Religious diversity and reasonable accommodation in the workplace in six European countries: An introduction

Veit Bader¹, Katayoun Alidadi² and Floris Vermeulen¹

Abstract
After a period during which many in the West, especially Europe, expected religion to progressively fade away from public life, for various reasons religion has, over the last two decades, re-established itself as a phenomenon to be reckoned with in the globalized West. It has also become a favoured research topic for, amongst others, social scientists and legal scholars. While the European Union (EU) has a limited competency when it comes to matters of religion, in 2000 an important Directive was adopted, prohibiting discrimination on the basis of religion or belief in the area of employment. The EU’s interest, however, extends beyond the anti-discrimination framework, explaining why in 2010 it funded a three-year multidisciplinary project on religious diversity and secularism in Europe (RELIGARE). One of the areas of investigation, illustrating the various tensions that arise when religious claims are formulated in 21st-century Europe, concerned the area of employment and labour relations. This article provides an introduction – philosophical, legal and sociological – to a special issue with six contributions drawing from sociological data collected within the RELIGARE project. From a sociological perspective, these contributions illustrate the challenges and tensions raised by religion and belief both in secular workplaces (the individual religious freedom cluster) and

¹University of Amsterdam, The Netherlands
²Catholic University of Leuven, Belgium

Corresponding author:
Katayoun Alidadi, Institute for Human Rights and Critical Studies, Law Faculty, Catholic University of Leuven, Tiensestraat 41, Box 3416, Leuven 3000, Belgium.
Email: katayoun.alidadi@law.kuleuven.be
in faith-based or religious ethos workplaces (the collective religious freedom cluster) in England, the Netherlands, Denmark, Bulgaria, France and Turkey.

Keywords
Employment, human rights, reasonable accommodation, RELIGARE, religion and belief, religious diversity, secularism

Introduction
Liberal-democratic states in Europe are increasingly confronted with claims to accommodate a wide variety of religious beliefs and practices, and this puts pressure on entrenched institutional arrangements and established balancing of conflicting human rights in diverse societal fields. As is well known, basic human rights contain tensions or conflicts between ‘freedom’ and ‘equality’ and between ‘collective’ and ‘individual’ autonomy, more specifically between collective or associational freedoms of religious communities, on the one hand, and individual religious freedoms and other basic rights of individuals, on the other hand. These tensions are unavoidable. For one, collective freedom of religion requires a fair amount of autonomy for churches and religious organizations that has to be balanced with, and limited by, individuals’ basic human rights such as the freedom of speech/expression/religion and the right to non-discriminatory treatment. What makes these matters even more challenging is that the individuals concerned (e.g. minors, dissenters, women, sexual or ethnic minorities) are particularly vulnerable, even within their own (religious) minority groups.

Tensions or conflicts between rights certainly are normative tensions, but not of the kind of ‘normativity’ characteristic for moral philosophy. On the contrary, these are tensions inherent in the legal norms (i.e. norms claiming legal validity in the respective jurisdiction) as contained in international conventions (e.g. the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the European Convention on Human Rights (ECHR)) as well as in the constitutions and laws of most states. Consequently, judges and legislators are constantly dealing with the ‘basic tensions’ between human rights and interests by weighing and balancing them in specific laws and in specific cases and contexts. By doing so, they also decide how the liberal-democratic state and private parties should deal with the increased religious diversity on the ground and prevent possible tensions from escalating into full-blown conflicts. Laws and jurisprudence may entail forms of reasonable accommodation – in a broad, not only legal sense – of religious claims, but quite often they also hinder or exclude the possibilities for reasonable accommodation. The latter can be the case when priority is given to formal conceptions of equality to the detriment of more substantive conceptions, and when religion is perceived in a particular sphere of life as problematic, disruptive and out of place.

In this special issue, we focus – against the background of broader studies and the results of the RELIGARE project that include family law, public space and state funding of religions and Faith-Based Organization (FBOs) – on one specific domain:
that of the labour market and work organizations. Employment has been one of the areas where the basic tensions described above have played out prominently in various European states. Employment law plays a role in the rights of employees to express their religious beliefs and follow religious norms and practices (asking for accommodation or exemptions), which may conflict with the ‘standard’ practices and rules of private or public employers. Whether we think of the claim of a pious Christian airport check-in assistant to visibly wear a cross necklace while at work, the dismissal of an adulterous public relations manager by his church employer or the refusal of a civil servant to shake hands with a member of the opposite sex, legal (and media) cases can be symptomatic for what goes on on the ground. And there have been ample challenging cases in recent times in countries such as Belgium, France, Germany, Denmark, the Netherlands and the United Kingdom. When it comes to illustrating the basic tensions between collective and individual religious rights and freedoms, and principles such as non-discrimination and equal treatment, the domain of employment might serve as a model of dealing with religious diversity in an increasingly culturally and religiously heterogeneous Europe.

How courts and other relevant decision-makers (such as Equal Treatment Commissions) practically deal with the basic tensions, that is, how they balance and weigh rights and arguments in various ways in specific contexts and circumstances, may be scrutinized through case law analysis. Clearly, intermittent (quasi-)legal decisions are embedded in larger societal dynamics and framing exercises, involving various actors and interest groups. Yet there is still a dearth of systematic research on these broader sociolegal debates and developments when it comes to instances of reasonable accommodations for religious claims in Europe.1 The aim of this special issue is to fill part of a void in the available research by presenting data from interviews conducted across six European countries in the frame of the RELIGARE project. These interviews were conducted with a wide variety of ‘key opinion makers’ including religious and secular leaders, political figures and trade unionists.2 We were interested in the way in which key actors – religious and non-religious – perceive the different laws and judicial decisions in different contexts and deal with tensions before they escalate into legal claims. When accurate knowledge of legal frameworks is lacking, opinions and behaviours on the ground may be only very loosely connected to what the law says. For this reason, the fact that in Europe there is no legally enforceable duty to reasonably accommodate for religion or belief should not be taken to mean that no (conscious) accommodations occur in real life – in fact they often do. Further, the ‘reconnection with the ground’ allows for questioning the specific reasons and arguments resulting in granting or rejecting accommodations (in practice/in case law) and also in assessing whether and, if so, how these contextualized processes are influenced by deeper, implicit cultural biases. While the main focus of the articles lies in the presentation of the data from interviews, the respective legislation and case law serves as a necessary background. Therefore, the contributions in this special issue incorporate legal studies on decisions of courts and relevant decision-makers (Equal Treatment Commissions) with the sociological research findings.

The basic tensions that arise in the workplace are certainly not homogeneous and we need to at least distinguish between two ‘clusters’ of cases, whether they arise in the
private or public sectors. First, these tensions can be framed as (non) religious interests of employees versus interests of other parties (employers, co-workers, customers and general public), and other liberal principles such as non-discrimination (sex and gender equality): the *individual religious freedom cluster*. Second, there may be a clash between collective autonomy (practices of majority or minority religious organizations and associations that are protected by collective religious freedoms) and principles of non-discrimination on the basis of religion, gender, sexual orientation, race, ethnicity and nationality, the *collective religious freedom cluster*.

In this special issue, the contributions illustrate the situation in this regard in six different states, namely England, the Netherlands, Denmark, Bulgaria, France and Turkey. Each country-specific contribution provides the context as well as makes an in-depth analysis of the opinions and perspectives presented by the interviewees. In the following introduction, we first place the debate on reasonable accommodations in a wider philosophical context, then discuss the legal frameworks of anti-discrimination law and human rights under which employment accommodation claims are assessed, and we finally (briefly) go into some of the more striking aspects of the national contributions in this special volume. In the concluding contribution to the special issue, by Marie-Claire Foblets, the various perspectives are compared in more depth, noting salient differences and resemblances across the country studies.

**Why ‘reasonable accommodation’ and ‘what's in the name’?**

The legal concept of ‘reasonable accommodation’ was first developed in American and Canadian law. We propose here to use the concept in a broader sense in two regards: first, in order to address accommodation of claims by cultural, particularly religious minorities also in other domains of law such as family and divorce law, legal regulation of public spaces and public financing; and, second, covering not only legal and quasi-legal accommodations but also societal, political and administrative accommodation. The need for reasonable accommodation emerges in situations of *cultural inequalities* in which legitimate interests and rightful claims conflict, in which opposing rights (or first-order normative principles) have to be balanced and in which this balancing and the resort to deeper, guiding (or second-order) principles do not lead to clear-cut, context-independent solutions or decisions.

