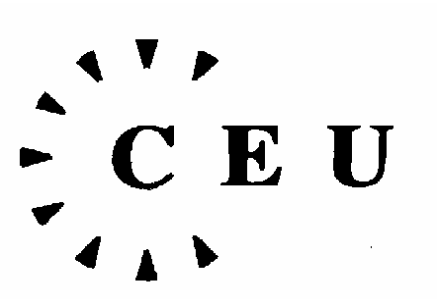

WORKPLACE ACCOMMODATION OF RELIGION AND BELIEF: *COMPARATIVE ANALYSIS OF U.S. AND EUROPEAN NON-DISCRIMINATION STANDARDS*

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ABSTRACT

The main question this thesis aims at answering is whether European practice should follow the Unites States model in terms of establishing a separate duty for an employer to reasonably accommodate religion and belief in the workplace. Although a strong conceptual framework for adjudication of such religious claims exists, the European Court of Human Rights is reluctant to adhere to it, as the analysis of Article 9 cases shows. The thesis questions the assertion that 'standard' concepts of European non-discrimination law, namely direct and indirect discrimination and/or positive action, can serve as a depositary for a duty of workplace accommodation. The analysis further shifts to Title VII jurisprudence of the United States courts exploring the strengths and the limitations of the American religious accommodation model.

ABBREVIATIONS

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EComHR	European Commission of Human Rights
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
FED	Framework Employment Directive (Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation)
CoE	Council of Europe
EU	European Union
U.S.	United States

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INTRODUCTION

Spirituality in the workplace, according to Bennis, is 'one of the most important and original topics of our time'.[1] It juxtaposes two intrinsic human rights values – freedom and equality – and provides a space for a multi-layered debate combining the views of legal, political, philosophy scholars and even human resources specialists. This thesis strives to place religious employees and their employers in the center of the debate with the purpose of determining how a duty of reasonable accommodation could assist in building a respectful and pluralistic workplace, where the rights and the interests of both parties are taken into account.

Roger Williams, a philosopher and proponent of religious freedom, compared to imprisonment situations when people are prevented from observing their religion or believes; and to the 'soul rape' the instances when they are forced to support believes they disagree with and to act contrary to their conscience.[2] Law addressed Williams' concerns with a concept of 'conscientious objection', which was firstly applied in the military setting. In a broad terms it is a right to be exempted from the law, which is otherwise

[1] A review by Dr. Warren Bennis (University of Southern California) of Douglas A. Hicks, *Religion and the Workplace: Pluralism, Spirituality, Leadership* (Cambridge University Press 2003)

[2] Martha Nussbaum, 'The burqa and the new religious intolerance', May 22, 2012, available at <http://www.abc.net.au/religion/articles/2012/05/22/3507845.htm> last accessed 6 September 2012

universally applicable (e.g. universal military conscription), on the grounds of one's religious convictions or believes.[3]

The right to object to a general requirement calls for a corresponding duty. In the recent cases of *Bayatyan v. Armenia* the ECtHR named this States obligation, saying that

> *respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.*[4]

The key words to be extracted from the passage are 'equality', 'cohesive and stable pluralism', 'religious harmony' and 'tolerance'. It seems that these universal human rights truths should be evenly applicable beyond the military, to other social domains such as a workplace. But is that really so?

From the early 80's the EComHR, and later – the ECtHR – has been ruling against the religious employees in the cases where they asked to have their religious observances accommodated. Neither the employees who requested days offs or schedule changes, so they could observe religious holidays or attend Friday prayers in the mosque; nor those who asked for an exemption form the dress code policy to be able to wear the headscarves or requested to be exempted from performing certain duties contrary to their

[3] See e.g. Glyn Seglow, 'Theories of Religious Exemptions' in Gideon Calder and Emanuela Ceva (eds), *Diversity in Europe. Dilemmas of Differential Treatment in Theory and Practice* (Routledge 2011) 53

[4] *Bayatyan v. Armenia*, App no 23459/03 (ECtHR 7 July 2011), para 126

conscience, succeeded in ascertaining their rights under Article 9 of the ECHR (freedom of conscience and religion).[5]

The EU recognizes 'respect for human dignity, freedom, democracy, equality' as its founding values.[6] Being a pioneer in the field of equal opportunities law and policy, the Union offers protection from different forms of discrimination via secondary legislation. A more careful look, however, revels that not all vulnerable groups are protected equally – for example, only employees with disabilities enjoy the right to request accommodation from their employers. By contrast, in the U.S. and in Canada, the duty of reasonable accommodation – which is a corollary to the right of conscientious objection – has been extended beyond disability grounds and applies to religion and belief.

The thesis rests on the assertion that the European legal framework as it is, does not sufficiently 'respect, protect and fulfill' the rights of religious employees. Although Europe for a long time was perceived as secular, the sociologists of religion believe that it 'is not longer in an age of progressive secularism, but rather is included in an era of global 'desecularization'.[7] Statistical data[8] coupled with intensifying debates 'with explicitly religious

[5] See analysis of the cases in Chapter 2.
[6] *Treaty on European Union*, 13 December 2007, 2007/C 306/01, Article 2
[7] Edel Hughes, 'Freedom of Religion in a Globalized World: The European Experience' in Jeffrey F. Addicott and others (eds), *Globalization, International Law, and Human Rights* (Oxford University Press 2012) 67–68
[8] European Institute for Comparative Cultural Research, 'Annex 5. Languages and Religion in Europe – Basic Data and Legal Protection' in *Sharing Diversity: National Approaches to Intercultural Dialogue in Europe* (European Commission, Directorate-General for Education and Culture 2008)

overtones', such as headscarves issues, evidence that many issues within rising multicultural society remain unresolved.[9]

The cases of four Christian employees in the United Kingdom[10] became catalyst for discussion on the need to introduce a duty of religious accommodation into the European non-discrimination framework. In fact, the UK Equality and Human Rights Commission launched an informal consultation with various stakeholders asking whether a 'concept akin to reasonable accommodations for individuals wishing to manifest their religions or beliefs in the workplace should be incorporated into the approach to human rights in the UK'. [11] While some of the respondent supported the introduction of this concept, other were resistant arguing that '[t]he limits of this concept were unclear' and it would 'cause greater burden to businesses, increase complexity, confusion and conflict'.[12]

The cases which fueled the debate on the place of religion in the workplace are currently pending before the ECtHR. In the parallel, the EU is deliberating the adoption of a new, comprehensive piece of secondary legislation in the field of equality and non-discrimination.[13] Given these two

[9] Hughes, 'Freedom of Religion in a Globalized World: The European Experience' 69

[10] *Ladele v. the United Kingdom* (pend.) App no 51671/10 (lodged on 27 August 2010 ECtHR); *McFarlane v. the United Kingdom* (pend.) App no 36516/10 (lodged on 24 June 2010 ECtHR); *Chaplin v. the United Kingdom* (pend.) App no 59842/10 (19 September 2010 ECtHR); *Eweida v. the United Kingdom* (pend.) App no 48420/10 (10 August 2010 ECtHR).

[11] Equality and Human Rights Commission, 'Consultation response summary - Legal intervention on religion or belief rights: seeking your views'' (September 2011) 4–5

[12] Ibid.

[13] Proposal for a Council Directive COM(2008) 426 of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

on-going processes the current research is of a high relevance. It aims at contributing to the on hand work in this field by exploring available legal responses to religious conflicts in the 'secular' workplace. It is important to acknowledge that a considerable amount of work has been done in this field, [14] however given the latest developments and remaining ambiguity as to the limits of religious accommodation concept, several gaps of these researches can be identified. Firstly, the applicability of the United States experience to the European domain has not been analyzed only until recently. So far the analysis performed lacks completeness as often it ends up proving that a duty of religious accommodation can be found in or may be introduced to the European non-discrimination framework, but fails to draw the contours of such duty. Secondly, preceding legal researches lack conceptual ground, which on the other hand can be found in the works of political theorists or philosophers. The thesis strives to combine approaches across the disciplines to build a strong case for religious accommodation. To the best knowledge of the author, it for the first time infuses European workplace accommodation debate with Hicks 'respectful pluralism' theory.

The research specifically addresses 'secular' employees, i.e. labour relations between the churches and clergy or other personnel with significant religious duties are not covered. Due to the limited space, the author does not

[14] Legal, political and social literature is reviewed thought the thesis. Particular attention should be drawn to the RELIGARE project that served as a valuable source of reference materials (http://www.religareproject.eu/).

offer an in-depth analysis on intersectionality between religion and gender or the notions of *religion* and *belief*. The United States was chosen as a comparative jurisdiction since the duty of reasonable accommodation was a part of its legal system for years and rich jurisprudence on this matter allows tracking and identifying the pros and cons of the approach. The main question the thesis aims at answering is whether European (both the EU and the ECtHR) practice should follow the U.S. regulation in terms of establishing a separate duty for employer to reasonably accommodate religion and belief?

Data for the research were gathered from multiple sources at various time points during the 2011-2012 academic year. The author looked into a number of sources, such as normative acts, jurisprudence of national, supranational and regional courts, scientific research articles and books; reports prepared by national and international human rights organizations and bodies designated to monitor and conduct a research on equality, multiculturalism and other human rights issues.

The author used logic, theoretical, philosophical and cross-disciplinary analysis methods. A comparative analysis was used not only to compare three jurisdictions, but also to contrast position of scholars on specific matters within each of them.

The thesis consists of an introduction, a main body and conclusions. The main body is divided in four chapters.

The **first chapter** provides a basic analysis of legal and political theories of religious accommodation and takes a more careful look good management based argument and the arguments from liberty and equality. The overarching question of this chapter is what is the normative ground for the accommodation of religious diversity and what guiding norms and principles can be derive from theory to assist legislators, courts and employers to reconcile conflicting interests in such cases.

The **second chapter** aims to determine whether a European religious freedom clause, i.e. Article 9 of the ECtHR, can serve as a depositary for reasonable accommodation duty, given the inherent limitations of this Article. It also looks into the religious freedom guarantee under the Charter of Fundamental Rights to understand whether the duty in question can be extracted from it. Finally the author analyzes implications of the controversial religious accommodation claims awaiting their resolution under Article 9.

The **third chapter** explores the interconnection between the duty to accommodate religion and belief and the 'standard' forms of discrimination (direct and indirect discrimination) and a positive action in order to determine to whether there is a need for an additional regulation at all.

The **fourth chapter** brings an example of the United States, as a jurisdiction where a duty of religious accommodation is regulated by law. The objective of the last chapter is to determine whether and how American practice can assist in the resolution of religious conflicts in the workplace and

whether it is feasible to transpose the reasonable accommodation model developed in the U.S. to the European system.

CHAPTER 1. WHY TO ACCOMMODATE RELIGION AND BELIEF IN THE WORKPLACE: A CONCEPTUAL FRAMEWORK

Religious accommodation has become an issue of interest and debate across various field of social science. Works of legal scholars, political scientists, moral philosophers and even human resources consultants create a diverse pull of views, experiences and theories which shape a normative framework which serves as a good starting point for a further discussion. In particular, the choice of a theoretical approach will determine our assessment of practical solutions for the resolution of religious conflicts in the workplace. The first chapter will provide a basic analysis of legal and political theories of religious accommodation and take a more careful look into utilitarian or good management based argument, which is often left aside when discussing workplace accommodation. It will also make use of the essay on respectful pluralism by Douglas Hicks, which builds a framework for negotiating religious commitments in the workplace. The overarching question this chapter aims at answering is what is the normative ground for the accommodation of religious diversity and what guiding norms and principles can be derive from theory to assist legislators, courts and employers to reconcile conflicting interests in such cases.

1.1 Good Management Based Argument: the Value of a Diverse Workforce

Grutter v. Bollinger is a landmark case where the U.S. Supreme Court upheld the University of Michigan's Law School admission program based on race-preferences as not contrary to the Equal Protection Clause. The challenged policy aspired 'diversity[15] which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts.' The Court deferred to the School's judgment and found that the 'educational diversity' is a compelling state interest justifying an affirmative action program in the educational setting.[16] The judgment provoked discussions whether diversity rationale could be applied in the labor setting. Legal scholars reacted by claiming that integration of the workforce, contrary to integration of student body, does not contribute to the improved job performance.[17] Leaving aside affirmative action idea, it is questionable whether lawyers' assumptions about diverse workforce (in)efficiency fit squarely with the contemporary management theory and practice.

Influential management consultant Peter Drucker predicted, and the recent studies have proved,[18] that diversity in a contemporary workplace is not a vision, but rather a reality. A rise of multinational corporations is today

[15] The policy tailored a specific type of diversity, i.e. 'ethnic and racial'.
[16] *Grutter v. Bollinger*, 539 U.S. 306 (2003)
[17] Marley S. Weiss, 'Other Decisions of Major Significance For Labor and Employment Practice' [2003] The Supreme Court 2003 Term: Labor and Employment Cases and Implications, 235–236
[18] Helen Russon, 'Rethinking the Melting Pot' [1994] Oregon State Bar Bulletin

coupled with expanding diversification of what used to be purely 'national' workplaces. The latter is now 'accounting [minorities] for more that half of new net entrants and at least one third of all entrants into the workplace'[19] A diversified workplace brings both benefits of more specialized expertise and costs of integration of new employees. As Drucker further claimed, the benefits of workplace diversity can be capitalized in such way that diverse organization gains competitive disadvantage against it rivals if organizational policies are tailored to the needs of individuals, and in particular, accommodation of 'minority' employees is used to unleash their unique potential, while preserving the uniqueness this potential stems from. [20]

Indeed, organization of contemporary workplace seems to follow Drucker's theory. Expansion of people-friendly working space where persons are seen as the most valuable capital (even compared with technologies, which instantly become outdated) and their out-of-work needs are proactively accommodated shows that companies find beneficial to increase investment in the human recourses. Experts claim that old-style workplace premised on minimal skills, job security, intrusive monitoring and motivation by fear and threats is being replaced by new 'market-infused, flexible, team-based workplace'.[21] The major requirement for workers is ability to quickly acquire new skills and engage into team work, since compensation schemes are tided

[19] Jennifer D. Oyler and Mildred Golden Pryor, 'Workplace diversity in the United States: the perspective of Peter Drucker' (2009) 15 Journal of Management History 420, 435–436
[20] Ibid, 425-426
[21] Cynthia L. Estlund, 'The Changing Workplace as a Locus of Integration in a Diverse Society' (2000) 331 Columbia Business Law Review

up with team performance, rather than seniority as it used to be. Use of temporary and contract workers is increasing, what means that employee's interactions with their colleagues are more fluid, less hierarchical and more often.[22] Despite the fact that employment relations last shorter, than it used to be, loyalty remains as important as productivity, with only difference that it is cultivated not by 'stick' (which proved to be inefficient), but by 'carrot', namely by meeting needs of workers through creation of people-friendly policies.

Accommodation of religious observer's needs is falls neatly into a new concept of people-friendly workplace. Those who are not deprived of exercise of their religious beliefs are able to create necessary social ties with their colleagues and contribute with their unique professional expertise to the achievement of the common goal. Moreover, as Estlund puts it, positive effect of integrated workplace, which becomes 'arena for sociability and cooperation among diverse co-workers',[23] extends to the broader society as it decreases alienation in the social sphere. If, on the contrary, religious employees are prevented from required observances– a sort of damage which Roger Williams compared to imprisonment[24] – the company is at a high risk of loosing its benefits on the multicultural competitive market.

[22] Ibid.
[23] Ibid.
[24] Martha Nussbaum, 'The burqa and the new religious intolerance', May 22, 2012, available at <http://www.abc.net.au/religion/articles/2012/05/22/3507845.htm> last accessed 6 September 2012

Drucker emphasized that workers are inherently different from recourses as they have 'absolute control over whether [they] work at all…The human recourses must be therefore always motivated to work'.[25] Conflict-free process of accommodation of workplace religious observance can arguably serve as the best motivator for the religious employees to sustain the productivity and remain loyal to the employer.

1.2 Rights Based Argument: Liberty and Equality

Our analysis proceeds with the argument from integrity and conscientious objection. It suggests that by being forced to act against his conscience, a person is acting not in accordance with his own duties,[26] which, in turn, harms his integrity or, if we take Kantian perspective, his freedom. Therefore a person should be given a right to be conscientiously opposed to a variety of state laws and policies. Real life examples include objection to military conscription,[27] registration of same-sex partnerships,[28] provision of counseling service to same-sex couples,[29] professional obligations in the sphere of reproductive healthcare,[30] including abortion[31] and other.[32] Jonathan Seglow

[25] Oyler and Pryor, 'Workplace diversity in the United States' 428
[26] Paul Bou-Habib, 'A Theory of Religious Accommodation' (2006) 23 Journal of Applied Philosophy 109–126; Jessica Almqvist, *Human Rights Law in Perspective. Human Rights, Culture and the Rule of Law* (Hart Publishing 2005)
[27] *Bayatyan v. Armeni*a, App no 23459/03 (ECtHR 7 July 2011)
[28] *Ladele v. the United Kingdom* (pend.) App no 51671/10 (lodged on 27 August 2010 ECtHR)
[29] *McFarlane v. the United Kingdom* (pend.) App no 36516/10 (lodged on 24 June 2010 ECtHR)
[30] Adriana Lamačková, 'Conscientious Objection in Reproductive Health Care: Analysis of Pichon and Sajous v. France' (2008) 15 European Journal of Health Law 7–43
[31] *Tysiąc v. Poland*, App no 5410/03 (ECtHR 20 March 2007)
[32] For other settings when the right to conscientious objection is brought up see examples of Argentina and Thailand in Marcelo Alegre, 'Conscious Oppression: Conscientious Objection

identifies more arguments for the legitimacy of conscientious objection claims. He argues that it is unfair (and therefore unjust) for the law to burden religious members of society, when the parallel burden is not put on majority;[33] and that the state should respect 'the space required by any activity that has the general shape of searching for the ultimate meaning of life'[34] and thus avoid compelling people to act against their conscience. The problem with an argument from conscience is, as Barry points out, the fact that it does not in all circumstances explain what kind of state duty, if at all, follows an objection.[35] Even if integrity argument justifies to some extent state duty to refrain from forcing a person to engage into practices he is opposed to, it does not necessarily follow that the state, acting as a legislator or as an employer, has a positive obligation to provide flexible working schedules or alternative division of job tasks. Thus it leaves a room for an argument, often made by respondent States, regarding 'freedom to resign'.[36]

One more way to look into the phenomena of religious accommodation is from the perspective of justice and equality. Waldron asserts that 'liberal rights and principles of justice are designed to give you a fair chance to pursue your conception of the good without denying that same chance to anyone

in the Sphere of Sexual and Reproductive Health' (Seminario en Latinoamérica de Teoría Constitucional y Política, Paper 65. 2009) 1

[33] Seglow, 'Theories of Religious Exemptions' 53

[34] Ibid, 56

[35] Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press 2002) 44

[36] See Chapter 2.

else'.[37] On this basis Quong argues that the law must be either adequate so to allow individuals to adhere to their conception of good or compossible, i.e. to build a system of regulations which would pro-actively accommodate different conceptions of good.[38] When particular conceptions are treated more favorably than others, inequality arises and thus such law is deemed to be unjust. An example are our workdays and weekends which are rooted in Christianity and which ignore the fact that some people may belong to different religion, e.g. to the Seventh-Day Adventist Church who observes Saturday as the Sabbath, and may need completely different working schedules. Since changing the whole systems is not feasible, accommodation of their needs for observance on particular days is required by the principle of justice. It thus leads us to the argument that accommodation is an intrinsic part of the notion of equality or, in other words, a requirement of equal treatment, rather than a special measure or a mere 'exemption' (as a right to conscientious objection is often understood). Although more reliable than other arguments, argument from equality comes with certain limitations. First one to resolve is the problem of harm, namely to what extent the principle of justice requires allowing people to adhere to *their* conceptions of good if they do harm to others. Shiffrin defines accommodation as 'a social practice in which agents absorb some of

[37] Jonathan Quong, 'Cultural Exemptions, Expensive Tastes, and Equal Opportunities' (2006) 23 Journal of Applied Philosophy 53, 58
[38] Ibid.

the costs of other people's behavior',[39] which leads to wonder whether same-sex couple which is denied psychological counseling by a psychiatrist believing that homosexuality is a sin, a counseling which otherwise is not only legal, but also a duty of this particular doctor, should absorb the harm incurred by the behaviour of the counselor.[40] Quong stresses a ground principle that accommodation should not create new injustices,[41] but does not give further guidance for the resolution of conflicts alike. Second related problematic question is who should bear the costs of accommodation, especially when it concerns private businesses in cases of job schedule shifts.

