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2010, Volume 17, Number 2

MJ

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MAASTRICHT JOURNAL of European and Comparative Law

REASONABLE ACCOMMODATION FOR RELIGIOUS MINORITIES: A PROMISING CONCEPT FOR EUROPEAN ANTIDISCRIMINATION LAW?^{*}

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ABSTRACT

In both the United States and Canada, the concept of reasonable accommodation first emerged in equality law as a means of handling religious diversity. It was then applied to other grounds of discrimination, most notably disability. In the European Union, the evolution of antidiscrimination law is following a different path: a duty of reasonable accommodation was for the first time established by the 2000 Employment Equality Directive (or Directive 2000/78/EC) but only with respect to disability. Nonetheless, the question whether a right to reasonable accommodation can be derived from the prohibition of discrimination based on religion laid down by the same Directive, or, alternatively, whether such right should be recognized in future European legislation is becoming increasingly salient.

Keywords: reasonable accommodation; antidiscrimination; religion; disability; Employment Equality Directive

^{*} This article is based on a revised version of a paper published by the three authors in French: 'Aménager la diversité: le droit de l'égalité face à la pluralité religieuse', in the *Revue trimestrielle des droits de l'homme*, 2009, p. 319–373. It is part of a research carried out within the research program (*Action de Recherche Concertée*) 'Outsiders in Europe: The Foreigner and the 'Other' in the Process of Changing Rules and Identities', coordinated by Prof. Andrea Rea and financed by the *Communauté française* of Belgium. The translation of this paper was carried out by Mathias Möschel. The authors are grateful to the anonymous reviewer for valuable comments on a previous draft of this article.

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When the Employment Equality Directive¹ was passed in 2000, the concept of a right to reasonable accommodation it introduces in favour of disabled workers was a novelty for European Union law. By contrast, in the United States and in Canada, this notion had been part of antidiscrimination law for years and was by no means limited to disabled people but could also be claimed on religious grounds.

Reasonable accommodation is based on a fundamental observation: some individuals, because of an inherent characteristic they have, such as disability or religion, are prevented from performing a task or from accessing certain spaces in conventional ways. Since society is organized primarily on the basis of people who do not share those traits, the former may be unable to access employment, services, or other activities. Hence, the interaction between an individual's characteristics and the physical, social or normative environment ultimately deprives him/her of the advantages of an employment or of a service which, in principle, should be open to everyone.² At times, an accommodation of that environment, namely its modification or adjustment, allows people having that characteristic to avoid such disadvantage when compared to other individuals. Accordingly, the laws of some countries hold that in such situations the principle of equality and non-discrimination imposes a duty of 'reasonable accommodation', that is, the obligation to take all appropriate measures so as to guarantee certain categories of people protection against discrimination by granting access to employment or other activities. However, this duty has a limit: the accommodation must be 'reasonable'. It cannot impose a disproportionate burden on the person having to bear it, which can be an employer, any other private economical actor or a public authority.³

Academics are split over the question whether to qualify the refusal to provide reasonable accommodation as direct discrimination, indirect discrimination or as a third, *sui generis* type of discrimination.⁴ In any event, from a conceptual point of view, the duty of reasonable accommodation is closely related to the concept of indirect discrimination. It is indeed based on the idea of substantive equality by recognizing that a facially neutral provision, namely one that does not formally distinguish on the basis of a prohibited criterion, may be discriminatory in its effects when it discriminates *de facto* against a protected group of people. This corresponds precisely to the concept of

¹ Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, [2000] OJ L 303/16.

² Waddington, 'Reasonable Accommodation', in D. Schiek *et al* (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Ius Commune Casebooks for the Common Law of Europe (Hart Publishing, Oxford 2007), p. 631 at 629-756.

³ See the definition offered by Bosset, 'Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable', in M. Jezequel, *Les accommodements raisonnables: quoi, comment, jusqu'où? Des outils pour tous*, (ed. Yvon Blais, Cowansville 2007), p. 10 at 3-28.

⁴ On this controversy, see McCrudden, 'Theorising European Law', in C. Costello and E. Barry (eds), *Equality in Diversity - The New Equality Directives* (Irish Centre for European Law, Dublin 2003), p. 27 - 28 at 1-38; Waddington, 'Reasonable Accommodation', p. 740-754; on the relationship between the concepts of reasonable accommodation and discrimination, see also Jolls, 'Antidiscrimination and Accommodation', 115 *Harvard Law Review* (2001), p. 642-699.

indirect discrimination. However, indirect discrimination only enables a determination of whether a provision, criterion or practice has a discriminatory character. Should this be the case, such a provision, criterion or practice must in principle be abandoned and replaced by a new, non-discriminatory, generally applicable measure. Yet, in certain cases, where the controversial measure seems the best way to achieve a certain legitimate objective, the adjustment of that measure by means of an exception may be the only way to eliminate the discriminatory character without compromising the measure's purpose. From this perspective, reasonable accommodation can be interpreted as a specific response, in the form of an exception, to an indirect discrimination.

This article aims to analyze the emergence and evolution of the concept of reasonable accommodation in relation to religious practice in United States and Canadian law and to ponder its relevance for European law. Part I examines how the concept of reasonable accommodation appeared and evolved in United States' law from the 1970s, and in Canadian law from the 1980s onward (I). Part II discusses the extent to which this concept is emerging in European law. Considering first the European Convention on Human Rights, it is shown that both the right to religious freedom (Article 9) and the right not to be discriminated against (Article 14) could provide a basis for the development of this concept. Moving then to European Union law, it is sustained that while a duty of reasonable accommodation is formally recognized only in relation to disability in the sphere of employment, an argument can be made that the general prohibition of indirect discrimination entails an obligation to accommodate some requests based on religious beliefs (II).

§1. REASONABLE ACCOMMODATION IN AMERICAN AND CANADIAN LAW

Both in the United States and in Canada the duty of reasonable accommodation was first recognized in the domain of religious non-discrimination. This concept has nevertheless undergone a separate evolution in each country and has been interpreted more broadly under Canadian law (B) than in the American legal system (A).

A. AMERICAN LAW

United States law was the first to acknowledge a duty of reasonable accommodation on the grounds of religion and later on the grounds of disability. Initially, in one of its guidelines adopted in 1968, the *Equal Employment Opportunity Commission* – the federal agency responsible for enforcing the prohibition of discrimination in employment mandated by Title VII of the 1964 *Civil Rights Act* – provided that an employer who refuses to accommodate the religious practices of his/her employees violates federal anti-discrimination legislation, if such accommodation can be made without undue

hardship.⁵ This point of view was rejected by multiple federal jurisdictions, including the United States' Supreme Court.⁶ However, in 1972, following an amendment introduced by Senator Randolph, a member of the religious community of the Seventh Day Adventists who consider Saturday to be the day of rest, Congress modified Title VII of the 1964 *Civil Rights Act* to add a duty for private or public employers 'to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business'.⁷

In the decision *TWA v. Hardison*,⁸ the Supreme Court clarified the extent of the duty. An employee alleging a violation of the reasonable accommodation principle must prove that a religious command in which (s)he genuinely believes conflicts with an employment regulation, that (s)he informed the employer of this situation, and that (s)he was sanctioned for not observing such regulation. At this point, the employer in turn has to show that (s)he offered a reasonable accommodation which would allow the employee to follow the commands of his or her religion, or that any reasonable accommodation would have led to an undue hardship on the employer's business. While there is a consensus that an accommodation is not reasonable when it infringes on other employees' rights, the extensive interpretation given to the concept of undue hardship by the Supreme Court has sparked some controversy. The judges held that '[t]o require TWA to bear more than a *de minimis* cost in order to give respondent [Hardison] Saturdays off would be an undue hardship [...]'.⁹ This interpretation stands in contrast with the definition provided later in 1990 in the *American with Disabilities Act*, which describes undue hardship as an 'action requiring significant difficulty or expense'.¹⁰ Nonetheless, on the basis of Title VII of the *Civil Rights Act*, employers have been required to provide some types of accommodation, such as exceptions to clothing rules, changes in working hours which do not entail the payment of overtime or the infringement of other employees' rights (like exceptions to benefits tied to seniority in a company), or authorizations of selected absences for religious festivals.¹¹

⁵ 29 C.F.R. §1605.1 (1968).

⁶ See Corrada, 'Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases', *University of Denver Sturm College of Law, Legal Research Paper Series, Working Paper No. 07-12* (2007), p. 19; *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971). Note that the Supreme Court was equally divided because one of its justices did not take part in the decision.

⁷ *Civil Rights Act of 1964*, CRA, Title VII, Equal Employment Opportunities, 42 US Code Chapter 21, §701 (j). On the origins of this amendment, see Oleske, Jr., 'Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation', 6 *University of Pennsylvania Journal of Constitutional Law* (2004), p. 532 at 525-572.

