

Religion, Equality and Employment in Europe

The Case for Reasonable Accommodation

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• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON

2017

Hart Publishing

An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd Bloomsbury Publishing Plc
Kemp House 50 Bedford Square
Chawley Park London
Cumnor Hill WC1B 3DP
Oxford OX2 9PH UK
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

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First published 2017

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-50991-137-0
ePDF: 978-1-50991-139-4
ePub: 978-1-50991-138-7

Library of Congress Cataloguing-in-Publication Data

Names: Alidadi, Katayoun, author.

Title: Religion, equality and employment in Europe : the case for reasonable accommodation / Katayoun Alidadi.

Description: Oxford [UK] ; Portland, Oregon : Hart Publishing, 2017. | Includes
bibliographical references and index.

Identifiers: LCCN 2017003842 (print) | LCCN 2017004791 (ebook) (print) |
LCCN 2017004791 (ebook) | ISBN 9781509911370
(hardback : alk. paper) | ISBN 9781509911387 (Epub)

Subjects: LCSH: Religion in the workplace—Law and legislation—Europe. | Freedom
of religion—Europe. | Discrimination in employment—Law and legislation—Europe. | Religious
minorities—Legal status, laws, etc.—Europe. | Equality before the law—Europe. | European
Court of Human Rights. | Convention for the Protection of Human Rights and Fundamental
Freedoms (1950 November 5)

Classification: LCC KJC2945.R44 A74 2017 (print) | LCC KJC2945.R44 (ebook) | DDC 344.2401/58—dc23

LC record available at <https://lcn.loc.gov/2017003842>

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

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author information, details of forthcoming events and the option to sign up for our newsletters.

PREFACE

Religion, Equality and Employment in Europe critically assesses and evaluates the legal protections for the religion or belief of employees in private-sector employment within a multi-layered European normative framework. Besides examining relevant case law of Europe's two supranational courts—the European Court of Human Rights and the Court of Justice of the EU—the study engages three European countries that exhibit both striking socio-legal commonalities and differences. Three different Western European legal cultures, namely Belgium, the Netherlands and Britain, serve as in-depth country studies for this thematically focused systematic comparison. Interactions between the applications of national-level and Europe-wide norms are also considered throughout. While showing important realizations and potentials of the anti-discrimination law and human rights frameworks, notable gaps and shortcomings in legal protection are illustrated through case law examples. Building on the analysis, various ways forward are proposed for an inclusive Europe which accepts, respects and—where possible and reasonable—accommodates the religious and philosophical diversity of its citizens and inhabitants. One of these proposals focuses on the legal concept of *reasonable accommodation*, which has been the subject of much debate and controversy.

Going beyond the paradigmatic headscarf cases by investigating a wide array of religious requests and needs which have arisen or are bound to arise in the near future in the European workplace, this book aims to make a constructive contribution to ongoing debates surrounding the sensitive and controversial issue of the accommodation of religion and belief in Europe in the domain of employment, which is interlinked with other important areas of social life such as education, housing and health care. Besides the display of religious dress and symbols in the workplace, the possibility to celebrate religious holidays or days of rest, religiously motivated objections to certain employment-related functions, and a number of issues which concern the workplace as social context (eg, the observance of dietary rules, shaking hands with members of the opposite sex) are investigated. The often varied responses such questions have received in the different countries that are the focus of this study provide food for thought for any stakeholder concerned with the uniform, or at least convergent, understanding of European anti-discrimination and human rights norms.

This study engages deeply with the relevant normative frameworks at both national and EU levels and bridges disciplines by drawing insights from legal theory and empirical disciplines such as the sociology of law, sociology of religion,

legal anthropology and socio-legal studies. Because of the topic and the interdisciplinary approach, this book will appeal to a broad range of scholars, practitioners and students, as well as to segments of the larger public seeking to gain insights into issues of religious diversity and accommodation which go beyond media sound bites. Indeed, the discussion on reasonable accommodation may provide a genuine barometer for the perspectives and debates on the ground in Europe regarding religion's undeniable role in society. Such debates are hardly outside the ambit of the EU, considering that the EU has progressed far beyond its humble origins as an economic unit into a more complete political and social model, with issues related to social cohesion and human rights amongst its core concerns. While religion and religious symbols in Europe have drawn increasing attention in the past two decades, it should be clear that the recent influx of millions of refugees from Muslim majority countries—prospective European employees—will anchor the continued topicality of the issue of religion and work as a crucial part of integration policies in Europe. Much stands to be gained by adopting appropriate measures which aim to fight discrimination and exclusion while sending critical messages of inclusivity and togetherness within the management of religious and philosophical diversity in general.

Introduction: Religion and Employment in Europe. Thick Identities Colliding with Muscular Liberalism

I. The Turn Towards Religion and Accommodation

‘[M]odernity does not necessarily bring about secularization. What it does bring about, in all likelihood necessarily, is pluralism’.¹

The period during which religion was expected to progressively fade from public life in the West, especially in Europe, now lies well behind us.² Over the last three decades religion has re-established itself as a phenomenon to be reckoned with in the globalised West.³ Even in Europe, ‘the exceptional case’⁴ when it comes to the importance of religion in the lives of the (majority) population, previously ignored or neglected issues related to religion in public life have turned into favoured research topics for political, social and legal scholars in a ‘relatively new area of reflection’.⁵

Since the end of World War II, the racial and religious make-up of Western Europe has been altered significantly as immigrants, asylum seekers and ‘guest workers’ have established new homes here. A new-fangled religious diversity, with Islam in Europe at the forefront, has added to religious diversities of predominantly Judeo-Christian nature which have been a fixture of Europe for centuries. It is not merely the (re)surrection of religion as such which raises a variety of

¹ P Berger, G Davie and E Fokas, *Religious America, Secular Europe? A Theme and Variations* (Aldershot, Ashgate, 2008) 12–13.

² See, eg, WC Durham Jr. and BG Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (Wolters Kluwer, 2010) xxxi (‘today we are more likely to make the mistake of seeing religion as everywhere and dangerous, rather than viewing it as nothing and irrelevant’).

³ In the words of Gilles Kepel, God has ‘taken revenge’. G Kepel, *La Revanche de Dieu. Chrétiens, juifs et musulmans à la reconquête du monde [The Revenge of God: The Resurgence of Islam, Christianity and Judaism in the Modern World]* (Le Seuil, 1991).

⁴ G Davie, *Europe: the Exceptional Case. Parameters of Faith in the Modern World* (Darton, Longman & Todd Ltd, 2002); Berger, Davie and Fokas, *Religious America, Secular Europe? A Theme and Variations*, n 1 above, 9.

⁵ Linda Woodhead, ‘*Religion or belief: Identifying issues and priorities* (London, Equality and Human Rights Commission Research report 48, 2009) iii.

challenges in the twenty-first-century modern Western society but the fact of religious (super)diversity which, for some, calls for adopting an accompanying paradigm of *religious pluralism*.⁶ From a political, social and legal perspective, vital standing is provided to the perennial *accommodation question*: how can and should religious or philosophical needs, whether rooted in immigration or long-standing diversities, be accommodated within liberal-democratic legal systems?⁷ And where do the limits lie of the fundamental right to freedom of religion or belief and to equality irrespective of religion or belief, in particular in cases of tension or head-on clashes with other fundamental rights and freedoms? Indeed, debates on religious freedom, equality and accommodation cannot be divorced from some highly intertwined and important contemporary debates on gender equality, LGBTQ rights and the freedom of speech. These debates must also take into account the larger socio-political context and concerns of multiculturalism, secularism and the role of (state) neutrality.

Employment is one area aptly illustrating the tensions that arise when religion or belief-based claims are formulated in twenty-first-century liberal-democratic Europe. For many individuals, religion and belief (including non-belief) remain a core part of their personal identity,⁸ and are not necessarily ‘shed’ when entering the workplace for the duration of one’s professional time.⁹ Between the *micro level* of personal and family life and the *macro level* of state policies and international relations, the role and treatment of religion and religionists at the *meso level* of the workplace thus take shape in pluriform ways. Conversely, employment participation is often the gateway to effective societal integration and social mobility. Otherwise stated: exclusion from employment significantly hurts people’s opportunities for social integration and their sense of societal acceptance. And while individuals may realise all too well that their religious (or non-religious) affiliation and practices are cause for discrimination and socio-economic disadvantage in

⁶ While diversity and pluralism are often used synonymously, a useful distinction is drawn by Diana Eck in that ‘pluralism is not diversity alone, but the energetic engagement with diversity’. See D Eck, *A New Religious America: How a ‘Christian Country’ Has Become the World’s Most Religiously Diverse Nation* (Harper San Francisco, 2001). On ‘super-diversity’, see S Vertovec, ‘Super-diversity and its implications’ (2007) 30 *Ethnic and Racial Studies* 1024, 1024–54.

