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# Reasonable Accommodations for Religion and Belief: Adding Value to Article 9 ECHR and the European Union’s Anti-Discrimination Approach to Employment?

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## Abstract

*Reasonable accommodations, a concept first introduced in the United States in the context of religious employment discrimination, is an established right for persons with disabilities under both international and EU law. The question whether to extend a similar right for reasons of religion or belief has generated much debate and controversy in a number of Member States. Some scholars have questioned the appropriateness and feasibility of strengthening religious rights in the European context in light of various cases involving “clashing rights” scenarios. Yet, in light of the existing primary legal instruments aiming to protect and include employees from increasingly diverse religious backgrounds in the European workplace, the concept of reasonable accommodations has various merits. This article discusses this “added value” by comparing a right to reasonable accommodations to the legal tools of human rights and EU non-discrimination law, and it considers the perspective offered by “deep equality” scholars in Canada, who argue for moving beyond accommodation.*

## Introduction

Under EU law, an enforceable right to reasonable accommodations is reserved for people with disabilities in the area of employment and occupation.<sup>1</sup> The UN Convention on the Rights of Persons with Disabilities 2006 also makes extensive use of the concept, bringing the denial of reasonable accommodations under the definition of discrimination on the basis of disability<sup>2</sup> and including a right to accommodations beyond

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<sup>1</sup> See Directive 2000/78 art.5 establishing a general framework for equal treatment in employment and occupation [2000] OJ L16/22 (EED); see also *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) 426 final art.4.

<sup>2</sup> UN Convention on the Rights of Persons with Disabilities 200 art.26.

the area of the labour market.<sup>3</sup> To achieve full inclusion of people with disabilities, effective individualised measures or supportive adaptations of the social environment are crucial and much needed.<sup>4</sup> Yet the concept of reasonable accommodations is not inherently linked to the characteristic of disability.<sup>5</sup> Its usefulness extends beyond, for instance, to the situation of religious (minority) employees, pregnant or breastfeeding women and employees with caring duties, where exclusion mechanisms at play are often times very similar and not less problematic from an equality perspective. This article focuses on the situation of religious employees, often belonging to minority religions or denominations,<sup>6</sup> working or seeking opportunities in secular/non-religious workplaces.<sup>7</sup>

The duty to “reasonably accommodate” employees (unless doing so would place an “undue hardship” on the employer) was first introduced under Title VII of the US Civil Rights Act in 1972 in the context of religious employment discrimination<sup>8</sup> before being transplanted to the 1990 Americans with Disabilities Act,<sup>9</sup> which is said to have “brought the issue of reasonable accommodations for individuals with disabilities to the attention of policy-makers and disability activists on a global scale”.<sup>10</sup> While in the United States reasonable accommodations can be claimed on the basis of disability and religion, in Canada, the right to accommodations is transversal, i.e. linked to all characteristics under equality law.<sup>11</sup> In Europe, few explicit reasonable accommodation duties extending beyond disability have been adopted,<sup>12</sup> but various countries do have specific legislation and measures in place which—without using the term explicitly—*de facto* amount to particular instances of (reasonable) accommodations for certain (religious) groups in employment and beyond.<sup>13</sup>

Case law shows that religious employees face various challenges in their attempt to reconcile competing religious and professional demands. Currently, conflicts involving religious accommodation requests in

<sup>3</sup> See, for instance, art.24 UN Convention on the Rights of Persons with Disabilities 2006, with regard to reasonable accommodations in education.

<sup>4</sup> See EED, Recital 16.

<sup>5</sup> Contra J. Huys, “Het niet voorzien van redelijke aanpassingen voor de persoon met een handicap is een vorm van discriminatie” (2003) 91 *Tijdschrift voor Sociaal Recht* 387, 391 (reasonable accommodations for religion “icing on the cake” as opposed to “necessary for the social survival” of individuals with disabilities).

<sup>6</sup> Arguments apply *mutatis mutandis* to belief although case law examples involving non-religious belief in employment are quite rare. One example is *Nicholson v Grainger* [2010] PLC KEAT/0219/09 (environmental convictions accepted as “belief”).

<sup>7</sup> For religious-ethos employers, see Y. Stox, “Religious-Ethos Employers and Other Expressive Employers under European and Belgian Employment Law” in K. Alidadi, M.-C. Foblets and J. Vrielink (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Aldershot: Ashgate 2012), pp.151–178.

<sup>8</sup> The EEOC argued that the prohibition of discrimination on the basis of religion under the 1964 Civil Rights Act implied a duty of reasonable accommodations. In 1972, after some courts did not accept this position, an explicit duty was included in the Civil Rights Act: 42 USCA s.2000 (e)(j); *Dewey v Reynolds Metal Co* 429 F. 2d 324 (6th Cir. 1970) (equally divided court).

<sup>9</sup> This was first included in the US Rehabilitation Act (1973), the predecessor of the ADA: Americans with Disabilities Act 1990 42 USC ss.12101 et seq.

<sup>10</sup> 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* (Oxford: Hart Publishing, 2007), pp.630–631.

<sup>11</sup> In Canada, the *de minimis* standard of the US Supreme Court has been rejected; see *Central Okanagan School District No.23 v Renaud* 2 S.C.R. 970 (Canada Supreme Court 1992).

<sup>12</sup> e.g. Flemish Decree on Proportionate Participation on the Labour Market of May 8, 2002 art.5.4. (general duty of reasonable accommodations for various “risk groups” (*kansengroepen*)).

<sup>13</sup> See Italian Law 101 of 1989 allowing the Jewish minority time off on important Jewish religious holidays in *Francesco Sessa v Italy* (28790/08) April 3, 2012; s.11 Employment Act 1989 (Sikhs exempt from duty to wear safety helmets on construction sites). The right to take breastfeeding breaks forms an accommodation based on gender. Examples outside employment include exemptions to animal slaughtering laws for Muslims and Jews; Motor-Cycle Crash Helmets (Religious Exemption) Act 1976 s.2A (Sikhs exempt from duty to wear motorcycle helmets).

the European workplace can be addressed under two main legal frameworks: human rights and non-discrimination law.<sup>14</sup> In the non-legal sphere, employees can also benefit from “concerted adjustments” (voluntary accommodations). The question addressed in this article is whether an *explicit* right to reasonable accommodations for religion and belief, particularly in employment, would hold “added value” over and above the existing protections for religion or belief, particularly under the European Convention on Human Rights (ECHR) and under EU Council Directive 2000/78 (Employment Equality Directive). This issue is complicated by the fact that reasonable accommodations are strongly affiliated with these protections. In particular, the freedom of religion and non-discrimination can be seen as “empty” or “nugatory” without a corresponding duty of reasonable accommodation.<sup>15</sup> The approach adopted is comparative, with a focus on case law of the European Court of Human Rights and a number of European jurisdictions, including the United Kingdom, the Netherlands, Belgium, France and Germany.

This article discusses both “tangible” and more “intangible” merits of reasonable accommodations. “Tangible” benefits of reasonable accommodations refers to the potential to address the legal-technical shortcomings under human rights and (indirect) discrimination. Indeed, the current frameworks show various holes and cracks. These gaps relate to pre-justification stage filtering mechanisms which prevent moderate and legitimate requests from receiving genuine consideration. Religious accommodation cases frequently do not even pass the admissibility stage under art.9 ECHR; if they do, the margin of appreciation forms an additional barrier, effectively *accommodating state parties’ non-accommodating standards*. EU anti-discrimination law, while promoting huge progress in the area of equal rights, has not addressed all shortcomings of the human rights frame (that was arguably not the purpose); what’s more, it has limitations of its own, for instance with the group requirement and comparing exercise under indirect discrimination claims. A reasonable accommodation duty can offer a useful complementary perspective to remedy—in a legal-technical sense—some of these concerns. But the merit and appeal of reasonable accommodations goes beyond the law and relates to the *language* and *framing* to address the situation and claims of religious individuals in secular workplaces; it introduces a much-needed new positive paradigm in the existing European vocabulary.<sup>16</sup> Framing claims of religious employees in terms of requests for reasonable<sup>17</sup> accommodations has the potential to move the debate away from and beyond pejorative “discrimination talk” or even “fundamental rights talk”, which is likely to trigger defensive reactions from “perpetrators.”<sup>18</sup> Recognising reasonable accommodations also has a “recognition effect”, signalling to religious employees that they can “stay who they are”, and that they are not “forced into self-denial” or “sent away.”<sup>19</sup>

In the first part I provide an illustrated typology of religious accommodation cases and address general concerns of exclusion, majoritarian bias and clashing rights. This is followed by separate analyses and

<sup>14</sup> L. Vickers, *Religious freedom, religious discrimination, and the Workplace* (Oxford: Hart Publishing, 2008); While there may be other relevant (labour) laws, e.g. duty to act in good faith, these play at best a marginal role, particularly since the rise in prominence of non-discrimination law. See e.g. Waddington, “Reasonable accommodation” in *Cases, materials and text* (2007), p.755.

<sup>15</sup> A. Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (Oxford: Oxford University Press, 2011), p.182; see also C. Jolls, “Anti-discrimination and Accommodation” (2001) 115 *Harvard Law Review* 642, 652–666 (arguing that traditional anti-discrimination law, especially disparate impact, is best understood as accommodation requirements, so that the two are not so easily distinguishable).

<sup>16</sup> See also Somek, *Engineering Equality* (2011), p.185, in terms of a “decommodifying” shift in EU non-discrimination law.

<sup>17</sup> For the various possible meanings of this term, see Waddington, “Reasonable accommodation” in *Cases, materials and text* (2007), p.635 (effective; “run of the mill”; not causing excess of difficulties or problems).

<sup>18</sup> That words do matter in the search for equality is clear to People-First disability advocates; see <http://www.disabilityisnatural.com/explore/pfj> [Accessed October 24, 2012]. In the same way that words describing people can help alter attitudes about those people, words that describe how to address a situation can effectuate a useful change in the paradigmatic treatment of certain people.

<sup>19</sup> Somek, *Engineering Equality* (2011), p.185.

critique of the human rights (the second part) and non-discrimination law (the third part) frameworks. The fourth part addresses the importance of a *legally enshrined* right in comparison with voluntary accommodations. The analysis of reasonable accommodations must also consider its own limits; in the fifth part, the accommodations critique is captured in the concept of “deep equality”. Finally, some conclusions are drawn up.

To be sure, this issue has already generated considerable debate in Europe.<sup>20</sup> Some leading voices have argued that adopting an explicit duty of reasonable accommodation for religious or philosophical beliefs and practices of (prospective) employees would hold little added value and even be confusing and counter-productive, considering the existing prohibition of direct and indirect discrimination under EU law.<sup>21</sup> For some scholars, the fact that claims of religious employees have the potential to conflict with other democratic values and (human) rights (“clashing rights”) has been the decisive reason for rejecting a right to reasonable accommodations for religion or belief.<sup>22</sup> Yet voices in favour of reasonable accommodations—either for religion or belief<sup>23</sup> or extending to all discrimination grounds<sup>24</sup>—have also been expressed. For instance, Bader has argued for religious accommodations from a moral minimalistic position<sup>25</sup> while Somek sees reasonable accommodations, more generally, as a remedy for the “normative deficiency” of EU anti-discrimination law.

