For the final version of this paper, see K. Alidadi, M.-C. Foblets and J. Vrielink (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, Ashgate, 2012.

Religion, Diversity and the Workplace. What Role for the Law?

Julie Ringelheim[*]

Introduction

The question of religious diversity in the workplace touches upon two crucial and much debated issues in contemporary Europe: religion and labour relations. The place of religion in European societies and its relations with the secular state in a context of growing religious pluralism are the object of vivid controversies. The handling of religious diversity in liberal democracies raises a range of challenges which have become familiar themes in political theory discussions and in the public debate in general: Does equality mean that people always have to be treated identically? Should religious differences be taken into account by legislators and policy-makers in some circumstances? What sort of religion-based demands can be accommodated in a liberal democracy and which ones cannot? Since the 1990s, controversies on these issues have been raging among multiculturalists,[1] liberals,[2] feminists,[3] or French-type Republicans.[4] As for labour relations, they have been profoundly affected by the move from a fordist to a post-fordist economy, in which the notion of flexibility becomes central, and the growth of mass unemployment as well as precarious and atypical forms of work. Furthermore, the problem of discrimination in employment against ethnic minorities, which are often also *religious* minorities, is a raising concern across the European Union (EU).

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[*] Researcher with the Belgian National Fund for Scientific Research (FNRS) and the Centre for Philosophy of Law of the catholic University of Louvain (UCL). PhD, European University Institute (Florence), LLM, Cambridge University (Trinity Hall College), Graduate in law from the Free University of Brussels (ULB). Email: julie.ringelheim@uclouvain.be. This paper was written while I was a Visiting Fellow at the Centre for the Study of Human Rights of the London School of Economics. I wish to thank the Centre for its support and assistance. I also thank Ilke Adam, Emmanuelle Bribosia, Daniel Dumont, Isabelle Rorive, and Andrea Rea for stimulating discussions on the subject of this chapter.

[1] Prominent proponents of multiculturalism include W. Kymlicka, *Multicultural Citizenship* (Oxford University Press, 1996) (advocating multiculturalism from a liberal perspective); B. Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Macmillan, 2000); T. Modood, *Multiculturalism* (Polity Press, 2007) and *Still Not Easy Being British – Struggles for a Multicultural Citizenship* (Trentham Books, 2010); J. Carens, *Culture, Citizenship, and Community – A Contextual Exploration of Justice as Evenhandedness* (Oxford University Press, 2000).

[2] For liberal critiques of multiculturalism, see in particular B. Barry, *Culture and Equality – An Egalitarian Critique of Multiculturalism* (Harvard University Press, 2001) and J. Waldron, 'Minority Cultures and the Cosmopolitan Alternative', in W. Kymlicka (ed.), *The Rights of Minority Cultures* (Oxford University Press, 1995), 93-122.

[3] S. Okin, "Is Multiculturalism Bad for Women?", in J. Cohen, M. Howard and M. C. Nussbaum (eds), *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (Princeton University Press, 1999), 9-24 (criticising multiculturalism from a feminist perspective). See also A. Phillips, *Multiculturalism without Culture* (Princeton University Press, 2007); S. Benhabib, *The Claims of Culture – Equality and Diversity in the Global Era* (Princeton University Press, 2002) (both proposing avenues for reconciling respect for diversity and women's right).

[4] On the French-type Republican model, see e.g. D. Schnapper, *Qu'est-ce que la citoyenneté?* (Gallimard, 2000). For a critical account of the French Republican model, see C. Laborde, *Critical Republicanism – The Hijab Controversy and Political Philosophy* (Oxford University Press, 2008).

It is in this wider context that the legal issues posed by religious diversity in the work sphere must be situated. Account must also be taken of the specificity of the workplace. The latter is characterised by a peculiar mix of freedom and constraint: the worker who enters into a work contract accepts being subject to the authority of the employer; she agrees to work under its direction, to receive instructions, to be imposed certain tasks in exchange of a wage. Formally, everyone is free to take a job or not. In practice, working is a necessity for most people. At the same time, people enjoy a certain degree of freedom to choose what type of work to do. Against this background, the legal questions religious diversity raises are threefold: first, are workers entitled to observe their religion at work in the first place? Second, can they claim to have their work conditions adapted in case of conflict with their religious beliefs? Third, and conversely, can an employer prohibit religious expression in the workplace or refuse to accommodate religious needs and if so, for what motive? To be sure, in case practising one's religion at work would not be recognised as a right, this does not mean that employers may not, on their own initiative, allow their workers to express their beliefs or adjust their work conditions to their religious practice. However, where the employer refuses to do so, the worker has no means of redress. In other words, the central concern from a legal viewpoint is whether respecting and/or accommodating religion at work is – or should be – left to the *discretion* of employers or whether it is – or should be – a matter of *legal obligation* and if so, what are its scope and limits.

This chapter seeks to explore where European law stands and what direction it could take in this regard. In order to put the legal discussion into perspective, Part I, drawing on social science studies, examines the social and economic developments which form the background against which the issue of religion in employment arises in contemporary Europe (Part I). This will set the ground for the analysis of the possible legal responses to religious claims in the European workplace, which will be the focus of Part II. Both EU law and the European Convention on Human Rights (ECHR) law will be considered. Two legal concepts will retain our attention: the right to religious freedom, guaranteed under Article 9 ECHR, and the right not to be discriminated against, protected under EU law and Article 14 ECHR. The adoption of EU directive 2000/78/EC[5] has significantly extended the protection provided in EU countries against discrimination based on religion or belief in the employment sphere. Yet, as will be seen, current European law does not provide a straightforward answer as to what extent either of these notions protects religious interests in the work context. In particular, the question whether an obligation to accommodate religious beliefs at work – similar to the duty to of reasonable accommodation of religious needs of workers which has been recognized in Canada and United States (US) law – can be derived from the norms of religious freedom or non-discrimination as guaranteed under European law, is not settled. Two approaches can be discerned in European case-law: the first one, which will be termed the "freedom of contract" approach, insists that the terms of a work contract, which workers freely agree to, can limit the latter's freedom to manifest their religion. By contrast, the second conception, here called the "social inclusion" approach, is concerned with promoting participation of all groups in social and economic life. Accordingly, it attaches special importance to the elimination of indirect barriers to professional integration of certain groups such as religious minorities. It will be argued that

[5] Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (OJ L 303 2.12.2000, p. 16). Hereinafter: Directive 2000/78/EC.

with the development of non-discrimination in EU law, this second perspective is increasingly gaining ground. (Part II).

This chapter is concerned with religious practice by *workers*. Of course, the opposite situation also exists: sometimes, religious claims in the worksphere are advanced by employers. This is the case where religious organisations act as employers and wish to impose special obligations based on their spiritual convictions on their employees. A specific exception to the prohibition of discrimination based on religion has been inserted in this regard in Directive 2000/78/EC for so-called "ethos-based organisations".[6] The questions raised by this provision however are of a different nature than those relating to religious expression by workers. For reasons of space and consistency, this chapter only addresses this latter situation, which is by far the most frequent.

I. Religious Diversity and Work Relations: the Wider Context

Understanding the social dynamics that underpin the issue of religious diversity in the workplace and how it is dealt with in contemporary Europe, requires considering two questions. First, it is noteworthy that these discussions are especially focused on *minority* religions. The expression of minority faiths in the workplace thus appears as one instance of a broader phenomenon, that is the new visibility of religious minorities in Europe, which has contributed to renew controversies about the relations between religions and the secular state. (1). Second, the questions raised by religious pluralism in the employment context must also be viewed against the background of the more general evolution of employment market and labour relations (2).