⁸ *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

⁹ *Ibid.*, p. 84; see the critique by Engle, 'The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII', 76 *Texas Law Review* (1997), p. 387 - 406 at 312-433.

¹⁰ *American with Disabilities Act* (1990), 42 U.S.C. §12111(10).

¹¹ On this jurisprudence, see Engle, 76 *Texas Law Review* (1997), p. 387-406; Rosenzweig, 'Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation', 144 *University of Pennsylvania Law Review* (1996), p. 2517-2522 at 2513-2536; Ch. L. Eisgruber and L. Sager, *Religious Freedom and the Constitution* (Harvard University Press, Cambridge MA 2007), p. 87-108.

Besides anti-discrimination legislation, there is a lively debate in American constitutional theory on whether federal and state legislators have a duty of accommodation which can be derived from the right to freedom of religion as established by the First Amendment of the United States' Constitution, the so-called *Free Exercise Clause*. Kent Greenawalt finds this is to be the most important contemporary question raised by the constitutional guarantee of freedom of religion.¹² The Supreme Court's position in this respect has changed over the years. Three decisions have shaped this eventful history: *Sherbert v. Verner* (1963), *Wisconsin v. Yoder* (1972) and *Employment Division v. Smith* (1990).

In its 1963 *Sherbert v. Verner* decision, the Court recognized for the first time that, under certain circumstances, an individual is entitled to an exemption from the application of a general rule, based on his freedom of religion. The judges held that the state had violated the plaintiff's freedom of religion by not granting unemployment benefits to a Seventh Day Adventist employee who had been laid off due to his refusal to work on Saturday for religious reasons, thereby allegedly indicating that he was not willing to accept a suitable employment.¹³ In principle, the Court established that any federal or state legislation which substantially, albeit indirectly, burdens the religious practice of certain individuals cannot be applied to them, unless such application is justified by a compelling governmental interest. This is the most stringent standard of review amongst the standards defined by the Supreme Court to justify an infringement of fundamental freedoms.¹⁴ For obvious reasons, American jurisdictions have nevertheless been reluctant to recognize individual exemptions from generally applicable rules based on religion. By interpreting *Sherbert* loosely, lower courts rejected a majority of requests for exemption on the grounds of freedom of religion, holding that the state had demonstrated the existence of a compelling governmental interest. However, in 1972 with the highly controversial decision *Wisconsin v. Yoder*,¹⁵ the Supreme Court granted

¹² K. Greenawalt, *Religion and the Constitution*, Vol. I (Princeton University Press, Princeton 2006), p. 15; see also B. Novit Evans, *Interpreting the Free Exercise of Religion. The Constitution and American Pluralism* (University of North Carolina Press, Chapel Hill and London 1997), p. 204–227.

¹³ *Sherbert v. Verner*, 374 U.S. 398 (1963). Twenty years earlier, in the decision *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court had already decided in favour of a couple of Jehovah's Witnesses who demanded that their son be dispensed from the obligation to greet the American flag at school. However, the Court had based its motivation on freedom of expression. On that occasion, the judges had reversed a precedent established three years earlier (*Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)).

¹⁴ Thus, the Court imported in the area of freedom of religion the standard of compelling governmental interest which it had until then only applied in its case law on the equal protection clause (14th Amendment) and on freedom of expression (1st Amendment). However, in those cases concerning requests for exemption on religious grounds, American courts have applied the criterion of compelling governmental interest much less strictly than they did with non-discrimination and freedom of expression. See Lupu, 'The Trouble with Accommodation', 60 *George Washington Law Review* (1992), p. 743–781.

¹⁵ *Wisconsin v. Yoder*, 406 U.S. 205 (1972). A few years earlier, the Supreme Court had dismissed a claim by an orthodox Jew who asked to be authorised to open his store on Sundays in spite of the legal

members of the Amish community the right to benefit from an exemption from the State of Wisconsin's legislation which fixes the mandatory school age limit at sixteen. The Court authorized Amish parents to pull their children out of school at the age of fourteen so as to continue their instruction by means of vocational training within the religious community. Thus, adolescents would not be estranged from the spiritual values of this religious group which believes in the virtues of a simple life far away from the complexities of a modern world and its intellectual or cultural ambitions. This decision provoked heated debates in legal scholarship and political philosophy.¹⁶

In 1990, with the decision *Employment Division v. Smith*,¹⁷ the Supreme Court revisited its position in *Sherbert v. Verner*. Two men, both members of the Native American Church, had been fired from their job in a drug rehabilitation organization for drug addicts because they had consumed a forbidden drug, peyote,¹⁸ during religious ceremony, in accordance with the traditions of their community. The state refused to grant them unemployment benefits because they were fired for gross misconduct. The Supreme Court was asked to establish whether the members of the Native American Church could demand to be exempted from the application of criminal sanctions mandated by law in case of consumption of peyote due to their freedom of religion. The majority of the Court concluded that the Constitution does not require Congress to grant such an exemption. Reversing the interpretation followed since *Sherbert v. Verner*, the judges found they did not have to show that a compelling public interest justified the application of the legislation to the case before them. In their view, barring any exceptions, such legislation is valid as long as it is demonstrated that it is not directed against a specific religious belief and that it does not discriminate amongst confessional groups. Where this is the

obligation of Sunday closures. Given that his religion obliged him to stay closed also on Saturdays he was disadvantaged with respect to other stores since he had to keep his shop closed two days a week instead of one day only. The majority held that the contested legislation indeed created, if indirectly, an impairment to people practicing certain religions. Nevertheless, an accommodation by means of exception would have managed the objective the State was trying to achieve with that legislation. The justices concluded that the federal States could establish exceptions but the Constitution did not mandate it. (*Braunfeld v. Brown*, 366 U.S. 599 (1961)). Compare with the decision of the Canadian Supreme Court, *R. v. Big M Drug Mart Ltd* ([1985] 1 S.C.R. 295, p. 336 and 337 (Justice Dickson).

¹⁶ In favour of this decision see W. A. Galston, *Liberal Pluralism* (Cambridge University Press, Cambridge 2002), p. 19 and p. 104–107; Greenawalt, *Religion and the Constitution*, p. 87–100; and with certain reservations, M. C. Nussbaum, *Liberty of Conscience – In Defense of America's Tradition of Religious Equality* (Basic Books, New York 2008), p. 140–145; for a critical comment see B. Barry, *Culture and Equality – An Egalitarian Critique of Multiculturalism* (Polity Press, Cambridge 2001), p. 242–245; Arneson and Shapiro, 'Democratic Autonomy and Religious Freedom: A Critique of *Wisconsin v. Yoder*', in I. Shapiro and R. Hardin (eds), *NOMOS 38: Political Order* (New York University Press, New York 1996), p. 356–411; Crowder, 'Galston's Liberal Pluralism', in *Australasian Political Studies Association Annual Conference 2004 Refereed Papers*, electronically available at www.adelaide.edu.au/apsa/papers (last visited 27.01.2010).

¹⁷ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

¹⁸ Peyote is a cactus which contains mescaline, a substance having psychotropic and hallucinogenic effects.

case the legislation's application to individuals, whatever the objections of religious nature they may have against it, is legitimate. Justice Scalia justified this position by stating that it is the responsibility of the legislator and not of judges to determine the circumstances in which an exemption should be granted. In his opinion, judges are not well positioned to weigh the importance of a religious command, to determine whether there is a compelling interest in applying the legislation and eventually to balance these two elements.¹⁹

As a reaction to this decision, Congress enacted the 1993 *Religious Freedom Restoration Act*,²⁰ which established a 'right to exemption' for religious motives within the limits laid down in *Sherbert*: it prohibits the government from substantially burdening a person's exercise of religion unless it demonstrates that it must do so to further a compelling government interest and that it uses the least restrictive means of furthering that interest. In yet another reversal, the Supreme Court declared this legislation invalid with respect to states. While under the 14th Amendment's Due Process Clause, Congress can enact appropriate legislation to enforce the constitutional guarantee that States respect the free exercise of religion, it cannot alter the meaning of constitutional rights. And this, in the Court's view, is precisely what the RFRA is doing: it attempts a substantive change in constitutional protections. This Act represents 'a considerable congressional intrusion into the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens'.²¹ However, the *Religious Freedom Restoration Act* remains valid when it applies to the federal government.²² Moreover, a number of States have adopted legislation with similar content. In sum, on the basis of the *Religious Freedom Restoration Act* or similar state legislations, one can currently benefit from an exemption from certain legal obligations on the grounds of individual religious beliefs if such legislation, albeit neutral and generally applicable, impairs the individual's freedom of religion substantively without any sufficient justification. A number of conditions need to be fulfilled in order to make the exemption available. First, the individual alleging a violation of her right to religious freedom must be sincere, meaning that she must seriously believe in the claimed religious precept. The criterion of 'sincerity' is aimed at preventing an individual from claiming an exemption on the basis of religion abusively and for mere convenience.²³ Second, the restriction to the practice of a religious belief must be substantial, meaning that it must reach a certain threshold of gravity. Finally,

¹⁹ See *Smith*, 494 U.S. 872 (1990) at p. 884–890. However, the legislator cannot illegitimately favour one religion over another. That would violate the Establishment Clause which is also enshrined in the First Amendment of the United States Constitution and which prescribes the separation between State and Church. See Lupu, 60 *George Washington Law Review* (1992), p. 743–781.