For the clarification of the inherent problems of accommodating claims by *religious minorities*, it may be illuminating to place them against the background of relationships between cultural minorities and majorities *more generally* because the core of the criticism of presumably ‘universal’, ‘impartial’, ‘neutral’, ‘difference-blind’ and ‘fair’ principles, rules and regulations by ‘racialized’, ‘(post)colonial’, ‘gendered’, ‘ethno-national’ and ‘religious’ minorities is very much the same: ‘impartiality is the guise that particularity takes to seal bias against exposure’. ‘Gender neutrality is simply the male standard’, ‘ethno-national-religious neutrality is simply the majority standard’, etc. Their criticism of the central ideological mechanism to universalize the particular and, at the same time, to hide this from view has been taken up and developed in different strands of critical theory – anti-racist, anti-colonialist or anti-imperialist, feminist, multiculturalist – and has, eventually, led to a critical reconceptualization of core principles of morality.
and law by recent moral and political philosophers. Confronted with the stark choice between an absolutist universalism that has been easily debunked as ‘Western’, ‘Euro-centric’, ‘Imperialist’ or Christian-biased ‘Secularism’, on the one hand, and a radicalized contextualism and ‘post-modern’ or ‘post-colonial’ moral relativism of ‘anything goes’, on the other hand, they tried to defend basic principles of morality and of more demanding liberal-democratic constitutionalism in a way that responds to such legitimate criticism.

In this section, we present some of the main results of discussions of normative accommodation of cultural diversity, broadly understood: what, if anything, can lawyers, legislators, judges and policymakers learn from moral and political philosophers? We proceed as follows: (i) If ‘difference-blind’ universalist morality and impartiality are impossible, *moderately universal morality and embedded impartiality* may be helpful in order to rescue core intuitions regarding ground rules, jurisprudence, administration and legislation. (ii) Criticism of ‘benign neglect of differences’ often brushes over important distinctions between structural and cultural inequalities. In situations of structural inequalities, the most appropriate rights and first-order principles are formal equality and more substantive equality, based on the second-order principle of *justice-as-hands-off*. In situations of cultural inequalities, however, even the rules and regulations cannot be strictly equal and states/institutions cannot be strictly neutral, and the appropriate second-order principles are *relational or inclusive neutrality* and *justice-as-even-handedness*. (iii) Conflicts of rights and tensions amongst first-order principles – inherent in liberal-democratic constitutionalism – quite in general, and independent of cultural inequalities, require ‘weighing and balancing’ in contexts, in short: ‘contextualised reasoning’ or ‘reasonable balancing’ as methods of reasoning. ‘Reasonable accommodation’ in a more specific sense is appropriate in cases of claims by religious minorities where religious freedoms clash with other basic rights such as non-discrimination (‘hard cases’), or with rules, regulations and institutions of ‘normative majorities’ that cannot be ‘strictly equal’ and where accommodation implies more or less serious material or symbolic costs (‘soft cases’).

Claiming an uncontested universal morality from some ‘Archimedian’ point, or ‘God’s Eye View from Nowhere’, is as impossible as is completely independent, impartial, neutral and objective cognitive knowledge. Presenting constructed, situated, embedded, relational and perspectivist knowledge as completely disinterested, neutral, objective and impartial reproduces five well-known fallacies: disinterestedness, pure origin, transparency, cultural imperialism and absolutism. As soon as we get rid of the misleading idea of ‘absoluteness’, however, we are able to reconceptualize the normative ideals of impartiality of normative judgements, neutrality of state institutions and objectivity of truth claims in order to rescue the laudable intuitions not only under ideal conditions, but in the real world. A minimal requirement of such a *moderately universal morality* is to take seriously the experiences of negatively privileged groups and cultural minorities and not only ‘listen to their voices’, but also institutionally guarantee their powerful presence in order for them to make themselves heard. Only by way of such a deep ‘intercultural dialogue’ or a really broad and deep ‘overlapping consensus’ on ground rules or constitutional essentials, can we hope to develop moderately universal and fairly minimal moral rules that are more than thinly disguised cultural particularism.
‘Benign neglect’ of cultural differences in the real world under conditions of structural and cultural inequalities can never achieve nor even approach, but actually hinders, fair and equal treatment of minorities or impartial judgment. Hence, embedded impartiality may also be needed in jurisdiction, administration and legislation.

By itself, the perennial repetition of the norm that judges should rule impartially – symbolized by iustitia with the veil – has never prevented biased jurisdiction on the basis of class, sex, gender, race, ethnicity, nationalism or religion. To achieve higher degrees of impartiality, listening to the voices of all parties is a necessary but insufficient step. This must be complemented by institutional and policy devices that increase the capacity of sensitive listening by pluralizing the judiciary. Only by a fair representation of relevant minorities may the laudable normative goal of impartial justice become more than an ideological veil hiding from view the predominant bias in the interpretation and application of presumed universal, neutral and difference-blind rules.

The same holds true for the different departments of government (executive powers). The laudable normative ideal of neutral state administration may be realized to a higher degree by a difference- and inequality-sensitive politicization of administration in a framework of separation of administration and politics. A fair representation of relevant minorities becomes more important with the degree in which the discretionary powers increase (higher civil servants), and the boundaries between making and applying the rules become blurred.

That ‘benign neglect’ works counterproductively for achieving higher degrees of impartiality and neutrality is broadly acknowledged nowadays, also when it comes to rule-making by legislation. The old liberal idea that members of parliament deliberating and deciding on the common good without intermediaries such as political parties would be the optimal setting to guarantee the neutrality of the state, is still with us in legal fictions. These fictions of the free mandate require member of parliaments to be accountable only to their own consciences, cut loose from all interest groups, perspectives and negotiations. However, they have been replaced by pluralist, political party democracy, which is based on the insight that higher degrees of relational neutrality can only be achieved if one takes explicitly into account the experiences, perspectives and, last but not least, the organized voices of all those whose interests are affected and at stake – their own voices and those of their representatives, not those of benign paternalists pretending to speak for them – in order to protect against the tendency ‘to legislate for the normative majority’.

Until now, we have argued under the presumption that ‘strict neutrality’ as a normative or prescriptive device would be a morally required goal and an achievable aim, and that all rules and regulations have to be difference-blind. This presumption is shared by all critics – philosophical or otherwise, old or new – of policies of affirmative action, of multiculturalism and by secularist critics of religious accommodation. Yet state-neutrality may not only be, unfortunately, unachievable in the real world, but it may also be, in cultural matters, an undesirable utopia. In order to clarify this issue, we have to spell out more clearly what ‘differences’ may mean. ‘Differences’ have played a very ambiguous role in critical ethnic and racial studies, critical legal studies and critical feminism, multiculturalism and religious studies. In our view, differences signify three crucially distinct phenomena that also have an impact on the respective appropriate normative ideals.
First, differences are often meant to indicate structural inequalities of positions and of allocations, for example, legal inequalities or economic, social and political inequalities even under conditions of strict legal equality. The appropriate ideal that guides fights and policies against structural inequalities is formal or more substantive equal treatment, based on a universalist principle of justice, which Carens has coined ‘fairness-as-hands-off’. This requires that class- or elite-descent and ascriptive categorizations should not have any impact on the distribution of resources and rewards, and we also think that cultural ways of life should not matter either, except in cases where a clearly demonstrable link exists with individual performances and ambitions, under the condition that cultures would be fairly freely chosen. Here, we should ‘regard people abstractly, taking into account only generic human interests’, and treat individuals as equal human beings with equal basic needs or rights and equal claims to essential natural and societal resources, not as being categorized or belonging to particular categories or groups. International and constitutional anti-discrimination law is an increasingly adequate legal articulation and specification of this ideal. Cultural differences, self-definitions and identity claims should not count, and a difference-blind ideal, goal or aim is just right.

Yet we have already shown that trying to achieve ‘strict neutrality’ and even the principle/right of formal equal treatment in the real world requires ‘difference-sensitive’ means, strategies and policies. The principle of more substantive equality of economic, social, legal and political opportunities – required by more demanding conceptions of egalitarian morality – ranges from minimal interpretations, including those that specify minimally adequate or appropriate opportunities, to actually very utopian interpretations of fully equal opportunities for all, irrespective of class position and ascriptive and irrelevant cultural characteristics. It minimally requires a fight against direct and indirect, statistical, structural or institutional discrimination in order to achieve real legal equality, and it may require policies of affirmative action in all cases of serious historical and/or structural inequalities.