1. *Religious minorities and the renewal of the debate on secularism*

Judging by the case-law discussed in various chapters in this volume, disputes relating to religious practice of workers seem to concern primarily, although not exclusively, *minority* faiths. Muslims, which constitute the largest religious minority in Western Europe – they are estimated to represent 4 to 7 percent of the current population in France, Germany, Great Britain and the Netherlands[7] – are especially present in these discussions. In Belgium, a study carried out in 2009-2010 finds that the most frequent requests for accommodation of religious beliefs reported by the employers interviewed concern Muslims.[8] In the United Kingdom, according to a 2007 inquiry commissioned by the Home Office, Sikh, Muslim and Hindu organisations were almost twice as likely as Christian organisations to report unfair treatment experienced by their members in employment. The latter included dress restrictions, working on religious days, lack of respect of religious customs as well as application and recruitment practices. Among them, Muslims were the most likely to indicate that this unfair treatment was frequent rather than occasional.[9]

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[6] Article 4(2) of Directive 2000/78/EC.

[7] J. Césari, *When Islam and Democracy Meets:Muslims in Europe and the United States* (Palgrave, 2006), 9. The author however notes that it is difficult to obtain accurate statistics in this regard as in most European countries religious affiliation is not asked in population censuses.

[8] I. Adam and A. Rea (dirs), "La diversité culturelle sur le lieu de travail. Pratiques d'aménagements raisonnables", *Research commissioned by the Centre for Equal Opportunities and the Fight against Racism,* September 2010, 132.

[9] P. Weller, A. Feldman and K. Purdam, "Religious discrimination in England and Wales", *Home Office Research Study 220*, 2007, 51-64.

It could be tempting to interpret the overrepresentation of minorities in contestations relating to religion at work as the sign of a rising religiosity among them which would contrast with the decline of religious practice in the majority populations. The supposed growing religiousness among Muslims and the threat it is said to pose to the European tradition of secularity have indeed become a common narrative in European media.[10] Yet, such reading overlooks other important factors to be taken into account when considering the position of religious minorities in the workplace. First and foremost, despite the high degree of secularization of Western European societies, the traditionally dominant religion still to some extent informs the legal organization of employment. This is most evident for what regards the official days of rest which in large part reflect Christian holidays. In this relation, it is interesting to note that according to the findings of the aforementioned Belgian study, the most frequent request for accommodation reported by employers concern the possibility to take a day off for religious reasons. Another example of Christian influence on employment regulation is the fact that European legislations legalizing abortion usually recognize a right to conscientious objection for doctors and nurses.[11] Whatever the actual level of religiosity among the majority population, the fact that Christian religious traditions are implicitly taken into account in the norms that structure the worksphere means that observant Christians can remain *invisible* in the workplace. By contrast, this state of affairs heightens the visibility of minority religions insofar as their followers have to make special requests if they want to have their work conditions adapted to their religious practice.

Another factor that permits to put into perspective the idea of a rise in religious demands at work lies with the evolution of the situation of minority religious communities in the socio-economic sphere. The first generation of migrants workers from Muslim countries who arrived in West European states in the 1950s-1960s - as part of guest-workers programmes in the case of Belgium, France, Germany and the Netherlands[12] - were confined to specific, unskilled, sectors of the economy. However, the second and third generations, who grew up in Europe, are accessing wider and more diversified employment areas. Minority workers are now present in sectors where they were previously absent. Accordingly, some employers are confronted today with a religious diversity that was practically inexistent thirty years ago and that they have not been used to deal with. It has also been suggested that as descendants of immigrants have acquired citizenship, they have become more confident and assertive in their demands for cultural and religious recognition.[13] On this account, if such requests are becoming more common this would be the sign that young minority workers feel that they are part of the country they live in and are therefore entitled to have their religious traditions respected, whereas their parents tended to adopt a low profile.

Meanwhile, the public assertion of Muslim (or other minority) religion and identity contradicts what has long been a common assumption in Europe, namely that modernity

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[10] See J. Cesari, "Introduction", J. Cesari and S. McLoughlin (eds), *European Muslims and the Secular State* (Ashgate, 2005), 4; Ph. Connors, "Contexts of Immigrant Receptivity and Immigrant Religious Outcomes: the Case of Muslims in Western Europe", 33(3) *Ethnic and Racial Studies* 376 (March 2010), 380.
[11] See, for instance, the French legislation: Article 2212-8 of the Public Health Code (*Code de santé publique*) (Loi No. 2001-588 du 4 juillet 2001, J.O. 7 July 2001).
[12] J. Césari, *When Islam and Democracy Meets, supra* note 7, 13.
[13] I. Adam and A. Rea (dirs), *supra* note 8, 136.

would inevitably bring in its wake the decline and marginalisation of religion.[14] The secularization theory, which has long been dominant in social sciences, has popularized the idea that faith was to become increasingly irrelevant in modern societies and retreat in a strictly private sphere. As José Casanova points out, the secularization thesis, in its classic version, claims that societal modernisation entails not only the "structural differentiation", that is the autonomisation of the secular spheres – the state, the economy, the science – from religion, but also the fading away and privatization of religion.[15] This process was seen as indispensable to modernity: in order for a society to be modern, it had to privatize faith, to relegate it to non-public and non-political spaces.[16] Yet since the 1960s, this theory has been subject to intense debates and critical reappraisals.[17] Empirical research has highlighted that outside Europe, modernity did not necessarily entail the decline of religiosity and marginalisation of religion.[18] In Europe itself, which is considered the most secularized region in the world, secularisation process took different forms and attained different levels of intensity, depending on the dominant religious tradition and on the history of state-church relations.[19] Moreover, from a normative viewpoint, a number of authors have argued that, provided certain conditions are met, religions may enter the public sphere and assume the role of civil society actors, without endangering individuals' freedom and modern differentiated structures.[20]

The rise of religious pluralism in contemporary Europe has also contributed to renew discussions about the meaning and implications of *secularism*, that is the political-legal doctrine which posits the separation of state and religion as a necessary component of liberal democracies. This notion has translated into various institutional models across Europe, ranging from strict separation or *laïcité* in France to mild forms of separation in Germany, the Netherlands or Belgium. But in theoretical literature on secularism, the French *laïcité* and the American disestablishment clause, both based on a strict conception of separation, have tended to be viewed as the paradigmatic forms of secularism.[21] Yet, in recent years, various authors have argued that secularism, properly understood, is not incompatible with the state accommodating religious practice of citizens nor with individuals expressing their faith in the public sphere.[22]

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[14] J. Cesari, "Introduction", in J. Cesari and S. McLoughlin (eds), *European Muslims and the Secular State* (Ashgate, 2005), 2.

[15] J. Casanova, *Public Religions in the Modern World* (the University of Chicago Press, 1994). On the concept and theory of secularization, see also D. Martin, *On Secularization – Towards a Revised General Theory* (Ashgate, 2005); R. Wallis and S. Bruce, "Secularization – The Orthodox Model" in S. Bruce (ed.), *Religion and Modernization: Sociologists and Historians Debate the Secularization Thesis* (Clarendon Press, 1992), 12 and B. Wilson, "Reflections on a Many Sided Controversy", in S. Bruce (ed.), *Religion and Modernization: Sociologists and historians debate the secularization thesis* (Clarendon Press, 1992), 195.

