EDITIONS DE L'UNIVERSITE DE BRUXELLES

The Others in Europe

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iee INSTITUT D'ETUDES EUROPEENNES

CHAPTER VI

Reasonable accommodation of religious diversity in Europe and in Belgium: Law and practice

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The religious landscape in Europe has been considerably diversified as a result of post-colonial immigration. This has had an important impact on the evolution of the relationship between state and religious communities in European countries. However, pluralisation of religious practice also has implications for other areas of social life and legal regulation including first and foremost, labour relations. In particular, in most countries the organisation of labour has to a certain extent, albeit implicitly, traditionally taken the specificities of the dominant religion into account. This is epitomized in the choice of non-working days which usually reflect the holidays of the majority religion. What happens when workers following a minority religion ask for adaptations in regulations enabling them to practice their faith? How do employers react to such demands? And what does the law require in such case?

In United States and Canada law, these issues have long been dealt with under the notion of "reasonable accommodation" (Bribosia, Ringelheim and Rorive, 2009 and 2010). This concept first appeared in US law in 1972 when Congress modified Title VII of the 1964 *Civil Rights Act* which prohibits discrimination based on religion and adds 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" (§ 701 (j); Oleske, 2004, p. 532). As a result of this provision, employers have been required, for instance, to provide exceptions to clothing rules, changes in working hours which do not entail the payment of overtime or the infringement of other employees' rights, and authorisation

of selected absences for religious festivals (Engle, 1997, p. 387-406; Rosenzweig, 1996, p. 2517-2522; Eisgruber and Sager, 2007, p. 87-108)[1].

However, the concept of reasonable accommodation has been most developed in Canada. Introduced in the 1980s by courts specialised in the interpretation of the Canadian Human Rights Act[2], the concept was confirmed by the Supreme Court in *Ontario Human Rights Commission (O'Malley) v. Simpson-Sears Limited*, decided in 1985 (see Woehrling, 1998, p. 329; Bosset, 2007, p. 3-28). Drawing on principles of equality and non-discrimination, the Supreme Court ruled that employers have a duty of reasonable accommodation. Constructed as a corollary to the prohibition of discrimination, and especially indirect discrimination, the obligation of reasonable accommodation means that the author of a provision or policy, which *de facto* disadvantages an individual on the basis of a prohibited ground of discrimination, must use all reasonable means to adapt the provision or policy to the special needs of that individual so as to protect him/her from its discriminatory effects. Importantly, the obligation does not only concern religion. Any kind of discrimination may potentially give rise to a duty to accommodate (Bosset, 2007, p. 13-14)[3]. In the US, by contrast, the duty of reasonable accommodation has only been extended to disabilities[4]. In US law, as in Canadian law, the obligation to accommodate has a limit. The accommodation must be "reasonable". It cannot impose a disproportionate burden – an "undue hardship" –, on the person bearing that burden, whether it be an employer, any other private economical actor or a public authority (Bosset, 2007, p. 10). According to the Canadian Supreme Court, the "reasonable" or "unreasonable" character of an accommodation must be assessed within the context of each case and with flexibility, taking into account such factors as the limited financial resources of the organisation, impairment of third party rights and the efficiency of the company or the institution (Brunelle, 2001, p. 248-251).

In Canada, reasonable accommodation granted for religious reasons has to some extent become an instrument for negotiating cultural and religious plurality. In this regard, it is part and parcel of the Canadian notion of multiculturalism and Quebec's concept of interculturalism (Crépeau and Atak, 2007). This was precisely the view

[1] Besides anti-discrimination legislation, a lively debate exists in American constitutional theory on whether federal and state legislators have a duty of accommodation which can be derived from the right to the freedom of religion as established by the First Amendment of the United States' Constitution, the so-called *Free Exercise Clause*. See Greenawalt, 2006, p. 15 and Novit Evans, 1997, p. 204-227.

[2] These are laws enacted at the provincial or federal level whose main aim is to combat discrimination based on certain grounds and whose implementation is guaranteed by specialised institutions created 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.

[3] As regards religion, the duty of reasonable accommodation may have another basis than non-discrimination. Canadian judges have inferred a similar obligation from the right to religious freedom as established by the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms (Article 3) (Woehrling, 1998, 369 ff; Woehrling, 2006a, 12 ff).

[4] *Americans with Disabilities Act* (1990), 42 U.S.C. § 12111(10).

taken by the Advisory Commission on the practices of accommodation relating to cultural differences created by Quebec's prime minister in 2007 in response to the controversy arising in the province of Quebec after some instances of formal or informal accommodations generated tremendous media attention (Bouchard and Taylor, 2008, p. 53-58; Gaudreault-Desbiens, 2009, p. 151-175). After a year of research and consultation, the "Bouchard-Taylor Commission", sharing the names of its two presidents, historian and sociologist Gérard Bouchard and philosopher Charles Taylor, concluded that, contrary to what certain media suggested, there had been no sudden increase in demands for adjustment or accommodation and that all in all, such demands were managed efficiently by public institutions. Interestingly, the *Bouchard-Taylor* report highlights that, aside from a small number of accommodations imposed by court, a wide range of adjustments were negotiated amicably by public or private actors. The report thus proposes to limit the phrase "reasonable accommodations" to accommodations obtained through legal means and to distinguish them from what it terms "concerted adjustments", meaning accommodations arising and handled outside the courts, regardless of whether there is, legally speaking, a duty to accommodate (Bouchard and Taylor, 2008, p. 64-65). Taken together, these accommodations practices assume various shapes. They may consist in a mere exemption from the application of an indirectly discriminatory rule (i.e. the decision of the Royal Canadian Mounted Police to exempt Sikhs willing to serve in its ranks from the obligation to wear the traditional Stetson hat[5]) or in the creation of a special regime (i.e. in the famous *Multani* case, a Sikh pupil was allowed to wear the traditional dagger or *kirpan* at school, provided that it be worn under his clothes; that it be carried in a sheath made of wood; and that it be wrapped and sewn securely in a sturdy cloth envelope, to prevent any risk of it causing injury[6]). An accommodation may also consist of 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.

What is the relevance of these developments for the European context? So far, no legal instrument adopted at the European level has expressly recognised a duty of reasonable accommodation for religious reasons. This however does not mean that there is no room for this concept in European countries. First, following the Canadian example, the question may be raised as to whether an obligation for reasonable accommodation could be drawn from the general prohibition of indirect discrimination based on religion. Such prohibition is enshrined in both the European Convention on Human Rights (ECHR) and the European Union (EU) Employment Equality Directive, passed in 2000[7]. Another potential source for such a duty would be the right to freedom of religion, as guaranteed in Article 9 ECHR. Second, at the national level, one may identify isolated instances of adaptations of general rules granted by law to take into account special needs of certain religious minorities.

[5] *Grant v. Canada (Attorney General)*, [1995] 1 *F.C.* 158.

[6] Canadian Supreme Court, *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 256 and Woehrling, 2006b, footnote 45.

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

Moreover, in practice, employers across Europe face demands from employees belonging to minority faiths to accommodate their religious specificities, which they must deal with in one way or another.