## Setting the stage for the reasonable accommodations debate

### *Typology of religious accommodation claims and feasibility of an EU-wide approach*

What, in effect, are religious accommodations cases have been a feature of social and constitutional law for some time, at least in some Member States. In recent years<sup>26</sup> these types of cases have become more frequent. *Legal* cases only form the tip of the iceberg, as litigation is one possible “coping mechanism” for an employee facing conflicting duties. From among a variety of accommodation cases<sup>27</sup> involving private employees and civil servants, a distinction can be proposed between:

- conflicts or requests related to religious dress (including religious symbols) and grooming in both front-office and back-office positions;
- requests motivated by a need to reconcile conflicting religious time-working obligations;

<sup>20</sup> L. Vickers (European Network of Legal Experts in the Non-discrimination Field), *Religion and Belief Discrimination in Employment — the EU Law* (Brussels: European Commission, 2007), pp.19–20; for Belgium: M.-C. Foblets and C. Kulakowski (pres.), *Rapport Rondetafels van de Interculturaliteit* (Brussels: November 2010), pp.18–19; this Committee was set up to offer the government advice on various multicultural challenges: because of disagreements within the Committee no concrete recommendation with regard to the issue of reasonable accommodations for religion or belief was advanced, except that the issue merits further research.

<sup>21</sup> See L. Waddington, “Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability?” (2011) 36 NTM/NJCM-Bulletin 186.

<sup>22</sup> See M. Malik, “Religious Freedom in The 21st Century” (Westminster Faith Debates, April 18, 2012) *Religion and Society Research Programme*, <http://www.religionandsociety.org.uk> [Accessed October 24, 2012].

<sup>23</sup> V. Bader, *Secularism or Democracy? Associational governance of Religious Diversity* (Amsterdam University Press, 2007), p.129; for the United Kingdom: B. Hepple, *Equality: the New Legal Framework* (Oxford: Hart Publishing, 2011), and Vickers for a more cautious position: *Religion and Belief Discrimination in Employment* (2007), p.20.

<sup>24</sup> Somek, *Engineering Equality* (2011), pp.183–184.

<sup>25</sup> Bader, *Secularism or Democracy?* (2007), p.153. This position would allow considerable space for accommodations, in particular in the employment context as “only some ethno-religious practices of non-liberal minorities conflict with the core of minimal morality”.

<sup>26</sup> The focus is on post-2000 cases, but there are important cases going back to the 1980s.

<sup>27</sup> This typology is based on a collection of case law from the European Court of Human Rights and 10 countries involved in RELIGARE (Belgium, Bulgaria, Denmark, France, Germany, Italy, the Netherlands, Spain, Turkey, and the United Kingdom).

- requests for exemptions or alterations of particular job duties or circumstances, including socialising customs; and
- requests to use certain (often already existing) facilities or space, typically for prayer or meditation.

Some illustrations can be offered:

- a female Muslim receptionist dismissed for seeking to wear a headscarf during work hours<sup>28</sup>;
- a female Muslim teachers dismissed for wearing a headscarf in the classroom<sup>29</sup>;
- a female Muslim store clerks rejected for or dismissed from jobs in grocery stores because of their headscarf<sup>30</sup>;
- a Sikh hotel employee dismissed for wearing a turban and sporting a beard<sup>31</sup>;
- a female Muslim doctoral researcher being stripped from her financial stipend because, as a civil servant, she donned a headscarf while conducting research at the University<sup>32</sup>;
- a Christian airline check-in assistant requesting to visibly wear a necklace with a crucifix on the job<sup>33</sup>;
- a Christian tram conductor dismissed for displaying a large crucifix on the job<sup>34</sup>;
- a female Muslim nurse fired by a hospital because she sought to cover her elbows instead of wearing a sleeveless uniform<sup>35</sup>;
- various Seventh Day Adventists wanting to observe their Sabbath<sup>36</sup>;
- a Muslim teacher at a public school requesting limited time off to participate in the collective Friday prayers<sup>37</sup>;
- Muslim employees leaving or requesting to leave the workplace for short periods to pray<sup>38</sup>;
- a Jewish restaurant manager dismissed for taking an extended bereavement period beyond the allowed legally foreseen period<sup>39</sup>;

<sup>28</sup> Belgium: Antwerp Labour Tribunal April 27, 2010, AR/06/397639/A, confirmed by Labour Court of Appeal Antwerp, December 23, 2011, A.R. Nos 2010/AA/453 en 2010/AA/467(G4S case), currently pending before the *Cour de Cassation*.

<sup>29</sup> *Dahlab v Switzerland* (42393/98) February 15, 2001; the United Kingdom (involving face veil/*niqab* in the classroom): *Azmi v Kirklees MBC* [2007] I.C.R. 1154 EAT; Germany: Higher Labour Court Hamm, October 16, 2008, 11 Sa 280/08; Belgium: several cases before the Council of State, e.g. October 18, 2007, Nos 175.886 and 175887; December 21, 2010, No.210.000.

<sup>30</sup> Denmark: Supreme Court, January 21, 2005, 22/2004 No.U.2005.1265.H (*Fotex* case); Belgium: *Hema* case pending before the Labour Tribunal—see Alidadi, Foblets and Vrieliink, “Introduction” in *A Test of Faith?* (2012), pp.9–10.

<sup>31</sup> The Netherlands: Kantonrechter Amsterdam, January 24, 1986, *Die Port van Cleve BV v J. Singh*, Rechtspraak Rassendiscriminatie 1995, pp.171–173.

<sup>32</sup> France: Administrative Court Toulouse, April 17, 2009, *Sabrina Trojet v Université Paul Sabatier*, No.0901424.

<sup>33</sup> The United Kingdom: *Eweida v British Airways* [2010] EWCA Civ 80; [2010] I.C.R. 890.

<sup>34</sup> The Netherlands: *Gerechthof Amsterdam*, June 15, 2010, LJN: BM7410.

<sup>35</sup> The Netherlands: Civil Court’s-*Hertogenbosch*, July 13, 2009, *Jeroen Bosch Ziekenhuis v X*, LJN: BJ2840.

<sup>36</sup> *Konttinen v Finland* (2494/94) December 3, 1996 (Seventh Day Adventist church wanting to observe the Sabbath on Friday afternoons); France: Administrative Court of Appeal Paris, March 31, 2009, No.08PA01648; for the United States: *Trans World Airlines, Inc v Hardison* 432 U.S. 63 (1977) and *Sherbert v Verner* 374 U.S. 398 (1963); for Canada: *Ontario Commission of Human Rights and Theresa O’Malley v Simpsons-Sears Ltd* 2 S.C.R. 536 (1985).

<sup>37</sup> *X v United Kingdom* (8160/78) March 12, 1981.

<sup>38</sup> Germany: Higher Labour Court Hamm, February 26, 2002, 5 Sa 1582/01; France: Appeal Versailles, March 23, 2011, *Nathalie Benyahia v Cabinet Koskas (Société d’Expert Comptable)*, No.10/03264.

<sup>39</sup> France: Court of Appeal Paris, May 25, 1990, No.36864/89 (involving a Jewish religious-ethos employer, i.e. a restaurant selling kosher food).

- a Muslim higher education teacher refusing to shake hands with female students/colleagues<sup>40</sup>;
- a Muslim grocery store clerk not wanting to handle or come in contact with products containing alcohol<sup>41</sup> or pork<sup>42</sup>;
- Christian marriage registrars refusing to officiate over same-sex partnerships or marriages<sup>43</sup>;
- a Jehovah's Witness requesting permission to be absent from office birthday parties<sup>44</sup>;
- a Muslim job applicant rejected for a child care provider position for stating at the job interview that she would not eat with the children during the period of Ramadan<sup>45</sup>;
- a Christian relationship counsellor requesting exemption from work involving psycho-sexual therapy to same-sex couples.<sup>46</sup>

Together such cases provide a wealth of information on which issues arise in practice and how judges in Europe deal with legal conflicts involving religious claims under the current frameworks. They also illustrate the widely divergent situations on the ground in EU Member States when it comes to tolerating, accepting or accommodating for religious dress, holidays or other practices of religiously observant employees. This means that adopting an explicit *EU-wide* right<sup>47</sup> would have the advantage of levelling the playing field across the EU labour markets, creating more convergence in the legal practices of the Member States and aiding the free movement of workers.<sup>48</sup> This is not to say that a reasonable accommodation duty will guarantee a uniform approach in all Member States, as it has arguably not done in the case of disability,<sup>49</sup> but it is bound to discredit and brush away some extreme limiting approaches which are incompatible with the idea and purpose behind reasonable accommodations.

### *Exclusion and majoritarian bias*

Societies may very well have a reflex to legislate for the normative majority.<sup>50</sup> Insider-outsider divisions created by laws carrying “morally intolerable ethno-religious bias”<sup>51</sup> and social standards can disadvantage

<sup>40</sup> The Netherlands: ETC Opinions Nos 2006-202 and 2006-220; District Court Rotterdam, August 6, 2008, LJN: BD9643.

<sup>41</sup> Germany: Federal Labour Court, February 24, 2011, No.2 AZR 636/09; in the Netherlands, see Equal Treatment Commission, *Opinion 2000-75* (Muslim employee in retirement home successfully claimed accommodation not to have to serve alcoholic beverages to clients).

<sup>42</sup> France: *Cour de cassation*, 24 March 24, 1998, No.95-44738.

<sup>43</sup> United Kingdom: *Ladele v Islington LBC* [2009] EWCA Civ 1357; [2010] 1 W.L.R. 955; Netherlands: ETC Opinion No.2008-40, April 15, 2008.

<sup>44</sup> Denmark: Eastern High Court, January 3, 2008, OE2008.B-821-07.

<sup>45</sup> Denmark: Eastern High Court, January 14, 2008, U.2008.1028Ø.

<sup>46</sup> United Kingdom: *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880; [2010] I.R.L.R. 872; 29 B.H.R.C. 249.

<sup>47</sup> In this context it is important to note that EU Directives generally “shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”): TFEU art.288(3).

<sup>48</sup> See EED Recital 11; however, with the Commission's proposal for a new horizontal non-discrimination directive stalled, one may justifiably be sceptical about the feasibility of such an EU-wide solution. See L. Waddington, “Future prospects for EU equality law: lessons to be learnt from the proposed equal treatment directive” (2011) 36 E.L. Rev. 163–164 and 182; “Green Paper on Equality and Non-discrimination in an Enlarged EU” COM(2004) 379 final, p.15 (noting that achieving unanimity in policy-making on non-discrimination and equal treatment is much more difficult in a post-enlargement European Union).

<sup>49</sup> Waddington, “Reasonable accommodation” in *Cases materials and text* (2007), pp.633–634.

