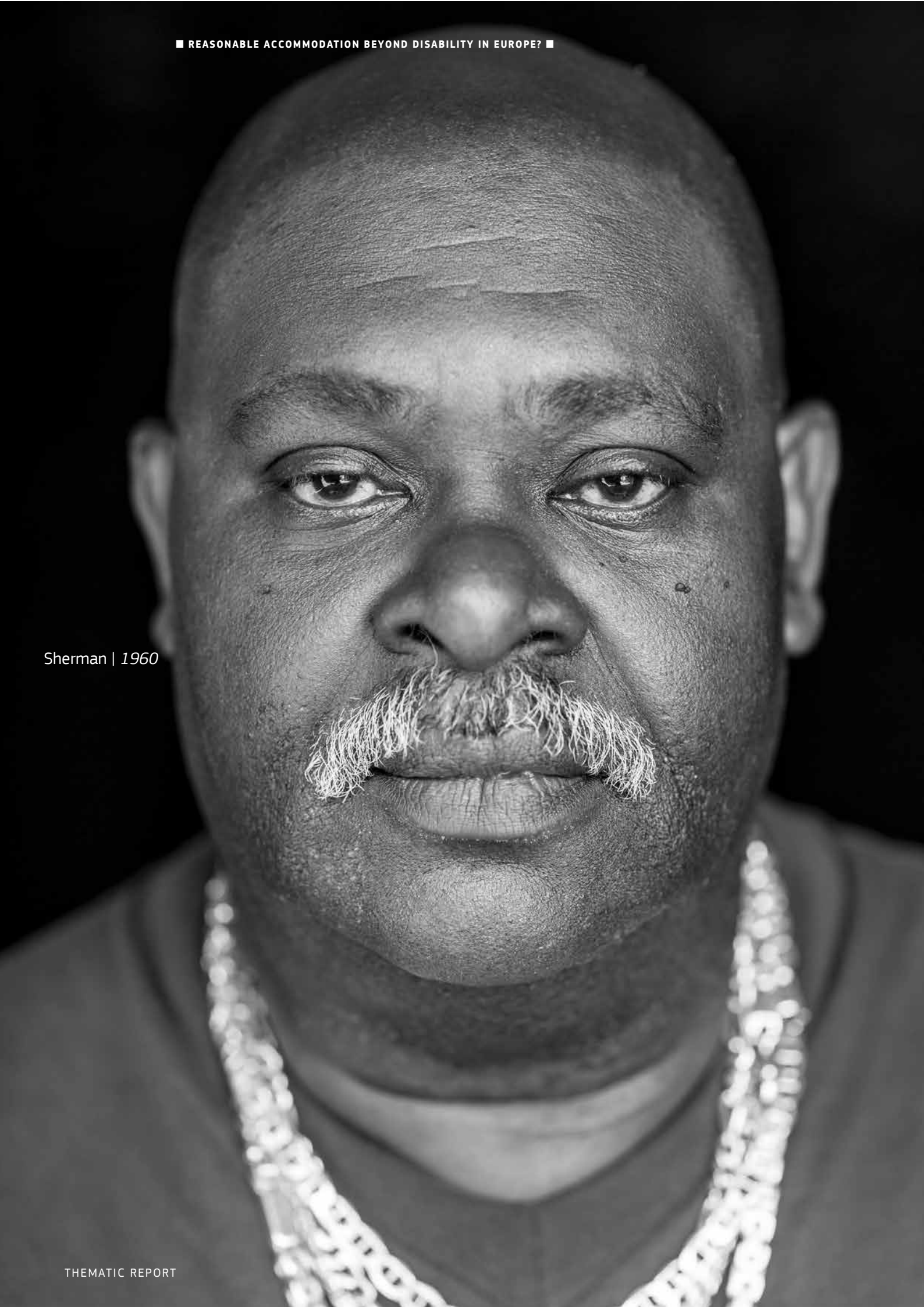
⁸¹ ECtHR (3rd Chamber), *El Morsli v. France*, 4 March 2008.

⁸² These decisions were issued on 30 June 2009 by the Fifth Chamber of the Court: *Aktas v. France*, *Ghazal v. France*, *Bayrak v. France* and *Gamaleddyn v. France* concerning the prohibition on wearing the headscarf at school, *Jasvir Singh v. France* and *Ranjit Singh v. France* concerning the prohibition on wearing the Sikh turban. See also ECtHR (5th Chamber), *Dogru v. France* and *Kervanci v. France*, 4 December 2008, § 75. The facts at issue in these two last cases arose before the 2004 Act prohibiting the wearing of ostentatious religious signs in public schools was adopted. It concerned two Muslim girls who had been expelled from school because they refused to take off their headscarf during sports classes but who had proposed replacing the headscarf with a cap.

⁸³ Act No. 2004-228 of March 15, 2004 regulating, by virtue of the principle of secularity, the wearing of signs or attire manifesting a religious adherence in public schools (*Loi du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*), Official Journal, No. 65, 17 March 2004, p. 5190.

⁸⁴ I. RORIVE, "Religious Symbols in the Public Space: In Search of a European Answer", 30 *Cardozo Law Review* (2009), 2669-2698.

⁸⁵ HRC, *Bikramjit Singh v. France*, Communication No. 1852/2008, 4 December 2012 (CCPR/C/106/D/1852/2008). See E. BREMS, E. BRIBOSIA, I. RORIVE & S. VAN DROOGHENBROECK, "Le port de signes religieux dans l'espace public : Vérité à Strasbourg, erreur à Genève?", *Journal des tribunaux* (2012), 602-603; "Freedom of Religion in Public Schools: Strasbourg Court v. UN Human Rights Committee", *Strasbourg Observers*, 14 February 2013 (online); S. OUALD CHAIB and E. BREMS, "Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe", *Journal of Muslims in Europe* 2 (2013) 1-26.



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that cases be heard within a reasonable time (...), and that it observed a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.⁸⁶

The peremptory nature of the reasoning is surprising since it either leads to a lack of review of the state decision or to the distortion of the proportionality requirements. To be clear about this, it is of course of crucial importance that individual and, essentially, multiple religious considerations do not dictate the functioning of justice or of public institutions.⁸⁷ But this imperative must be rooted in reality, and, as the three judges that signed a joint dissenting opinion called to mind, “seeking a reasonable accommodation of the situation in issue may, in some circumstances, constitute a less restrictive means of achieving the aim pursued”.⁸⁸ In this respect, the dissenting judges stressed that not only had the applicant immediately announced his difficulty in attending the hearing upon its scheduling, but also that no concrete evidence had been produced demonstrating disturbance to the functioning of the public service and justice. They remarked that at most, “the requested adjournment might have caused some administrative inconvenience stemming, for instance, from the need to inform the parties involved of the new date for the hearing”.⁸⁹ But they dismissed the argument founded on the violation of the reasonable time limit. They added that it was not a matter of urgency as the hearing in question did not concern a detention measure or the rights of a detained person. As was rightly observed by Nicolas Hervieu, “the majority solution forms part of an ‘all or nothing’ logic, whereas the judges of the minority were inclined to favour a logic of a better conciliation based on the notion of reasonable accommodation”.⁹⁰ Thus, the judges of the majority ignored the fact that the concept of reasonable accommodation can, in certain circumstances, be helpful to erase the discriminatory consequences which a calendar created for a Christian religion entails for followers of minority religions.⁹¹

This decision is all the more surprising, as it was rendered little more than a year after the *Jakóbski*⁹² case in which the European Court of Human Rights had unanimously found the Polish authorities to be in breach of the freedom of religion⁹³ for not having taken seriously a Buddhist detainee’s application to receive vegetarian meals. Although the judgment in *Jakóbski* follows the lines of decisions that protect the dignity of imprisoned persons and is firmly rooted in the facts of the case (the denigrating and even hostile attitude of the prison authorities; absence of consultation of the Buddhist Mission;⁹⁴ no requirement to provide meals prepared, cooked or served in a special manner; absence of evidence to support the contention of the Polish authorities that extra costs and technical difficulties would be incurred by serving meat-free meals), it also bears witness to the Court’s pragmatic attitude, which was adopted by the judges of the minority in the *Sessa* decision.⁹⁵

⁸⁶ ECtHR (2nd Chamber), *Francesco Sessa v. Italy*, 3 April 2012, § 38.

⁸⁷ On the same line, see N. HERVIEU, “Valse-hésitation de la jurisprudence strasbourgeoise sur la notion d’*‘accommodement raisonnable’* en matière religieuse”, in *Lettre Actualités Droits-Libertés du CREDOF*, 15 April 2012 (online); L. PERONI and S. OUALD CHAIB, “Francesco Sessa v. Italy: A Dilemma Majority Religion Members Will Probably Not Face”, *Strasbourg Observers*, 5 April 2012 (online).

⁸⁸ Joint dissenting opinion of Judges Tulkens, Popović and Keller, para 9.

⁸⁹ *Ibidem*, para. 13.

⁹⁰ N. HERVIEU, *op. cit.*, *Lettre Actualités Droits-Libertés du CREDOF*, 15 April 2012 (our translation).

⁹¹ L. PERONI and S. OUALD CHAIB, *op. cit.*, *Strasbourg Observers*, 5 April 2012 (online).

⁹² ECtHR (4th Chamber), *Jakóbski v. Poland*, 7 December 2010.

⁹³ In the Court’s opinion, there was no cause for a separate examination from the standpoint of Article 14 of the Convention combined with Article 9 (§ 59).

⁹⁴ Contrary to the case which led to the decision of the European Commission of Human Rights in *X v. the United Kingdom*, 5 March 1976.

⁹⁵ See S. OUALD CHAIB, “Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights”, in K. ALIDADI, M.-CL. FOGLETS AND J. VRIELINK (eds.), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, Ashgate, 2012, 33-58.

A similar approach, according to which refusing a reasonable accommodation might amount to an indirect discrimination, was again adopted in the recent *Eweida* case.⁹⁶ Ms Eweida, a practising Coptic Christian, was prevented from wearing a visible necklace with a cross by the uniform requirements imposed by her employer, British Airways. Based on the right to freedom of religion (Article 9 ECHR), the Court ruled, contrary to a previous line of cases (as discussed above), that the possibility of resigning from the job does not mean that there is no interference with the employee's freedom. Instead, according to the Court, "the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate".⁹⁷ The United Kingdom failed at the stage of the proportionality test. The ECtHR considered that the domestic court gave too much weight to the employer's corporate image: Ms Eweida's cross was discreet and there was no evidence that the wearing of previously authorised items (such as the Sikh turban or the Muslim *hidjab*) had any negative impact on British Airways' brand, especially as the company loosened its uniform requirement afterwards.⁹⁸

A different outcome was reached with respect to Ms Chaplin, whose application was dealt with in the *Eweida and Others* case. Ms Chaplin, a practising Christian working as a nurse at a State hospital, also complained that her employer prohibited her from visibly wearing Christian crosses around her neck at work. In the Court's view, the protection of health and safety on a hospital ward was inherently of much greater importance than the preservation of corporate image. The Court added that "this is a field where the domestic authorities must be allowed a wide margin of appreciation. The hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence".⁹⁹

The *Eweida and Others* case also concerns two other applications (*Ladele, McFarlane*) in which the respect of the rights of others justified interference with the right to freedom of religion. Put in another way, the accommodation was not reasonable. When the Civil Partnership Act of 2004¹⁰⁰ came into force, Ms Ladele, a civil registrar employed by the London Borough of Islington, objected to registering same-sex partnerships because, as an orthodox Christian, she sincerely believed that same-sex unions are contrary to God's law. Initially, she was permitted to make informal arrangements with colleagues to switch duties, but after a few months, homosexual colleagues felt victimised and argued that Ms Ladele's refusal to register same-sex partnerships was discriminatory. She faced a disciplinary sanction for not fulfilling her duties and for breaching Islington's "Dignity for All" equality and diversity policy. Ms Ladele applied to the Employment Tribunal, complaining of direct and indirect discrimination on grounds of religion or belief and of harassment. She initially won her case,¹⁰¹ but lost on appeal on the grounds that the purpose of the disciplinary sanction was not to punish Ms Ladele for her religious beliefs, but was related to the fact that she was not fulfilling the duties inherent in her job.¹⁰² Any individual who was contractually obliged to participate in the registration of civil partnerships and had abstained from such duties, for whatever reason, would have been treated in an identical manner.¹⁰³ As emphasised by the Employment Appeal Tribunal, this solution was, in practice, the only tenable solution given that direct discrimination based on religious belief cannot be justified under the system implemented by the Employment Equality Directive. The position defended by the Tribunal at first instance effectively amounted to obliging employers to accede to all demands of employees motivated by genuine religious

⁹⁶ ECtHR (4th Chamber), *Eweida and Others v. the United Kingdom*, 15 January 2013.

⁹⁷ On the question of waiving fundamental rights by entering freely into an employment relationship, see O. DE SCHUTTER, "Human Rights in Employment Relationships: Contract as Power", 1 *European Journal of Human Rights* (2013) 21-56, 47-54.

⁹⁸ ECtHR (4th Chamber), *Eweida and Others v. the United Kingdom*, 15 January 2013, § 94.

⁹⁹ *Ibidem*, § 99.

¹⁰⁰ Civil partnership enables same-sex partners to enter into a contract to which the same rights as those conferred by marriage are attached.

¹⁰¹ *Ladele v. London Borough of Islington*, case No. 2203694/2007, Employment Tribunal of Central London (not published).

¹⁰² See also *McClintock v. Department of Constitutional Affairs* [2008] IRLR 29. This case relates to a Justice of the Peace who refused to sit on panels on which he might be called on to place children for adoption with same-sex couples.