Against this background, this article seeks to consider the relevance of the concept of reasonable accommodation as a device for handling religious plurality in European labour relations. The first part discusses the state of European law as to whether a legal duty to provide accommodation for religious reasons may be derived from antidiscrimination and/or religious freedom norms. It considers both EU law and the European Court of Human Rights (ECHR). The second part uses Belgium as a case-study to explore national laws and policies regarding accommodation of minority religious practices. First, we emphasise that whereas Belgian law, like the law of most other EU countries, does not expressly recognise any right to reasonable accommodation for religious reasons, some instances of adaptation of general legislation already exist which take the special needs of religious minorities into account. Second, we trace the emergence of the concept of "reasonable accommodation" in the Belgian public debate. Third, taking a sociological approach, we enquire as to what sorts of adjustments are *de facto* asked for in the employment sector and how employers cope with such demands. Here, we highlight that despite the absence of any clear *right* to reasonable accommodation, informal practices of negotiated accommodation or, in the words of the Bouchard-Taylor report, "concerted adjustments", can be observed in various employment settings.

Reasonable accommodation in Europe: The legal framework[8]

European law, at present, does not expressly provide for a right to reasonable accommodation for religious reasons. Yet, arguably, such a right could be derived from existing provisions on antidiscrimination and religious freedom, either from the ECHR, as interpreted by the European Court of Human Rights or from the 2000 EU Employment Equality Directive, which prohibits both direct and indirect discrimination based on religion.

European Court of Human Rights case law

ECHR institutions have frequently had to deal with cases whereby a demand similar to a request for reasonable accommodation for religious reasons was at stake (Evans, 2001, p. 168-199; Stavros, 1997, p. 607-627 and Ringelheim, 2006, p. 167-169 and p. 323-338). In the context of Article 9 (freedom of religion), this concept could *a priori* 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 Court as implying the requirement of proportionality between the means used and the envisaged ends. In a number of cases, the Court has held

[8] This part of the paper is a revised version of Part II of Bribosia, Ringelheim and Rorive, 2010.

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 rights and freedoms (Van Drooghenbroeck, 2001, p. 190-219). Accordingly, the case can be made that if a provision, which is justified by a legitimate objective, infringes upon the religious freedom of certain individuals and that an accommodation would allow avoidance of such an impairment without at the same time compromising the intended aim, this second solution should be favoured as it represents the least restrictive solution to achieve the objective.

Yet, the Court and the Commission refused to follow that path when interpreting Article 9. An example of that position is the decision of the former European Commission of Human Rights, dated 12 July 1978, rejecting the application of a British citizen of Sikh religion claiming that the law requiring the use of a helmet to drive a motorcycle impaired his religious freedom because he was thereby compelled to remove his turban. The Commission simply holds that the measure has a legitimate aim with respect to Article 9 (2), namely the protection of health[9], and 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[10], a primary school teacher in a London public school 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 go pray at the Mosque. While the Commission admits that Article 9 may entail for the State "positive obligations inherent in an effective "respect" for the individual's freedom of religion" (§ 3), it nonetheless holds 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" (§ 9).

This reasoning has been widely criticised by commentators for its formalism (Velaers and Foblets, 1997, p. 292-293; Evans, 2001, p. 130-131; Gunn, 1996,

[9] Eur. Comm. H.R., *X. v. United Kingdom*, 12 July 1978 (Appl. No. 7992/77), *D.R.* 14, p. 234. An older decision, dated 5 March 1976, concerned the application by a Jewish prisoner, who complained that he did not have access to *kosher* food and that no Jewish service was held in prison. Here, the Commission judged that the demand was unfounded because the prisoner had 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" (Eur. Comm. H. R., *X. v. United Kingdom*, 5 March 1976 (Appl. No. 5947/1976), *D.R.* 5, p. 8).

[10] Eur. Comm. H.R., *X. v. United Kingdom*, 12 March 1981 (Appl. No. 8160/78), *D.R.* 22, p. 27.

p. 312). 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. A similar determination would have meant verifying whether the authorities had legitimate motive 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 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" (§ 28) 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 or to ponder the possibility of putting accommodations in place which might mitigate the discrimination suffered by adherers of a minority religion simply because this situation seemed totally "natural" for the simple reason that it corresponded to the norm established in numerous countries.

In this respect, the Grand Chamber decision *Thlimmenos v. Greece*, dated 6 April 2000, marks a turning point 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 recognises 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 [11]. 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 grounds 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 because 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" (§ 47). Nevertheless, Greece replied that since the legislation had general application Mr Thlimmenos could not be exempted. But the Court rejected this argument: it is "by

[11] Eur. Ct. H.R. (Grand Chamber), *Thlimmenos v. Greece*, 6 April 2000, § 44.

failing to *introduce appropriate exceptions* to the rule barring persons convicted of a serious crime from the profession of chartered accountants" (§ 48)[12] that the 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, 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 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 compared to the duty of reasonable accommodation (Arnardottir, 2003, p. 101; De Schutter, 2005, p. 53).

Since *Thlimmenos*, however, the Court has not added new applications of this second consequence of the non-discrimination principle in relation to freedom of religion, even though it recognised and developed the notion of indirect discrimination[13]. 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[14]. The *El Morsli v. France* decision of 4 March 2008, also based solely on Article 9, further illustrates the reluctance of the Court to infer a right to reasonable accommodation from freedom of religion. Here the Court declares the application of a Muslim woman inadmissible. This woman complained that she was denied access to the French Consulate in Marrakech when trying to deposit her French visa application in order to be able to reunite with her husband in France because she refused to remove her headscarf for an identity control. The applicant held that she had been willing to remove her headscarf in the presence of a female agent and that she could thus have been identified. Nonetheless, the Court ruled that regardless, refusal to provide a female agent for Mrs El Morsli's identification did not exceed the State's margin of appreciation in matters of security controls.

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

[12] Our emphasis.

[13] Eur. Ct. H.R. (Grand Chamber), *D.H. and Others v. Czech Republic*, 2007.

[14] Eur. Ct. H.R. (3rd Chamber), *Kosteski v. The former Yugoslav Republic of Macedonia*, 2006, § 37. In fact, the laws of the former Yugoslav Republic of Macedonia allow employees of Muslim faith to take leaves of absence for recognised 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 off to celebrate a religious festivity could be considered an impairment of his freedom of religion.

30 June 2009 [15] 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 [16]. 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 discrete and had no religious connotation. The Court held that since the prohibition contained in the 2004 French Act does not violate the Convention's Article 9, it is the State's discretion to determine whether the alternatives suggested by the students are "ostentatious" religious signs.

Yet the logic of reasonable accommodation has re-emerged in the Court's case-law on Article 14 in the context 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 enable the same end [17]. In the case at hand, 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 (§ 95). 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 Right's 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, recognised 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.

[15] These judgments were issued on 30 June 2009 by the Fifth Chamber of the Court: *Aktas v. France*, *Ghazal v. France*, *Bayrak v. France* and *Gamaleddyn v. France* (concerning the prohibition to wear the headscarf at school), *Jasvir Singh v. France* and *Ranjit Singh v. France* (concerning the prohibition to wear the Sikh turban). See also Eur. Ct. H.R. (5th Chamber), *Dogru v. France* (Appl. No. 27058/05) and *Kervanci v. France* (Appl. No. 31645/04), decisions of 4 December 2008, § 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.