<sup>50</sup> Bader, *Secularism or Democracy?* (2007), p.153 (“the laws of the country (*lex fori*) have been deeply moulded by ethno-religious practices of the dominant majority”); G. Bouchard and C. Taylor, *Building the Future: A time for Reconciliation, Report of the Consultation Commission on Accommodation Practices Related to Cultural Differences* (Québec: 2008), p.64 (“All societies tend to legislate for the majority and it follows that legislation is never truly neutral”).

<sup>51</sup> Bader, *Secularism or Democracy?* (2007), p.153; Bouchard and Taylor, *Building the Future* (2008), p.64.

various groups and individuals. In particular, labour market conditions may form obstacles to entry and advancement for women or men with caring obligations, for people with disabilities, but also for ethno-religious minorities, among others. To religious minorities such as Jews, Muslims and Seventh Day Adventists living in Europe, it is clear that the Sunday closing laws and public holiday schedules are not designed with them in mind. Similarly, Muslims and Sikhs may feel disadvantaged by so-called “neutral” or professional work dress requirements which conflict with some elements of religious modesty and dress.

Some communities have found creative ways around these obstacles, where their deeply held beliefs or religiously mandated practices conflict with mainstream professional duties, such as in the case of the French “Bureau du Chabbath” set up to link Jewish job applicants with open positions that guarantee the Sabbath and days off for Jewish festivals.<sup>52</sup> But more common are individual strategies to find various “coping mechanisms”. These coping mechanisms, which often imply personal and family sacrifices, may include adaptation, negotiation, choosing from a limited range of employment options, self-employment or pulling out of the labour market altogether.<sup>53</sup>

In this regard the prohibition of indirect discrimination under the Employment Equality Directive can play a pivotal role. Indirect discrimination on the basis of, for instance, disability or religion or belief is the realisation that seemingly neutral provisions, criteria or practices<sup>54</sup> can put *persons with a disability or of a particular religion or belief* at a particular disadvantage *compared with other persons* without this characteristic (able-bodied; belonging to the majority religion, or having no religion in some contexts). Such indirect discrimination requires a *group* disadvantage, and is only accepted if it is objectively justified as being necessary and proportionate for a legitimate aim.<sup>55</sup> A more direct and positive way of addressing the issue is to award individuals the right to reasonable accommodations. This may be done within anti-discrimination law, whereby the denial of reasonable accommodation is considered a form of discrimination, but it is not necessary to force reasonable accommodations within the “dual framework” of anti-discrimination law.<sup>56</sup>

Turning to the human rights framework, even if the fundamental right to freedom of religion was not designed with issues of workplace accommodations, but rather with instances of religious persecution in mind, the language of art.9 is certainly broad enough to be interpreted as implying a duty of reasonable accommodations.<sup>57</sup> The European Court of Human Rights (as the former Commission), while having been given various opportunities, has until now declined to go down that road.<sup>58</sup> Two twins of UK cases currently being considered by the European Court will force it to delve into this issue once again.<sup>59</sup> These cases involve four Christian claimants who lost their employment discrimination cases in domestic courts: Nadia Eweida and Shirley Chaplin sought to visibly wear crucifix neck chains on the job, as a British Airways check-in assistant and as a nurse, respectively. Liliane Ladele and Gary MacFarlane’s claims involve their denial to officiate over same-sex partnerships as a registrar and assist same-sex couples as a relationship counsellor, respectively.

<sup>52</sup> See <http://www.bureauduchabbath.org> [Accessed October 24, 2012].

<sup>53</sup> e.g. E. Tzadik, “Jewish Women in the Belgian Workplace” in *A Test of Faith?* (2012), pp.225–242 (accounts of various “coping mechanisms”).

<sup>54</sup> EED art.2.

<sup>55</sup> *Bilka-Kaufhaus GmbH v Weber von Hartz* (170/84) [1986] E.C.R. 1607; [1986] 2 C.M.L.R. 701.

<sup>56</sup> Waddington, “Reasonable accommodation” in *Cases, materials and text* (2007), pp.740–745.

<sup>57</sup> See the dissent of three judges in *Francesco Sessa v Italy* (28790/08) April 3, 2012, addressing this issue head-on (discussed below).

<sup>58</sup> See below; also K. Henrard, “A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to ‘Church-State Relations’ under the Jurisprudence of the European Court of Human Rights” in *A Test of Faith?* (2012), pp.59–86.

<sup>59</sup> *Eweida and Chaplin v United Kingdom* (48420/10 and 59842/10); *Ladele and McFarlane v United Kingdom* (51671/10 and 36516/10). The hearings were held on September 4, 2012.

*Religious accommodations and clashing rights*

These sets of cases, and in particular the *Ladele* case, have led to extensive debate in the United Kingdom.<sup>60</sup> One reason may be that *Ladele* plays out the conflict between religious claims and the right to non-discrimination of sexual minorities in a public context, serving as a prototypical “clashing rights” case involving anachronistic religious beliefs versus new struggles for equal rights and recognition. For Malik this case persuades that a right to reasonable accommodations would lead us too far.<sup>61</sup> Yet, while *Ladele*’s claim would receive a fair consideration under a reasonable accommodation framework (and, e.g., not be dismissed as inadmissible), the claimant would not necessarily be accommodated as the right to accommodations—under any standard—is not unrestricted: the outcome would depend on the factual circumstances surrounding the individual employee and employer. If Ms *Ladele* is the only registrar in a given jurisdiction, it is clear the accommodation would be unreasonable as some couples would not be able to access a service on the same basis as others. On the other hand, if she is part of a large enough team of registrars (which will be the case in Islington), her work can be scheduled as such that she does not have to officiate over same-sex partnerships but respectfully defer to her colleagues. It is preferable to allow employees or civil servants to carry on with their jobs without compromising deeply held belief or religious practices if this does not impose undue organisational or other burdens. Same-sex couples need not be confronted with internal work schedules. In this sense the principles governing the *Ladele* case may not be much different from that of Catholic doctors or nurses objecting to abortion or other sensitive medical interventions,<sup>62</sup> or indeed the late Belgian King Baudouin.<sup>63</sup> Neither the doctors, nurses, Ms *Ladele* nor the king deny anyone personhood and dignity; they all seek to live and act according to their own conscience. It may be said that these people just need to find other jobs, but that implies that people are effectively blocked from opportunities owing to their conscience: this is hardly consistent with equal employment opportunities and the idea of an inclusive society that values people’s freedoms and rights.

Not everyone would not agree with such “back office” arrangements. Malik, for instance, would reject this, basically on dignitary grounds.<sup>64</sup> In her view, “[t]here should be no accommodation for the religious where the exemption is from a key constitutional or human right such as the right to equality.”<sup>65</sup> This

<sup>60</sup> e.g. see the written submission by the *British Equality and Human Rights Commission to the ECtHR*, (September 2011), <http://www.equalityhumanrights.com/news/2011/september/commission-submits-intervention-on-religious-discrimination-in-the-wo/> [Accessed October 24, 2012] (the Commission submitted that the decisions in *Eweida/Chaplin* should be reversed, while *Ladele/McFarlane* should stand.); A. Donald, *Religion or belief, equality and human rights in England and Wales*, Equality and Human Rights Commission Research Report 84 (2012), p.xiii; K. Norrie, “Conscience and public service” (April 14, 2008), *Journal of the Law Society of Scotland*, <http://www.journalonline.co.uk/Magazine/53-4/1005151.aspx> [Accessed October 24, 2012] (noting that it was a conscious decision to not insert a “conscience clause” in the that the UK Civil Partnership Act 2004 for objecting registrars); M. Malik, “Religious Freedom in the 21st Century” (Westminster Faith Debates, 2012).

<sup>61</sup> Malik, “Religious Freedom in The 21st Century” (2012), p.3 (“constitutional rights would be violated”).

<sup>62</sup> The Netherlands: ETC No.2000-13, March 21, 2000 (concerning a Protestant nurse who had conscientious objections against assisting abortions. The Commission noted that “[the hospital] deals with applicants who have conscientious objections on a regular basis”).

<sup>63</sup> In 1989, the late King Baudouin of Belgium declared he would “rather abdicate than to sign into law an act legalizing abortions”: J. Bouveroux, “Een land zonder koning” (April 3, 2010), <http://www.deredactie.be/cm/vrtnieuws/binnenland/1.749701> [Accessed October 24, 2012] (constitutional scholars found a creative way to deal with the conscientious impasse. The king was held to be temporarily “in the impossibility to reign”, an option foreseen in the Constitution for times of war, and the Government signed the Bill into law. In a letter to the prime minister, the king had asked, “Is it normal that I am the only Belgian citizen who is obliged to act against his conscience in such an important matter? Does the freedom of conscience count for all but the King?”).

<sup>64</sup> Malik, “Religious Freedom in The 21st Century” (2012), pp.3–4.

<sup>65</sup> Malik, “Religious Freedom in The 21st Century” (2012), p.4; see also Chai R. Feldblum, “Moral Conflict and Liberty: Gay Rights and Religion” (2006) 72 *Brooklyn Law Review* 61; Norrie, “Conscience and public service”

contravenes the classic approach towards clashing rights which dismisses the idea of “automatic trumps” and the existence of strict hierarchies between competing fundamental rights.<sup>66</sup> But also, as Koppelman argues, such an account amounts to “occluding one horn of the dilemma”; for indeed there are “similarities between the felt situation of both sides ... and comparable intangible burdens felt by conservative Christians”.<sup>67</sup> Referencing the ideal of political neutrality and the core question formulated by Rawls,<sup>68</sup> Koppelman finds the argument that “religious claims to exemption from anti-discrimination laws should almost always be rejected” unacceptable: “This is the kind of sanction that is likely to drive dissenters into the closet. And, as gay people know so well, the closet is not a healthy place to be.”<sup>69</sup> He concludes that “religious objectors should *usually* be accommodated [as] religious exemptions are a sensible way to address America’s cultural division over the moral status of homosexuality”.<sup>70</sup>

The issue of registrars objecting to officiating same-sex marriages has also engaged the Netherlands (the first country to legalise same-sex marriage in 2001). In 2008, the Dutch Equal Treatment Commission reversed its line of jurisprudence in the case of the so-called “*weigerambtenaren*”. Under its current case law, individuals who conscientiously object to officiating over same-sex marriages may be excluded from such positions.<sup>71</sup> Such cases involving “clashing rights”, for instance where religious freedom is played out against the right to non-discrimination of sexual minorities, are becoming “increasingly frequent”.<sup>72</sup> Brems attributes this to two developments. First, the list of fundamental rights is continuously expanding, through adoption of new treaties but mainly through interpretation of existing provisions in treaties like the ECHR. Secondly, the inflation in clashing rights situations is also due to the horizontal effect of fundamental rights, i.e. the application of fundamental rights with respect to various non-state actors.<sup>73</sup>

### *From soft-boiled to hard-to-crack*

In this clashing rights conflation context, Zucca and Bader, among others, have called for distinguishing between genuine conflicts and other, less challenging cases (Zucca: constitutional dilemmas versus *sensu lato* conflicts; Bader: hard cases versus softer or symbolic cases).<sup>74</sup> *Ladele* may be a hard(er) case, but arguably many religious employment requests do not involve any real conflicts or harm anyone and thus require very little by way of “balancing” in practice. For instance, the requests of grocery store clerks to

(April 14, 2008), *Journal of the Law Society of Scotland*, <http://www.journalonline.co.uk/Magazine/53-4/1005151.aspx> [Accessed September 25, 2012] (“where public duties are involved, there should be no place for invoking rights of conscience at the expense of those in civil partnerships”).