¹⁰³ *London Borough of Islington v. Ladele* [2008] UKEAT 0453/08/RN, 10 December 2008, §§ 52-55.

belief (adjustment of working times, prayer time, clothing, etc.),¹⁰⁴ irrespective of the nature of these beliefs.¹⁰⁵ In this respect, the Employment Appeal Tribunal gave the example of a civil registrar who was a follower of a Christian church in the US that advocated the supremacy of the white “race” and who was able to rely on this belief when refusing to perform mixed marriages. This Tribunal also concluded that no indirect discrimination had taken place on the grounds that the requirement for all registrars to perform civil partnership ceremonies was a measure aimed at implementing the principle of equal treatment, to which the public authorities are legally subjected. Consequently, the objective pursued was legitimate and the Tribunal held that the principle of proportionality had been respected.¹⁰⁶

Although the ruling of the European Court of Human Rights might be disappointing in its laconic reliance on the margin of appreciation,¹⁰⁷ its solution is, in our opinion, correct. As a matter of principle, accommodating Ms Ladele’s belief might have given the signal that certain unions are less legitimate than others. This would render meaningless the principle of equality and non-discrimination that civil servants must respect when fulfilling their functions. As Julie Ringelheim has put it, one can only imagine with difficulty that such an exemption would be granted to a civil servant who opposed unions between persons of different religions or origins.¹⁰⁸ Similarly, in the case of Mr McFarlane, a relationship therapist fired because he refused to abide by his (private) employer’s policy to counsel same-sex and heterosexual couples in an indiscriminate manner, the ECtHR held that “The State authorities (...) benefitted from a wide margin of appreciation in deciding where to strike the balance between Mr McFarlane’s right to manifest his religious belief and the employer’s interest in securing the rights of others”.¹⁰⁹

2. Ethnicity: The Roma as a vulnerable group

The reasoning of the European Court of Human Rights in the seminal *Thlimmenos* case,¹¹⁰ which requires differences to be taken into account in order to implement the principle of non-discrimination with respect to members of religious minorities, has been used to address accommodations required by certain Roma in order to pursue their traditional lifestyle, for instance exceptions to generally applicable land use regulations.

In a report written in the framework of the Legal Network, Olivier De Schutter has given a useful account of the representative cases presented to the European Court of Human Rights in which the majority of the members of the Court “have failed to correctly rely on the notion of effective accommodation”.¹¹¹ In 2001, the Grand Chamber of the European Court of Human Rights dismissed five applications and found that the United Kingdom authorities were not required to provide different treatment to Roma living in caravan homes whose situations were allegedly different from that of the rest of the population.¹¹² As Olivier De Schutter stresses, the Court based its reasoning in part on the

¹⁰⁴ *Ibidem*, § 72. See also, A. MCCOLGAN, “Class wars? Religion and (In)equality in the Workplace”, 38/1 *Industrial Law Journal* (2009) 11-14.

¹⁰⁵ *London Borough of Islington v. Ladele* [2008] UKEAT 0453/08/RN, 10 December 2008, § 106.

¹⁰⁶ *Ibidem*, § 117. The decision of the Employment Appeal Tribunal was appealed to the Court of Appeal, which on 15 December 2009 upheld the Employment Appeal Tribunal’s conclusions ([2009] EWCA Civ 1357).

¹⁰⁷ J. RINGELHEIM, “Adapter l’entreprise à la diversité des travailleurs: la portée transformatrice de la non-discrimination”, 1 *European Journal of Human Rights* (2013), 57-82, 79; S. SMET, “Eweida, Part II: The Margin of Appreciation Defeats and Silences All”, *Strasbourg Observers*, 23 January 2013 (online).

¹⁰⁸ J. RINGELHEIM, *op. cit.*, 1 *European Journal of Human Rights* (2013), 79-80.

¹⁰⁹ ECtHR (4th Chamber), *Eweida and Others v. the United Kingdom*, 15 January 2013, § 109.

¹¹⁰ See above, in Part 2.1.

¹¹¹ O. DE SCHUTTER, *The Prohibition of Discrimination under Human Rights Law. Relevance for the EU non-discrimination directives – an update* (European Commission, 2011), 57.

¹¹² ECtHR (Grand Chamber), *Chapman v. the United Kingdom*, 18 January 2001, §§ 127-130; *Beard v. the United Kingdom*, 18 January 2001, §§ 129-132; *Coster v. the United Kingdom*, 18 January 2001, §§ 139-142; *Jane Smith v. the United Kingdom*, 18 January 2001; *Lee v. the United Kingdom*, 18 January 2001, §§ 126-130.

fear that “to accord to a Gypsy who has unlawfully stationed a caravan site at a particular place different treatment from that accorded to non-Gypsies who have established a caravan site at that place or from that accorded to any individual who has established a house in that particular place would raise substantial problems under Article 14 of the Convention”.¹¹³ In his view, “this confuses the obligation to provide effective accommodation (or to treat differently situations which require such differential treatment) with a form of positive action, which it is not”.¹¹⁴ Relying expressly on the rationale of *Thlimmenos*, seven Judges filed a joint dissenting opinion highlighting the fact that “discrimination may arise where States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different”.¹¹⁵

It is in this direction that the case law of the European Committee of Social Rights, acting in the framework of the Revised European Social Charter of 1996, has been moving. In several cases¹¹⁶ (some of which have concerned disability as well),¹¹⁷ the European Committee has questioned “the acceptability of measures or policies that are ‘neutral’, but that do not include specific monitoring of their impact on certain vulnerable groups”.¹¹⁸

In line with this, two decisions rendered in 2013¹¹⁹ censure French and Belgian policies that do not respect the right of Travellers (some of whom are of Roma origin and others who are partially settled) to live in caravans or trailers according to their traditional lifestyle. These policies were held to disrespect the Travellers’ rights by only granting them access to an extremely reduced number of public sites, by not (or hardly ever) granting them authorisation to place a caravan on a rented or purchased private site, by multiplying the regulatory prohibitions of parking on public roads and by evicting families settled in an illegal manner from a site without offering them the possibility of relocation, without prior notice and sometimes in a brutal manner, in winter or at night. According to the Committee, these complaints relate to “discrimination connected with the identical treatment of people in different situations as their caravan lifestyle means that Traveller families are not in the same situation as the rest of the population”.¹²⁰ The principle of non-discrimination “imposes an obligation of taking into due consideration the relevant differences and acting accordingly”.¹²¹ The Committee also stresses that systemic discrimination “can be understood as legal rules, policies, practices or predominant cultural attitudes, in either the public or private sector, which create relative disadvantages for some groups, and privileges for other groups”.¹²² After having recalled that caravans have to be considered as housing, the Committee emphasised, following the logic of reasonable accommodation, that “the regulations on living conditions (particularly those on health and safety) must be reasonably adapted to these alternative forms of housing so as not to place unwarranted restrictions on the possibility of residing in such dwellings”.¹²³

¹¹³ ECtHR (Grand Chamber), *Chapman v. the United Kingdom*, 18 January 2001, § 95.

¹¹⁴ O. DE SCHUTTER, *The Prohibition of Discrimination under Human Rights Law*, *op. cit.* (2011), 40.

¹¹⁵ Joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall, para. 8.

¹¹⁶ O. DE SCHUTTER, *The Prohibition of Discrimination under Human Rights Law*, *op. cit.* (2011), 45-50 and the cases discussed in these pages.

¹¹⁷ See, for instance, the seminal decision of the ECSR, *International Association Austisme-Europe (IAAE) v. France*, Collective Complaint No. 13/2002, decision on the merits of 7 November 2003.

¹¹⁸ O. DE SCHUTTER, *The Prohibition of Discrimination under Human Rights Law*, *op. cit.* (2011), 50.

¹¹⁹ ECSR, *European Roma and Travellers Forum (ERTF) v. France*, Collective Complaint No. 64/2011, decision on the merits of 24 January 2012; ECSR, *International Federation of Human Rights (FIDH) v. Belgium*, Collective Complaint No. 62/2010, decision on the merits of 21 March 2012.

¹²⁰ Collective Complaint No. 62/2010, 21 March 2012, § 50.

¹²¹ Collective Complaint No. 62/2010, 21 March 2012, § 140. Compare with ECtHR (Grand Chamber), *Chapman v. the United Kingdom*, 18 January 2001; ECtHR, *Buckley v. the United Kingdom*, 25 September 1996.

¹²² Collective Complaint No. 64/2011, decision of 24 January 2012, § 41.

¹²³ Collective Complaint No. 62/2010, 21 March 2012, § 74.

It is worth stressing that the European Court of Human Rights relies on the notion of a “vulnerable group”¹²⁴ with regard to the Roma and is attentive to their special needs. In the famous *D.H. and Others v. the Czech Republic* case,¹²⁵ the complaints related to the exclusion of a majority of Roma children from the mainstream education system due to their placement in “special” schools intended for those with learning difficulties. The allocation of Roma children to “special” schools was based on the use of tests designed to assess intellectual capacity. Building on its previous case law, the Court recalled that a member State might treat groups differently in order to correct factual inequalities and stressed that special consideration should be given to the needs and different lifestyle of the Roma. However, the Grand Chamber condemned the Czech Republic because “the schooling arrangements for Roma children were not attended by safeguards (...) that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account [the] special needs [of Roma children] as members of a disadvantaged class” (§ 207). Relying on the vulnerability of the Roma as members of a disadvantaged class and on the prohibition of indirect discrimination, the Court imposes on the States a duty to take into account the special needs of the Roma children in the field of education,¹²⁶ which is close in practice to a reasonable accommodation duty.¹²⁷

This duty was reinforced in the recent case *Horváth and Kiss* concerning a similar issue of school segregation in Hungary.¹²⁸ For the first time the Court referred to “the positive obligations of the State to undo a history of racial segregation in special schools” (§ 127). “[I]n light of the recognised bias in past placement procedures”, the Court stated “that the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests” (§ 116).¹²⁹ Once again, there is no reference to a reasonable accommodation duty as such but rather to a positive duty to put an end to historical and structural discriminations.

The *Muñoz Díaz* case is another example.¹³⁰ It concerned a woman of Roma origin who complained about the refusal to grant her a survivor’s pension on the grounds that her marriage according to Roma rites was considered as a mere *de facto* marital relationship despite the fact that public authorities had treated her as a spouse as long as her husband was alive and that she sincerely believed that she was married. Although the facts of the case were highly specific and the ruling of the Court is very much based on these facts, the Court developed general considerations entrenched in the logic of reasonable accommodation. First, the Court observes that “there is an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle”.¹³¹ Secondly, the Court “takes the view that, whilst the fact of belonging to a minority does not create an exemption from complying with marriage laws, it may have an effect on the manner in which those laws are applied”.¹³² In keeping with this, “the vulnerable

¹²⁴ On this notion of vulnerable group in the case law of the ECtHR and its relation to equality law, see L. PERONI and A. TIMMER, “Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law”, *International Journal of Constitutional Law*, 2013, forthcoming.

¹²⁵ (2008) 47 EHRR 3.

¹²⁶ See also ECtHR (Grand Chamber), *Oršuš and Others v. Croatia*, 16 March 2010, § 149.

¹²⁷ It is important to highlight, as the claimants did in this case, that the issue at stake was not a matter of affirmative action. On the distinction between reasonable accommodation and positive action, see L. WADDINGTON, “Reasonable Accommodation”, in D. SCHIEK, L. WADDINGTON and M. BELL (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, *Ius Commune Casebooks for the Common Law of Europe*, Hart, 2007, 745-751.

¹²⁸ ECtHR, *Horváth and Kiss v. Hungary*, 29 January 2013, § 101.

¹²⁹ A. TIMMER, “Horváth and Kiss v. Hungary: a strong new Roma school segregation case”, *Strasbourg Observers*, 6 February 2013 (online).

¹³⁰ ECtHR (3rd Chamber), *Muñoz Díaz v. Spain*, 8 December 2009.

¹³¹ *Ibidem*, § 60.

¹³² *Ibidem*, § 61 (our emphasis).

position of Roma means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases".¹³³

3. A case-by-case approach

This overview of the European Court of Human Rights' case law only allows a nuanced conclusion. Since *Thlimmenos* was decided in 2000, the Grand Chamber of the Court has, in principle, recognised that there can be discrimination when a State, without any reasonable and objective justification, refrains from adapting a general rule, if necessary by introducing exceptions, to avoid affording the same treatment to people who are in a different situation where such treatment disadvantages people practising a certain religion. The only case where the European Court of Human Rights has expressly developed the *Thlimmenos* rationale based on indirect discrimination along the lines of reasonable accommodation concerns the issue of disability, namely in *Glor v. Switzerland*. The case law of the European Court of Human Rights and of the European Committee of Social Rights is also developing in this direction by taking into account the special needs of the Roma and imposing a positive duty to the States. In the religious field, the European Court of Human Rights seems much more reluctant to follow this path and often relies on the national margin of appreciation. However, *Eweida v. the United Kingdom* might mark a turning point towards a more effective proportionality test.

¹³³ *Ibidem*, § 61.



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Part III European Union

1. A reasonable accommodation duty focused on disability

While the United States and Canada recognise a right to reasonable accommodation beyond disability, the European Union has so far established an explicit duty of accommodation only in favour of disabled individuals in the employment context.

The Employment Equality Directive specifies in Article 5:

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.¹³⁴

In 2000, the concept was “relatively new and unexplored in the European arena”,¹³⁵ at least in the field of non-discrimination law. Only the United Kingdom, Ireland and Sweden had already implemented it with respect to persons with disabilities in the employment sector. To our knowledge, at the time, there was never a call to foster reasonable accommodation with respect to other grounds enshrined in Article 13 EC (now 19 TFEU).

For the time being, reasonable accommodation could be extended, on behalf of persons with disabilities, to the domains of social security, education, and access to goods and services. This would require the Commission’s proposal for a directive, presented on 2 July 2008,¹³⁶ to be approved unanimously by the Council. The proposal specifies that “a denial of reasonable accommodation is considered a form of discrimination. This is in line with the UN Convention on the Rights of Persons with Disabilities and coherent with Directive 2000/78/EC”.¹³⁷ Once again, the proposed directive discusses the tool of reasonable accommodation only with respect to persons with disabilities. Arguably, the European Union has little choice but to pursue its implementation beyond the field of employment since the conclusion of the UN Convention by the EU.¹³⁸ The proposed directive mostly concerns the boundaries of reasonable accommodation and its cost. In this respect, the Commission is eager to reassure economic operators:

Concerns have been expressed that a new Directive would bring costs for business but it should be emphasised that this proposal builds largely on concepts used in the existing directives with which economic operators are familiar. As to measures to deal with disability discrimination, the concept of reasonable accommodation is familiar to businesses since it was established in Directive 2000/78/EC. The Commission proposal specifies the factors to be taken into account when assessing what is “reasonable”.¹³⁹

¹³⁴ Some guidance is provided as to the meaning of reasonable accommodation and disproportionate burden in the preamble (recitals 20 and 21).

¹³⁵ L. WADDINGTON, *Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice*, EU network of experts on disability discrimination (EU Commission, 2004), 6.

¹³⁶ Articles 3 (Scope) and 4 (Equal treatment of persons with disabilities) of the Proposal for a Council Directive presented by the Commission on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final). This proposal for a directive intends to make the material scope of the Employment Equality Directive coincide with that of the Race Equality Directive.

¹³⁷ Proposal for a Council Directive presented by the Commission on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final).

¹³⁸ In particular, see Articles 2 and 5 of the UN Convention.

¹³⁹ *Ibidem*.