Second, cultural inequalities between respective majorities and minorities, which may continue to exist even after serious legal and political inequalities have eventually been overcome (e.g. rich ‘middlemen minorities’ or rich national minorities) or even under conditions of rough complex equality. The fatal flaw of many egalitarian liberal critics of policies of multiculturalism and of religious accommodation is that they completely neglect or do not recognize the importance of cultural inequalities as problems of justice. Justice, however, is concerned not only with socio-economic, political and legal inequalities, but also with persistent patterns of collective discrimination and misrecognition and with ongoing patterns of cultural inequalities. If one clearly recognizes that states cannot be culturally neutral – neither linguistically and ethno-nationally nor religiously – it is remarkably inconsistent that these same critics usually do not hesitate to endorse the particularity of ‘nation’ states by the standard mix of democratic self-determination in historically contingent political units defined by a common history and some ‘national’ core. The appropriate principle of justice that should guide minority protection and liberal accommodation cannot be fairness-as-hands-off, however.

Third, cultural differences or cultural diversity under conditions in which severe structural and cultural inequalities are absent. In ‘ideally fair’ or ‘just societies’, justice would obviously be silent. If one distinguishes between both structural and cultural
inequalities, on the one hand, and diversity or differences, on the other hand, the problem is not ‘difference’ but inequalities, at least for all justice-based theories. In this ideal world, racist, ethnicist, sexist, genderist, religious and nationalist inequalities would cease to exist and there would be no reason for affirmative action, multiculturalism or minority protection policies. Many universalist cosmopolitans seem to think that in such a ‘gender-free society’ gender, ethnic, national and religious differences would also lose their meaning and impact on habits, lifestyles, ways of life, patterns of interaction and distinction, and that the appropriate utopia would be a ‘difference-blind’ society. From a perspective of justice, we may leave this issue to be discussed and resolved by happier people in some imaginable future, although this overly abstract, rigid and individualistic view seems to be at odds with the equally held opinion that an ideally just society should allow a broad variety of collectively lived and organized cultural diversity.

Fairness-as-hands-off cannot be conceived as an appropriate principle in matters of culture and the symbolization of collective identities for many reasons. It neglects the inevitable partiality of all cultures, public cultures of liberal-democratic states included. It ‘is a very radical ideal. It is hard to know what space would be left for ordinary politics on this account ... apart from libertarians, most of those advocating liberal neutrality do not run up the red flag of revolution’ 14 The history of particular ethno-national and religious cultures is inevitably inscribed in public spaces, times, cultures and symbols of all liberal politics, however ‘thin’ or ‘civic’ they may be. In the end, strict neutrality and fairness-as-hands-off would literally strip people of their histories, languages, public holidays based on religion, public monuments, rituals and symbols of national identity, public dress codes, history and literature lessons in public education and so on.15 The result would be the fiction of a ‘naked public square’. Even in an ideal world this would not only be impossible, it would also be neither morally required nor desirable. A more appropriate reformulation of justice in this regard is fairness-as-even-handedness, stating that in order:

... (t) treat people fairly, we must regard them concretely, with as much knowledge as we can obtain about who they are and what they care about. This approach requires immersion rather than abstraction ... The guiding idea of evenhandedness is that what fairness entails is a sensitive balancing of competing claims for recognition and support in matters of culture and identity. Instead of trying to abstract from particularity, we should embrace it, but in a way that is fair to all the different particularities. Now, being fair does not mean that every cultural claim and identity will be given equal weight, but rather that each will be given appropriate weight under the circumstances and given a commitment to equal respect for all. History matters, numbers matter, the relative importance of the claim to those who present it matters, and so do many other considerations.16

Where a fully equal treatment is either impossible or unfair to cultural and religious majorities, fairness-as-evenhandedness is the right second-order principle and reasonable accommodation is the appropriate way or method to sort things out.

To sum up, both second-order principles of ‘strict neutrality’ and ‘fairness-as-hands-off’ with regard to ethno-religious inequalities and differences try to articulate important moral intuitions, but do so in the wrong way. Strict neutrality should not be sacrificed in favour of outright particularism, but replaced by relational or inclusive neutrality, which
– under conditions of serious cultural inequalities – are better able to realize the intuition that constitutions, laws, institutions, policies and administration should be ethnoculturally and religiously as neutral as possible. ‘Fairness-as-hands-off’, equal treatment and compensatory affirmative action are appropriate for fighting structural inequalities. Fairness-as-even-handedness is not meant to replace ‘fairness-as-hands-off’ in all these regards. It is a supplementary second-order principle to deal with cultural inequalities. It is appropriate for fighting unfair treatment of cultural minorities in matters of organization and public culture, where strict neutrality is impossible and totally equal treatment is not only unachievable, but also counterproductive and unfair to majorities. As such, it helps to guide the difficult arts of balancing involved in claims to religious accommodation.

Conflicts between rights and tensions amongst first-order principles – inherent in liberal-democratic constitutionalism – quite in general, and independent of cultural inequalities, require ‘weighing and balancing’ in contexts, in short: contextualised reasoning. ‘Reasonable balancing’, in general, however, should be distinguished from reasonable accommodation, strictly speaking. Both have in common that they are not principles at all, but methods of reasoning that are guided by first- and second-order principles. Reasonable balancing, for instance, can be helped by standardized tests such as the famous ‘three prong test’ in cases of overriding basic rights, for example, of ‘free speech’ by ‘public order’. Reasonable accommodation in a more specific sense is the appropriate method in cases of claims by religious minorities where religious freedoms clash with other basic rights such as non-discrimination (‘hard cases’), or with rules, regulations and institutions of ‘normative majorities’ that cannot be ‘strictly equal’ and where accommodation implies more or less serious material or symbolic costs (‘soft cases’). Finally, arguing – as we do – in favour of reasonable accommodation in general is obviously not the same as proposing to introduce this method in the short-term, for example, by recommending to open up the ‘anti-discrimination directive’ in the present political context in the EU or in member states. This might be neither strategically prudent – and one has to take ‘negative externalities’ seriously – nor necessary because most of the expected gains may be achieved by taking serious and stretching interpretations of ‘indirect discrimination’.

Besides reasonable accommodations in the broader sense we utilized above, we also need to discuss the legal concept, which is derived from North America and remains controversial in the European legal order. This is the subject of the next section. We take the philosophical and legal theory reflections above to guide the discussion and analysis of reasonable accommodations as a legal concept in the EU and in the six selected case study countries.

**Reasonable accommodations as a legal concept in the dual legal framework in Europe**

**Religious accommodations in Europe**

On the basis of recent case law and (media) reports collected from a variety of EU member states within the frame of the European research project RELIGARE, it is clear that
employees do not always find it easy or possible to shed religious skin upon entering the workplace and for the duration of their professional time. Similarly, employers whose activities or mission are strongly motivated by faith (so-called faith-based employers) insist on adequate exemptions and flexibility under laws and practices to safeguard their operational autonomy. In fact, religion is present and plays a role in various ways and at different moments in the labour relations cycle, from the time of selection and hiring through promotion to suspension or termination, and it can play a role both on the side of employees and on the side of employers.

What in effect are religious accommodation cases have been a feature of social and constitutional law for some time. Perhaps one of the oldest religious accommodation cases in Europe, which gained press coverage, was in the United Kingdom in 1969: after a heated conflict between the UK’s Wolverhampton Transport Committee and several of its Sikh conductors and drivers, a ban on turbans and beards was retracted. A Sikh group leader, Sohan Singh Jolly, regarding the ban as a ‘direct attack’ on his religion and had even ‘threatened to burn himself to death in protest’. After resolution, the matter was laid to rest and was never introduced in court. While luckily not all cases get so heated, legal cases involving religious dress and other issues have undeniably become more frequent in recent years. This may be in part because of the growing religious diversity and assertiveness amongst religious minorities in Europe, but also because of developments in the legal frameworks available to claimants. Still, legal cases only form the ‘tip of the iceberg’; employee ‘coping mechanisms’ very often fall short of consulting a lawyer and initiating litigation. This explains the lack of case law in certain states, such as Bulgaria and Turkey, both discussed in more detail in the current special issue and with regard to some particular issues that nonetheless arise on the ground.

When cases do reach legal fora, there are important differences in the approaches and reasoning adopted, even though the shared commitment to non-discrimination and freedom of religion would presumably point to some convergence. Comparative legal research in fact establishes the widely divergent situations on the ground in EU member states when it comes to tolerating, accepting or accommodating for religious dress, holidays or other practices of religiously observant employees. In a number of EU member states, courts and equal treatment commissions have de facto required employers to accommodate religious beliefs and practices of their workers under the prohibition of (indirect) discrimination, but this is clearly not the case in all member states where recent case law is available. Sociological data presented in this special issue support this by illustrating the different reasoning and argumentation of key players towards issues of accommodation and discrimination. For instance, while various respondents in England and the Netherlands (even from the secularist corners) argued for a level of flexibility when it comes to religious employees in the workplace, in France trade unionists (even those affiliated with the Christian-democrats) strongly rejected the possibility of diverting from strict equal treatment of all employees.