<sup>66</sup> E. Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp/Oxford: Intersentia, 2008), p.2.

<sup>67</sup> A. Koppelman, “You can’t hurry love: why antidiscrimination protections for gay people should have religious exemptions” (2006) 72 *Brooklyn Law Review* 125, 125–126.

<sup>68</sup> J. Rawls, *Political Liberalism*, rev. paperback edn 1996 (Columbia University Press, 1993), p.4 (reference in Koppelman, “You can’t hurry love” (2006) 72 *Brooklyn Law Review* 125, 138–139):

“How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”

<sup>69</sup> Koppelman, “You can’t hurry love” (2006) 72 *Brooklyn Law Review* 125, 146.

<sup>70</sup> Koppelman, “You can’t hurry love” (2006) 72 *Brooklyn Law Review* 125, 126 (emphasis added).

<sup>71</sup> ETC Opinion No.2008-40, April 15, 2008; see H. Post, *Gelijkheid als nieuwe religie: een studie over het spanningsveld tussen godsdienstvrijheid en gelijkheid* (Nijmegen: Wolf Legal Publishers, 2010).

<sup>72</sup> Brems (ed.), *Conflicts between Fundamental Rights* (2008), p.2.

<sup>73</sup> Brems (ed.), *Conflicts between Fundamental Rights* (2008), p.2; O. de Schutter and F. Tulkens, “Rights in Conflict: The European Court of Human rights as a Pragmatic Institution” in Brems (ed.), *Conflicts between Fundamental Rights* (2008), pp.171.

<sup>74</sup> L. Zucca, “Conflicts of Fundamental Rights as Constitutional Dilemmas” in Brems (ed.), *Conflicts between Fundamental Rights* (2008), p.20; Bader, *Secularism or Democracy?* (2007), pp.129, 153.

wear headscarves on the job and the request of a Jehovah's Witness to be excused from office birthday parties conflict with no competing *fundamental* rights.<sup>75</sup>

Still, what constitutes a hard or a soft case is far from clear-cut. Conflicts that are perceived in religious claims cases are sometimes more due to the way of framing things<sup>76</sup> and "softer cases often turn to be hard in various liberal-democratic states".<sup>77</sup> But it is clear that religious accommodations cases should not be conflated with the issue of clashing rights. To be sure, there can still be *tensions* between co-workers if one worker gets a day off or is excused from performing an annoying or heavy task, making co-workers' jobs less enjoyable, but this situation can also occur in the case of disability accommodations. Similarly, there can be contradictions with collective negotiated rights; this is not a product of *religious* accommodations, but inherent to the idea of accommodations for individual employees.<sup>78</sup>

For instance, an Irish labour court case concerned a request of an employee with cerebral palsy to have the task of sorting internal mail (that she had to carry out on a rotational basis) reassigned to other employees.<sup>79</sup> This had created tensions among co-workers and the employer had refused to reassign the task. The court held that the employer had violated his duty of reasonable accommodation under a (low) "nominal cost" standard under the then-applicable Irish Employment Equality Act 1998 as this in its view concerned a "costless" accommodation. It found that the "situation could have been defused at *no cost*" by redistributing the task among other staff on a rotational basis.<sup>80</sup>

Clearly, there *was* an extra burden on colleagues but the Irish court may have seen in this a negligible price to pay for an inclusive solution.<sup>81</sup> It would appear that even applying the low "costless" standard to religious accommodations would make a difference: a Muslim grocery store employee who requests not to have to handle products containing alcohol or pork can also be accommodated with very little burden. Stocking the alcoholic beverages aisle can be reassigned to colleagues, and customers can be directed to avoid the "no Alcohol" check-out aisle (through signs similar to "cash only", "express check-out", or "register closed") if they know their purchases include alcohol. The same goes for a teaching trainee who requests to wear trousers instead of Bermuda shorts because showing her calves goes against a duty of modesty she observes as a Muslim<sup>82</sup>; she should also be awarded this costless accommodation. Yet, under the current frameworks, reasonable accommodations for religion or belief would provide an appropriate and modest response to these situations as well as to harder clashing rights cases.

## **Human rights and reasonable accommodations: accommodation duty based on the freedom of religion?**

The regional European human rights system under its current interpretation by the European Court of Human Rights (ECtHR) can be said to form a *minimum threshold* intended to deal with cases of persecution

<sup>75</sup> Denmark: Eastern High Court, January 3, 2008, OE2008.B-821-07.

<sup>76</sup> Brems (ed), *Conflicts between Fundamental Rights* (2008), p.4.

<sup>77</sup> Brems (ed), *Conflicts between Fundamental Rights* (2008), p.4. But, conversely, conflicts between fundamental rights are "frequently not recognized as such": see also Bader, *Secularism or Democracy?* (2007), p.154.

<sup>78</sup> See art.16 EED which requires that any provisions in collective agreements contrary to the principle of equal treatment are declared null and void.

<sup>79</sup> Irish Labour Court of January 23, 2002, discussed in Waddington, "Reasonable accommodation" in *Cases materials and text* (2007), p.638 (emphasis added).

<sup>80</sup> Irish Labour Court of January 23, 2002, discussed in Waddington, "Reasonable accommodation" in *Cases materials and text* (2007), p.638 (emphasis added).

<sup>81</sup> Much as the dissenting judges in *Sessa* were willing to accept a level of burden to accommodate religious diversity in a multicultural society; see below.

<sup>82</sup> Brussels Labour Court of Appeal (7th Chamber), October 17, 2002, J. dr. jeun. 2002, afl. 220, 77 (teaching trainee refused permission to wear trousers instead of Bermuda shorts on the job requests unemployment benefits).

or other grossly unacceptable state conduct. With regard to religious accommodation cases in the “voluntary setting” of the workplace, however, the limitations of art.9 are clear:

“The Strasbourg institutions have not been at all ready to find an interference with the right to manifest a religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance.”<sup>83</sup>

Article 9 ECHR protects the freedom of thought, conscience and religion in its two aspects, the *forum internum* and the *forum externum*. The *forum internum* refers to the right to have inner thoughts and beliefs and as this is absolute, the state cannot intervene with it. The *forum externum*, on the other hand, refers to expressions or manifestations of inner religious convictions in public and private spheres. Thus acts of “worship, teaching, practice and observance” can be limited in accordance with art.9(2) as long as they are “prescribed by law” and “necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”<sup>84</sup>

In the key *Thlimmenos* case against Greece,<sup>85</sup> the ECtHR found a violation of art.14 (non-discrimination) in conjunction with art.9. A Jehovah’s Witness had been refused appointment to a post of chartered accountant because of his criminal conviction for conscientiously objecting to military service. However, the Court considered that,

“such difference of treatment does not generally come within the scope of Article 14 in so far as it relates to access to a particular profession, the right to freedom of profession not being guaranteed by the Convention.”<sup>86</sup>

In other words, had the claimant argued this case as a religious accommodation case, he would have been unsuccessful (arguably no interference would have been found). It was the particular framing, in terms that in “*the application of the relevant law* no distinction is made between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offence”, that was successful for the complainant.<sup>87</sup>

While the ECtHR never utilised the terms “indirect discrimination” or “reasonable accommodations”, *Thlimmenos* is sometimes credited with having introduced these concepts in the Court’s case law.<sup>88</sup> The Court did stress the state’s positive duty in circumstances which call for a differential treatment under art.9:

“The Court has so far considered ... Article 14 ... violated when States treat differently persons in analogous situations without providing an objective and reasonable justification ... However ... *this is not the only facet of the prohibition of discrimination* ... [Article 14] is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”<sup>89</sup>

While this was indeed a promising route to giving art.9 a thicker significance, the 2000 *Thlimmenos* approach has not been extended to cases of religious accommodation in the workplace. This is not to say art.9 is meaningless in the employment context as violation of art.9 have been found in religious

<sup>83</sup> Lord Bingham’s comment in *R. (on the application of SB) v Governors of Denbigh High School* [2006] UKHL 15; (2006) 23 B.H.C.R. 276 at [2].

<sup>84</sup> ECHR art.9.2.

<sup>85</sup> *Thlimmenos v Greece* (2001) 31 E.H.R.R. 15.

<sup>86</sup> *Thlimmenos v Greece* (2001) 31 E.H.R.R. 15 at [41].

<sup>87</sup> *Thlimmenos v Greece* (2001) 31 E.H.R.R. 15 at [42] (emphasis added).

<sup>88</sup> See K. Henrard, “A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to ‘Church-State Relations’ under the Jurisprudence of the European Court of Human Rights” in *A Test of Faith?* (2012), p.81.

<sup>89</sup> *Thlimmenos v Greece* (2001) 31 E.H.R.R. 15 at [44] (emphasis added).

discrimination cases. In *Ivanova*,<sup>90</sup> the Court held that art.9 was breached where a claimant was fired from her position as a swimming pool manager at a public school after *refusing to resign or renounce her faith under pressure*. *Ivanova* was a member of a Christian Evangelical Group known as “Word of Life”, which was refused legal recognition by the Bulgarian State and which—as the Court noted—was subject to a “policy of intolerance on the part of the authorities”. Here the Court saw that “at the heart of the applicant’s case was whether her employment had been terminated solely ... because of her religious *beliefs*”.<sup>91</sup>

But when it comes to religious accommodation cases the Court (following the former Commission) rather easily dismisses for lack of interference with art.9, often by using the filter of “freedom to resign”, even if the requests are for very modest adaptations. When a case does pass the inadmissibility stage, the margin of appreciation doctrine or a very meek justification test is utilised.<sup>92</sup>

The former Commission’s decision in *X v United Kingdom*<sup>93</sup> is illustrative. The Commission dismissed the claim of a Muslim teacher with the Inner London Education Authority (ILEA) for a modest time accommodation to attend collective prayers on Fridays, based on the fact that the employer could rely on the terms of the contract the employee had signed and committed to. It also underlined the freedom of choice of the employee: he was free to resign if he found his teaching obligations conflicting with his religious duties.<sup>94</sup> Thus there was little sympathy for the dilemmas faced by the full-time teacher of Muslim faith in a context where work was organised to fit the needs and schedule of the majority. Similarly, in *Konttinen*,<sup>95</sup> the religious time accommodation claim made by a member of the Seventh Day Adventist Church was found inadmissible. The claim was for a work schedule alteration so as not to work on his Sabbath, starting from sunset Friday afternoon (which would be the case at the most five Fridays per year). Again, the Commission noted the contractual commitment the employee was under: “*the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion ...*”<sup>96</sup>

This line of jurisprudence, again reiterated in *Stedman*,<sup>97</sup> has rightly been criticised as too formalistic, with too little appreciation for the reconciliation of work and religious commitments.<sup>98</sup> It also seems to place contractual obligations on higher footing than religious commitments, which can of course change over the course of a career. The emphasis is placed on scrutinising (the absence of) pressure to change,<sup>99</sup> but what are ignored are the various pressures to conform (reinforced by the signals given in these decisions).