In the Opinion of the Committee of the Regions, one can find some hints as to the need to allow other vulnerable groups, designated as disadvantaged persons, to benefit from the concept. In its policy recommendations (in the point on “developing targeted approaches”), the Committee of the Regions:

suggests that reasonable accommodation to the disabled and for *disadvantaged persons* has to be broadened to improve their access to and participation in educational or vocational training, healthcare services, housing, transport, shops, leisure activities and access to other goods and services in a proportional way, to ensure they are treated equally and to avoid undue bureaucracy and the abuse of complaints procedures.¹⁴⁰

In addition, the European Parliament made a proposal to extend the provision of reasonable accommodation to “*young children*, or persons who associate with a person with a disability, where the accommodation is needed to enable such persons to provide personal assistance to a person with a disability”.¹⁴¹ For the time being, the suggestions of the Committee of the Regions and the European Parliament to broaden the range of beneficiaries of reasonable accommodation have not received much publicity and, given the unanimity requirement in the Council, the fate of the directive proposal seems open to question.¹⁴²

That being said, the meaning of “disability” within the framework of the Employment Equality Directive has been widened. The Court of Justice of the EU recently pursued this path in the two joined *HK Danmark* cases involving chronic disease,¹⁴³ moving from a medical model – followed in the *Chacón Navas* case –¹⁴⁴ to a social approach to disability in conformity with the UN Convention on the Rights of Persons with Disabilities.

In line with this, the Court of Justice of the EU held:

If a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which *in interaction with various barriers* may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of ‘disability’ within the meaning of Directive 2000/78.¹⁴⁵

2. Disability-related “special” characteristics

Undoubtedly, there is a larger consensus on the need to develop a society that includes persons with disabilities, compared, for instance, to the lively controversies around the place of religion in the (semi) public sphere and the

¹⁴⁰ Opinion of the Committee of the Regions on non-discrimination, equal opportunities and the implementation of the principle of equal treatment between persons, 80th Plenary Session 17-18 June 2009, Doc. No. ECOS-IV-030, § 46 (our emphasis).

¹⁴¹ Report on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS)), Doc. No. A6-0149/2009, 23 March 2009 (rapporteur: Kathalijne Maria Buitenweg), Amendment 14 (Art. 2, § 5 of the directive proposal) (our emphasis).

¹⁴² L. WADDINGTON & A. LAWSON, “Disability and non-discrimination law in the European Union. An analysis of disability discrimination law within and beyond the employment field”, European network of legal experts in the non-discrimination field, European Commission, 2009, 15-23.

¹⁴³ ECJ, *HK Danmark v. Dansk Almennyttigt Boligselskab DAB and HK Danmark v. Pro Display A/S in Konkurs*, 11 April 2013, joined cases C-335/11 and C-337/11.

¹⁴⁴ ECJ, 11 July 2006, Case C-13/05; L. WADDINGTON, “Case C-13/05, *Chacón Navas v. Eures Colectividades SA*”, 44 CMLR (2007): “the problem lies in the individual, and not in the reaction of society to the impairment or in the organization of society” (p. 491).

¹⁴⁵ ECJ, *HK Danmark v. Dansk Almennyttigt Boligselskab DAB and HK Danmark v. Pro Display A/S in Konkurs*, 11 April 2013, joined cases C-335/11 and C-337/11, § 41 (our emphasis).

visibility of religious minorities. But, beyond these contingent factors, the theoretical background that framed the Equality Directives should not be overlooked. They are based on the idea that protected characteristics (such as race, gender, sexual orientation or religion) are rarely relevant to employers or service providers and should be ignored.¹⁴⁶ This model, which treats dominant and disadvantaged groups on the same footing, is not entirely satisfactory in disability cases as insisting on similar treatment might perpetuate disadvantage.¹⁴⁷ In other words, “the neglect of steps to accommodate disability as a human difference is a major source of disability discrimination: formal guarantees of equal treatment without the provision of special support and access mechanisms for disabled persons will not be sufficient to achieve genuine equality of opportunity”.¹⁴⁸

Another key point of the reasonable accommodation duty is that it requires an analysis of an individual’s situation, which suits anti-discrimination disability law very well. A disability is very individual-specific since types and degrees of disability are infinite. Here, reasonable accommodation is like a bespoke suit, i.e. it is somehow individually tailored. However, this is not to say that the benefit of a reasonable accommodation might not extend beyond a specific individual, for instance when it concerns the issue of accessibility (e.g. placing a ramp in a working environment).¹⁴⁹

3. The response of the indirect discrimination device

By comparison, meeting the special needs of other vulnerable or disadvantaged groups to ensure their effective participation is usually considered to be adequately tackled by adopting a group dimension and applying the indirect discrimination device.

As a reminder, an indirect discrimination “shall be taken to occur when an apparently neutral provision, criterion or practice would put persons having a particular [characteristic, such as religion and belief, race or age] at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the measure to achieve that aim are appropriate and necessary”.¹⁵⁰ Initially developed by the Court of Justice of the EU,¹⁵¹ the concept of indirect discrimination is based on a substantive view of equality which acknowledges that a facially neutral provision which does not formally distinguish on prohibited grounds, may have discriminatory effects on a certain category of protected individuals.

A first example is the issue of religion. While different treatment based directly on religion is completely illegal, except, within certain limits, for churches and ethos-based organisations,¹⁵² a measure which indirectly discriminates on the same ground is valid when it can be justified by referring to the classical criteria justifying the violation of a fundamental right, i.e. the legitimacy of the objective pursued and the proportionality of the means in relation to the ends. Now, in proceeding with such a proportionality analysis, the issue of a possible reasonable accommodation

¹⁴⁶ L. WADDINGTON, *op. cit.*, 36/2 NTMINJCM-Bull (2011), 187.

¹⁴⁷ S. FREDMAN, ‘Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?’, in: A. LAWSON and C. GOODING (eds), *Disability Rights in Europe. From Theory to Practice* (Oxford, 2005) 199-203.

¹⁴⁸ N. BAMFORTH, M. MALIK and C. O’CINNEIDE, *Discrimination Law: Theory and Context* (London, 2008), 1072.

¹⁴⁹ On the issue of accessibility, see *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, 15.11.2010, COM(2010) 636 final.

¹⁵⁰ Article 2(2)(b) of the Race Equality Directive and the Employment Equality Directive.

¹⁵¹ See especially the decisions *Jenkins* (ECJ, 31 March 1981, Case C-96/80, ECR 911) and *Bilka-Kaufhaus* (ECJ, 13 May 1986, Case C-170/84, ECR 1607) where the Court of Justice took inspiration from the jurisprudence of the US Supreme Court (*Griggs v. Duke Power Co.*, 401 US 424 (1971)), which the latter then abandoned (see *Washington v. Davis*, 426 US 229 (1976) and *Wards Cove Packing Co. v. Antonio*, 490 US 642, 109 S.Ct. 2115 (1989)), but whose principle was in part re-established by the Civil Rights Act 1991 (Pub. L. No. 102-66, 105 Stat. 1071).

¹⁵² Article 4(2) of the Employment Equality Directive refers to “churches and other public or private organisations the ethos of which is based on religion or belief”.

may arise. Does a measure entailing a specific disadvantage for people of a certain religion but pursuing a legitimate aim pass the proportionality test if it can be shown that a reasonable accommodation would avoid the harm caused to these individuals? For instance, a regulation in a chemical laboratory may prohibit the wearing of any head covering and require that a special apron be worn for safety reasons. This “apparently neutral” regulation has the effect of placing Muslims wearing a headscarf at a disadvantage. While it undoubtedly pursues the legitimate objective of safety, is it “appropriate” and “necessary” if the wearing of a fireproof headscarf would reconcile safety and the practice of religion? In other words, when a reasonable accommodation is possible, could the justification for an indirectly discriminatory measure fail?¹⁵³

The issue is delicate and indications from the Court of Justice of the EU’s case law are scarce. As of today, only the 1976 decision in *Vivien Prais*¹⁵⁴ is directly relevant to the topic. Here, Ms Vivien Prais had applied for an open competition organised by the Council of the European Communities to hire translators. Once she had been informed of the date on which the written test would take place, she notified the Council that this coincided with the first day of the Jewish holiday Shavuot, a date on which religious requirements prohibited her from travelling and writing. After her request to take part in the open competition at another date was rejected, she filed an action with the Court of Justice of the EU claiming that this decision violated the clause in the Staff Regulations according to which candidates are chosen without distinction as to race, religion or sex. While rejecting the claim, the Court acknowledged that it is “desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests”.¹⁵⁵ The Court also reiterated that a written test must be identical and take place under the same conditions for all candidates.¹⁵⁶ Hence, the appointing authority must not accommodate by offering other dates for the test unless it has been notified before the other candidates have been invited. The Court seems to make implicit reference to the concept of reasonable accommodation: in order to avoid (indirect) discrimination, the European institutions might have to adapt the test schedule. In European law, the concept of reasonable accommodation is therefore present between the lines prior to the Employment Equality Directive, namely in the context of religious discrimination.

Could we conclude that the concept of reasonable accommodation is superfluous beyond the issue of disability to the extent that there may already be an obligation to provide reasonable accommodation under EU law as a way to solve cases of indirect discrimination?

To tackle this question, one should first be aware of the major differences between indirect discrimination and reasonable accommodation. Indirect discrimination requires establishing that a wider group of people sharing a protected characteristic are, or potentially would be, disadvantaged by the challenged measure. Reasonable accommodation does not require such a group assessment as it is owed to individuals and is designed to meet their personal needs. Furthermore, indirect discrimination is only prohibited if the measure in question does not pass the proportionality test, which allows for a balancing of interests.¹⁵⁷ On the contrary, a duty to accommodate can only be denied if the accommodation amounts to a disproportionate burden, which, once again, is much more case-specific and shifts the burden of proof to the shoulders of the employer or the service provider.¹⁵⁸ Second, the judicial implementation of indirect discrimination is raising concern in many Member States as judges are still

¹⁵³ On the links between indirect discrimination and reasonable accommodation for religion in European law, see L. VICKERS, *Religion and Belief Discrimination – The EU Law* (European Commission, 2006), 20-22.

¹⁵⁴ ECJ, 27 October 1976, *Vivien Prais*, Case C-130/75, ECR 1589.

¹⁵⁵ *Ibidem*, § 18.

¹⁵⁶ *Ibidem*, § 13.

¹⁵⁷ For a clear presentation of the different stages of the justification test regarding indirect discrimination based on ethnic origin, see e.g. the Opinion of Advocate General Kokott delivered in the *Belov* case on 20 September 2012 (C-394/11, §§ 100-123).

¹⁵⁸ L. WADDINGTON, *op. cit.*, 36/2 NTMINJCM-Bull (2011), 192-194; J. RINGELHEIM, *op. cit.*, 1 *European Journal of Human Rights* (2013), 73-75.

ignoring or not at ease with the concept of indirect discrimination.¹⁵⁹ This gives rise to a great deal of uncertainty when combined with the fact that it is far from clear in many civil law jurisdictions that the prohibition of indirect discrimination might include a duty to accommodate when it represents the less restrictive solution to achieve the legitimate objective which is pursued. In this light, one can understand why some voices are pleading for the recognition of a specific accommodation duty beyond the issue of disability in EU law.¹⁶⁰

4. The logic of accommodation is not a new legal phenomenon

At this stage, and before looking at the specific situation in Member States, it is crucial to understand that, while the concept of the duty of reasonable accommodation enshrined in non-discrimination law has only emerged within the last fifteen years in most Member States, recourse to accommodation is by no means a recent phenomenon in law. In the context of accommodations made in the name of culture, religion or language, Xavier Delgrange is of the opinion that “the practice of reasonable accommodation is a political process that involves building public space to accommodate the various components of the multicultural society harmoniously, respecting their particularities. General legal rules, necessary in a democratic society, should be implemented tactfully, in a way that safeguards as widely as possible the rights and freedoms of members of the community. Its legal expression is polymorphic”: a legal rule taking into account a different standard, a legal rule allowing for exceptions, the conciliatory interpretation of a legal rule, etc.¹⁶¹

In labour law, there is a long-standing body of rules which requires employers to make adaptations to the workplace in order to guarantee access to the labour market and equal employment opportunities for certain groups, such as young workers (and children when child labour was not prohibited) and women.¹⁶² EU law has reinforced many of these requirements, addressing for instance the working time and health and safety of young people, who enjoy higher standards and should be guaranteed “working conditions appropriate to their age”.¹⁶³ Pregnant women at work and workers who have recently given birth also enjoy the protection of EU law, which imposes a variety of obligations on employers.

We share Lisa Waddington’s analysis, which has also been further developed by Julie Ringelheim,¹⁶⁴ according to which “these provisions can be regarded as effective accommodations to ensure equal opportunities for female workers in the labour market. The obligation to provide time off from work for antenatal examination can, in particular, be compared to a similar accommodation provided for workers with disabilities, who may need to receive medical or rehabilitation treatment during working hours or simply take regular rest periods. These situations can

¹⁵⁹ CH. TOBLER, *Limits and potential of the concept of indirect discrimination* (European Commission: 2008) 55-69. See also the section on the implementation of indirect discrimination in the country reports written by the European network of legal experts in the non-discrimination field (available on www.non-discrimination.net).

¹⁶⁰ As to religion and belief in the workplace, see M.-C. FOBLETS and K. ALIDADI (eds), *Summary Report on the RELIGARE Project - Religious Diversity and Secular Models in Europe. Innovative Approaches to Law and Policy* (RELIGARE project, EU, FP7, 2013), p. 13 and seq. As to age, see M. SARGEANT, “Older Workers and the Need for Reasonable Accommodation”, 9 *International Journal of Discrimination and the Law* (2008) 168-180.

¹⁶¹ X. DELGRANGE, “La Belgique, berceau et sépulture des accommodements raisonnables”, in E. BRIBOSIA and I. RORIVE (eds), *Accommoder la diversité religieuse. Regards croisés Canada/Europe/Belgique* (PIE, 2014), § 4, forthcoming (our translation).

¹⁶² L. WADDINGTON and A. HENDRIKS, “The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination”, 18 *The Industrial Journal of Comparative Labour Law and Industrial Relations* (2002), 403-427, 416.

¹⁶³ Council Directive 94/33/EC on the protection of young people at work, Official Journal L216/12, 22 June 1994, in the preamble and in Art. 1, § 3.