[16] J. Casanova, *supra* note 15, 38-39 and 63-66; T. Asad, 'Secularism, Nation-State, Religion', in T. Asad, *Formations of the Secular – Christianity, Islam, Modernity* (Stanford University Press, 2003), 181-201, at 181.

[17] See *inter alia* the collection of articles in J. A. Beckford and Th. Luckmann (eds), *The Changing Face of Religion*, London, Sage, 1989 and S. Bruce (ed.), *Religion and Modernization: Sociologists and historians debate the secularization thesis* (Clarendon Press, 1992).

[18] P. Berger (ed.), *The Desecularization of the World: Resurgent Religion and World Politics* (Eerdmans, 1999).

[19] See D. Martin, *op. cit.*; R. Wallis and S. Bruce, *supra* note 15, pp. 15-17. For an inquiry into religious practice in the different parts of Europe, see A. M. Greeley, *Religion in Europe at the End of the Second Millenium* (Transaction Publishers, 2003).

[20] See in particular J. Casanova, *supra* note 15, esp. at 55-58 and 211-234.

[21] On the importance of the American constitutional model in theoretical discussions about secularism, see in particular V. Bader, "Religion and States. A New Typology and a Plea for Non-Constitutional Pluralism", 6(1) *Ethical Theory and Moral Practice* 55 (2003).

[22] See, among others, L. Zucca, "Crucifix in the Classroom: The Grand Chamber Decision in Lautsi", *International Journal of Constitutional Law* (forthcoming) and L. Zucca, "Law vs. Religion", in C. Ungureanu and L. Zucca (eds), *Law,*

The workplace occupies a peculiar position in these debates. The latter are indeed largely structured around the distinction between the public and private spheres. But depending on what definition of these notions is adopted, the workplace can fall on either side of this dichotomy. Under one approach, very present in feminist literature, the public square is understood as comprising all domains external to the family. From this perspective, the employment sphere, like market relations in general, is part of the *public* realm.[23] For other scholars, the public refers to state institutions as opposed to civil society, which includes the family, the market and private associations of citizens.[24] Here, the workplace will be seen as part of the *private* sphere, at least as far as private employment is concerned. Yet, civil servants who are employed in state institutions fall within the public sphere. Hence, in many European states, the question arises whether the notion that the state should be neutral towards the various religions and beliefs entails special obligations for public servants, in particular in relation to the wearing of religious symbols while at work. As illustrated by several chapters in this book, there is no consensus on this issue in Europe. The positions taken by the various states on this matter reflect the conception of secularism prevailing in their legal and political traditions. Additionally, even if employment in the private sector is considered as part of the private sphere, it is nevertheless highly regulated by the state: the way the relations between state and religions are conceived may thus impact on how religious expression at work is dealt with in both public and private employment.

2. *The evolution of work relations*

As emphasised by Ilke Adam and Andrea Rea, the question how religious diversity is managed in the worksphere must also be viewed in the light of the profound evolutions labour relations have undergone in Europe in the last forty years.[25] It is generally considered that European societies have moved from a fordist to a post-fordist economy. In the fordist system, the economy was dominated by large industrial enterprises engaged in mass production of cheap standardized goods, based on a high specialisation of tasks and a pyramidal structure of management. Labour relations were characterised by a hierarchical organisation of work and uniform collective norms regulating large sectors of the industry. In the post-fordist model, by contrast, the service industry holds a central place while the workplace governance is marked by increasing heterogeneisation and individualisation of work modalities. Flexibility and autonomy become key words.[26]

State and Religion in the New Europe: Debate and Dilemmas (Cambridge University Press, forthcoming); C. Laborde, *Critical Republicanism. The Hijab Controversy and Political Philosophy* (Oxford University Press, 2008) (writing from a Republican perspective); T. Modood, *Multiculturalism: A Civic Idea* (Polity, 2007) (writing from a multiculturalist perspective); R. Bhargava, "States, Religious Diversity, and the Crisis of Secularism", *Open Democracy*, available at http://www.democracy.net (last accessed: 15 April 2011) (arguing for a conception of secularism inspired by the Indian model).

[23] See, for instance, the classic article by F. Olsen, "The Family and the Market", 96 *Harv. L. Rev.* 1497 (1983). On the different understandings of the public and private spheres in political theory, see J. Weintraub, "The Theory and Politics of the Public/Private Distinction", in J. Weintraub and K. Kumar (eds), *Public and Private Thought and Practice – Perspectives on a Grand Dichotomy* (The University of Chicago Press, 1997), 1.

[24] J. Weintraub, *supra* note 23.

[25] I. Adam and A. Rea (ed), *supra* note 8, 136.

[26] For an overview of this transformation and how it affects labour relations in the EU, see A. Supiot (ed.), *Au-delà de l'emploi – Transformations du travail et devenir du droit du travail en Europe* (Flammarion, 1999). See also H. Collins, *Employment Law* (University Press, Oxford, 2d ed., 2010), 101-105.

More empirical research is needed to assess how these changes impact on the way religious pluralism is dealt with in the workplace. However, it is possible to surmise that their impact is ambivalent: in some respects, current changes could facilitate the taking into account of religious specificities in the workplace. But in other regards, these processes increase the vulnerability of certain categories of workers, hence making it more difficult for them to insist on having their religious beliefs accommodated.

Ilke Adam and Andrea Rea suggest that as a general matter, the trend towards heterogeneisation and flexibilisation of labour organisation leaves more room for adaptations of work conditions to personal circumstances of various types, including religious practice, than old-style rigid regulations.[27] In fact, one striking indication arising from their inquiry into the accommodation of cultural and religious diversity in the workplace is that requests for adjustments of work modalities are by no means limited to religious motives. Such demands are described as a recurring issue in the day-to-day life of companies. The most frequent requests according to interviewees relate not to religion but to family situations: they concern in particular parents who have alternate guardianship arrangements for their children and wish to have their working time adapted accordingly.[28] More generally, it has been pointed out that the individualisation of work conditions is part of a larger process of diversification of aspirations, expectations and lifestyles in European societies which is inevitably reflected in the worksphere.[29] Thus, the relations between religious beliefs and employment must be situated in the broader debate about how to enable all workers, and especially women, to better reconcile the various aspects of their life: paid work, unpaid work, family life, leisure, rest, etc..;[30] in other words, how to implement the "general principle of adapting work to the worker", which the EU Council Directive 93/104/EC refers to.[31] For Hugh Collins the "problem of achieving a balance between work and other aspects of the life cycle is surely one of the most complex facing society today."[32]

Yet, other trends in the European labour market seem likely to make accommodation of minorities' religious specificities more difficult. I. Adam and Andrea Rea highlight that some categories of workers, especially those employed in low skilled jobs, are still subject to tightened control and have little autonomy.[33] In fact, for the most precarious workers, the weight of subordination to the employer has increased: in their respect, the employer does not only enjoy the authority normally attached to employment relations, he also has the power not to renew the contract which, in a time of mass unemployment, is a particularly daunting prospect.[34] Generally, compared to the 1960s, the socio-economic condition of the