²⁰ 42 U.S.C. 2000bb (1993).

²¹ *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Justice Kennedy).

²² *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).

²³ A similar requirement has been imposed by Canadian jurisprudence (*infra*, Point II of Part I). The modalities but also the legitimacy of such a 'sincerity control', nevertheless raise some controversy. See Greenawalt, *Religion and the Constitution*, p. 109–123 and p. 205–207; Steinberg, 'Rejecting the Case

the exemption cannot be granted if it undermines the achievement of a compelling governmental interest.²⁴

B. CANADIAN LAW

Though Canada was not the first to introduce the concept of reasonable accommodation into anti-discrimination law, it is the country where this concept, by becoming an instrument for negotiating cultural and religious plurality, has had the most important development. Media coverage and widespread popular debate which have ensued since the beginning of the 2000s are evidence of the important position this concept now occupies in Quebec and, more broadly, in Canada. What came to be called the 'accommodation crisis'²⁵ stemmed from the tremendous media attention generated by some instances of formal or informal accommodation granted for religious or cultural reasons in the province of Quebec. This 'time of turmoil' marked the years 2006–2007²⁶ and led to the creation by Quebec's prime minister of an advisory Commission on the practices of accommodation relating to cultural differences. The '*Bouchard-Taylor Commission*' was named after its two presidents, the historian and sociologist Gérard Bouchard and the philosopher Charles Taylor.²⁷ Interestingly, the Commission decided not to limit its work to the legal dimension of the problem. Rather it saw the debate over reasonable accommodation as calling into question the model of socio-cultural integration developed in Quebec since the 1970s.

The concept of reasonable accommodation first appeared in Canada during the 1980s.²⁸ This common law principle was introduced by courts specialized in the interpretation of the Canadian Human Rights Act,²⁹ before being applied by ordinary courts and eventually confirmed by the Supreme Court for the first time in *Ontario*

Against the Free Exercise Exemption: A Critical Assessment', 75 *Boston University Law Review* (1995), p. 277–286 at 241–320.

²⁴ On the interpretation of these criteria, see Greenawalt, *Religion and the Constitution*, p. 200–228.

²⁵ Bouchard and Taylor, *Building the Future – A Time for Reconciliation*, Consultation Commission on Accommodation Practices Related to Cultural Differences, Government of Quebec (2008), p. 43 et seq, full report in English electronically available at www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf (last visited: 01.05.2010).

²⁶ Bouchard and Taylor, *Building the Future*, p. 53–58. See also Gaudreault-DesBiens, 'Religious Challenges to the Secularized Identity of an Insecure Polity: A Tentative Sociology of Québec's 'Reasonable Accommodation' Debate', in R. Grillo et al (eds), *Legal Practice and Cultural Diversity* (Ashgate, Aldershot 2009), p. 151–175.

²⁷ Québec government, Order-in-Council, No. 95–2007 concerning the establishment of the Consultation Commission on Accommodation Practices Related to Cultural Differences, 8 February 2007.

²⁸ On the origins and evolution of the concept see, in particular, Woehrling, 'L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse', 43 *Revue de droit de McGill* (1998), p. 325–401; for a more recent contribution, see Bosset, in *Les accommodements raisonnables: quoi, comment, jusqu'où? Des outils pour tous*, (2007), p. 3–28.

²⁹ These are laws enacted at the provincial or at the federal level whose main aim is to combat discrimination based on certain grounds and whose implementation is guaranteed by specialized institutions created

Human Rights Commission (O'Malley) v. Simpson-Sears Limited, decided in 1985.³⁰ Ms. O'Malley, a salesperson in a large department store, had been denied accommodation of her work hours, even though she had notified her employer that they were incompatible with her religion which imposed strict observation of the Shabbat. Hence, she felt victim of indirect discrimination on the grounds of her religion. While the Ontario Human Rights Code did not make any reference to this concept,³¹ the Supreme Court drew on equality and non-discrimination principles to find that employers have a duty of reasonable accommodation.³²

Under Canadian law, the notion of reasonable accommodation is conceived of as a derivation of the equality principle and more specifically of the prohibition of indirect discrimination, namely the discrimination resulting from the prejudicial impact of a facially neutral provision, practice or policy.³³ The duty of accommodation, construed as a corollary of the prohibition of indirect discrimination, is the duty for the author of a provision, practice or policy, which *de facto* penalizes an individual on the basis of a prohibited ground of discrimination, to take into account as far as possible the specific needs of that individual and to protect him or her from the discriminatory effects of such provision, practice or policy. This duty arises independently from an express reference in legislation, even though, after having been confirmed by case law, it was enshrined into some human rights statutes.³⁴

Based on the principle of equality, the duty of reasonable accommodation has a large field of application. While the wide publicity given to reasonable accommodation for religious motives may make it appear to be the most prevalent form of accommodation, in reality disability followed by gender, national origin or age are more frequent grounds for accommodation in Canada.³⁵ The subject matter areas where the principle of reasonable accommodation applies are also very large. Whereas the principal developments occurred in the employment context, reasonable accommodation equally applies to the

for that purpose. As opposed to the Canadian Charter of Rights and Freedoms of 1982, these laws impose obligations on both public authorities and 'horizontally' between private parties.

³⁰ *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd*, [1985] 2 S.C.R. 536; see Woehrling, 43 *Revue de droit de McGill* (1998), p. 329.

³¹ The Ontario Human Rights Code was modified in 1986 to introduce explicitly the duty of reasonable accommodation (R.S.O. 1990 (Ontario) c. H 19, Article 11, 24).

³² *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd*, [1985] 2 S.C.R. 536, p. 554-555.

³³ Thereafter, the Canadian Supreme Court determined that the duty of reasonable accommodation also applied in cases of direct discrimination (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU (Meiorin)*, [1999] 3 S.C.R. 3). See Bosset, in *Les accommodements raisonnables: quoi, comment, jusqu'où? Des outils pour tous*, (2007), p. 12.

³⁴ See, in particular, the provision introduced, in 1998, in the Canadian Human Rights Act which recognizes that based on the principle of non-discrimination all individuals have the right 'to have their needs accommodated' (R.S., 1985, c. H-6, s. 2; 1996, c. 14, s. 1; 1998, c. 9, s. 9.).

³⁵ For case law concerning grounds of discrimination other than religion, see Bosset, in *Les accommodements raisonnables: quoi, comment, jusqu'où? Des outils pour tous*, (2007), p. 13-14.

public supply of goods and services – in particular in education and health.³⁶ Moreover, the obligation concerns private individuals as well as public authorities.

However, in *Alberta v. Hutterian Brethren of Wilson Colony*, a four to three decision adopted in July 2009,³⁷ the Supreme Court limited the extension of the concept of reasonable accommodation in relation to public powers. While the Court acknowledges that reasonable accommodation can be a helpful concept when assessing the legitimacy of impairment to a protected right at the hands of a government action or administrative practice,³⁸ it holds that this is not the case when a legislative measure of general application is involved. As opposed to the lower courts which had decided on the same matter, the Supreme Court finds that '[b]y their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualised determination [...]'.³⁹ The constitutionality of such laws of general application must be determined with respect to criteria that are less stringent than those required by the duty of reasonable accommodation: the government is entitled to justify the law by establishing that the measure is rationally connected to a pressing and substantial goal, that it minimally impairs the right and that it is proportionate in its effects.⁴⁰ In assessing the minimal impairment, the Court nevertheless gauges the availability of alternative solutions. In this specific case, the members of the Hutterian Brethren of Wilson Colony invoked their sincere belief according to which the second of the Ten Commandments prohibited them from having their photograph willingly taken. They alleged therefore that the Province of Alberta's regulation which imposed on them the display of a photo on the driver's licence without any possible exception entailed a breach of their right to religious freedom. The Court however rejected their claim, holding that the contested regulation was justified by a legitimate aim, namely maintaining the integrity of the driver's licensing system in a way that minimizes the risk of fraud or identity theft, and that no alternative solution could achieve that objective while avoiding taking the pictures of the plaintiffs.