¹⁶⁴ J. RINGELHEIM, *op. cit.*, 1 *European Journal of Human Rights* (2013), 62-69.

be compared to those of workers who wish time off in order to worship or who, for religious reasons, are not able to work on Saturdays or Sundays”.¹⁶⁵

However, we believe that the accommodation duty enshrined in Article 5 of the Employment Equality Directive is a specific “legal animal” even if it stems from the same species as the legal tools described by Xavier Delgrange or Lisa Waddington. Two intertwined characteristics allow us to understand its originality. First, its detailed implementation is not set out in a piece of legislation since the suitable accommodation is of an *individual nature* which depends on the abilities of the recipient of the accommodation, and on the work-related skills and activities that are required by the job description. In other words, the array of possibilities is much wider than for those related to the special needs of young or pregnant workers. Second, the *procedure* which follows the request for accommodation between the worker and the employer is somehow part of the duty itself and is crucial as regards the assessment of whether the threshold of reasonableness is met. This is much less so when the legislation imposes specific and definite obligations on employers, in terms, for instance, of granting maternity leave and time off to attend antenatal examinations or to perform breastfeeding, providing that the employer cannot invoke “undue hardship”.

¹⁶⁵ L. WADDINGTON and A. HENDRIKS, *op. cit.*, 18 *The Industrial Journal of Comparative Labour Law and Industrial Relations* (2002), 418-419.



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Part IV

Member States

This section is based on the data provided by the country reports for 2012 produced by the European network of legal experts in the non-discrimination field.¹⁶⁶ With this in view, an additional question was introduced into the template framing the national reports: “Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any other grounds than disability?”. As it turns out, the national experts seem to have applied different conceptions of the notion of reasonable accommodation. While some considered it in a narrow sense limited to a formal implementation in statutory law, others adopted a broad approach and included case law on indirect discrimination where the court applied the logic of reasonable accommodation in its reasoning.

Therefore, the following presentation neither aspires to be exhaustive nor pursues the quantitative objective of identifying precisely the number of Member States that, in one form or another, have mechanisms available that are akin to reasonable accommodation for reasons other than disability. Rather, the goal is to provide, on the basis of the information furnished by the country reports, an impressionist cartography of reasonable accommodations for reasons other than disability, namely those covered by the Race Equality Directive and the Employment Equality Directive (race and ethnicity, religion and belief, age and sexual orientation).¹⁶⁷ For this purpose, accommodations recognised by legislators, by case law or in practice will be outlined.

What is striking from the overall examination of the country reports is that very few Member States have implemented an express general right to reasonable accommodation beyond disability (Sweden, Finland, Slovakia, the Vienna Region in Austria and the Flemish Region in Belgium). And, these rare examples are not even all clear-cut. Most often, statutory law does not refer to reasonable accommodation as such but encompasses a provision whose philosophy is linked to the reasonable accommodation device and could give rise to a duty beyond disability through judicial interpretation.

In **Sweden**, employers “are to conduct goal-oriented work to actively promote equal rights and opportunities in working life regardless of sex, ethnicity, religion or other belief”.¹⁶⁸ More precisely, employers are expected to implement such measures as can be required in view of their resources and other circumstances to ensure that working conditions are suitable for all employees regardless of sex, ethnicity, religion or other belief.¹⁶⁹ Such an obligation with a public law character could be interpreted as a duty of reasonable accommodation in the field of employment. It could be used to ask for specific reasonable accommodation measures: for instance, female changing rooms or accommodation of workers’ holidays to take into account religious festivals. In the same line but in the field of education, Chapter 1, Section 8 of the School Act (2010:800) requires the municipality to give equal access to basic compulsory and secondary education to all children regardless of social or economic background. If a

¹⁶⁶ The reports concern the 28 Member States, Iceland, Lichtenstein, the FYR of Macedonia, Norway and Turkey (they will be available on <http://www.non-discrimination.net/> by the end of 2013). The authors of this thematic report are grateful to the national experts for the information they provided. Austria: Dieter Schindlauer, Belgium: Emmanuelle Bribosia, Bulgaria: Margarita Ilieva, Croatia: Lovorka Kušan, Cyprus: Corina Demetriou, Czech Republic: Pavla Boučková, Denmark: Pia Justesen, Estonia: Vadim Poleštšuk, Finland: Rainer Hiltunen, France: Sophie Latraverse, FYR of Macedonia: Biljana Kotevska, Germany: Matthias Mahlmann, Greece: Athanasios Theodoidis, Hungary: András Kádár, Iceland: Guðrún Dögg Guðmundsdóttir, Ireland: Orlagh O’Farrell, Italy: Chiara Favilli, Latvia: Anhelita Kamenska, Liechtenstein: Wilfried Marxer, Lithuania: Gediminas Andriukaitis, Luxembourg : Tania Hoffmann, Malta: Tonio Ellul, The Netherlands: Rikki Holtmaat, Norway: Else Leona McClimans, Poland: Łukasz Bojarski, Portugal: Manuel Malheiros, Romania: Romanița Iordache, Slovak Republic: Janka Debrecéniová, Slovenia: Neža Kogovšek, Spain: Lorenzo Cachón Rodríguez, Sweden: Per Norberg, Turkey: Dilek Kurban, United Kingdom: Aileen McColgan.

¹⁶⁷ The specific measures relating to pregnant and breast-feeding women, even though sometimes being presented as reasonable accommodations (see above, in Part III related to European Union Law), are not taken into account here since, being related to gender, they do not fall within the grounds of discrimination covered by the European Network of Legal Experts in the Non-discrimination Field.

¹⁶⁸ Chapter 3, Section 3 of the Swedish Discrimination Act of 5 June 2008.

¹⁶⁹ Chapter 3, Section 4 of the Swedish Discrimination Act of 5 June 2008.

child faces difficulties attending school because the school does not accommodate her/his religious beliefs or those of her/his parents, the failure to accommodate may be regarded as indirect discrimination on the ground of religion. In this context, the duty to provide equal access to education (regarding all forms of social background including religious background) in the School Act may be an important factor in the proportionality test.

The **Finnish** Non-Discrimination Act entails a duty to foster equality which pertains to the philosophy of reasonable accommodation. In all their activities, public authorities have to “seek purposefully and methodically to foster equality and consolidate administrative and operational practices that will ensure the fostering of equality in preparatory work and decision-making. In particular, the authorities shall alter any circumstances that prevent the realisation of equality”.¹⁷⁰ Even though the consequences of such a positive duty on the existence of a general right to reasonable accommodation are not obvious since it is anticipatory and preventive rather than reactive, judicial interpretation could pave the way to such a right.

Similarly, in **Slovakia**, the Anti-discrimination Act states that compliance with the principle of equal treatment also consists in the adoption of measures to prevent discrimination in all the fields covered by the Anti-Discrimination Act (i.e. employment, social security including social advantages, health care, provision of goods and services including housing, and education).¹⁷¹ Although in no way equivalent to an express duty of reasonable accommodation, it could be inferred from this principle that a certain duty to provide reasonable accommodation applies to the areas and grounds which are regulated by the existing laws prohibiting discrimination beyond disability and employment.

In addition, two Regions have recognised a general duty of reasonable accommodation beyond disability. First, in **Austria**, the Viennese Anti-Discrimination Act, in its amended version of November 2010,¹⁷² applies the concept of “disproportionate burden” to all grounds of discrimination¹⁷³ which, through judicial interpretation, could imply a duty of reasonable accommodation for all of these. Second, in **Belgium**, the Flemish authorities implemented the European reasonable accommodation device without restricting its application to disability. It could potentially be used with respect, for instance, to religion, age, race and ethnic origin.¹⁷⁴ However, to our knowledge, concrete cases of application only concern disability.

Aside from the few isolated countries in which a general duty of reasonable accommodation on grounds other than disability enjoys legislative recognition in – or sometimes even beyond – the field of employment, the situation in Europe is very eclectic. The examples cited in this section are classified according to certain criteria. Religion (and belief) is by far the criterion in relation to which the highest number of accommodations is identified (1). This is followed by ethnic origin (2) and then age (3), even though, in the latter case, it is debatable whether the examples forwarded by the authors of the country reports fit into the category of reasonable accommodations. Sexual orientation is omitted here as no example of accommodation linked to this criterion has been identified.

¹⁷⁰ Non-Discrimination Act (21/2004) (as amended by several Acts, including No. 84/2009), Section 4.

¹⁷¹ Section 2, paragraph 3, of the Slovakian Anti-discrimination Act of 20 May 2004 (*Zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (Antidiskriminačný zákon)*) (Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other laws (Anti-discrimination Act)).

¹⁷² *Wiener Antidiskriminierungsgesetz, Landesgesetzblatt für Wien* No. 35/2004 idF LGBl Nr. 88/2012.

¹⁷³ *Ibidem*. Provision § 3a/3 states: “Indirect discrimination shall be deemed to occur when the complete removal of conditions which led to the disadvantage qualifies as a disproportionate burden as stated in sub para 2 but there is a failure to implement reasonable measures in order to achieve at least significant improvement of the situation of the respective person in the sense of the maximum possible approximation to equal treatment.”

¹⁷⁴ Article 5, § 4 of the Decree of 8 May 2002 on proportional participation in the employment market (*Décret du 8 mai 2002 relatif à la participation proportionnelle dans le marché du travail* (MB, 26 July 2002)), as modified on 9 March 2007 (MB, 6 April 2007)).

1. Religion and belief

A **first category of States** has some forms of reasonable accommodation regarding religion and belief in their positive law, either through cooperation agreements or through case law.

In **Spain** and **Italy**, religion-specific arrangements (for example, working hours, leave days, meals and ritual slaughtering) are contained in the agreements with religious denominations (such as the agreements with the Italian Association of Jewish Communities and the Italian Association of Seventh-day Adventists or, in Spain, the cooperation agreements signed with Protestants, Jews and Muslims)¹⁷⁵ but not in terms of the general concept of “reasonable accommodation”.

In a **second category of States**, freedom of religion and/or the prohibition of indirect discrimination are interpreted in such a way that a positive duty to accommodate religious belief is imposed. In **Germany**, public authorities are under a duty to take into account the special needs of religious communities and the individuals who form these communities because of the fundamental right to freedom of religion enshrined in Article 4 of the Basic Law. Employers have to pay due consideration to the fundamental right to freedom of religion.¹⁷⁶

Similarly, in the **United Kingdom**, there is no formal duty to provide reasonable accommodation in respect of grounds other than disability. However, a failure to make reasonable accommodation for religious beliefs could violate the ECHR as incorporated into UK law by the Human Rights Act. Moreover, it can be said that the avoidance of indirect discrimination (by, for example, accommodating dress codes related to ethnicity or religion or accommodating time-off requests linked to religious observance) is tantamount to the provision of reasonable accommodation. This is certainly so not least because rigid refusals of accommodation are likely to amount to unlawful indirect discrimination.¹⁷⁷

In the same line, in **Norwegian law**, a lack of accommodation in relation to religion may constitute direct or indirect discrimination based on general rules laid out in the Anti-Discrimination Act as well as on the constitutional right to freedom of religion. Moreover, absence from work/school on religious holidays, the possibility of daily prayer at work, etc. are treated as negotiable rights, and form part of individual or collective agreements. In this respect – and this could be highlighted as a good practice – the Equality Ombudsman has developed a handbook on religion at work, to guide both employees and employers regarding their religious rights in relation to work.¹⁷⁸

¹⁷⁵ Law 24/1992 of 10 November approving the Agreement of Cooperation between the State and the Federation of Evangelical Religious Entities of Spain; Law 25/1992 of 10 November approving the Agreement of Cooperation between the State and the Federation of Jewish Communities of Spain and Law 26/1992 of 10 November approving the Agreement of Cooperation between the State and the Islamic Commission of Spain. See L. VICKERS, *Religion and Belief Discrimination in Employment*, *op. cit.*, p. 22.

¹⁷⁶ Cases include religious dress codes, e.g. *mala* beads (Land Labour Court (*Landesarbeitsgericht*) Düsseldorf, 22 March 1984, 14 Sa 1905/83), the Sikh turban (Labour Court (*Arbeitsgericht*) Hamburg, 3 January 1996, 19 Ca 141/95), and the headscarf (Federal Labour Court (*Bundesarbeitsgericht*, BAG), 10 October 2002, 2 AZR 472/01; Labour Court (*Arbeitsgericht*) Dortmund, 16 January 2003, 6 Ca 5736/02), though it is constitutional to prohibit a teacher in a public school from wearing a headscarf (Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG), 2 BvR 1436/02; Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG), 2 C 45/03, 24.6.2004). Other cases concern breaks for prayers (*Land* Labour Court (*Landesarbeitsgericht*) Hamm, 18 January 2002, 5 Sa 1782/01: balancing of interests in the case of prayer breaks; no obligation if the production process is disrupted).

¹⁷⁷ See the cases of *Copsey* (Court of Appeal for England and Wales, *Copsey v. WWB Devon Claeys Ltd*, [2005] EWCA CIV 932 (25 July 2005)) and *Begum* (House of Lords, 22 March 2006, *R (on the application of Begum) v. Denbigh High School*, [2006] UKHL 15), *Eweida*, *Chaplin*, *McFarlane* and *Ladele* (see references quoted in the ECtHR case referred to in part II of this report).

¹⁷⁸ See <http://www.ldo.no/Documents/10-01-27%20Religionsh%c3%a5ndbok.pdf> (accessed on 15 April 2013).

Beside these examples of accommodation of religious belief in employment or education, **most States** grant recognition by sector of reasonable accommodation of religious belief and practices. The most frequently recognised accommodations relate to time off for religious festivals in employment and education and flexible working hours, followed by accommodations with regard to dietary requirements and slaughtering of animals. More contentious issues are the accommodation of employment requirements and the wearing of religious symbols.

1.1 Time off for religious festivals and flexible working hours

In the field of employment, several States have included a specific duty to provide reasonable accommodation for religion/belief regarding working hours and/or time off for religious festivals. This is the case, among others, in **Bulgaria**,¹⁷⁹ **Romania**,¹⁸⁰ **Croatia**¹⁸¹ and **FYR of Macedonia**.¹⁸²

Interestingly enough, this type of accommodation has existed for a long time under written **Belgian law**. The 1978 Act on employment contracts preserves a provision dating back to an Act of 10 March 1900 which imposes the obligation “to grant the employee the necessary time to fulfil his religious obligations as well as the civil obligations imposed by the law”.¹⁸³ In addition, regarding the issue of flexible work arrangements depending on the employee’s religious or philosophical belief, the position of the Belgian National Employment Council (*Conseil national de travail*) is that companies are better placed to manage issues related to the organisation of such a system than the Employment Council or the Parliament.¹⁸⁴ This opinion illustrates the Belgian social partners’ (management and trade unions) determination not to regulate by means of a general rule but to leave the negotiations up to trade unions and companies, thus adopting a more pragmatic rather than principle-driven approach.

