



EUROPEAN POLICY BRIEF



RELIGARE

Religious Diversity and Secular Models in Europe: Innovative Approaches to Law and Policy

A comparative legal study addressing religious or belief discrimination in employment and reasonable accommodations for employees' religious or philosophical beliefs or practices

Ongoing project

May 2012

INTRODUCTION

Setting the scene:

Religious diversity in Europe presents challenges in various social domains

The growing religious diversity in European societies poses important policy challenges in various domains of social life. The new religious landscape means that European states not only have to cope with inhabitants with varying commitments to Christianity as well as with humanists, agnostics, atheists, and Jewish and/or Muslim minority populations, but in many instances also with a 'super-diverse' range of other religious cultures and traditions which have entered Europe by way of immigration and conversion.

Challenges with the position of Islam have been most visible, prompting a number of states to adopt restrictive measures on religious dress, family life and places of worship.

Within the RELIGARE research project, the focus is on **four social domains** where both acute and chronic challenges have arisen and responses have been formulated, namely **the family, the labour market, the public space and the State's support to religions**.

Issues related to religion and belief have become increasingly topical in Europe's **workplaces**, illustrating that the idea that religion or belief should remain confined to the private lives of individuals is untenable in present day Europe.

Cases from across Europe illustrate how some religious practices, beliefs and identities pervade various or all aspects of individual lives and that religion or belief is important to employees and employers in the workplace. The available European and national case law and sociological data show that **tensions and conflicts have arisen with regard to religious dress and grooming requirements, opportunities to take time-off for employees to observe religious holidays and other practices and certain job tasks and**

conditions that run counter to some religious or philosophical rules and practices. These issues have arisen in both private and public sector employment.

This policy brief relates to both sectors of employment, but does not address in particular the case of churches and public or private organisations whose ethos is based on religion or belief.

In most cases, issues relate to the position of Muslim employees, who form one of the groups experiencing discrimination in European workplaces, as shown through the EU Minorities and Discrimination Survey (EU-MIDIS) and reports by the EU Agency for Fundamental Rights (FRA), Pew Research Center, and Amnesty International.

Courts have addressed these issues under two legal frameworks: the non-discrimination framework and the human rights framework. It must be noted that there is an important EU non-discrimination law framework set down in Directive 2000/78 with regard to the strand of religion and belief in the employment area. Freedom of thought, conscience and religion is guaranteed by Art. 9 of the European Convention on Human Rights, Art. 10 of the EU Charter of Fundamental Rights as well as national (constitutional) provisions, but arguably non-discrimination law has been more effective than human rights law in this area.

RELIGARE: evaluation of legal solutions in light of freedom of religion and non-discrimination

The endeavour of RELIGARE has been to evaluate which legal frameworks and instruments are best suited to guarantee respect for the rights of all individuals to freedom of thought, conscience and religion and to non-discrimination on religious or belief grounds, recognising that there can be tensions with other important rights and interests.

This policy brief addresses the particular role of reasonable accommodations for religious beliefs and practices in this regard. Considering the often problematic socio-economic status of ethno-religious communities (e.g. low participation rates, high unemployment, occupational segregation) it is justified to consider law and policy practices and instruments that work towards a more substantive notion of equality. Under certain circumstances and conditions, reasonable accommodations could help towards this objective.

Managing religious diversity: ten European case studies

While all European countries present interesting examples of managing religious diversity under State law, ten core European countries form the geographical focus of this project: **Belgium, Bulgaria, Denmark, France, Germany, Italy, the Netherlands, Spain, Turkey, and the UK**. The constitutional models in these countries illustrate the diversities of histories and approaches to religion within Europe: ranging from the French *laic* model, via various ‘selective cooperation’ models’ without established church, to countries with established churches. In addition, the countries also reflect different degrees of experience with religious diversity in society:



By analysing and comparing (legal) solutions to challenges of religious diversity, insights can be gained into ‘good practices’, ranging from **revision of constitutional and legislative frameworks to more pragmatic solutions and piece-meal adjustments.**

How does the issue of discrimination-free workplaces relate to the Europe 2020 strategy?

The EU 2020 strategy, ‘A strategy for smart, sustainable and inclusive growth,’ is the long term strategy of the EU in the context of a prolonged economic and financial crisis. It sets a number of targets with the aim to establish a strong and sustainable economy with ample employment opportunities. One of the goals under the strategy is to create a high-employment economy. In particular, by 2020, the employment rate of the population aged 20-64 should increase from the current 69% to at least 75%.