⁷ See, generally, V Bader, *Secularism or democracy? Associational governance of religious diversity* (Amsterdam, IMISCOE/Amsterdam University Press 2007); The term accommodation does not itself make clear who does the accommodating. Accommodations by a host society may be more visible, but often substantial accommodations—in the form of coping mechanisms—are continuously taking place on the side of the newcomers or minorities.

⁸ See, eg, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by UN General Assembly resolution 36/55 of 25 November 1981, Preamble (‘[R]eligion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life’).

⁹ L Vickers, *Religious freedom, religious discrimination, and the workplace* (Oxford, Hart Publishing, 2008) 4. While religious practice and religious identity are certainly connected, they do not need to go hand in hand. For instance, amongst Turkish and Moroccan youth in the Netherlands a decline in mosque attendance and prayer was coupled with a ‘heightened sense of Muslim identity’. See Johannes A van der Ven, *Human rights or religious rules?* (Brill, 2010) 24.

everyday life, they often particularly cherish this element of belonging as a source of empowerment, strength and pride. In fact, marginalisation of individuals and groups because of religion can even serve to reinforce beliefs, practices and belonging.¹⁰ Restraints on religious practices may thus have counter-productive effects.

This book focuses on responses to religious and non-religious belief and practices that are anchored in law. The law at times and in certain situations offers explicit answers, from mandating or allowing particular accommodations to banning certain practices altogether. But in many instances, abstract general principles of law must be applied (or ignored) to address new or unanticipated challenges. Many situations, thus, still await satisfactory resolution.

More particularly, religious and non-religious beliefs and observance are recognised and protected under human rights law and under equality legislation in Europe. Notwithstanding this, on the ground there remain—at times significant—burdens on entering and thriving in the European workplace, and some employees may face what is called ‘existential dilemmas’.¹¹ A testing ‘religion penalty’¹² may be the reality for many devout religionists or ‘obdurate believers’¹³ who strictly observe rules and practices separating themselves from the norms in their largely secular surroundings. Other employees ‘may be happy to ignore the religious traditions in order to accommodate an employer’s demands’.¹⁴ But perhaps most workers who hold religion or belief dear in their personal life may find themselves somewhere in the middle: not quite existentially torn between the demands of two different worlds and worldviews, but neither entirely content to downplay or effectively abandon at work the beliefs or practices they consider provide ultimate meaning to their life.

The topic of religion or belief in private sector employment remains by and large underexplored territory, as recently noted by the UN Special Rapporteur on Freedom of Religion or Belief.¹⁵ More attention has been directed to educational settings, the public space or public sector employment in Europe, in particular the dress of Muslim women, including the headscarf/hijab, niqab/burqa and more recently the ‘burqini’. The analysis in this book aims to fill part of this gap. Since

¹⁰ P Connor, ‘Contexts of immigrant receptivity and immigrant religious outcomes: the case of Muslims in Western Europe’ (2010) 33 *Ethnic and Racial Studies* 376; JR Kunst et al, ‘Coping with Islamophobia: The effects of religious stigma on Muslim minorities’ identity formation’ (2012) 36 *International Journal of Intercultural Relations* 518.

¹¹ H Bielefeldt, *Interim report of the UN Special Rapporteur on the Freedom of religion or belief. Tackling religious intolerance and discrimination in the workplace*, no A/69/261 (United Nations, 2014) 17.

¹² J Lindley, ‘Race or Religion? The Impact of Religion on the Employment and Earnings of Britain’s Ethnic Communities’ (2002) 28 *Journal of Ethnic and Migration Studies* 427 (finding there is also ‘a pure Islamic penalty’).

¹³ Vickers, *Religious freedom, religious discrimination, and the workplace*, n 9 above, 4; the term ‘obdurate believer’ is borrowed from A Bradney, ‘Faced by Faith’ in D Oliver et al (eds), *Faith in law* (Oxford, Hart Publishing, 2000).

¹⁴ *ibid*, 4.

¹⁵ See Bielefeldt, *Interim report of the UN Special Rapporteur on the Freedom of religion or belief. Tackling religious intolerance and discrimination in the workplace*, n 11 above, 7.

Max Weber's *The Protestant Ethic and the Spirit of Capitalism* (1905), the relationship between religion and economics has been much debated in sociology of law studies.¹⁶ However, research rooted in secularisation theory has disconnected religion and the workplace, since these were seen to be distinct spheres: 'The former are seen by many as concerned with issues of meaning, value, and ultimate significance with the latter concerned primarily with making money.'¹⁷ More recently the compartmentalisation is being challenged by experiences on the ground. The dilemmas faced by 'modern Antigones', torn between their religious commitments and professional duties, can only fully be appreciated within a framework which recognises that religion can play a *legitimate role* in an employee's life, including during work hours and in the workplace.

Indeed, Vickers frames this pertinent question as follows:

A preliminary question that arises when considering the interaction of religion and the workplace is why the work relationship, traditionally viewed as a private contractual arrangement between master and servant, should be a forum in which religion has any traction at all. After all, the main aim of employers is the running of efficient and profitable businesses; and employees give up a degree of autonomy when they enter the workplace, in return for a wage. Why then should religious employees expect their religious interests to be accommodated at work at all?¹⁸

From a legal point of view, one can refer to relevant protections: the right to freedom of thought, conscience and religion (in short: the freedom of religion or belief) is a fundamental human right, with horizontal effect, and the prohibition of discrimination is even more closely tailored towards private, contractual relations. But this evokes the deeper, underlying policy question of *why* to adopt or continue to support such protection, or even to advocate more effective protection under existing or new frameworks that may offer better guarantees that reasonable accommodation takes place on the ground. This is a vital debate and one which defies easy answers. But it is reasonable to assert that companies and businesses—whether large or small—do far much more in society than simply pursue profits for their owners or shareholders; they operate within a certain socio-cultural context, sometimes with considerable power and influence and are important 'distributive agents'¹⁹ with regard to scarce goods (including jobs and positions which have financial and intangible benefits such as respect, confidence, security etc). This power, position and (at times) status justify obligations towards social justice.

¹⁶ See A van Hoorn and R Maseland, 'Does a Protestant work ethic exist? Evidence from the well-being effect of unemployment' (2013) 91 *Journal of Economic Behavior and Organization* 1; A Strhan, 'Book Review: *Spirituality, Inc.: religion in the American workplace* by L Lambert III (NY University Press, 2009)' (2014) 11 *Journal of Management, Spirituality & Religion* 91.

¹⁷ Strhan, 'Book Review: *Spirituality, Inc.: religion in the American workplace*', *ibid* at 91; S Bruce, *God is Dead: Secularization in the West* (Wiley-Blackwell, 2002).

¹⁸ L Vickers, 'Law, religion and the workplace' in Silvio Ferrari (ed), *Routledge handbook of law and religion* (Abingdon, Routledge, 2015) 272.

¹⁹ For a discussion of employers as distributive agents, see Alexander Somek, *Engineering Equality. An Essay on European Anti-Discrimination Law* (Oxford, OUP, 2011).

Conversely, employees do not give up their personal autonomy entirely when they contract out their labour, but their interests and rights may compete with those of other employees, the employer, customers and the larger society. This makes the balancing of interests and rights a justifiable and necessary undertaking in any system which values fundamental rights, and the exercise may point to the potential of *reasonable* accommodation in meeting the needs of particular workers. The emphasis on reasonableness, in the prior sentence and the title, is significant as there are limits; not to the willingness to meet the other halfway (or somewhere there) but to the practical possibility and expediency of doing so in particular cases and circumstances. I will return to this point later.

To be sure, accommodation of religious needs in Europe does not concern only immigrants or Muslims, its implications and applications have never been restricted to certain groups. I argue for reasonable accommodation on the basis of religion *or belief*, thus including non-belief, as a symmetrical right. Yet the issue and the proposed right to reasonable accommodation cannot be divorced from the current socio-economically and culturally precarious status of newcomers in Europe. At the basic level, openness towards accommodation only makes sense when a society rejects an assimilative policy towards newcomers and by extension towards all those who in certain ways derogate from the majority—sometimes seen as ‘neutral’—norm. Assimilation is ‘one-way integration’, ‘where the newcomers do little to disturb the society they are settling in and become as much like their new compatriots as possible’.²⁰ Tariq Modood has written that

[f]rom the 1960s onwards, beginning in the Anglophone countries and spreading to others, assimilation as a policy has come to be seen as impractical (especially for those who stand out in terms of physical appearance), illiberal (requiring too much State intervention) and inegalitarian (treating indigenous citizens as a norm to which others must approximate).²¹

Johannes Van der Ven similarly concludes that assimilation is ‘politically impracticable, judicially objectionable, and morally reprehensible’.²² With assimilation as a policy discredited, even the attacks on multiculturalism have not been accompanied by explicit calls to bring it back. Also, various scholars ‘have begun to focus on the problems that an assimilationist bias and, more concretely, that specific employment demands to assimilate raise for the equality ideal’.²³ This does not take away from the fact that to many politicians in Europe, a ‘successful integration’ nonetheless approximates to assimilation. For instance, former

²⁰ T Modood, ‘Four modes of integration’ in MC Foblets and JF Schreiber (eds), *Les Assises de Interculturalité/De Rondetafels van de Interculturaliteit/The Round Tables on Interculturality* (Brussels, Larcier, 2013) 44.