There is an internal diversity amongst the variety of accommodation cases which have arisen recently in Europe and elsewhere, and there may be different ways to categorize them for analytical reasons. We have suggested the following typology of accommodation cases involving private employees and civil servants (individual religious freedom cluster):
(a) conflicts or requests related to religious dress (including religious symbols) and grooming in both front-office and back-office positions;

(b) requests motivated by a need to reconcile conflicting religious time–working time obligations;

(c) cases involving requests for exemptions or alterations of particular job duties or circumstances, including socializing customs; and

(d) requests to use certain (often already existing) facilities or space, typically for prayer or meditation.

When it comes to the cases collected regarding faith-based employers, the following distinction can be made (collective religious freedom cluster):

(a) hiring (and dismissal) practices involving the religious ethos exception (Article 4.2 EU Directive 2000/78);

(b) balancing FBO rights with that of employees’ privacy and family rights.

Alternatively, one could distinguish between ‘soft cases’, which do not involve conflicts between fundamental rights (e.g. Eweida, see later), and more ‘hard cases’, where tensions or conflicts between fundamental rights can be detected (e.g. Ladele, see later), as argued earlier. This may be useful in narrowing down the controversial cases within the topic of reasonable accommodations and perhaps also for breaking down principled objections against reasonable accommodations in general.

Origins of the idea and concept of reasonable accommodations

As already mentioned, the origins of the legal concept of reasonable accommodations lie in the United States. In 1972, a duty to ‘reasonably accommodate’ employees’ religious beliefs, observance and practices was introduced under Title VII of the Civil Rights Act. An employer is only exempt from this duty to make appropriate amendments to workplace rules or practices if he can convincingly demonstrate that this would place an ‘undue hardship’ on the pursuits of its business.

The idea behind religious accommodations in the United States itself appears much older and intimately linked to the idea of religious freedom (as opposed to religious tolerance): in September 1789, George Washington – paving the way for the First Amendment to the US Constitution – wrote in a letter to the Annual Meeting of Quakers:

I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit. (emphasis added)

Thus, both the idea behind religious accommodations or exceptions awarded because of religious specificities as well as the application of the concept as a legal right arose in the context of religious rights in the United States. However, it was only after the concept was recycled and utilized in the 1990 Americans with Disabilities Act that it gained influence far outside the United States and travelled amongst others to the European
This is with the exception of Canada, where the Supreme Court in fact developed a much stronger doctrine of religious accommodations building on the US experience, and later extended it to other grounds of discrimination under the Canadian Charter of Rights and Freedoms. The duty to reasonably accommodate employee’s religious beliefs and practices being interpreted by various US court decisions, it also reached the US Supreme Court, which has adopted a ‘de minimis’ standard for assessing whether there is an ‘undue hardship’. This means that a refusal to accommodate an employee can be justified by showing that ‘more than a de minimis cost’ would be required. The Canadian Supreme Court, in its Renaud decision, explicitly rejected this low standard, holding that:

[T]here is good reason not to adopt the ‘de minimis’ test in Canada. [...] The case law of this Court has approached the issue of accommodation in a more purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry. The approach of Canadian courts is thus quite different from the approach taken in U.S. cases.

In Europe, reasonable accommodations have not been introduced for reasons of religion or belief. It was, in contrast, established as an enforceable right for persons with disabilities under Article 5 of the EU Directive 2000/78 (‘Employment Equality Directive’) and there are, under the horizontal anti-discrimination directive proposal introduced by the European Commission in 2008, plans to strengthen and expand this right for persons with disabilities into other domains of social life such as housing and public transportation.

But this is not to say that the idea of reasonable accommodations for religious groups is foreign to the European continent. Various European countries do have specific legislation and measures in place which – without using the term reasonable accommodation or its equivalent in the local language explicitly – de facto amount to particular instances of (reasonable) accommodations for certain (religious) groups in employment and beyond.

Still, it is the case that few explicit reasonable accommodation duties extending beyond disability have been adopted since the Employment Equality Directive, even though this merely establishes a minimum, that is, nothing prevents member states to go further in their protection against discrimination and the promotion of equality. And there are many signs that this situation is not about to change easily in the coming years.

As the quote from George Washington earlier makes clear, the willingness to award special or at least different treatment because of religious beliefs, practices and needs depends largely on how the role of religion in society is assessed: Is it seen as a positive and useful force or as primitive, disruptive and unsettling? Here a difference may be detected between the perspectives and ideas on the role of religion in the United States and Canada, on the one hand, and in some European countries where debates are raging about the relevance of the right to freedom of religion in the given multicultural context (e.g. the Netherlands; Belgium) and/or where a militant secularism is seen as the guarantor of equal rights and emancipation in a difference-blind republican system (e.g. France), on the other hand. Thus, the apprehensions against reasonable accommodations, mirroring the apprehensions against allowing the revival of the role of religion in society, are many. Amongst those are fears for the inflating role of religious organizations and
doctrine in public life, concerns for slippery slope situations that may lead to ‘turning back the clock’ as well as the protection of (formal) equality.

**Manoeuvring the dual legal framework**

In such perspective, where Europe is facing a ‘test of faith’ when it comes to questions of religion, it is important to (first) focus on the existing protections in the law for religious freedom or against religious discrimination. Currently, a dual legal framework applies in Europe to what constitute workplace accommodations requests: both anti-discrimination law (highly EU law-triggered or-driven) and human rights law (ECHR, in particular Articles 9 and 14) can be used as bases for presenting legal claims. Outside the legal sphere, employees can also benefit from ‘concerted adjustments’ (voluntary accommodations).

While arguments on the basis of human rights law (Articles 9 and 14 ECHR) and anti-discrimination standards may be contradictory on specific cases, often they complement each other and a claimant invokes both the protection against religious or belief-based discrimination under national anti-discrimination law as well as Article 9 (and 14) ECHR on the freedom of thought, conscience and religion.

For instance, a saleswoman fired for wearing a headscarf from a grocery store or retailer can contend her dismissal was unlawful as it constitutes discrimination based on her religion (Islam) and can argue that this violates her fundamental right to manifest her religion in practice and observance. With the growing prominence of European non-discrimination law in the labour setting, instances involving religious or ideological beliefs and practices in the workplace are mainly being framed and scrutinized under this framework, which seems to lend priority to ‘equality’ as opposed to other important values, interests and considerations. While its role has been essential in revealing and fighting unjust situations, the non-discrimination framework also has inherent weaknesses when viewed as facilitator between religious and other interests in the workplace. Its weakness relates to its absorption in a predominant market ethos of society as well as its necessity to rely heavily on the (vicarious) responsibilities of employers as ‘distributive agents’. The role of human rights (Article 9 ECHR) has been much less prominent, almost nominal at times, and some would even argue Strasbourg had made it toothless with its line of jurisprudence in Article 9 cases. Recent developments may affect the respective importance of these two legal tools though. In its 2013 *Eweida* judgment, the European Court of Human Rights has triggered a re-evaluation of the role Article 9 can play in voluntary employment situations, or at least it has undertaken a first attempt at revitalizing Article 9 in the context of religious employment accommodation claims. Here, the European Court found that Article 9 was violated in the case of Nadia Eweida, who was prohibited from visibly wearing a modest cross on a necklace while at work as a check-in assistant for British Airways (BA) at Heathrow airport (at least during the months between her being reprimanded and BA’s amendment of its dress code regulations to allow the visibly wearing of such religious symbols).

The European Court found that the balance made between the business interest of BA towards a certain image or brand, while legitimate, should not have overruled the fundamental right of an employee to manifest her religion by way of a discrete religious symbol which could have little impact on the employer’s image. In other words, contractual
obligations cannot simply trump fundamental rights in the absence of special circumstances (e.g. safety and security requirements as in the case of Chaplin; see later) and in general. The claims of three other British Christians who complained of limitations on their deeply held religious beliefs and practices were, however, dismissed as it was considered that the restrictions there fell within the state’s margin of appreciation – in particular because a conflict between Convention rights was presented (freedom of religion vs equal treatment irrespective of sexual orientation in the cases of Liliane Ladele and Gary McFarlane).

**Human rights in the workplace in flux: Eweida and others v. the UK before the European Court on Human Rights**

A discussion of the *Eweida* case, together with the facts of the three less successful cases, may be useful to demonstrate that domestic courts, following this decision, may have to consider more seriously the employment claims of religious employees under the ECHR.