It is evident that this goal cannot be achieved without tackling the realities of employment discrimination as faced by the immigrant and ethno-religious minority workforce in Europe. Both access discrimination and treatment discrimination are an explanatory factor in low labour market participation, high unemployment, poor work conditions, pay gaps and sector segregation of vulnerable ethno-religious groups. However, it is noteworthy that the word “discrimination” appears only once in the Commission’s document (under the 5th poverty target). The importance of equal opportunities in the labour market should appear more prominently in this context.

Formal vs. substantive equality in the workplace

At a time when economic growth is of the utmost importance in the EU, policy tools that work towards creating an inclusive labour market, and which fully take advantage of the skills and talents of its (ethno-religiously) diverse population, should be adopted. In doing so, these **policies must look beyond formal equal treatment and work towards creating a more substantive equality.** While under *formal* equality, the focus is on identical or similar treatment *irrespective* of particular personal characteristics including religion, under *substantive* equality context-relevant religious or belief-based identities, beliefs and practices of employees *are* sometimes to be taken into account.

KEY OBSERVATIONS

Is religion or belief an *issue* in the European workplace?

The large majority of workplace tensions or conflicts do not escalate into legal conflicts, but rather are dealt with at the local company level, whether or not they are satisfactorily addressed for all parties. Still, public debates on the presence of religious and cultural symbols at work, including as displayed by teachers in public schools, have taken place in Belgium, Denmark, Germany, France, the Netherlands and the UK and have already resulted in **a number of judicial cases involving the role of religious beliefs, practices and observances in a variety of workplaces** (private, public, faith-based organisations,..). In Bulgaria and Italy, such cases have not yet reached the courts while in Turkey and Spain cases remain rare.

Judicial cases have **predominantly involved employees of minority religions** such as Muslims and Sikhs, but there are also cases involving Seventh-day Adventists and devout Christian employees. The following provides some illustrative cases:

a. With regard to religious symbols and dress/grooming:

- A female Muslim receptionist was dismissed for seeking to wear a headscarf during work hours (Belgium: Antwerp Labour Court of Appeal, 23 December 2011);
- A female Muslim doctoral researcher's financial stipend was retracted because she –as a civil servant- wore a headscarf when conducting research at the University (France: Administrative Court of Toulouse, 17 April 2009);
- A Christian airline check-in assistant was dismissed after she sought to wear a necklace with a large crucifix at work (the UK: *Eweida v. British Airways* [2010] EWCA Civ 80);
- A Sikh hotel employee was dismissed for wearing a turban and growing a beard (the Netherlands: Kantonrechter Amsterdam 24 January 1986);
- A female Muslim nurse was fired by a hospital because she sought to cover her elbows (and particular hygiene standards justified a sleeveless uniform) (the Netherlands: Civil Court 's-Hertogenbosch 13 July 2009);
- Female Muslim teachers have been dismissed for wearing a headscarf in the classroom (ECtHR: *Dahlab v. Switzerland*; Belgium, France, Germany)
- Female Muslim store clerks have been denied jobs or dismissed by grocery stores because of their headscarves (Denmark, Belgium, France).

b. With regard to requests for time off to observe religious duties or holy days:

- A Seventh-day Adventist employee was dismissed for absenting himself on the Saturday Sabbath (EComHR 3 December 1996, *Kontinen v. Finland*);
- A Muslim public teacher was denied a limited amount of time off to be able to participate in collective Friday prayers (EComHR 12 March 1981, *X. v. United Kingdom*).

c. With regard to exemptions of certain job duties that contradict religious or philosophical beliefs:

- A Muslim (higher education) teacher refused to shake hands with female students/colleagues (the Netherlands: District Court of Rotterdam, 6 August 2008);
- A Muslim grocery store clerk asked not to have to handle or be in touch with alcohol (Germany: Federal Labour Court, 24 February 2011);
- A Christian marriage registrar asked not to have to officiate over same-

sex partnerships as this ran counter to her religious beliefs (The UK: *Ladele v London Borough of Islington* [2009] EWCA Civ 1357).

Legal framework with regard to religion in employment

The fundamental right to freedom of thought, conscience and religion is firmly enshrined in the Constitutions of the member states as well as in Art. 9 of the European Convention on Human Rights and Art. 10 of the Charter of Fundamental Rights of the EU.