In this latter instance, the complainants based their claim for reasonable accommodation on religious freedom. In some cases indeed, the Canadian judges have inferred the duty of reasonable accommodation from the right to religious freedom

³⁶ On the difficulties raised by the application of the concept of reasonable accommodation in the domain of public services, see Saris, 'L'obligation juridique d'accommodement raisonnable', in H. Dorvill (ed.), *Problèmes sociaux: theories et methodologies de l'intervention sociale*, Vol. IV (PUQ, Québec 2007), p. 385–425.

³⁷ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567.

³⁸ *Ibid.*, para. 67.

³⁹ *Ibid.*, para. 69; likewise, the judges found the concept of 'undue hardship' hard to apply to the legislator who adopts legislative measures (*ibid.*, para. 70). With regard to the difficulty of transferring to legislative and regulatory activity the notion of reasonable accommodation initially developed in the sectors of employment and provision of goods and services, see also the observations of Woehrling, 43 *Revue de droit de McGill* (1998), p. 357–359.

⁴⁰ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, para. 71.

as established by the Canadian Charter of Rights and Freedoms (Article 2a)) and the Quebec Charter of Human Rights and Freedoms (Article 3) instead of from the principle of equality and non-discrimination.⁴¹ Thus, the freedom of conscience and religion, and the prohibition of discrimination based on religious grounds largely overlap as justification for the duty of reasonable accommodation on the basis of religion.⁴²

As the detailed description in the *Bouchard-Taylor* report shows, the accommodations can assume various shapes. They may be imposed by a court or negotiated amicably and may either consist in a mere exemption from the application of the indirectly discriminatory rule⁴³ or in the creation of a special regime.⁴⁴ The accommodation can also consist in the provision of infrastructures or of particular services in favour of those affected, such as specific meals in hospitals or prisons. The focus on contextualisation leads to a large variety of accommodations which are, most of the time, identified on a case by case basis. Yet, for the legal duty of accommodation to arise, an impairment of religious freedom or a discrimination based on religion must be established.⁴⁵

Importantly, the duty of accommodation only exists as long as it is 'reasonable'. This requirement, and hence the arguments that can be raised to oppose a demand for

⁴¹ Woehrling, 43 *Revue de droit de McGill* (1998), p. 369 et seq; J. Woehrling, 'La place de la religion dans les écoles publiques du Québec', in *Actes de la XVIIème Conférence des juristes de l'Etat* (ed. Yvon Blais, Cowansville 2006), p. 12 et seq. at 3-62.

⁴² Woehrling, 'La liberté de religion, l'obligation de neutralité religieuse de l'Etat et le droit à l'accommodement raisonnable: quelle place pour la religion dans les institutions publiques?', 33 *Revista catalana de dret public* (2006), p. 369-403.

⁴³ Thus, the Royal Canadian Mounted Police (the R.C.M.P.) authorised Sikhs to serve in their ranks and exempted them from the obligation to wear the traditional Stetson hat. This decision by the R.C.M.P. was challenged in court for being contrary to the religious freedom of members of the public who might enter into contact with police wearing the turban, a beard and the ceremonial Sikh dagger. The Federal Court (Trial Division) nonetheless rejected this argument (*Grant v. Canada (Attorney General)* (T.D.), [1995] 1 F.C. 158).

⁴⁴ This solution prevailed in the famous *Multani* case with respect to the carrying of the *kirpan* (the ceremonial dagger worn by Sikhs) in a public school. A school regulation prohibiting the carrying of arms was judged by the Supreme Court as being indirectly discriminatory towards Sikh students. In that case, a Sikh student was authorised to wear the *kirpan* in public school, provided 'that the *kirpan* be worn under his clothes; that the *kirpan* be carried in a sheath made of wood, not metal, to prevent it from causing injury; that the *kirpan* be placed in its sheath and wrapped and sewn securely in a sturdy cloth envelope; that school personnel be authorized to verify, in a reasonable fashion, that these conditions were being complied with; that the petitioner be required to keep the *kirpan* in his possession at all times, and that its disappearance be reported to school authorities immediately' (*Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 1 S.C.R. 256, 2006 SCC 6) as described by Woehrling, 33 *Revista catalana de dret public* (2006), footnote 45.

⁴⁵ This is precisely what allows distinguishing between reasonable accommodations and mere *adjustments* 'offered or allowed to facilitate the integration of religious or cultural minorities or to favour friendly relationships between majority and minorities' (Woehrling, 33 *Revista catalana de dret public* (2006), p. 20). The *Bouchard-Taylor* report uses this distinction in a slightly different way since it limits reasonable accommodations to accommodations obtained through legal route and includes, under the name 'concerted adjustments', those arising and handled in the citizen sphere, regardless of whether the obligation is of legal nature or of non-legal nature (Bouchard and Taylor, *Building the Future*, p. 64-65).

accommodation, vary depending on the context in which the request is made (employment, supply of goods and services, education, etc.) and on whether the demand is addressed to a private or a public authority. The notion of 'reasonableness', which defines the limit of the obligation to accommodate, has been articulated most clearly in the employment field. In order to be discharged of his duty of accommodation the employer must first of all show the rational character of the policy or the provision generating the indirect discrimination.⁴⁶ In addition, he has to prove that he took all necessary means to find an accommodation⁴⁷ but that this would be an undue hardship. The Supreme Court has interpreted this later limitation loosely. Rather than defining this concept exhaustively, it prefers to enumerate certain factors which allow a better understanding of the concept⁴⁸ such as limited financial and material resources, impairment of third party rights and the efficiency of the company or the institution.⁴⁹ These factors must be considered in the context of each case and with flexibility. Moreover, the Court clearly rejects the *de minimis* standard which is applied in the United States.⁵⁰ Concrete and material proof of the undue hardship must be submitted; mere hypotheses or speculations are not sufficient. Thus, the refusal to grant a leave of absence for religious reasons cannot be justified out of fear that too many requests would be made. This so called 'snow ball effect' must be materially proved.⁵¹ The same is true for the potential argument that other employees' rights would be impaired: for example, one will need to establish that within the company different requests for accommodation for religious reasons might substantially disrupt the company's organization and hence affect workers' rights. While the evaluation criteria for undue hardship have been identified relatively clearly in the area of employment relationships, the issue is less settled in the service area and, in particular, for public services where judicial precedents are rare.⁵²

⁴⁶ The requirement of a rational link is defined as 'an employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply' (Justice Wilson, in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, p. 520-521). If the rational character of the provision or policy cannot be shown the sanction will be the invalidity of the provision rather than its reasonable accommodation (Woehrling, 43 *Revue de droit de McGill* (1998), p. 342).

⁴⁷ The obligation to negotiate in good faith is reciprocal and the person asking for accommodation cannot refuse proposals made to her for the simple reason that they are not the ideal solution or precisely what she asked for. On the obligation to collaborate when negotiating an accommodation, see Saris, 'L'obligation juridique d'accommodement raisonnable', p. 385 et seq.

⁴⁸ This is Justice Wilson's position when writing for the majority in the decision *Central Alberta Dairy Pool (Central Alberta Dairy Pool v. Alberta (Human Rights Commission))*, [1990] 2 S.C.R. 489, p. 520-521).

⁴⁹ These factors have been summarised by Ch. Brunelle, *Discrimination et obligation d'accommodement en milieu de travail* (ed. Yvon Blais, Cowansville 2001), p. 248-251.

⁵⁰ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, p. 984.

⁵¹ See *Smart c. Eaton Ltée*, [1993] J.T.D.P.Q. n. 2, 1993 TDPQ 602.

⁵² Bosset, in *Les accommodements raisonnables: quoi, comment, jusqu'où? Des outils pour tous*, (2007), p. 24; Bouchard and Taylor, *Building the Future*, p. 163.