¹⁷⁹ Under the Protection Against Discrimination Act, Art. 13 (2), employers have a duty to provide reasonable accommodation for religion/belief in terms of working hours and rest days, where “this would not lead to excessive difficulties [...] and where [it is possible] [...] to compensate for the possible adverse consequences on the [business]”.

¹⁸⁰ Limited accommodation in respect of religion is spelled out in Art. 134 (1) letter F of the Labour Code in relation to the observance of religious celebrations by employees through the granting of two leave days for two religious celebrations each year, to be taken according to the faith of the employee, under the condition that the faith of the employee is part of a state-recognised religion – a special procedure established by Law 489/2006, the Law on Religious Freedom and the General Status of Religious Denominations.

¹⁸¹ While Catholic religious holidays are national holidays, members of the three biggest religious minorities (Orthodox Christians, Muslims and Jews) have a right to a day off on the days of their main religious festival (Act on Holidays, Remembrance Days and Non-working Days; Official Gazette 33/1996 with amendments).

¹⁸² Limited accommodation in respect of religion is mentioned in the Law on Holidays of the Republic of Macedonia (*Закон за празниците на Република Македонија*), Official Gazette of the Republic of Macedonia, No. 21/1998, 18/2007). Under this law leave is to be granted for religious celebrations on the basis of the faith of the employee (Arts.1, 2). In this respect, see ECtHR *Kosteski v. the former Yugoslav Republic of Macedonia* (2007), referred to above in Part II.

¹⁸³ Article 20, § 5 of the Act dated 3 July 1978 concerning employment contracts (*Loi du 3 juillet 1978 relative aux contrats de travail* (MB 22 August 1978)). L.L. CHRISTIANS, “Diversité au travail. Entre cultures et consciences. Entre identité et éthique. Enjeux juridiques des recompositions postmodernes du religieux”, in J. Ringelheim (ed.), *Le droit et la diversité culturelle* (Bruylant, 2011) 638.

¹⁸⁴ Opinion No. 1687 concerning “Flexible holiday at the employee’s choice” dated 6 May 2009, p. 3 (*Avis n°1687 relatif au “Jour férié flottant au choix du travailleur”*). Recommendation No. 21 addressed to labour relations commissions (*commissions paritaires*), social partners and companies with regard to the possibility of introducing a flexible holiday at the employee’s choice as a replacement for a Sunday or another regular holiday, dated 6 June 2009, p. 2.



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In **Spain**, the cooperation agreements signed by some religious communities and the State contain provisions accommodating work hours and leave days.¹⁸⁵ Their implementation is mostly subject to the employer's agreement. The weekly day of rest of the Seventh-day Adventists and Jewish communities can be granted instead of the day provided by Article 37.1 of the Workers' Statute as the general rule, but only with the agreement of all the parties, which courts have traditionally interpreted as having to be requested by the employee before signature of the contract. Moreover, members of the Islamic communities belonging to the Islamic Commission may request permission to stop work every Friday from 13.30 to 16.30 and one hour before sundown during Ramadan. This right is also subject to an agreement with the employer, and the hours not worked must be offset. In the case of the Islamic Commission and the Jewish community, there is a list of religious holidays that can replace those established in Article 37 of the Workers' Statute, again with the agreement of both parties. An interesting doctrine on this subject has been formulated in the judgment of the Madrid High Court of 27 October 1997. In this case, following a request for adaptation of working hours, the court – not once referring to the Cooperation Agreement – states that although the courts of first instance should require employers to adapt working hours, thus allowing their employees to meet their religious obligations properly as well as not making them behave in a way incompatible with their beliefs, the worker must show honesty and good faith by indicating his or her religious faith and the need for special working hours when applying for the job.¹⁸⁶

In the **United Kingdom**, there is case law considering that the respect of freedom of religion may lead to a duty to accommodate working hours and holidays under certain circumstances. The *Copsey* case, decided in 2005 by the Court of Appeal of England and Wales, represents an important example of this trend.¹⁸⁷ In this case, a British quarrying company had to increase its activities and re-organise its employees' working hours to satisfy additional orders. In agreement with the trade unions, the company introduced a rotating seven-day shift pattern. Stephen Copsey refused this new work organisation because his religion prevented him from working on Sundays. He also declined an alternative position in the same workplace which the employer had proposed to him. After consulting with the trade unions and other employees, it was decided that no exception to the shift pattern would be granted and Copsey was thus fired. At the time of the layoff, the legislation implementing the Employment Equality Directive had not yet entered into force in the United Kingdom,¹⁸⁸ explaining why the complaint was based mainly on the freedom of religion and Article 9 of the European Convention on Human Rights. Amongst the arguments presented to the Court, Copsey's counsel put forward the concept of reasonable accommodation established by Canadian law, in particular by the 1985 *O'Malley* decision of the Canadian Supreme Court.¹⁸⁹ The Court of Appeal found that the case did indeed raise an issue of religious freedom¹⁹⁰ and declared that an employer has to organise working conditions in such a way that the religious beliefs of employees are respected. However, this obligation is not unlimited and certain work instructions may be justified by economic requirements in spite of their impact on an employee's possibility to practise his religion.¹⁹¹

¹⁸⁵ Law 24/1992 of 10 November approving the Agreement of Cooperation between the State and the Federation of Evangelical Religious Entities of Spain; Law 25/1992 of 10 November approving the Agreement of Cooperation between the State and the Federation of Jewish Communities of Spain, and Law 26/1992 of 10 November approving the Agreement of Cooperation between the State and the Islamic Commission of Spain. See VICKERS, *Religion and Belief Discrimination in Employment*, 22.

¹⁸⁶ J. ROSSELL, *La no discriminación por motivos religiosos en España*, Madrid, MTAS, 2008, pp. 104-107.

¹⁸⁷ *Copsey v. WWB Devon Clays Ltd* [2005] EWCA CIV 932 (25 July 2005).

¹⁸⁸ Employment Equality (Religion or Belief) Regulations 2003, in force since 2 December 2003. See § 8 of the Court of Appeal's decision cited here above ([2005] EWCA CIV 932).

¹⁸⁹ See above, in Part 1.2.

¹⁹⁰ The Court of Appeal severely criticised the decisions by the European Commission of Human Rights in this area (*Ahmad v. United Kingdom*, 1981; *Konttinen v. Finland*, 1996; *Stedman v. United Kingdom*, 1997), because they unnecessarily limit freedom of religion ([2005] EWCA CIV 932, §§ 31-35 *per* Lord Justice Mummery, §§ 44-66 *per* Lord Justice Rix, § 91 *per* Lord Justice Neuberger. See also above, in Part 2.2.

¹⁹¹ [2005] EWCA CIV 932, § 69-71 *per* Lord Justice Rix, § 95 *per* Lord Justice Neuberger.

Even in France, where secularism is traditionally very strict and which is not particularly open to reasonable accommodation when religion is at issue, there is a ministerial instruction allowing immediate superiors in the public service to authorise requests for religious holidays not foreseen by the French legal holiday calendar. This instruction provides indicative information and lists the principal Orthodox, Armenian, Muslim, Jewish and Buddhist holidays.¹⁹² In the private sector, “as far as holidays to observe religious festivals are concerned, private employers increasingly allow this type of absence, as long as they are counted as personal days off. These adjustments are nevertheless not legally required and imply that the employee uses his personal days off to observe his religious obligations”.¹⁹³ “Therefore, nothing prevents an employer from refusing such absences. Indeed, the Supreme Court (*Cour de cassation*) has already held that the absence of a Muslim employee to celebrate Eid al-Adha against her employer’s will could justify dismissal”.¹⁹⁴

In the field of education, the issue of time off to observe a religious festival is also important. As in the area of employment, this issue is closely linked to the fact that, in various European countries, the main Christian holidays correspond to public holidays while this is not the case for other religions.

The case of **Belgium** is interesting in this respect because the issue is dealt with differently in the two main Communities. In the Flemish Community, a Decree adopted in 2003 by the Flemish government authorises nursery and primary school pupils to take a day off so as to celebrate “in conformity with the pupil’s philosophical beliefs as recognised by the Constitution”.¹⁹⁵ In contrast, in the French Community (Federation Wallonia-Brussels) where no such provision exists, pupils must rely on *ad hoc* measures. Thus, in December 2008 when the Muslim festival of Eid al-Adha (Festival of Sacrifice) coincided with the exam period in primary and secondary school, practices in the Brussels region varied from school to school: some agreed to postpone the exams by one day, sometimes even organising a teachers’ in-service training day on that date. Others asked pupils to justify their absence for family reasons pursuant to a strict application of school regulations.

Even in **France**, the jurisprudence of the Administrative Supreme Court (*Conseil d’Etat*) clearly provides for a duty of reasonable accommodation on religious grounds regarding the obligation of children to attend school. In this case, the Administrative Supreme Court has given priority to the protection of freedom of worship, arguing that compulsory school attendance is not intended to, and may not, lawfully “deny to pupils who request it such individual leave of absence as may be necessary for worship or celebration of a religious festival, at least in so far as their absence is compatible with performance of the tasks entailed by their studies and with the maintenance of public order (*ordre public*) in the school”.¹⁹⁶

1.2 Dietary requirements and slaughtering of animals

The possibility of obtaining special diets is particularly important in situations where people are “captive” or at least have no choice but to take the meals that are offered in prison, hospital, and the army or, to a certain extent, at school.

¹⁹² Ministerial instruction of the Ministry of Public Service No. 2106 of 14 November, 2005 regarding authorisations of absence on religious grounds for the year 2006, reiterates ministerial instruction No. 901 of 29 September, 1967.

¹⁹³ G. CACERES. “Reasonable Accommodation as a Tool to Manage Religious Diversity in the Workplace: What about the ‘Transposability’ of an American Concept into the French Secular Context?”, *op. cit.*, pp. 283-315.

¹⁹⁴ *Ibidem*, French Supreme Court, 16 December 1981.

¹⁹⁵ Article 10ter, § 2 f) of the Decree of the Flemish government dated 12 November 1997 concerning the registration of nursery and primary school pupils (*Arrêté du Gouvernement flamand du 12 novembre 1997 relatif au contrôle des inscriptions d’élèves de l’enseignement fondamental* (MB, 6 January 1998, p. 136)), as modified by the Decision of the Flemish government dated 21 March 2003.

¹⁹⁶ French Administrative Supreme Court, 14 April, 1995, *Consistoire central des Israélites de France*, *Recueil Lebon*, p. 169; *Dalloz* 1995, Jur., p. 481, obs. Koubi G.

In **Belgium**, since 2002, the general instructions for prisons guarantee inmates the possibility of receiving meals which take into account the requirements of their religion “if they do not have to be prepared according to formal rituals”.¹⁹⁷ Moreover, prisoners can, at their request, receive their meal at times other than the regular hours if their religious beliefs so require.¹⁹⁸

In **Spain**, the Cooperation Agreements with the various religious communities (Evangelical, Jewish and Islamic) contain specific regulations to ensure reasonable accommodation for employees of particular religions. The three Agreements contain provisions on special diets. Such a possibility (adaptation of food to Islamic religious precepts and mealtimes during the Ramadan fast) is provided for Muslims if they are interned in public centres or establishments (prisons and other centres), or present on military premises as well as in public and subsidised private schools, where requested. This provision does not contain an obligation, since Article 14.4 of the Agreements clearly states that in this case only “attempts shall be made”. In the field of employment, therefore, there are no provisions on this issue.

Beside these instances of legislative recognition, one might mention a **Slovenian case** in which the Advocate of the Principle of Equality issued an opinion recognising the right to reasonable accommodation on the grounds of religion regarding dietary requirements in the private employment sector.¹⁹⁹ In this case, the applicant, who was a Muslim, was employed by a company which offered organised warm meals to its employees. As a Muslim, the applicant did not eat pork or dishes made with pork fat. Instead of warm meals, employees could receive a dry meal, which, however, also often contained pork. The applicant wished to make use of a monthly allowance offered to employees in order to buy food in accordance with his religion. However, this allowance was only available to employees who submitted a medical certificate confirming that they required a special diet. It is noteworthy that the company adapted the menus to the Catholic religion, which requires a special diet on Fridays. The Advocate found that, since all employees were treated equally in the area of food provision regardless of their religion, the applicant as a Muslim was put in a less favourable position than the other employees. Muslims working for the company were in a situation in which they could either choose to eat food in contravention of their religious beliefs or be left without a meal and without an appropriate monetary substitute for a meal. Such treatment led to discrimination on the grounds of religion. The Advocate found that reasonable accommodation was already provided for a certain group of employees, those belonging to the Catholic religion, and the company should simply extend this rule to employees of a different religion. The Advocate made this decision even though there are no provisions in the law on reasonable accommodation for individuals because of their religion.

In **Turkey**, while there is no national law (including case law) setting forth an obligation to accommodate religious belief, there has recently been a positive development in practice. In response to the petition of an Alevi parliamentarian for the accommodation of the Alevi Muharrem fast in restaurants within the premises of the national parliament, the Speaker of the Turkish Parliament authorised the serving of special food in accordance with the dietary restrictions of Alevi deputies during the period of 15-27 November 2012. This was the first time ever that a public institution had accommodated Alevis during their fast.

In addition, **as in most other European countries, Belgium** has an exception to the general rule according to which animals can be slaughtered only after they have been stunned: this rule does not apply to slaughters prescribed by a religious ritual,²⁰⁰ provided that they are performed according to conditions established by royal

¹⁹⁷ Article 87 of the Ministerial Decree dated 12 July 1971 containing the general guidelines for penitentiary establishments (*Arrêté ministériel, du 12 juillet 1971, portant instructions générales pour les établissements pénitentiaires* (MB, 10 August 1971), as modified by Article 12 of the Ministerial Decree, dated 15 April 2002 (*Arrêté ministériel du 15 avril 2002* (MB, 11 May 2002)).

¹⁹⁸ *Ibidem*.

¹⁹⁹ Opinion No. UEM-0921-10/2008-3.

²⁰⁰ Article 16, § 1 of the Federal Act dated 14 August 1986 relating to the protection and well-being of animals (*Loi du 14 août 1986 relative à la protection et au bien-être des animaux* (MB, 3 December 1986)).