When it comes to religious discrimination, all EU member states have now adopted legislation banning various forms of discrimination on the basis of religion or belief. The **development of equality legislation in member states complements human rights, labor laws and collective labour agreements, and other laws relevant to the position of employees in the workplace.**

In EU member states without pre-existing equality legislation, provisions were adopted to implement the **Employment Equality Directive (2000/78/EC)**. This Directive, aiming to put into effect the principle of equal treatment in the member states as regards employment and occupation, prohibits direct discrimination, indirect discrimination, harassment and instruction to discriminate on the grounds of religion or belief, disability, age or sexual orientation. The Directive also protects against victimization on the basis of the same grounds.

Do religious discrimination cases involve multiple or intersectional discrimination?

The ground of religion or belief has a strong potential to overlap with (the protected ground of) racial or ethnic origin as members of religious communities are often also part of minority ethnic groups in society. Other personal characteristics such as gender, sexual orientation or disability can also intersect with religion or belief.

In employment discrimination cases, it is not necessarily clear on which basis an employee was discriminated against and the employee faces some **options on how to frame a claim**. This is apparent in cases litigated on the basis of religious discrimination or on the basis of religious freedom that have strong links to ethnicity or gender discrimination and vice versa. Cases litigated on the basis of other protected grounds, such as sex, ethnicity or freedom of speech, can also exhibit elements of religious belonging or practices.

For instance, dismissing a Muslim woman for wearing a headscarf on the job relates to the protected grounds of religion, ethnicity and sex, and thus involves multiple and in some cases intersectional discrimination.

What does *indirect* discrimination on the basis of religion or belief entail? Why is this such an important concept for tackling entrenched forms of disadvantage and discrimination?

The Employment Equality Directive defines indirect discrimination as “**an apparently neutral provision, criterion or practice** [which] would put persons having a particular religion or belief (...) at a **particular disadvantage** compared with other persons.” Such provision, criterion or practice can be justified if there is a legitimate aim and the means of achieving that aim are appropriate and necessary.

Many member states have adopted this definition, sometimes word for word.

Cases involving indirect discrimination often reveal **structural or implicit barriers** which previously went unnoticed and unchallenged,

Is there a right to reasonable accommodation on the basis of religion or belief in the European workplace?

thus making the concept an important tool in addressing structural inequalities and barriers to participation.

The Employment Equality Directive does **not explicitly** include a right for employees to request reasonable accommodations from their employers or labour unions on the basis of religion or belief in the workplace. The concept was introduced in the Directive but was limited to the ground of disability.

Only a limited number of member states have included (some) rights to reasonable accommodations for religious beliefs or practices or similar measures:

- Art. 13 (2) of the 2004 Bulgarian Protection Against Discrimination Act provides that employers have a duty to ensure working conditions **in terms of working hours and days of rest** in accordance with an employee's faith as long as this "would not result in excessive difficulty for the organisation and implementation of the production process, and where there are possible ways to compensate for any potential unfavourable consequences of this on the overall production outcome."
- under the Flemish Decree of 8 May 2002 on proportionate representation (which has a limited material scope of application) the notion of "reasonable accommodations" is not restricted to persons with disabilities and could therefore also apply to persons of a particular religion or belief or an ethnic origin. There is no case law on this topic though.
- in Spain, the Cooperation Agreements between the state and the Evangelical, Jewish and Islamic communities recognise the rights of employees adhering to these religions to celebrate their religious holidays but require that an agreement is reached with the employer.

Is a right to reasonable accommodation included or implied in the prohibition of (indirect) discrimination on the basis of religion or belief?

This debate is ongoing amongst legal scholars. Some argue that if interpreted 'dynamically' the prohibition of indirect discrimination already includes a right to reasonable accommodation of deeply-held beliefs and religious practices. The freedom of religion can also require positive steps to realise the effective exercise of the fundamental right. Others argue that adopting an explicit duty of reasonable accommodations -such as in the case of disability- would have important consequences for the current state of affairs.