[16] Act No. 2004-228 of March 15, 2004, *JO*, No. 65, 17 March 2004, p. 5190.

[17] Eur. Ct. H.R. (1st section), *Glor v. Switzerland*, 30 April 2009, § 94.

European Union antidiscrimination law

The concept of reasonable accommodation is not unknown to European Union law. The 2000 "Employment Equality Directive"[18] which establishes a general framework for equal treatment in employment and occupation without discrimination based on religion or belief, disability, age or sexual orientation, does lay down a duty to provide reasonable accommodation but only in favour of disabled people 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 2008[19] is approved by the Council.

In contrast, EU law does not recognise a duty of reasonable accommodation as such 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. Under EU law:

> "[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 measure to achieve that aim are appropriate and necessary (...)" (Article 2 (2) (b) of the Employment Equality Directive).

Initially, this principle was established by the European Court of Justice to guarantee the effectiveness of the principle of equal pay between men and women[20]. The concept of indirect discrimination is indeed based on a substantive view of equality; it acknowledges that an apparently neutral provision 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 organisations" (Article 4 (2) of the Employment Equality Directive), indirect discrimination based on religion can be justified by referring to the classical criteria framing the violation of a fundamental right, i.e. 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 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.

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

[19] Articles 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).

[20] See ECJ, Case C-96/80, *Jenkins*, 31 March 1981, (1981) ECR, 911 and ECJ, Case C-170/84, *Bilka-Kaufhaus*, 13 May 1986, (1986) ECR, 1607.

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 (Vickers, 2006, p. 20-22)?

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* is directly relevant to the topic[21]. 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" (§ 18). The Court also reiterated that a written test must be identical and take place under the same conditions for all candidates (§ 13). 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 was therefore present between the lines in European law prior to the Employment Equality Directive and this in the context of religious discrimination.

Reasonable accommodation in Belgium

Until recently, the concept of reasonable accommodation for religious diversity was practically absent from Belgian discourse[22]. Only in 2009 did it appear in the public debate as evidenced by the explicit reference to the concept in the latest annual report of July 2009 by the *Centre pour l'égalité des chances et la lutte contre le racisme* (the Centre for equal opportunities and the fight against racism, hereinafter,

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[21] ECJ, Case C-130/75, *Vivien Prais*, 27 October 1976, (1976) ECR, 1589.

[22] In the 2005 survey concerning the "active manifestation of religious or philosophical beliefs in the public sphere" commissioned by the *Centre pour l'égalité des chances et la lutte contre le racisme*, the term "accommodation" only appears every now and then. Moreover, no theoretical approach to the concept is proposed. *Les expressions actives de convictions religieuses ou philosophiques dans la sphère publique. Situations – pratiques – gestions*, March 2005 (under the supervision by Professors M.-C. Foblets and M. Martiniello), available at the Centre's website at the following address: http://www.diversite.be/?action=publicatie_detail&id=83&thema=2).

the Centre or the CECLR)[23]. Additional evidence can be found in the public debate on the subject in newspapers[24] and during conferences[25]. The lively controversy generally opposes two groups of people and associations. On the one hand, there are those defending a narrow definition of secularism which often refers to the French concept of *laïcité* and the legal prohibition of the wearing of a headscarf in schools. On the other hand, there are those who are in favour of accepting the possibility of certain accommodations in the name of cultural diversity. At the same time the federal minister for equal opportunities, Joëlle Milquet, has inserted this topic into the five priorities of her equal opportunities' programme[26].

Together with the debate opposing the Belgian political-linguistic communities (Flemish and Walloons) on federalism and Belgium's future, the controversy concerning cultural and religious diversity causes a major stir in the Belgian political arena, including the political institutions themselves (Parliament, Senate, political parties, etc.)

Specific normative recognitions

Under Belgian law, public or private institutions have no explicit general duty to grant reasonable accommodation on the basis of religion[27]. Neither does such an obligation seem to be recognised in current case law. Interestingly though, Flemish authorities have adopted the definition of reasonable accommodation contained in the Employment Equality Directive without restricting its application to disability. Hence, this 2002 decree also applies *inter alia* to other grounds of discrimination, including religion[28]. To our knowledge, however, this decree has not produced any

[23] Centre pour l'égalité des chances et la lutte contre le racisme, Annual Report 2008, *Discrimination / Diversité*, available at the Centre's website at the following address: http://www.diversite.be/?action=publicatie_detail&id=106&thema=2. On this subject see the developments *infra*.

[24] *Libre Belgique* on 18 May 2009, op-ed entitled "'Raisonnables', les accommodements?" ("Are accommodations reasonable?". This article seems to be attributable to the members of *Rappel* (Réseau d'actions pour la promotion d'un Etat laïque, the network of actions for the promotion of a secular state). See also the debate organised in *Le Soir*, on 20 and 21 May 2009, p. 20-21, on the topic "Faut-il accepter les particularismes?" ("Must one accept particularism?").

[25] One-day seminar organized on 22 May 2009 by "Bruxelles laïque" and the *Centre Bruxellois d'action interculturelle* on the topic "Accommodements raisonnables: une voie possible vers une laïcité interculturelle?" (Reasonable accommodations: a possible way towards an intercultural secularism?). For more details see the website of Bruxelles laïque (www.bxllaique.be). One-day seminar *Les nouveaux défis à la laïcité dans les sociétés à identités plurielles (The new challenges to secularism in societies with plural identities)*, organized the 6 March 2010 by the association "La Morale Laïque".

[26] Intervention by the Minister during the conference "Actualité du droit de la non-discrimination", organized at the Facultés Universitaires Saint-Louis de Bruxelles, on 19 May 2009.

[27] See in this sense, the above-mentioned Annual Report 2008 by the Centre on p. 60.

[28] Article 5 (4) of the Decree dated 8 May 2002 concerning the proportional participation in the employment market (*Décret du 8 mai 2002 relatif à la participation proportionnelle dans le marché du travail* (*MB*, 26 July 2002), as modified on 9 March 2007 (*MB*, 6 April 2007)). The Decree dated 10 July 2008 establishing the framework of the Flemish policy for equal

formal application of that concept beyond the domain of disability. By not establishing any general right to reasonable accommodation, Belgium does not distinguish itself from other European Union Member States. One of the rare exceptions is Sweden where the employers' obligation to adopt positive measures aiming at adapting the workplace for individuals belonging to specific ethnic and religious communities is sometimes presented as deriving from the necessity of reasonable accommodation (Bell, Chopin and Palmer, 2006, p. 41).