Although a normative argument from equality seemingly makes the strongest case, it does not provide enough guidance on how to resolve religious conflicts when accommodation of one group comes to the detriment of rights or needs of the other. Hicks argument about respectful pluralism has more elaborate benchmarks to offer in this respect.

1.3 Moral Argument: Respectful Pluralism

Hicks constructive framework begins with a 'basic assertions about the employee as a *human person'*, namely the author defends the argument that every human being has equal dignity on the basis of which he should be afforded equal respect; as the concept of dignity does not depend on merit, no

[39] Seana Valentine Shiffrin, 'Egalitarianism, Choice-sensitivity, and Accommodation' in R. Jay Wallace and others (eds), *Reason and Value:Themes from the Moral Philosophy of Joseph Raz: Themes from the Moral Philosophy of Joseph Raz* (Oxford University Press 2006) 275

[40] *McFarlane v. the United Kingdom* (pend.) App no 36516/10 (lodged on 24 June 2010 ECtHR)

[41] Quong, 'Cultural Exemptions, Expensive Tastes, and Equal Opportunities' 61

differentiation of degree of respectful treatment is permissible.[42] To a large extent this line of reasoning goes hand in hand with the argument from equality described above. Hicks further argues that 'one's sense of dignity is affected by work', which is partly recognized and translated into labour laws focusing on fair wages and working conditions.[43] However, these are not the only factors that have an impact on our sense of dignity, Hicks asserts, 'religious, spiritual and cultural commitment is a constructive part of one's identity that cannot be compartmentalized and should not be silenced from explicit expression during work hours'.[44] Thus these commitments should be allowed to be expressed, to the greatest extent, at work – the rules that the author defines as 'the presumption of inclusion'. Unlike a non-discrimination clause, this argument goes beyond mere prohibition of unfair treatment, 'it is more expansive in calling for leadership that respects and allows employees to express their identity'.[45] Notably, Hicks does not limit 'identity' to religion, he also includes in this definition race, gender, sexual orientation and other aspects which built identity.[46]

Presumption of inclusion is limited by three norms. The first 'limiting norm', according to Hicks is 'non-degradation', which 'prohibits coworkers from employing speech or symbols or otherwise conveying messages directed

[42] Douglas Hicks, 'Religion and respectful pluralism in the workplace: a constructive framework.' (2003) 2 Journal of Religious Leadership 23, 31
[43] Ibid, 33-34
[44] Ibid, 34
[45] Ibid, 36
[46] Ibid, 35

at particular individuals or groups of coworkers that show clear disrespect for them'.[47] Under such norm would, most likely, fall situations similar to *Wilson* case,[48] when a Roman Catholic employee took a religious vow to openly wear an anti-abortion button depicting a color image of 18-20 weeks old fetus. Her co-workers – some of personal reasons, such as miscarriage or premature infant death – were opposed to being exposed to the photograph and threatened to leave the job[49]. Indeed in such situation both from the perspective of Hicks argument and its first limitation and, as it stems from the Court's ruling, the employer was right in limiting public display of the button in the office.

The second norm limiting presumption of inclusion is non-coercion. It prohibits employers and employees from imposing their religious and other values on co-workers and subjecting colleagues to unwanted invitations violating their human dignity.[50] Example of such situation could be *Chalmers v. Tulon Co*,[51] where the plaintiff, evangelical Christian, working as a supervisor in the company, wrote a letter to her manager urging him to ask for God's forgiveness and stop acting contrary to God's will. She was terminated and appealed against the decision arguing that she was not provided a reasonable accommodation. The Court's ruling is compatible with Hicks second limitation, as it found that 'sending personal, distressing letters to [co-

[47] Ibid, 36
[48] *Wilson v. U.S. West Communications* 58 F.3d 1337 (8th Cir. 1995)
[49] Matthew W. Finkin, *Privacy in Employment Law* (Bureau of National Affairs 2003) 379
[50] Hicks, 'Religion and respectful pluralism in the workplace' 37
[51] *Chalmers v. Tulon Co. of Richmond* 101 F.3d 1012 (4th Cir. December 4, 1996)'

workers'] homes, criticizing them for assertedly ungodly, shameful conduct, would violate employment policy'.

The third limiting norm proposed by Hicks is 'non-establishment', which asserts that 'given the circumstance of employee diversity, it is not morally acceptable for the company to endorse, or in any way promote one particular religion, or spiritual worldview over others, is if that worldview is deemed "generic" or is the religion of the majority'.[52] It is a kind of Establishment Clause for companies, which bars them from and promoting one particular religion. This norm is less relevant to the discussion on religious accommodation; however, for the purpose of argument, it should be noted that cases of 'religiously offending employers' aiming at establishing religious atmosphere in the secular workplaces were dealt by the courts in line with Hicks moral argument.[53]

Hicks further notes that when developing inclusive diversity policies, employers can invoke additional constrains, such as 'legitimate safety and efficiency reasons' and 'legitimate end of profit-seeking by companies'.[54] Hicks provides a few examples for 'workplace scenarios'. In case of employees wearing religious garb in the workplace, according to him, the

[52] Hicks, 'Religion and respectful pluralism in the workplace' 37

[53] See e.g. *State by McClure v. Sports & Health Club, Inc.* 370 N.W.2d 844 (Minn. 1985). The Court found discriminatory behavior of employers', who considered religious to be an intrinsic component of their business in Sports and Health Club. The set of his practices included 'permitting only born-again Christians to hold management positions; questioning prospective employees about their religious beliefs and practices, their marital status and their sexual relations; requiring managers to attend weekly Bible studies, and suggesting that other personnel also attend'.

[54] Hicks, 'Religion and respectful pluralism in the workplace' 37–38

principle of inclusion suggests that these employees can call 'for a high level of understanding and flexibility on the part of the employer and the co-workers.' And only 'in very rare cases, when genuine safety concerns cause danger for a person in loose-fitting clothing, holding a certain position, corporations would have a moral obligation beyond *de minimis* costs to find a suitable alternative position for the employee.'[55] Above described real cases from the U.S. courts prove that Hicks moral argument can be successfully applied in practice.

So far Hicks' 'constructive framework' seems to be the most coherent and practically applicable to solve religious conflicts in the workplace. However, its criticism should not be overlooked. One of the most obvious gaps, identified also by Seifert, is the fact that Hicks limits his analysis to private sector and thus escapes discussion on highly problematic matters of religious accommodation claims among civil servants and other public employees. As Seifert writes, '[e]xercise of religious freedom in workplaces at State institutions is not only a question of reconciling the conflicting interests of the employee and the operational interests of the State.'[56] However, as the further analysis will show, Hicks' theory can still be applicable to the cases of government officials and other public servants – in particular given that when developing his model, he takes into account third limiting norm – non-

[55] Ibid, 38-39
[56] Achim Seifert, 'Review of Douglas A. Hicks, Religion and the Workplace: Pluralism, Spirituality, Leadership' (2004) 25 Comparative Labor Law and Policy Journal 463, 472

establishment. It will be relevant when discussing the limits of religious accommodation in the public workplaces.

CHAPTER 2. SETTLING EMPLOYMENT DISPUTES UNDER EUROPEAN RELIGIOUS FREEDOM CLAUSE

The European 'Supreme Court' once firmly established that 'freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned.'[57] The Court has also highlighted on numerous occasions that 'democratic society' rests on hallmarks of pluralism, tolerance and broadmindedness.[58] The Court has 'frequently emphasized the state's role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs',[59] yet this organization can be executed differently depending on the Contracting State's approach towards religion in general.[60] Different understanding leads to different answers when deciding on such

[57] *Kokkinakis v. Greece* App no 14307/88 (ECtHR 25 May 1993) para 31
[58] *Handyside v. the United Kingdom* App No 5439/72 (ECtHR 7 December 1976) para 49
[59] *Leyla Sahin v. Turkey* [GC] App no 44774/98 (ECtHR 10 November 2005) para 107
[60] When addressing the question of the religion's role in the particular states, the scholars tend to rely on the three-prong categorization. First one is a state-church system, which is characterized by close links between the State and a particular religious community, which are usually established on the constitutional level (e.g. the UK, Denmark); separation system, where the national constitutions explicitly recognize secularity of the State (e.g. France, Ireland) and hybrid or cooperationist systems, which although being secular, organize and maintain cooperation between the religious groups (sometimes – de facto one group predominantly) on the basis of agreements (e.g. Spain, Germany) (Gerhard Robbers (ed), State and Church in the European Union (2nd edn, Nomos Publishers 2005) 577).

dilemmas as display of public symbols, interaction with religious organizations and attitude towards religious expression in the workplace.

It is suffice to add that the ECtHR, due to the nature of the Convention, is primarily concerned with civil and political rights and thus does not have explicit competence to adjudicate 'right to work' claims. This limitation should be kept in mind together with the fact that religious questions are, as it was mentioned above, of a sensitive nature and do not enjoy European consensus, thus States are afforded relatively wide margin of appreciation when choosing the means how to resolve them.

This chapter will aim to determine whether a European religious freedom clause, i.e. Article 9 of the ECtHR can serve as a depositary for reasonable accommodation duty, given the inherent limitations of this Article. It will also look into the religious freedom guarantee under the Charter of Fundamental Rights to understand whether the duty in question can be extracted from it. Finally the author will look into controversial religious accommodation claims awaiting their resolution under Article 9.

2.1 Analysis of Religious Accommodation Claims under Article 9

The ECtHR on a number of occasions has dealt with the religious accommodation requests, however has never explicitly used the language of a 'reasonable accommodation' or an 'undue hardship' when adjudicating them. Such claims arose in variety of settings - from prison to employment – and

concerned different kinds of accommodation: time-off for observance of religious holidays, shift swaps and other scheduling changes, particular dietary preferences, dress standards (further they will be referred as accommodation type cases). Inquiry into the ECtHR case-law will focus on the claims in employment and prison settings, since the latter provides valuable comparative material for the former.

2.1.1 Manifestation of Religion or Belief

As Malcom Evans duly notes, '[u]nderstanding what is meant by the 'manifestation' of religion or belief lies at the heart of the proper application of Article 9'.[61] In order to answer this question one should determine what constitutes 'a belief', 'a manifestation' and when does particular act attributable to the State will be regarded as interference. Only once the interference is established under Article 9(1), the Court might turn to the analysis of its legitimacy and necessity under Article 9(2). Importantly in all except one[62] workplace accommodation type cases the Court failed to undertake the latter analysis as it established that either the applicant's act in question was not a manifestation of his/her belief or/and that interference did not occur.

So far neither the Court, nor its predecessor, the Commission, has not given a definitive answer on what the 'religion' or 'belief' exactly are. Definition of 'religion' has not caused any major problem – mainstream

[61] Malcolm D. Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Council of Europe Publishing 2009) 9
[62] *Dahlab v. Switzerland* App no 42393/98 (ECtHR 15 February 2001)

(Christianity, Buddhism, Islam) religions as well as more recent religious movements (Jehovah's Witnesses, Scientology, Moon Sect) were readily qualified to fall within the notion.[63] Defining belief, which encompasses both 'philosophy of life' and non-theistic as well as atheistic convictions is a more ambiguous case.[64] While pacifism and veganism can be accepted, belief in assisted suicide is not.[65] Generally the Court aims to determine whether a particular set of convictions 'attain[s] a certain level of cogency, seriousness, cohesion and importance'.[66]

In *Blumberg,* accommodation type case,[67] the applicant's employer ordered him to conduct a medical examination of an apprentice. Applicant refused as he feared a 'possible bias' which could lead to difficulties if he had to work with the apprentice in the future. Mr. Blumberg was dismissed for a failure to obey instructions. He argued further before the labour courts that he was prevented from carrying out the examination by a 'moral dilemma' without providing further reasoning. The ECtHR unanimously declared the application inadmissible, since the 'applicant's refusal to examine the apprentice does not constitute an expression of a coherent view on a fundamental problem'.[68] Therefore the refusal cannot be regarded as a manifestation of such belief. The Court highlighted the importance of some

[63] Jim Murdoch, *Freedom of Thought, Conscience and Religion* (Directorate General of Human Rights and Legal Affairs of the Council of Europe 2007) 11–12
[64] Ibid.
[65] Murdoch, *Freedom of Thought, Conscience and Religion* 11-12
[66] *Jakobski v. Poland App no 18429/06 (ECtHR 7 December 2010) para 44*
[67] *Klaus Blumberg v. Germany* (admis.) App no 14618/03 (ECtHR 18 March 2008)
[68] Ibid.

substantiation for the 'moral dilemma', claimed by the applicant. Court's position in this case cannot be regarded as unfounded since Mr. Blumber has not provided any information on the convictions underlying the refusal; yet it is not entirely clear what degree of substantiation the Court may request. [69]

If determining what constitutes 'religion' or 'belief' for the purpose of Article 9 does not cause much trouble in accommodation type cases, the major difficulty arises when deciding whether particular employer's act – or, more frequently, failure to act – falls within 'manifestation' ambit.

According to the ECtHR developed jurisprudence, Article 9(1) protects so-called *forum internum*, the area of inner convictions which is absolute and *forum externum*, practice or manifestation of particular religion, whether individually or in community with others. 'Manifestation' covers 'worship, teaching, practice, observance' and other acts, such as ritual animal slaughtering, proselytism and other form of religious expression.[70] However, starting with *Arrowsmith* decision,[71] Strasbourg Court decided to filter down certain activities which are not *central* to a particular religion, but are merely *inspired* by it. In this standard-setting case the Commission decided that although pacifism as a set of believes can be protected under freedom of thought clause, its manifestation 'does not cover each act which is motivated or influenced by a religion or a belief'. The applicant was convicted for the

[69] In *Kosteski* case the Court also asked to substantiate the claim for accommodation. This case will be discussed further.
[70] Murdoch, *Freedom of Thought, Conscience and Religion* 15
[71] *Arrowsmith v. the United Kingdom* (admis.) App no 7050/75 (EComHR May 16 1978)

distribution of pacifistic leaflets only against the war in Northern Ireland, yet leaflet's content implied that she was not opposed to the use of force in general, but only to the British policy in Northern Ireland. Therefore it did not express pacifist views and thus couldn't qualify for the protection under Article 9.

The lesson to be extracted from this decision is that the Court will not merely look into the form of expression, it will give due consideration to the content of belief – some acts influenced by religion or belief will pass the muster,[72] while others, like one in *Arrowsmith* will not. Given the circumstances of the case described above the Commission decision does not seem illogical, but in general such approach is problematic, since the Court becomes bound to analyze the content of religious and spiritual tenets, which it has neither capacity, nor the power for. Several examples of accommodation type case will illustrate the point.

In *Kosteski* case,[73] the applicant was fined for absence from work in Electricity Company of Macedonia when he was celebrating Muslim religious holiday – Bayram festival. While the applicant claimed a breach of his Article 9 and Article 14 rights, the Government, relying on the opinion of the Chief of the Islamic Community, argued that the absence from the work during

[72] For example in *Jakobski v. Poland* (op.cit.) the Court considered 'that the applicant's decision to adhere to a vegetarian diet can be regarded as motivated or inspired by [Buddhist] religion and was not unreasonable'.

[73] *Kosteski v. the former Yugoslav Republic of Macedonia* App no 55170/00 (ECtHR 13 April 2006)

religious holiday was not a manifestation of religious belief.[74] The national Constitutional Court when deciding the case also doubted the genuineness of the applicant's beliefs, since they 'objectively did not correspond to those of the Muslim faith', i.e. lack of knowledge of the basic most important tenets of the religion or the way in which one joins 'Muslim' faith.[75] The Strasbourg Court favored respondent's argument, deciding that 'while it may be that this absence from work was motivated by the applicant's intention of celebrating a Muslim festival it is not persuaded that this was a manifestation of his beliefs in the sense protected by Article 9', since the applicant asking for the exemption from the general rule failed to substantiate his claim.[76] In this case the substantiation question comes from a different angle – since the Court cannot doubt that Islam is indeed a religion, it disqualifies applicant's act as falling short of the 'manifestation' criteria. By doing that it accepts the conclusion of the inquiry performed by the domestic courts into both content of the norms and applicant's knowledge.