In the US, soon after the adoption of the 1964 Civil Rights Act, the Equal Employment Opportunities Commission (EEOC) interpreted the prohibition of religious discrimination under that Act to imply a duty of reasonable accommodations on the employer. In 1972 such duty was explicitly included in the Civil Rights Act, after the EEOC's position was dismissed in a number of court cases. Now, under Title VII of the Civil Rights Act an employer has the legal duty to reasonably accommodate the practices, observances or beliefs of his or her workers unless doing so would amount to an undue hardship.¹

¹ The concept of undue hardship has been interpreted by the U.S. Supreme Court as a *de minimis* standard, see *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). In contrast, the Canadian Supreme Court, taking a more purposive approach aimed at removing entry barriers to the employment market, has adopted a more demanding standard, see *Central Okanagan*

With respect to the European setting, we need to look at how the prohibition of (in)direct discrimination is interpreted and applied in religious discrimination cases. In the Netherlands and Germany, something closely akin to a duty of reasonable accommodation arguably already exists under the current legal framework:

- Several Dutch employment cases consider and evaluate the efforts of employers to look for alternative solutions to keep the employee on the job.
- A German Federal Labour Court decision held that the dismissal of a Muslim employee from a supermarket because of his refusal to work with alcoholic drinks would be invalid if there was other employment available for the employee (e.g. a transfer to the fresh food department).

But this is not necessarily the case in Belgium, where courts have explicitly stated that it would be pointless to look into whether the parties considered a possible transfer of the employee to another position since “there exists no duty of reasonable accommodation.” The same can be said with regard to Denmark, France and Turkey.

It is clear that these contrasting approaches affect the availability of adequate employment opportunities for religious minorities across member states. An individual’s religious beliefs or practices such as dress can (sometimes starkly) reduce the range of employment opportunities they are able to accept in certain countries but not in others. The adoption of an explicit duty would thus have significance.

Is there an ‘added value’ for employers and employees to adopting an explicit duty of reasonable accommodation for religion or belief?

The concepts of indirect discrimination and reasonable accommodations are interrelated, but there are some important differences.

Although a successful claim of indirect discrimination does not require an *actual* comparator (a hypothetical comparator is accepted), a *group* disadvantage is required. Also, the open justification system under EU law allows for (widely) divergent decisions/outcomes in very similar cases, within the same legal system but particularly across different member states with divergent Church-Religion arrangements and histories. These are two differences with the reasonable accommodations framework, which concentrates on the **situation of the individual employee** requesting an accommodation and **shifts the burden** of demonstrating the required hardship in offering such accommodation to the employer.

A more subtle yet important **difference between discrimination and accommodation** lies in the more intuitive nature of accommodation versus the more complex legal concept of indirect discrimination. Also, a discrimination allegation could have a more disparaging effect on the employment relations as it carries an undeniably pejorative implication. Accepting the idea of reasonable accommodations, however, entails a mentality switch with regard to the role of religion in the workplace and in the lives of employees.

RECOMMENDATIONS FOR POLICY-MAKERS

I. For EU policy makers

- Amend the Employment Equality Directive to add a right for public and private employees to request reasonable accommodations on the basis of religious beliefs, practices and observances, unless this results in a demonstrated disproportionate burden or cost on employers.
- Track the legislative and judicial implementation of the Employment Equality Directive, in particular available national case-law applying the prohibition of discrimination on the basis of religion or belief. Develop a coherent and clear policy in addressing national decisions or developments that defeat the purpose of anti-discrimination norms.
- Include the aspect of *religious and philosophical* diversity more clearly in the EU's discourse on the value of diversity.
- Adopt explicit strategies accommodating EU employees from diverse religious backgrounds, promoting such strategies in other public and private workplaces through example.
- Create or encourage platforms for exchange of good business practices accommodating request for religious accommodations and promote these national or cross-national practices across EU member states.

II. For national governments

- Adopt national legislation giving employees a legal right to request reasonable accommodations for religious beliefs, practices and observances in public and private workplaces, unless such would impose a demonstrated disproportionate burden or cost on employers.
- Establish an advisory service ('helpline') for employers and other decision-makers with questions about religious accommodations in various work settings, possibly operated by an equality body.
- Encourage the inclusion of workers from diverse religious backgrounds in the workplace through a variety of policy-tools: e.g. encourage and incentivize company diversity plans which also touch on *religious* diversity, address legitimacy of company 'neutrality policies'.

III. For local governments, trade unions, equality bodies, NGO's

- Demystify the concept of indirect discrimination using information campaigns and informational resources directed at employers and employees. Voluntary accommodations that help employees reconcile professional and religious duties and do not cause any organisational hardships should be offered as good examples.
- Educate labour market stakeholders and the general public on common religious practices and observances of religious minorities in the country.
- Emphasise the unacceptability of disadvantaging, negative treatment or discrimination of employees on the basis of their religion or belief as well as their religious or philosophical practices and observances.