Until recently, there was still hope that art.9 case law emphasising the positive duties in areas other than employment<sup>100</sup> could be applied by the Court in the employment context once a suitable case came along. In a 2012 case, the ECtHR’s internal division over this matter became clear. The British cases involving four Christian employees will require a revisiting of this question.

<sup>90</sup> *Ivanova v Bulgaria* (2008) 47 E.H.R.R. 54 .

<sup>91</sup> *Ivanova v Bulgaria* (2008) 47 E.H.R.R. 54 at [81].

<sup>92</sup> See S. Knights, “Approaches to Diversity in the Domestic Courts: Article 9 of the European Convention on Human Rights,” in R. Grillo et al. (eds), *Legal Practice and Cultural Diversity* (Aldershot: Ashgate, 2009), pp.283–298; S. Ouald Chaib, “Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights” in *A Test of Faith?* (2012), pp.33–58.

<sup>93</sup> *X v United Kingdom* (8160/78), March 12, 1981 at [13].

<sup>94</sup> *X v United Kingdom* (8160/78), March 12, 1981 at [15].

<sup>95</sup> *Konttinen v Finland* (24949/94) December 3, 1996.

<sup>96</sup> *Konttinen v Finland* (24949/94) December 3, 1996, p.9 (emphasis added).

<sup>97</sup> *Stedman v United Kingdom* (1997) 23 E.H.R.R. CD168 (involving a Christian who refused to sign a new employment agreement requiring regular work on Sundays).

<sup>98</sup> Ouald Chaib “Religious Accommodation in the Workplace” in *A Test of Faith?* (2012), pp.33–58.

<sup>99</sup> See also *Ivanova v Bulgaria* (52435/99) (2008) 47 E.H.R.R. 54.

<sup>100</sup> e.g. *Jakóbski v Poland* (2012) 55 E.H.R.R. 8 (prison context); *Konstantin Markin v Russia* [2012] Eq. L.R. 489 (parental leave, military).

In *Sessa* (2012),<sup>101</sup> a Jewish attorney representing a civil party in a criminal case was faced with a hearing date set on one of the most important Jewish holidays (Yom Kippur). Even though he had a legislative basis<sup>102</sup> to rely on and he had raised the issue before the initial hearing was even set (some four months in advance), his requests for adjournment were repeatedly refused by the Italian courts. The majority issued a decision of inadmissibility which referred to *Kontinnen* and *Stedman* as precedents. An important dissent was written by three judges—Tulkens, Popović and Keller—explicitly arguing for incorporating a reasonable accommodation duty under art.9 ECHR.

The majority saw no interference with claimant's freedom of religion: he was not pressured or prevented from observing Yom Kippur. Also, his presence as representative of the civil party was not mandatory but only optional and—if he wished—he could have used the option to have a colleague replace him at the hearing. Further, “had there been an interference”, this should be considered 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 that cases be heard within a reasonable time. The dissenting judges rebut these arguments quite convincingly: in their view there clearly was an interference and, where several alternatives are imaginable to achieve the pursued legitimate aim, the proportionality test requires the authorities to resort to “the least restrictive means”. Reasonable accommodation is seen as such means in the given circumstances.<sup>103</sup> The three dissenting judges also sensibly acknowledge that accommodation can impose a certain level of burden, here in the form of administrative inconvenience, but this is a modest price to pay for respecting freedom of religion in a multicultural society.<sup>104</sup>

### *Article 9 ECHR in the workplace and domestic courts*

Domestic courts, while not prevented from adopting a more liberal/accommodating stance, have demonstrated a lack of enthusiasm for going beyond the protection offered under the interpretation of the ECtHR.<sup>105</sup> The French Cassation Court in 1998 held, in the case of a supermarket employee of Muslim faith who refused to handle pork and asked to be transferred from the butchery to another department, that, absent any express contractual clause, religious convictions of workers are not protected by the employment contract.<sup>106</sup> Hence the employer had done nothing more than to ask the employee to execute the tasks for which he was hired; the employer was free to ignore religious requests by employees without having to provide any justification. However, allowing contractual obligations to override human rights in this way is problematic. In the labour relations context, it also ignores the reality of power asymmetries. In addition, religious commitments do not necessarily remain static over time. Employees can change religions, or alter their interpretation, commitments and practices in intensity. The rigid “contract standard” ignores this possibility.

<sup>101</sup> *Francesco Sessa v Italy* (28790/08) April 3, 2012, Note by A. Overbeeke (2012) 7 *European Human Rights Cases* 1645; see also S. Ouald Chaib, “Francesco Sessa v. Italy: A Dilemma Majority Religion Members Will Probably Not Face” (April 5, 2012), *Strasbourg Observers*, <http://strasbourgobservers.com/2012/04/05/francesco-sessa-v-italy-a-dilemma-majority-religion-members-will-probably-not-face/> [Accessed September 25, 2012].

<sup>102</sup> Italian Law 101 of 1989 gives Jewish people the right to have their Sabbath and 15 important religious holidays including Yom Kippur and Sukkoth respected.

<sup>103</sup> *Sessa v Italy* (28790/08) April 3, 2012, at [10] of dissent.

<sup>104</sup> *Sessa v Italy* (28790/08) April 3, 2012, at [13] of dissent. Ouald Chaib, who calls for this case to be referred to the Grand Chamber, approves of the stance taken in the dissent: Ouald Chaib, “Francesco Sessa v. Italy” (April 5, 2012), *Strasbourg Observers*, <http://strasbourgobservers.com/2012/04/05/francesco-sessa-v-italy-a-dilemma-majority-religion-members-will-probably-not-face/> [Accessed September 25, 2012].

<sup>105</sup> See S. Knights, “Approaches to Diversity in the Domestic Courts: Article 9 of the European Convention on Human Rights” in *Legal Practice and Cultural Diversity* (2009), pp.290–293.

<sup>106</sup> French *Cour de cassation*, March 24, 1998, No.95-44738.

German courts have adopted a different approach, rejecting such formalistic standards. For instance, the Higher Labour Court of Hamm<sup>107</sup> held that an employee “does not resign his constitutional right to religious freedom” by signing an employment contract which is in conflict with religious duties. In this case, it was held that an employee can be excused from work to pray, unless it would lead to business disruptions violating the employer’s constitutional right. This approach to conflicting rights under German constitutional law, termed “praktischen Konkordanz” (practical concordance), aims to find a “compromise with minimal restrictions of both rights”.<sup>108</sup> This may be a promising approach to reasonable accommodations involving clashing rights.<sup>109</sup>

Considering the various impediments that requests for religious accommodations have to pass through to even receive a genuine consideration under art.9(2), a legal duty of reasonable accommodations would offer important additional protection and guarantees to employees who face work conditions competing with religious commitments. The question would no longer be: was there an “interference” (answer being no if alternative employment is imaginable<sup>110</sup>) or does this issue fall within the margin of appreciation of states? Rather, parties and/or the Court could cut to the chase: can the request be accommodated, i.e. would it be reasonable and not impose disproportionate burdens on the employer? Resourcefulness and good will could take parties a long way. Offers made by employees can also be considered, such as in *Kontinnen* where the employee had made offers to stay longer on other days to recoup the hours. In the end, not all accommodations may be awarded (reasonable accommodations are not unrestricted), but it would guarantee that a due consideration is given and a genuine proportionality test is performed in cases of bona fide requests for accommodations to reconcile or facilitate observing both professional and religious commitments. This is a huge win in itself.

## **EU anti-discrimination law and religious accommodation: added value in light of the prohibition of indirect discrimination?**

The right to a treatment free of discrimination, including on the basis of religion or belief in the labour market, is firmly enshrined under EU law and domestic laws. In particular, the Employment Equality Directive establishes a general legal framework for equal treatment in employment and occupation and aims to combat discrimination on the grounds of religion or belief, as well as disability, age and sexual orientation.<sup>111</sup> The Directive prohibits direct and indirect discrimination, harassment and instruction to discriminate on the basis of religion or belief, disability, age or sexual orientation, all as regards employment and occupation. It also mandates reasonable accommodations for individuals with disabilities.<sup>112</sup>

<sup>107</sup> Higher Labour Court of Hamm, January 18, 2002, 5 Sa 1782/01.

<sup>108</sup> Brems (ed.), *Conflicts between Fundamental Rights* (2008), p.3.

<sup>109</sup> However, even if the result may be the same, this case perhaps need not be framed as a clashing rights case.

<sup>110</sup> See *Schüth v Germany* (1620/03) September 23, 2010 (an organist and choirmaster of a Roman Catholic parish was dismissed because of having an extra-marital relationship. The Court found a breach of art.8 ECHR The fact that the claimant had limited opportunities to find a job outside the church was of particular importance).

<sup>111</sup> Article 19 TFEU (ex art.13 EC) provides the legal basis for taking “appropriate action” to combat discrimination based on “sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. Introduced by the Treaty of Amsterdam, it put an end to the long debate about the EU’s competence on antidiscrimination matters”.

<sup>112</sup> EED art.5 states: “[E]mployers 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*” (emphasis added). This provision has been criticised for its “poor drafting”: Waddington, “Reasonable accommodation” in *Cases, materials and text* (2007), pp.665–666.

Reasonable accommodations are, as Fredman argues in the disability rights context, a “challenge to the existing anti-discrimination paradigm”.<sup>113</sup> While “non-discrimination law is traditionally underpinned by the idea that the protected characteristic, such as race or gender, is rarely relevant to the employment decision ... [and] the protected characteristic should therefore be ignored”, the idea behind reasonable accommodations is that “ignoring, by failing to accommodate, the characteristic can result in denying an individual equal employment opportunities”.<sup>114</sup> Therefore:

“Instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change.”<sup>115</sup>

The concepts of reasonable accommodations and indirect discrimination<sup>116</sup> may be seen as functional equivalents, but there are differences.<sup>117</sup> On the one hand, indirect discrimination could be regarded as more encompassing and implying a much higher burden on employers.<sup>118</sup> When a measure or situation is considered to disadvantage a certain group by its very design, it should be corrected so that it does not hurt potential and future employees. A simple accommodation for a current/individual employee would not seem to suffice.<sup>119</sup> Also, if there is talk of discrimination, economic cost arguments are unlikely to succeed under the justification test.<sup>120</sup> In this sense, depending on the standard adopted for assessing reasonable accommodations, indirect discrimination could be considered a stronger tool for employees in some cases.<sup>121</sup>

On the other hand, indirect—as well as direct—discrimination requires a group disadvantage and going through a comparison exercise. The claimant must show that a requirement would put persons of a particular religion or belief at a particular disadvantage compared with others. Because of this group disadvantage requirement, claims have been blocked from receiving appropriate consideration under the equality framework. *Eweida*<sup>122</sup> illustrates how the group disadvantage requirement can be paralysing for (true or alleged) “sole believers”. The UK Court of Appeal dismissed the claim of indirect discrimination, although it was shown that Muslim women were allowed to wear a headscarf and Sikh men could wear turbans on the job. In fact, unlike in an earlier workplace religious symbol case,<sup>123</sup> the Court never reached the justification stage of indirect discrimination.<sup>124</sup> This is similar to cases under art.9 which are filtered without

<sup>113</sup> 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: Hart Publishing, 2005), p.199.