However, the novelty of the question of reasonable accommodation needs to be put into perspective as pertains to European law. An old debate in legal doctrine exists concerning religious objection (*exception de conscience*) to the execution of a contract and especially of employment contracts (Christians, forthcoming). Moreover, in various cases the legislator takes religious specificities into consideration. Under written Belgian law, the 1978 Act on employment contracts maintains a provision already existing under the Act of 10 March 1900 which imposes the obligation "to grant the employee the necessary time to fulfil his religious obligations as well as the civil obligations imposed by the law"[29] (Christians, forthcoming). More recently, as in other Member States, written Belgian law has introduced modalities in various sectors which *de facto* function like reasonable accommodations (Réseau UE d'experts indépendants en matière de droits fondamentaux, 2005, p. 35-37; Dassetto, Ferrari and Maréchal, 2007, p. 43-51 and p. 56-59). In order to grasp this evolution, it is necessary to look beyond employment and also take into account measures that have been adopted in other fields. Thus, as in most other European countries, Belgium has an exception to the general rule according to which animals can only be slaughtered after they have been dazed. This rule does not apply to slaughters prescribed by a religious ritual[30], provided that they are performed according to conditions established by royal decree. In particular, such slaughters can only be performed pursuant to the Jewish or Muslim ritual and by specialised butchers authorised by the Belgian representative organs of the Jewish religion (the *Consistoire central israélite*) and of the Muslim religion (the *Exécutif des Musulmans*)[31]. In addition, since 2002, the general instructions for prisons guarantee inmates the possibility of obtaining meals which take their religious requirements into account "as long as they do not have to

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opportunity and equal treatment (*Décret du 10 juillet 2008 portant le cadre de la politique flamande de l'égalité des chances et de traitement* (*MB*, 23 September 2008) characterises the "refusal of reasonable accommodation for disabled people" as a discrimination (Article 19). This decree further establishes that in the employment context these provisions do not apply in those cases of discrimination described in the 2002 decree concerning a proportional participation in the employment market (Article 20 (2)).

[29] Article 20 (5) of the Act dated 3 July 1978 concerning employment contracts (*Loi du 3 juillet 1978 relative aux contrats de travail (MB*, 22 August 1978)).

[30] Article 16 (1) of the Federal Act dated 14 August 1986 relating to the protection and well-being of animals (*Loi du 14 août 1986 relative à la protection et au bien-être des animaux*, *MB*, 3 December 1986).

[31] Article 2 (1) of the Royal Decree dated 11 February 1988 relating to certain slaughtering prescribed by a religious rite (*Arrêté royal du 11 février 1988 relatif à certains abattages prescrits par un rite religieux*, *MB*, 1 March 1988).

be prepared according to formal rituals" [32]. Hence, Jewish or Muslim prisoners can obtain the same type of meals as those delivered to all other prisoners but without any pork. But they cannot demand prison authorities to provide *kosher* or *halal* meat, i.e. meat butchered according to the rites prescribed by their religion. However, they can receive meals prepared outside of the prison according to formal rituals if their religious community covers the additional costs. Moreover, prisoners can, at their request, receive their meal at times other than the regular hours if their religious beliefs so require [33]. This provision allows Muslims to receive their meals after sunset during Ramadan.

Official holidays represent another example of reasonable accommodation for religious grounds under written Belgian law. This issue is closely linked to the fact that the main Christian holidays correspond to public holidays while this is not the case for other religions (Commission du dialogue interculturel, 2005, p. 77). In 2003, a decree by the Flemish government authorised nursery and primary school pupils to take a day off so as to celebrate "in conformity with the pupil's philosophical beliefs as recognised by the Constitution" [34]. In contrast, in the French community where no such provision exists, pupils must rely on *ad hoc* measures. Thus, in December 2008 when the Muslim festivity of *Aïd el Kebir* (Festival of Sacrifice) coincided with the exam period in primary and secondary school, the schools' practices in the region of Brussels varied from school to school: some accepted to postpone the exams by one day, sometimes even organising a pedagogical day on that date. Others asked that pupils justify their absence for family reasons pursuant to a strict application of school regulations.

Regarding the employment sector, the issue of flexible work arrangements depending on the employee's choice, in particular on religious or philosophical grounds, has recently been placed onto the political agenda. Upon request from the Employment Minister, the National Employment Council (*Conseil national du travail*) avoided taking a clear stance on the point. It basically placed the ball into the companies' court, holding that they are better equipped to manage issues related to the labour organisation of such a system [35]. While declaring that "it understands the reasons for wanting to offer employees the possibility to take advantage of flexible days off" the National Employment Council nevertheless considered that "it is not

[32] Article 87 of the Ministerial Decree dated 12 July 1971 containing the general guidelines for penitentiary establishments (*Arrêté ministériel, du 12 juillet 1971, portant instructions générales pour les établissements pénitentiaires, MB*, 10 August 1971), as modified by Article 12 of the Ministerial Decree, dated 15 April 2002 (*Arrêté ministériel du 15 avril 2002, MB*, 11 May 2002).

[33] *Ibid.*

[34] Article 10*ter* (2) (f) of the Decree by the Flemish government dated 12 November 1997 concerning the registration of nursery and primary school pupils (*Arrêté du Gouvernement flamand du 12 novembre 1997 relatif au contrôle des inscriptions d'élèves de l'enseignement fondamental, MB*, 6 January 1998, p. 136), as modified by the Decision by the Flemish government dated 21 March 2003.

[35] Opinion n. 1687 concerning the "Flexible holiday at the employee's choice" dated 6 May 2009, p. 3 (*Avis n° 1687 relatif au "Jour férié flottant au choix du travailleur"*).

advisable to introduce an additional paid legal holiday or to designate an existing one for that scope"[36]. Regarding the hypothesis of replacing a Sunday or a regular holiday, the Conseil reminds us that the system introduced by the Act dated 4 January 1974 concerning holidays, "permits the establishment of a substitute day through collective bargaining either by the social partners or directly within the companies themselves". It therefore recommends that the labour relation commissions and companies "take advantage of this possibility to replace a holiday with a working day at the employee's choice in order to take into account the multiple realities of their employees' religious and philosophical beliefs"[37]. This opinion illustrates the social partners' determination (management and trade unions) not to regulate by general rule but to leave the negotiations up to labour relations and companies, thus adopting a more pragmatic rather than principle-driven approach.

Emergence of the issue of reasonable accommodation in Belgian public debate

The issue of reasonable accommodation was addressed only indirectly in the 2005 report by the federal government's Commission of Intercultural Dialogue (*Rapport de la Commission du Dialogue Interculturel*). That Dialogue's objective was to "take stock of the issues related to a multicultural society as it develops in Belgium (...) neither avoiding the "tough" questions nor becoming blind due to media hype around certain elements (headscarf, terrorism, international context...) which, even though important, sometimes hides the daily reality of "living together"". The report covers numerous topics related to "living together" in a multicultural society. As far as the active manifestation of religious beliefs in the public sphere is concerned, it focuses on religious signs (Commission du dialogue interculturel, 2005, p. 54-56 and Annex 3), but avoids deciding on the controversies which arose within the Commission and which echoed the intense debates which took place in the Belgian public on this issue (Bribosia and Rorive, 2004; Delgrange, 2008 and forthcoming; Van Drooghenbroeck, 2010 and forthcoming). The term "reasonable accommodation" never appears in the report. However, some concrete proposals for taking religious diversity into account reflect a logic corresponding to the concept of reasonable accommodation. This is the case for the recommended measures in the civil service area allowing "all civil servants to live their culture and religion (for example with regards to festivals and dietary practices) while respecting the State's functions and the necessity of neutrality" (p. 69) as well as for the recommendation "to the public powers to study the possibility of choosing one's holidays" on the basis of the "basic individual right to benefit from the holidays most important in his/her eyes" (p. 77).