The development of the concept of reasonable accommodation for religious reasons in Canadian law raises some tricky issues. A first important question concerns the requirements necessary to demand an accommodation for religious reasons. Whether such demand is based on the principle of equality or on the right to religious freedom, the claimant must show in which way the rule, provision or practice disadvantages her on the basis of religion, which means that one needs to show that there is a conflict between the rule and a religious command. However, what should judges decide when the claimed religious obligation is controversial within the faith community itself? Must they verify whether it is 'objectively' an obligation of that religion or limit themselves to determining whether the plaintiff sincerely believes this is the case? In a controversial five to four decision, *Syndicat Northcrest v. Amselem* (2004),⁵³ the Supreme Court favoured a subjective and individualist conception of freedom of religion.⁵⁴ As the *Bouchard-Taylor* Commission highlighted, this subjective approach has the advantage of enabling courts to avoid entering into the interpretation of religious dogmas or to defining what religion is – a problem some deem to be almost impossible to solve.⁵⁵ It also avoids the risk that courts will marginalize minority religions or minority voices within a religious community and it is in line with the contemporary evolution of religion towards individualization.⁵⁶ However, the other side of the coin is that by fixing the judicial review on the subjective point of view of the claimant, one could facilitate opportunistic and fraudulent requests. Another difficulty lies with the fact that verifying the plaintiff's sincerity could enter into conflict with an individual's right to privacy.⁵⁷

⁵³ *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551. The case arose because some Orthodox Jews wanted to erect an individual *sukkah* (a booth built in occasion of *Sukkot*, or the Festival of booths) on their balcony and for that purpose asked for an exemption from the condominium's by-laws. The homeowners' association, the *Syndicat*, had proposed an accommodation consisting in the installation of a common *sukkah* in the gardens of the building. However, this solution had been rejected by the applicants because they believed this would be incompatible with their religious convictions, according to their own interpretation of the commandments. The trial judge as well as the Court of Appeal held that for a practice to be protected by freedom of religion, the applicant must show that it is mandated by the official teachings of the religion. Here, the judge had expressly granted more attention to the rabbi testifying for the homeowners than to the plaintiff's rabbi. The five majority justices of the Supreme Court instead found that the plaintiffs' subjective belief was decisive. They concluded that there had been an impairment of their freedom of religion, which could not be justified by the defence of third party property rights. On this case, see Woehrling, 33 *Revista catalana de dret public* (2006), p. 390 et seq.

⁵⁴ For a critique of the Supreme Court's position, see Saris, 'La prise en considération des convictions religieuses par le droit positif au Canada', in M.-C. Foblets et al (eds), *Convictions philosophiques et religieuses et droits positifs* (Bruylant, Brussels 2010).

⁵⁵ Note that in principle, the right to reasonable accommodation is not limited to religious convictions but extends also to secular convictions, given that both Charters protect not only freedom of religion but also freedom of conscience. See in this sense, *Maurice v. Canada (Attorney General)*, (2002) 210 D.L.R. (4th) 186.

⁵⁶ Bouchard and Taylor, *Building the Future*, p. 175–177.

⁵⁷ Woehrling, 33 *Revista catalana de dret public* (2006), p. 390 et seq.

Another challenge consists in the conflict of rights to which certain requests of accommodation may lead. As already noted, the legal duty of accommodation is not absolute; it can be limited by the necessity to protect other rights or an important public interest. As far as possible, courts proceed with a balancing exercise aimed at finding a solution which may harmonize the rights in conflict. But as the *Bouchard-Taylor* report recognises, such a harmonization may not always be possible. For instance, when parents object due to religious reasons to a blood transplant for their child deemed vital by the medical personnel, the exercise of religious freedom is incompatible with the child's right to life. Confronted with a similar situation, the director of a hospital in Ontario had decided to ignore the parents' refusal. This position was supported by the Supreme Court.⁵⁸ Another important reason for concern lies in requests contesting coeducation or challenging the gender equality principle. In this respect, the report of the *Bouchard-Taylor* Commission emphasizes that the criteria elaborated by the courts already allow rejecting demands of reasonable accommodation which would jeopardize gender equality.⁵⁹

§2. REASONABLE ACCOMMODATION IN EUROPEAN LAW

So far, no instrument adopted at the European level has expressly recognized a duty of reasonable accommodation for religious reasons. This does not mean that there is no room for this concept in European law. Arguably, such a right could be derived from existing provisions on antidiscrimination and religious freedom. Considering first the European Convention on Human Rights (ECHR), it will be seen that the case law of the European Court of Human Rights on non-discrimination combined with the right to freedom of religion provides some ground for such development (A). Turning then to EU antidiscrimination law, it will be argued that the 2000 Employment Equality Directive, which prohibits both direct and indirect discrimination based on religion, offers another possible avenue for the emergence of a right to reasonable accommodation (B).

A. THE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The ECHR institutions have had to deal a number of times with cases in which a demand similar to the request for reasonable accommodation for religious reasons was at stake.⁶⁰

⁵⁸ *R v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315.

⁵⁹ Bouchard and Taylor, *Building the Future*, p. 174-175; on the potential conflicts between religious beliefs and the prohibition of gender and sexual orientation discrimination in the context of European and United Kingdom law, see McColgan, 'Class wars? Religion and (In)equality in the Workplace', 38 *Industrial Law Journal* 1 (2009), p. 1.

⁶⁰ On reasonable accommodation for disability in the European Court of Human Rights (ECHR)'s case law, see De Schutter, 'Reasonable Accommodations and Positive Obligations in the ECHR', in A. Lawson and C. Gooding (eds), *Disability Rights in Europe. From Theory to Practice* (Hart Publishing,

For a long time these institutions have not looked favourably at the recognition of a 'duty of reasonable accommodation' whether solely on the grounds of freedom of religion (Article 9 of the Convention) or on the grounds of Article 9 read in conjunction with Article 14, which prohibits discrimination with respect to any of the rights and freedoms guaranteed by the Convention.

In the context of Article 9, this concept could nevertheless find support in the criterion of proportionality which determines the compatibility of a measure impairing freedom of religion with the Convention. Article 9 §2 provides that a restriction on religious freedom is only permitted if it is prescribed by law and is necessary in a democratic society to achieve one of the legitimate aims listed in the same provision. The concept of 'necessary in a democratic society' has been interpreted by the European Court of Human Rights (ECtHR) as implying the requirement of proportionality between the means used and the envisaged ends. Importantly, in a number of cases, the Court has held that the proportional character of a measure entails that amongst the various means of achieving a certain end the authorities should opt for those least impairing the rights and freedoms.⁶¹ Accordingly, one could argue that if a provision, which is justified by a legitimate objective, impairs the religious freedom of certain individuals and that an accommodation would allow the avoidance of such an impairment without at the same time compromising the intended aim, this second solution should be favoured because it represents the less restrictive means of achieving the objective.⁶²

Yet, the Court and the Commission refused to follow that path clearly when construing Article 9. An example of that position is the decision of the former European Commission of Human Rights, dated 12 July 1978, concerning the complaint presented by a British applicant of Sikh religion who claimed that the British law requiring the wearing of a

Oxford and Portland, Oregon 2005), p. 35–63. On the issue of reasonable accommodation on religious grounds in the ECHR's case law, see C. Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford University Press, Oxford 2001), p. 168–199; Stavros, 'Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from Across the Pond?', 6 *E.H.R.L.R.* (1997), p. 607–627; J. Ringelheim, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme* (Bruylant, Brussels 2006), p. 167–169 and p. 323–338.

⁶¹ See S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme – Prendre l'idée simple au sérieux* (F.U.S.L./Bruylant, Brussels 2001), p. 190–219. Thus, in domains outside of freedom of religion, the proportionality test has sometimes led the Court to consider that a provision, although it pursued a legitimate general objective, nonetheless entailed in some of its specific applications a disproportionate interference with a right. Hence, the Court found that maintaining the provision without any possibility of exception made it disproportionate with respect to the objective and thus contrary to the Convention. See for example ECtHR *Gaskin v. United Kingdom* [1989], no. 10454/83; ECtHR *Osman v. United Kingdom* [1998], no. 23452/94. See on this point, Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme – Prendre l'idée simple au sérieux*, footnote 282, p. 213; Ringelheim, *Diversité culturelle et droits de l'homme*, p. 330–332.

⁶² For a similar reasoning in the area of disability based on Article 8 (right to privacy) read in conjunction with Article 14, see ECtHR *Glor v. Switzerland* [2009], no. 13444/04.

helmet to drive a motorcycle impaired his freedom of religion because he was thereby compelled to remove his turban. The Commission rejected the claim, simply holding that the measure has a legitimate aim with respect to Article 9 §2, namely the protection of health.⁶³ Hence, the Commission did not find it useful to proceed with a proportionality analysis to see whether an alternative measure guaranteeing the protection of health while allowing the Sikhs to conform to their religious practice was available. There have also been a number of complaints to the Commission by employees concerning their leaves of absence. In the famous case *X. v. United Kingdom* decided in 1981,⁶⁴ the applicant was a primary school teacher in a London public school who complained against the refusal by the school authorities to accommodate his working hours so as to allow him to take 45 minutes off at the beginning of the afternoon on Fridays to pray at the Mosque. While the Commission admitted that Article 9 may entail for the state 'positive obligations inherent in an effective 'respect' for the individual's freedom of religion',⁶⁵ it nonetheless held that the facts before it did not reveal any interference with the applicant's freedom of religion. In the eyes of the Commission the decisive element was that the applicant 'of his own free will, accepted teaching obligations under his contract with ILEA [the *Inner London Education Authority*], and that it was a result of this contract that he found himself unable to work with the ILEA and to attend Friday prayers'.⁶⁶ This reasoning has been widely criticized by commentators for its formalism.⁶⁷ By deeming that the teacher's freedom of religion had not been impaired, the Commission was able to dodge the determination of whether such a measure is necessary in a democratic society. Such a determination would have meant verifying whether the authorities had legitimate motives to refuse accommodating the applicant's work hours to avoid the conflict with his freedom of religion, for instance because such an accommodation would have led to an infringement of other individuals' rights or because it would have excessively upset the functioning of the school. The Commission also rejected the complaint based on the

⁶³ European Commission of Human Rights, *X. v. United Kingdom* [1978], no. 7992/77, D.R. 14, p. 234. An older decision, dated 5 March 1976, concerned the application by a Jewish prisoner, who complained for not having received *kosher* food and that no Jewish service was being held in prison. Here, the Commission judged that the demand was unfounded because the prisoner had in fact received *kosher* food, had had contacts with a secular Jewish visitor and the initiatives by the authorities had been approved by the Grand Rabbi. Hence, the authorities 'had done everything possible to respect the applicant's beliefs' (European Commission of Human Rights, *X. v. United Kingdom* [1976], no. 5947/1976, D.R. 5, p. 8).