²¹ *ibid.*, 44. In 1966, UK Home Secretary Roy Jenkins in a now famous speech argued that integration is ‘not a flattening process of assimilation but equal opportunity accompanied by cultural diversity in an atmosphere of mutual tolerance’.

²² van der Ven, *Human rights or religious rules?*, n 9 above, 231–32.

²³ TK Green, ‘Work culture and discrimination’ (2005) 93 *California Law Review* 623; see also K Yoshino, ‘Covering’ (2002) 111 *Yale Law Journal* 769.

French President Nicolas Sarkozy argued the primary responsibility of the person who is to successfully integrate in the following terms:

C'est de la part de celui qui arrive la volonté de s'inscrire sans brutalité, comme naturellement, dans cette société qu'il va contribuer à transformer, dans cette histoire qu'il va désormais contribuer à écrire. La clé de cet enrichissement mutuel qu'est le métissage des idées, des pensées, des cultures, c'est une *assimilation réussie* (emphasis added).²⁴

This may have been a proverbial slip of the tongue, but even when the term 'assimilation' is not used expressly, what is intended in political and popular discourse on integration and participation is 'a flattening process of assimilation', which implies leaving behind 'outlandish' religious beliefs and practices. The risk is that the bar is placed 'so high that newcomers either can't or do not want to jump over it'.²⁵ Therefore, the case for reasonable accommodation and the rejection of assimilation policy go hand in hand.

II. Scope of Analysis and Overview

An increasingly heterogeneous Europe thus presents politicians, policy-makers, lawyers and judges with a variety of societal challenges, including the setting of appropriate parameters for the fundamental right to freedom of religion and belief and non-discrimination on the basis of religion and belief in the area of employment. Considering the link with multiculturalism, integration, social cohesion concerns, and dire socio-economic inequality of Muslims and other ethno-religious minorities in Europe, the (non) accommodation of religion or belief should be considered a highly volatile, pressing and intractable matter.

Operating within a non-assimilative 'integration by accommodation' framework,²⁶ this book critically examines and evaluates the legal protections in place for issues of religion or belief arising in the private sector European workplace.²⁷

²⁴ N Sarkozy, 'Respecter ceux qui arrivent, respecter ceux qui accueillent', *Le Monde*, 8 December 2009. This view has consequences as far as religious practices are concerned, since former President Nicolas Sarkozy argues that 'Chrétien, juif ou musulman, homme de foi, quelle que soit sa foi, croyant, quelle que soit sa croyance, chacun doit savoir *se garder de toute ostentation et de toute provocation* et, conscient de la chance qu'il a de vivre sur *une terre de liberté, doit pratiquer son culte avec l'humble discrétion* qui témoigne non de la tiédeur de ses convictions mais du respect fraternel qu'il éprouve vis-à-vis de celui qui ne pense pas comme lui, avec lequel il veut vivre'.

²⁵ B Eeckhout, 'Het besef rijpt dat integratie alleen kan werken als iedereen zijn eigen identiteit en cultuur mag ontwikkelen', *De Morgen*, 12 March 2014.

²⁶ This is the perspective from the state; for the point of view of non-dominant ethnocultural groups and individuals towards the dominant society, see JW Berry et al (eds), *Cross-cultural psychology: research and applications*, 2nd edn (Cambridge University Press, 2002) 354. See also van der Ven, *Human rights or religious rules?*, n 9 above, 21; Y Lamghari, *L'Islam en entreprise: La diversité culturelle en question* (Editions L'Harmattan, 2012) 25–26.

²⁷ The demarcation between the public sector and the private sector is not always clear-cut. My distinction depends on the identity of the employer (the state or another entity or person).

The *dual and multilayered framework*²⁸ in place necessitates a multilevel, transnational legal analysis,²⁹ simultaneously taking into account legal developments at supranational and domestic levels in human rights and equality law.³⁰ The private sector angle also provides insights into the dynamic of labour relations and illustrates the tensions in the (at least theoretical) absence of *state* neutrality³¹ concerns, while revealing at the same time dominant standards in the organisation of labour and working life that form particular barriers to the participation of religious workers.

Religion in the workplace issues, then, can be analysed under two main legal frameworks, which exhibit significant overlaps and interactions.³² First, the human rights law framework protects all human beings' freedom of thought, conscience and religion and right to non-discriminatory treatment, a protection which is not specific or tailored to the area of employment. In contrast, under EU anti-discrimination law different forms of disadvantaging and discrimination, including based on the grounds of religion and belief, are prohibited specifically in the economic site of employment and occupation.³³ In Europe, these two frameworks largely correspond to the legal tools of the European Convention on Human Rights (ECHR) and EU Directive 2000/78 pertaining to the area of employment, occupation and vocational training (Employment Equality Directive),³⁴ as implemented in national legislation. The meaning of these two frameworks and their effectiveness for the protection of religious interests and claims are concretised through their application by national as well as supranational courts, prominently

Public sector employment represented more than 29% of the total employment on average between 2008–11 in Belgium (31.5%), the Netherlands (29.5%) and the UK (29.7%), all countries with a 'very large public sector' (Eurostat).

²⁸ 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 and the prominence of human rights and especially non-discrimination law in religion in the workplace cases, the latter forms the focus.

²⁹ G Shaffer, 'Transnational Legal Process and State Change' (2012) 37 *Law & Social Inquiry* 229 (defining Transnational Law as 'law in which transnational actors, be they transnational institutions or transnational networks ... play a role in constructing and diffusing legal norms').

³⁰ Other levels, in particular the international level, are also important but arguably have played less of a role than the ECHR and EU in this area and will therefore only briefly be discussed.

³¹ This concern for neutrality in the area of religion and culture may be 'an attempt to grasp an illusion'. SD Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (Oxford, Oxford University Press, 1995) 96. Some nonetheless consider it a worthwhile political ideal. A Koppelman, 'The fluidity of neutrality' (2004) 66 *The Review of Politics* 633.

³² Article 14 ECHR is an auxiliary non-discrimination provision. The protocol establishing a freestanding non-discrimination provision has a limited role considering the lack of wide-spread ratification.

³³ A proposed Directive would extend the area of protection against religious discrimination beyond employment and vocational training into social protection, social advantages, education, and the access to and supply of goods and services available to the public, including housing, see Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

³⁴ Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, [2000] OJ L303, 02/12/2000, 16–22.

the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).³⁵

Recent case law of the ECtHR, for instance the 2013 *Eweida* case,³⁶ aptly illustrates the fluidity and flexibility of the ‘law in practice’ and consequently of the relation between the human rights and anti-discrimination law frameworks. The question is not just which is more effective or useful than the other, but rather how the respective frameworks interact and influence each other to define an appropriate level of protection. To what extent (and through which legal mechanisms) are private sector employees’ religious or non-religious beliefs and practices (best) protected? Are there particular limitations or shortcomings associated with the respective legal frameworks? The employee-angle implies ample attention for the position and role of *individual employees’* religion and belief in (a wide variety of) private sector employment, which can (but need not) come into tension or conflict with rights and interests of others or with abstract principles.³⁷

Understanding and analysing the jurisprudence of the ECtHR and relevant EU law form the first step towards a more contextual analysis of three country studies, namely Belgium, the Netherlands and the United Kingdom.³⁸ The key reason for the selection of these countries—all sharing the common EU frameworks—was the existence of relevant and developing domestic *law and jurisprudence* as well as important *societal* developments and public debates surrounding law and religion, multiculturalism, and the integration of minorities.³⁹ The country studies illustrate the achievements and potential, but also the gaps in, limitations of and lack of coordination between current multilevel legal protections. Experiences and insights from other jurisdictions—including the United States and Canada, where

³⁵ There is also interaction between the two supervisory courts (CJEU-ECtHR), sometimes with explicit references in cases. The process of the EU’s accession to the ECHR has, however, come to a halt following the CJEU opinion 2/13 of 18 December 2014 on the Accession of the European Union to the ECHR.

³⁶ *Eweida and Others v United Kingdom*, Application nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

³⁷ This book does not include self-employment, public sector employment or employment in religion-ethos companies. However, there are undeniable overlaps and cross-over effects with the situation of public servants, as discussed below.