Similarly, in the recent *Kovalkovs* case,[77] the Court seems not to depart from its previous approach and engages into analysis of ecclesiastical teachings. Mr Gatis Kovalkovs, adherent to the Hare Krishna movement, being detained in prison claimed to had been denied practicing his religious in

[74] 'The Chief of the Islamic Community had not stated that a believer should abstain from working during Islamic religious holidays as an expression of religion or that working during such holidays was contrary to their beliefs.' (para 34).
[75] Para 23.
[76] Para 39.
[77] *Gatis Kovalkovs v. Latvia* (admis.) App no 35031/05 (ECtHR 31 January 2012)

the cell, as he could not read religious texts and perform religious rituals (incense sticks, burning of which is a part of religious ritual, were confiscated during the search). Initially the Court took a commendable stance saying that '[c]learly, it is not the Court's task to determine what principles and beliefs are to be considered central to the applicant's religion or to enter into any other sort of interpretation of religious questions'.[78] But when deciding whether the restriction placed upon sticks burning is proportional and, as a matter of fact, having strong health and security arguments to uphold the necessity of the restriction ('burning of incense sticks typically creates a powerful odour'), it turned to the opinion of the Directorate of Religious Affairs and made a conclusion that sticks burning was not essential for applicant's freedom to manifest religion.[79]

As Chaib points out, teachings and practice of certain religions is a very subjective issue,[80] therefore what some persons might find essential for genuine exercise of their belief and adherence to their religious identity, others might not, despite the fact of what particular national chapters, departments or communities say. The idea behind religious freedom is not to protect coherence of and abidance to a 'classical' religious doctrine, but to ensure that individual theistic, non-theistic and atheistic convictions and their *personal*

[78] Para 60.
[79] Para 68.
[80] Saïla Oual Chaib, '*Gatis Kovalkovs v. Latvia*: The Strasbourg Court keeps the door to reasonable accommodation open', March 15, 2012 available at <http://strasbourgobservers.com/2012/03/15/gatis-kovalkovs-v-latvia-the-strasbroug-court-keeps-the-door-to-reasonable-accommodation-open/> last accessed 22 August 2012

expression is not unlawfully abridged. Moreover, expert opinions and information on religious matters provided by national governments should be examined critically as the credibility of its sources (also given the interest in favorable outcome of the case) is highly doubtful. For instance, in *Jakobski* case, the Polish government arguing that Buddhism did not prescribe vegetarianism relied on the *Wikipedia*, [81] an unverified open source, which is not advised to be used for research projects. It is important to note that sincerity of person's, requesting accommodation, believes can be called into question and asked to be substantiated, hence the claims made of fraudulent reasons are not 'eligible' for protection. Together with other objective criteria (impact of a particular activity on the rights of others, security, health) they would serve as more reliable benchmarks rather than inquiry into ecclesiastical doctrines.

2.1.2 Legitimacy of Interference

The third point to consider is whether a particular act or a failure to take an action, attributable to the State constitutes interference. To this end it is crucial to determine whether in a specific instance the State was only under negative obligation to refrain from interfering with exercise of a freedom or also, under positive obligation to secure it.[82] It is not always clear on what occasions the State is bound by positive obligation. A general rule is that the 'Convention is interpreted and applied in a manner which renders its rights

[81] *Jakobski v. Poland* App no 18429/06 (ECtHR 7 December 2010) para 38
[82] Murdoch, *Freedom of Thought, Conscience and Religion* 20–22

practical and effective, not theoretical and illusory'[83] hence the fair balance should be struck between interest of community and an individual.[84] If Article 9 religious freedom guarantee to be seen as a depositary for the duty of religious accommodation, the Court is required to interpret interference in light of positive obligations, i.e. obligation to take measures to accommodate a manifestation of employee's belief.

Approach currently exercised by the court in employment accommodation type cases was firstly adopted *X. v. UK* case in 1978.[85] X, the applicant, worked as a full time teacher. He believed that a religious duty of every Muslim was to offer prayers on Fridays, he asked the authority for a permission to attend congressional prayers in the mosque. Attendance of the prayers would result in missing 45 minutes of class work on every Friday afternoon. His permission was denied (although in previous schools headmaster allowed him to take time-off for the same purpose) and after applicant failed to obey, he was offered a part-time position (4,5 days) and his salary was deducted accordingly. Mr. X. claimed violation of his Article 9 and 14 rights. Firstly, the Commission established that since he accepted teaching obligations under the contract of his own free will, he 'remained free to resign if and when he found that his teaching obligations conflicted with his religious duties'. Secondly, answering the question whether the authority was obliged

[83] *Christine Goodwin v. the United Kingdom* [GC] App no 28957/95 (ECtHR 11 July 2002) para 74
[84] *Hatton and Others v. the United Kingdom* [GC] App no 36022/97 (ECtHR 8 July 2003)
[85] *X v. the United Kingdom* (admis.) App no 8160/78 (EComHR13 March 1981)

under Article 9 to give any consideration to his religious position, the Commission relied on Government's observations that serious difficulties arose from the applicant's absence in previous school. When deciding that interference with applicant's rights did not take place no explicit consideration was given to the fact that the applicant provided school with various suggestions how to solve the problem and the school failed to react to any of them; or to the fact that previous school's headmaster explicitly stated that the time adjustment was not difficult and other employees did not complain about it.

The same reasoning was maintained in subsequent employment accommodation type cases. In *Konttinen* the Court denied applicant's (adherent of the Seventh-day Adventist Church) claim to modify his working hours so that he would be able to end his work before sunset on maximum five Fridays per year to observe Sabbath. The Commission explicitly stated that the fact that Mr. Konttinen was free to relinquish his post is regarded 'as the ultimate guarantee of his right to freedom of religion'.[86] Louise Stedman's request to relief her from Sunday work[87] and Sessa Francesco's, a lawyer acting as a representative of one of the complainants motion to adjourn the Court's hearing so that he is able to observe Yom Kippur and Sukkoth (Jewish holidays), were dealt in the same manner.[88] In all cases the Court established that the applicants faced adverse consequences not because of beliefs they

[86] *Tuomo Konttinen v. Finland* (admis.) App no 24949/94 (ECtHR 3 December 1996)
[87] *Louise Stedman v. United Kingdom* (admis.) App no 29107/95 (ECtHR 9 April 1997)
[88] *Sessa Francesco v. Italy* App no 28790/08 (ECtHR 3 April 2012)

held, but because they failed to comply with general rule and thus no interference was established.

Although the author does not tend to imply that the outcome of all cases should have been different, the major drawback is a lack of coherent and systematic analysis on the part of the Strasbourg Court. Once it fails to find State's interference with the applicant's right, it is relieved from the duty to review factual circumstances under proportionality analysis and balance competing interests. It is interesting how flippantly, without any substantiation provided by the State, the Court maintains that '[e]ven supposing that interference with applicant's rights took place, it was justified on grounds of the protection of the rights and freedoms of others, in particular the public's right to the proper administration of justice and the principle that cases be heard within the reasonable time and was proportionate'.[89] It highly contrasts with case-law on Article 10: in the latter the Court readily accepts almost any kind of interference so to proceed to the proportionality review. In accommodation type cases, on the contrary, by anxiously following a line of reasoning from 1981 the ECtHR seems to approach the case not as a guardian from the tyranny of majority, but as defender of Government's interests. The State does not participate in sharing burden of proof, even more – circumstances favorable to the individual applicant are somehow watered down in the ruling. Finally, as Bratza argues, seeing 'freedom to resign' as an

[89] Ibid.

ultimate guarantee of religious liberty is questionable given the circumstances of a modern employment market[90] and, to add, ideas of freedom and justice itself.

Nevertheless there is a positive turn in the accommodation type jurisprudence, even though it bypasses employment cases. In recent *Jakobski*[91] and *Kovalkovs*[92] cases interference with prisoners' religious freedom was examined in light of the positive duty of the state 'to take reasonable and appropriate measures to secure the applicant's rights'[93] In *Kovalkovs* the Court further found that the interference pursued legitimate aims of protection of the rights of others, i.e. interests of inmates and financial implications on the part of the state and proceed to the necessity and proportionality review. Indeed the commentators were right to welcome this turn in accommodation jurisprudence. As Chaib highlights, the wording used by the Court 'is a remarkable reference to the concept of reasonable accommodation used in other jurisdictions',[94] e.g. Canada and the United States. Unfortunately, the ECtHR is not keen on sustaining the same approach once employment is concerned, the judgment in *Francessco v. Italy*, criticized above, was delivered after seminal prisoners cases.

[90] Nicolas Bratza, 'The 'precious asset': freedom of religion under the European Convention on Human Rights' (2012) 14 Ecclesiastical Law Journal 256–271

[91] Mr. Jakóbski, Polish prison detainee, complained about a violation of his freedom of religion, since the prison authorities did not provide him with a complete meat-free diet he requested. According to his claim, no-pork diet did not comply with his religious dietary rules required by Mahayana Buddhism.

[92] Factual circumstances of the case were discussed in the previous section.

[93] Para 47 in *Jakobski* and para 62 in *Kovalkovs*.

[94] Chaib, 'Gatis Kovalkovs v. Latvia: the Strasbourg Court keeps the door to reasonable accommodation open'

2.1.3 'Necessary in a Democratic Society'

Once the Court establishes *prima facie* case of freedom violation (interference) and determines that it pursued a legitimate aim prescribed by a law, it proceeds to analyze whether the particular measure was 'necessary in a democratic society'. Necessity is a complex test, which requires to conclude whether the interference (a) corresponded a pressing social need; (b) was justified by relevant and sufficient reasons and (c) was proportionate. Hence at this stage the applicants claim is decided under the formalized analytical framework employed to deal with tensions between the rights (values) pleaded.[95] Originating from the German Constitutional Court this doctrinal construction – also known as 'proportionality analysis[96] – allows for substantive examination of the claim, which is practically absent in the early stages ('manifestation', 'interference'). The rigorousness of the review of assessment performed by the national authorities is determined by the margin of appreciation, afforded by the Court to the State. The ECtHR has recognized on several occasions[97] that its competence in reviewing certain decisions made in the area of religion is limited, given that these questions reflect 'historical, cultural and political sensitivities.[98]

[95] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 73–165

[96] Ibid.

[97] Murdoch, *Freedom of Thought, Conscience and Religion* 33

[98] Due to the limited scope and space of the thesis author will not go in depth assessing controversy surrounding the concept of 'margin of appreciation' and its application. For the extensive analysis see e.g. George Letsas, *A theory of interpretation of the European Convention on Human Rights* (Oxford University Press 2007); Yutaka Arai-Takahashi, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of*

Had the described employment accommodation type cases reached this stage, the Court would have a chance to balance the competing interests at stake. On applicant's side it would mean examining the nature of his work duties and the type of accommodation he seeks to achieve. On employer's part, the feasibility of accommodation given employer's interests would be estimated. Suffice to note that in the most recent, *Franceso* case, the dissenting judge argued for the proportionality analysis. He asserted that the authorities were required authorities to choose least restrictive means in the range of alternatives and noted that applicant asked for adjournment of the hearing, which did not have an urgent character, four months in advance. One may claim that in practice the ECtHR has rejected the least-onerous-means test (strict necessity test) and more willingly resorts to the examination of whether the means employed by the national authorities were 'reasonable' hereby providing a leeway for the State.[99] Nevertheless the dissenting opinion holds true drawing court's attention to the fact that the range of alternatives existed and it was the ECtHR's duty (as a body responsible for the 'European supervision') to consider them. Even if the Court is not looking for the least restrictive measure, it is a matter of a settled case-law that the most restrictive measure is not acceptable.

the ECHR (Intersentia 2002); Howard C. Yourow, *The margin of appreciation doctrine in the dynamics of European human rights jurisprudence* (M. Nijhoff 1996), International studies in human rights v. 28

[99] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Brill 2009) 111–135

No case concerning adjustment of the working hours or conscientious objection to assigned work tasks has reached this stage of judicial scrutiny so far, but cases of religious attire in the workplace did. Although *Dahlab* and *Kurtulmus* are only admissibility decisions, the Court engaged into proportionality review to determine a compatibility of a ban on headscarves in the workplace with the Convention. Both claims were, however, declared inadmissible as manifestly ill-founded.

Luicia Dahlab worked as a primary school teacher in Switzerland. She converted to Islam and started wearing a headscarf after two years at school, while after about three years the education board prohibited her wearing from wearing it while carrying out her professional duties. Before the Court she argued that the ban in question amounted in violation of Article 9. The ECtHR found that a prohibition of wearing a headscarf indeed constituted an interference, which was prescribed by the law and pursued legitimate aims (rights and freedoms of others, public order and public safety). The Court further observed that the State succeeded in balancing applicant's right to manifest her religion against the principle of state neutrality and a need to protect pupils from 'proselytizing effect' of the headscarf. The Court held that given children's tender age (four and eight years) they are perceptive to the power of a symbol, which, according to the Strasbourg Court, compromises a message of 'tolerance, respect for others and, above all, equality and non-discrimination'. It concluded that given the margin of appreciation of the

State, the restriction was proportionate and thus 'necessary in a democratic society'.

Kurtulmus case[100] concerned a Turkish university associate professor, who was wearing a headscarf for more than six years before she became a subject of disciplinary investigation. She was suspended from her duties and subsequently dismissed for a failure to comply with a dress code. Like in *Dahlab* the ban was considered to be an interference justified by the law. Curious that although the Court seemed to overcome 'interference' prong and go further, its 'proportionality' review remain strikingly similar to the one observed on working hours cases, namely *Konttinen, Stedman* and *Francesco*. Firstly, it emphasized that it considers 'not objections to the way a person dresses as a result of his or her religious beliefs', but a 'paramount consideration' underpinning the principle of secularism. Secondly, it held that since Mrs Kurtulmus assumed a status of a public servant of her own free will, she was obliged to comply with the rules requiring restraining from expressing her religious beliefs in public. The ECtHR concluded that given broad State's margin of appreciation the restriction at stake was 'justified by imperatives pertaining to the principle of neutrality in the public service and, in particular in the State education system, and to the principle of secularism' and proportionate.

[100] *Kurtulmus v. Turkey* App no 65500/01 (ECtHR 24 January 2006)

Proportionality review performed by the Court in these two accommodation type cases can be criticized on several grounds. Firstly, one may notice clear inconsistency in Court's reasoning. In *Dahlab*, it was very concerned about 'proselytizing effect' of the religious attire on young children, while in *Kurtulmus* it did not even mention the fact that professor was teaching grown-up students who cannot be considered a vulnerable group. Secondly, the ECtHR was not mindful of the fact that there were no complaints from the school authorities or the parents throughout the period of three years while Mrs. Dahlab was wearing a headscarf. Thus the assumption of 'proselytizing effect' is questionable and ungrounded. Thirdly, there is no examination of State's positive obligations to respect applicant's freedom of religion and duty of public institutions to engage into the dialogue with the applicants; there is also no assessment of possibility to employ less restrictive means. 'State neutrality' and 'secularism', as Chaib notes, are afforded 'almighty weight in the balance'.[101] This is not to say that these principles are completely irrelevant, indeed a question of a reconciliation of a State-Church order with religious liberty claims of public employees are highly sensitive. The sensitivity of the issue, however, does not relieve the Court from its primary duty to exercise consistent and thoughtful European supervision, which seems to be lacking in accommodation type cases.

[101] Chaib, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights' 47

2.2 Religious Freedom Guarantee under the Charter of Fundamental Rights

It is widely accepted, that the Lisbon Treaty enhanced the protection of human rights in the EU by making the Charter of Fundamental Rights legally binding. However as the further brief overview will show, it is hardly of immediate assistance to the resolution of religious accommodation claims.

As it concerns religious freedom, the Charter addresses it in four articles[102] and for the first time establishes right to freedom of religion in the text of primary sources of the Union's law.[103] However, it should be noted from the outset that the Charter provisions (neither Article 10, nor Article 22 or others) in any way do not broaden the powers of the European Union to regulate, for instance, church-state relationship within the country and adopt the acts regulating establishment or operation of religious communities. Article 51 stipulates[104] that 'the Charter does not extend the field of application of the Union law beyond the powers of the Union' and addresses

[102] Article 10 (freedom of religion); Article 14 (right to education); Article 21 (non-discrimination) and Article 22 (religious diversity).

[103] Interesting to note that for some time the article was deliberated in a briefer version of Article 10, referring to 'freedom of thought and conscience' and omitting the implication of the freedom of religion (see Tania Groppi, 'Freedoms: Article 10 - Freedom of Thought, Conscience and Religion' in William B.T. Mock (ed), *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press 2008) 65).

[104] Although, the stipulation is not that clear. On the (artificial) distinction between the field of application of the Charter (implementing EU law) and general principles (acting within the scope of EU law), see Derrick Wyatt, Alan Dashwood, Barry Rodger, and Eleanor Spaventa, 'The Charter of Fundamental Rights' in *European Union Law* (6th edn, Hart Publishing 2011) 382–383 and Christopher McCrudden and Haris Kountouros, 'Human Righs and European Equality Law' in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding Article 13 Directives* (Cambridge University Press 2007) 103

exceptionally the situations when the Union and the member states 'are implementing EU law'.