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[27] I. Adam and A. Rea (eds), *supra* note 8, 136.
[28] I. Adam and A. Rea (eds), *supra* note 8, pp. 48-49. See also E. Bribosia, A. Rea, J. Ringelheim, and I. Rorive, "Reasonable Accommodation of Religious Diversity in Europe and in Belgium: Law and Practice", in S. Bonjour, A. Rea and D. Jacobs (eds), *The Others in Europe* (Editions de l'Université de Bruxelles, 2011), 91, 107-108.
[29] This process is especially manifest in the evolution of working time management: whereas the fordist model was based on uniform, standardized and stable working schedules, nowadays, timetables are increasingly heterogeneous and individualized. The rate of workers who have the same timetable every day and every week has significantly decreased in Europe. See A. Supiot (ed.), *supra* note 25, 93-137.
[30] See H. Collins, *supra* note 26, pp. 77-97.
[31] EU Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ L 307, 13.12.1998, p. 18. See also A. Supiot, (ed.), *supra* note 25, 127.
[32] H. Collins, *supra* note 26, p. 12. See also H. Collins, "The Right to Flexibility", in J. Conaghan and K. Rittich (eds), *Labour Law, Work and Family: Critical and Comparative Perspectives*, Oxford University Press, Oxford, 2005.
[33] I. Adam and A. Rea (ed), *supra* note 8, 132.
[34] A. Supiot (ed.), *supra* note 26, p. 37.

most vulnerable categories of the workforce has worsened. Unemployment has become structural. Job insecurity has risen. While in the fordist period, the full-time employment contract of indefinite duration was the norm, in the post-fordist era, the employment status of workers becomes more unstable and fluctuating. Temporary work, casual work, part time work have become much more common.[35] For many workers, the flexibilisation of work conditions means their adjustment to the company needs rather than to their own aspirations.[36] At the same time, employers have become more demanding in the level and variety of skills they require from their employees: in line with the new management methods, individuals are expected to bring to the company not only their technical competences but also personal and social abilities, such as adaptability, autonomy, reactivity, communication skills, or creativity.[37] The development of these new selection criteria has contributed to the gradual exclusion from stable employment of the least-qualified, the least "adaptable" to the new work organisation models.[38]

Among the groups that are especially harmed by these evolutions, lie immigrants and their descendants. Their unemployment rate is generally consistently higher than the national average. In addition, they tend to be concentrated in low-paid and low-level jobs.[39] Although this is not the only factor explaining this situation, the existence of discrimination is widely documented.[40] This phenomenon particularly affects migrants from Muslim countries, including second-generation. In United Kindgom, the first triennial review published by the Equality and Human Rights Commission in 2010,[41] highlights that compared to the other religious and conviction groups, Muslims have the lowest rates of employment: male Muslim unemployment is 9% while the national average is 5%.[42] The British labour market, moreover, is characterised by a high level of occupational segregation. Muslims are less likely than any other religious group to be in better paying, higher status, positions. Instead, they are found to a greater extent in plant and machinery factory work and unskilled jobs.[43] Similarly, in Belgium, studies have shown a process of "ethno-stratification" of the labour market which penalizes in particular people with

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[35] R. Castel, *Les métamorphoses de la question sociale. Une chronique du salariat* (Gallimard, 1995), 645-675; A. Supiot (ed.), *supra* note 26, 53-92; H. Collins, *supra* note 25, 38.
[36] R. Castel, *supra* note 35, 649-650. See also A. Supiot (ed.), *supra* note 26, 261-263.
[37] See L. Boltanski and E. Chiapello, *The New Spirit of Capitalism*, Verso, 2007, pp. 90-91 (original title: *Le nouvel esprit du capitalisme*, Gallimard, Paris, 1999).
[38] L. Boltanski and E. Chiapello, *supra* note 37, 82-98 and 240-242; R. Castel, *supra* note 35, 651-655.
[39] A. Heath, "Crossnational Patterns and Processes of Ethnic Disadvantage", in H. Anthony and Ch. Sin Yi (eds), *Unequal Chances, Ethnic minorities in Western Labour Markets*, Proceedings of the British Academy, Vol. 137 (Oxford University Press, 2007), 639-695.
[40] See in particular the studies on discrimination against migrant workers conducted in various European countries based on situation testing: E. Cediey and F. Foroni (ISM-CORUM), "Les Discriminations à raison de "l'origine" dans les embauches en France. Une enquête nationale par tests de discrimination selon la méthode du BIT*", Bureau international du Travail*, 2006 (published in 2007); E. Allasino, E. Reyneri, A. Venturini, and G. Zincone, "Labour market discrimination against migrant workers in Italy", 67 *International Migration Papers* (International Labour Office, 2004); R. Zegers de Beijl, "Documenting Discrimination against Migrants Workers in the Labour Market. A comparative study of four European countries", *International Labour Organization*, 2000; P. Arrijn, S. Feld, and A. Nayer, "Discrimination in access to employment on grounds of foreign origin: the case of Belgium", 23 *International Migration Papers* (International Labour Office, 1998); W. Actis, M. Angel de Prada, and C. Pereda, "Labour market discrimination against migrant workers in Spain", 9 *International Migration Papers* (International Labour Office, 1996); Fr. Bovenkerk, M.J.I. Gras, and D. Ramsoedh, "Discrimination against migrant workers and ethnic minorities in access to employment in the Netherlands", 4 *International Migration Papers* (International Labour Office, 1995).
[41] Equality and Human Rights Commission, *How Fair is Britain? Equality, Human Rights and Good Relations in 2010, The First Triennial Review*, 2010, available at http://www.equalityhumanrights.com/key-projects/how-fair-is-britain/ (last accessed: 10 April 2011).
[42] *Id*., 405.
[43] *Id.*, 429.

Moroccan and Turkish background, regardless of whether they have acquired Belgian nationality: they are more likely than the majority population to be unemployed and remain largely concentrated in less-skilled and low status jobs.[44] Such phenomenon of "ethnic penalty" has also been observed in the case of second-generation Maghrebins in France[45] and Turkish and Moroccan migrants in the Netherlands.[46]

Coming back to the issue of religious diversity at work, given the vulnerable positions of many minority workers, and especially Muslims, in the labour market, they are likely to have little bargaining power in case the employer refuses to accommodate their religious beliefs. In view of the difficulties they experience in the labour market, it can be hypothesised that they will often not be in a position to negotiate or contest the employer's decision.[47]

A last factor that proves significant for how religious diversity is dealt with in the workplace is the importance taken by the relation between companies and the general public in a service-based economy. Indeed, in service companies, the work relation does not only involve the employer and the workers: the client – her preferences, attitudes, expectations – acquires a crucial place. This, in some European countries, appears to have a determining impact on how *visible* religious practice, primarily the wearing of a headscarf by female employees, is handled by employers. The French and Belgian case-law analysed by Rim-Sarah Alouane and Katie Alidadi in their contributions to this book provides various examples of situations where the wearing of a headscarf is deemed problematic by the employer as soon as the employee has to be in contact with the public. By the same token, the Belgian study on accommodation of religion in the workplace suggests that it is a common practice for private companies in Belgium to based their policy regarding the headscarf on a distinction between front-office and back-office work, prohibiting it in the first case, allowing it in the second.[48] The supposed negative attitudes of the general public towards certain types of religious manifestations thus permeate the work relationship and directly influence how some forms of religious diversity is managed by employers.