Nadia Eweida, a Coptic Christian, started working for BA in 1999 as a check-in assistant at London Heathrow airport and she remains active there up to today. In 2004, BA changed its staff uniform and a detailed uniform code specified that religious accessories and dress should – if at all – be worn under the uniform. In cases where this was impossible (e.g. a headscarf or turban cannot be worn underneath the uniform), an approval would have to be obtained. Such approvals were, amongst others, routinely given to Muslim employees who wished to wear the headscarf (which had to be in the BA colours). Ms Eweida initially did not wear a cross visibly while at work, but in 2006, she started to do so as a sign of her Christian faith. She was repeatedly asked to conceal her necklace, and she did so hesitantly at first. But then one day she refused, and was then sent home until she would be willing to abide by the uniform code. BA offered her a back-office position, which did not require the wearing of a uniform and would allow her to wear openly a cross, but this offer was rejected.

At this time, the case reached the British and international press. Ms Eweida argued BA’s policy is discriminatory: Muslim employees can wear a headscarf but she is unable to wear a discrete crucifix ‘the size of a five-cent penny’. In the press, BA’s double standards are also criticized, which leads to amendment of the dress code and Ms Eweida’s return to the workplace.47

The dispute, however, persevered regarding the 4-5 months prior to the amendment of the uniform code (she was sent home 20 September 2006 until 3 February 2007), during which Ms Eweida remained at home without pay. Her attorneys present claims on the basis of equality law – direct and, principally, indirect discrimination – and also argue a violation of Article 9 ECHR. Thus, they fully utilize the dual framework available to them. However, neither of the two arguments appears successful before the employment courts (tribunal and appeal) or before the Court of Appeal. The wearing of a cross is seen by the Court of Appeal as the applicant’s personal choice, not as a religious obligation. Thus, the Court finds the requirement of a group disadvantage is lacking so that there can be no indirect discrimination since that implies discrimination against a defined group, not only disadvantage to the claimant herself. (Here, a difference with a duty of reasonable accommodation
can be noted since no group disadvantage is required: the focus is on the individual case at hand, and the fact that a case would be unique to the claimant is no reason for objection to accommodation). The Court of Appeal further argues that the dress code, even if it would be indirectly discriminating against a certain religious group, was in fact justified since it pursued a legitimate aim (establishing a professional image) and the ban on religious symbols was proportionate to that aim.

When it comes to Article 9, much less attention is given to that argument. According to the Court of Appeal, Article 9 is of little assistance to Ms Eweida’s case and, accordingly, no interference is found with Article 9. The Court of Appeal refers to a quote by Lord Bingham in House of Lords in *R (SB) v. Governors of Denbigh High School* [2006] UKHL 15, which states:

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 . . . In *Stedman v United Kingdom* (1997) 23 EHRR CD 168 it was fatal to the applicant’s article 9 claim that she was free to resign rather than work on Sundays.

This refers to the ‘freedom to resign’ doctrine; since Ms Eweida was also free to find alternative employment, without much undue hardship or inconvenience, she could not establish that there was an interference, let alone a violation, of her freedom of thought, conscience or religion under Article 9. Indeed, this doctrine had been quite elaborately developed in the former European Commission on Human Right’s jurisprudence (see *X. (Ahmad) v. UK*, 12 March 1981, App. nr. 8160/78; *Stedman v. UK*, 9 April 1997, App. nr. 29107/95), and more recently, in April 2012, the European Court of Human Rights had referred to this line of decisions as precedent in *Francesco Sessa v. Italy*. Many commentators had, however, critiqued the Court’s reasoning that the possibility of finding alternative employment would constitute adequate guarantee for the freedom of religion, referring to other areas of the Court’s jurisprudence where it had rejected such reasoning.48

Before the European Court, the UK government repeated this “freedom to resign” defense. However, surprisingly, the Court ended up explicitly rejecting this line of reasoning:

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate. (consideration 83)

The European Court then proceeded to examine whether the domestic courts found a ‘fair balance’ in the matter, that is, whether ‘Ms Eweida’s right freely to manifest her religion was sufficiently secured within the domestic legal order and whether a fair
balance was struck between her rights and those of others’ (consideration 91). The Court does not consider it essential that the state has no ‘legal provisions specifically regulating the wearing of religious clothing and symbols in the workplace’ as most member states in fact do not.

In the end, Ms Eweida, whose strategy to pursue her case in Strasbourg was criticized by some commentators, prevailed because

... the Court has reached the conclusion in the present case that a fair balance was not struck. On one side of the scales was Ms Eweida’s desire to manifest her religious belief. As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer’s wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida’s cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways’ brand or image. (consideration 94; emphasis added) 49

The Eweida decision sheds new light on the quote above by Lord Bingham; it is as if the European Court stands up to assert the Convention’s (new) relevance in this emerging area. From now on, the filtering of cases should be less severe and a thorough balance between interests should seriously consider the freedom of religion of employees, taking into account the link between a ‘healthy democracy’ and pluralism and (visible) religious diversity also when it concerns European workplaces. For the same reason, it seems fit to argue that religiously distinct employees cannot be sent ‘back office’, except perhaps in rare circumstances.

While Ms Eweida prevailed before the European Court of Human Rights, the applications of three other British Christian employees who also argued for their freedom to experience or manifest their religion in the workplace (and whose cases were joined) were rejected.

First, Shirley Chaplin, a nurse who worked in a public hospital and wished to wear a necklace with cross at work lost her case: here, unlike in the Eweida case, the defense was presented that wearing the necklace involved a safety and security risk (namely elder patients could grab and pull on it). The European Court did not feel itself well placed to double guess the safety and security assessment performed at the hospital and domestic court level and deferred to these judgments as being within the state’s margin of appreciation. This means an employer who can demonstrate convincingly that the wearing of certain items involves a safety or security risk can also justify restrictions on religious symbols and dress.

Second and third, the applications of two Christians who refused to perform certain job tasks because of their religious views and beliefs on marriage and homosexual relationships were also unsuccessful. Both Liliane Ladele, the marriage registrar, and Gary McFarlane, the relationship consultant, had argued for a level of accommodations (not having to perform same-sex partnership civil ceremonies and not having to provide...
psychosexual relationship therapy to homosexual couples, respectively), but the European Court held that the resolution of their cases (dismissal) fell within the state’s margin of appreciation. When there is a conflict between Convention rights, here freedom of religion versus equal treatment irrespective of sexual orientation, such margin is awarded to states. The *Eweida* decision was taken 5:2, with a dissenting opinion of judges Bratza and David Thór Björgvinsson. There was also a dissenting opinion of judges Vučinić and De Gaetano, arguing why in their view Article 9 (in particular the freedom of conscience) had in fact been violated in the case of Ms Ladele. The Civil Partnership Act 2004 that had been adopted years after Ms Ladele became a marriage registrar foresaw in accommodations for employees who were unwilling to officiate same-sex partnerships, and such accommodations and switches between colleagues had taken place for some time before the conflict arose. According to the two dissenting judges, it was:

[A] combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured ‘gay rights’ over fundamental human rights) [which] eventually led to her dismissal. (consideration 5)

Further, in their view accommodation ‘could have been achieved without detriment to the overall services provided’ but:

Instead of practising the tolerance and the ‘dignity for all’ it preached, the Borough of Islington pursued the doctrinaire line, the road of obsessive political correctness. It effectively sought to force the applicant to act against her conscience or face the extreme penalty of dismissal – something which, even assuming that the limitations of Article 9 § 2 apply to prescriptions of conscience, cannot be deemed necessary in a democratic society. Ms Ladele did not fail in her duty of discretion: she did not publicly express her beliefs to service users. Her beliefs had no impact on the content of her job, but only on its extent.

This dissenting opinion makes clear the possibility of reconciling reasonable accommodation for religious (civil servant) employees, who may conscientiously object to certain (new) job tasks, while pursuing a broad equality and inclusion agenda for other vulnerable groups such as sexual minorities. We can support this reconciliatory approach that rejects trumping certain concrete rights in the (abstract) name of general principles. Indeed, there should be balance made; when the inclusion of new groups can be achieved without the exclusion of other groups this is preferable.

In general, it can be stated that the *Eweida* decision requires that there be sufficient consideration for the employee’s fundamental right to freedom of religion; in no way will employees always win their case, since other interests are implicated and may justifiably prevail. But it cannot be the case, that business or image interests prevail almost automatically and employees’ interests are only nominally acknowledged. One could argue that a certain level of accommodation is now required under Article 9, even if the Court does not use this term explicitly or provide a clear standard. This implies the revitalization of freedom of religion in the private and public employment context; while
previously Article 9 played at most a subsidiary role, now it could come much more prominently to the fore in analyses.