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decree. In particular, such slaughters can only be performed pursuant to the Jewish or Muslim ritual and by specialised butchers authorised by the representative organs of the Jewish religion (the *Consistoire central israélite*) and of the Muslim religion (the *Exécutif des Musulmans*) in Belgium.²⁰¹

In **Germany**, the Federal Constitutional Court has held that, if a non-German butcher who is a pious Muslim wants to slaughter animals without stunning them (ritual slaughter) in order to facilitate his customers' consumption, in accordance with their religious convictions, of the meat of animals that were ritually slaughtered, the constitutionality of this activity is to be examined in accordance with Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law (*Grundgesetz*, GG).²⁰² The Animal Protection Act²⁰³ provides that an exceptional permission for ritual slaughter can be granted.²⁰⁴

1.3 Accommodation of employment or vocational training requirements

The issue of accommodation of employment requirements is a contentious one as is illustrated by the cases before the European Court of Human Rights commented on in Part II of this report. Most recently, the cases of *Ladele*²⁰⁵ and *McFarlane*,²⁰⁶ originating from the **United Kingdom** and decided by the ECtHR in 2013, show how delicate it can be to deal with those kinds of demands for accommodation when they are liable to conflict with fundamental rights of others.²⁰⁷

It is worth comparing the *Ladele* case with similar cases dealt with by the former **Dutch Equal Treatment Commission** (ETC)²⁰⁸ regarding claims brought by civil registrars who had refused to celebrate marriages between same-sex people for religious reasons. Initially, the ETC required local councils to provide "solutions" for civil servants who have religious objections to celebrating same-sex marriages.²⁰⁹ However, the ETC reversed this position in Opinion 2008-40.²¹⁰ According to Rikki Holtmaat,²¹¹ the opinion of principle delivered by the ETC in 2008 diverged from the pragmatic solutions that had been recommended previously and stressed the "exemplary role" that a public authority must play in combating discrimination. In this context, a civil servant's personal religious conscience must yield to the general interest. In contrast, in earlier ETC Opinions the proportionality test applied in the case of indirect discrimination equated to an implicit duty to provide reasonable accommodation, although this was not made explicit.

²⁰¹ Article 2, § 1 of the Royal Decree dated 11 February 1988 relating to certain slaughtering prescribed by a religious rite (*Arrêté royal du 11 février 1988 relatif à certains abattages prescrits par un rite religieux* (MB, 1 March 1988)).

²⁰² *Bundesverfassungsgericht* (BverfG) 1 BvR 1783/99, 15.1.2002.

²⁰³ Sec. 4a.1 in conjunction with Sec. 4a.2, No. 2 (*Tierschutzgesetz* - TierSchG, of 18.05.2006 (BGBl. I, 1206, 1313)).

²⁰⁴ The latter codification was last amended on 09.12.2010 (BGBl. I, 1934).

²⁰⁵ Employment Appeal Tribunal, 15 December 2009, *Ladele v. London Borough of Islington* [2009] EWCA Civ 1357, [2010] ICR 532, [2010] IRLR 211, <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html>.

²⁰⁶ Employment Appeal Tribunal, 30 November 2009, *McFarlane v. Relate Avon Ltd*, [2010] 1 507, [2010] IRLR 196, http://www.bailii.org/uk/cases/UKCAT/2009/0106_09_3011.html.

²⁰⁷ See above, in Part II.

²⁰⁸ One must keep in mind that the Opinions of the ETC are not binding.

²⁰⁹ Opinion No. 2002-25, (5.8) and Opinion No. 2005-26, available in Dutch on the website of the CGB: <http://www.cgb.nl>.

²¹⁰ Opinion No. 2008-40, available in Dutch on the website of the CGB: <http://www.cgb.nl>, and referenced in the *European Anti-Discrimination Law Review*, 2008, No. 6/7, pp. 106-107. According to the Dutch Commission, the town council's refusal to enter into a contract of employment pursued the legitimate objective of combating discrimination against homosexual persons whose rights were in question. It held that it was "difficult to justify" a town council permitting a civil union registrar to treat homosexual couples differently from heterosexual couples.

²¹¹ European Network of Legal Experts in the Non-discrimination Field, *Netherlands Report on Measures to Combat Discrimination. Directives 2000/43/EC and 2000/78/EC*, 2008, section 0.3.

Another application of a similar reasoning might be found in ETC Opinion 2006-202 where the former Equal Treatment Commission considered that a municipality had failed to search for alternative ways of greeting people within their organisation. Therefore, the applicant could not be rejected for a job solely because he refused to shake hands when greeting people of the opposite sex because of his Islamic beliefs. Whereas the ETC upheld the existence of indirect discrimination founded on the religious convictions of the applicant,²¹² the court of first instance in Rotterdam ruled in favour of the city council in August 2008.²¹³ This court maintained that it was its responsibility to protect women against the discriminatory behaviour of a civil servant and that fostering a good relationship between the local authorities and citizens was one of the key aspects of the position of customer manager that the applicant had applied for. This argument convinced the Court that the difference in treatment was justified. It ruled that the city of Rotterdam could have legitimately chosen “to observe the usual rules of etiquette and of greeting customs in the Netherlands”.²¹⁴

Another equality body, the **Danish Board of Equal Treatment**, adopted the philosophy of reasonable accommodation to decide a case in which a young Muslim woman studying to become a nutrition assistant at a vocational school had to quit her education because the school would not exempt her from the requirement to taste pork.²¹⁵ She was willing to prepare and touch dishes made with pork but due to her religion she refused to taste them. As a nutrition assistant she would be working in large kitchens and if necessary, she argued, there would always be a colleague to taste the food she prepared. She claimed that it was discrimination due to her religion and referred to three other vocational schools that did not require their students to taste pork. She also pointed to a letter from the Ministry of Education stating that students could not be required to taste all kinds of food. The Board concluded that it would be against the religion of the complainant to taste dishes made with pork. According to the Board, a requirement to taste pork established a *prima facie* case of indirect discrimination due to the complainant’s religion. The Board concluded that the vocational school could not prove that it was necessary for the complainant to taste pork for her to complete her education as a nutrition assistant. The Board emphasised that she was willing to prepare and touch dishes made of pork as well as to taste all other kinds of food. Finally, the Board stressed the fact that the complainant, because of the requirement set by the school, could not complete her education. Thus, the Board awarded compensation of approximately EUR 10,000 (DKK 75,000) for indirect discrimination due to religion.

Along these lines, the **Estonian Labour Disputes Committee**, a quasi-judicial body, resolved a case regarding employment requirements by recognising an implicit duty to accommodate an employee’s religion-related characteristics. In this case, a kindergarten teacher, being a Jehovah’s Witness, was fired *inter alia* owing to her failure to celebrate Christian holidays and children’s birthdays. The Committee found her dismissal to be discrimination on the grounds of religion or beliefs in the meaning of the Law on Equal Treatment.²¹⁶ It might be presumed on the basis of this decision that the employer was supposed to consider (to accommodate) the religion-related particularities of its employees when planning the kindergarten’s activities.

²¹² Opinion No. 2006-202 of 5 October 2006, available in Dutch on the website of the CGB: <http://www.cgb.nl>, and referenced in the *European Anti-Discrimination Law Review*, 2007, No 5, p. 89.

²¹³ District Court of Rotterdam, 6 August 2008, LJN BD9643, referenced in the *European Anti-Discrimination Law Review*, 2009, No 8, pp. 56-57.

²¹⁴ See, however, the judgment of the District Court of Rotterdam, 6 August 2008, LJN: BD9643.

²¹⁵ 8 February 2012, No. 213/2012, available at: <http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=829&type=Afgoerelse>

²¹⁶ Labour Inspectorate, written communications of 17 January 2012.

In **France**, apart from the rare cases of conscientious objection for religious reasons in the field of employment that are posited in a legislative text,²¹⁷ the case law tends to rather emphasise the employee's contractual obligations as well as her/his freedom to quit her/his work instead of an obligation of any sort to accommodate an employee's religious practices. In this line, the French Supreme Court (*Cour de cassation*) held that a Muslim employee who had worked for two years in the butcher's section of a supermarket where he had entered into contact with pork could not ask to be transferred to another department on the basis of his religious beliefs. According to the Court, the employee's religious beliefs are not part of the employment contract and the employee therefore has to perform the task for which he has been hired.²¹⁸ This reasoning based exclusively on contractual obligations appears hardly to be in conformity with the recent case law of the European Court of Human Rights in the *Eweida and Others* case (discussed above in Part II). The argument of freedom to resign is not in itself sufficient to trump freedom of religion and the different interests at stake should be carefully balanced.

As mentioned above, this balancing approach, which is more in line with the logic of reasonable accommodation, is present in several decisions issued by the German courts on freedom of religion in employment.

1.4 Religious symbols and dress codes

It is particularly difficult to provide a picture of the situation in Europe as regards accommodations concerning religious symbols and dress codes. Indeed, we have only to look at the two extremes represented by the manner in which France and the United Kingdom approach these issues to see that the situation is especially patchy. France stands out on account of its strict secularism and its habitual reluctance to accommodate religious diversity.²¹⁹ On the contrary, the accommodation of religious/cultural dress is relatively unproblematic for the most part in the United Kingdom, at least in areas where the population is heterogeneous. Most school uniforms would accommodate, for example, Sikh turbans, Muslim headscarves and Jewish *kippahs*, and public servants (including immigration officers, judges and police and prison officers) may wear these head coverings.

In this respect, as discussed in Part II of this report, the case law of the European Court of Human Rights does not (yet) play a genuinely harmonising role inasmuch as it has regularly entrenched itself, in cases of demands for accommodation as regards religious symbols, behind the national margin of appreciation in order to not condemn any model.

Besides, where legislation is passed, this most often does not aim to provide accommodations but, on the contrary, is designed to prohibit certain religious signs at school, targeting students and teachers,²²⁰ or even in public spaces

²¹⁷ As Gabrielle Caceres has pointed out, in the context of employment in the healthcare sector, it is possible nevertheless to rely on conscientious objection. In fact, the Public Health Code (*Code de la santé publique*) allows a doctor to refuse to perform an abortion (C. santé publ., art. L. 2212-8). Nor can a doctor be forced to perform a tubal ligation for birth control reasons (C. santé publ., art. L. 2123-1). It seems that in similar cases a doctor cannot be held liable for refusal of medical assistance even if there is a danger for the woman (Trib. corr. Rouen, 9 July 1975, *D.*, 1976, p. 531) ("Reasonable Accommodation as a Tool to Manage Religious Diversity in the Workplace: What about the 'Transposability' of an American Concept into the French Secular Context?", *op. cit.*)

²¹⁸ French Supreme Court, 24 March 1998, No. 95-44738.

²¹⁹ In this respect, see C. CACERES, "Reasonable Accommodation as a Tool to Manage Religious Diversity in the Workplace: What about the 'Transposability' of an American Concept into the French Secular Context?", *op. cit.*

²²⁰ E. BRIBOSIA & I. RORIVE, "Le voile à l'école: une Europe divisée", *Revue trimestrielle des droits de l'homme* (2004) 951-983.

in general, as exemplified by the legislation recently adopted in France²²¹ and Belgium.²²² As a notable exception, we will highlight the isolated regulations in certain countries accommodating the wearing of a Sikh turban. In the United Kingdom, Sikh men are exempted from otherwise generally applicable statutory requirements to wear helmets when riding motorcycles and to wear hard hats when working on construction sites. In Denmark, there is an exception to the Regulation on Crash Helmets,²²³ but there are no religious exceptions in relation to the Weapons Act. This was confirmed in a judgment of the Eastern High Court of 24 October 2006, in a case related to a Sikh carrying a *kirpan* knife as a religious symbol in a public space.²²⁴

The pertinent case law itself is difficult to identify as the concept of reasonable accommodation is never formally cited by national judges. Indeed, the concept of reasonable accommodation for religious reasons has not yet entered into the case law of most Member States. An example of this is the French Administrative Supreme Court (*Conseil d'Etat*)'s ruling in emergency proceedings, dated 6 March 2006, on the application by the association United Sikhs and Mr Mann Singh requesting the suspension of a circular mandating individuals to submit an identity photograph in which they appear without a head covering in order to renew their driving licence.²²⁵ The plaintiffs claimed that “the Sikh community finds itself in a special cultural and religious situation justifying a different treatment” and that “this difference is taken into account and recognised in certain countries”. Alleging a violation of the freedom of religion (Article 9 ECHR) and the principle of non-discrimination (Article 14 ECHR) the plaintiffs argued that “since they are Sikhs the measure cannot achieve its aim [limitation of the risks of fraud and of forgery] because the turban in no way prevents identification”. The *Conseil d'Etat* referred to the case law of the European Court of Human Rights²²⁶ and refused to enter into the debate on reasonable accommodation. In order to reject the request, the *Conseil* limited itself to declaring that the controversial provisions did not seem to be unsuitable or disproportionate with regards to the objective, namely to allow “the most complete possible identification of the person pictured by the contested document”.²²⁷

The Belgian *Club* case, decided by the Labour Appeal Court of Brussels in January 2008, is another illustration of this jurisprudential trend which does not embrace the logic of reasonable accommodation regarding the issue of religious symbols.²²⁸ In 2004, the well-established book shop Club fired a saleswoman who, after several years on sick leave, came back to work wearing the Islamic headscarf and did not comply with her employer's order to not wear it at work. The employee was dismissed without compensation or advance warning for serious misconduct (*motif grave*). She launched judicial proceedings and lost her case before the First Instance Labour Court of Brussels (*Tribunal du travail*) on 21 March 2006. On appeal, the Labour Appeal Court (*Cour du travail*) confirmed the first

²²¹ Law No. 2010-1192 of 11 October 2010 prohibiting the wearing of clothing covering the face in public spaces (*Loi interdisant la dissimulation du visage dans l'espace public*), JORF No. 0237, 12 October 2010.

²²² Law of 1st June 2011 prohibiting the wearing of any clothing totally, or mainly, hiding the face (*Loi du 1^{er} juin 2011 visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage*), *Moniteur belge*, 13 July 2011.

²²³ Regulation No. 518 of 3 July 1998. Section 81(5) of the Road Traffic Act (*Færdselsloven*) and § 2 of Government Circular Bkg 1998 518.

²²⁴ U.2007.3160. The Court found that there was no exception in the Arms Act (*Våbenloven*) in relation to religious symbols. The Court therefore held the *kirpan* to be a knife and consequently there had been a violation of the Act. The *kirpan* was confiscated, but a fine was annulled because the Court considered the reason for wearing the *kirpan* as mitigating circumstances. The Court did not find the sanction to be a violation of Article 9 of the ECHR. The Danish courts made no reference to any ECtHR decisions or judgments. The issue of reasonable accommodation was not as such argued in the case.

²²⁵ Ordonnance No. 289947.

²²⁶ In particular, ECtHR (2nd Section), *Suku Phull v. France*, decision of 11 January 2005 (order to a Sikh passenger to remove his turban for a security check at an airport).

²²⁷ Our translation.