Since 2008, the Centre for Equal Opportunities and Opposition to Racism has explicitly tackled the concept of reasonable accommodation on the grounds of religion, especially through exchanges with the French Anti-Discrimination High

[36] Recommendation No. 21 addressed to the labour relation commissions (*commissions paritaires*), to the social partners and to companies with regards to the possibility of introducing a flexible holiday at the employee's choice as a replacement for a Sunday or another regular holiday, dated 6 June 2009, p. 2.

[37] *Ibid.*

Authority (*Haute autorité française de lutte contre les discriminations*, the HALDE) and the Quebec Human Rights Commission (*Commission des droits de la personne du Québec*) on the topic of intercultural harmonisation[38]. The results of those contacts became reflected mainly in the 2008 Annual Report "Discrimination/Diversity", published on 8 July 2009, in which the Centre explicitly refers to the concept of reasonable accommodation (p. 98). It begins by stating – in our opinion too decidedly – that "reasonable accommodation for religious reasons is not recognised as a right under Belgian legislation" and that "there is no legal obligation to respond to such kind of claims" (p. 60). However, the Centre thereafter summarises the findings on reasonable accommodation and practices of intercultural harmonisation contained in the *Bouchard-Taylor* report and highlights the utility of studying the way in which other countries deal with problems also faced by Belgian society (p. 62-63). The informational tool concerning the so-called "belief signs" (*signes convictionnels*)[39] posted by the Centre on its website in Autumn 2009[40], represents another manifestation of the growing interest for the concept. This document seeks to provide an overview of the provisions in force in the employment, public and education sectors as well as proposing general recommendations by the Centre in this domain. One of the thematic highlights is specifically dedicated to "reasonable accommodations/ negotiated adjustments" (p. 49). After explaining that the concept was established by anti-discrimination legislation pertaining to disability, the Centre asks if it should be extended to religion or culture and also questions the most appropriate terminology: "reasonable accommodations" (*accommodements raisonnables*), "practices of harmonisation" (*pratiques d'harmonisation*) or "negotiated adjustments" (*ajustements concertés*)? Elsewhere in the same document, the Center insists on the importance of promoting of a "common life based on the intercultural harmonisation and on the respect for everybody's convictions", highlighting at the same time that "intercultural and interbelief harmonisation must follow the path of negotiated adjustments as much as possible. The *civic* path based on negotiation and compromise is preferable to the *judicial* or the *legislative* path" (p. 4).

At the political level, the concept entered the agenda of certain political parties in 2009. Amongst the French speaking ones, Ecolo (the Green party) explicitly inserted the development of the practice of reasonable accommodations into its programme for the June 2009 regional elections. In the name of its objective to create a "truly

[38] These contacts were further strengthened during a closed seminar organized by the Halde on 11 and 12 September 2008 on the topic "France, Québec and Belgium: the challenge of secularism and reasonable accommodation on the basis of religion".

[39] The notion of "belief sign" is defined as meaning "any object, image, clothing, symbol more or less visible which expresses the belonging to a religious, political or philosophical belief for those who 'send' the sign or for those who 'receive' it, p. 6. See http://www.diversite.be/signes (last visited on 18 June 2010).

[40] Centre pour l'égalité des chances, "Les signes d'appartenance convictionnelle. Etat des lieux et pistes de travail", November 2009. This document can be consulted on the Centre's internet website at the following address: http://www.diversite.be/signes. Pdf version: http://veruiterlijkingen.diversiteit.be/hoofddoeken/files/File/Signes%20convictionnels.pdf (last visited on 18 June 2010).

intercultural" society, this party, basing itself on the Quebec experience, advocates for the rapid institutionalisation of this mechanism. This proposal, however, no longer appears in its 2010 federal election programme. The other French speaking parties seem divided on the issue even though the Brussels socialist party also referred to the Quebec model of management of intercultural conflicts through reasonable accommodation as a source of inspiration in the fight against discriminatory practices in its programme for the June 2009 regional elections[41]. The Flemish parties rarely politicise this issue which nevertheless receives positive responses from private and public actors.

The interest in reasonable accommodation shown by the Centre as well as by most associations in the intercultural domain certainly has favoured the introduction of this issue by the federal minister for equal opportunities, Joëlle Milquet (Cdh), into the Rountables on Interculturality's agenda whose objective it is to propose recommendations to the government on matters relating to the management of diversity[42]. These Roundtables were convened in 2009 and their closure was planned for September 2010 before the government fell and new federal elections were held on 13 June 2010. The "definition of a policy of 'reasonable accommodations' in matters of interculturality" appears in the (open) list of 13 covered topics. In this context the Centre has commissioned a university study to establish an appraisal of the harmonisation practices and of the reasonable accommodations in employment (*see infra*). Thus, the Centre followed an earlier recommendation by researchers (Bribosia, Ringelheim and Rorive, 2009).

Demands and practices of reasonable accommodation in the workplace

Until today there has been no real coverage of the demands or practices of reasonable accommodation in the workplace in Belgium. However, two sources can be relied upon: consultation organised by the Centre and research conducted within the framework of the Roundtables on Interculturality. The objective of the consultation concerning the "active manifestations of religious or philosophical beliefs in the public sphere" organised by the Centre in 2005 was to "feel the pulse of decision-makers who are sometimes prompted to concretely manage cultural and religious diversity, by means of a relatively systematic consultation organised throughout the country and in different sectors of activity" (CECLR, 2005). Without entering into details of the results for each sector (CECLR, 2005, p. 19 ff), the survey reveals a great variety of attitudes ranging from a general prohibition to the conditional acceptance of active manifestations of religious beliefs, namely ostentatious signs, specific attitudes and behaviours, or specific requests related to religious or philosophical rules. The report contains no express reference to a right to reasonable accommodation but one can find indications of actors searching for "accommodations" "as far as possible" or "as long as the labour organisation is not made too difficult" (p. 13). The report illustrates

[41] Brussels Federation of the Socialist Party, "Programme des socialistes bruxellois pour les élections régionales du 7 juin 2009 – Chapitre 8", p. 72-73, available at: http://www.ps.be/Source/PageContent.aspx?MenID=18344&EntID=1 (last visited on 18 June 2010).

[42] Agreement of the federal government dated 18 March 2008. For more details see the internet website at: http://www.interculturalite.be/Les-assises-2009,3?lang=fr

a "proliferating pragmatic creativity to resolve sometimes complicated situations the Belgian way, intended in the best sense of the term" (p. 6). Whereas a major part of the consulted contact persons were reluctant to introduce a general regulation and preferred a pragmatic case by case approach, others wished nonetheless for "the formulation of guide posts or of a framework of reference allowing to limit the concerned manifestations" (p. 11).

Moreover, the Centre's practice of attempting dispute resolutions in reported cases of discrimination based on religious beliefs also reflects an approach oriented towards solving issues through compromise by finding reasonable settlements for religious diversity[43].