⁶⁴ European Commission of Human Rights, *X. v. United Kingdom* [1981], no. 8160/78, D.R. 22, p. 27.

⁶⁵ *Ibid.*, para. 3, p. 33.

⁶⁶ *Ibid.*, para. 9, p. 35. The European Commission followed a similar reasoning in *Konttinen v. Finland* [1996], no. 24949/94, D.R. 87-B, p. 68; and in *Stedman v. United Kingdom* [1997], no. 29107/95, D.R. 89-B, p. 10.

⁶⁷ See note by Velaers and Foblets, 'L'appréhension du fait religieux par le droit. – A propos des minorités religieuses', 30 *Revue trimestrielle des droits de l'homme* (1997), p. 292–293 at 273–307; Evans, *Freedom of Religion*, p. 130–131; Gunn, 'Adjudicating Rights of Conscience Under the European Convention on Human Rights', in J.D. van der Vyver and J. Witte, Jr (ed.), *Religious Human Rights in Global Perspective – Legal Perspectives* (vol. 2) (Martinus Nijhoff, The Hague 1996), p. 312 at 305–330.

violation of Article 14 (non-discrimination clause). The applicant argued that as opposed to Muslims, Christian workers had no difficulty to reconcile their professional obligations with the practice of their religion since the dates of official holidays overlap with the main Christian festivals. The Commission only observed that 'in most countries, only the religious holidays of the majority of the population are celebrated as public holidays'.⁶⁸ Thus, the Commission seems to acknowledge, if implicitly, that the challenged regulation has a different impact on an individual's freedom of religion depending on whether one belongs to the majority religion or to a minority one. However, the Commission did not find it helpful to question the legitimacy of this difference and to ponder the possibility of putting accommodations in place which might mitigate the disadvantage suffered by adherers of a minority religion, just because this situation was totally 'natural' in its view for the simple reasons that it corresponds to the norm established in numerous countries.

The Grand Chamber decision *Thlimmenos v. Greece*, dated 6 April 2000, marks a turning point in this respect in the Court's jurisprudence on the basis of Article 14. Until then, the Court had held that the principle of non-discrimination enshrined in Article 14 only prohibited the state from treating people who were in analogous situations differently without any objective and reasonable justification. In *Thlimmenos*, the Court recognizes for the first time that the non-discrimination principle has another facet: it also prohibits the State from failing to 'treat differently persons whose situations are significantly different' without an objective and reasonable justification.⁶⁹ The applicant, a Jehovah's Witness, contended that, in spite of having successfully passed the relevant exam, the Greek authorities had refused to appoint him to a chartered accountant's post, on the ground that he had been convicted of a serious crime five years earlier for having refused to do military service due to religious reasons. The authorities justified their decision on the basis of existing legislation prohibiting any person convicted of a crime to become a chartered accountant. While acknowledging that such legislation pursues a legitimate objective, namely to prevent dishonest or untrustworthy people from this profession, the Court declared that, as applied to Mr. Thlimennos, it lacked any pertinent and reasonable justification: his conviction for being a conscientious objector is considerably different from that of other convicted criminals because his motivations do not 'imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession'.⁷⁰ Greece, nevertheless, replied that since the legislation had general application Mr. Thlimmenos could not be exempted. But the Court rejected this argument: It is 'by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants'⁷¹ that the

⁶⁸ *X. v. United Kingdom*, para. 28, p. 38.

⁶⁹ ECtHR *Thlimmenos v. Greece* [2000], no. 34369/97, para. 44.

⁷⁰ *Ibid.*, para. 47.

⁷¹ *Ibid.*, para. 48 (our emphasis).

Greek state violated the applicant's right not to be discriminated against on the grounds of his religion.

Thus, the *Thlimmenos* decision establishes two principles: first of all, the rule of non-discrimination enshrined in Article 14 of the Convention is violated when a state does not treat differently persons whose situations are different without objective and reasonable justification. Then, in order to avoid such a discrimination the state can be asked to modify a general rule, if necessary by establishing appropriate exceptions. Even though these terms are not explicitly used, this second principle can be matched with the duty of reasonable accommodation.⁷²

Since *Thlimmenos*, however, the Court has not added new applications of this second consequence of the non-discrimination principle, at least in relation to freedom of religion, even though it recognized and developed the notion of indirect discrimination.⁷³ A number of decisions even seem to step back from this jurisprudence. Thus, in *Kosteski v. The former Yugoslav Republic of Macedonia*, dated 13 April 2006, the Court seems to adhere to the precedents established by the Commission in matters concerning leaves of absence.^{74, 75} The decision *El Morsli v. France*, dated 4 March 2008, and based like the *Kosteski* decision on Article 9 alone, also shows the reluctance by the Court of Human

⁷² In this sense, L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, Oxford 2008), p. 221; O. M. Arnardottir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff, The Hague 2003), 101; and De Schutter, 'Reasonable Accommodations and Positive Obligations in the ECHR', p. 53.

⁷³ See ECtHR *D.H. and Others v. Czech Republic* [2007], no. 57325/00.

⁷⁴ ECtHR *Kosteski v. The former Yugoslav Republic of Macedonia* [2006], no. 5517/00, para. 37. The aim of the litigation was different from that in the decisions *X. v. United Kingdom* and *Konttinen*: the laws of the former Yugoslav Republic of Macedonia allow employees of Muslim faith to take leaves of absence for recognized Muslim festivals, whereas the Christian festivals, Christmas and Easter, are declared official holidays for all citizens. If the applicant had received disciplinary sanctions for not coming to work during Muslim festivals, it was because the employers doubted his being Muslim. They accused him of abusing the right to take leaves of absence during those specific dates granted to the believers of that religion. However, the Court after reminding the abovementioned case law by the Commission used this occasion to declare that it was not persuaded that the sanction against an employee who had taken time off to celebrate a religious festivity could be considered an impairment of his freedom of religion.

⁷⁵ One could also mention *Pichon and Sajous v. France* (2001), where two pharmacists complained that they had been convicted for refusing, for religious reasons, to sell contraceptive pills in their dispensary. While ruling that no interference with the right to religious freedom has occurred, the Court at the same time suggests that the contested measure was justified by a legitimate objective under Article 9(2). It observes that 'as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.' (ECtHR *Pichon and Sajous v. France* [2001], no. 49853/99, (our emphasis)). Would it have applied a reasoning based on the notion of reasonable accommodation, the Court could have ruled that the accommodation demanded, i.e. an exemption from the obligation to sell contraceptive pills, conflicted with the right of other individuals to health or to privacy (which includes the right to decide whether or not to become parents as the Court recognised in ECtHR *Evans v. United Kingdom* [2007], no. 6339/05, para. 71). Hence, it was unreasonable and could be refused.

Rights to infer a right to reasonable accommodation from freedom of religion. Here the Court declares inadmissible the application by a Muslim woman who complained that, when trying to deposit her French visa application in order to be able to reunite with her husband in France, she had been denied access to the French Consulate in Marrakech because she had refused to remove her veil for an identity control. The applicant held that she had been willing to remove her veil in the presence of a female agent and that she could thus have been identified. However, the Court held that in any case, the refusal to provide a female agent for the identification of Ms. El Morsli did not exceed the State's margin of appreciation in matters of security controls.⁷⁶

The argument of respect for the national margin of discretion is also put forward by the Court to dismiss the issue of reasonable accommodation in six decisions dated 30 June 2009⁷⁷ concerning the exclusion of Muslim or Sikh students from high schools in France pursuant to the application of the 2004 Act prohibiting the wearing of ostentatious religious signs in public schools.⁷⁸ Some students affected by the measure proposed an alternative solution so as to be able to keep attending school, namely to wear a cap or a bandana instead of the headscarf or a *keski* instead of the Sikh turban. These signs, they argued, were discreet and had no religious connotation. The Court holds that since the prohibition contained in the 2004 French Act does not violate the Convention's Article 9 – it is justified in its view by the legitimate objective of protecting the rights of others and defending public order – it is the State's discretion to determine whether the alternatives suggested by the students are 'ostentatious' religious signs. It thus excludes requiring public authorities to search for means to reconcile the objective of the disputed Act with the applicants' right to manifest their religion. The circumstances at stake were probably not the most suitable for the recognition of a duty to provide reasonable accommodation. The question of such an obligation typically arises in situations where a general norm, while not aimed at regulating religious practice, *indirectly* impacts on the right of a minority to observe its faith. The French Act banning the wearing of ostentatious religious signs in schools, by contrast, is precisely designed to restrict the

⁷⁶ ECtHR *El Morsli v. France* [2008], no. 15585/06.