²²⁸ Labour Appeal Court (*Cour du travail*) of Brussels, 15 January 2008, *E.F. v. Club corp*, R.G. No. 48.695, *Journal des tribunaux du travail*, 2008, p. 140. See also the commentary on this decision in *European Anti-Discrimination Law Review*, 2008, No. 6-7, p. 87.

instance decision on 15 January 2008. The Court based its ruling on several grounds. First, according to the Court, freedom of religion was not really at stake in the case because the company did not blame its employee for her adherence to the Islamic faith but because she came to work wearing an ostentatious religious symbol despite the fact that there were clear company guidelines according to which workers not only should wear a uniform with the logo of the company but should also refrain from wearing any symbols or clothes likely to undermine the corporate image (described as an “open, available, sober, family-based and neutral” image). Second, the freedom to manifest one’s religion is not absolute: restrictions are allowed where the religious practices are “likely to lead to chaos”. In the present case, the Labour Appeal Court considered that the company could justify the firing by the objective consideration of its corporate image. Third, there was no discrimination as the company policy applied to all workers without any distinction. In this last stage of the reasoning, the notion of indirect discrimination was totally ignored. Although the prohibition of the wearing of religious signs was applicable to all employees, it certainly had a disparate impact on those employees whose religion prescribed the wearing of such a symbol. The Appeal Court should at least have checked whether the company was pursuing a legitimate aim and whether the means used to pursue this aim were necessary and proportionate to it.

Without suggesting that their rulings are systematically favourable to accommodations, one will nevertheless note that the jurisdictions of the United Kingdom seem to be much more sensitive to this accommodation logic concerning religious symbols and dress. The argument of indirect discrimination is at least examined and, if the accommodation is refused, this is generally because it is considered disproportionate or unreasonable. This was the situation in the famous *Begum* case where the issue of the wearing of a particular form of Islamic dress (a *djilbab*) which was prohibited under the school dress-code was chiefly considered in light of the freedom of religion. In this case, the Court of Appeal decided that a Muslim schoolgirl’s right to freedom of religion under Article 9 ECHR had been violated, as her school had failed to give adequate weight, in deciding its school uniform policy, to her religiously-motivated desire to wear a particular form of Islamic dress. The House of Lords subsequently reversed this decision, on the basis that the school had consulted with Muslim groups and alternative schooling options were available for the girl, which would have allowed her to wear her religious dress.²²⁹ Moreover, a number of cases alleging indirect discrimination on racial grounds²³⁰ have been brought before the courts in which employers or educational institutions have imposed dress codes on health and safety grounds thereby disadvantaging members of particular ethnic groups who were not able to comply with the dress requirements. Examples of such codes include a “no beards” requirement applicable for reasons of hygiene to those involved in food preparation or packaging,²³¹ a requirement that all railway repair workers wear protective headgear²³² and a prohibition on the wearing of a religious bangle by a Sikh schoolgirl.²³³ In addition there is the recent *Chaplin v. Royal Devon and Exeter NHS Foundation Trust* case,²³⁴ in which a nurse unsuccessfully challenged a prohibition, based on health and safety grounds, on wearing a crucifix around her neck.²³⁵ The outcome of such cases, in common with any other complaint of indirect discrimination, depends on whether the employer can show that their need for the rule outweighs its discriminatory impact: often such cases have resulted in the employer’s recognition that there were other, non-discriminatory, ways in which they could have dealt with the health and safety risk. All in all, in these different cases judged by the courts in the United Kingdom, the logic of reasonable accommodation is never explicit but presents itself as a more rigorous application of the prohibition of indirect discrimination and of the proportionality test implicit in this prohibition.

²²⁹ House of Lords, 22 March 2006, *R (on the application of Begum) v. Denbigh High School*, [2006] UKHL 15, <http://www.bailii.org/uk/cases/UKHL/2006/15.html>.

²³⁰ In the United Kingdom, for historical reasons, those cases were dealt with as race discrimination cases under the Race Relations Act 1976. Actually, there was no direct prohibition of religious discrimination in the United Kingdom until the adoption of the Employment Equality (Religion or Belief) Regulations 2003.

²³¹ *Panesar v. Nestle Co. Ltd.* [1980] IRLR 64; *Blakerd v. Elizabeth Shaw Ltd* [1980] IRLR 64.

²³² *Singh v. British Rail Engineering Ltd* [1986] ICR 22.

²³³ *R (Watkins-Singh) v. Governing Body of Aberdare Girls School* [2008] EWHC 1865 (Admin), [2008] ELR 561.

²³⁴ See above, in Part 2.1.

²³⁵ [2011] EqLR 548.



Aron | 1995

Finally, accommodations with respect to religious symbols and dress code are mostly a result of practice and are consequently particularly difficult to identify by means of a legal approach.²³⁶ In this respect, mention must be made of the study on the practices of accommodating religious and cultural diversity in the employment field in Belgium, carried out by Andrea Rea and Ilke Adam and commissioned by the *Centre pour l'égalité des chances* (the equality body).²³⁷

In addition, one may highlight the initiative adopted in Sweden, after a controversial case decided by the Equality Ombudsman regarding the wearing of the *niqab* at school.²³⁸ The School Inspectorate (created in 2008) issued new guidelines²³⁹ on the wearing of the *burka* and *niqab* in schools on 11 of January 2012. The guidelines state that it is acceptable to prohibit the *niqab* or *burka* for health and safety reasons, and the examples provided in the guidelines include hygiene in restaurants, the food industry and health care, and safety in laboratories. The new guidelines also recognise that the *niqab* or *burka* can create obstacles in a teaching situation and can thus be forbidden if the obstacle is manifest. There are no examples of manifest obstacles for teaching that warrant a prohibition. Instead, the guidelines, adopting the rationale of reasonable accommodation, emphasise that such obstacles can in most cases be overcome by other means than asking the pupil to remove her *burka* or *niqab* and that it is only in the few cases in which such solutions are impossible that a prohibition is allowed. In the examples given, the teacher can normally solve the situation through less severe means. For instance, it would be acceptable to require the exposure of the face only for the few seconds it takes to identify a pupil taking a test. If the teacher cannot read facial expressions it is harder to ensure that the pupil understands, but such a problem could be overcome by addressing questions to the pupil. The Equality Ombudsman supports the new guidelines.²⁴⁰

1.5 Other cases

As an interesting example, we might highlight the attempt to accommodate Muslim religious burial rituals in **Romania**. The Parliament adopted Law 75/2010 on the Discharge from Hospitals or Morgues of Deceased Muslims²⁴¹ that adapted existing provisions on hospitalisation and discharge from hospital and morgues of the deceased to Islamic tenets. In order to observe religious prescriptions, Law 75/2010 provides in Article 1 that if the deceased was a practising Muslim, upon the family's request, the corpse must be discharged within 24 hours of establishment of death, in accordance also with Law 104/2003 regarding the handling of human corpses and the removal of organs and tissues from corpses for transplant.

²³⁶ See P. SHAH, "Asking about reasonable accommodation in England", *International Journal of Discrimination and the Law*, 2013, 1-30.

²³⁷ I. ADAM & A. REA, (eds), *La diversité culturelle sur le lieu de travail. Pratiques d'aménagements raisonnables*, VUB/ULB, 2010, http://www.diversite.be/?action=publicatie_detail&id=126&thema=6.

²³⁸ On the 30 of November 2010, the Equality Ombudsman decided on an important and widely debated *niqab* case (2009/103). A 24-year-old ethnic Swede who converted to Islam and decided to wear a *niqab* for religious reasons was not allowed to follow an educational programme training people to become pre-school teachers (*barnskötare*). The school claimed that a *niqab* made it harder to teach the woman since the teacher could not read her face if it was covered. The School was not sanctioned. The Equality Ombudsman dropped the case, but only because the school found alternative solutions, and allowed the woman to wear her *niqab* if such solutions did not work, if for instance male students could not be seated behind her.

²³⁹ The former guidelines on the *burka* and *niqab* were adopted in 2003 by the Swedish National Board of Education. It emphasised that decisions must be made locally by the individual school. A general prohibition of *burka* or *niqab* was not permissible pursuant to the School Act. Decisions must be made on a case-by-case basis. The central requirement was to have a dialogue with each woman who may have to remove her *burka* or *niqab*. The dialogue concerned common values, for instance gender equality and other democratic values upon which the Swedish educational system relies. After such a dialogue, the Board was generally positive towards a local ban during class hours.

²⁴⁰ http://www.skolverket.se/lagar_och_regler/juridisk_vagledning/elever-med-heltackande-sloja-i-skolan-1.165928;
<http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2012/DO-valkomnar-Skolverkets-vagledning-om-religios-kladdsel-i-skolan>.

²⁴¹ Romania/Law 75/2010 on Discharge from Hospitals or Morgues of Deceased Muslims (6.05.2010).

Moreover, some examples of accommodation arising from the country reports relate to the specific context of prisons. In FYR of Macedonia, prison facilities allow inmates to express their religious convictions. The Law on the Execution of Sanctions states that inmates are allowed to satisfy their religious feelings and needs in accordance with the conditions and resources of the institution.²⁴² In 2012, the Cypriot Ombudsman was called upon to investigate an issue involving Greek nationals of Pontic origin who were denied the right to visit the prison church to celebrate a special holiday for them and a group of Nigerian inmates who were denied the right to be visited by an Evangelical priest. In both of these cases, the Ombudsman rejected the justification put forward by the prison authorities²⁴³ and urged them to respect the religious rights of detainees and facilitate the practice of any religion they choose.²⁴⁴ This position, which does not expressly refer to reasonable accommodation, could be read as a recommendation to the relevant authorities to respect religious freedom for prisoners by providing them reasonable accommodation to allow them to practise their faith.

In **Finland**, the Basic Education Act states that if there are three or more pupils belonging to a minority religious community they are to be provided with religious education in accordance with their own religion or with ethics education if they do not belong to any religious community.²⁴⁵ Finally, in **Germany**, the Federal Administrative Court recently dealt with compulsory coeducational swimming lessons where boys and girls train together. A Muslim girl asked for a dispensation to accommodate her religious beliefs despite the fact that she was allowed to wear a *burkini*, i.e. a special swimsuit covering the body. She argued that she was still exposed to seeing boys' chests and could not entirely avoid having some contact with them. The Federal Administrative Court ruled that the *burkini* could be regarded as a sufficient means for reasonable accommodation of her religious beliefs.²⁴⁶

2. Race and ethnic origin

The examples of reasonable accommodations relating to ethnic origin which emerge from the country reports are rare and concern principally the Roma.

In **France**, Law No. 2000-614 of 5 July 2000, on the accommodation of Travellers, establishes the duty to integrate occasional school attendance of travelling Roma children.²⁴⁷ In addition, the same law obliges municipalities to provide parking spaces for Travelling Roma. If a municipality fails to do so, it is barred from seeking removal of the Travellers' trailers and from prohibiting parking²⁴⁸ and can be challenged for this failure before the administrative courts. Decree 2001-569 of 29 June 2001 lays out the technical requirements for these areas.²⁴⁹ The Administrative Supreme Court decided in 2000 that a mayor could incur liability for failure to implement regulations and accommodations for Travellers. In addition, it also decided that, unless he or she complied with accommodation requirements, a mayor could not forbid their presence on the territory for less than the period necessary for their transit.²⁵⁰ Notwithstanding,

²⁴² *Закон за извршување на санкции* (Law on Execution of Sanctions), Official Gazette of the Republic of Macedonia, No.2/2006, 57/2010, Art. 141; Const.Ct. Decision No.09/2006 (10.05.2006).

²⁴³ The prison authority rejected this request on the ground that it amounted to proselytism (forbidden under the Cypriot constitution and under prison regulations) in view of the fact that no detainee had upon admission to the prison declared himself to be a follower of the evangelical church. The prison authorities sought to justify their actions on the assumption that "a detainee's will is variable due to the nature of his psychological condition." As a result, the policy is to allow visits only from representatives of the religion or dogma of which the detainee had declared to be a follower upon admission to the prison.

²⁴⁴ Report No. A/P 2430/10, 2445/10, 2446/10, 2447/10, 2467/10, 1728/11, dated 09.04.2012.

²⁴⁵ Section 13, Basic Education Act (Perusopetuslaki 628/1998).

²⁴⁶ Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG), 6 C 25.12, 11 September 2013.

²⁴⁷ www.legifrance.gouv.fr/texteconsolide/MEEAX.htm.

²⁴⁸ TGI de Montauban of 3 May 2002, www.rajf.org/article.php3?id_article=1043.

²⁴⁹ http://www.le114.com/contenu.php?dossier=0&id_rubrique=2&cns_mode=read&id_theme_fiche=1,2,3&id_fiche=40.

²⁵⁰ Administrative Supreme Court (*Conseil d'Etat*), 20 December 2000, No. 211284, *Recueil Lebon 3 / 8 SSR*.

these measures, as praiseworthy as they might be, do not yet appear to take account sufficiently of the vulnerability and the specific needs of Roma in the field of housing, as is demonstrated by the condemnation of France by the European Committee of Social Rights of the Council of Europe in 2013.²⁵¹

In the **United Kingdom**, a failure to provide reasonable accommodation for Roma and Traveller families could give rise to a breach of Article 8 ECHR. In the case of *First Secretary of State v. Chichester District Council*, the Court of Appeal decided that the right of members of the Travelling community to respect for their home life under Article 8 of the ECHR had to be given due weight in planning decisions.²⁵² This followed the decision of the European Court of Human Rights in *Connors*, according to which the legal framework governing the possible eviction from property failed to take into account the special needs and position of the Travelling community, and therefore constituted a violation of the positive obligations imposed under Article 8 of the ECHR.²⁵³ In *Kay v. Lambeth*,²⁵⁴ the House of Lords held that, while Article 8 would not normally be available as a defence to eviction proceedings against members of the Traveller community illegally occupying land, there might be circumstances in which a local government policy or regulation could be challenged under the ECHR before the administrative courts for failing to accommodate the special needs of particular groups. In these two cases, the reasoning is not based explicitly on a reasonable accommodation duty but rather on a positive duty to accommodate the special needs of the members of the Traveller community deduced from their right to respect for private and family life as enshrined in Article 8 ECHR.²⁵⁵

Beyond the accommodation of the social needs of the Travellers, one might highlight that in **FYR of Macedonia**, limited accommodation in respect of ethnicity can be found in the Law on Holidays of the Republic of Macedonia.²⁵⁶ Under this law, days of leave are to be granted for the specific celebrations of some ethnic communities (Articles 1 and 2).