So what is the value of a formal recognition of the religious freedom in the Union's 'Bill of Rights'? Adoption of the Charter means that any law or practice falling within the ambit of the EU law 'will be now subject to closer judicial scrutiny and evaluation from a fundamental rights perspective'.[105] Moreover, as Vickers asserts, the right to freedom of religion and non-discrimination right (which, on the contrary, is much more developed in the EU law and practice) on the grounds of religion and belief are interconnected, and the legal weight given to the former add additional strength to the latter.[106] Consequently the Charter is envisioned as not only enriching the understanding of a non-discrimination obligation and, but also as capable of 'help[ing] to determine the outer boundaries of the [Framework Employment] Directive's protection'.[107]

Article 10 (1) exactly reproduces Article 9 (1) of the ECHR and does not in its wording express recognition to the freedom not to believe. It is not entirely clear why this right was omitted, especially since the ECtHR extensively addressed it in the case-law.[108]

[105] Sergio Carrera and Joanna Parkin, 'The Place of Religion in European Union Law and Policy: Competing Approaches and Actors inside the European Commission' (2010) No 1 Religare Working Paper, 6

[106] Lucy Vickers, *Religion and Belief Discrimination in Employment – the EU Law* (Office for Official Publication of the European Communities 2006) 38

[107] Ibid, 39

[108] See e.g. *Buscarini and Ors v. San Marino* [GC] App no 24645/94 (ECtHR 18 February 1999) para. 34

Yet, Article 10 was also criticized on the other grounds. Wording of Article 9 (2) of the ECHR recognizes the absolute nature of the *forum internum* while allowing to impose limitations on the *forum externum*. It is thus clear that since there is only a general limitation clause in the Charter (Article 52(1)) it indistinctively applies to all dimensions therefore significantly limiting the first one.[109]

However both critiques (to the extent as it concerns the inconsistency with the ECtHR case-law) might be rebutted by recalling a 'minimum floor guarantee' as provided by Articles 52(3) and 53. These provisions have two-fold purpose: firstly, to ensure that the ECHR is seen as a minimum level guarantee which cannot be derogated from and therefore the Union's provided standard of protection in any case will not be inferior[110] and secondly, it provides a starting point to reconcile possible differences in the Strasbourg and Luxembourg Courts' approaches, [111] especially bearing in mind the prospects of the Union's accession to the ECHR. It means that although Article 10 does not expressly protect non-believers, the CJEU and the Member States will interpret it in the light of the ECHR's case-law that provides such protection. Accordingly, the Charter will not be read as imposing limitations on internal religious freedom, since it is fully protected by the ECHR.

[109] Groppi, 'Freedoms: Article 10 - Freedom of Thought, Conscience and Religion' 69
[110] Wyatt, Dashwood, Rodger, and Spaventa, 'The Charter of Fundamental Rights' 383
[111] Marta Cartabia, 'General Provisions: Article 53-Level of Protection' in William B.T. Mock (ed), *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press 2008) 336–337

One should bear in mind that the drafters of the Charter were entitled to consolidate and codify the existing rights so to ensure their visibility, rather than to create new ones.[112] In addition, the Union lacks the competence to regulate questions related to religious freedom. Hence although there is nothing in the text of the Charter that could preclude the CJEU from finding a reasonable accommodation duty under religious freedom clause, it is understandable why some scholars[113] are concerned about adverse influence of the ECtHR's restrictive interpretation of a religious accommodation duty on the CJEU.

2.3 Emerging Accommodation Type Cases: Testing the Limits of European Religious Liberty

Response of the ECtHR to accommodation type cases has been unsatisfactory; the Charter of Fundamental Rights does not seem to bring heightened protection to religious freedom. Strasbourg influenced even British judges who ruled against four religious employees at the same time upholding dismissal of two of them. All cases concerned a form of religious objections towards employment regulations, all spurred academic, policy and general debates in the United Kingdom and beyond and at the meantime all four are

[112] Cologne European Council, 3 and 4 June 1999, Presidency Conclusions, 150/99 REV 1, para 44. and see Wyatt, Dashwood, Rodger, and Spaventa, 'The Charter of Fundamental Rights' 360–362

[113] See e.g. Gwyneth Pitt, 'Religion or Belief: Aiming at the Right Target?' in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding Article 13 Directives* (Cambridge University Press 2007) 209, 217

pending before the ECtHR. These cases provoked British Equality and Human Rights Commission to launch an 'informal public consultation' on the use of a reasonable accommodation concept. Thus a more careful look into factual and legal circumstances is required for the purpose of the research.

Ms Ladele, Christian, served in the Registrar of Births, Deaths and Marriages in Islington from 1992. When same-sex civil partnership act was enacted in the United Kingdom in 2004, Islington designated all existing registrars to perform same-sex partnership ceremonies as part of their duties (although the Act did not explicitly require involvement of all the registrars) in the framework of 'Dignity for All' policy. The applicant refused to follow saying that 'I feel unable to directly facilitate the formation of a union that I sincerely believe is contrary to God's law' and requested Islington to accommodate her beliefs. The latter failed to respond and initiated proceedings against Ms Ladele on the ground that she violated above named policy and did not perform her duties.[114]

McFarlane case[115] involved similar questions. Mr. McFarlane, a Christian, worked for Relate (national organization which provides confidential sex therapy and relationship counseling service) from 2003. He provided general counseling for heterosexual and homosexual couples, although initially he had some concerns about it. In 2007 he decided to train psycho-sexual therapy, but asked to be exempted from offering this therapy to same-sex coupled in the

[114] *Ladele v. the United Kingdom* (pend.) App no 51671/10 (lodged on 27 August 2010 ECtHR)
[115] *McFarlane v. United Kingdom* (pend.) App no 36516/10 (lodged on 24 June 2010 ECtHR)

view that it would conflict with his religious believes which perceived homosexuality as a sinful act. Relate dismissed him for a 'gross misconduct'.

Both applicants did not succeed in domestic proceedings and thus turnd to Strasbourg court claiming, *inter alia*, a violation of their right to manifest religion under Article 9. How good are the chances of Ladele and McFarlane? In the view of the Court of Appeal, the ECtHR jurisprudence 'support[s] the view that Ms Ladele's proper and genuine desire to have her religious views relating to marriage respected should not be permitted to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community.'[116] This assertion was reiterated in the second applicant's case.

If the ECtHR does not revisit it jurisprudence, it is trapped to follow the lead of the preceding judgments. On the basis of its own previous reasoning, it may find applicants' conscientious objection to particular tasks did not amount at manifestation of their religion or belief. Alternatively, under 'freedom to resign' doctrine that employers' conduct it may find that they did not amount to an interference. It is very likely that the Court would recall a particular accommodation type case where employees were dismissed because they refused to perform their duties because of religious objections – namely *Pichon and Sajous v. France*[117] – and where, according to the Court, no

[116] *Ladele v. London Borough of Islington* [2009] EWCA Civ 1357 (15 December 2009), para. 55

[117] *Pichon and Sajous v. France* (admis.), App no 49853/99 (ECtHR 2 October 2001)

interference of their rights occurred.[118] Noteworthy, if the Court does not establish that a manifestation of the applicants' religion was in place, it would likely to overlook the fact that Ms Ladele did not initially sign up to 'Diversity for All' policy (as opposed to McFarlane whose contract was clear about non-discrimination policy), thus she did not enter into contract freely and being fully informed (as opposed to other accommodation type cases). Moreover, if the ECtHR proceeds with non-interference approach, it will not notice that none of the employers even consider making alternative arrangements, which, in both situations, applicants sought. Most importantly, the essential question of whether and what kind of arrangements could have been made would remain untouched.

However, Ladele and McFarlane are not the only challenging claims invoking European religious liberty clause the Court has to deal with. In Autumn 2010 Ms Eweida, a practicing Coptic Christian, was denied a possibility to openly wear a cross in her workplace, British Airways Plc. where she worked as a member of check-in staff.[119] Employer justified the denial by no-accessories police, which was, in the course of proceedings reviewed permitting to display religious and charity symbols. Ms Chaplin, was not

[118] The ECtHR found that no interference occurred 'as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy' (*Pichon and Sajous v. France* (admis.), App no 49853/99 (ECtHR 2 October 2001)).
[119] *Eweida v. the United Kingdom* (pend.) App no 48420/10 (10 August 2010 ECtHR)

allowed to wear a crucifix on a chain around her neck by her employer – State hospital – where she served as a nurse.[120]

Again, the claims failed in the domestic courts. The second case was decided in the light of the first one. In *Eweida*, on appeal, Lord Bingham explicitly said that

> *The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.*

According to Hatzis, 'a surprisingly brief treatment of Article 9' indicates 'inadequate attention paid to the human rights aspect of the case'.[121] This is indeed true, but it indicates even more than that – above cited passage effectively summarizes unfortunate approach adopted by the ECtHR to the accommodation type cases in employment setting. It was already said above that this issue is sensitive. But these four cases bring a new aspect to the table. Previously almost all situations (except for *Pichon and Sajous*) dealt with adherents to minority religions and thus the overarching issue was formulated as 'how far we can go in a multicultural society in accommodating religious minorities'.[122] But the cases discussed here were brought by Christians, who are the largest denominations not only in the United Kingdom, but also in

[120] *Chaplin v. the United Kingdom* (pend.) App no 59842/10 (19 September 2010 ECtHR)
[121] Nicholas Hatzis, 'Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination' (2011) 74 The Modern Law Review 287–305
[122] Saïla Oual Chaib, 'Francesco Sessa v. Italy: A Dilemma Majority Religion Members Will Probably Not Face', April 5, 2012

Europe. Thus, from freedom of religion perspective the question has broadened - what is the place of religion in pluralistic society and to what extent convictions of religions persons are to be respected and duly considered in public domain? From the moral perspective the answer was provided by respectful pluralism framework. From the legal perspective, especially on the European level, the answer is more complicated given variety of state-church relationship and margin of appreciation doctrine reserved for the Member States.

But ultimately it is not all about whether or not religious employees will win – it is about proper adjudication of their religious freedom claims. Concluding this chapter, it is worth to note that the ECtHR is indeed capable of taking these claims seriously. As it reasoned in *Jakobski case*:

> *According to the applicant's religion he was supposed to have a simple meat-free diet. He merely asked to be granted a vegetarian diet, excluding meat products. The Court notes that his meals did not have to be prepared, cooked and served in a prescribed manner, nor did he require any special products. (...) [H]e was not offered any alternative diet, nor was the Buddhist Mission consulted on the issue of the appropriate diet. The Court is not persuaded that the provision of a vegetarian diet to the applicant would have entailed any disruption to the management of the prison or to any decline in the standards of meals served to other prisoners.*[123]

The idea of reasonable accommodation, even without naming it as such, can find it way into the reasoning of the Court under 'necessary in a democratic society' test of Article 9. The question is whether the Court is ready to look for it.

[123] Para 52, references omitted.

CHAPTER 3. FINDING RELIGIOUS ACCOMMODATION DUTY UNDER CURRENT EUROPEAN NON-DISCRIMINATION FRAMEWORK

Reasonable accommodate is a relatively new and undeveloped concept in the European legal framework. To some extent it appears to be addressed by other legal concepts, like indirect discrimination or a positive action. The further analysis will explore interconnection between the duty to accommodate religion and belief and these concepts in order to determine to whether there is a need for an additional regulation at all.

3.1 From Maastricht to Lisbon via Strasbourg: Religion as a Protected Ground

3.1.1 The Principle of Non-discrimination under Article 14 ECHR

Prohibition of religious discrimination is enshrined in Article 14 of the ECHR.[124] As the text of the Article reads, it does not established free standing right, but rather accessory obligation of the States not to discrimination on the listed and 'other' grounds when they act within the scope of Conventional

[124] Protocol 12 of the ECHR introduces free-standing prohibition of discrimination and thus is greater in scope if compared with Article 14. However it has been ratified so far only by seventeen Council of Europe Member States and only one case, *Sejdić and Finci v. Bosnia and Herzegovina*, has been examined under its Article 1, where the Court stated that stated that 'the analysis of discrimination cases would be identical to that established by the ECtHR in the context of Article 14' (European Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-discrimination Law* (Publications Office of the European Union, 2011) 64–65). Therefore in the present work authors will focus on the text and interpretation of Article 14 exceptionally.

rights. Such situation is sometimes criticized being 'parasitic' requirement stripping non-discrimination right of the 'bite'.[125] In addition the ECtHR has treated Article 14 claims in a ways which made prominent equality scholars to criticize the Court of being inconsistent.[126]

There are two primary avenues of the Strasbourg's response to the allegations of discriminatory treatment. The Court either avoids a discussion on the breach of equality principle altogether by deciding the matter only under substantive provision (e.g. finding that discriminatory acts amounted in violation of Article 3 or Article 8) or engages into the analysis under Article 14. What is important for the purpose of our discussion is that the Court is willing to give a wide interpretation to the 'ambit requirement'. The ECtHR recognized that Article 14 is an 'autonomous' provision, it can be violated even where no breach of substantive provision of the Convention is found. Does it mean that in above described accommodation type cases applicants theoretically had a chance to succeed with Article 14 claims, even if no interference with their Article 9 rights was establishes? The answer is yes. In *Thimelmenos* case the Court accepted that the unequal treatment complained by the applicant

> *falls within the ambit of a Convention provision, namely Article 9. In order to reach this conclusion, the Court, as opposed to the Commission, does not find it necessary to examine whether the applicant's initial conviction and the authorities'*

[125] Rory O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies: The Journal of the Society of Legal Scholars 211, 212-216
[126] Ibid.

subsequent refusal to appoint him amounted to interference with his rights under Article 9 § 1.[127]

However, the Court clearly did not apply this consideration to accommodation type cases. For instance, in *Stedman* the applicant argued discrimination on the ground of religion in violation of Article 14, but her claim was found manifestly ill-founded since already in Article 9 analysis the Court found that the applicant had been dismissed not because of her religious convictions, but because of a refusal to work. In other words it found that the matter simply does no fall into the 'scope of Conventional rights'. It followed the same reasoning in *Kurtulmus* where it stated that the 'rules on wearing the Islamic headscarf are unrelated to the applicant's religious affiliation or her sex', what is indeed an odd proposition.

The first barrier constructed by the Court is a failure to find interference, while the second is a failure to consider the effects of a regulation on the members of religious groups. Being overprotective of State's legitimate aims and equal application of the rule, the Court remains blind to the fact that the idea of substantive equality requires not to treat persons in different circumstances identically.

3.1.2 Evolution of the EU Anti-discrimination Law

The EU integration project commenced as an economic union based on the idea of economic, rather than social cohesion, this is the reason why the Union's social policy was initially fragmented, if not invisible. Accordingly,

[127] *Thlimmenos v. Greece* App no 34369/97 (ECtHR 6 April 2000) para 43

the principle of equality originated from the market equality, i.e. principle of non-discrimination of the goods and services in between the Member States as well as equal treatment of workers linked to the free movement of labour and establishment. Amsterdam Treaty brought a major shift into the EU equality law by introducing Article 13 – 'the most exciting of the [Treaty's] new possibilities', as Robin Allen QC fairly refers to it.[128] This Article has not established a free-standing equality principle, but it created a legal basis for the legislation in the non-discrimination field.

Soon after the Amsterdam Treaty was adopted, the Commission, which exercised the power to propose legislative drafts, held the Vienna Conference to determine the further steps within ta newly-established EU mandate. The anti-discrimination protection on the grounds of race and ethnicity was embodied in the Race Directive,[129] which material scope covers an access to and the conditions of employment, social protection, including social security and welfare, social advantages, education and access to goods and services, including housing.[130]

Religion and belief, perceived as grounds for non-discrimination separate from ethnicity and race, were discussed within the framework of a less extensive protection and finally evolved into the Framework Employment

[128] Robin Allen QC, 'Article 13 EC, Evolution and Current Contexts' in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding Article 13 Directives* (Cambridge University Press 2007) 38
[129] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, 29 June 2000
[130] Ibid, Article 3

Directive.[131] The aim of the Directive was to lay down a general legal frame to combat discrimination.[132] As concerned the material scope, it is applied to both public and private sectors in relation to conditions for access to employment (selection criteria, recruitment conditions and promotion) and all types of vocational guidance, working conditions (dismissal and pay) and membership in professional organizations.[133] The Directive recognized direct[134] and indirect discrimination,[135] as well as harassment[136] and instruction to discriminate[137] as the forms of discrimination. It also prohibited victimization[138] and introduced a duty for reasonable accommodation, however only in reference to disability.[139]

Although the most apparent distinction between two Directives lies in the material scope of afforded protection, other differences, namely the system

[131] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16, 27 November 2000
[132] The CJEU explicitly recognized that the Directive cannot be regarded as a source of the principle of equal treatment, which is derived from international instruments and constitutional traditions common to the Member States (Case C-144/04, *Werner Mangold v Rüdiger Helm,* 22 November 2005).
[133] Article 3
[134] Article 2(2)(a)
[135] Article 2(2)(b)
[136] Article 2(3)
[137] Article 2(4)
[138] Article 11.
[139]Article 5. For the discussion on duty of reasonable accommodation of disability see e.g. Anna Lawson, 'Reasonable Accommodation and Accessibility Obligations: Towards a More Unified European Approach?' in Isabelle Chopin and Thien Uyen Do (eds), *European Anti-Discrimination Law Review No 11* (Publication Office of the European Union 2010)

of exceptions to the principle of equal treatment and enforcement mechanisms, can be identified.[140]

So far the ECJ (now – the CJEU) delivered the judgment only in one accommodation type case, where it 'directly deliberated freedom of religion'.[141] *Prais* case[142] concerned a failure of the Council to accommodate the request of a Jewish woman to reschedule the open competition for the translator's vacancy, since it took place on the first day of a Jewish feast of *Shavout*, during which she was not able to travel or to write. The ECJ rejected the applicant's claim, since she informed the Council about 'her difficulties', when the date was already fixed and other candidates informed. However, the Court also outlined the duty of the authority to take into account 'religious reasons' which make the dates unsuitable for the candidates, but insofar as they inform about it in advance. Hereby the Court balanced accommodation of religion with a principle of competitive equality, but unlike the Advocate General Warner who delivered the opinion in this case, the Court avoided any reference to any human rights treaty safeguarding freedom of religion and even was reluctant to include 'general principles' considerations, although the doctrine was already in place. The Advocate General, on the other hand, provided an extensive account of constitutional rules of the Member States and

[140] Yuwen Li and Jenny Goldschmidt (eds), *Taking Employment Discrimination Seriously: Chinese and European Perspectives* (Martinus Nijhoff Publishers 2009) 228–229 and 235–236228-229 and 235-236

[141] Michał Rynkowski, 'Freedom of Religion in the European Union: German and Polish Perspectives' in Adam Bodnar and others (eds), *The Emerging Constitutional Law of the European Union* (Springer-Verlag 2003) 76–77

[142] Case 130-75, *Vivien Prais v. Council of the European Communities*, 27 October 1976

the case-law of the ECtHR as to the practice of working time adjustment on behalf of religious convictions of those concerned, but nevertheless came to the unfavorable to Mrs. Praise conclusion.[143]

3.1.3 Unequal Protection of Equality Grounds: the Hierarchy

Some scholars have suggested that uneven approach towards equality legislation might evidence the creation of hierarchy 'between race and gender, on the one hand, and all the other discrimination grounds on the other hand'[144] or, more precisely, 'race equality now at the top, having overtaken sex equality law with the passage of Race Directive'.[145] Even if unequal level of protection is not a purposeful construction of the hierarchy, but rather recognition of 'relevant differences between covered characteristic', the equality experts imply that neither the legislator's, nor the Court's approach cannot be said to be consistent.[146] Further will look into whether or not the 'inequality of equality law' can be objectively justified and, particularly where do religion and belief, as the protected grounds, stand in the contemporary system.