<sup>114</sup> Waddington, “Reasonable accommodation” in *Cases, materials and text* (2007), p.632.

<sup>115</sup> Fredman, “Disability Equality” in *Disability Rights in Europe* (2005), p.203.

<sup>116</sup> D. Schiek, “Indirect discrimination,” in *Cases, materials and text* (2007), pp.323–327; the concept was developed through the jurisprudence of the ECJ since the 1960s in the area of sex discrimination.

<sup>117</sup> On the relation between the two concepts, see Vickers, *Religion and Belief Discrimination in Employment* (2007).

<sup>118</sup> M. de Vos, “De bouwstenen van het discriminatierecht in de arbeidsverhoudingen” in M. de Vos and E. Brems (eds), *De Wet Bestrijding Discriminatie in de praktijk* (Antwerp: Intersentia, 2004), p.81.

<sup>119</sup> De Vos, “De bouwstenen van het discriminatierecht in de arbeidsverhoudingen” in *De Wet Bestrijding Discriminatie in de praktijk* (2004).

<sup>120</sup> Waddington, “Reasonable accommodation” in *Cases, materials and text* (2007), p.644. On the other hand, the only remedy in case of a discrimination may be compensation, in which case the effectiveness of the anti-discrimination system is limited.

<sup>121</sup> For the United States: R. Corrada, “The Supreme Court and title VII” (January/February 2003), *Liberty Magazine*, <http://www.libertymagazine.org/index.php?id=1273> [Accessed October 24, 2012] (describing the case of an air traffic controller who won a \$2.25 million disparate treatment (indirect discrimination) claim, and arguing that he may not have prevailed if he had argued only that his employer refused a reasonable accommodation).

<sup>122</sup> *Eweida* [2010] EWCA Civ 80; [2010] I.C.R. 890.

<sup>123</sup> *Azmi* [2007] I.C.R. 1154.

<sup>124</sup> It could be argued that the Court of Appeal erred in qualifying the case as request as an idiosyncratic wish of the employee *in this case*. But it remains that “group disadvantage is the starting point of indirect discrimination” (Schiek, “Indirect discrimination” in *Cases, materials and text* (2007), p.330).

being a genuine assessment. In contrast, a claim for reasonable accommodations requires no showing of *group* disadvantage. This is significant because,

“disadvantage is not necessarily experienced by all or most members of a particular group, but is ... experienced on the individual level depending on both individual and environmental factors. Such *individual forms of disadvantage* can only rarely be revealed by making of group comparison, which is characteristic for both direct and indirect discrimination standards. Reasonable accommodation discrimination therefore requires a different approach to *do justice to the particularities of an individual in a given situation*.”<sup>125</sup>

The fact that a right to accommodations does not require the showing of a group disadvantage also means that it is a symmetrical instrument that is not merely of benefit to individuals belonging to minority religions but can be invoked by members of the majority as well.

This regards the tangible added value, but there are more intangible reasons for arguing for reasonable accommodations. The complexity<sup>126</sup> of the notion of indirect discrimination no doubt affects its application in everyday life. The framing of issues in terms of accommodations is more intuitive and straightforward, which serves the goal of advancing solutions that meet individual needs in a given context.<sup>127</sup> Language, key in debates on discrimination and equality, is indeed an important element pleading in favour of reasonable accommodations.<sup>128</sup> When addressees of a legal rule do not *understand* a rule, that rule is bound to stay ineffective *in practice*. This may be one reason that the advancements made through the concept of indirect discrimination have been called “disappointing”.<sup>129</sup> In addition, being approached for failing to reasonably *accommodate*<sup>130</sup> or *discriminating against* an employee may mean the same thing in legal parlance but will be perceived differently by an employer. The first may trigger a far less defensive response that conserves space for negotiation.<sup>131</sup> Once a *legal* claim has been presented, though, this subtle difference in connotations can be considered absolved, but while negotiations are pending it may be significant. Arguably, the reasonable accommodations framework also disregards “the potential benefits that could accrue to employers from adapting their workplace” to the needs of certain employees<sup>132</sup> But the fact that the reasonable accommodations terminology allows a potential conflict situation to be reframed in positive language makes it a potent tool.

<sup>125</sup> Waddington, “Reasonable accommodation” in *Cases, materials and text* (2007), p.745 (emphasis added).

<sup>126</sup> Schiek, “Indirect discrimination,” in *Cases, materials and text* (2007), p.324 (“Why would a legislator introduce a concept as complicated as indirect discrimination?”).

<sup>127</sup> Waddington, “Reasonable accommodation” in *Cases, materials and text* (2007), p.670. This is not to say that the various elements (reasonable, disproportionate/hardship) do not raise particular *legal* issues.

<sup>128</sup> In Belgium a debate erupted in September 2012 when a leading newspaper, *De Morgen*, announced it would ban the term “*allochtoon*” from its reporting.

<sup>129</sup> Schiek, “Indirect discrimination,” in *Cases, materials and text* (2007), pp.332–333.

<sup>130</sup> Even though the failure to provide accommodations can fall under the definition of discrimination, the term does not necessarily by association acquire a pejorative connotation.

<sup>131</sup> This pejorative connotation of the term “discrimination” is one reason why the Dutch Equal Treatment Act 1994 (still) uses “*distinction*” (“*onderscheid*”).

<sup>132</sup> Waddington, “Reasonable accommodation” in *Cases, materials and text* (2007), p.725 (in the context of disability) referring to K. Wells, “The impact of the Framework Employment Directive on UK disability Discrimination Law” (2003) 32 I.L.J. 264 because of the focus on “the financial cost of the accommodation as the primary factor in determining whether a ‘disproportionate burden’ exists”. In the United States, the functional equivalent of “disproportionate burden” is “undue hardship”. The latter term also fails to recognise potential benefits and externalities of accommodations for parties other than the particular worker.

*Beneficiaries of reasonable accommodations: from disability to religion or belief?*

Waddington has argued that extending the duty of reasonable accommodations to religion or belief in the EU context has important drawbacks. Although she finds the Canadian “unified approach” to reasonable accommodations appealing, she dismisses it for legal-technical reasons related to the particular structure of EU anti-discrimination law.<sup>133</sup> She rejects the adoption of a specific reasonable accommodation duty for religion or belief—such as under the US Civil Rights Act of 1964—because,

“slightly different accommodation duties can create confusion and misunderstanding, and arguably this is not to be encouraged, particularly given the complexity of the existing disabilities-related reasonable accommodations duty.”<sup>134</sup>

However, she argues that the prohibition to indirectly discriminate, if interpreted “dynamically” as is done in the Netherlands, can signify a *de facto* accommodation duty for religion or belief.<sup>135</sup> With regard to disability, this subdued approach would be insufficient “given the very individualised nature of some of the accommodations required by people with disabilities”, unlike “situations where a measure is likely to lead to disadvantage for a group of people who share a characteristic protected by non-discrimination law”.<sup>136</sup> Waddington contrasts the individual nature of many disability accommodations as a difference with religious accommodations which are seen as more group-based.<sup>137</sup> This is not entirely convincing. There are many examples of disability accommodations that would benefit a group of people and, conversely, there are examples where individualised adaptations are required to allow employees to reconcile work and faith commitments. In fact, certain accommodations, in particular those not involving “hard” costs such as some forms of physical alterations, are just the same in the case of a religious accommodation (time requests; work alterations).<sup>138</sup> Moreover, the trend towards individualisation and “mix and match”/“fusion” of religions is likely to call for increasingly individualised solutions, fitting better within the case-by-case approach of reasonable accommodations than the group-centred analysis under indirect discrimination.

It is true that “dynamism” in anti-discrimination law interpretation would address many concerns. There are several good illustrations in the Netherlands, the United Kingdom and Germany. However, in EU Member States such as Belgium and France, judges show resistance to activism that calls for departing from formal egalitarianism and allowing “special favours” for religion. Thus the situation “on the ground” is considerably different in various Member States. Belgian courts have held in quite clear terms that the concept does *not* entail any duty for employers to offer employees (e.g. who request to wear religious dress in violation of expectations or policies) any form of accommodation, including offering an alternative position with the company where that would be possible.<sup>139</sup> In Dutch cases, the efforts of employers to look for solutions to keep the employee on the job are considered central, and alternative avenues are even

<sup>133</sup> Waddington, “Reasonable Accommodation” (2011) 36 NTM/NJCM-Bulletin 41.

<sup>134</sup> Waddington, “Reasonable Accommodation” (2011) 36 NTM/NJCM-Bulletin 41, 52.

<sup>135</sup> Waddington, “Reasonable Accommodation” (2011) 36 NTM/NJCM-Bulletin 41, 49. Waddington acknowledges that “it is not clear if the concept of indirect discrimination can be used to create a duty to accommodate for each e.g. religious individual or older person since the concept is defined in terms of group disadvantage ... A further potential problem with this approach is that it may create uncertainty. The prohibition of indirect discrimination does not clearly enunciate a duty to accommodate, and this may only be recognized or understood by (specialist equality) lawyers and judges. Employers and other parties may be unaware that the prohibition of indirect discrimination can include within it a positive duty to accommodate”.

<sup>136</sup> Waddington, “Reasonable Accommodation” (2011) 36 NTM/NJCM-Bulletin 41, 49.

<sup>137</sup> Waddington, “Reasonable Accommodation” (2011) 36 NTM/NJCM-Bulletin 41, 49.

<sup>138</sup> M. Stein, “The Law and Economics of Disability Accommodations” (2003) 53 Duke L.J. 88.