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[44] See K. Phalet, "Down and Out: The Children of Migrant Workers in the Belgian Labour Market", in H. Anthony and Ch. Sin Yi (eds), *Unequal Chances, supra* note 39, 143-180; S. Vertommen, A. Martens and N. Ouali, "Topography of the Belgian Labour Market – Employment: Gender, Age and Origin", *Research within the framework of the Interuniversitary Consortium on Immigration and Integration, Koning Buodenwijnstichting/Fondation Roi Beaudouin,* June 2006, available at www.kbs-frb.be/publication.aspx?id=178372&LangType=2060 (last accessed: 15 April 2011) ; A. Martens, N. Ouali, M. Van de Maele, S. Vertommen, Ph. Dryon, H. Verhoeven, "Discriminations des étrangers et des personnes d'origine étrangère sur le marché du travail de la Région de Bruxelles-Capitale", *Recherche dans le cadre du Pacte social pour l'emploi à Bruxelles, Rapport de synthèse*, January 2005.

[45] R. Silberman and I. Fournier, "Is French Society Truly Assimilative? Immigrant Parents and Offspring on the French Labour Market", in H. Anthony and Ch. Sin Yi (eds), *Unequal Chances, supra* note 39, 221-268.

[46] P. Tesser and J. Dronkers, "Equal Opportunities or Social Closure in the Netherlands?", in H. Anthony and Ch. Sin Yi (eds), *Unequal Chances, supra* note 39, 359-401.

[47] I. Adam and A. Rea observe, however, that the fact that religious minorities are concentrated in certain sectors may in some cases facilitate the accommodation of their religious needs, such as the adaptation of canteen meals to dietary requirements: for pragmatic reasons, employers may tend to respond positively to such requests when they are supported by a large part of the workforce. But some demands, in contrast, may be more difficult to satisfy where minorities members are numerous: where Muslims represent the majority of employees, it might not be possible for a company or institution to allow them all at the same time to take a day off for a religious holidays or to leave work earlier during Ramadan. On this point, see the findings of I. Adam and A. Rea (eds), *supra* note 8.

[48] I. Adam and A. Rea (eds), *supra* note 8, esp. at 94-95.

II. Religious Diversity and Work Relations: What Role for the Law?

The concrete questions religious diversity may raise in the sphere of labour relations are varied and numerous. For the forms the practice of a religion may take are themselves very diverse. In some cases, the issue is simply whether a worker can express her religious beliefs while at work, for instance, through the wearing of specific cloths like a headscarf or through the act of praying. Here, the question is whether the employer, in virtue of its general authority, can prohibit this sort of behaviour in the worksphere. In other circumstances, the problem is whether an employee can have his work conditions adjusted to allow him to observe his faith either *within* or *outside* the workplace, for example, being allowed to take a day off for a religious holiday, having canteen meals adapted to dietary requirements or being exempted from performing certain tasks, like having contact with pork meat, serving alcohol or contributing to the production of arms. In this situation, a pre-existing norm applicable in a specific work context – the list of holidays days, the composition of canteen menus, the definition of tasks to be carried out by the staff – conflicts with a worker's religious practice: the problem is thus whether the latter can obtain an adaptation of this rule in order to solve the conflict. Of course, in practice the distinction between these two types of cases is not clear-cut: more often than not, where an employer's decision to forbid one religious manifestation at work (e.g. the wearing of a headscarf) is contested, the employer will try to justify it by claiming that this behaviour clashes with some work rule or requirement (e.g. safety conditions or the image the company wants to convey to the public). This may spark a second discussion on whether this rule can be adjusted to accommodate a worker's religious needs.

The starting point of any legal analysis of these questions is that employment is based on a contract: it is "a consensual relation between two parties involving an exchange."[49] Workers sell their labour power – their time, efforts and skill - in return for a pay.[50] Furthermore, the distinctive trait of employment contract is the element of subordination it involves: by taking a job, the employee consents to being subject to the authority of the employer. The employer acquires the right to direct the worker to perform a range of tasks according to his instructions. Formally, each party to the contract is supposed to be free and equal. In reality, in most of the cases, the employer is in a much stronger position than the employee. This permits it to fix the terms of the contract to its advantage. The initial inequality of power is compound by the authority the employer enjoys over its employees in virtue of the contract. There is thus a clear risk that the employer might abuse the factual and legal power it holds. This danger has long been recognized by the law: the tension between freedom to contract and subordination lies precisely at the heart of employment law as it has developed in European countries.[51] In the words of Alain Supiot, "the question of power is at the core of labour law".[52] Despite differences of legal traditions in Europe,[53] the main object of employment law has everywhere been "to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."[54] Labour law thus aims at framing the exercise of its power by

[49] H. Collins, *supra* note 26, 6.
[50] *Id.*, 3.
[51] A. Supiot, *Critique du droit du travail* (P.U.F., 2d ed., 2007), 110.
[52] *Id.*, 109 (my translation).
[53] For an overview of the different traditions of labour law in Western Europe: A. Supiot, *supra* note 53, 13-33.
[54] P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (Stevens, 3d ed, 1983), 18, quoted by H. Collins, *supra* note 26, 6.

the employer: by introducing mandatory rules and procedures, it seeks to secure a minimum level of safety and fairness for workers and to prevent potential abuse of managerial authority.[55]

Employment law has typically been concerned with safeguarding the safety and health of workers, protecting them against termination of contract without just cause, regulating working hours and, in most industrialized countries, guaranteeing a minimum wage. Yet, traditionally, it does not deal with the place of religion at work. Accordingly, the question arises whether authorizing religious expression and/or accommodating spiritual beliefs in the workplace is left to the discretion of employers – meaning that they can allow it or not without having to provide justification for doing so and that workers who do not conform with their decision can be disciplined – or whether workers can derive from some existing legal provision a right in this regard which could be enforced through judicial action. In European law, there are two possible foundations for such a right: the right to religious freedom, protected under Article 9 ECHR, and the prohibition of religious discrimination, laid down by the European Convention but also by EU law. While Article 14 ECHR precludes discrimination in the enjoyment of the rights enshrined in the ECHR, Directive 2000/78/EC, adopted in 2000, outlaws discrimination in employment and occupation based *inter alia* on religion or belief.[56]

Traditionally, two different responses have coexisted to the question whether religious freedom or antidiscrimination can protect religious interests at work. These two approaches fundamentally rest on different understandings of the relation between market processes and antidiscrimination as well as, more generally, between freedom to contract and human rights. The first approach gives primary importance to contractual freedom. It will be termed here the "freedom of contract" approach (1). The second, alternative, conception can be labelled the "social inclusion" approach as it recognizes a central place to the objective of achieving social and professional inclusion of all groups, and especially the most disadvantaged (2). Recent developments in EU antidiscrimination law have clearly reinforced this second approach. Yet, the extent to which employers could be required, based on the non-discrimination norm, to accommodate religious beliefs of their workers remains uncertain.

1. *The freedom of contract approach*

The issue of religion in the workplace can be viewed as one instance of a broader problem employment relations give rise to, that is the potential tension between contractual freedom and human rights. The terms of a labour contract, or the requirements made by employers based on their managerial authority, may involve restrictions to the fundamental rights of workers, for example, where they are required to wear a uniform which excludes the wearing of a headscarf. But similar questions can arise in relation to other rights: to take one example among many, where an employer prohibits employees from speaking to the press about the company without prior authorization, it limits their freedom of speech. The general question this raises is to what extent human rights are applicable to the worksphere. According to a first approach, contractual freedom must be given primary importance.