⁷⁷ These judgments were issued on 30 June 2009 by the Fifth section of the Court: ECtHR *Aktas v. France* [2009], no. 43563/08; ECtHR *Ghazal v. France* [2009], no. 29134/08; ECtHR *Bayrak v. France* [2009], no. 14308/08; and *Gamaleddyn v. France*, no. 18527/08 concerned the prohibition to wear the headscarf at school; in ECtHR *Jasvir Singh v. France* [2009], no. 25463/08, and ECtHR *Ranjit Singh v. France* [2009], no. 27561/08, the prohibition to wear the Sikh turban at school was at stake; see also ECtHR *Dogru v. France* [2008], no. 27058/05; and ECtHR *Kervanci v. France* [2008], no. 31645/04, para. 75. The facts at issue in these two cases arose before the 2004 Act prohibiting the wearing of ostentatious religious signs in public schools was adopted. It concerned two Muslim girls who had been expelled from school because they refused to take off their headscarf during sports classes but who had proposed to replace the headscarf with a cap.

⁷⁸ *L. n° 2004-228 du 15-03-2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* (Act No. 2004-228 of March 15, 2004, regulating by virtue of the principle of *secularism*, the wearing of signs or attire manifesting a religious belonging in public schools), *J.O.*, n. 65, 17 March 2004, p. 5190.

right to manifest one's religion in specific circumstances. Once the Court had admitted that the ban was compatible with Article 9 ECHR, the only way applicants could try to convince the Court that their right had nonetheless been violated was by arguing that the signs they wore were not 'ostentatious' or not religious. But the Court was unlikely to dispute the interpretation made by the state of what constitutes an 'ostentatious' religious sign within the meaning of the Act.

Yet the logic of reasonable accommodation has re-emerged in the Court's case law on Article 14 in the context not of religion but of disability. In *Glor v. Switzerland* (2009), the applicant, a diabetic, complained that he had been declared unfit for military service and ordered to pay a military-exemption tax because he was only afflicted with a minor disability (diabetes), while persons suffering from a major disability were not subject to this tax. The Court here insists that a measure which interferes with an individual's rights can only be considered proportionate and necessary in a democratic society if no alternative measure, less invasive of the rights at stake, would allow for the same end to be achieved.⁷⁹ In the case at issue, rather than forcing the applicant to pay the tax when he was actually willing to do his military service, it would have been possible to implement particular forms of military service or alternatives adapted to people in his situation. Hence it was possible to achieve the objective with a measure less impairing of the applicant's rights.⁸⁰ Accordingly, the Court finds a breach of the right not to be discriminated against combined with the right to privacy.

This overview of the European Court of Human Rights' case law allows a nuanced conclusion. Whereas freedom of religion, as interpreted by the Court to this date, does not provide fertile grounds for the development of a duty of reasonable accommodation, the rule of non-discrimination established by Article 14 seems more promising. Indeed, since the *Thlimmenos* decision, the Court has, in principle, recognized that there can be discrimination when the State, without any reasonable and objective justification, refrains from adapting a general rule, if necessary by introducing exceptions, to avoid affording the same treatment to people who are differently situated where such treatment disadvantages people practicing a certain religion.

B. EUROPEAN UNION LAW

The concept of reasonable accommodation is relatively new in European Union law. It was introduced in 2000 with Directive 2000/78/EC⁸¹ (hereinafter 'Employment Equality Directive') which establishes a general framework for equal treatment in employment and occupation without discrimination based on religion or belief, disability, age or sexual

⁷⁹ ECtHR *Glor v. Switzerland* [2009], no. 13444/04, para. 94.

⁸⁰ *Ibid.*, para. 95.

⁸¹ Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, [2000] OJ L 303/16.

orientation.⁸² However, its field of application is limited: the duty to provide reasonable accommodation applies only in favour of disabled people⁸³ and in the employment sector. It could be extended, on behalf of the disabled, to the domains of social security, education, access to goods and services if the Commission's proposal for a directive presented on 2 July 2008⁸⁴ is approved unanimously by the Council.

In contrast, European Union law does not recognise as such a duty of reasonable accommodation when religion or belief, instead of disability, is at stake. The question whether such a duty exists may nevertheless arise when deciding certain cases of indirect discrimination. As a reminder, an indirect discrimination 'shall be taken to occur when an apparently neutral provision, criterion or practice would put persons having a particular religion or belief [...] at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the measures to achieve that aim are appropriate and necessary [...]'.⁸⁵ Initially, the notion of indirect discrimination was established by the European Court of Justice to guarantee the effectiveness of the principle of equal pay between men and women.⁸⁶ Based on a substantive view of equality, it acknowledges that a facially neutral provision, intended as one which does not formally distinguish on the grounds of a prohibited ground, may have discriminatory effects towards a certain category of protected individuals.

While directly discriminating against an individual on the grounds of religion is completely illegal, except, within certain limits, for 'churches' and 'ethos-based organizations',⁸⁷ an indirect discrimination based on religion can be justified by referring to the classical criteria framing the violation of a fundamental right, that is, the legitimacy of the pursued objective and the proportionality between the means and the ends. Now, in proceeding with such a proportionality analysis, the issue of a possible reasonable accommodation may arise. Does a measure entailing a specific disadvantage

⁸² Article 1 of Directive 2000/78/EC, [2000] OJ L 303/16. The notion of reasonable accommodation is not mentioned in the Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, [2000] OJ L 180/22.

⁸³ For an autonomous and uniform definition of disability under European law, see the decision in Case C-13/05 *Chacon Navas* [2006] ECR I-6467.

⁸⁴ Article 3 (Scope) and 4 (Equal treatment of persons with disabilities) of the Proposal for a Council Directive presented by the Commission on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final. This proposal for a directive intends to make the material scope of the Employment Equality Directive (Council Directive 2000/78/EC, [2000] OJ L 303/16) coincide with that of the Racial Equality Directive (Directive 2000/43/EC, [2000] OJ L 180/22).

⁸⁵ Article 2(2)(b) of Council Directive 2000/78/EC, [2000] OJ L 303/16.

⁸⁶ See especially the decisions Case C-96/80 *Jenkins* [1981], ECR 911 and Case C-170/84 *Bilka-Kaufhaus* [1986], ECR 1607, where the Court of Justice took inspiration from the jurisprudence of the U.S. Supreme Court (*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)), which the latter then abandoned (see, *Washington v. Davis*, 426 U.S. 229 (1976) and *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989)), but whose principle was in part re-established by the *Civil Rights Act* 1991 (Pub. L. No. 102-66, 105 Stat. 1071).

⁸⁷ Article 4(2) of Council Directive 2000/78/EC, [2000] OJ L 303/16.

for people of a certain religion, but pursuing a legitimate aim, pass the proportionality test if it can be shown that a reasonable accommodation would avoid the harm caused to these individuals? For instance, a regulation in a chemical laboratory may prohibit the wearing of any headdress and require the wearing of a special apron for security reasons. This 'apparently neutral' regulation has the effect of placing Muslims wearing a headscarf at a disadvantage. While it undoubtedly pursues a legitimate objective, is it 'appropriate' and 'necessary' if the wearing of a fireproof headscarf would allow reconciling the security mandate with the practice of religion? In other words, when the possibility of a reasonable accommodation occurs, could it neutralize the justification of the indirect discrimination?⁸⁸

The issue is delicate and the indications from the European Court of Justice's case law are few. As of today, only the 1976 decision in *Vivien Prais*⁸⁹ is directly relevant to the topic. Here, Ms. Vivien Prais had presented her candidacy for an open competition organised by the Council of the European Communities to hire translators. Once she had been informed of the date on which the written test would take place, she notified the Council that this coincided with the first day of the Jewish holiday *Shavuot*, a date on which the religious commands prohibited her from travelling and writing. After her request to take part in the open competition at another date was rejected, she filed an action with the European Court of Justice claiming that this decision violated the clause in the Staff Regulations according to which candidates are chosen without distinction of race, religion or sex. While rejecting the claim, the Court acknowledged that it is 'desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests'.⁹⁰ The Court also reiterated that a written test must be identical and take place under the same conditions for all candidates.⁹¹ Hence, the appointing authority must not accommodate other dates for the test unless it has been notified before the other candidates have been invited. The Court seems to make implicit reference to the concept of reasonable accommodation: in order to avoid (indirect) discrimination, the European institutions must as much as possible accommodate the dates of the tests to religious observances. The concept of reasonable accommodation is therefore present between the lines in European law prior to the Employment Equality Directive and this in the context of religious discrimination.⁹²

⁸⁸ On the links between indirect discrimination and reasonable accommodation for religion in European law, see Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, p. 223–225; and L. Vickers, *Religion and Belief Discrimination – The EU Law* (European Commission, Office for official publications of the European Communities, Luxembourg 2006), p. 20–22.