[143] Opinion of Mr Advocate General Warner delivered on 22 September 1976 in the Case 130-75, *Vivien Prais v. Council of the European Communities*, 27 October 1976

[144] Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecclesiastical law journal 280, 301–302; Helen Meenan, 'Introduction' in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding Article 13 Directives* (Cambridge University Press 2007) 4, supra note 8; Pitt, 'Religion or Belief: Aiming at the Right Target?' 224, *supra note* 86; Carrera and Parkin, 'The Place of Religion in European Union Law and Policy: Competing Approaches and Actors inside the European Commission' 9;Dagmar Schiek, 'The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation' (2006) 35 Industrial Law Journal 329, 341

[145] Pitt, 'Religion or Belief: Aiming at the Right Target?' 224

[146] Lisa Waddington and Mark Bell, 'Reflecting on Inequalities in European Equality Law' (2003) 28 European Law Review 349, 13

There might have been political reasons which explain unequal material scope of two Directives.[147] Other scholars offered view from the perspective of 'substantive differences between covered grounds'.[148] Scienk proposes a three-prong categorization of the grounds: first ones relates to 'ascribed differences' (race, gender and – partially – disability), second are based on the 'actual and unalterable biological differences' (sex, - partially – disability and age) and the third ones include differences which are the product of choice (religion and belief and sexual orientation).[149] The opinion that religion and belief are the matters of choice was also expressed by Sedley LJ in *Eweida v British Airways* case[150]. Unsurprisingly, such division has attracted critique. For instance, Vickers argues that 'a high percentage of religious adherents stay in the religious groups into which they were born,

[147] De Witte also asserts that 'uneven approach is the result of a compromise reflecting the different levels of commitment to different forms of discrimination among the Member States' (Carrera and Parkin, 'The Place of Religion in European Union Law and Policy: Competing Approaches and Actors inside the European Commission' 9). Other authors explained that uneven approach to the protected grounds was determined by political events of that time - the Vienna Conference took place against the background of growing power of ultra-nationalist Jorg Haider's Austrian Freedom Party, which by that time was causing tensions inside the Union, and the idea of the protection of racial and ethnic minorities against the anti-immigrant tendencies was especially relevant. There is also an idea that the Commission was not keen on taking comprehensive approach covering all non-discrimination grounds, because it would have significantly exceeded the material scope of Article 13 and, by the same token, its own powers (see Allen QC, 'Article 13 EC, Evolution and Current Contexts' 38).

[148] Waddington and Bell, 'Reflecting on Inequalities in European Equality Law' 7

[149] Dagmar Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8 European Law Journal 290, 309–312. Steven D. Jamar has a similar approach. He also argues that religious employment discrimination fundamentally differs from other types of workplace discrimination, because in the cases when racial, sexual, age, disability grounds are involved the latter are the matter of 'birthright', while 'beliefs and concepts are a matter of choice'. (Steven D. Jamar, 'Accommodating Religion at Work: a Principled Approach To Title VII and Religious Freedom' (1996) 40 The New York Law School Law Review 719, 728)

[150] *Eweida v. British Airways* [2010] EWCA Civ 80, para 40

showing little mobility between religious groups and suggesting that for many, in practice, religion is not chosen.'[151]

Waddington and Bell alternatively propose that some characteristics 'do not effect on the ability or availability to perform work' (gender, race, ethnic origin and sexual orientation), other grounds 'may occasionally restrict availability to perform job' (sex and religion with regard to times of worship) and some of the grounds can limit both ability and availability to perform job (disability and age).[152] Authors conclude that if such distinction is accepted, that Union's equality-approach has clear loopholes as regards the protection of religion and belief, since there is no established duty for its accommodation, contrary to the ones for disability and pregnancy – characteristics, which influence person's position in the workplace.[153]

Problematic disparities of two Equality Directives are aggravated by the fact that the legislator separated race and ethnic origin on the one hand and religion and belief on the other hand, without the clear and strong rationale for such division. It is true that ethnic groups are not always homogenous in their religious adherence, if any. However, it is equally true, that some categories such as 'Jews', 'Sikhs', 'Muslims' and other can fall both within category of ethnic origin and religion.[154] As Vickers duly notes, that uneven coverage of grounds creates hierarchy within the category of 'religion and belief' in a

[151] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' 301–302
[152] Waddington and Bell, 'Reflecting on Inequalities in European Equality Law' 8–9
[153] Ibid, 9
[154] See Pitt, 'Religion or Belief: Aiming at the Right Target?' 229; Vickers, *Religion and Belief Discrimination in Employment – the EU Law* 35

sense that 'religious groups that can claim separate ethnic identity are given greater protection [in the fields of education, housing and access to goods and services] than those who remain only religious groups'.[155]

Although the 'hierarchy of equality' critique is pertained to the EU non-discrimination framework, there are grounds to believe that the ECtHR is also not immune from these allegations. Again, it seems that we find 'religion' as a ground in an adverse position vis-à-vis other protected grounds. According to de Shutter:

> *A certain hierarchy of grounds does appear in the case-law of the European Court of Human Rights: although, in most cases, a difference of treatment will pass the test of non-discrimination if it pursues a legitimate aim by means of presenting a reasonable relationship of proportionality with that aim, where differential treatment is based on a 'suspect' ground, it will be required that it is justified by 'very weighty reasons' and that the difference in treatment appears both suited for realizing the legitimate aim pursued, and necessary.*[156]

To add, once the ground considered to be a 'suspect'[157] the Court will narrow down State's margin of appreciation. How does the Court classify anti-discrimination grounds? According to Gerards, the factors that play a role are: (1) common consensus between Member States, (2) character and importance of the affected rights, (3) nature of interference.[158] The latter two factors mean that for instance, 'sex' ground will not be treated equally in cases of private

[155] Vickers, *Religion and Belief Discrimination in Employment – the EU Law* 35
[156] Erica Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' (2006) 13 Maastricht Journal of European and Comparative Law 445, 453
[157] The ECtHR does not expressly use such terminology. It comes from U.S. Supreme Court jurisprudence, see Otis H. Stephens and John M. Scheb, *American Constitutional Law: Civil Rights and Liberties* (Cengage Learning 2007) 470–485
[158] Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' 458

life (Article 8) and domestic violence which is recognized to amount in degrading treatment (Article 3). The first element is the most flexible one and most likely to influence judicial scrutiny of a particular ground over time. For instance, in respect to 'race', the Court found that '[r]acial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences requires from the authorities special vigilance and a vigorous reaction', thus giving a particular attention to this ground.[159] The Court later found that discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour',[160] while initially it refused even to consider complaints of unequal treatment on the grounds of sexual orientation.[161] As ir regards the ground of 'sex', again the Court took a chance to emphasize that 'advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe' and thus 'very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention'[162] However 'religion' was never afforded a heightened scrutiny review; and the Court have not proclaimed religious equality to be a goal for the Member States to achieve.

[159] *D.H. and Others v. the Czech Republic* [GC] App no 57325/00 (ECtHR 13 November 2007) para 176
[160] *Vajdeland and Others v. Sweden* App no 1813/07 (ECtHR 9 May 2012) para 55
[161] *Dudgeon v. the United Kingdom* App no 7527/76 (ECtHR 22 October 1981) para 70
[162] *Abdulaziz, Cabales and Balkandali v. The United Kingdom* App nos 9214/80, 9473/81, 9474/81 (ECtHR 14 October 1983) para 78

Examples stemming from the Strasbourg case-law demonstrate that it shares the same incoherent approach towards equality grounds as its Luxembourg counterpart. The difference is, however, that the hierarchy of equality is endorsed exceptionally by the Court, rather than determined by the Member States' agreed legislation. In this respect to the latter, some scholars have proposed that recent developments in the CJEU would allow creating a uniform approach through judicial interpretation, without amendments to EU Equality Directives.

Mangold and, subsequently, *Kücükdevici*[163] judgments the CJEU created a new jurisprudence of general principles applicable in the age discrimination realm. This doctrine allows setting aside a national law conflicting with a general principle of non-discrimination on the ground of age even before the period of the transposition of the Directive has expired.[164] Schienk also suggests, that introduction of general principles doctrine could at least partially outbalance the 'hierarchy of equality', since it would allow strengthening the protection currently provided by the Directive.[165]

[163] *Kücükdevici* para 21. This case is also notable for infusing the reasoning with the supplementary reference to the Charter's non-discrimination clause (see para 22).

[164] See Schiek, 'The ECJ Decision in Mangold' 336–337; Claire Kilpatrick, 'The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture' (2011) 40 Industrial Law Journal 280, 283–285. Recent *Römer* case brought more clarity (although – some scholars assert that it rather narrowed done the far-reaching approach taken in age discrimination cases) to the operation of general principles of equality vis-à-vis the provisions of Framework Directive. The Court highlighted that in order for general principle (of sexual orientation) to apply prior to the transposition of the Directive, the situation should fall within the scope of the EU law and the situation, such as Römer's would fall therein only when the period for the transposition of the Directive has expired (*Case C-147/08, Jürgen Römer v. City of Hamburg*, 10 May 2011

[165] Schiek, 'The ECJ Decision in Mangold' 340

However, this might be not entirely so. As Kilpatrick convincingly argues, the general principles might be of practical help for situations which occurred prior to the transposition deadline, but which are falling within the scope of EU law (although once might be difficult to find) and to the instances concerning discriminatory practices of private employers which occurred after the transposition of the directive, but could not have been tackled before due to the lack of the horizontal direct effect of the directives. However, in such cases, as the judgments have shown, the Court might alter the practice of the Directive's application, but not their substance.[166] Therefore the Court is not likely to 'find' the duty of religious accommodation in the text of the Framework Employment Directive, basing its reasoning on the general principle of religious non-discrimination.

Although there is no need to contest Fitzpatrick's assertion that it is 'clear [from the judgment] that all the equal treatment principles manifested in the two Directives are equally fundamental',[167] the adoption of a more coherent piece of legislation to remedy a low-level of a protection afforded to 'religion and belief' may be a more feasible option.

In 2008 the Commission a Proposal for a Council Directive of 2 July 2008 on implementing the principle of equal treatment between persons

[166] Kilpatrick, 'The Court of Justice and Labour Law in 2010' 287
[167] Barry Fitzpatrick, 'The 'mainstreaming' of sexual orientation into European equality law' in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding Article 13 Directives* (Cambridge University Press 2007) 314

irrespective of religion or belief, disability, age or sexual orientation.[168] The Directive basically 'levels up' the protection on the grounds of religion and belief, disability, age and sexual orientation to that already established for race and ethnic origin by the Race Directive, i.e., if adopted, the material scope would extend to the areas of social protection, social advantages, education and access to and supply of goods and services.[169] However, the Proposal does not do much to remedy the drawbacks of 'religion and belief' legal status as related to the workplace, e.g. the duty of religious accommodation is absent from the text. Bell claims that the Directive by and large follows the pattern of existing Directives and 'does not attempt to make a wider reform of EU anti-discrimination legislation'.[170]

Consequently, as for today, there is no strong tool to remedy the created 'hierarchy of equality' or unjustified differentiation of equality grounds, which puts those suffering disadvantage due to their religion or belief at the workplace, in particularly vulnerable position.

3.2 Limitations of the Existing Equality Concepts

3.2.1 Direct and Indirect Discrimination

[168] Proposal for a Council Directive COM(2008) 426 of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation
[169] Ibid, Article 3
[170] Mark Bell, 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive' (2009) 3 The Equal Rights Review 7, 8

Some scholars argue that existing forms of discrimination, namely direct and indirect discrimination, may serve as a depositary for the duty of reasonable accommodation.[171] Others disagree claiming that is neither necessary, nor advisable to explore the duty of reasonable accommodation through the lens of 'indirect discrimination' at all, mainly because there is no link to the discrimination criterion.[172]

The notion of direct discrimination is based on the rationale, that particular characteristic is in the vast majority of cases irrelevant for the employment and therefore should be ignored when hiring a person, distributing bonuses, promoting and alike. According to Leonen, direct discrimination on the grounds of religious could be at stake in situations when the employer refused to accommodate 'the symbols of a specific religion only' or 'specific religious expression as opposed to other expression of belief'.[173] For example, companies policy to prohibit wearing *hijab* specifically, while allowing for other head covering, such as turbans or *yarmulke*, can be argued

[171] Bribosia Bribosia, Julie Ringelheim, and Isabelle Rorive, 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?' (2010) 17 Maastricht Journal of European and Comparative Law 137, 156–158; Lucy Vickers, *Religious Freedom, Religious Discrimination, and the Workplace* (Hart Publisher 2009) 223

[172] For the arguments see Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination* (Office for Official Publications of the European Communities 2008) P. The contrasting point: Article 2 of the *United Nations Convention on the Rights of Persons with Disabilities* includes 'denial of reasonable accommodation' as a form of discrimination. For more information on the duty of reasonable accommodation of disability: Lawson, 'Reasonable Accommodation and Accessibility Obligations: Towards a More Unified European Approach?' and Lisa Waddington, 'Future Prospects for EU Equality Law: Lessons to be. Learnt from the Proposed Equal Treatment Directive' [2011] European Law Review 163–184

[173] Titia Loenen, 'Accommodation of Religion and Sex Equality in the Workplace under the EU Equality Directives: A Double Bind for the European Court of Justice' in Katayoun Alidadi and others (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Ashgate Publishing Limited 2012) 79–80

to amount to a direct discrimination on the basis of a particular religion, namely, Islam. At heart of direct discrimination is a violation of fundamental Aristotelian moral principle that 'alike cases should be treated alike'.

However, 'insisting on similar treatment simply reinforces a particular norm and perpetuates disadvantage', Fredman argues. In order to achieve substantive equality, as opposed to the formal equality, the concept of direct discrimination was supplemented by prohibition of 'indirect discrimination'. [174] Indirect discrimination rests on the assumption that 'apparently neutral' provision can disproportionally disadvantage members of a group sharing protected characteristic and thus amount in unequal treatment. For instance, company's 'no headwear' policy might discriminate against Sikh workers who become solely adversely affected by it, as opposed to their non-religious colleagues.[175]

Both direct and indirect forms of discrimination are prohibited under European law. Both forms of discrimination are recognized by the ECtHR[176]

[174] As Justice Burger famously developed the idea of indirect discrimination in *Griggs v Duke Power Co* 401 U.S. 424 (1971): 'Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. It has -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one all seekers can use.'

[175] Employers Forum for Belief in Association with The Business of Faith, 'Religious Diversity in the Workplace: The Guide available at <http://www.efbelief.org.uk/data/files/publications/499/Religious-Diversity-in-the-work-place.pdf>, last accessed 17 March 2012

[176] In *Carson and Others v. the United Kingdom* App no 42184/05 (ECtHR 16 March 2010) ECtHR recognized that differential treatment of persons in 'analogous, or relevantly similar, situations' based on identifiable characteristics is discriminatory (para. 6.1). In *Thlimmenos v. Greece* [GC] App no 34369/97 (ECtHR 6 April 2000) the Court went a step further and found that non-discrimination principle prohibits from failing to 'treat differently persons whose situations are significantly different' (para. 44).

and FED,[177] however particular differences exist when it comes to justification of less favorable treatment. Strasbourg Court has chosen to apply general defense to both forms of differential treatment. It means that discrimination can be justified if objective and reasonable justification exists, in other words, if it does pursue a legitimate aim and there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realized'.[178] Under the EU law almost the same approach is taken regarding justification of indirect discrimination,[179] but defense for indirect discrimination is more specific and narrow. Namely, direct discrimination can only be justified by genuine occupational requirements[180] by application (but only as regards the 'age' ground) of Article 6, of different treatment on the grounds of age. More careful look into jurisprudence of the European courts will also suggest that the CJEU is more likely to consider indirect discrimination in employment cases: e.g. Prais case, discussed above, was decided even prior to FED; while the ECtHR is more reluctant to apply it.

After analyzing the nature of two main discrimination forms, it is important to answer the question whether some scholars are right claiming that a duty of reasonable accommodation is excessive and a non-discrimination

[177] See Chapter 3.1.1
[178] For direct discrimination see *Burden v. the United Kingdom* [GC] App no 13378/05 (ECtHR 29 April 2008) para. 60; for indirect discrimination see *Thlimmenos v. Greece* [GC] App no 34369/97 (ECtHR 6 April 2000) para. 46
[179] See FED Article 2(2)(b) '[…] unless the provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'.
[180] Article 4.

framework, as it stands, can effectively address the requests of religious employee(s).

Let us recall the example of Sikh employees, who are disproportionally disadvantaged by 'no headware' policy. For indirect discrimination a wider evidence of group disadvantage, something beyond numerically small group of workers, is needed. Thus, the situation becomes more complicated, when there is only one Sikh man in the company requesting an exception from uniform policy – since he cannot be considered as 'persons' within the meaning of FED Article 2(2)(b), which by definition implies more than one member, most likely he would not be able to benefit from indirect discrimination prohibition.[181] Reasonable accommodation, on the other hand, requires an individualized analysis,[182] focusing more on the recipient's availability to perform work [183] and the activities that are required [184] and does not require to show a wide group of people who are or would be adversely affected by a 'provision, criterion or practice' in question.[185] Under this duty, the individual employee can request, e.g. to take time off to make a pilgrimage or religious

[181] Lisa Waddington, 'Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability?' (2011) 36 NTM|NJCM-Bulletin 186, 188

[182] ' …employers shall take appropriate measures, where needed in a particular case, to enable a *person with a disability* to have access to, participate in, or advance in employment, or to undergo training…' (emphasis added) (Framework Employment Directive, Article 5).

[183] Waddington and Bell, 'Reflecting on Inequalities in European Equality Law' 8–9. In case of workplace disability accommodation the analysis will have to take into account not only availability, but also ability to perform job.