³⁸ The United Kingdom consists of Great Britain (England, Wales and Scotland) and Northern Ireland. The focus of the research is on the situation in Britain (England and Wales) which differs both socially and legally from that in Scotland and Northern Ireland. On 23 June 2016, 51.9% of the voting British electorate voted to leave the EU. The withdrawal of the UK from the EU will have widespread effect, including in the area of human rights and non-discrimination law, but I will not engage with this issue here since the research for this book was conducted before the Brexit vote and at the time of finalising the manuscript, neither the timetable nor any concrete terms for withdrawal were yet established.

³⁹ The three selected countries are ‘visionary’ to some extent: the state and stakeholders such as equality bodies are actively engaged in developments in the areas of law and policy, and are not merely passive addressees of supranational norms. What goes on on the ground is considered relevant and worthy of debate. Two of the countries may even be called vanguards in the area of anti-discrimination and equality: in the case of the UK and the Netherlands anti-discrimination law developed before and was a driving force in the process leading to the adoption of EU law standards, so that these should be home to various good practices.

a duty of reasonable accommodation on the basis of religion is operative—also analysed so as to shed light on the current European state of play and possible future developments.

While this book focuses on legal responses and developments, these cannot be divorced from the larger social and political background and *Zeitgeist* in Europe. Legal cases form the proverbial ‘tip of the iceberg’ when it comes to realities and conflicts on the ground.⁴⁰ Employee ‘coping mechanisms’⁴¹ often fall short of litigation, which can be seen as the *ultimum remedium* or an option if relations have already gone awry. The legal topography remains a patchy reflection of societies’ challenges and successes in dealing with religious diversity in the ground. For instance, the absence of case law on an issue in a given jurisdiction can signify very different conditions: it may mean an issue (say, wearing religious dress at work) is unproblematic in that jurisdiction, but conversely it may be explained by a lack of a minimum level of integration needed for the request to even come up. It may (also) be due to highly problematic trappings, obstacles and exclusions preventing potential claimants⁴² from obtaining legal redress.⁴³ Indeed, a general reason for the existence of sporadic case law on religious affiliation or accommodation discrimination relates to the lack of knowledge about rights and avenues to pursue claims when faced with such discrimination. The Special Eurobarometer 393 relating to discrimination in the EU in 2012 showed that 17 per cent of Europeans and 27 per cent of Europeans self-identifying as part of an ethnic minority have personally experienced discrimination in the past 12 months.⁴⁴ Yet, a staggering 37 per cent admit not knowing their rights, and even those who have personally experienced discrimination are not significantly more aware of their rights.⁴⁵ Interestingly, the most popular place to turn to when faced with discrimination seems to be the police (34 per cent), which is listed way before equality bodies (16 per cent) and tribunals and trade unions (10 per cent).⁴⁶ In addition, one can imagine other barriers and obstacles of time and resources for victims of discrimination. Against

⁴⁰ On the process of reframing tensions and problems into conflicts, legal conflict, and religious legal conflict, see K Alidadi and MC Foblets, ‘Framing multicultural Challenges in Freedom of Religion Terms. Limitations of minimal human rights for managing religious diversity in Europe’ (2012) 30 *Netherlands Quarterly of Human Rights* 388, 388–416.

⁴¹ See M Galanter, ‘Justice in many rooms: courts, private ordenings, and indigenous law’ (1981) 19 *Journal of Legal Pluralism* 1 (‘avoidance’, ‘exit’, ‘lumping it’, ‘self-help’). In John Berry’s terms, these could be regarded as ‘acculturation strategies’ of non-dominant ethno-cultural groups towards the dominant group. JW Berry, ‘Integration and Multiculturalism: Ways towards Social Solidarity’ (2011) 20 *Papers on Social Representations* pp 2.1–2.21, 2.5.

⁴² The most ‘fundamental’ religionists may thus not appear as claimants in the cases discussed: they may have long adopted an exit strategy.

⁴³ eg (FRA) European Union Agency for Fundamental Rights, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (2011).

⁴⁴ European Commission. Directorate-General Justice, *Special Eurobarometer 393 ‘Discrimination in the EU in 2012’* (November 2012), 6–7 of summary report.

⁴⁵ *ibid*, 6–7 of summary report.

⁴⁶ *ibid*, 8 of summary report. Minorities are somewhat less inclined than the average to turn to the police in case of discrimination.

this background, the occurrence of requests, implicit or explicit, and legal claims to wear religious dress at work, to take short breaks to pray or to find alternative job duties for conscientiously objecting employees can be regarded as a positive signal of attempted inclusion and participation.

Cases which reach the courts may be indicative or symptomatic of larger developments taking place on the 'shop-floor of social life' and serve as a gateway to a better understanding of those grassroots developments. It is the *combination* of legal analysis and empirical data, then, which can produce the most insightful results; indeed, social science studies provide much needed data to contextualise case law analysis. At times, such studies can tell of things to come, for instance by revealing issues that have not yet been raised in legal cases. Case law decisions illustrate the 'special effect of the law', ie the application of the law in official enforcement. But anyone interested in the social working of legal measures should look for the 'general effects of the law', that is the use of rules 'outside the context of official application and enforcement'.⁴⁷ This points to the (lack of) difference law makes in concrete social situations or its (in)ability to bring about social change.

Law and society cannot be isolated from one another; even if artificially represented as separate, they mutually influence each another. Specific case law decisions can trigger certain developments on the ground, in particular in case of significant radiating effect or societal messaging. For instance, there are strong indications that Belgian case law on the legality of company 'neutrality' policies in the private sector has promoted a mushrooming of such practices—which have exclusionary effects—on the ground. Also, an employer who believes he can legally reject an applicant who wants to wear a headscarf or other religiously distinct dress will feel free to ask certain questions and make certain dress demands. Not only distributive agents like employers (whose understandings of legal rules are the basis for everyday organisational decision-making) are influenced by legal messaging; published and publicised cases can effectively change *employee* behaviour as well. Imagine a young Muslim woman who wears a headscarf in search of an internship or first job; she may reconsider applying for a job at a clothing store if she has heard of a recent judgment of a labour court siding with an employer who fired an employee for 'refusing to dress neutrally'. In anticipation of or as a reaction to experienced restrictions, this woman may decide to focus her efforts on pursuing a back-office job instead, exploring self-employment, or continuing her studies. Her coping mechanism may amount to, what Ghumman and Jackson call, 'self-handicapping' behaviour⁴⁸ which can go so far as halting any search for gainful employment.

This book consists of two main parts. Taking on a European and comparative perspective, Part I discusses the legal frameworks in place under Article 9 of the ECHR and the protection against discrimination on the basis of religion under

⁴⁷ J Griffiths, 'The social working of anti-discrimination law' in MLP Loenen and PR Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (Kluwer, 1999) 319.

⁴⁸ S Ghumman and L Jackson, 'The downside of religious attire: the Muslim headscarf and expectations of obtaining employment' (2010) 31 *Journal of Organizational Behavior* 4.

the EU Employment Equality Directive.⁴⁹ The ECtHR has emphasised the ‘margin of appreciation’ of states when it comes to controversial issues such as religious manifestation and religious pluralism where no consensus can be found amongst the Council of Europe Member States.⁵⁰ In addition, until the 2013 *Eweida* case, the ‘freedom to resign’ doctrine prevented adequate consideration for employees’ religious interests. Conversely, religion or belief has ascended the equality agenda in the last two decades. The EU’s adoption of the Employment Equality Directive in 2000 forms a highlight. This Directive has provided EU Member States with a largely unified language, but interpretations under national anti-discrimination legislation vary considerably. The CJEU has not yet received an opportunity to decide on the scope and extent of protection against religious discrimination in the workplace 16 years after the adoption of the prohibition of discrimination on the basis of religion or belief in EU law, but this is soon set to change as two very relevant cases stand to be decided by the CJEU.*

Considering the relatively narrow guidance from the ECtHR and the CJEU, decisions on the proper limits or accommodations of employees’ religions essentially remain the purview of Member States and their domestic courts. Part II offers a comparative and contextualised analysis of relevant Belgian, Dutch and British cases involving religious dress and grooming, religion-worktime conflicts, affiliation discrimination and a number of other religion-workplace accommodations matters that pertain to religious employees in the mainstream (private sector) workplace.

Since ‘a lot of European countries seem to wrestle with this issue [of religious pluralism and its limits] and are increasingly torn apart over it’, Loenen and Goldschmidt regard ‘more comparative legal work [as] urgently needed’.⁵¹ Sensitive conflicts involving the role of religion in public life and multiculturalism will necessarily be culturally embedded into broader and evolving societal circumstances. Legislative responses and judicial decision-making reflect strategies and choices best understood within the context of broader societal circumstances that are always in motion. For instance, minority policy in the Netherlands has experienced an important ‘shift away from policies of multiculturalism’ following a number of public tensions and occurrences.⁵² In the UK, the ‘race prism’ is

⁴⁹ Another level includes the ILO. This will not be discussed *in extenso* considering the limited role it has played in the area of non-discrimination on the basis of religion or belief.