What is most significant is that the European Court explicitly overruled its own ‘freedom to resign’ doctrine, which in the past had led to dismissal in the admissibility phase and avoidance of a genuine balancing of a claim on its merits. Now that the possibility for an employee to find alternative employment no longer bars the finding of an interference with a Convention right, but rather forms a factor in the justification and proportionality assessment, an interference with a right can be more readily found and the Court can proceed to verifying whether a fair balance was made between the varying rights and interests. While the balancing in Eweida was specific to the facts of the case (the cross example), and the Court explicitly regarded this as a discrete symbol of faith, it also included the Islamic headscarf and the Sikh turban in its consideration.

Finally, the European Court may also have opened the door for the protection of more individualistic manifestations of religion. This may approximate employee rights under a duty of reasonable accommodation as opposed to indirect discrimination, which requires group disadvantage and evidence that ‘persons’, other than the applicant, would be put at particular disadvantage by the measure in question. This is because the Court held that:

In order to count as a ‘manifestation’ within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question. (consideration 82)

The decision has important consequences for domestic courts, when they are called to resolve religious accommodation cases, whether involving religious symbols and dress or specific tasks that employees are not comfortable with because of their religious principles and beliefs. In particular, company ‘neutrality policies’ – banning religious, philosophical and political symbols in the workplace – have been treated quite deferentially by Belgian Courts. Therefore, in the next section, we will illustrate this in connection with Belgian case law on company neutrality policies.

**Calling into question the legitimacy and proportionality of company neutrality policies following Eweida**

In Belgium, the legitimacy and proportionality of so-called neutrality policies restricting employees from wearing any religious, philosophical or political symbols has been readily accepted in a number of decisions. Recently, the labour court in Tongeren took a decision in the widely publicized case of Muslim (converted) saleswoman who was fired by the Dutch retailer HEMA from its Genk branch for wearing a headscarf. The woman had worked for HEMA for almost two months but was fired when HEMA started receiving customer complaints about the headscarf in its store. At the time, HEMA did not have
an explicit neutrality policy, as some Belgian companies have adopted, and in fact HEMA accommodated Muslim staff in the Netherlands by providing a headscarf in their company colours. However, when this case made headlines in Belgium, HEMA issued a peculiar press statement explaining that they saw themselves required to conform to ‘local customs and preferences’ and because it was ‘apparently’ not customary to wear a headscarf at work in Belgium, it had decided to adopt a neutrality policy banning all religious symbols in the future. HEMA offered the dismissed employee a back-office position, which she rejected because she enjoyed the contact with customers and did not see why she needed to be hidden from customer purview.

HEMA lost the case before the labour court in Tongeren – the saleswomen was awarded six months’ back pay as penalty because the court found there to be direct discrimination – but the argument of the labour court would effectively block similar claims against HEMA in the future, since it has now adopted an explicit neutrality policy. The decision further sends out an approving signal to other companies considering such policies (which imply excluding religiously distinct employees from the outset).

The labour court, finding inspiration in the decisions of the Dutch former Equal Treatment Commission (now absorbed into the College for Human Rights), distinguished between two situations: one, religious dress accommodation cases where the employer had no pre-existing dress policy at the time it dismisses an employee and, two, where there was in fact such policy to start with. In the former case, the analysis would involve assessing whether there was direct discrimination, which could only be justified in the case of a genuine occupational requirement. In the case of the saleswoman at HEMA, the labour court could not regard the not wearing of a headscarf as such genuine occupational requirement (it stated obiter dicta that such could be considered ‘at most desirable or appropriate’). In contrast, if there had been such neutrality policy in place, a dismissal or refusal to hire someone because of religious dress would have to be assessed under an indirect discrimination analysis. This implies that the measure can then more easily be justified, so long as a legitimate objective is pursued in a suitable and appropriate manner. And here, the court held that such neutrality policies generally meet this test and thus can justify indirect distinctions. The Centre for Equal Opportunities and Opposition against Racism, which had voluntarily intervened in the case, had asked the labour court to refer a number of prejudicial questions for clarification to the European Court of Justice, but the labour court found that to be unnecessary to resolve the case at hand.

The labour court mainly addressed the discrimination claims and devoted minimal attention to Article 9 arguments. It stated formulaic that ‘on the basis of article 9.2 ECHR and the jurisprudence of the European Court of Human Rights, the Belgian employer can prohibit the wearing of a headscarf during work hours by way of a neutrality policy’. There was no concern in the judgment that HEMA was using the (real or supposed) bias of its customers to exclude vulnerable employees or that the fundamental rights of people were sacrificed in light of the majority’s sentiments. This is even though ‘fundamental rights ultimately exist to protect minorities, unpopular minorities in particular, against the tyranny of the majority’ and the European Court of Justice in the Feryn case had held that (real or implied) discriminatory preferences of customers are no justification for discriminating (future) employees.
The *Eweida* judgement has ramifications for this analysis and the latter statement of the labour court. Certainly, company neutrality policies cannot be considered to *automatically trump* Article 9 fundamental rights of employees any longer. It must be recognized that such policies imply real restrictions on the employee rights and seriously impact the opportunities of minorities in the employment market. This does not mean restrictions on dress are no longer allowed in the workplace: a ban was, for instance, accepted in the *Chaplin* case because of safety and security considerations. But in *Eweida*, the image concerns of BA proved insufficient to warrant overstepping employee rights to manifest their freedom of religion in the workplace. It is clear that after *Eweida*, where the European Court closely links pluralism, democracy and the protection of religious freedom together, a more effective consideration of employee rights under Article 9 is required.

**Religious diversity and reasonable accommodation of religious claims in the workplace: Case studies of six countries of the RELIGARE project**

In this special issue, our focus is, as mentioned, on perceptions of the possibility and desirability of reasonable accommodation of religious claims in the workplace in six European countries: England, the Netherlands, Bulgaria, Denmark, France and Turkey. These six countries provide a good cross section of the historical and legal diversity of religion–state relations in Europe. Together, they represent a wide range of systems for governing religious affairs, socio-historical trajectories, relationships to the Council of Europe and the EU and experiences of religious diversity.

France and Turkey are representatives of a first model of ‘church–state’ relationships: countries where there is, in principle, a strict separation between religious denominations and the state. In such systems, ‘secularism’ is written into the constitution or other foundational acts.54 State policy is required to be conducted by means of secular laws alone – as based on secular grounds – and is therefore kept strictly separate from religious beliefs. Such states relegate religion, in theory at least, to the private sphere and oppose its legal, administrative and political institutionalization. But there are differences between such secularist states, and there are also other approaches in Europe. France has been a predominantly Catholic country, which finances Catholic schools, though it has fairly well-organized secularist groups guarding their privileged versions of *laïcité de combat* in opposition to old and new religions, particularly Islam. It has a large, long-standing Muslim immigrant population. Turkey, a predominantly Muslim country, has been a secularist republic limiting or neglecting religious freedoms to non-Sunni Muslims and other religions. Kemalist secularism is under siege by the AK Party government and religious freedoms for others are massively contested.

The Netherlands is a representative of a second model of ‘selective cooperation’, which combines non-establishment with conditional (limited) legal, administrative and/or political pluralism. Pluralism goes together with the requirement that the state be neutral, understood as allowing all religions and denominations to have equal footing. The Netherlands has had to come to terms with rapid secularization and with the
presence of new religious minorities, particularly Muslims. The UK and Denmark are
representatives of a third model of countries with established churches (of the Protestant
variety) that accept official institutional links between the state and, respectively, the
Church of England/Scotland and the Folkekirke (Danish People’s Church). Both coun-
tries are faced with the challenge of integrating a growing diversity of religions, partic-
ularly Islam, but differ with regard to numbers of Muslims (high in the United Kingdom
and low in Denmark) and degrees of organization and mobilization. Finally, Bulgaria is a
country which had an established Orthodox church (representing the third model) that
went through a period of official state atheism under the communist regime, and whose
transition to democracy and recent entry into the EU have shaken up the relationship of
politics/society to religion. Bulgaria’s new constitution, adopted in 1991, proclaims
Eastern Orthodox Christianity as the ‘traditional religion’ of Bulgaria. Bulgaria, more-
over, has a 10% Muslim population (the highest of all countries in our sample except for
Turkey), dating from the Ottoman era.