[55] H. Collins, *supra* note 26, 11; A. Supiot, *supra* note 53, 111.
[56] Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (OJ L 303 2.12.2000, p. 16).

Under this view, private parties should be left as free as possible to define the terms and conditions of the contract as best suits their economic interests, including where this implies departing from certain human rights. Employers cannot be required to accept certain conditions or behaviours if they were not provided for in the contract. In view of the authority conferred to them by the contract, to which the worker has consented, they should be able to decide at their own discretion whether the religious practice of a worker is compatible with business interests. The worker's right to religious freedom is guaranteed insofar as by virtue of his contractual freedom he is free not to take a job or to resign if the conditions conflict with his religious beliefs.

As noted by Olivier De Schutter, this approach looks with suspicion at any attempt by the state to intervene in market processes and impose certain obligations on employers.[57] Accordingly, it interprets restrictively the obligations stemming from the prohibition to discriminate. On this account, non-discrimination only entails that employers cannot disadvantage certain individuals in decisions on recruitment, promotion, access to training, etc., based on characteristics such as their religion or belief, race, ethnicity, gender, disability, sexual orientation or age; they can only have regard to criteria which have a direct and genuine link with the position to be provided. But businesses cannot be required to go beyond this and contribute to the wider societal goal of promoting the social and professional inclusion of groups disadvantaged on the labour market, such as ethnic or religious minorities, through measures such as adapting the organisation of work to their religious needs.[58] The observance of a (minority) religion is seen as a choice, the consequences of which must be assumed by the individual worker, in case his religious practice does not fit with the current organisation of the workplace. Non-discrimination here is regarded as an instrument in the service of the market: it contributes to the good functioning of economic processes by eliminating irrational decisions by employers, that are based on characteristics unrelated to work performance. But it does not justify imposing rules that deviate from market norms and aim at remedying exclusionary effects produced by the market itself.[59]

This view is reflected in the 24 March 1998 decision of the French Cassation Court: In the case of a supermarket employee of Muslim faith who had asked to be transferred from the butchery to another service in order not to be in contact with pork, the Court ruled that absent any express contractual clause, religious convictions of workers are not part of the labour contract. Hence, the employer does not commit any fault by asking the employee to execute the task for which he was hired.[60] In other words, the employer is free to ignore religious requests by employees without having to provide any justification for it. Freedom to contract overrides the right to religious freedom.[61]

A similar conception underlies the approach of the former European Commission of Human Rights to cases involving requests of accommodation of work schedules for

[57] O. De Schutter, *Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi* (P.I.E.-Peter Lang, 2001).
[58] For a discussion of this first conception of non-discrimination, see O. De Schutter, *supra* note 59, esp. at 24-28.
[59] Id., at 203-204.
[60] Cass. soc., 24 mars 1998, n° 95-44.738, *M. Azad c. Chamsidine*. On this case, see the comments by R.-S. Alouane, 'The Practice of Religion in the Workplace in France: in Search of an Elusive Balance', this volume. See also O. De Schutter, *supra* note 59, at 51.
[61] More generally, on the relations between labour law and individual human rights in French law, see A. Supiot, *supra* note 53, at 160-164.

religious reasons. In the famous *X. v. United Kingdom* decision, where a Muslim teacher complained that the London state school in which he worked had refused to arrange his time-table so as to enable him to take forty-five minutes off on Friday to attend the prayer at the mosque, the European Commission of Human Rights found no interference with his right under Article 9.[62] Determining in its opinion was the fact that he had voluntarily accepted teaching obligations under his contract with the school and remained free to resign if he found that these duties clashed with his religious beliefs.[63] The Commission, therefore, did not require the state to demonstrate that satisfying the applicant's demand would not have been possible for reasons related to work performance: in its view, the mere fact that workers are free to leave their job is sufficient to protect their religious freedom. The Commission also rejects the discrimination claim. The applicant pointed out that Christian workers had no difficulty reconciling their working obligations with their religious observance as general official holidays reflect Christian traditions. To this, the Commission simply replies that he has not shown to have been treated less favourably than individuals placed in comparable situations, that is "teachers belonging to religious minorities".[64] The Commission thus considers as self-evident that the applicant's situation can onlybe compared to that of other minority workers and not to that of employees practising the *majority* religion. It adds that "in most countries, only the religious holidays of the majority of the population are celebrated as public holidays".[65] The Commission thereby suggests, without any further explanation, that it is only natural that the norm of the workplace corresponds to the norm of the majority and that adepts of minority faiths must adapt to it or resign. The European Court has never directly addressed the issue. But in *Kosteski v. the Former Yugoslav Republic of Macedonia* (2006), it incidentally endorses the Commission's jurisprudence on work schedule and religious holidays.[66] In particular, it expresses doubts that taking a day off to celebrate a religious feast is a manifestation of religious beliefs protected under Article 9 ECHR.[67]

2. *The social inclusion approach*

The "freedom of contract" approach presents several problems. By postulating that the two parties to the contract are free and equal, it neglects the reality of power relations in which they are located. In practice, workers are usually not in a position to negotiate the terms and conditions of the contract. Job contracts are generally offered on a "take it or leave it" basis by employers.[68] Further, by stating that the employees' right to freedom of religion is not affected as long as they remain free to resign, it overlooks the importance of the sacrifice required from individuals to be able to practice their religion.[69] For most people,

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[62] ECommHR, 12 March 1981, *X.* v. *United-Kingdom*, App. No. 8160/78, *D.R.* 22, 27.
[63] *Id.*, para. 9 and 15. This is restated in ECommHR, 3 December 1996, *Konttinen* v. *Finland*, App. No. 24949/94, *D.R.* 87-B, 68.
[64] *X. v. United-Kingdom*, p. 38, para. 27.
[65] *Id.*, para. 28.
[66] ECtHR, 13 April 2006, *Kosteski* v. *The Former Yugoslav Republic of Macedonia*, para. 37. In the country concerned, citizens of Muslim faith were allowed, under the Constitution, to take a day off on Muslim recognized public holidays. The problem at stake was that the authorities contested that the applicant was truly Muslim, since he had previously celebrated Christian holidays.
[67] *Id*., para. 38.
[68] H. Collins, *supra* note 26, 7.
[69] In this sense, see the critique of the European Commission's case law: C. Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001), 130-131; and J. Velaers and M.-C. Foblets, "L'appréhension du fait religieux par le droit. – A propos des minorités religieuses", 30 *Revue trimestrielle des droits de l'homme* 273 (1997), at 293.

employment is their main source of income. Beyond economic necessity, work is also "the medium through which many people gain self-respect and a sense of participation and inclusion in society."[70] In addition, at least as far as days of rest are concerned, it disregards the fact, discussed above (see section 1.1), that in most European countries the majority religion is implicitly taken into account in current regulation of the workplace.