⁵⁰ *Leyla Şahin v Turkey*, Application no 44774/98 (ECtHR, 10 November 2005) para 109 (‘where questions concerning the relationship between states and religions are concerned, on which the opinion in democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance’).

* On 14 March 2017, the CJEU issued two highly anticipated judgments interpreting the prohibition of religious discrimination under the Employment Equality Directive. See Case C-157/15, *Achbita v G4S Secure Solutions NV*; Case C-188/15, *Bougnaoui v Micropole SA*.

⁵¹ MLP Loenen and JE Goldschmidt, ‘Religious pluralism and human rights in Europe: reflections for future research’ in MLP Loenen and JE Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, 2007) 319.

⁵² BP Vermeulen, ‘On Freedom, Equality and Citizenship. Changing Fundamentals of Dutch Minority Policy and Law (Immigration, Integration, Education and Religion)’ in MC Foblets, JF Gaudreault-DesBiens and AD Renteln (eds), *Cultural Diversity and the Law State Responses from Around the World* (Bruylant/Éditions Yvon Blais, 2010); The murders of Pim Fortuyn and Theo Van Gogh can be noted as the most marking and shocking recent events in the struggles of the Dutch multicultural society.

slowly but surely being supplemented, but not supplanted, with a religion-based and social class perspective. And in Belgium, a country which teeters between progressivism and conservatism, the success of the Flemish nationalist party (Nieuw-Vlaamse Alliantie (N-VA)) in the 2014 general elections has signified a further shift towards curtailing employment equality policies instead of seeking ways to realise the potential of existing laws (let alone adopting new ambitious ones).⁵³ In the three countries under review, case law decisions, including some divergent interpretations of similar legal EU law concepts, reflect the role of different legal cultures, historical developments and concerns, as well as policy and prevailing perceptions of religion in society.

In the conclusion, I engage both levels of analysis and summarise a sustained *argument in favour of an explicit duty of reasonable accommodation on grounds of religion and belief in the European labour market*. This duty is to complement and reinforce, rather than to replace, the current legal protections to achieve greater substantive equality and a genuine freedom of religion or belief for the forum *internum* and *externum* in the mainstream employment setting.

Currently, there is no explicit right to reasonable accommodations for religion or belief under either legal framework. This is in contrast to the situation in the United States and Canada, where employers have a legal obligation to accommodate the religious or non-religious beliefs, practices and observances of workers, albeit to different extents and enforced with different levels of zeal. The question of whether to adopt in Europe a similar right to reasonable accommodation for reasons of religion or belief as in North-America has generated much debate and controversy in a number of Member States. I highlight some of the ‘added value’ by contrasting a right to reasonable accommodation with the legal tools of human rights law (Article 9 ECHR) and EU non-discrimination law, as interpreted in the case law of the ECtHR, the CJEU and a number of EU Member States, as well as comparing to ‘voluntary’ accommodation practices on the ground.

Arguing for effective freedom of religion or belief for employees in the current European socio-political context is a perilous task—even apart from any context of economic crisis—considering that the ‘first human right’ itself is under pressure.⁵⁴ Indeed, the basic idea behind a (separate) protection for the freedom of religion in today’s multicultural and religiously diverse societies has repeatedly been called

⁵³ Appointing a staunch opponent of any equality legislation to the board of the Interfederal Centre for Equal opportunities, now Unia, is surely a warning sign. J Van Horenbeek, ‘N-VA’er aangesteld bij Gelijkekansencentrum: “Discrimineren is een fundamentele vrijheid”. Matthias Storme (N-VA): controleur of saboteur?’, *De Morgen*, 25 October 2014 (noting that the coalition agreement sets forth a ‘re-evaluation’ of the anti-discrimination act in the future).

⁵⁴ See, amongst others, H Bielefeldt, ‘Freedom of Religion or Belief—A Human Right under Pressure’ (2012) 1 *Oxford Journal of Law and Religion* 1; H Bielefeldt, ‘Misperceptions of Freedom of Religion or Belief’ (2013) 35 *Human Rights Quarterly* 33.

into question.⁵⁵ At the same time, non-discrimination law has known a steady rise, becoming the ‘fastest growing part of labour law’⁵⁶ but its effectiveness in addressing instances of *religious or philosophical* disadvantage has remained limited. To some, the religion strand under discrimination law is less worthy of protection than other human characteristics such as race/ethnicity, gender, disability, and sexual orientation.⁵⁷ Often the argument that religion or belief, as opposed to the other ‘immutable’ characteristics, involves a ‘personal choice’ figures strongly in the balance.⁵⁸ Such challenges to *the principle* of protection for religious freedom or non-discrimination have real consequences when it comes to the level of *practical application* on the ground and before the courts.

Before turning to the analysis of the relevant supranational and domestic law, the subsequent two sections explore two key overarching themes: the issue of reasonable accommodations (III) and the larger philosophical debate of why religion-workplace clashes are taking place in today’s liberal-democratic Western countries (IV).

III. Reasonable Accommodation: Typology, Hard Cases, Substantive Equality and Decommodification

The legal concept of ‘reasonable accommodations’ originates in the United States⁵⁹ and was further developed in Canada.⁶⁰ In both countries, the concept was introduced with regard to religious employment discrimination and later extended to disability (in the United States) and other grounds (Canada). It is now firmly established as a right for persons with disabilities under both international and EU law.⁶¹ Yet, what in effect are religious accommodations cases, ie adjustments of work rules or practices that remove or alleviate conflicts between work obligations

⁵⁵ Even while Western governments have taken it upon themselves to proclaim this fundamental right abroad; see USCIRF, Canada agency for freedom of religion abroad; see also EU Guidelines for the Protection and Promotion of Freedom of Religion or Belief.

⁵⁶ M De Vos, ‘Worden Europese arbeidsrelaties Amerikaans? Kritische rechtsvergelijkende perspectieven bij de discriminatieverboden in het arbeidsrecht’ in D Cuypers (ed), *Gelijkheid in arbeidsrecht: gelijkheid zonder grenzen?* (Intersentia, 2003) 243.

⁵⁷ A McColgan, ‘Class wars? Religion and (in)equality in the workplace’ (2009) 38 *Industrial Law Journal* 1.

⁵⁸ *ibid.*

⁵⁹ Title VII of the US Civil Rights Act of 1964 (42 US Code Chapter 21) prohibits employers from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. Title VII was amended in 1972 to include a legal mandate on employers with 15 or more employees to accommodate the religious practices and observances of their employees or prospective employees, unless to do so would create an ‘undue hardship’ on the employer.

⁶⁰ *O’Malley v Simpsons-Sears* [1985] 2 SCR 536.

⁶¹ See the UN Convention on the Rights of Persons with Disabilities of 2006; Art 5 Employment Equality Directive.

and religious obligations of the employee,⁶² have been occurring for some time in Europe as well. 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, had even 'threatened to burn himself to death in protest'.⁶³ 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 become more frequent in recent years, in part because of the growing religious diversity and assertiveness of minorities in EU Member States as well as because of facilitating legal developments.

A. Towards a Typology of Reasonable Accommodation

Over the years, religious individuals have requested time off to fulfil religious duties, observation of special days of rest or the celebration of festivals, permission to wear religious garb (eg Islamic headscarves) or symbols (eg necklace with crucifix) on the job, and exemptions of general labour laws or workplace policies in most—if not all—European Member States⁶⁴ and at the European level.⁶⁵

Besides 'employment accommodation cases', which often involve dilemmas like that in play in *Antigone's* tragedy (ie a hard choice between 'the law' and the tenets of one's faith), there are also cases which can be categorised as religious discrimination cases *sensu strictu*.⁶⁶ In such cases, workers are discriminated, excluded, harassed or victimised simply on account of their (perceived) (non)adherence to a particular religion.

Surprisingly perhaps, court cases involving such egregious patterns are far rarer; cases typically raise some element—practice, appearance, manifestation—apart from non-manifested belief or affiliation. This may lead to a—mistaken—impression

⁶² This typology, relating to secular workplaces, was developed within the frame of the European RELIGARE project. See MC Foblets and K Alidadi, 'The RELIGARE Report: religion in the context of the European Union: engaging the interplay between religious diversity and secular models' in MC Foblets et al (eds), *Belief, Law and Politics What Future for a Secular Europe?* (Aldershot, Ashgate, 2014). For an extensive list of illustrations from across 9 European Member States and Turkey, see K Alidadi, 'Reasonable Accommodations for Religion and Belief: Adding Value to Article 9 ECHR and the European Union's Anti-Discrimination Approach to Employment?' (2012) 37 *European Law Review* 693.