Within the framework of the Roundtable on Interculturality's activities, the Centre commissioned a university field study (Adam & Rea, 2010) which seeks to take an inventory of harmonisation practices and of reasonable accommodations in the employment context.

This is an extension of the consultation begun in 2005 which attempts to obtain a more precise picture in a specific domain, employment, where the debate seems to be more discreet than in that of education.

Due to budgetary and time constraints this research was limited to five domains in the public sector (education, health, administration and "parastatal" (or semi-public), immigration and integration) and four domains in the private sector (wholesale, banking & insurance, alimentary industry, cleaning). Without claiming to be an exhaustive investigation or a representative overview of the situation on the employment market, methodologically, the research consisted of the interrogation of private and public or semi-public sectors where the descendants of Moroccan or Turkish migrants are most present. The rationale for this was that there would be more demands for reasonable accommodation in those domains based on a principle of probability. All of the companies in the concerned domains were contacted as well as management and trade unions and the new actors in charge of the management of some of these issues in companies including the diversity managers present particularly in Flanders. However, not all of the companies responded and some had not experienced such situations. The inquiry was based on individual interviews and focus groups. The interviews were structured to assess the demands for reasonable accommodation formulated for cultural or religious reasons, the provided answers, the procedures put in place to reach that answers, and the degree of satisfaction with the results from the different involved parties. The situations are both numerous (more than 400) and contrasting. Though this research did not look for representativity, it did try to highlight the typical demands and modes of resolution adopted by the organizations.

What is known today as the issue of reasonable accommodation represents an ongoing topic of discussion within companies often having nothing to do with religious or cultural questions. Two of the most frequent accommodations concern either weekly working hours or the duration of holidays. Requests for an accommodation of weekly working hours is made by parents who share the care of their children. Requests for changes in the duration of holidays assumes that an employee may take a longer

[43] For some examples see: Bribosia, Ringelheim and Rorive, 2010, p. 38.

annual vacation than legally prescribed and concerns either individuals who wish to embark on an extended travel or individuals, especially of foreign origins, who would like to visit their family in their country of origin. These requests are frequent and are directly dealt with between the employees and those in charge of personnel, either at the management or local level with the foreman.

Thereafter, as far as demands related to the practice of a minority religion are concerned, it should be noted that this is not a new phenomenon. For instance, spaces for prayer were made available for Muslim workers in a number of steel companies in Wallonia and Flanders during the 1970s and 1980s. The same happened in some mines in Limburg. During a time when employment immigration was in high demand, private employers easily complied with the demands by immigrant Muslim workers. This seems to have changed now that policies seek to halt or limit immigration. Even though this is not a Belgian example, one can cite the strike at the Talbot-Citroën plant in 1982 (Tripier, 1990) where the demands by immigrant workers initiating the movement were not limited to eligibility at social elections but also included the possibility to pray during working hours and the provision of a room for that purpose.

The 2010 field study has highlighted a number of categories of demands for accommodation, depending on whether they concern dress code, diet, space for prayer or holidays for religious festivals. The following paragraphs will outline the different situations for each of these categories before providing a first and brief analysis of the responses given.

Demands for accommodation concerning the dress code

One situation is predominant regarding the dress code: the use of headscarves by female employees. Wearing a long beard, a natural characteristic associated with the Salafi movement, is often mentioned without however being problematized in the same way. No prohibition has been proposed concerning this matter which leads in some ways to a gendered differential treatment if not outright discrimination towards women. In a cleaning company (company A) where Belgians of foreign origins were numerous, a female employee asked whether she could wear the headscarf during working hours. She directly asked her foreman who, pursuant to consultation with the construction manager, allowed the piece of clothing. This solution was achieved without the intervention of the human resources' department. However, the employee was forced to take off her headscarf on one of the construction sites on which she was working because the client – i.e. the company where the cleaning company was operating – demanded her to do so.

The situation is more nuanced in the hospital sector. For instance, in one public hospital (B) the persons in charge of human resources refused to allow a woman to wear the headscarf. Generally employee neutrality in public hospitals is provided as a justification even though at times the reasons are more generic. Some argue for example that the wearing of a headscarf represents a risk when performing certain tasks. Indeed, this distinctive sign is often associated with values and positions that are viewed as not conforming to the law or to the philosophical or political orientations of public hospitals (contraception, abortion, euthanasia, in vitro fertilisation, etc.). In Flemish and French-speaking Catholic hospitals (C) the requests by female workers

to wear the headscarf were accepted by means of an agreement concerning the type of headscarf. Thus the human resources management proposed a company headscarf for any person wishing to wear a headscarf, based on a time in which some of the nurses were nuns. This authorisation was inserted into the employment regulations. Since this is a company with "religious background", there is no mobilisation around the principle of neutrality in the discourse.

In some hotels, rooms are cleaned by hotel employees and not by outsourced personnel. Generally the accommodation takes place on the workplace with the person in charge of organising the work. Nevertheless, a difference appears with regards to the standing of the hotel. In 2 or 3 star hotels the headscarf seems to be more tolerated than in 4 or 5 star hotes where it is more likely to be prohibited.

Confronted with a large personnel turnover at the reception and at the cash register, the management of a furniture wholesale company (company D) called the employees charged with the replenishment of the shelves to solve this labour shortage. In that case the company realised that certain female employees refused to work at the reception or at the cash registers because that implied taking off their headscarves which, on the contrary, was accepted in the warehouse. The company appealed to an imam and thereafter to a permanent trade union representative of Moroccan origins belonging to the Christian trade union (CSC). Following these meetings and two meetings by the workers' council, the management accepted that the employees could wear a headscarf in the company's colours, blue and yellow, at the reception and at the cash registers. This negotiation is certainly also due to the specificity of this Swedish company which is very attached to questions concerning cultural diversity and whose Brussels location is in a neighbourhood inhabited by multiple ethnic minorities.

In a municipal administration (E), a female employee presented herself with the headscarf the day of her contract signature. The person in charge of the personnel told her she could not be hired unless she took it off, invoking the neutrality of public service and the fear that this situation might spark conflicts amongst the employees. In another municipal administration (F), on the contrary, the request by female employees to wear the headscarf was accepted, provided that this would occur in the back office whereas at the front desk it was prohibited. In these two municipal administrations the responses were given by the person in charge of human resources. This position can be found in other companies, in particular in a large wholesale company where the diversity manager played an important mediating role.

Demands for dietary accommodation

As far as food is concerned, the most important requests concern the possibility to propose meals that do not exclusively consist of pork or that also offer *halal* meat in company canteens. In the banking sector two types of situations have been observed. In historical Belgian banks (G) employee's requests not to have only pork-based meals have been accommodated. However, the management refused to integrate *halal* or *kosher* meals for the personnel due to the excessive costs of those demands, which had been supported by the Christian trade union. On the contrary, in an American bank (H) all the requests were accepted. The management of the bank provided vegetarian meals

and thereafter ordered meat in *halal* and *kosher* butcheries. This open-mindedness can basically be explained by similar practices existing in the United States.

In one cleaning company (I) in Brussels where the majority of the trade union delegates are of Moroccan origin, the meals served during the workers' council consisted exclusively of *halal* meat. Thereafter Belgian employees asked that pork should also be served. In that interesting case the contrasting demands originated from trade union representatives of different origins wishing ultimately for the offering of a choice of meals.