<sup>139</sup> Labour Court of Appeal Brussels, January 15, 2008, JTT 140 (“Club” bookstore case); Labour Court of Appeal Antwerp, December 23, 2011, A.R. Nos 2010/AA/453 and 2010/AA/467 (G4S).

proposed by the ETC itself. For instance, when a Muslim woman was denied a call centre job because the employer was of the opinion that the sound transmission over the headset would be of lesser quality when worn over a headscarf (thus lowering the quality of the communication between phone operator and customers), the ETC proposed a (cost-free) alternative that would satisfy both employer and employee but which had been overlooked in the heated debate: namely, the headset could be worn *under* the headscarf.<sup>140</sup> There are other examples where the ETC imposes a de facto duty of reasonable accommodations on the employer.<sup>141</sup> A recent German decision takes a similar approach. When a Muslim employee was dismissed from a supermarket because of his refusal to handle products containing alcohol, the Federal Labour Court held that the dismissal would be invalid if there was other employment available for the employee (e.g. transfer to the fresh food department).<sup>142</sup>

In Belgium, by contrast, in an employment dispute between a private employer and a saleswoman who sought to wear a headscarf on the job in a large bookstore, the court found it pointless to look into whether the parties considered a possible transfer to a back office position since “there exists no duty of reasonable accommodation”.<sup>143</sup> Recently, the Antwerp Labour Court of Appeal referred to this decision for its position that the employer, a large multinational outsourcing receptionist and security services, need not offer the receptionist fired for seeking to don a headscarf on the job an alternative back office position with the company.<sup>144</sup>

The Dutch and German approach is preferable both from an equal rights perspective as well as from an economic efficiency line of argument. Offering an existing employee an accommodation so he can stay with the company can also be to the employer’s advantage, for instance saving recruitment and training costs. The non-accommodation approach towards indirect discrimination also fails to recognise the repercussions on the social benefits sphere.<sup>145</sup> But under the current anti-discrimination law framework, these divergent approaches fall within the range of possibilities.

It may be necessary to remedy this situation through legislation since it is likely that the ECJ will not mandate the more progressive approach. The ECJ has not yet explicitly decided on the scope and extent of protection against religious discrimination in the workplace, i.e. whether it implies a level of accommodation; but there is good indication that the ECJ will strictly guard this right as benefiting only individuals with disability. In *Coleman* the Court saw reasonable accommodations as “specific measures which would be rendered meaningless or could prove to be disproportionate if they were not limited to disabled persons only”, so that under the current Directive they “can only relate to disabled people.”<sup>146</sup>

## Voluntary accommodations on the ground versus legally enshrined rights

Besides reasonable accommodations as *an (implied) right* under art.9 ECHR or the prohibition of indirect discrimination, one must also take stock of voluntary accommodations<sup>147</sup> or “concerted adjustments”<sup>148</sup> on the ground. These can be awarded for a variety of reasons, including economic efficiency, image concerns,

<sup>140</sup> Dutch ETC Opinion No.2006-215, October 27, 2006.

<sup>141</sup> Dutch ETC Opinion No.2012-24, February 2, 2012 (time off requests for free Sundays in travel agency).

<sup>142</sup> Federal Labour Court, February 24, 2011, No.2 AZR 636/09. See also ETC Opinion 2000-75 (Muslim employee in retirement home successfully claimed accommodation not to have to serve alcoholic beverages to clients).

<sup>143</sup> Labour Court of Appeal (4th Ch.), No 48.695, January 15, 2008, JTT 2008, issue 1003, 140.

<sup>144</sup> Antwerp Labour Court of Appeal, December 23, 2011, A.R. Nos 2010/AA/453 and 2010/AA/467(G4S).

<sup>145</sup> See K. Alidadi, “Muslim Women Made Redundant” in *A Test of Faith?* (2012), pp.245–282.

<sup>146</sup> *S. Coleman v Attridge Law* (C-303/06) [2008] E.C.R. I-5603; [2008] 3 C.M.L.R. 27 at [42] (right to reasonable accommodations was denied to caretaker of disabled child). For a critique, see Somek, *Engineering Equality* (2011), p.182.

<sup>147</sup> Considering the possible “dynamic interpretation” of indirect discrimination, it could be argued that these are not merely “voluntary” but fall under employers’ non-discrimination duties.

<sup>148</sup> See Bouchard and Taylor, *Building the Future* (2008), p.64.

moral reasons, good faith and conflict-avoiding strategy. In Belgium, the Centre for Equal Opportunities and Opposition to Racism, with competency for enforcing anti-discrimination norms, has argued against adopting an enforceable reasonable accommodation duty, instead seeking to rely entirely on “voluntary” concessions by employers.<sup>149</sup> However, such *voluntary* adjustments remain fragile as they ultimately depend on the good will of stakeholders.<sup>150</sup> Fostering good will is commendable, but it is no substitute for providing legal remedies. In principle, nothing prevents a change of heart and reversal of an arrangement, even at the whim of the accommodating party. This is a crucial difference compared with *legally* enforceable rights: even if the entitlement to accommodations is not absolute and offers much leeway in practice, the legal enforceability of reasonable accommodations means that legal remedies are available in case accommodations requests are ignored, downright rejected or suddenly retracted. The existence of voluntary accommodations in certain companies do not make legally enshrined rights obsolete.

And vice versa, the introduction of a reasonable accommodations duty does not mean that pragmatic, voluntary accommodations would become moot, meaningless or ineffective. Rather, the negotiation between parties (often one “weaker” than the other) will then be transformed and placed “in the shadow of the law”.<sup>151</sup> In case of a rejected request or sudden change of heart, legal recourse will be available to the employee and a court will assess if granting accommodations would be reasonable and proportionate under the circumstances.

### **The limitations of the reasonable accommodations: “rule and exception” approach versus “deep equality”**

Notwithstanding its potential to address existing shortcomings in the human rights, non-discrimination law and voluntary accommodations frameworks, the tool of reasonable accommodations has its own limits. In particular, this is due to the individual justice and “rule and exception” approach towards social processes of exclusion. Religious minority employees are not placed on a totally equal footing with their more naturally conforming colleagues: they have a right *to ask* for accommodations and only under certain *conditions to receive* such accommodations. This leaves “norms and rights ... inflected by particular historical traditions and national cultures”<sup>152</sup> and the majority-biased organisation of society on various levels unchallenged. Accommodating minorities “(as required by any meaningful interpretation of religious freedoms) does not change the religious bias of the rules and symbols of the national centre”.<sup>153</sup>

Beaman and other scholars<sup>154</sup> have argued for “going beyond (toleration and) accommodation”<sup>155</sup> and looking at what they term “deep equality”, finding this particularly appropriate in the Canadian context (with a multicultural mandate in the constitution, with existing duties and higher standards of reasonable

<sup>149</sup> K. Alidadi, “Studie over redelijke aanpassingen voor religie op Belgische werkvloer” (2011) 221 *Juristenkrant* 6.

<sup>150</sup> For Belgium: I. Adam and A. Rea, *Culturele diversiteit op de werkvloer: Praktijken van redelijke aanpassing/La diversité culturelle sur le lieu de travail: Pratiques d'aménagements raisonnables* [Cultural Diversity in the workplace: Practices of reasonable accommodation], Research commissioned by the Centre for Equal Opportunities and Opposition against Racism (Brussels: September 2010).

<sup>151</sup> This term is borrowed from Marc Galanter (M. Galanter, “Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law” (1981) 19 *J. Pluralism and Unofficial L.* 1, 25) and Robert Mnookin (R. Mnookin and L. Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 *Yale Law Journal* 950), among others.

<sup>152</sup> T. Modood, “Is There a Crisis of Secularism in Western Europe?” (2012) 73 *Sociology of Religion* 130, 136.

<sup>153</sup> Bader, *Secularism or Democracy?* (2007), p.167.

<sup>154</sup> L. Beaman, “Deep equality: moving beyond tolerance and accommodation” (2012), *Luther College*, <http://www.luthercollege.edu/impetus/winter2012/lbeaman> [Accessed October 24, 2012] and references cited; S. Day and G. Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996) 75 *La Revue du Barreau Canadien* 433.

<sup>155</sup> Beaman, “Deep equality” (2012), <http://www.luthercollege.edu/impetus/winter2012/lbeaman> [Accessed October 24, 2012]; Day and Brodsky, “The Duty to Accommodate” (1996) 75 *La Revue du Barreau Canadien* 433.

accommodations).<sup>156</sup> Beaman sees the “core problem” with conceptualising religious diversity challenges in terms of toleration or accommodation as follows,

“both frameworks create a hierarchical positioning of ‘us’ and ‘them’ that is conceptually unavoidable ... This positioning creates a situation in which the accommodating group makes normative judgments about who is ‘worthy’ to receive accommodation and whether their beliefs are sincere or important enough to receive consideration.”<sup>157</sup>

The concept of “deep equality”, which is proposed as a way to move beyond this impasse, is said to be “still a bit nascent”. However, it is clear it requires a reshaping that is “profound”, requiring scrutinising and addressing underlying assumptions. Thus starting from a *tabula rasa* seeking to “undo” existing power structures may be appropriate. In the case of the organisation of (working) time, “deep equality” could thus call for an overhaul of the current public holidays schedule. This would mean minorities need not “request” or “claim” a day off, they just have the benefit of not having to work when their religion proscribes a day of rest or an important holiday. This would certainly aid employees who fail to see the appeal of *negotiated* reasonable accommodations because this avoids conflict and emphasises (respecting) hierarchy (e.g. some Asian cultures).<sup>158</sup> Even in the absence of cultural obstacles, there may be various reasons why in practice an employee would decide not to ask for a day off for a religious holiday, even if this is very important to him or her and even if (s)he has knowledge that there is a legal right to do so: there may be personal, practical or psychological obstacles to requesting accommodations.

From a principled standpoint, such quest for “deep equality” should not be easily dismissed as it has the potential to break down existing insider/outsider distinctions, making *ex post* accommodations redundant. The argument then goes that minorities are selling themselves short by taking comfort in “mere” accommodations, accepting small hand-outs instead of pressing for more radical and transformative equality.

The *tabula rasa* proposal, however, ignores that in many areas strict equality (or state neutrality) may be impossible: even the “least restrictive way” imaginable may still appear restrictive to some. For instance, in order to understand each other, we need to speak some common language(s), which will disadvantage certain minorities. It may also be unfair, at least if fairness is seen as even-handedness, not strict neutrality.<sup>159</sup> Stripping the public sphere of all possible symbols, including symbols associated with predominant religious majorities, to institute a strict equal public standing seems unjustifiable,

“since Britain cannot shed its cultural skin, to deny the Christian component of its identity in the name of granting equal status to all its religions is unjust (because it denies the bulk of its citizens their history) ... The only way to reconcile these two demands is both to accept the privilege status of Christianity *and* to give public recognition to other religions.”<sup>160</sup>

<sup>156</sup> Day and Brodsky, “The Duty to Accommodate” (1996) 75 *La Revue du Barreau Canadien* 433.

<sup>157</sup> Beaman, “Deep equality” (2012), <http://www.luthercollege.edu/impetus/winter2012/lbeaman> [Accessed October 24, 2012]; Day and Brodsky, “The Duty to Accommodate” (1996) 75 *La Revue du Barreau Canadien* 433. In an employment context, the hierarchical position is also that between employees and employers. Part of the critique that Beaman formulates against the language of reasonable accommodations is that it was originally developed in the context of this power dynamic between employer and employee, and was never meant to be applied as an overarching principle to discuss religious diversity more broadly in society.