⁶³ X, 'Sikh busmen win turban fight', *BBC News*, 9 April 1969. 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'.

⁶⁴ Vickers, *Religious freedom, religious discrimination, and the workplace*; D McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford, Hart Publishing, 2006).

⁶⁵ See, eg, *Dahlab v Switzerland*, Application no 42393/98 (ECtHR, 15 February 2001).

⁶⁶ This can be access discrimination preventing a person from obtaining gainful employment or treatment discrimination once a person is on the job.

that this is not an important issue on the ground.⁶⁷ One reason behind the dearth of such cases may be that in the case of ethno-religious minorities, such cases are framed as ethnic discrimination as opposed to religious discrimination as the two forms of discrimination coincide and the former is subject to a stronger legal regime.⁶⁸ For instance, in March 2014 a job applicant named Ahmed received an email from a Belgian construction company he had applied to telling him his application was rejected because they had bad experiences with foreigners such as calling in sick too frequently.⁶⁹ With the overlap between ethnic/racial origin and religious discrimination in such cases involving Muslims of an ethnic minority background, such as Moroccan Muslims in Belgium, the potential discrimination claim based on (presumed) religious affiliation can disappear in the background, ‘absorbed’ as it were by a more solid ethnic discrimination framing.

One may consider all relevant cases—accommodation cases and discrimination cases *strictu sensu*—under the banner of ‘discrimination’, and certainly if one wants to apply equality or non-discrimination law,⁷⁰ this appears an imperative. But for analytical reasons, it makes sense to distinguish the two since in the latter instance there is no ‘request’, ‘demand’ or even unexpressed ‘wish’ for some form of work accommodation.⁷¹ The issue simply never arises because the individual is excluded a priori from employment opportunity or promotion, possibly but not necessarily because of certain assumptions about the need for accommodation.

While in practice a number of religious manifestations have come up regularly as issues in the workplace, the scope of requested accommodations is potentially endless and it is impossible to be exhaustive considering the wide variety of new and old religions or beliefs and workplace practices in Europe. As far as requests

⁶⁷ See, eg, *Ivanova v Bulgaria*, Application no 52435/99 (ECtHR, 12 April 2007).

⁶⁸ L Waddington and M Bell, ‘More equal than others: Distinguishing European Union equality directives’ (2001) 38 *Common Market Law Review* 587 (arguing protection of racial and ethnic discrimination is at the top of the equality hierarchy in the EU).

⁶⁹ X, ‘Geen job voor Ahmed door “vreemde naam”’, *De Standaard*, 7 March 2014.

⁷⁰ I use the terms *equality law* and *non-discrimination law* as equivalents throughout this analysis. Some commentators do see a difference in emphasis in that equality law is broader and represents a further (more audacious) stage in the development of this area of law. eg B Hepple, *Equality: The New Legal Framework* (Oxford, Hart Publishing, 2011) 1, noting the ‘shift of focus from negative duties not to discriminate, harass or victimise, to positive duties to advance equality, justify the re-invention of this branch of law as equality law, of which discrimination law is an essential but not exclusive part’. In this sense, reasonable accommodation represents a fitting approach under equality law.

⁷¹ How cases and controversies are described and framed is of crucial importance: ‘the employee’s demand was not taken into account’ versus ‘the employee requested a certain exception’ versus ‘the employee refused to accommodate the employee’. These different ways of saying the same thing may conjure up very different images of the parties involved and the process of negotiation between them. As far as possible, I use ‘demand’ and ‘request’ as synonyms, without intended difference. Indeed, it has been said that a central issue in the debate on cultural diversity remains the ‘search for the right vocabulary to talk about difference and citizenship’. See Monique Nuijten, ‘Legal Responses to Cultural Diversity: Multi-Ethnicity, the State, and the Law in Latin America’ in M-C Foblets, Jean-François Gaudreault-DesBiens and Alison Dundes Renteln (eds), *Cultural Diversity and the Law: State Responses from Around the World* (Bruylant/Éditions Yvon Blais, 2010) 237.

for accommodations by employees are concerned, the following proposed typology has guided the analysis throughout:

- first, some requests are due to tension or conflict between dress code mandates derived from religious and workplace codes or practices, both for front-office and back-office positions;⁷²
- second, requests may be motivated by a need to reconcile conflict or tension between working time obligations and religious time demands;⁷³
- third, requests may seek to take away conflict or tension related to certain job duties, including conscientious objections; and
- finally, there may be particular tensions or conflict related to workplace socialising expectations, demands or work conditions which may raise difficulties and objections for workers with certain religious beliefs or practices.⁷⁴

As said, the question of whether to extend a similar right to accommodation for reasons of religion or belief has generated much debate and controversy. A number of scholars who support the protection against religious or belief discrimination have nonetheless spoken out against adopting an explicit duty, questioning the appropriateness and feasibility of strengthening religious rights in the European context given that tensions between religious freedom and other values and rights (including non-discrimination of other vulnerable persons) are hard to deny and that (some forms of) religious expressions in the public sphere generate anxiety and restrictive legislation. In this debate, the concept is sometimes misinterpreted as an unrestricted right to workplace adaptations and a complete exemption from carrying any personal burden for one's religious commitments. Properly understood though, claims for reasonable accommodation are claims for inclusion through the facilitation of a substantive form of equality and there are good reasons why we should principally accept the approach when requests are based on religion or belief in the European workplace setting.

Some instances (but certainly not all) involve sensitive 'hard cases' which necessitate a delicate and difficult balancing act between conflicting interests, values and rights, including those of employers, co-workers, and the employee involved.⁷⁵ 'Soft cases', where accommodations harm no compelling interests and are (nearly)

⁷² This most often relates to the headscarf. On the front-office/back-office distinction and the role it plays when it comes to the accepting of religiously distinct dress, see K Alidadi, 'From Front-Office to Back-Office: Religious Dress Crossing the Public-Private Divide in the Workplace' in S Ferrari and S Pastorelli (eds), *Religion in Public Spaces* (Aldershot, Ashgate, 2012) 159–190.

⁷³ See, eg, requests for time off to observe a day of rest/Sabbath, a religious holiday, an extended bereavement period, or daily and weekly prayers.

⁷⁴ The line between the last two categories is somewhat fuzzy when the debate revolves around what is an actual job duty and what is not.

⁷⁵ L Vickers, *Religion and Belief Discrimination in Employment—The EU law* (Brussels, European Network of Legal Experts in the Non-Discrimination Field, 2006) 5 ('One disadvantage of such a fact-sensitive approach is that predicting the outcome in any particular case becomes difficult as so many interests are being weighed in the balance. However, the advantage of such an approach is that it can provide consistency in terms of clear procedural safeguards, to ensure that restrictions on religious

cost-free, can also be identified. Contrary to what one may think, even these ‘soft cases’ have not been unequivocally successful in courts across Europe. What’s more, frequently cases do not even receive adequate consideration. Various modes of arguments have prevented due consideration of the (religious) employee; these include arguments that the employee is free to resign and look for alternative employment, an adherence to formal equality standards or (certain conceptions of) ‘neutrality’.

B. Substantive Equality and Decommodification

Indeed, in this area, choices have to be made between (mere) formal equality⁷⁶ and laws and policy initiatives that aim for a more audacious substantive equality. Reasonable accommodations are, as Sandra Fredman argues in the disability rights context, a ‘challenge to the existing anti-discrimination paradigm’.⁷⁷ While ‘non-discrimination law is traditionally underpinned by the idea that the protected characteristic, such as race or gender, is rarely relevant to the employment decision ... [and] the protected characteristic should therefore be ignored’, the idea behind reasonable accommodations is that ‘ignoring, by failing to accommodate, the characteristic can result in denying an individual equal employment opportunities’.⁷⁸ Reasonable accommodation can indeed promote social inclusion, by allowing for (and at times mandating) the recognition and appropriate facilitation of relevant differences in a given social context. The concept of equality undergirding accommodation, then, is one that not only allows but at times ‘requires adaptation and change’.⁷⁹

The issue of the underpinning notion of equality is not merely of theoretical interest. A focus on equal or consistent treatment (under formal equality’s

freedom, and exceptions to the non-discrimination principle are only imposed after proper consideration of the varied interests at stake, in the cultural and political context of the particular Member State’).

⁷⁶ While formal equality is of utmost importance, there are shortcomings in the approach *solely* based on this concept of equality. Anatole France captured the disingenuous effects of laws that apply equally to everyone in a famous quote: ‘In its majestic equality, the law forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal loaves of bread’: Anatole France, *The Red Lily* (1894), chapter 7.

⁷⁷ S Fredman, ‘Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?’ in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe. From Theory to Practice* (Oxford, Hart Publishing, 2005) 199.