The six contributions embed insights and data obtained from a series of interviews in
the respective church–state models. The article on England by Prakash Shah illustrates
how respondents there perceived problems of religious diversity in the English work-
place. These include particular types of dress or appearance, time off from work for
prayers or during particular days of the week, food requirements, as well as some broader
themes of ‘conscientious objection’ including the non-provision of particular forms of
services, for instance, adoption, marriage registration or relationship counselling to gays,
or abortion. Some of these problems were specifically discussed in the context of
whether or not a form of reasonable accommodation should be granted. Respondents
in England seem reluctant to endorse specific legal provision to guarantee such reason-
able accommodation. However, there was broad support and examples for having the
principle adopted in the practice of employers. More specifically, Shah contends that
none of the respondents in England were able to come up with examples or situations
outside of the group of Abrahamic religions (Judaism, Christianity and Islam) that
inform any ‘universalist concept of religion’, which inevitably distorts and skews other
traditions and cultures. This may seem conflictual with the occurrence of religious-
framed claims by Sikhs, one of which was described earlier in the introduction. Accord-
ing to Shah, when Sikhs and others from non-Western traditions raise their claims in
religious terms and try to ensure their recognition as a ‘religious’ group, this only shows
that these traditions have been transformed with some degree of success in [into] a
version of the Abrahamic cultures. Particularly the Sikhs show ‘a tradition in an
advanced state of transformation into a religion’. It has to be said, however, that this sug-
gestion remains controversial, and Shah may well have underestimated the occurrence of
conflicts involving non-Abrahamic religions or their inclusion in the sociological
interviews.55

In the next contribution, Floris Vermeulen and Rabia El Morabet Belhaj analyse the
situation in the Netherlands. As they see it, individual religious employees are actually
not under that much pressure to adapt; rather, there is strong support for these individuals
to act in accordance with their religious beliefs. When it concerns public employment,
however, religious civil servants do seem to be under considerable pressure in the Nether-
lands; secular respondents argue that civil servants are part of the state apparatus and
therefore have no right to ask for exemptions or accommodations on the basis of their religious beliefs and practices, especially if this implies making direct or indirect distinctions on the basis of their personal beliefs. With regard to the collective cluster, Vermeulen and El Morabet Belhaj found that associational freedoms for religious organizations and faith-based organizations have also come under secularist pressure; non-discrimination is often invoked as the supreme principle, trumping associational autonomy. These observations suggest a shift in the Dutch tradition of governing religious diversity, and secularist pressures are exerting significant impact on the position of religious employees, especially civil servants, and associational autonomy in the Netherlands.

In the contribution on Denmark, Lisbet Christoffersen and Niels Valdemar Vinding explain how the question of reasonable accommodation is discussed on the basis of current legislation in the well-regulated and pragmatic Danish labour market. Religious employees make religious claims and thereby challenge a ‘secular’ understanding of the Danish labour market. This raises the question of how much religion of the individual can be accepted in the general public sphere. Furthermore, religious organizations call for the protection of their organizational identity and seek to employ and dismiss personnel according to the norms of their religious ethos. This raises the question of how far the idea of reasonable accommodation can be extended in the Danish labour market. The authors conclude that a pragmatic approach taken by some of the religious respondents arguing in favour of reasonable accommodation of religious claims in the Danish workplace leads to concerns by secular respondents that such an approach could hijack the rights of individual (secular) employees working for religious ethos employers.

Turning to Bulgaria, Maya Grekova, Iva Kyurkchieva and Maya Kosseva argue that awareness and sensitivity towards issues of religious diversity is low in this Eastern European state with a proclaimed ‘traditional religion’. Public interest in religion is aroused only by certain ‘provocative events’ that they describe. Respondents claim that there are no problems related to or provoked by religion in the field of labour–legal relations concerning individuals; however, there are some important cases in which tensions are clearly present. These cases relate to religious holidays and prayers and the issue of religious dress in the workplace. These cases did not lead to new litigation, nor did they reach courts or equal treatment commissions. One explanation for the lack of legal cases, the authors suggest, may be the general lack of trust in the justice system as well as the presence of more pressing matters for workers who may face poverty, in one of the poorer EU member states.

In contrast, in France, the situation is, as explained by Franck Frégosi and Deniz Kosulu, quite different. Religion is quite high on the public agenda, even if not everyone is necessarily comfortable with this phenomenon. In 2013, the French Cour de Cassation halted developments that aimed at transposing the concept of laïcité – and the associated restrictions on religious manifestations – from the public sector to the private sector. The authors illustrate how for various respondents, including trade unionists, the topic of religious diversity in the French workplace is strongly embedded in the framework of laïcité, which frustrates the public expression of religious identities and tends to individualize these identities also in the labour market. According to some French respondents, employees should be free to practise their religion, but they should not make claims on behalf of their membership to a religious group. The article, however, also shows that the reality of
religious discrimination in the French workplace is much more complex than most respondents tend to make us believe. Discrimination of religious employees, in a direct or indirect manner, happens more often than is officially reported in France. Many respondents suggested many religious discriminations are framed as discriminations are based on ethnic origin or gender. In addition, Muslim employees are victims of more often than others in the labour market. The article ends with some recent examples of businesses that treat the issue of religious diversity in the French workplace in a more pragmatic manner, which opens more possibilities for reasonable accommodation. Within this new context, businesses acknowledge the business case for positively engaging with the existence of religious diversity in the French workplace.

Addressing the situation in Turkey (the only non-EU state included in the RELIGARE project and this special issue), Tuğba Tanyeri-Erdemir, Zana Çitak, Theresa Weitzhoffer and Muharrem Erdem focus on two specific issues of discrimination on grounds of religion or belief in the Turkish workplace: discrimination because of wearing a headscarf and religious affiliation discrimination, specifically with regard to Alevi’s. Their findings suggest that – while the headscarf has dominated the issue of discrimination on religious grounds – a more pervasive discrimination takes place against members of religious groups other than the Sunni-Hanefite majority. Most respondents agree that current state policy in Turkey contributes little to the promotion of respect, tolerance and pluralism, but instead presents and seeks to reproduce a perspective of a religiously homogeneous society, in fear of perceived threats to social cohesion (‘splitting society’).

In a final, more comparative contribution considering the six country studies as a whole, Marie-Claire Foblets, based on a close reading of the contributions and experiences within the multidisciplinary RELIGARE project, reflects on the challenges presented by the illustrated tensions in labour relations in both secular workplaces (the individual religious freedom cluster) and faith-based or religious ethos workplaces (the collective religious freedom cluster).

In conclusion, after a period during which many intellectuals in the West, especially Europe, expected religion to progressively fade away from public life, for various reasons (immigration, globalization and secularization), religion has over the last two decades re-established itself as a phenomenon to be reckoned with in the globalized West. The raising of religious claims in the work setting, and the request for reasonable accommodation by individual employees and requests for exemptions by religious ethos employers are but a few consequences of the fact that for some individuals and groups, religion pervades all aspects of social life. This perspective rejects the straightjacketing of religion in the ‘private space’ as unnatural and unfair. However, the occurrence of such religious claims is necessarily mediated, in the case of individual employees, by socio-economic considerations. Often, those who find certain job requirements or conditions difficult to fulfil because of their conscience, beliefs and practices are minorities who, besides being vulnerable to conformist cultural pressures, also hold vulnerable socio-economic positions. No doubt their plight deserves to be better researched and understood. Since religion in society is becoming a favoured research topic for social scientists, we hope this special issue will spark further interest and encourage others to enter into and contribute to this debate.
Acknowledgements

The editors wish to thank all the contributors for their collaboration during the RELIGARE project and on this collective special issue; in addition, we are grateful to Susan Easton, Marie-Claire Foblets, Kristen Ghodsee, Maleiha Malik, Marcel Maussen, Bas Schotel, Mine Yildirim, Tymen van der Ploeg, Frederik Thuesen and Amit Panda for assistance, useful comments and discussions along the way.

Funding

This work was supported by the RELIGARE project that received funding under the European Commission’s Seventh Framework Programme (Socio-Economic Sciences and Humanities; grant agreement number 244635).

Notes


2. The respondents thus included labour market stakeholders such as trade unionists and religious ethos employers, but we did not specifically target employers or individual employees (although opinion makers sometimes reflected on their own experiences as employees). The reason for this is that the interviews explored topics and controversies in the four RELIGARE focus areas (employment, family law, public space, and state support and financing of religions). Despite (or thanks to) this selection, the interviews lead to important insights on the topic of religious accommodations in the workplace.

3. It is important to distinguish as clearly as possible reasonable accommodation as a legal concept from the broader meaning and use as a societal and political concept. Here the focus is on the former, but the latter is also, obviously, important. Reasonable accommodation as a method can be ‘strategically wise’ for public debate, civil society organizations, and so on.