The desire to offer a variety of food taking into account the employees' requests also occurred in an agro-food business (J) where during a personnel party all the dietary obligations were taken into consideration (*halal*, Spanish-Italian and Belgian meals). In order to ensure maximum participation of personnel to a similar party, a semi-public transportation company (K) took the initiative to propose a *halal* meal for the entire staff before any formal request was made.

In one hospital (L), Muslim employees complained that the company canteen only offered one meal at night which was often composed of pork meat. These employees demanded that only *halal* meat should be served. The management agreed but in the workers' council the trade union representatives opposed that solution and asked that two different meals be proposed. Due to the excess costs associated with two different meals, the management decided nonetheless to offer *halal* meat only at night. A similar situation arose in a hospital (M) where Muslim employees asked for food which would be more in line with their religious beliefs. The request was addressed to human resources who in turn referred it to the trade union representatives. The demand was not met because it was not representative of the entire staff and would have created a cost to be shouldered by all the employees.

Demands for accommodation concerning prayer space

Demands for prayer space involve both authorisation to pray at the workplace and the provision of a suitable space for that activity. In a public company (N), a foreman found an employee praying in a space accessible to the public. This situation gave rise to a debate amongst the team which consisted mainly of Muslim employees. Even though the foreman deemed that in the name of neutrality of public institutions, this practice should be prohibited, in particular in a space accessible to the public, it was decided by common agreement that the employees (park caretakers) could pray in the locker rooms during their break. In another semi-public company (O), domestic garbage disposal, the employees asked to pray during working hours. The owner of the company, who became personally involved in the solution, invited an imam who convinced the employees to pray after work, based on the rationale that the Quran authorises individuals to catch up on their prayers after the prescribed hours for work reasons. Thus the employees agreed to postpone their prayers. In yet another semi-public company (P) the employees of a private cleaning company use a room reserved exclusively for the use by its employees for prayer. This practice is tolerated in particular since the foreman and the inspectors of that company are themselves Muslim and appear to be more open to this request. Thus, in these two companies

these practices are possible due to the proximity between the employees without the involvement of the human resources department.

In one hospital (Q), the management planned to provide a space for prayer to its employees. Personnel were offered the use of the devotional room initially reserved to patients as there were not many requests. The employment regulations of a transport company (R) formally prohibit the practice of prayer in the name of the neutrality principle but sometimes tolerate it in the field with the knowledge of the human resources department, especially when supervision is decreased, such as break time for busdrivers. Nevertheless, prayer is not accepted in spaces for collective use such as locker rooms though it is not prohibited in the work space, in that case, the bus. In a wholesale company (S), the management had signed a charter of diversity which authorised employees to pray in the workplace but only during their break. The employees must organise amongst themselves without disturbing the organisation of labour and without any specific space having been allocated to them. Last but not least, the practice of prayer has been authorised during break time in a municipal administration (T). The demand had been advanced by two employees who negotiated the allocation of a specific space with their hierarchical superior. However, following complaints by other employees who viewed this as a favourable treatment incompatible with the principle of neutrality, the accomodation was reversed.

Demands for accommodations concerning holidays

Demands concerning holidays for religious festivals are of two different kinds. The first is quite widespread and concerns the festival at the end of Ramadan and that of Eid al-Adha. The second one concerns the organisation of labour during Ramadan. Without entering into the details of specific practices, two different types of treatment emerge depending essentially on the size of the company and the number of employees. As far as the two specific festivals are concerned, a major part of the employees take the day off based on the principle of personal preferences. The problem arises in companies where the number of Muslim employees is high. In that case either the company accepts to work with reduced personnel, if that is possible, or it anticipates those holidays in its planning of the organisation of labour. These demands presuppose an arrangement between employees, particularly in public sector companies where continuity of service has to be guaranteed. In the Flemish speaking educational system a paradoxical situation can be observed. Whereas the pupils have the right to stay home during religious festivals, the (Jewish and Muslim) religion teachers do not have that choice. Requests to extend this right to teachers have been made. However, they have been unsuccessful so far because they raise the issue of equality with the other Jewish or Muslim teachers who teach different subjects. As far as Ramadan is concerned there is no fixed rule given that the time period is longer. In this case it is working time arrangements amongst employees that are most common.

Analysis

The examples above demonstrate the multiplicity of situations and responses. In both the public and private sector, the number of employees of Muslim origins in the workforce determines the explicit formulation of demands as well as the

necessity to solve them, whether by recognition and negotiation or inconspicuously and informally. On the basis of Boltanski and Thévenot's theory on the economies of worth (1991) it is possible to oppose two principles of justice to the expressed demands. One takes place in the private sector and the other takes place in the public (and semi-public) sector. In the private sector the principle of efficiency predominates whereas in the public sector the principle of representativity is dominant. Indeed, in the former domain decisions to tolerate the employee's demands, often under certain conditions, are taken in the name of efficiency. This efficiency relates mostly to the management of the labour organisation. In companies with a particularly high number of personnel of Muslim origin (cleaning, transport, agro-food), production depends on the employees' presence and motivation. Hence, for the sake of convenience, attempts at accepting the employees' demands are made in order not to destabilise the production and team organisation, a fact that becomes particularly evident with regard to the demands for holidays coinciding with religious festivals. On the contrary, in public companies and at times in semi-public ones, the principle of neutrality of the public service is often invoked.

However, it seems there are some exceptions to these principles. As noted before (Rea and Ben Mohamed, 2000), tolerance for headscarves in both private and public companies, for example, can be limited on the basis of the criterion of visibility. Thus the headscarf can be accepted in the back office but rejected at the front desk. In that case, the argument of economic efficiency prevails in the private domain (company A), in other words the desire not to frighten the client. For the public domain tolerance consisting of the suspension of the principle of neutrality can be limited by the fear of complaints by customers (company F) or of conflict with other employees (company E).

It is important to stress that these demands for reasonable accommodation in the workplace do not simply oppose employees on one side and employers on the other. As a number of situations show, the position of other employees and trade union representatives is also important. In fact, rejection of demands is often the result of opposition by other employees and certain trade union representatives (companies E, I, L, T). On this point, it seems clear that these issues cause debates even within employees' collectives and with their representatives which is why it is difficult to expect a unified response from trade unions. It is equally clear that the issue of diversity is more openly addressed in the Christian trade union (CSC) than in the socialist trade union (FGTB). Moreover, it should be noted that in international companies (D and H) which are particularly attentive to diversity issues, the resolution modes are based on an entrepreneurial culture of multiculturalism management. Similarly, in companies with religious backgrounds (company C), a functional solution is often proposed. Far from the political and media debate, a certain pragmatism seems to dominate in the employment context even though, in certain circumstances, especially with regard to the headscarf, political and philosophical discourses around the principle of neutrality of public, and sometimes private, services influence the responses provided to demands for reasonable accommodation.

Aside from this, reasonable accommodations are relatively contingent and dependent on the involved actors and the combination of actors. Undoubtedly, these

demands are most often solved by means of "local justice" (Elster, 1992). The foreman and the intermediary middle management have significant discretionary powers. Most examples show that the employees only rarely address themselves to the people in charge of human resources.