⁷⁸ L Waddington, ‘Chapter six: reasonable accommodation’ in D Schiek, L Waddington and M Bell (eds), *Cases, materials and text on national, supranational and international non-discrimination law* (Oxford, Hart Publishing, 2007) 632. This leaves many questions open; eg which differences are to be taken into account (since surely it is unfeasible to take every individual characteristic into account)? Which form of (different) treatment is called for and how far should that difference or need be accommodated?

⁷⁹ Fredman, ‘Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?’ in *Disability Rights in Europe*, n 77 above, 203.

mandate to ‘to treat like cases alike’) can have a vastly different outcome than under a substantive conception mandating unlike treatment of inherently unlike situations. For instance, requests by an employee seeking a dress code alteration or a work schedule amendment may be rejected by reference to formal equality, ie the employee is being treated identically to their colleagues. However, this is a needs-blind position without regard for the identity and starting position of groups and individuals. A more substantive conceptionalisation that looks to participation and inclusion as an overarching goal offers backing for certain adjustments; this is based on an acknowledgement that genuine equality calls for such accommodations, in particular for workers who want to participate in work contexts that were largely shaped without taking into account their religious or cultural beliefs and practices.

In his former position as UN Special Rapporteur on the freedom of religion or belief, Heiner Bielefeldt wrote that

[a]gainst a widespread misunderstanding, the purpose of reasonable accommodation is not to ‘privilege’ members of religious minorities at the expense of the principle of equality. In fact, the opposite is true. What reasonable accommodation encourages is the implementation of substantive equality.⁸⁰

The challenge is to broaden the *legal* concept of equality to include a substantive approach in various areas of law.⁸¹ In light of the limits of existing primary legal instruments aiming to protect and include employees from increasingly diverse religious backgrounds in the European workplace, the concept of reasonable accommodations has its merits as part of a substantive equality approach with an eye for the *effects* of measures (or of the status quo) on the equality *in practice* of different groups.

The progression of non-discrimination law in the EU has coincided with a noticeable decline in social policies, with much weight put on the principle of equality and equal opportunities to realise solidarity.⁸² Anti-discrimination law is less objectionable to neo-liberals since it can be framed as seeking to correct

⁸⁰ Bielefeldt, *Interim report of the UN Special Rapporteur on the Freedom of religion or belief. Tackling religious intolerance and discrimination in the workplace*, n 11 above, 16.

⁸¹ *ibid.*, 56–57. Similarly, De Vos sees three main weaknesses in formal equality, many of which are remedied by *adding* substantive equality (but certainly not by deserting formal equality altogether): ‘it requires comparison with a comparator in order to establish discrimination, it is essentially passive and static and does not assure any particular outcome, and it disregards the inherent collective dimensions of inequality such as group membership, entrenched inequality or societal realities’: M De Vos, *Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78/EC* (Brussels, European Network of Legal Experts in the Non-Discrimination Field, 2007) 10. See also K Wentholt, ‘Formal and Substantive Equal Treatment: the Limitations and the Potential of the Legal concept of Equality’ in MLP Loenen and PR Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (Kluwer, 1999) 53 (‘A broad concept of equality encloses both the formal and the substantive component’).

⁸² The difference lies in that non-discrimination law can be seen as a ‘neo-liberal mechanism’, which fully operates within and embraces the market paradigm while having some redistributive goals, while social policies aiming at decommodification go further in trying to lessen the ‘relentless grasp of the market’ on individual’s lives.

market failures such as irrational prejudice and exclusion and reinstates market rationality and efficiency.⁸³ Somek, offering a leftist critique of EU law, has argued that non-discrimination law alone cannot and should not carry the day, and that the visibility of equality law should not stand in the way of other measures in the area of social policy.⁸⁴ Somek sees equality law, despite its main utility in fighting stereotypes and disadvantage, as 'normatively deficient': '[r]ather than stating what it takes to realise equality, anti-discrimination norms merely exclude single acts or cumulative practices that impact unequally on members of different groups'. Also, equality law 'tries to accomplish redistributive objectives by deontological means',⁸⁵ meaning it relies on correcting the actions and intentions of actors such as employers. Yet, Somek also rightly recognises that non-discrimination law is not merely about redistribution. Indeed, properly applied equality law 'spills over into the pursuit of decommodification.'⁸⁶

Progressive interpretations of anti-discrimination law notions have the potential to approach such decommodification by rejecting the idea of the employee as an impersonal, standardised ideal-type mold which is deprived and denuded of particularity and individuality. In particular, under a reasonable accommodation approach this is so, since the focus is not only on the context which has excluding effects but also on the particular individual(s) raising the issue or making a request. The employee is not just a member of the labour force, bartering time and labour for a salary, but a real live individual with human dignity and individual identity traits which deserve respect and, if needed, accommodation. By making the workplace more 'humane' and thus necessarily diverse, the law has the potential to outreach automatic market thinking which renders labour just another commodity and the worker as a seller of his/her skills, abilities and time. The cover image to this book, the work of artist Herman Van Nazareth, offers a striking visual depiction of the risks of erasing personal characteristics. The blurred images of the 'neutral worker' devoid of personality, identity and a reflective sense of self can act as a metaphor for the dehumanising effect of conformist pressures and demands targeting the visibility of human individuality. Various developments in Europe, like the mushrooming of 'neutrality policies' in the private sector, operate in that very direction. Reasonable accommodation can be an antidote, in particular if accompanied by effective human rights and non-discrimination enforcement as well as proactive policies and company practices working towards employment inclusion and workplace diversity.

⁸³ See the economic justifications of the Employment Equality Directive in recitals 7, 11, 17, and 37.

⁸⁴ Somek, *Engineering Equality*, n 19 above, 141.

⁸⁵ Somek, *ibid.*, 93. With employers and other gatekeepers as important 'distributive agents'.

⁸⁶ Somek, *ibid.*, 136. A commodity being 'that which is produced in order to be sold on a market ... Labour ... is a fictitious commodity ... not produced for sale but for entirely different reasons, nor can this activity be detached from the rest of life, be stored or mobilized', at 94 fn 6. See also S Choudhry, 'Distribution vs. Recognition: The Case of Anti-Discrimination Laws' (2000) 9 *George Mason Law Review* 145; IM Young, *Justice and the politics of difference* (Princeton NJ, Princeton University Press, 1990).

IV. Liberalism, Thick Identities and Coping Mechanisms

The treatment of deeply-held beliefs and practices of individuals in the secular workplace is an illustration of the more general issue prevalent in political philosophy, namely of how liberalism treats religion and religionists, and more specifically how (political) liberalism treats those with ‘thick’ identities.⁸⁷ These are ‘identities thick with affiliations, beliefs and moral positions’⁸⁸ and religious identity is a prime example. The conflict and dangers of extending the ideology beyond the political are aptly noted as such:

A particular liberal ideal is that of the ‘self prior to its ends.’ On this view, the self can be detached from its beliefs, tastes or preferences: ends are not intrinsic to the self but separate. The extension of this philosophical view into the social realm might be an expectation that, when people emerge into public space, they leave behind their ‘thick’ identities (and the symbols that go with them) and bring only their ‘pure’ ‘unencumbered’ self.

The danger is that this reasoning may be applied far beyond the political, to mean that expression of ‘core doctrines’ or fundamental philosophical or moral beliefs should not be carried beyond the private realm, so that they are never to be made visible to others. One might think that liberalism involves a great plurality of identities, symbols and forms of expression in public space. But it’s also possible for liberalism to be distorted, requiring that these cultural markers be left behind, so that the public space remains ‘neutral’—bland and unproblematic.⁸⁹

What lies behind this is the functional differentiation and separation of ‘spheres’—such as ‘public’ and ‘private’—and the isolation of social settings such as ‘work’ and ‘family’ with each their own codes, symbols, norms, standards and expectations.⁹⁰ Transgressing those norms may hold consequences and be frowned upon, as any parent who, through circumstances, is forced one day to bring his or her child to work can attest.

Michael Walzer calls liberalism ‘a world of walls’ and sees the erection of these walls as creating new liberty.⁹¹ But this way of framing the world, and expecting people to rigidly live by it, is also an estrangement from the reality many people live in and, by extension, also separates, or requires individuals to separate out, the different aspects of their individual identity: indeed, ‘such an understanding

⁸⁷ On identity, see van der Ven, *Human rights or religious rules?*, n 9 above, 53 et seq: ‘Identity and difference are interrelated, which makes it a relational concept as in classical ontology. Identity may be defined as continuous awareness that individuals, groups, and communities, despite all discontinuity, remain ‘the same’, remain ‘themselves’ over time.’

⁸⁸ See B Coleridge, ‘Religious expression in the public sphere’, *EuropInfos (Christian perspectives on the EU)* #158, March 2013.