Another issue which is indirectly linked with ethnic or national origin is the accommodation of linguistic requirements. In this line, in **Ireland** case law has established that the employer may be obliged to make special arrangements for employees, such as providing translated contracts for foreign nationals.²⁵⁷ In **Sweden**, there is a general right to time off for (Swedish) language studies according to the (1986:163) Act on the right to leave for immigrants in order to pursue Swedish language studies.

3. Age – Special duties to accommodate young and/or older workers

The application of the concept of reasonable accommodation to the criterion of age presents a problem of demarcation from other notions, especially from the special needs measures or the special conditions provided for young workers. In this respect, Council Directive 94/33/EC of 22 June 1994 on the protection of young people

²⁵¹ ECSR, *European Roma and Travellers Forum (ERTF) v. France*, Collective Complaint No. 64/2011, decision on the merits of 24 January 2012. On this decision, see above, in Part II.

²⁵² [2004] EWCA Civ 1248. See also *Clarke v. Secretary of State for the Environment* [2001] EWHC Admin 800. 128 (2004) 40 EHRR 189.

²⁵³ ECtHR, *Connors v. the United Kingdom*, 27 May 2004, § 94-95.

²⁵⁴ House of Lords, 8 March 2006, *Kay & Ors v. Lambeth Borough Council*, [2006] UKHL 10, [2006] 2 AC 465, <http://www.parliament.uk/pa/ld200506/ldjudgmt/jd060308/leeds-1.htm>.

²⁵⁵ Regarding other examples of provisions “which, although they are not classified as reasonable accommodation duties, can de facto have the same result”, see L. WADDINGTON, “Reasonable accommodation”, in D. SCHIECK, L. WADDINGTON & M. BELL (eds.), *Non-Discrimination Law*, Hart Publishing, Ius Commune Casebooks for the Common Law of Europe, 2007, 754-756.

²⁵⁶ *Закон за празниците на Република Македонија* (Law on Holidays of the Republic of Macedonia), Official Gazette of the Republic of Macedonia, No. 21/1998, 18/2007.

²⁵⁷ Equality Tribunal DEC – E2006 – 050 *Five Complainants v. Hannon's Poultry Export Ltd, Roscommon*, see *Ireland Country Report 2008* p. 12.

at work²⁵⁸ includes provisions relating to the employer's general obligations, "such as protection of the health and safety of young people, assessment of the risks to young people associated with their work, assessment and monitoring of the health of young people, information about young people and children's legal representatives on the possible risks to their health and safety. In addition, the Directive contains provisions relating to working hours, night work, rest periods, annual leave and rest breaks".²⁵⁹ Most national measures which treat young workers as a vulnerable group fall within the scope of the Directive. Related provisions are implemented by European and national regulations regarding the protection of pregnant and breast-feeding women.²⁶⁰

To list the entirety of such measures adopted by the Member States would exceed the confines of this report. In this respect, we refer to the thematic report authored by Declan O'Dempsey and Anna Beale on *Age and Employment*²⁶¹ in which they have undertaken a systematic overview of the different national measures designed for the protection of young workers.

Certain national experts have nevertheless indicated, as examples of age-related reasonable accommodations, provisions in their legal orders that imply adaptations of working hours, leave or certain working conditions that are incumbent on employers if young workers are present. Where these provisions impose obligations on the employer to accommodate the work environment or working conditions in order to take into account certain particular characteristics of young workers, we do not think that they represent applications of the legal concept of "reasonable accommodation" in the strict sense. Indeed, these are obligations borne by the employer independently of their (non-) "reasonable" character in a given situation and which are more standardised. Again, this point is in line with the regulation of the protection of pregnant or breast-feeding women which is imperative for the employer and certainly implies the accommodation of the working environment, tasks and working conditions, but does not employ the notion of reasonableness or of "undue hardship". We will nevertheless refer to some examples below in order to illustrate the fine line that might exist between specific measures designed to take into account the vulnerability of young individuals on the labour market and the duty of accommodation based on the age of the workers.

In **Bulgaria**, under the Labour Code minor employees are entitled to special protection.²⁶² Among other duties, employers must afford special care to minor employees by providing them with alleviated conditions for work and vocational training.²⁶³ This could be viewed as following the logic of accommodation to the special needs of young workers. In the same line, in **Finland** the Young Workers' Act requires that the employer ensures that a young worker is given such training and guidance as is necessary in view of the working conditions, his age and other factors, so that he is not a danger to himself or other persons.²⁶⁴

Regarding older workers, while the extension of reasonable accommodation to cover the older workers is discussed in academic writings (M. Sargeant) and despite some similarities that may exist with the situation of disabled workers, only one example of accommodation of older workers is mentioned in the country reports under review. In **FYR of Macedonia**, the Labour Law sets out special measures protecting older workers regarding their working hours. It provides that these workers cannot be assigned to work overtime or in night shifts (Article 180). This measure is stipulated only for workers above the age of 57 for women and 59 for men (Article 179).²⁶⁵

²⁵⁸ Official Journal L 216 of 20.08.1994.

²⁵⁹ Online on Europa website.

²⁶⁰ See above, in Part III.

²⁶¹ Declan O'Dempsey and Anna Beale, *Age and Employment*, European Commission, 2011, pp. 31-34.

²⁶² Art. 294.6, Labour Code.

²⁶³ Art. 305 (1), Labour Code.

²⁶⁴ Section 10, Young Workers' Act (*Laki nuorista työntekijöistä* 998/1993).

²⁶⁵ See also Declan O'Dempsey and Anna Beale, *Age and Employment*, *op. cit.*, p. 39.

To sum up:

A review of the 2012 country reports shows that, beyond disability, a certain duty of reasonable accommodation may be found in the national laws of the Member States (and the six additional States covered by the Network) but the way of implementing such a duty, the criteria and the fields concerned differ from one State to another. In a nutshell, three situations might be distinguished. First, in some States, a duty to allow precise forms of accommodation in a specific sector is established by law or regulation. Second, a duty of reasonable accommodation could be deduced from the prohibition of indirect discrimination through case law, following the Canadian example which is based on substantive equality. Third, in most Member States of the EU, there is no legal duty of reasonable accommodation beyond disability but some adjustments are nevertheless granted. In practice, the person in charge (such as an employer, school director or the head of a hospital) may grant an adjustment, but this remains entirely contingent on his/her discretion, without any duty to do so.

Ashton | 1966



Conclusion

The concept of reasonable accommodation expresses an important idea in the evolution of the principle of equality: if individuals belonging to certain groups do not have access to employment or services, the problem does not necessarily lie in the characteristics these individuals present compared to the majority. It can also be the result of an environment conceived without bearing their situation in mind. This shifts the focus from the characteristics of the individual who is prevented from taking advantage of an employment opportunity or a service to the conditions which create obstacles to access by such individuals in the sectors concerned. By encouraging reflection on the way in which this context can be modified, reasonable accommodation aims at guaranteeing equal opportunities and at allowing everyone to fully participate in society whatever her or his specific characteristics.

In Europe, as in Canada and the United States, the concept of reasonable accommodation derives from the right to equality and non-discrimination. However, the concept's demarcation lines and field of application vary from one legal order to the other. While the United States recognise a right to reasonable accommodation for both disability and religion in employment statutory law, Canada goes beyond these two grounds to include, among others, ethnic origin, age and gender in areas other than employment (education, for instance). Indeed, it is in Canada where the right to reasonable accommodation has expanded most. This is due to the fact that the reasonable accommodation device is rooted in the implementation of the concept of substantive equality. The European Union has so far established an explicit duty of accommodation only in favour of disabled individuals in the employment context. And very few Member States have implemented an express general right to reasonable accommodation beyond disability.

Are there specific characteristics related to disability which justify its status as the only ground that gives rise to a reasonable accommodation duty under EU law? Beyond the international consensus on the need to develop a society that is inclusive of persons with disabilities, one of the key points of the reasonable accommodation duty is that it requires an analysis of an individual's situation, which suits anti-discrimination disability law very well. In contrast to age and the specific needs of older workers (which may greatly vary from one person to another), when accommodation of religious beliefs or ethnic requirements is at issue, the focus very much shifts from the individual to the group. Such a focus causes difficulties when religious beliefs or cultural constraints go against gender equality or support differential treatment based on sexual orientation. In this line, we should not ignore how, both in Canada and the United States, the application of the reasonable accommodation tool to religion has generated very lively debates even outside of legal circles, as demonstrated by the work of the Bouchard-Taylor Commission²⁶⁶ in Quebec. Indeed, the implementation of this concept in the sphere of religion touches upon a fundamental question for contemporary democracies, namely how to respond to religious diversity in a democratic State.²⁶⁷ It also raises the thorny issue of which values should be protected in a democracy. Is it more legitimate for employees to ask to be excused from work on Saturdays so that they can keep the Sabbath than so that they can participate in weekly meetings of a group which campaigns for the release prisoners of conscience or to spend more time with their families? And, as stressed by some authors, implementing reasonable accommodation with respect to religious requirements tends to favour people who practise their religion in an orthodox manner.²⁶⁸ Of course, finding the right balance is not at all simple when religious minorities are facing exclusion. In this line, the wearing of the *hidjab* by Muslim women is controversial as issues of gender and racial equality are closely linked to religion, as the case law of some Member States shows. In this respect, the concept of "vulnerable" group developed by the European Court of Human Rights as regards the Roma might be useful in deconstructing social stigmas and stressing the fact that the overarching issue is not the same when a member of a minority is asking for reasonable accommodation as when the request comes from a member of the majority. In addition, it could help in addressing the issue of intersectional characteristics. At this stage, there is hardly any debate on the issue of whether the accommodation duty should be

²⁶⁶ BOUCHARD and TAYLOR, *Building the Future*, op. cit.

²⁶⁷ See the contributions to the book *Institutional accommodation and the citizen: legal and political interaction in a pluralist society* (Council of Europe, 2009).

²⁶⁸ C. LABORDE, "La liberté de religion à l'âge séculier", in E. BRIBOSIA and I. RORIVE (eds), *Accommoder la diversité religieuse. Regards croisés Canada/Europe/Belgique* (PIE Lang, 2014), forthcoming.

extended to protect people who are disabled but who may also require a specific accommodation because of another characteristic protected by equality law.

In Canada, courts and legislatures have expressed themselves in favour of reasonable accommodation, understood as an instrument leading to a transformation of the rules and institutions of Canadian society so as to render them more welcoming to all. However, more recent Supreme Court decisions seem to put an end to this evolution by excluding the principle of reasonable accommodation on grounds of religion or culture when legislative measures of general application are concerned. And in the United States, a much higher standard of undue hardship is applied where disability is at issue in comparison with religion with the result that few religious requests are *de facto* accommodated as many do not pass the test of *de minimis cost*.

In Europe, the situation is less clear than it might appear at first glance. Undoubtedly, by adopting the Employment Equality Directive European Union law has established the duty of reasonable accommodation only for employers and in favour of disabled individuals. No such duty is envisaged on the basis of religion, ethnicity or age. However, the prohibition of indirect discrimination might be interpreted by the Court of Justice of the EU or by the jurisdictions of a Member State as requiring, in certain cases, that the author of a provision or of a rule of general application adapt that measure in order to avoid discriminating indirectly against certain individuals because of their religion, ethnicity or age. A similar interpretation of the prohibition of discrimination has been developed by Canadian jurisdictions and finds support in a few Member States' case law. The EU Court of Justice implicitly adopts a similar reasoning in its *Vivien Prais*²⁶⁹ decision – admittedly handed down prior to the adoption of Directive 2000/78/EC and which remains unconfirmed. Besides, since the *Thlimmenos v. Greece* ruling, the European Court of Human Rights has recognised that, in accordance with the principle of non-discrimination enshrined in Article 14 of the Convention, the legislator may, under certain circumstances, be asked to introduce appropriate exceptions into legislation to avoid disadvantaging people practising a certain religion. While the European Court of Human Rights usually tends to leave a wide national margin of appreciation when issues of religious accommodation are in question, its recent ruling in the *Eweida* case might pave the way for a stricter assessment of the proportionality test that is more in line with the one applied by the Human Rights Committee and the European Committee of Social Rights concerning Roma.

However, developing the duty of accommodation as a corollary of the prohibition of indirect discrimination is problematic in Europe as the very concept of indirect discrimination is overlooked in many Member States. Indeed, the national reports produced by the European network of legal experts in the non-discrimination field show to what extent the boundaries between legal concepts such as reasonable accommodation, indirect discrimination and positive action are blurred. Reasonable accommodation is also sometimes associated with measures implemented through legislation to take into account the special needs of a category of individuals (pregnant women, young workers, etc.). Although there is a similar philosophy behind these legal tools, they operate, as we have seen, in different ways.

Within the legal orders of Member States of the European Union, adaptations of certain general rules are sometimes allowed, in a few cases so as to take into account the way of life of Roma Travellers, but most often to avoid impairing indirectly the practice of a religion. The shapes these adaptations assume are comparable to certain applications of the concept of reasonable accommodation in Canada and the United States. However, these examples need to be distinguished from a situation in which the State recognises the *general right* to reasonable accommodation in the employment context or in other areas of social life. The recognition of such a broad right means that the accommodations which can be achieved are not limited in advance. It also implies that the believers of a minority religion benefit from the same protection as those belonging to the majority religion. And the duty bearer is compelled to consider any request for accommodation which is submitted and can only reject it under the conditions established by law or jurisprudence.

²⁶⁹ ECJ, 27 October 1976, Case C-130/75, ECR 1589, mentioned above in Part 3.3.

The American and Canadian experiences nevertheless highlight the difficulties which the practice of reasonable accommodation can pose when applied on a large scale. These are most prominently the risk of an increase in litigation as well as the delicate assessment of the limits to the duty of accommodation, in particular when the adjustment demanded raises issues of its compatibility with other fundamental rights such as gender equality. Furthermore, if adjustments come in the form of an exception to a generally applicable rule, they can enter into conflict with the concept of formal equality and the principle of the general application of laws. Additionally, the existence, whether objective or subjective, of the religious precept claimed may be a source of controversy.

One way to address the issue might be to foster different legal responses depending on whether pro-active measures are conceivable because a protected group is concerned as a group. As there are general rules to take into account the special needs of pregnant women or young workers, there could be comparable rules to make allowance for the traditional lifestyle of Roma or Travellers or the need to allow minorities time off to celebrate religious festivals which do not correspond to bank holidays, for instance. Additional issues might be addressed through application of the concept of indirect discrimination and a strict proportionality test. In this line, reasonable accommodation could be dedicated to situations where individual assessment is required. This mostly concerns persons with disabilities or aging persons whose situation might require *ad hoc* responses to their needs in order to enable them to fulfil their job and more generally, to fully participate in society on an equal footing.

Marjo | 1989

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