<sup>158</sup> Of course, conflict-avoiding employees will also avoid litigation and may not make use of other legal rights (non-discrimination, human rights) either, so this is not a limitation that reflects the weakness of reasonable accommodations *per se*.

<sup>159</sup> Bader, *Secularism or Democracy?* (2007), pp.153, 167.

<sup>160</sup> B. Parekh, “Religion in Public life” in T. Modood (ed.), *Church, State and Religious Minorities* (London: Policy Studies Institute, 1996), pp.19–20; cited in Bader, *Secularism or Democracy?* (2007), p.168.

Moreover, overhauls are impractical and highly unfeasible in the European context. Experiences in France<sup>161</sup> and Belgium<sup>162</sup> show that proposals for even modest pluralisation of states' public holiday schedules are beyond contentious: they are simply not negotiable for the mainstream. The comfort of a known system is not easily forfeited, in particular if the objective is to recognise newcomers who in widespread discourse are only welcome if they adapt, i.e. *assimilate*, satisfactorily. In contrast:

“The great attraction of regulation-plus-exemptions is that it lowers the stakes and makes possible a legislative compromise that does not threaten the deepest interests on either side.”<sup>163</sup>

Thus it seems unwise to give up reasonable accommodations for the still underdeveloped perspective of “deep equality” in the European context. In fact, it may simply be anachronistic to argue for “going beyond accommodations” in a Europe that is yet to develop the first signs of accommodation-fatigue.<sup>164</sup> Beaman has recognised the role of different (national) contexts, stating she has,

“become painfully aware of the non-transportability of deep equality in the way I imagine it in the Canadian context when talking about it in the European context.”<sup>165</sup>

She acknowledges that for instance in the Belgian context, accommodation,

“is seen in a positive way, as a perhaps radical step toward opening Belgian society to the ‘other’, who must be made to feel welcome. Once we examine Belgian culture more carefully, it may be that accommodation is exactly the right approach in that context at this time.”<sup>166</sup>

Still, “deep equality” understood as a long-term aspiration does hold promise. This would come close to mainstreaming religious equality.<sup>167</sup> Indeed, when (*re*)*designing* rules and standards, the aim should be to include as many interests as possible and choose avenues that accommodate all, or at least restrict and disadvantage vulnerable minority groups as little as possible.<sup>168</sup> But this understanding of “deep equality” does not render reasonable accommodations any less useful. It just adds another layer, which will be the main purview of legislators and regulators.<sup>169</sup> Assessing accommodation claims remains in large part a

<sup>161</sup> Bader, *Secularism or Democracy?* (2007), p.326 fn.28; see *Report of the French Commission of Reflection on the Application of Secularity in the Republic* (December 2003), p.65. (The French Stasi Commission came up with a proposal to have the most sacred days of the two main minority religions in France (Islam and Judaism) recognised as public holidays.)

<sup>162</sup> See Foblets and Kulakowski (pres.), *Rapport Rondetafels van de Interculturaliteit* (2010), p.68 (proposal related to the public holiday schedule involved cancelling all Christian holidays except for Christmas, adopting three new (non-religious) holidays and giving every employee two holiday credits to be chosen freely in accordance with one's culture or religion.)

<sup>163</sup> Koppelman, “You can't hurry love” (2006) 72 *Brooklyn Law Review* 125, 135.

<sup>164</sup> Somek, *Engineering Equality* (2011), pp.189–190. In a 2012 critique of EU non-discrimination law, Somek proposes (transversal) reasonable accommodations as a way out of the pre-dominant EU non-discrimination framework.

<sup>165</sup> L. Beaman, “Deep equality: A response” (2012), *Luther College*, <http://www.luthercollege.edu/impetus/winter2012/lbeamanresponse> [Accessed October 24, 2012].

<sup>166</sup> Beaman, “Deep equality: A response” (2012), *Luther College*, <http://www.luthercollege.edu/impetus/winter2012/lbeamanresponse> [Accessed October 24, 2012].

<sup>167</sup> See also the United Kingdom's public sector equality duty: Hepple, *Equality* (2011), pp.134–140.

<sup>168</sup> *Vivien Prais v Council of the European Communities* (130/75) [1976] E.C.R. 1589; [1976] 2 C.M.L.R. 708, judgment at [19] (claim by Jewish woman who was unable to compete in a EU employment test because it was scheduled on a Jewish holiday was rejected, but the ECJ stated that the Council should “avoid fixing for a test a date which would make it impossible for a person of a particular religious persuasion to undergo the test”).

<sup>169</sup> Brems (ed.), *Conflicts between Fundamental Rights* (2008), p.3 (arguing that legislators are better placed than judges to deal with conflicting human rights situations because the right invoked by applicant receives most attention in court).

complementary jurisprudential tool that allows for individualised solutions that take into account contextual factors and considerations in an either deep or shallow equal society.

## Conclusions

In its Green Paper accompanying the proposed horizontal Directive, the European Commission expressed its wish to “complete” the European non-discrimination framework.<sup>170</sup> It can be argued that the recipe is missing an important ingredient, namely reasonable accommodations for reason of religion or belief. One may ask, even if the fate of the proposed horizontal Directive at this time remains unclear, whether a new directive which cements the European Union’s reservation of reasonable accommodations to one particular vulnerable group (individuals with disabilities) may block this avenue in the foreseeable future.

Various case law examples discussed in this article illustrate how religious employees, often belonging to minorities with limited employment prospects, struggle in reconciling work life with their religious commitments. Legal claims, to be regarded as the tip of the iceberg, have been raised with respect to religious dress, religious time, conscientious objections to work duties and a variety of other religion-work matters. Only some of these cases involve conflicts with other fundamental rights and can thus be regarded “hard cases”. “Soft cases”, where accommodations harm no compelling interests and are (nearly) cost-free, have also been identified. Contrary to what one may think, even these “soft cases” have not been unequivocally successful in court. What’s more, frequently cases do not even receive an adequate consideration. This leads to the question whether the legal framework is adequate to address (legitimate) challenges faced in an increasingly heterogeneous Europe since:

“A culturally homogeneous society whose members share and mechanically follow an identical body of beliefs and practices is today no more than an anthropological fiction.”<sup>171</sup>

Addressing this observation, this article has argued in favour of adopting a duty of reasonable accommodation on the basis of religion or belief, seeing this not as “icing on the cake” but rather as crucial in light of (1) the legitimate needs that arise on the ground in various workplaces; (2) the shortcomings of the current legal frameworks; and (3) fairness reasons (i.e. considering the background of historically grown standards, institutions and norms based on the dominant Christian strands). There are both tangible as well as intangible benefits associated with an explicit enforceable duty of reasonable accommodations. The tangible benefits relate to the potential of a reasonable accommodations framework to address legal-technical shortcomings in the current legal frameworks. As opposed to art.9 claims, interference with the employee’s freedom of religion is not central to the reasonable accommodations argument. And in contrast to indirect discrimination claims, reasonable accommodations require no showing of group disadvantage or comparing the claimant with others. The focus is on the individual employee working for an individual employer in a concrete context. While there is no guarantee that accommodations will be granted in the end, there is a warranty that requests receive a minimal level of consideration: requests may not be ignored or downright refused by employers and concrete efforts must be made to reconcile competing commitments and interests.

Reasonable accommodations are to be seen as an effective tool aimed at the inclusion of religious minorities or “outsiders” in a meaningful way in society without insisting on these minorities’ assimilation

<sup>170</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Non-discrimination and Equal Opportunities: a Renewed Commitment COM(2008) 420 final, p.4.

<sup>171</sup> B. Parekh, “A Commitment to Cultural Pluralism” (1998), p.3, UNESCO commissioned paper, <http://unesdoc.unesco.org/images/0011/001107/110756Eo.pdf> [Accessed October 24, 2012].

to dominant standards. Indeed, the burden of adaptation cannot be entirely on one side in a multicultural society which values the rights and freedoms of its diverse constituencies.<sup>172</sup>

It may be argued that it is (more) desirable to “rehabilitate” existing tools, e.g. by advocating for a more “maximal” approach to human rights<sup>173</sup> or a more “dynamic” approach to indirect discrimination claims, rather than to look at a new instrument in an already complex legal landscape. However, this would ignore the *intangible* benefits, which relate to *positive language* and *mode of framing* (straightforward and direct) in which reasonable accommodations embed potential conflict situations. The reasonable accommodations framework offers employers, employees and society an alternative language to address tension between legitimate needs, without the need to resort to *discrimination* or *fundamental rights* rhetoric. Also, this provides a certain level of “recognition”.<sup>174</sup> Holding on to formal equality can sometimes lead to inequality and exclusion.<sup>175</sup> By stressing the legitimacy of *differential treatment* on the basis of religion or belief, reasonable accommodations challenge the classic non-discrimination mantra requiring equal treatment of people *despite* differences in characteristics. But in the symbolic/political domain, formal equality amounts to non-recognition<sup>176</sup> and thus what is called for in light of the need for recognition is exactly a level of “politics of difference”.<sup>177</sup>

While reasonable accommodations fall short of instituting a regime of strict equality, there remains a “great attraction” in the approach because of its comparative modesty and straightforwardness. It does merit stressing that accommodations must be complementary to more transformative and structural changes to the labour market and beyond. But, in Europe, it is premature to argue for “going beyond accommodations”; rather we can start to make a case for “giving reasonable accommodations a chance”.

<sup>172</sup> “Green Paper on Equality and Non-discrimination in an Enlarged EU” COM(2004) 379 final, p.20.

<sup>173</sup> E. Brems, “Human Rights: Minimum and Maximum Perspectives” (2009) 9 *Human Rights Law Review* 349; K. Alidadi and M.-C. Foblets, “Framing multicultural challenges in freedom of religion terms. Limitations of minimal human rights for managing religious diversity in Europe”, *Netherlands Quarterly of Human Rights* (2012, forthcoming).

<sup>174</sup> C. Taylor, “The politics of recognition” in C. Taylor and A. Gutmann (eds), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994), pp.25–73.

<sup>175</sup> EU Fundamental Rights Agency, *Data in Focus Report 2: Muslims* (FRA, 2009), [http://fra.europa.eu/fraWebsite/eu-midis/eumidis\\_muslims\\_en.htm](http://fra.europa.eu/fraWebsite/eu-midis/eumidis_muslims_en.htm) [Accessed October 24, 2012] (data on how Muslims across 14 Member States experience discrimination and victimisation).

<sup>176</sup> Beaman, “Deep equality” (2012) <http://www.luthercollege.edu/impetus/winter2012/lbeaman> [Accessed October 24, 2012] (“Similarity can and should shift, depending on the parties involved. If it doesn’t, it can too easily lapse into sameness, or disrespect for difference”).

<sup>177</sup> Modood, “Is There a Crisis of Secularism in Western Europe?” (2012) 73 *Sociology of Religion* 130, 136.