[184] Waddington, 'Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability?' 188

[185] Ibid, 193

holidays,[186] change a working shift to attend a church on Sunday,[187] to be provided with a praying space[188] or to be exempted from the use of company-wide established biometric hands scanning security system.[189]

It may seem that such situation can be dealt easier under ECHR framework, since the wording of indirect discrimination used by the Strasbourg court is less strict, however this court is less receptive to indirect discrimination (especially as it concerns employment) claims and scholars note that a number of decisions 'seem to step back from [*Thlimmenos v. Greece*] jurisprudence'.[190]

In fact, previously discussed *Eweida* case illustrates the point. On the discrimination claim, the UK Court of Appeal interpreted 2003 Regulation[191] implementing FED as requiring that case 'some identifiable section of workforce, quite possibly a small one, must be show to suffer a particular disadvantage which the claimant shares'. [192] Since there were no employees of

[186] Employers Forum for Belief in association with The Business of Faith, 'Religious Diversity in the Workplace: The Guide'
[187] Ibid, 7
[188] Ibid.
[189] In *407 ETR Concession Co. v. CAW [2007]* three employees claimed that using the biometric scanners installed in the company premises conflicted with their religious beliefs. 'They asserted that a tenet of their faith was that individuals were to avoid being "marked" by three sequential sixes — 666 — which they believed to be the "mark of the Beast," particularly on one's forehead or right hand. According to the employees (and expert testimony provided by a Pentecostal pastor), since the biometric scanners generated a nine-digit number for each employee's hand, the biometric scanners could impose the "mark of the Beast" (i.e., 666) on them and, as a consequence, they would risk damnation.' (Dan Pugen, 'Biometric Hand Scanners vs. Religious Rights' (2007) 1 Co-Counsel: Labour & Employment Quarterly 3, 4)
[190] Bribosia, Ringelheim, and Rorive, 'Reasonable Accommodation for Religious Minorities' 154. Also see Chapter 3.1.1.
[191] Replaced by the United Kingdom Equality Act 2010
[192] *Eweida v. British Airways* Plc [2010] EWCA Civ 80 (12 February 2010) para. 15

British Airways, apart from the applicant, who insisted on wearing a cross, thus she was not considered as a member of an actual (as, according to the appellate court, hypothetical group would not suffice) disadvantaged group and her request constituted a mere 'personal preference'.

Further, closely related to the problem of a group disadvantage is a question of a comparator. The EU anti-discrimination law, as it was developed in the jurisprudence of the CJEU is based on vertical/horizontal comparison:

> *Unfavorable treatment will be relevant to making a determination of discrimination where it is unfavorable by comparison to someone in a similar situation. A complaint about 'low' pay is not a claim of discrimination unless it can be shown that the pay is lower than that of someone employed to perform a similar task. by the same employer. Therefore a 'comparator' is needed: that is, a person in materially similar circumstances, with the main difference between the two persons being the 'protected ground'.*[193]

In order to establish a comparatively unequal treatment the allegedly adversely affected group, which share the protected characteristic ought to be compared with the group sharing the same qualities, except for a protected ground, i.e. women to men, disabled people to the ones without disability and so on. Tobler argues, 'sui generis forms of discrimination, such as reasonable accommodation and harassment, deal with a 'certain, specific result independent of the comparability of situations'.[194] Given the range of peculiarities related to various religious observance, it would be hardly possible to compare highly individualized situations of workers and their

[193] European Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-discrimination Law* 23
[194] Tobler, *Limits and Potential of the Concept of Indirect Discrimination* 23

requests. Moreover, it would not be clear whether they should be compared to their non-religious co-workers or those belonging to the religion of majority (especially as it concerns public holidays and week-ends) or to workers of other minority religions who do not pose similar requests.

In relation to the ECtHR the problem of discriminatory intention should be discussed. Although it is often stressed that the existence of prejudice or an intention to discriminate 'are not actually of relevance to determining whether the legal test of discrimination has been satisfied', the Strasbourg court lacks coherent approach to it. While in Roma segregation case it ruled that it was not relevant whether the police in question targeted primary Roma children,[195] in its most recent judgments it clearly required to prove that differential treatment 'was part of an organized policy or that the hospital staff's conduct was intentionally racially motivated'.[196] Such reasoning unjustifiably raises a bar of proof in discrimination cases and it detrimental for reasonable accommodation claims. For example, a failure to consider Muslim employee's request to take two 15 minutes break instead of one 30-minutes one in order to pray as his religious believes prescribe, would not, most likely, imply Islamophobic motives of the manager. However the failure to enter into a discussion on the mode of accommodation will itself be a breach of a reasonable accommodation duty.

[195] *D.H. and Others v. the Czech Republic* [GC] App no 57325/00 (ECtHR 13 November 2007) paras 175 and 184.
[196] *V.C. v. Slovakia* App no 18968/07 (ECtHR 8 November 2011) para. 177; see also *N.B. v. Slovakia* App no 29518/10 (ECtHR 12 June 2012)

Neither the prohibition of indirect discrimination, nor the duty of reasonable accommodation are not absolute. The fourth major disparity lies within the test applied to justify an adverse effect of 'neutral' treatment. Under the EU Law, indirect discrimination can be justified by the legitimate aim of the pursued measure provided that such the means of achieving the aim are appropriate and necessary. The assessment under this test will anyway take into account the number of affected individuals. On the other hand, in the case of reasonable accommodation (although only in reference to disability) the FED brings up a 'disproportionate burden' test,[197] which is different from the 'traditional' one primarily because it concerns individual situations.

The relationship between 'traditional' forms of discrimination and the reasonable accommodation duty is far from being clear and settled. Annex I summarizes variety of approaches taken by the EU Member States in incorporating this duty, in relation to disability, as they were obliged under FED,[198] into their national legislation. Some of them consider a failure to accommodated disabled employee as indirect discrimination,[199] others – as direct discrimination,[200] third – as just 'discrimination'[201] and the remaining part do not seem to recognize that a failure to comply with accommodation

[197] Ibid, Article 5 and Preamble, Recital 21: 'To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.'
[198] Some Member States went beyond the requirement of EU anti-discrimination law and introduced reasonable accommodation duty in relation to religion or other grounds.
[199] Austria, the Czech Republic, Denmark, Spain.
[200] Belgium, Greece, Sweden.
[201] France, Germany, Malta, Poland, Portugal, Slovakia (a breach of the principle of equal treatment), the United Kingdom.

duty is a form of discrimination at all.[202] As Lucy Vickers notes, due to the inherent differences in the legal concepts of traditional discrimination forms and reasonable accommodation, the absence of statutory obligation of reasonable accommodation creates major disadvantages.[203] It also inhibits the principle of the legal certainty, as the employees cannot predict the outcome of the case as it is unclear what evidence are required to build a *prima facie* case and what justification test would the court apply.

3.2.2 Positive Action

Some commentators[204] argue that reasonable accommodation can be read into the concept of a positive action, found both in FED[205] and the ECtHR Article 14 case-law. Positive action is used to describe a deliberate use of religion (gender, race, etc.) conscious criteria for the purpose of benefiting a group of minorities previously disadvantaged or excluded on the grounds of their religion (gender, race, etc.).[206] A range of measures fall under this umbrella definition, ranging from 'soft' to 'strict' ones, e.g. adoption of action plans to encourage workplace diversity; redefining the standard criterion on

[202] Bulgaria (in some cases was recognized as direct discrimination), Cyprus (the Equality Body recognizes as 'discrimination'), Estonia, Finland, Hungary, Ireland (in some cases was recognized as 'discrimination'), Latvia, Lithuania, Luxembourg, Romania, Slovenia (but the Equality Body in two instances found a failure to provide reasonable accommodation as indirect discrimination).

[203] Vickers, *Religion and Belief Discrimination in Employment – the EU Law* 31

[204] See examples of commentators' positions in Lisa Waddington, 'Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice' (European Commission 2004) 30

[205] Article 7

[206] Kapotas Panagiotis, 'Gender Equality And Positive Measures For Women In Greece', June 10, 2005 4

the basis of which employment or promotion are allocated; provision of training aimed at members of the underrepresented groups; flexible or strict quotas.[207] All of them seek to alter the group representation in a given environment and, (as the duty of reasonable accommodation) require a different treatment of the beneficiary.

Although one may argue that positive action concept is a depositary for reasonable accommodation duty, several arguments seem to discourage from following this lead. Firstly, on a conceptual level, both FED and the ECtHR when dealing with positive action subscribe to the formal equality model: they regard such action as an exception to, rather than illustration of equal treatment. [208] To illustrate the point, in *Belgian Linguistic* case the ECtHR observed that difference in treatment intended to 'correct factual inequalities' was permissible only as long as they responded to factual inequality; after factual inequality disappears, the measure should be no longer applied.[209] Reasonable accommodation, on the contrary, is an aspect of equality itself and it is not temporary in nature. It s not designed to favour religious people over non-religious, it still requires individual to be qualified for the particular work, if he/she is accommodated. Secondly, on a more practical level, a positive

[207] Dagmar Schiek, Lisa Waddington, and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law: Ius Commune Casebooks for the Common Law of Europe* (Hart Publishing 2007) 762

[208] Marc De Vos, *Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC* (Office for Official Publication of the European Communities 2007) 33

[209] *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium* App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECtHR 23 July 1968) para 10

action focuses, similarly to indirect discrimination, on a group disadvantage, while reasonable accommodation is designed to solve individual cases. Lastly and importantly, positive action is optional and targeted at Member States, whereas reasonable accommodation is clearly a duty which is not limited to the State actors, but also covers private employees.

Taking into consideration all that was said above, the concept of reasonable accommodation as developed in this paper, does is not equal to the positive action concept. What unites both concepts is that they may seen as a part of a broad framework of State's positive obligations as both require proactive State involvement in pursuit of equality in practice.

3.3 A Step Closer to a Substantive Equality in Europe: Emergence of a New Discrimination Form

The duty of religious accommodation covers a different sphere from other non-discrimination concepts. As it was argued above, it attaches particular significance to the individual situation of a religious employee by omitting a requirement of a comparator. It answers the argument from equality and justice and, moreover, represents a step closer to a substantive equality by avoiding much criticized, but still operating assimilation model of non-discrimination.[210] Under this duty, the employer is obliged to respect

[210] Assimilation model, which is followed by both European systems, imposes upon employer 'equal treatment of all employees without paying attention to any differences which may exist between them', it 'uses male standard as the yardstick for comparison' (see Ruth Ben-Israel, 'Equality and Prohibition of Discrimination in Employment' in *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (Kluwer 1998) 247–250 and 268–270 'Male standard' is usually defined as 'white, thin, male, young, heterosexual, christian, and

individual manifestation of religion or belief, irrespectively of whether or not it follows generally recognized religious tenants.

Religious accommodation 'restrore[s] infairness, arising from the lack of a certain act (omission), based on the idea that, in some cases, the effect of omission can be just as unfair as an effect of commission, which can be either direct or indirect discrimination'.[211] Reasonable accommodation of disability is introduced as a benchmark of a new social model of disability, which rests on the assumption that disadvantage is created not by physical or psychological impairment, but by a failure of an employer and a society as a whole to create conditions for the integration of the persons with disabilities. Similarly, religious accommodation is a cornerstone of respectful pluralism framework according to which impaired fairness is to be restored not by religion-blindness but by creating conditions allowing employees to expresses their identity; the identity that encompasses a manifestation of religion.

It is also suggested that reasonable accommodation can serve as a remedy when the fact of direct or indirect discrimination is established.[212] However it is not the most effective solution as it does not pursue the best interests of both employers and employees. In labour relations both parties have their own interests, employers – to ensure the uninhibited functioning of the profitable

financially secure' (Audre Lorde, 'Age, Race, Class and Sex: Women Redefining Difference' in *Sister Outsider: Essays and Speeches* (The Crossing Press 1984 116).

[211] Toshihiro Higashi, 'The Prohibition of Discrimination and Three Types of Discrimination Identified in the Convention on the Rights of Persons with Disabilities' (UN Economic and Social Commission for Asia and the Pacific, available at <http://www.unescap.org/sdd/issues/disability/crpd/files/Paper-II-Higashi-20110121.pdf> 12

[212] Ibid, 14

business and employees – to work in a comfortable environment and be remunerated for their work accordingly. Labour conflicts, including discrimination claims, are usually contrary to the interests of both parties. A duty of reasonable accommodation creates a foundation for a dialogue between the employer and the employee where both of them have certain duties (employee – to prove sincerity of belief, request accommodation; employer – to consider and to provide accommodation). Where the duty of reasonable accommodation is merely a remedy, employer is burdened to build at least a *prima facie* discrimination case at the court to prove an adverse treatment and only in the very end enter into discussion as to the mode of accommodation. Given that court proceedings often irrevocably impede fiduciary employment relations, such claims end up being resolved as a matter of dismissal and damages, rather than accommodation.

The above analysis demonstrates that there are strong grounds to disagree with Tobler who argues that a breach of reasonable accommodation duty is 'a breach of a positive obligation, which does not need any further or specific label'.[213] There are also strong arguments for treating religious accommodation as a sui generis form of discrimination. Such qualification automatically raises questions about its contours and limitations which are to be discussed in the next chapter.

[213] Scholars also disagree on what does the Article 2(2)(b)(ii) is supposed to mean and there is no case-law to support/strongly disagree with any of the positions. On the discussion see Tobler, *Limits and Potential of the Concept of Indirect Discrimination* 53

CHAPTER 4. LEARNING A LESSON: A FAILURE TO ACCOMMODATE RELIGION AS DISCRIMINATION *SUI GENERIS*

Title VII of the U.S. The Civil Rights Act requires an employer, once notified, reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement. In religious accommodation claims do not pose a question whether employees were treated equally, at least not in the formal equality sense. In fact, an individual seeks an adjustment to a neutral work rule that infringes his ability to manifest and practice his religion or belief. The last chapter will aim at determining whether and how American practice can assist in the resolution of religious conflicts in the workplace and whether it is feasible to transpose the reasonable accommodation model developed in the U.S. to the European system.

4.1Evolution of Religious Accommodation Duty in the U.S.

The Civil Rights Act 1964 was enacted to eradicate discriminatory practices employed by private actors.[214] Initially Title VII of the Act, which outlaws discrimination in the employment, was envisioned by the drafters as a tool to combat 'race, creed ad ancestry' bias, without any mention of religion.[215] Given unfortunate legacy of the country such situation is

[214] Mack A. Player, 'Coverage and Scope of the Equal Pay Act' in *Employment Discrimination Law. Cases and Materials* (Westlaw Publisher 1990) 149

[215] Keith S. Blair, 'Better Disabled than Devout? Why Title VII. Has Failed to Provide Adequate. Accommodations Against Workplace. Religious Discrimination' (2010) 63 Arkansas Law Review 515, 521

understandable and, it is curious to note that thirty-five years later on the other side of the Atlantic, experts for the EU were facing the very same dilemma – 'whether more than just race and ethnicity should be addressed in the first stage', i.e. in the first European-wide anti-discrimination act.[216] Both the U.S. and Europe eventually broadened a range of protected grounds, including religion as one of them.

However Title VII as it was originally enacted did not impose religious accommodation duty on the employer – it merely barred discriminatory actions on the part of employer. In addition to the statutory regulation, US Equal Employment Opportunity Commission in 1967 Regulation stated that 'employers must accommodate employees' religious needs unless the accommodation would be an undue hardship to the employer'.[217]

Judicial approach towards religious discrimination claims at that time can be illustrated by *Dewey v. Reynolds Metals* case.[218] Mr. Dewey, member of the Faith Reformed Church, was employed at Reynolds as a dye repairman. According to the collective agreement between the company and its employees, the employees were under obligation to perform all overtime work 'except when an employee has a substantial and justifiable reason for not working'. When after 14 years of work Mr. Dewey was scheduled to work on Sunday, he refused to do so because his according to his religious beliefs it

[216] Allen QC, 'Article 13 EC, Evolution and Current Contexts' 38
[217] Blair, 'Better Disabled than Devout? Why Title VII. Has Failed to Provide Adequate. Accommodations Against Workplace. Religious Discrimination' 522
[218] *Dewey v. Reynolds Metals* 402 U.S. S. Ct. 689 (1971) . Decision of the 6th Circuit affirmed by an equally divided Court.

was holy day – Sabbath. Until August 28, 1966 Mr. Dewey was able to find a replacement when he was asked to report for work on Sunday. After that date he refused to either work or to seek a replacement and was fired for a failure to follow collective bargain overtime clause.

Although the district court favored Mr. Dewey's claim that a collective-bargaining decision discriminated him on the basis of his religious believes, the 6th Circuit Court found for the company.[219] It found that providing Mr. Dewey with the requested exception would constitute a reverse discrimination of the employees. Importantly, the 6th Circuit rejected the EEOC Regulation, since, according to the Court, compelling an employer to accommodate religious beliefs in the workplace would constitute a violation of the Establishment Clause.

Responding to *Dewey*, Senator Jennings Randolph, who was a Seventh Day Baptist himself, proposed the amendment to the Title VII which tracked the EEOC Regulation mentioned above.[220] The Congress passed the amendment, which modified definition of religion and *de jure* established duty of reasonable accommodation. Section 2000e(j) now reads as follows:

> *The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.*

[219] *Dewey v. Reynolds Metals* 429 F.2d 324 (6th Cir. 1970)
[220] Blair, 'Better Disabled than Devout? Why Title VII. Has Failed to Provide Adequate. Accommodations Against Workplace. Religious Discrimination' 523

On a positive side the courts adhere to the broad reading of 'religion', which does not require belonging to an organized religious sect.[221] In order to establish a *prima facie* discrimination case under Title VII the employee should show that (1) he has a *bona fide* belief and employment requirement conflicts with it (2) he informed employer about the conflict (3) employer discharged or disciplined him for the refusal to comply with the requirement in conflict.[222] Once *prima facie* case is established, the burden of proof shifts to the employer, who has 'to prove that they made good faith efforts to accommodate [employees] religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship.[223]

On a negative side, a new amendment failed to provide any guidance on the content of 'reasonable accommodation' or 'undue hardship' thus leaving to the courtesy of the judicial branch. Further will look into two seminal cases decided by the U.S. Supreme Court – *Trans World Airlines, Inc. v. Hardison* [224] and *Ansonia Board of Education v. Philbrook* [225] – to show that the judicial branch hardly pursued the same religion-protective vision as the one of the Congress.