Proximity is fundamental in formulating the demands and in providing a response that is often only temporary at this level. This local justice is essentially elaborated for issues relating to food or to prayer at the workplace. Thus, the discretionary power of the foreman leaves ample spaces for arbitrariness. The response heavily depends on that person's beliefs. Where the foremen are Muslims themselves it is proximity that prevails whereas when they are non-Muslims the argument of reverse discrimination can be invoked.

This local justice also depends on the combination of the involved actors. Three different typical situations emerge. In a first case, negotiation is completely local and reasonable accommodation occurs between the requesting employee and his/her closest foreman. The proposed solutions in that case are relatively unstable given that they can change due to the intervention from external (clients or users) or internal actors (hierarchical superiors). In the second case the reasonable accommodation is achieved thanks to the mediation by a traditional actor such as the trade union delegate or representative. This triangular configuration often ensures a stable accommodation. Sometimes intermediaries, other than traditional figures in industrial relations, (diversity manager, imam) intervene as mediators (companies D and O) pursuant to requests from the management or human resources. The intervention of those intermediaries implies an increased formalisation of requests and the involvement of the company's hierarchy. Finally, reasonable accommodation can lead to formalisation in employment regulations or in the company's diversity charter. In these situations, human resources departments often act preventively.

As regards the entire study, whereas numerous demands were registered, a majority of the actors, whether employers or trade unions, were adamant that this topic remains discreet. In fact, trade unions fear the influence of this issue in negotiations with employers on topics which they deem to be more important such as salaries, accommodation of working times and careers. Employers share the same point of view even though they are not as categorically opposed. Like the National Employment Counsel (*Conseil national du travail*), employers and trade unions fear any legislative initiative on the subject and prefer practices of local negotiation, namely by the company. Most actors in the employment sector prefer the absence of publicisation of this issue. These same actors are suspicious of mobilisation for a cause by actors external to the employment sector (associations) because they want to remain in control of the agenda and of the mode of historically constructed autonomous negotiation (Alaluf, 1999). Eventually this leads to another issue, namely the representativity of employee representatives, in particular in public service where employees, and even more so their representatives, rarely belong to ethnic minorities.

Conclusion

The development of European anti-discrimination law has led to the emergence of the concept of "reasonable accommodation" in European legal and political

vocabulary. The European Employment Equality Directive of 2000 only recognises the duty of accommodation in favour of disabled people. However, the introduction of this concept unavoidably poses the question whether, as under Canadian law, a similar duty for religious grounds can be deducted from existing provisions or, in the absence of such provisions, whether it would be advisable to provide for such a mechanism through written law, as in the American case. The answer to the first question is less evident than would seem at first sight. While no duty of reasonable accommodation on the basis of religion is explicitly established under European Union law, the prohibition of indirect discrimination might be interpreted by the European Court of Justice or by Member State jurisdictions 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. The European Court of Justice implicitly adopts a similar reasoning in its decision *Vivien Prais* – a decision admittedly decided prior to the adoption of the Employment Equality Directive and which remains unconfirmed. In any case, European Union law does not prevent Member States from defining the obligation of reasonable accommodation more broadly than the Employment Equality Directive. Besides, since the *Thlimmenos v. Greece* ruling, the European Court of Human Rights recognises that, as a result of 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.

The relative novelty of reasonable accommodation should not lead us to forget some older practices that this concept builds upon in the European context. For example in Belgium during the 1970s and 1980s demands, such as those for a prayer room, formulated by immigrant employees often received an affirmative answer of a pragmatic nature, especially in private companies for production reasons. Today, as demonstrated by the study conducted in the framework of the Roundtables on Interculturality, the desire by employees to have some of the constraints related to practice of a minority religion – generally Islam – recognised in the employment sphere gives rise to a number of cases where local and informal solutions were negotiated by actors in the labour market without reference to any legal obligation. One can nevertheless observe different attitudes depending on whether one looks at the private sector or the public sector on the one hand, or at the type of demands on the other hand. For instance, adjustments in meal composition as well as demand for holidays during religious festivals seem to cause little opposition even if they sometimes clash with practical or financial obstacles. This is not the case for demands concerning headscarves or space for prayer in the workplace. Here, employers, particularly public employers (but not only), are much more reluctant to accommodate demands although some examples of accommodation exist in those cases as well.

Obviously, these determinations do not imply that recognition of a legal obligation of reasonable accommodation for religious reasons in Europe is not relevant. First, conceptually, reasonable accommodation expresses an important idea in the evolution of the principle of equality. If individuals belonging to certain minorities have difficulty accessing 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. By inviting reflection as to how this environment might be modified, this concept purports to guarantee equal opportunities to disabled individuals or to those practicing a certain religion and to ensure their integration in social, economic and cultural life. From this point of view, not only people must adapt to their environment. Equality demands that the environment itself, as far as this is possible, be altered in ways which allow everyone to fully participate in society regardless of their specific characteristics. Second, from a practical standpoint, recognition of a right to reasonable accommodation in the employment or other contexts would reinforce the individual's position *vis a vis* the authority upon which the duty rests. Indeed whether demands for accommodation on the basis of religion will be taken into account or not will not depend on the employer's discretionary power along with all the risks of arbitrariness that it entails. Employers would be obligated to search for a reasonable solution within the limits established by law or by the courts. Thus by establishing common rules applicable to all companies and other related sectors, the "legalisation" of accommodation practices could contribute to guarantee legal certainty and the equality of individuals in the treatment of their demands.

However, the introduction of a legal duty for reasonable accommodation could also cause some inconveniences. One can fear that the possibility of new demands for justice would also lead to increased conflicts within companies, not only between employees and employers but also amongst employees, where the legitimacy of recognizing religious specificities is sometimes called into question. One consequence is the potential for employers to develop strategies which seek to avoid hiring Muslim employees, fearing that they might then invoke the right to reasonable accommodation. Losing the discretionary power to reject demands for accommodation might therefore shift discrimination to the moment of hiring. Another difficulty highlighted by the American and Canadian experience is faced by the judges whenever a religious rule invoked by the applicant for accommodation is contested within the concerned religious community. The Bouchard-Taylor Commission report nevertheless puts these risks into perspective. According to the authors, the Canadian experience of "reasonable accommodations" is generally positive. As a whole, Canadian institutions and economic actors have successfully integrated the mechanism of reasonable accommodation.

It is maybe too early to determine whether recognition of a legal duty of reasonable accommodation would be the most appropriate instrument to guarantee the right to non-discrimination by religious minorities in Europe. But one can already envisage a middle ground between the recognition of a general right to reasonable accommodation on the basis of religious grounds in the workplace and the preservation of the *status quo*. This would consist of introducing certain specific accommodations for employees as specified by the legislation. In the Belgian context a sufficiently strong convergence of opinion allows for a legislative intervention which would guarantee the same rights to all employees while keeping in mind the constraints of companies: holidays for religious festivals and adjustment of meals to meet religious prohibitions. On other

topics such as headscarves, on the contrary, it seems currently difficult to build a consensus whereby the issue could be regulated for the entire employment sector.