⁸⁹ *ibid.*

⁹⁰ On functional differentiation, see van der Ven, *Human rights or religious rules?*, n 9 above, 53–54; Also A Seligman, ‘Socio-Historical Perspectives on the Public and the Private Spheres’ in S Ferrari and S Pastorelli (eds), *Religion in Public Spaces* (Aldershot, Ashgate, 2012).

⁹¹ M Walzer, ‘Liberalism and the Art of Separation’ (1984) 12 *Political Theory* 315–30.

avoids the essential unity of a person's life: it not only separates various dimensions of society, but also different dimensions of the person.⁹²

Religious identity does not only function in the 'religious sphere', but 'also functions in areas pertaining to primary relations and the life world (social identity), careers (professional life)'.⁹³ In fact, many of the world religions emphasise the importance or even sanctity of work, awarding it ethical value. In addition, some employees (religious or not) may regard work as an extension of family and do not differentiate strongly between these different settings. When 'there is a hybrid combination of diverse identities without any optimal harmony between them [taking more or less pathological forms like the dissociation, levelling and elimination of areas of identity, as well as a double bind when two or more areas conflict]', various coping mechanisms are possible. Following Albert Hirschman, three prototypical possible 'ways out' can be reconstructed.⁹⁴ First, an employee who faces conflicting demands may decide to quit his or her job, or find alternative ways to eliminate the conflict (exit or 'voting with one's feet'). Secondly, he or she may attempt to negotiate, to raise a voice, to 'critically champion changes' (voice). Finally, there is the option of 'loyalty', ie one accepts various cognitive discords in order not to have to give up any of the identities. Various case law analyses can attest to the fact that the availability and prospect of various coping mechanisms are influenced by the law and its messaging.

'Strongly held faith', argues American literary and constitutional critic Stanley Fish, are 'exhibits in liberalism's museum'⁹⁵ and simply cannot be 'taken seriously' because they go against the prime value of liberalism, namely 'Reason'.⁹⁶ Rawls' distinction between 'political liberalism', which is value-neutral with regard to various worldviews, and 'comprehensive doctrines', of which religious systems are one form, has been heavily attacked. In this regard, James Hitchcock speaks of 'comprehensive liberals'.⁹⁷ As secularism becomes more muscular, and thus takes more clear and assertive stances similarly to comprehensive doctrines on moral matters, it would seem that more extensive and generous accommodation becomes

⁹² Coleridge, 'Religious expression in the public sphere', n 88 above. However, certain positions, which can also be considered 'liberal' would allow for the visibility of thick identities in public spheres. Coleridge considers Charles Taylor's politics of recognition as such a position.

⁹³ van der Ven, *Human Rights or Religious Rules?*, n 9 above, 57.

⁹⁴ A Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge MA, Harvard University Press, 1970).

⁹⁵ S Fish, 'Our Faith in Letting It All Hang Out (op-ed)', *New York Times*, 12 February 2006 (Following the Danish Cartoon affair in 2006, American constitutionalist Stanley Fish discussed the double-sided defence of Flemming Rose, the culture editor of the Danish *Jyllands-Posten* newspaper; 'Mr. Rose may think of himself, as most journalists do, as being neutral with respect to religion—he is not speaking as a Jew or a Christian or an atheist—but in fact he is an adherent of the religion of letting it all hang out, the religion we call liberalism').

⁹⁶ S Fish, *There's no such thing as free speech: and it's a good thing, too* (Oxford University Press, 1994) viii (noting that 'reason' is an ideologically charged construction, as are terms such as 'neutrality' and 'tolerance').

⁹⁷ J Hitchcock, 'The Enemies of Religious Liberty' (February 2004) *First Things: A Monthly Journal of Religion & Public Life* 26.

necessary if the state is to robustly guarantee freedom to live according to one's own conscience. For one, Fish denotes liberalism itself as an ideology,⁹⁸ and even a 'religion' or 'faith' itself, with the 'first tenet of the liberal religion' being that:

[E]verything (at least in the realm of expression and ideas) is to be permitted, but nothing is to be taken seriously. This is managed by the familiar distinction—implied in the First Amendment's religion clause—between the public and private spheres. It is in the private sphere—the personal spaces of the heart, the home and the house of worship—that one's religious views are allowed full sway and dictate behavior ... But in the public sphere, the argument goes, one's religious views must be put forward with diffidence and circumspection. You can still have them and express them—that's what separates us from theocracies and tyrannies—but they *should be worn lightly* (emphasis added).⁹⁹

'Religion worn lightly' implies that religious views, and arguably symbols and appearances as well, 'should not be urged on others in ways that make them uncomfortable'.¹⁰⁰ In liberalism, religions are to be accorded 'respect; nothing less, nothing more', respect may not 'cost you anything' but its generosity remains barely skin-deep and is in fact a form of condescension: 'I respect you; now don't bother me'. Accordingly, Fish sees liberalism (and liberals) as being condescending to those with strong beliefs. Strongly held faiths do not fare well in liberal states, and as Fish sees it this is not only the case in secularist Europe, as he also refers to examples of this approach in the United States, where religion is of enduringly significance for large segments of the population and is much more openly utilised in public and political discourse. In various cases the demands made by liberalism, in some eyes 'modest' demands to enable liberty for all, may be impossible to follow for those whose actions are informed by their 'thick identities' and 'moral compass' and for whom exemptions to neutral rules may be necessary to guarantee freedom and equality.¹⁰¹

Jürgen Habermas, with Western Europe in mind, has argued that we are transitioning from a secular to a 'post-secular society' in which 'secular citizens' have to award a previously denied respect for 'religious citizens'. The latter should even be encouraged to draw from their religious convictions to offer criticism of

⁹⁸ Fish, *There's no such thing as free speech*, n 96 above.

⁹⁹ Fish, 'Our Faith in Letting It All Hang Out': 'in the same vein, we can speak of 'faith in moderation': see J Schwedler, *Faith in Moderation: Islamist Parties in Jordan and Yemen* (2006); J Spinner-halev, 'Liberalism and Religion: Against Congruence' (2008) 9 *Theoretical Inquiries in Law* 553 ('Rawls worries that advocates of comprehensive views of religion will want to impose their views on others, but in fact it is his comprehensive view of justice that is in danger of imposing itself on religion. Liberal views of justice are much more imperialistic than most religions. Most religions (with some exceptions) realise that they cannot impose their views on others. In Western liberal democracies, many religious people want to be able to live by their own practices. They are less interested in imposing their views on outsiders (though some are), and are more interested in being able to adhere to their own rules', at 554). In the same vein, Oldenhuis calls this '*dempen*' ('toning down'), which in particular for public functions he considers justified: see FT Oldenhuis (ed), *Religie op de werkvloer* (Protestantse Pers, 2013) 9.

¹⁰⁰ Fish, *ibid*. See also the concept of 'covering' as a form of assimilation demand. E Goffman, *Stigma: notes on the management of spoiled identity* (Touchstone, 1963); Yoshino, 'Covering', n 23 above.

¹⁰¹ See, eg, US Supreme Court, *Yoder v Wisconsin*, 406 US 205 (1972).

established contemporary solutions.¹⁰² But it is also argued that two characteristic developments of modern, Western society, namely functional differentiation and globalisation, have produced a 'religious identity crisis' linked to the pluralist condition:

[o]ngoing contact with members, groups, and duties of other religions not only puts one's own religion's claims to uniqueness, universality, and absoluteness at risk, but also raises questions about what religious truth and authority still mean in a religiously pluralistic context.¹⁰³

Consequently, when it comes to questions of religion and belief in the secular labour market, Europe is facing a real 'test of faith'. When an employee raises an issue of accommodation or even makes an explicit request, there has already been a level of (self) negotiation of religious beliefs, practices and principles. A level of 'accommodation' has already taken place behind the scenes. The accommodation exercise may have led to the decision not to pursue employment at all and to search for alternative modes of meaning. After all, perhaps the coping strategy which allows for the most undisturbed religious fervour may be pulling out of the workplace or even the labour market as a whole. This coping mechanism is one to take into account when assessing accommodation requests: the issue transcends the employee-employer relationship and touches on issues of societal fairness and inclusion with the labour market playing a mediating role. Not engaging in such a balancing exercise, and merely viewing the matter from the point of view of business discretion or business prerogatives, risks creating unintended counter-productive effects in society. Excluding minorities and those with perceived (too) thick identities from employment opportunities may block out some problems in the mainstream labour market but it will channel problems elsewhere. Clearly, many responses are possible: employees may re-assess and amend their religious practices or may search for alternative ways of leading productive lives, but negative experiences may make some into credulous receptors of intolerant and violent messages.

¹⁰² J Habermas, 'Religion in the Public Sphere' (2006) 14 *European Journal of Philosophy* 1.

¹⁰³ van der Ven, *Human rights or religious rules?*, n 9 above, 54.