[221] Joan A. Evans, 'Religious Accommodation in the Workplace: Can We Strike a Balance? (Schmidt Labor Research Center Seminar Paper Series, University of Rhode Island)', 2007 2–3, available at <http://www.uri.edu/research/lrc/research/list.htm> last accessed 3 August 2012
[222] *Anderson v. General Dynamics Convair Aerospace Division* 589 F.2d 397 (9th Cir. 1978), para 15
[223] Ibid, para 16
[224] *Trans World Airlines, Inc. v. Hardison* 432 U.S. 63 (1977)
[225] *Ansonia Board of Education v. Philbrook* 479 U.S. 60 (1986)

4.1.1 Hardison and the 'Undue Hardship' Test

The first out of two religious accommodation cases decided by the U.S. Supreme Court after the enactment of the amended Title VII is – *Trans World Airlines, Inc. v. Hardison*. Mr. Hardison worked as a clerk for Trans World Airlines, in the department which operated 24/7 365 days a year. Being a member of the Worldwide Church of God he informed the authority he was not able to work from sunset Friday till Sunday as he observed Sabbath. In exchange, he proposed himself to work during traditional holidays or to work only four days a week. The company rejected his proposal and eventually Mr. Hardison was fired.

The District Court found that accommodating Mr. Hardison would resulted in the undue hardship on employer, while the 8th Circuit Court of Appeal reversed the judgment.

The Circuit's judgment was reversed by the U.S. Supreme Court which found in favor of the employer. From the outset the Court recognized that a newly-introduced reasonable accommodation duty was intended to change the result of *Dewey* case, but 'it [told the Court] nothing about how much an employer must do to satisfy its statutory obligation'. The Court established that requiring the employer to incur more than *de minimis* cost to accommodate employee's religious beliefs would constitute undue hardship. Finally the Court reiterated reverse discrimination argument spelled out in Dewey linking it to undue hardship defense. The Court stated that proposed

accommodation would lead to a disparate treatment of other employees – this fact itself constituted an undue hardship.

The judgment was extensively criticized by the scholars as 'limit[ing] the [Congress enacted] amendment to the extent that it became meaningless'.[226] Indeed in this landmark case the Court took on inflexible approach contrary to the intent of the Congress and the idea of substantive equality. As Justice Marshall argued in his dissenting opinion, reasonable accommodation allows unequal treatment to the extent it does not impose undue hardship on the employer. It is true that unequal treatment won't amount to discrimination, because the employees are in different situations – Mr. Hardison's religious beliefs preclude him from working on Sabbath, while other employees beliefs do not. If a reverse discrimination argument is rebutted, '*de minimis'* rule remains too vague to be applied. It is not clear why *de minimis* costs appear in the *stare decisis* on the first place, it is even more unclear how the Court expects them to be estimated. The ultimate critique, also expressed by Justice Marshall, was that the Court avoided engagement into balancing exercise between *equal* interests of employee and the employer.

4.1.2 Philbrook and the Duty of 'Reasonable' Accommodation

[226] Huma T. Yunus, 'Employment Law: Congress Giveth and the Supreme Court Taketh Away: Title VII's Prohibition of Religious Discrimination in the Workplace' (2004) 57 Oklahoma Law Review 657

Three years after *Hardison* judgment the EEOC published the Guidelines on Discrimination Because of Religion[227] aiming at clarifying employers responsibilities under reasonable accommodation duty and mitigating negative effects produced by *Hardison*. The Guidelines required employer to act upon employees accommodation request: to determine and evaluate all available accommodation options and provide the one which least disadvantages the employee.

The weight of the Guidelines was tested in the second US Supreme Court religious accommodation case, *Ansonia Board of Education v. Philbrook.*[228] Mr. Ronald Philbrook, a member of a Worldwide Church of God, was employed by the Ansonia Board of Education as a high school teacher. His religious beliefs barred him from working during religious holidays, thus making him to miss around six working days throughout the year. According to the collective bargaining agreement, the school district allows a paid leave for religious holidays to three days and allotted additional three days of paid leave fore personal reasons, which could not be used for the same purpose as other leave provided, meaning for the religious holidays. Mr. Philbrook 'repeatedly asked the Board either to adopt the policy of allowing use of the three days of personal business leave for religious observance or, in the alternative, to allow him to pay the cost of a substitute and receive full pay for additional days off for religious observances. The Board consistently

[227] U.S. Equal Employment Opportunity Commission 'Guidelines on Discrimination Because of Religion', 29 C.F.R. Part 1605
[228] *Ansonia Board of Education v. Philbrook* 479 U.S. 60 (1986)

rejected both proposals'. Deciding the case under Title VII the U.S. Supreme Court held that the statutory rule did not require an employer to choose any particular accommodation, moreover 'any reasonable accommodation by the employer is sufficient to meet its accommodation obligation'. As to the EEOC Guidelines the Court stated that 'to the extent that the guideline,… requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute'.[229] The majority concluded that the Board complied with accommodation duty by providing Mr. Philbrook with an opportunity to take unpaid leave.

There are two major problems with the Court's ruling. Firstly and most obviously, the Court followed a much criticized line of narrowing down a religious accommodation duty thus rendering it practically ineffective. It did nothing to mitigate unequal situation of an employer and an employee by putting the latter into loose-loose situation: either to accept even the most ridiculous accommodation offered by the employer or to give up on the religious observance. Secondly, as Justice Marshall highlighted in his dissent, the Court's reasoning rested on the selective reading of the Guidelines – while relying on authoritative Commission's interpretation in one cases, it completely ignored it and even contradicted it in the other.

[229] Ibid, Footnote 6.

4.1.3 Controversy around the Workplace Religious Freedom Act

On the federal level the standard now is set by two cases described above, however, similar to the diversification of the anti-discrimination standards in the European Union, some of the U.S. states extend protection from religious discrimination beyond one required by the Title VII and the Supreme Court's interpretation.[230] To change Court-set standard, the piece of legislation known as the Workplace Religious Freedom Act (WRFA) has been unsuccessfully proposed since 90s (the initial proposal was amended several times).[231]

The most recent draft amendments were proposed by Senator John Kerry: they primarily addressed 'requests for accommodation with respect to garb, grooming, and scheduling due to employees' religious practices', clarifying what constitutes reasonable accommodation and acceptable employer's defense.[232] Notably, in respect to the latter, the author abandons 'undue hardship' test present today in the Title VII and uses the same test, but as established under the Americans with Disabilities Act (ADA).[233] Without further discussion on the prospects of this draft amendment, it should be

[230] U.S. Equal Employment Opportunity Commission, 'Compliance Manual on Religious Discrimination', s. 12

[231] For the timeline of the draft amendments to the Title VII see Federal Legislation Clinic at Georgetown University Law Center, 'Title VII and Flexible Work Arrangements to Accommodate Religious Practice & Belief' (2005) Paper 2 Charts and Summaries of State, U.S., and Foreign Laws and Regulations.

[232] 'S. 4046 (111th): Workplace Religious Freedom Act of 2010' (December 17, 2010) available at <http://www.gpo.gov/fdsys/pkg/BILLS-111s4046is> last accessed 6 August 2012

[233] '[A]ccommodation of such a religious practice shall be considered to impose an undue hardship on the conduct of the employer's business only if the accommodation imposes a significant difficulty or expense on the conduct of the employer's business when considered in light of relevant factors set forth in section 101(10)(B) of the Americans with Disabilities Act of 1990' (ibid, Section 4(a)(3)).

highlighted criticism has been already raised against modeling the religious accommodation claims regime after the ADA.[234] The major problem is that while deciding religious accommodation claims certain consideration should be given to guarantees under Free Exercise and Establishment Clauses, especially as it concerns public sector employment, while it is not the case in disability discrimination cases. Religious freedom guarantee substantively changes legal analysis and thus it is highly doubtful whether a blind transposition of test under ADA can be successful.

4.2 Analysis of Religious Accommodation Cases: Balancing Interests

As Silberg writes, 'variety of outcomes in religious accommodation cases is a function not of the diverse fact patterns of the cases, but rather of the individual court's theoretical assumptions about the interests to be balanced.'[235] She suggests three interpretative models adopted by the U.S. courts to balance the interests in religious accommodation cases, namely (1) the Individual versus the Group; (2) Free exercise versus Establishment; (3) Religious Interests versus Business Interests.[236]

Applying the first interpretative approach, the Courts usually considers the reasonableness of the accommodation based on its effect on co-workers. Often

[234] Blair, 'Better Disabled than Devout? Why Title VII. Has Failed to Provide Adequate. Accommodations Against Workplace. Religious Discrimination'
[235] Sara Silbiger, 'Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since *Trains World Airlines v. Hardison*' (1985) 53 Fordham Law Review 839, 849
[236] Ibid, see also Yunus, 'Employment Law: Congress Giveth and the Supreme Court Taketh Away: Title VII's Prohibition of Religious Discrimination in the Workplace'

the interests of the latter are found to prevail over the interests of an individual. As it was already said, it echoes the second norm limiting Hicks presumption of inclusion – non-coercion. Therefore it is difficult to agree with Silbiger who states that 'a court's sensitivity to the objections of grumbling workers (…) may sound a democratic theme, but such concerns have no place in religious accommodation cases.'[237] Principle of non-coercion is closely related to the idea that human beings are equal in their dignity and thus there is nothing to justify unwanted intrusion into a personal life and space of a co-worker by, for example, aggressive proselytizing. On the other hand, being a valid consideration such limitation should be applies with particular caution. Otherwise, a danger that a will of majority will trump the behavior that is not coercive in nature, but simply unpopular.

In Burns the employer argued the 'undue hardship' case 'upon opinions that "free rider" problems could cause serious dissension among employees, resulting in inefficiency of operation'.[238] The Court noted that witnesses in their statements 'did not attempt to relate a general sentiment against free riders either to Burns or to a person who [is] like Burns' and found that '[u]ndue hardship requires more than proof of some fellow-workers' grumbling or unhappiness with a particular accommodation to a religious

[237] Silbiger, p. 852.
[238] *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir.1979) para 3

belief. An employer or union would have to show (…) actual imposition on co-workers or disruption of the work routine'.[239]

In contrast with a solid benchmark established in *Burns*, is the case of *Brener*.[240] Alike with *Hardison*, the employee requested schedule changes that would avail him not to work during the Sabbath. The employer proposed to trade shifts with other employee: that, according to him, 'resulted in disruption of work routines and a lowering of morale among the other pharmacists'.[241] Although the Court found that the accommodation in this case implied more than *de minimis* costs,[242] the reasoning is flawed. In fact the employer did not make steps to accommodate Mr. Brener – shifting a burden of accommodation to the co-workers and than arguing that such arrangement resulted in their resistance *ab initio* can not be considered 'reasonable'.

The second interpretative model is adopted by the U.S. courts in cases concerning public employers,[243] when their primary defence is that accommodation requested by an employee would create 'an implied

[239] Ibid, para. 11. Similarly in a race discrimination case brought under Title VII the Second Circuit pointed out : '[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed' (*United States v. Bethlehem Steel Corp*., 446 F.2d 652, 663 (2d Cir. 1971) para 30).

[240] *Brener v. Diagnostic Center Hosp.*, 671. F.2d 141, 146 (5th Cir. 1982)

[241] Ibid, para 20

[242] Ibid.

[243] Government employees often raise claims arguing both a violation of Title VII and of a Free Exercise Clause. Due to the space constraints, this thesis will focus on Title VII case-law, without analyzing constitutional jurisprudence. For an analysis of the cases on religious exemptions decided under First Amendment Free Exercise Clause see W. Cole Durham, Jr. and Brett G. Scharffs, 'Chapter Six: Limitations on Religious Actions and Manifestations: The United States Experience' in *Law and Religion: National, International and Comparative Perspectives* (Aspen Publishers 2010). In particular, the relevant cases are *Sherbert v. Verner* S. Ct. 383 U.S. 398 (1963) (employment), *Wisconsin v. Yoder* 406 U.S. 205 (S. Ct. 1972) (education), *Employment Division v. Smith* 494 U.S. S. Ct. 872 (1990) (employment).

endorsement of (…) religion'.[244] In other words, these are the cases where a potential breach of an Establishment clause is involved. The essence of the Establishment Clause is that the Government should be entirely excluded from the area of religious instructions and vice-versa; religion should remain a private matter. The courts recognize that while some involvement and entanglement are inevitable, lines must be drawn.[245] Under Hicks' respective pluralism theory, anti-establishment is also one of the valid limiting norms, however he looks at it from the perspective of an employee – given the diverse backgrounds of workers, it is morally unacceptable for the employer to promote one and particular spiritual worldview.

In cases whether requested accommodation could reach a level of establishment, the courts hold that such accommodation it exceeds the level of *de minimis* costs and amounts to a 'undue hardship' on the part of the employer.[246] The Establishment Clause is not offended by governmental action if (1) the action has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not create an excessive entanglement of the government with religion.[247] A positive example of the application of this test is *Draper v. Logan County Pub. Library,* where the district court found that the employee working in the library and wishing to

[244] Yunus, 'Employment Law: Congress Giveth and the Supreme Court Taketh Away: Title VII's Prohibition of Religious Discrimination in the Workplace'
[245] See e.g. *Lemon v. Kurtzman* 403 S.Ct. U.S. 602 (1971)
[246] Silbiger, 'Heaven Can Wait' 854
[247] Known as a 'Lemon test' (from *Lemon v. Kurtzman* 403 S.Ct. U.S. 602 (1971))

wear necklace with a cross should have been accommodation.[248] It found that library's Establishment Clause concern invalid, because

> *Permitting library employees to wear her cross pendants and other unobtrusive displays of religious adherence would not have a religious purpose, would not excessively entangle the government with religion, and, most importantly, could not be interpreted by a reasonable observer as governmental endorsement of religion.*[249]

The court also gave further directions saying that [a] different conclusion might be justified, if for example, the library allowed employees to actively proselytize or if it permitted religious banners or slogans to be hung from the rafters'.[250] It seems that it puts a particular emphasis on the third prong of Lemon test – entanglement prong – looking into whether an external observe could reasonably conclude from the actions of the employee that the public institutions endorses particular religion or a set of beliefs.

The same line of reasoning was followed in the district court's judgment in the case of Reardon, Muslim teacher, who was prohibited from wearing her religious dress at school.[251] The court rejected schools argument based on the Establishment Clause, finding that 'there was a lack of evidence in the record of students perceiving the wearing of such garb as indicating state endorsement of religion'.[252] However, the judgment was reversed on appeal, where the appellate court held that such accommodation would send a

[248] *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2005)
[249] Ibid.
[250] Ibid.
[251] *United States v. Board of Education for the School District of Philadelphia* 911 F. 2d 882 (Court of Appeals 3d Cir. 1990)
[252] Ibid.

message that religion is preferred over non-religion and thus the school would incur more than *de minimis* costs.

According to Silbiger, only the third interpretative model truly reflects the purpose of Title VII; it provides 'flexible but predictable for analyzing a wide variety of accommodation problems'.[253] The analysis consists of two steps: (1) the courts consider whether the employer proved a financial cost of accommodation; (2) it will be determined how well the employer can bear those costs.[254]

A number of factors are relevant when assessing potential financial loss of the employer, namely 'the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.'[255] For example in *Cooper*, the court found that re-scheduling work so that the employee could observe Sabbath would pose undue hardship for employer because he would need to hire an additional worker. [256] But in *Protos* the same accommodation request would not amount to undue hardship as 'efficiency, production, quality and morale of [the employee's] segment of the Trim Department and the entire assembly line remained intact without her'.[257] The determination of the hardship is based on fact-specific, objective considerations, not mere hypothetical challenges.

[253] Silbiger, 'Heaven Can Wait' 857
[254] Ibid, p. 858-861
[255] Equal Employment Opportunity Commission (the United States), 'Compliance Manual on Religious Discrimination No. 915.003' s. 12(B)
[256] *Cooper v. Oak Rubber Co.*, 15 F. 3d 1375 (Court of Appeals, 6th Circuit 1994)
[257] *Protos v. Volkswagen of America, Inc.*, 797 F. 2d 129 (Court of Appeals, 3rd Cir. 1986)

There are several other types of cases which Silbiger for some reasons omits from her analysis, but which still would fall under 'business necessity' heading. Some types of accommodation may have effects on the customers and thus affect business considerations of the employer. The courts conclusion will highly depend on 'the nature of the [employee's] expression, the nature of the employer's business, and the extent of the impact on customer relations.'[258] For instance, it was found that allowing the employee, a nurse-consultant, to evangelize the customers would constitute an undue hardship,[259] but greeting the customers with phrases such as 'God Bless You' and 'Praise the Lord' would not.[260] In the latter case the courts were particularly mindful of insignificant effect of accommodation - the employer produced no evidence of decreased use of the cafeteria among customers. Also there might be security requirements imposed on the business by federal, state or local law. If requested accommodation breaches such requirements, it constitutes an undue hardship. The employer ought to be more flexible, when security requirements were unilaterally imposed by himself (herself).[261]

Although Silbiger is critical about first two interpretative models, both of them fall neatly with the Hicks' moral theory of respectful pluralism and correspond to the limitations he outlined. What we've observed through the

[258] Equal Employment Opportunity Commission (the United States), 'Compliance Manual on Religious Discrimination No. 915.003' s. 12(C)(6)(b)
[259] *Knight v. Connecticut Dept. of Public Health,* 275 F.3d 156 (2d Cir. December 12, 2001)
[260] *Banks v. Service Am. Corp.*, 952 F. Supp. 703 (D. Kan. 1996)
[261] Equal Employment Opportunity Commission (the United States), 'Compliance Manual on Religious Discrimination No. 915.003' s. 12(B)(5)

analysis of relevant jurisprudence is that the courts are not consistent when applying otherwise valid principles to different factual circumstances. It might be determined by restrictive interpretation of employers' duties adopted in two seminal Supreme Court cases described above. The third interpretative model although does not have a corresponding 'limiting norm' under Hicks' model, is still justified by what he calls 'legitimate safety and efficiency reasons' and 'legitimate end of profit-seeking by companies'.[262] Indeed, a range of variable was developed by the courts to assess whether and how particular accommodation would affect companies' business matters, but it does not deem first two interpretative models useless or, moreover, lawless. Further analysis will show how European courts can use good examples coming from all three types of analysis to enhance their reasoning in accommodation type cases.

4.3 Evaluation Form: Was the Lesson Worth Learning?

Notwithstanding the described weaknesses of religious accommodation claims' adjudication, the U.S. has advanced much further than Europe in providing a legal basis to solve religious conflicts in the workplace. Crucially, a duty of reasonable accommodation on the grounds of religion is explicitly stipulated in the U.S. non-discrimination law. The process of accommodation is dialogue-based and requires genuine efforts from both employee and employers. If the informal dialogue is unsuccessful and the case is brought

[262] Hicks, 'Religion and respectful pluralism in the workplace' 37–38

before the court, the absence of such efforts would be used against by the other party and would play a major role in the court's decision.