18. The defense of reasonable accommodation is often criticized as being too moderate, ‘pragmatic’ and of reproducing implicit or explicit cultural/religious ‘majority bias’. See Beamon LG (2011) ‘It was all slightly unreal’: What’s wrong with tolerance and accommodation in the adjudication of religious freedom? *Canadian Journal of Women and the Law* 23(2): 442–463. Hence we would have to move ‘beyond tolerance and accommodation’, at least in the Canadian context. Such criticism would be true only if ‘fairness as evenhandedness’ and reasonable accommodation would be meant to replace but not if they complement or supplement other second-order principles, basic rights, and methods of legal reasoning (see Alidadi, 2012; Bader V (2013) Moral minimalism and more demanding moralities: Some reflections on ‘tolerance/toleration’. In: Dobbernak J and Modood T (eds) *Tolerance, Intolerance and Respect: Hard to Accept*. Basingstoke, UK: Palgrave Macmillan, pp. 23–51, for criticism of ‘going beyond toleration’). In addition, the proposed alternative ‘deep equality’ assumes that we could eventually come up with strictly equal rules and regulations in matters of ‘culture and religion’, an assumption that is clearly wrong also in Canada and the United States.
19. To repeat, both reasonable balancing and reasonable accommodation are not moral or legal principles but methods of legal reasoning. As such, we need to develop more specified criteria and standards. With regard to ‘reasonable balancing’ of conflicting rights, generally there is a long tradition of specifying and working out such criteria (famous ‘three prong test’ of the US Supreme Court, weaker ones of the European Court of Human Rights (ECtHR) (legitimate aim, necessity, proportionality; ‘objective and justifiable’). Working out these standards happens by what we call reflexive, iterative learning processes (see Sabel CF and Zeitlin J (2012) Experimentalism in the EU: Common ground and persistent differences. Regulation and Governance 6(3): 410–426; Trute H-H (2005) Democratizing science: Expertise and participation in administrative decision-making. In: Nowotny H, Pestre D, Schmidt-Abmann E and Schulze-Fieltz H (eds) The Public Nature of Science Under Assault: Politics, Markets, Science and the Law. Berlin/Heidelberg: Springer, pp. 87–108. In specific contexts and comparable cases, it is the main task of justices of High Courts. It cannot be done in advance and in abstract by moral/political philosophers or theorists, neither by legal theorists. Yet, with regard to reasonable accommodation, we could learn a lot from practices in the United States (e.g. the ‘de minimis’ standard for assessing whether there is an ‘undue hardship’) and Canada (higher standards, see in second section of this introduction) in this regard.


21. Within the RELIGARE project, some 200 case law decisions relevant to the employment area were collected from 10 countries involved in the project (Belgium, Bulgaria, Denmark, France, Germany, Italy, the Netherlands, Spain, Turkey and the United Kingdom). The focus was generally on post-2000 cases, but there were some important cases going back to the 1980s.

22. BBC (1969) Sikh busmen win turban fight. BBC Online. Available at: http://news.bbc.co.uk/onthisday/hi/dates/stories/april/9/newsid_2523000/2523691.stm (accessed 21 September 2012). While not all of the then estimated 130,000 British Sikhs approved of this move, 14 workers ‘had vowed to follow suit and set fire to themselves if their request was not granted’. After the resolution, Mr Jolly said ‘I am a moderate and religious man and would never have taken the extreme step of threatening my life if they had not refused to listen to reason’.


25. This typology is based on a collection of case law within the RELIGARE project. (In addition to these ‘accommodation’ cases, there are also cases of (direct) discrimination on the basis of religious affiliation, harassment and victimization. For example, Ivanova v. Bulgaria (52435/99), 12 April 2007 (discussed later in part 2); Western High Court of Denmark of 25 October, 2000-U.2001.207.V (Jehovah’s Witness dismissed because of his religious affiliation)).


28. For example, requests for time off to observe a day of rest/Sabbath, a religious holiday, an extended bereavement period, or daily and weekly prayer.

29. For a list of illustrations, see Alidadi K (2012) n. 26 above, pp. 696–698.

30. After the adoption of the 1964 Civil Rights Act, the Equal Employment Opportunities Commission (EEOC) argued that the prohibition of discrimination on the basis of religion implied a duty of reasonable accommodations on the part of the employer. In 1972, after some courts did not accept this position, an explicit duty was included in the Civil Rights Act obliging employer and trade unions to reasonably accommodate the practices, observances or beliefs of workers unless doing so amounted to an undue hardship. 42 USCA s. 2000 (e)(j); Dewey v. Reynolds Metal Co. 429 F.2d 324 (6th Cir.) [1970] (equally divided court), see Bribosia E, Ringelheim J and Rorive I (2009) *Aménager la diversité: le droit de l’égalité face à la pluralité religieuse*. *Revue trimestrielle des droits de l’homme* 78: 319–373.

31. Since the premodern and early modern times, the focus in Western societies is said to have moved from religious tolerance to religious freedom, as evident in various international legal instruments such as the ICCPR and the ECHR; see Van der Ven JA (2010) *Human Rights or Religious Rules?* Vol. 1. Leiden, Holland: Brill, pp. 265–266. In public fora and debates, the concept and idea of (religious) tolerance, however, remains important.

32. See Americans with Disabilities Act 1990, 42 USC s.12101 et seq.


34. In Canada, the right to accommodations is transversal, that is, linked to all characteristics under non-discrimination law and can relate to religion, disability, gender and race, amongst others.


38. See the Law allowing the Jewish minority in Italy time off on important Jewish religious holidays in *Francesco Sessa v. Italy* (28790/08) [3 April 2012]. In the United Kingdom, section 11 of the Employment Act 1989 exempts turban-wearing Sikhs from having to wear safety helmets on a construction site. An instance of accommodation on the basis of gender is the right for new mothers to take (un)paid breastfeeding breaks on the job. There are also examples
outside of employment. In many countries, there are exemptions to animal slaughtering laws to accommodate Muslim and Jews; again in the United Kingdom, Sikhs are exempt from the requirement to wear motorcycle helmets under section 2A of the Motor-Cycle Crash Helmets (Religious Exemption) Act 1976.

39. For example, Article 5.4. Flemish Decree on Proportionate Participation on the Labour Market of 8 May 2002, applicable in the area of Flemish education and employment mediation, contains a general duty of reasonable accommodations for various ‘risk groups’ (kansengroepen). This provision has not been tested in practice with regard to religious minorities. Also under Article 13(2) of the Bulgarian Protection Against Discrimination Act, employers should provide employees time off to meet religious commitments or days off on their religious holidays. Under Article 173 of the Bulgarian Labour Code employees with religion other than the Eastern Orthodox Christianity have a right to use their annual leave when their denomination has a holiday or take up unpaid leave ‘but not more than the number of days for the Eastern Orthodox Christian holidays’. Thanks to Maya Kosseva for this information.

40. See Heneghan T (2012) European Union sees faith bias problem, but isn’t sure of a solution. Reuters, 10 December. Available at: http://blogs.reuters.com/faithworld/2012/12/10/european-union-sees-faith-bias-problem-but-isn’t-sure-of-a-solution/ (accessed 32 January 2013) (quoting Andreas Stein, head of the equality law unit in the European Commission as saying during the two-day RELIGARE conference on 4–5 December 2012, on the topic of reasonable accommodations, ‘These are already not easy times for defending (what) we currently have in place’ and ‘There is a non-negligible political risk in reopening these directives. Trying to improve them may achieve the opposite in the end’).


42. In addition, there may be other relevant laws and provisions, such as a general duty to act in good faith/act as a good employer under general labour laws. However, considering the marginal role of these norms, particularly since the rise in prominence of human rights and especially non-discrimination law, these will not be discussed. See, for example, Waddington (2007), n. 33 above, p. 755.

43. The weakness with concerted adjustments is the lack of legal certainty: a change of heart with the employer (or a change in circumstances, such as a new boss or complaining colleagues/customers) can signify the abrupt end of a once-mutually agreeable (negotiated or implicit) situation.


46. ECHR, Eweida and others v. the UK, App. nrs. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.


European Workplace. Aldershot, UK: Ashgate, 2012, pp. 33–58; The court had departed from this doctrine in particular employment cases, for example, when it concerned military functions (Konstantin Markin v. Russia, 22 March 2012, App. nr. 30078/06).

49. Since British Airways (BA) was a private employer, the Court also emphasized the positive duties of the state under Article 9: ‘domestic authorities failed sufficiently to protect the first applicant’s right to manifest her religion, in breach of the positive obligation under Article 9’ (consideration 95).


54. For example, the 1905 French law on the Separation of the Churches and State (Loi du 9 décembre 1905 concernant la séparation des Églises et de l’État) establishing the French principle of laïcité; Article 2 of the 1982 Constitution of Turkey which proclaims secularism (laiklik) as one of the (unchangeable) attributes of the Republic.