⁸⁹ Case C-130/75 *Vivien Prais* [1976] ECR 1589.

⁹⁰ *Ibid.*, para. 18.

⁹¹ *Ibid.*, para. 13.

⁹² This reasoning can be compared to that by the European Court of Human Rights in an isolated decision *S. H. and H. V. v. Austria* (1993). The applicants were practicing Jews and complained against the refusal by an Austrian court to accept their request to reschedule a court hearing that had been planned on

§3. CONCLUSION

The concept of reasonable accommodation expresses an important idea in the evolution of the principle of equality: if individuals belonging to certain minorities do not have access to employment or services the problem does not necessarily lie in the characteristics these individuals have with regards to the majority but it can also be the result of an environment conceived without bearing their situation in mind. This shifts the focus from the characteristics of the individual who is prevented from benefiting from an employment or a service to the conditions which create obstacles to the access of such individuals in the concerned sectors. By inviting reflection on the way in which this context can be modified, this concept answers to the intent to guarantee equal opportunities to disabled individuals or to people practicing a minority religion and to ensure their integration in social, economic and cultural life. From this point of view, not only people need to adapt to their environment. The ideal of equality demands that the environment itself, as far as this is possible, be changed in ways that allow everyone to participate fully in society.

While the United States and Canada recognize a right to reasonable accommodation for both disability and religion, the European Union so far establishes an explicit duty of accommodation only in favour of disabled individuals in the employment context. The similarity between American and Canadian law should nevertheless not mislead. In fact, the development of the concept has taken different turns in the respective legal orders and it is in Canada that the right to reasonable accommodation has expanded most. Whereas the Canadian jurisdictions have received the concept of reasonable accommodation very favourably, both in Canada and the United States its application to religion generates very lively debates even outside legal circles, as demonstrated by the work of the *Bouchard-Taylor* Commission. Indeed, the implementation of this concept in the religious domain touches upon a fundamental question for contemporary democracies, namely how to respond to religious diversity in a democratic state.⁹³ In Canada, courts and legislatures have expressed themselves in favour of reasonable accommodation, understood as an instrument leading to a transformation of rules and institutions of Canadian society so as to render them more welcoming towards all members of society by respecting the needs of their specific religions. However, the Supreme Court's decision of 24 July

an important Jewish holiday. The Commission insinuated that had the applicants duly informed the court of the problematic religious character of the hearing date once they had been informed of it, the judges would have had to offer a new date. However, in this case the applicants had reacted too late because they only wrote to the court ten days before the hearing, while they had been informed of it four months earlier. Since the case was very complex, involved a great number of people and the request had been made late, the Commission considered that the decision by the court had not been unreasonable. (European Commission of Human Rights, *S. H. et H. V. v. Austria*, no. 18960/91.

⁹³ See the contributions to the book *Institutional Accommodation and the citizen: legal and political interaction in a pluralist society* (Council of Europe, Strasbourg 2010).

2009⁹⁴ seems to draw a limit to this evolution by excluding the principle of reasonable accommodation when legislative measures of general application are concerned.

In Europe, the situation is less clear than it might appear at first glance. European Union Directive 2000/78/EC expressly establishes the duty of reasonable accommodation only for employers and in favour of disabled individuals. No such duty is envisaged on the basis of religion. However, the prohibition of indirect discrimination might be interpreted by the European Court of Justice or by the jurisdictions of a Member State as requiring, in certain cases, that the author of a provision or of a rule of general application adapt that measure to avoid discriminating indirectly against certain individuals because of their religion. A similar interpretation of indirect discrimination has indeed been developed by Canadian jurisdictions. The Court of Justice implicitly adopts a similar reasoning in its decision *Vivien Prais*⁹⁵ – a decision admittedly decided prior to the adoption of Directive 2000/78/EC and which remains unconfirmed. In any case, the law of the European Union does not prevent Member States from defining the obligation of reasonable accommodation more broadly than the Employment Equality Directive or to establish accommodations for religion based on Article 7 of the Employment Equality Directive which authorises within certain limits the implementation of positive actions '[w]ith a view to ensuring full equality in practice'. Importantly, since the *Thlimmenos v. Greece* ruling, the European Court of Human Rights recognizes that, thanks to the principle of non-discrimination enshrined in Article 14 of the Convention, the legislator may, under certain circumstances, be asked to introduce appropriate exceptions in legislation to avoid disadvantaging people practicing a certain religion, without any objective and reasonable justification.

In fact, in most EU Member States, one can already observe instances of isolated accommodations granted for religious reasons either through legislation or through *ad hoc* decisions of the responsible authority in a public institution or private organisation.⁹⁶ In particular, there is an increasing tendency across EU states to allow certain adaptations in their public institutions (schools, hospitals, prisons, etc.), mainly when it comes to the composition of meals and the possibility to obtain a leave of absence for religious festivals, so as to allow religious minorities to practice their religion.⁹⁷ However, these examples

⁹⁴ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567.

⁹⁵ Case C-130/75 *Vivien Prais* [1976], ECR 1589.

⁹⁶ M. Bell *et al*, *Developing Anti-Discrimination Law in Europe – The 25 EU Member States Compared* (European Commission, Office for official publications of the European Communities, Luxembourg 2006), p. 41.

⁹⁷ E.U. Network of Independent Experts in Fundamental Rights, *Thematic Comment No. 3 – The Protection of Minorities in the European Union*, 25 April 2005, CFR-CDF.ThemComm2005.en, p. 35–37, electronically available at http://ec.europa.eu/justice_home/cfr_cdf/doc/thematic_comments_2005_en.pdf (last visited: 25.05.2010); F. Dassetto *et al*, *Islam in the European Union: What's at Stake in the Future?* (European Parliament, DG for Internal Policies of the Union, 2007), p. 43–51 and p. 56–59; On exemptions from generally applicable laws granted for religious reasons under United Kingdom law, see McGoldrick, 'Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based

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need to be distinguished from a situation in which the state recognizes a *general right* to a reasonable accommodation in the employment context or in other areas of social life. The recognition of such a right means that the accommodations which can be achieved are not limited in advance. It also implies that the believers of a minority religion benefit from the same protection as those belonging to the majority religion. The individual's situation towards the authority on which the duty of accommodation rests is reinforced, as the latter has a duty to consider any request for accommodation which is submitted and can only reject it on conditions established by law or by jurisprudence.

The American and Canadian experiences nevertheless highlight the difficulties which the practice of reasonable accommodation can pose when applied on a large scale. These are most prominently the risk of an increase in litigation as well as the delicate assessment of the limits to the duty of accommodation, in particular when the demanded adjustment raises issues concerning its compatibility with other fundamental rights such as gender equality. Further, if adjustments come in the form of an exception to a generally applicable rule, they can enter into conflict with the concept of formal equality and the principle of the general application of laws. Additionally, the existence, whether objective or subjective, of the claimed religious command may be a source of controversy. However, the *Bouchard-Taylor* Commission's report suggests that the Canadian institutions and economic actors have all in all successfully integrated the mechanism of reasonable accommodation. Moreover, it proposes supplementary means to help them overcome the obstacles encountered. Seen in this light, the Canadian experience could provide a rich source of inspiration for the refinement of European Equality law. This does not mean that the concept of reasonable accommodation, as construed in Canadian law, ought to be transplanted as such in European legislation. But European law could take inspiration from the philosophy of the concept and adapt it to the specificities of its own legal system.⁹⁸

Opt Outs from Generally Applicable Laws', 9 *Human Rights Law Review* 4 (2009), p. 627-635 at 603; and Vickers, *Religious Freedom, Religious Discrimination and the Workplace*.

⁹⁸ See the paper presented by P. Bosset at the conference *Interacting in Diversity for Social Cohesion*, 7-8 December 2009, Council of Europe, Strasbourg (on file with the authors).