The alternative approach to the issue of religious diversity in the worksphere acknowledges the importance of employment for individuals' well-being as well as for social cohesion and seeks to achieve a balance between freedom to contract and the objective of social inclusion. It rests on a different vision of the relations between the worksphere and human rights. Under this view, human rights would be of limited utility if individuals could only exercise them at the cost of being excluded from the labour market. Thus, where a person is refused a job or fired because she wishes to manifest her faith in the workplace, this should count as a restriction to religious freedom. This does not mean that there cannot be situations in which an employer has valid reasons to limit religious practice at work or reject requests of accommodation. But the legitimacy of such interference should be assessed according to the criteria set forth in Article 9(2): while having a legal basis, it must be necessary in a democratic society to achieve one of the legitimate aims listed. It cannot be assumed that merely because a person is bound by a contract, any restriction to her rights decided by the employer is justified. State authorities have a positive obligation to protect individuals against violations of their rights committed by private parties like employers.[71] According to Hugh Collins, this conception of the relationship between employment and human rights is increasingly gaining ground:

> the former sharp contrast between the public sphere of rights and the private sphere of market relations in which civil liberties had no application is increasingly questioned. It is no longer accepted that workers leave their rights of citizenship at the doors to the workplace. The question is rather how far civil liberties should be protected against an employer's exercise of market power.[72]

Collins argues that the best reconciliation between the rights guaranteed under the ECHR and employment contracts "would be to require the employer to justify the contractual restriction by reference to a test of proportionality, so that the employer would be required to demonstrate that the terms represented business need of the employer that could not satisfactorily be met by any lesser restriction on the Convention right."[73] In the same vein, Lucy Vickers claims that any legal regulation of the relations between work and religion should seek to find "some compromise whereby religious individuals can work where to do so does not disproportionately interfere with the rights of others."[74] The right to resign should only be considered as a residual protection where accommodation of religious practice is inappropriate because it conflicts with the rights of others or places too much of a cost on the employer.[75]

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[70] L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart, 2008), 47. See also H. Collins, *supra* note 26, at 3-4.
[71] See *inter alia* D. Spielmann, "Obligations positives et effet horizontal des dispositions de la Convention", in F. Sudre (ed.), *L'interprétation de la Convention européenne des droits de l'homme* (Nemesis-Bruylant, 1998), 133-174.
[72] H. Collins, *supra* note 26, 25. See also at 209-234.
[73] *Id.,* 217.
[74] L. Vickers, *supra* note 70, 10.
[75] *Id.*, at 52-53.

The development of EU antidiscrimination law clearly reinforces this approach. Social inclusion is one of the declared aims of this body of law. Directive 2000/78/EC, the first EU instrument prohibiting discrimination based on religion in employment, states in its Preamble that it is designed *inter alia* to foster a labour market favourable to social integration, to guarantee equal opportunities for all and to promote the full participation of citizens in economic, cultural and social life.[76] Now, as emphasised by De Schutter, merely prohibiting employers from taking certain characteristics into account in decisions on recruitment, promotion or firing is not sufficient to achieve social and professional integration of those who are excluded from the employment market. This is because the structure of the workplace itself produces exclusionary effects on certain groups. Thus, under this second approach, companies can be asked to do more than abstaining from paying regard to certain features: they can be required to some extent to contribute to the objective of social inclusion through various measures, including transforming the work environment or organisation in order to eliminate barriers to employment opportunities for certain disadvantaged groups, like religious minorities.[77] In other words, the company can be asked to assume a social responsibility. This can be justified by the fact that businesses benefit from multiple advantages that are present in the environment in which they operate and that are provided by the collectivity, such as material infrastructures, public services and legal framework.[78]

In this relation, it is important to highlight that Directive 2000/78/EC outlaws both direct and indirect discrimination. While direct discrimination occurs where a person is treated less favourably than another is, has been or would be treated in a comparable situation based on a prohibited ground,[79] indirect discrimination occurs where a norm that is neutral on its face, because it does not formally distinguishes between individuals based e.g. on religion, puts persons with a given religion or belief at a particular disadvantage compared with other persons.[80] This entails that a policy which is not deliberately designed to harm a protected group but which has this effect in practice can, potentially, be deemed discriminatory. By raising attention to the adverse impact certain norms have on specific categories of persons, the notion of indirect discrimination enables to question the apparent neutrality of the environment.[81] Hence, a rule which disadvantages workers practicing a certain religion, such as dress requirements excluding the possibility to wear a headscarf or the setting of uniform days of holidays which does not permit minority workers to take a day off for important religious celebrations, could be contested based on the prohibition of indirect religious discrimination. To be sure, not each and every practice resulting in disadvantage is prohibited under non-discrimination law: a measure having such impact will not be deemed discriminatory if it is proved to rest on a legitimate aim and to constitute a proportionate mean to achieve this objective.[82] Nonetheless, the prohibition of indirect discrimination implies that where a work requirement penalizes workers observing a certain religion, the employers can be asked to justify this rule and this justification can

[76] Preamble, Recitals 8 and 9. See also H. Collins, "Discrimination, Equality and Social Inclusion", 66 *The Modern Law Review* 16 (2003) and O. De Schutter, *supra* note 53, at 57.
[77] O. De Schutter, *supra* note 53, at 25-28.
[78] O. De Schutter, *supra* note 53, at 27.
[79] Article 2(1)(a) of Directive 2000/78/EC.
[80] Article 2(1)(b) of Directive 2000/78/EC. Note that the European Court of Human Rights has endorsed the notion of indirect discrimination: ECtHR, 13 November 2007, *D.H. and Others v. Czech Republic*.
[81] O. De Schutter, "Interdiction de discriminer envers les étrangers et obligation d'intégration par le droit", in J. Ringelheim (ed.), *Le droit et la diversité culturelle* (Bruylant, 2011).
[82] Article 2(1)(b) of Directive 2000/78/EC.

be subject to judicial review. In effect, how judges will assess what constitutes a legitimate objective and proportionate means will be crucial in determining to what extent the prohibition of indirect discrimination protects religious interests in the worksphere.[83]

Canada and United States have gone one step further: in both countries, the law expressly recognizes a right to *reasonable accommodation* of religious beliefs in the worksphere.[84] The specificity of reasonable accommodation compared to indirect discrimination is to promote individualized solutions to conflicts between work rules and the religious practice of workers: where a norm is shown to have a detrimental effect on a person practicing a certain religion, it is not enough to establish that it is justified by a legitimate objective. The employer must also verify whether in the specific circumstances at stake it cannot be adapted to the situation of the individual affected.[85] This obligation, however, only exists as long as the accommodation is reasonable: the employer will be discharged of its duty to accommodate if it can prove that it took all necessary means to find a solution but that any adjustment would have entailed undue hardship and would therefore have been unreasonable, because it would have impaired on the rights of others, involved disproportionate cost, or hampered the efficiency of the company.[86] Based on this notion, employers have been required for instance to allow exceptions to dress requirements, changes in working timetables, or selected absences for religious festivals.[87] In the view of Lucy Vickers, such a duty to accommodate where to do so does not cause undue hardship can "create an adequate level of protection for religious interests, whilst giving space to employers to find an appropriate and proportionate balance between the competing rights ar work."[88]

Under EU law, a right to reasonable accommodation in employment has been expressly recognized only in favour of disabled workers.[89] Yet, various authors argue that the

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[83] On the justification of indirect discrimination, see generally D. Schiek, L. Waddington and M. Bell (eds), *Cases, Materials and Texts on National, Supranational and International Discrimination Law, Ius Commune Casebooks for the Common Law of Europe* (Hart, 2007), at 435-471.