RESEARCH PARAMETERS

Objectives

RELIGARE focuses on the challenges for state law posed by Europe's increasing religious diversity in four important domains of social life: **the family, the labour market, the public space and state support to religions.**

RELIGARE seeks to investigate and analyse which legal frameworks and instruments are best suited to guarantee respect for the rights of all individuals to freedom of thought, conscience and religion and to non-discrimination on religious or belief grounds. In particular, the goal is to identify those responses that adequately balance the principles of equality and non-discrimination with the freedom of thought, conscience and religion, protected as fundamental rights. Also, this includes assessing whether these responses are bound to their national contexts or relevant across Europe, and in particular identifying solutions flexible enough to accommodate the diverging historic and political contexts in the member states.

Methodology

The project applies an interdisciplinary approach, combining legal and empirical methods. A **comparative legal approach** is used to analyse the law in **10 countries (Belgium, Bulgaria, Denmark, France, Germany, Italy, the Netherlands, Spain, Turkey, the UK)**. In order to evaluate how tensions are perceived and dealt with 'on the ground,' in **6 selected countries (Denmark, Turkey, Bulgaria, France, the Netherlands and the UK)** **sociological interviews** with a number of key opinion makers or stakeholders (e.g. religious or humanist leaders, judges or commissioners, lawyers or academics, politicians, NGO's, labour unions) are conducted covering issues and controversies related to the four domains of RELIGARE. The six countries provide a good cross-section of the historical and legal diversity of secularity in Europe. They also represent a wide range of systems for managing religious affairs, of socio-historical trajectories, of relationships to the construction of Europe and of experiences of religious diversity.

Expected Results

- To identify the various challenges in the four selected domains of social life.
 - To offer more accurate knowledge of underlying challenges and responses to specific concerns related to Europe's religiously pluralist condition, drawing from the various national experiences;
 - To identify and assess promising policy solutions and good practice and to offer concrete policy recommendations (to both European, national and local levels) based on perceived successful responses and national experimentalism.
 - To develop a number of tools, such as a comparative case-law database with religious discrimination/freedom cases and commentaries and a comparative sociological study, which will be helpful for researchers, policy-makers and the public.
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PROJECT IDENTITY**Coordinator****KU Leuven (Belgium)**

Faculty of Law

Institute for Migration Law & Legal Anthropology

Scientific Coordinator: Prof. Marie-Claire Foblets:

marie-claire.foblets@law.kuleuven.be

Project Manager: Zeynep Yanasmayan:

zeynep.yanasmayan@law.kuleuven.be

Consortium**Belgium**

Centre for European Policy Studies (CEPS)

Dr. Sergio Carrera

Université Catholique de Louvain

Chair for Law and Religion

Prof. Louis-Léon Christians

Bulgaria

International Center for Minority Studies and Intercultural Relations

Dr. Maya Kosseva

Denmark

Københavns Universitet

Centre for European Islamic Thought

Prof. Jørgen Nielsen

France

Centre National de la Recherche Scientifique (CNRS)

Politique, religion, institutions et sociétés: mutations européennes (PRISME)

Prof. Francis Messner

Germany

Universität Erlangen-Nürnberg

Prof. Mathias Rohe

Italy

Università Degli Studi di Milano

Prof. Silvio Ferrari

The Netherlands

Vrije Universiteit Amsterdam

Dr. Adriaan Overbeeke

Universiteit van Amsterdam

Prof. Veit Bader

Spain

Universidad Complutense Madrid

Facultad de Derecho

Prof. Javier Martínez-Torrón

Turkey

Middle East Technical University

Dr. Tuğba Tanyeri-Erdemir

United Kingdom

Queen Mary, University of London

Dr. Prakash Shah

EC contact

Ms. Louisa Anastopoulou: louisa.anastopoulou@ec.europa.eu

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More information	Katayoun.alidadi@law.kuleuven.be
Further reading	State of the art research papers and other work package reports are accessible at www.religareproject.eu . A forthcoming book entitled ' <i>A Test of Faith? Religious Diversity and Accommodation in the European Workplace</i> ' (eds: K. Alidadi, M.-Cl. Foblets, J. Vrielink) (2012, Ashgate) addresses more in-depth various themes related to the topic of this policy brief.