An employee has to establish a *prima facie* case of failure to accommodate by showing that he (i) holds a sincere religious belief that conflicts with an employment requirement; (ii) has informed the employer about the conflict;[263] (iii) was discharged or disciplined for failing to comply with the conflicting employment requirement.[264] After a *prima facie* case is established, the burden of proof shits to the employer who has to show that he: (i) made a good faith effort to accommodate the conflicting religious belief or practice; or was not able reasonably to accommodate the employee without experiencing undue hardship.[265]

The ECtHR's reasoning in accommodation type cases could benefit from 'cooperative information-sharing process between employer and employee'[266] endorsed by the U.S. courts. In particular, when determining whether manifestation of religion or belief was at place, the Court would avoid making an unnecessary inquiry into the content of theistic doctrines if it analyzed 'the subjective good faith of an adherent' so to 'protect only those beliefs which are held as a matter of conscience'. [267] It could also introduce an

[263] 'An employee who is disinterested in informing his employer of his religious needs "may forego the right to have his beliefs accommodated by his employer"' (*Redmond v. GAF Corp*., 574 F.2d 897 (7th Cir. 1978)).
[264] Test was developed in *Ansonia Board of Education v. Philbrook* 479 U.S. 60 (1986)
[265] Ibid.
[266] Equal Employment Opportunity Commission (the United States), 'Compliance Manual on Religious Discrimination No. 915.003' *supra note* 122.
[267] 'Sincerity analysis seeks to determine the subjective good faith of an adherent .... The goal, of course, is to protect only those beliefs which are held as a matter of conscience'*(Int'l*

additional safeguard against unsubstantiated claims by looking into whether the applicant provided 'enough information about [his] religious needs to permit the employer to understand the existence of a conflict between [his] religious practices and the employer's job requirements'.[268]

As it concerns the question of interference, it would be found in all situations where the applicant suffered adverse consequences after bringing his accommodation claim to the employer. It would allow avoiding unreasonable and much criticized 'freedom of contract' 'mantra'. To justify the necessity of interference the State would be required to show that an employer took the initial steps to provide accommodation, the mere 'neutrality' would not suffice.[269]

It is not advisable, however, for the ECtHR to blindly follow the way paved by the U.S. courts. In particular, it was already determined that the standard set out in *Philbrook* compromises the underlying idea of Title VII when compelling an employee to accept any accommodation proposed by the employer. To be considered reasonable, 'the accommodation must in fact resolve the conflict between the job requirements and the employee's spiritual

Society for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981)). Durham also agrees that the government 'should accept people's description of their beliefs as religious unless it has a compelling reason not to', in particular when believes are not held sincerely and religiosity claims are made of fraudulent reasons (W. Cole Durham, Jr. and Brett G. Scharffs, *Law and Religion: National, International and Comparative Perspectives* (Aspen Publishers 2010) 52-55)

[268] *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993)

[269] *Riley v. Bendix Corp*., 464 F.2d 1113, 1115 (5th Cir. 1972)

obligations.'[270] An employer is not obliged to provide employee's preferred accommodation,[271] but should expect to bear additional costs as long as they do not meet undue hardship threshold.

Undue hardship defense, in details examined in the previous section, could be *mutatis mutandis*[272] applied by the ECtHR where considering necessity of the interference. Specifically, the Court could engage in the balancing exercise between such interests as business necessity, neutrality of the workplace, safety requirements and non-coercion of co-workers on the one hand and the importance of ensuring religious freedom of a particular employee and a broader interest of a plural workplace, on the another hand. It would require a fact-specific inquiry thus strengthening the reasoning of the Court and eliminating superficial decisions from the jurisprudence. Along the same line, in the pending case of *Eweida* the ECtHR could look into justifications behind the no accessories policy of the British Airlines. Was the employer concerned about endorsing a particular religion and, if yes, how justified such concerns were? Was the justification based on a business necessity and, if yes, what particular business interests were at stake?

[270] Equal Employment Opportunity Commission (the United States), 'Compliance Manual on Religious Discrimination No. 915.003' S 12(A)(1) . See also *Bruff v. N. Mississippi Health Serv*., Inc., 244 F.3d 495

[271] *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002)

[272] In particular, the ECtHR should take a critical approach towards *de minimis* rules as formulated in *Hardison*. For the reasons see s. 4.1.1.

When considering *Ladele* case, the Court could contrast it with *Noesen*[273] and *Shelton*[274] cases where the transfer of a pharmacist and a nurse, who conscientiously objected to particular work duties (selling contraceptives and performing abortion procedures accordingly), was considered as a reasonable accommodation. The Court could ask what steps did Islington take to accommodate Ms. Ladele's religious believes, whether any good faith efforts on Islington's part were involved at all. Such inquiry is consistent with the ECtHR's review performed in *Jakobski* and *Bayatyan* cases.

As to the question of transposing a reasonable accommodation duty into the EU legislation, certain lessons can be learned from ongoing debate around a Workplace Religious Freedom Act. Although having such duty endorsed on the supranational level could potentially enhance position of religious employees, the duty ought to be formulated with particular precision so to avoid ambiguity and judicial interventions capable of undermining a good intent of the drafters. The link with existing discrimination forms (direct and indirect discrimination) should also be clearly articulated.

[273] *Noesen v. Med. Staffing Network*, Inc., 2007 WL 1302118 (7th Cir. May 2, 2007)
[274] *Shelton v. University of Medicine and Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. August 10, 2000)

CONCLUSIONS

In 2005, when federal Commission for Intercultural Dialogue in Belgium commenced the report tackling the issue of reasonable accommodation, it stated its objective as to

> *[t]ake stock of the issues related to a multicultural society as it develops in Belgium (…) neither avoiding the 'tough' questions nor becoming blind due to media hype around certain elements (headscarf, terrorism, international context…) which, even though important, sometimes hides the daily reality of 'living together'.*[275]

The thesis equally raised complicated questions of religious conflicts in the workplace with the aim to determine whether the employees can successfully pursue religious accommodation claims under the current European legal framework and how the United States experience can assist the courts in adjudicating such requests. The performed research has shown that as far as the ECtHR is concerned, its analysis of accommodation type cases, whether performed under Article 9 or Article 9 in conjunction with Article 14 is not systematic or coherent. While it recognizes States' positive obligation to accommodate religious needs of prisoners and provide alternative service to those objecting to the military draft, freedom of conscience and religious of the employees is not equally protected. Such position goes contrary to the argument from liberty and equality, and is not pragmatic human resources management-wise, as Drucker's theory has

[275] Edouard Delruelle and Rik Torfs, 'Rapport final Commission du Dialogue interculturel' (Commission du Dialogue Interculturel May 2005). Translation from Emmanuelle Bribosia, Andrea Rea, Julie Ringelheim, and Isabelle Rorive, 'Reasonable Accommodation of Religious Diversity in Europe and in Belgium: Law and Practice' in Andrea Rea and others (eds), *The Others in Europe* (Université de Bruxelles 2011) 104

proved. Moreover, it adds nothing to the creation of a pluralistic and respectful European workplace. The author found that Hicks' model of respectful pluralism constitutes a strong moral ground for the accommodation of religious employees and can be practically applicable when adjudicating cases involving such claims.

On the European Union level a duty o reasonable accommodation does not extend to religious minorities and, contrary to the assertions of some scholars, cannot be deducted from those forms of discrimination which are stipulated under FED. Contrary to direct or indirect discrimination, it attaches particular significance to the individual situation of a religious employee by omitting a requirement of a comparator, 'group disadvantage' and adopting an individualized dialogue-based approach. Most importantly, it represents a step closer to a substantive equality by avoiding much criticized, but still operating assimilation model of equality.

In comparison with European 'model', the U.S. non-discrimination law is more advanced, however cannot be followed blindly since not all Title VII jurisprudence is consistent with the underlying aim of the Act. The author found that two seminal Supreme Court cases had an adverse effect on fleshing out the notions of 'reasonableness' and 'undue hardship'. Nevertheless a number of good examples can be extracted from the lower courts jurisprudence, specifically as limitations to this duty are concerned. The last section of the fourth chapter provided suggestions on how these examples can

be channeled to the European setting, to assist both the courts and the legislators.

The cases of four employees who failed to ascertain the United Kingdom courts are currently pending before the ECtHR. The findings of this thesis suggest that there are good reasons for the Court to abandon its earlier approach towards the claims of religious employees and start exercising fully-fledged European supervision, instead of superficial review. The benchmarks proposed should serve as a valid stating point to build on, and the U.S. experience is an immense source of inspiration.

On a broader scale the thesis touches upon more overarching issues such as a status of religion in the modern European states. The common thread appearing in many European countries 'has been invoking illiberal policies in order to maintain the strictly secular stats quo'[276] and religious employees became the primary targets of such policies. The courts appear to be unprepared to deal with the employee's complaints, but further in time

> *in a society (certain) religious practices become automatically equated with trouble and elicit resentment, and when—as a consequence—this negative perspective is (unquestioningly) copied into the norms and practices that govern the workplace.*[277]

In times when the European Union is facing enlargement, an efficient resolution of such conflicts, including an adequate judicial and legislative response, is crucial. However, religious differences should not be viewed in

[276] Hughes, 'Freedom of Religion in a Globalized World: The European Experience' 74
[277] Katayoun Alidadi and others (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Ashgate Publishing Limited 2012) 10

vacuum, the broader quest for the place of the Other in a diverse societies should be made. The inquiry into a multi-faced diversity encompassing intersecting identities will also challenge for the 'hierarchy of equality' which is now visible in Europe. This thesis aimed to make a small contribution to these fundamental debates and what emerged is, as Alidadi puts it 'a call for a common and positive language to develop thoughtful, contextual and innovative ways to deal with the tensions that can arise with respect to religion at work'.[278]

[278] Ibid.

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ANNEX I

COUNTRY[i]	DATE OF THE REPORT	RA[ii] – RELIGION[iii]	RA – DISABILITY	RA – OTHER GROUNDS	WHAT CONSTITUTES A FAILURE TO PROVIDE RA?
1. AUSTRIA	**1 JAN 2012**	**P[iv]**	**Y**	**P (Viennese law – all grounds)**	Indirect discrimination
2. BELGIUM	**31 DEC 2009**	**P[v]**	**Y**	**P (Flemish Decree – ethnic origin)**	Discrimination.
3. BULGARIA	**1 JAN 2011**	**P[vi]**	**Y**	**P (pregnant and nursing women)**	A failure to provide reasonable accommodation is not defined as discrimination, however in several cases it was recognized as direct discrimination.
4. CYPRUS	**1 JAN 2012**	**N**	**Y**	**N**	A failure to provide reasonable accommodation is not defined as discrimination, but decisions of equality body recognize it as such.
5. THE CZECH REPUBLIC	**1 JAN 2012**	**N**	**Y**	**N**	Indirect discrimination.
6. DENMARK	**1 JAN 2012**	**N[vii]**	**Y**	**N**	Indirect discrimination.
7. ESTONIA	**1 JAN 2012**	**N[viii]**	**Y**	**N**	A failure to provide reasonable accommodation is not defined as discrimination.
8. FINLAND	**1 JAN 2012**	**N**	**Y**	**N**	A failure to provide reasonable accommodation is not defined as discrimination.

9. FRANCE	**1 JAN 2012**	**N**	**Y**	**N**[ix]	Discrimination.
10.GERMANY	**1 JAN 2011**	**P**[x]	**Y**	**P (older people)**	Discrimination.
11.GREECE	**1 JAN 2012**	**N**	**Y**	**N**	Direct discrimination.
12.HUNGARY	**1 JAN 2012**	**N**	**Y**	**N**	A failure to provide reasonable accommodation is not defined as discrimination.
13.IRELAND	**1 JAN 2011**	**N**	**Y**	**P (language)**	A failure to provide reasonable accommodation is not defined as discrimination, but in the case-law it is recognized as such (without specifying the form of discrimination).
14.ITALY	**1 JAN 2010**	**P**[xi]	**N**	**N**	N/A
15.LATVIA	**1 JAN 2011**	**N**	**Y**	**N**	A failure to provide reasonable accommodation is not defined as discrimination.
16.LITHUANIA	**1 JAN 2011**	**N**	**Y**	**N**	A failure to provide reasonable accommodation is not defined as discrimination.
17.LUXEMBOURG	**1 JAN 2011**	**N**	**Y**	**N**	A failure to provide reasonable accommodation is not defined as discrimination.
18.MALTA	**1 JAN 2012**	**N**	**Y**	**N**	Discrimination.
19.NETHERLANDS	**1 JAN 2011**	**No info**	**Y**	**No info**	No information.
20.POLAND	**1 JAN 2011**	**P**[xii]	**Y**	**P (Roma)**	Discrimination.
21.PORTUGAL	**1 JAN**	**N**[xiii]	**Y**	**N**	Discrimination.

	2012				
22.ROMANIA	**1 JAN 2011**	**P**[xiv]	**Y**	**N**	A failure to provide reasonable accommodation is not defined as discrimination.
23.SLOVAKIA	**1 JAN 2011**	**N**	**Y**	**N**	Breach of principle of equal treatment.
24.SLOVENIA	**1 JAN 2012**	**N**[xv]	**Y**	**N**	A failure to provide reasonable accommodation is not defined as discrimination, however in two instances national equality body found it to be an indirect discrimination.
25.SPAIN	**1 JAN 2012**	**P**[xvi]	**Y**	**N**	Indirect discrimination.
26.SWEDEN	**1 JAN 2012**	**N**	**Y**	**N**	Direct discrimination (requires to determine a 'similar situation').
27.THE UNITED KINGDOM	**1 JAN 2011**	**N**	**Y**	**N**	Discrimination.

[i] Information in the Annex I is extracted from the latest available annual country reports on the situation in the EU Member States prepared by the European Networks of Legal Experts in the Non-discrimination Field. The reports are available at <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> and <http://www.non-discrimination.net/> (the 'Latest Documents' feed), last accessed 22 November 2012.

[ii] Reasonable accommodation.

[iii] **Y** – Yes. A duty of reasonable accommodation in relation to a specific ground is enshrined in the national (federal) non-discrimination legislation or subject-specific (e.g. employment) laws.

P – Partially. A duty of reasonable accommodation in relation to a specific ground is not enshrined in national (federal) non-discrimination legislation or area-specific (e.g. employment) laws, but is regulated by the particular constituent elements (e.g. lands) of the state.

N – No. A duty of reasonable accommodation in relation to a specific ground is not enshrined in the national non-discrimination legislation or subject-specific (e.g. employment) laws and is not regulated by any other means.

[iv] 'Only the Viennese Anti-Discrimination Act in its amended version from November 2010 includes the concept of "disproportionate burden" for all grounds (§ 3a), by that the law implicitly introduces the duty to reasonable accommodation for all grounds' (Report on Austria, p. 41).

[v] 'The Flemish Decree of 8 May 2002 on proportionate representation does not restrict the notion of "reasonable accommodations" to persons with disabilities and could therefore also apply in principle to persons of a particular religion or ethnic origin. This Decree has, however, a limited material scope of application' (Report on Belgium, p. 95).

[vi] Only as it concerns working hours and rest days, where "this would not lead to excessive difficulties [...] and where [it is possible] [...] to compensate for the possible adverse consequences on the [business]" (Report on Bulgaria, p. 34).

[vii] 'There are many examples both in the labour market and in the education sector of reasonable accommodation to for example allow Muslim students or employees the opportunity to pray in a room reserved for this purpose or to allow the opportunities to eat special food. However, this kind of reasonable accommodation is not based on any legislative obligation' (Report on Denmark, p. 59).

[viii] 'An interesting case was solved by a quasi-judicial body – the Labour Disputes Committee in 2011. A kindergarten teacher was fired inter alia due to failure to celebrate Christian holidays and kids' birthdays (the teacher was a Jehovah witness). The Committee found her dismissal to be discrimination on the grounds of religion or beliefs in the meaning of the Law on Equal Treatment. It might be presumed on the basis of this decision that the employer was supposed to consider (to accommodate) religion-related peculiarities of its employee while planning kindergarten's activities (Report on Estonia, p. 38).

[ix] 'On other grounds of discrimination there is no express provision providing for a duty of reasonable accommodation. However, the jurisprudence of the Administrative Supreme Court clearly provides for a duty of reasonable accommodation on religious grounds of the duty of children to attend school' (Report on France, p. 79).

[x] 'Employers have to pay due consideration to the fundamental right to freedom of religion… Cases include religious dress codes, e.g. Mala, turban of Sikhs ,or the head-scarf…Other cases concern breaks for prayers: balancing of interest in case of break of prayers, no obligation if disruption of process of production' [*references to the cases omitted*] (Report on Germany, p. 54-55, *supra note* 203).

[xi] With regard to religion specific arrangements (holidays, ritual slaughtering) for certain religious denominations are contained in the agreements with these (like those with the Unione delle Comunità Ebraiche Italiane and the Unione Italiana delle Chiese Cristiane Avventiste del 7° giorno), but not through the general concept of "reasonable accommodation" (Report on Italy, p. 30).

[xii] Act of 17 May 1989 on Guarantees of the Freedom of Conscience and Religion enables 'members of any churches and any religious association to obtain days off from work or study during religious holidays' (Report on Poland, p. 112)

[xiii] In the case concerning failure of a Bar Association to fix the exam date for the religious applicant, the court recognized it as an indirect discrimination, without invoking the concept of reasonable accommodation (Report on Portugal, p. 43).

[xiv] Labour Code grants 'two vacation days for two religious celebrations each year, to be taken according to the faith of the employee, under the condition that the faith of the employee is recognised as a state recognised religion' (Report on Romania, p. 56).

[xv] 'The duty of reasonable (appropriate) accommodation is only defined with respect to disability. In spite of this the Advocate of the Principle of Equality (*a body designated for the*

promotion of equal treatment in Slovenia – NB) issued an opinion recognising the right to reasonable accommodation on the grounds of religion' (Report on Slovenia, p. 39).

[xvi] 'Cooperation agreements with the various religious communities (Evangelical, Jewish and Islamic) employees of particular religions. The three agreements contain provisions on religious holidays and special diets' (Report on Spain, p. 43-44).