[84] In the US, following an amendment inserted in 1972, Title VII of the 1964 Civil Rigts Act places a duty on private and 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." (*Civil Rights Act of 1964*, CRA, Title VII, 42 US Code Chapter 21, §701 (j)). On this provision and related case law, see Ch. L. Eisgruber and L. Sager, *Religious Freedom and the Constitution* (Harvard University Press, 2007), 87-108 and J. M. Oleske, Jr., "Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation", 6 *University of Pennsylvania Journal of Constitutional Law* 525 (2004). In Canada, the obligation to provide reasonable accommodation was derived by the Courts from the equality and non-discrimination principles (See *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd*, [1985] 2 *S.C.R.* 536). Moreover, the right to reasonable accommodation under Canadian law is not limited to employment, it also applies to the supply of goods and services. See P. Bosset, "Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable", in M. Jézéquiel, *Les accommodements raisonnables: quoi, comment, jusqu'où? Des outils pour tous* (éd. Yvon Blais, Cowansville (Québec), 2007), 3-28 and P. Bouchard and Ch. Taylor, "Building the Future – A Time for Reconciliation", *Consultation Commission on Accommodation Practices Related to Cultural Differences*, Government of Quebec (2008), available at http://www.accommodements.qc.ca/ (last accessed: 15 April 2011).

[85] O. De Schutter, *supra* note 81. On this notion, see also L. Vickers, *supra* note 70, p. 223-225.

[86] Note that the notion of "undue hardship" has been interpreted differently by Canada and US Courts. US Courts accept more easily that an accommodation is unreasonable. See E. Bribosia, J. Ringelheim and I. Rorive, "Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?", in 17(2) *Maastricht Journal of European and Comparative Law* 137 (2010), at 140 and 148.

[87] Id., 140-150.

[88] L. Vickers, *supra* note 70, 223.

[89] Article 5 of Directive 2000/78/EC provides: 'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on

prohibition of indirect discrimination based on religion or belief in employment may implicitly entail an obligation to reasonably accommodate religious practice. In order to satisfy the requirement of proportionality, a rule having a detrimental effect on a protected group must be the least restrictive means to achieve the legitimate aim sought. This can be interpreted as requiring that before implementing such a rule, the employer considers alternatives to it, including the possibility to allow individual exceptions in order to avoid disadvantaging persons with a particular religion.[90] For instance, imposing the wearing of a uniform may be justified by reasons of hygiene and safety or communication strategy. But refusing to adapt this dress code in order to allow the wearing of a headscarf, where doing so would not impair these objectives, could be deemed disproportionate. On this account, the approach taken in disability discrimination should be considered as the expression of a more general principle, namely that employers should make allowance for the different needs of socially excluded groups and contribute to foster their social and professional integration.[91]

It remains to be seen whether the European Court of Justice will validate this interpretation of Directive 2000/78/EC.[92] The European Court of Human Rights in the *Thlimmenos v. Greece* ruling (2000)[93] has already seemed to endorse the principle on which the concept of reasonable accommodation rests. The applicant was a Jehovah's Witness whom the Greek authorities had refused to appoint as chartered accountant on the ground that he had been convicted of a serious crime five year earlier for having refused to serve in the military due to religious reasons. This decision was based on existing legislation barring the profession of chartered accountant to any person convicted of a crime. The government insisted that since the legislation has general application, no exemption could be provided. But the Court rejected this argument, stating that the right not to be discriminated against under Article 14 ECHR is not only violated when states treat differently persons in analogous situations, but also *when they fail to treat differently* persons whose situations are significantly different, without objective and reasonable justification.[94] In the case at stake, while the legislation was based on a legitimate objective, namely to prevent dishonest or untrustworthy people from this profession, its application to Mr. Thlimmenos lacked any reasonable justification: his conviction did not imply any dishonesty or moral turpitude likely to undermine his ability to work as chartered accountant.[95] Hence, "by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of

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the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures eisting within the framework of the disability policy of the Member State concerned.'

[90] See H. Collins, *supra* note 26, 73; L. Vickers, *supra* note 70, p. 223 and E. Bribosia, J. Ringelheim and I. Rorive, *supra* note 86, pp. 157-158.

[91] See in particular, H. Collins, *supra* note 26, at 73-74. See also O. De Schutter, *supra* note 59, 205.

[92] So far, only in the 1976 *Vivien Prais* case (Case C-130/75 *Vivien Prais* [1976] ECR 1589), decided well before the adoption of the Directive, did the ECJ implicitly touch upon the issue. The applicant had presented her candidacy for a competition organised by the Council of the European Communities to hire translators. She complained of the fact that the Council had rejected her request to take part in the written test at another date based on the ground that the date set coincided with an important Jewish holiday. She claimed that the Council had violated the clause in the Staff Regulation according to which candidates are chosen without distinction of race, religion or sex. Whilst rejecting her claim, the Court admitted 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" (para. 18). But given that a written test mut take place under the same conditions for all candidates, the appointing authority must not accommodate other dates for the test unless it has been notified before the other candidates have been invited (para. 13). Altough this terminology is not used, this ruling seems to endorse to some extent the logic underpinning the notion of reasonable accommodation.

[93] ECtHR, 6 April 2000, *Thlimmenos v. Greece*, para. 44.

[94] *Id.*, para. 44.

[95] *Id.*, para. 47.

chartered accountants", Greece violated his right not to be discriminated against on the grounds of his religion.[96] Since then, however, the European Court has not made any other application of this principle, at least in the employment sphere.[97]

Conclusion

Debates sparked by the management of spiritual diversity in the workplace include several different and interrelated dimensions. First, they reflect the more general queries and tensions generated by the pluralisation of the religious landscape in European societies. From this perspective, they are part and parcel of wider controversies about the relations between religions and the secular state. Second, from another viewpoint, they echo the growing discussions about how to allow workers to better reconcile their professional activity with their personal or family life. This problem takes particular significance in a context marked by the rise of individualisation and flexibilisation of work organisation as well as the precarisation of labour conditions of the most vulnerable categories of workers. One major challenge in this regard is how to ensure that flexibility does not merely serve the interests of employers but also meet the aspirations and needs of employees. Third, and more fundamentally perhaps, religion in employment touches upon the vaster problem of how to define the relations between work, law and human rights. At stake here is the task of determining what in labour relations should be regulated by the state and what should be left to private parties to decide, based on their contractual freedom, having regard to the inequality of power between employers and workers. The development of EU antidiscrimination law is likely to have a crucial impact on the way this question is dealt with across Europe. The emphasis it places on the objective of social inclusion and the prohibition of indirect discrimination it includes give further strength to the view that freedom of contract is not in itself a sufficient justification for restricting religious freedom at work and that employers can be required to contribute to eliminate indirect barriers to the professional integration of minority religious groups.

[96] *Id.*, para. 48. For a discussion of this ruling, see L. Vickers, *supra* note 70, at 115-116 and E. Bribosia, J. Ringelheim and I. Rorive, *supra* note 86, pp. 153-154.

[97] In *Jakobski v. Poland*, the Court holds that refusing to accommodate dieteray requirements of a detainee baesd on his religious beliefs constitutes a violation of the right to freedom of religion under Article 9 ECHR. While not using this terminology, the Court in substance acknowledges an obligation for state authorities to reasonably accommodate religious beliefs of individuals where they find themselves in closed public institutions, like prisons. See ECtHR, 7 December 2010, *Jakobski v. Poland*.