



Religare Working Paper

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



Religion and the Workplace

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Abstract

A Christian tram conductor seeks to wear a necklace with cross despite the no-jewelry company dress code, a Muslim saleswoman wants to wear a headscarf on the job even though her manager has stated this would be bad for business, factory workers request facilities separate from the locker rooms so they can pray during work breaks. These cases that have recently come up in various European countries illustrate that equality and non-discrimination on the basis of religion, and freedom of religion in the workplace is of crucial importance in today's Europe.

Considering the time workers spend in the workplace and the increasing importance of religious identity amongst certain groups, potential tensions between professional and religious duties, and requests for *de facto* accommodations are bound to keep coming up. Thus, within the larger RELIGARE project a key role is set for the work package on religion and the workplace.

RELIGARE does not aim to 're-invent the wheel' but rather to add value to the field by filling perceived gaps in the existing research. The work being organised in different stages, this paper fits within the first *status questionis* phase where available materials are collected and reviewed. This paper makes a modest attempt to describe the available research and issues in the intersecting fields of labour law, religious freedom and non-discrimination.

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Introduction

Within the larger EU FP7 RELIGARE project, which focuses on the challenges presented by the increasing diversification of religious and other convictions and practices in Europe, a central role is laid out for Work Package 4 with regard to equality, non-discrimination, and freedom of religion in the workplace.

The workplace is a site where we invest a lot of our time and energy, and for many a job is much more than a means of subsistence. Somewhat similar to religious belonging, professional belonging is a part of our identity. This makes conflicts between religious obligations and employment obligations all the more critical for the individual employee. Employers, called to manage an increasingly diverse workforce, face a dilemma when religion confronts other interests at play.² When conflicts reach the courts judges decide whether or not employer solutions were adequate.

In cases where religious employers (churches and faith-based organisations) have an interest in keeping a religiously uniform ‘workforce,’ a balance must be struck between the principles of non-discrimination and autonomy of religious collectives.

The main objective of Work Package 4 is a policy-oriented reflection on the exceptions, derogations, and accommodations made for reasons of religious conviction and practices in the field of labour law for (1) individual employees and for (2) collective religious organisations and their staff. Thus, this research area can be divided into two clusters: religion in the private workplace³ and employment relations in the ‘religious workplace.’

The first cluster looks at a number of mechanisms that have been implemented in the workplace to accommodate to various degrees for religious or non-confessional identity, namely anti-discrimination legislation (EU and national), reasonable adjustments or accommodations,⁴ conscientious objections, and positive measures/action, insofar as these relate to religion or belief in the workplace. Alternative resolutions of religious workplace disputes are looked at as well.

The second cluster revolves around the applicability of general state labour law and religious collectives as ‘employers.’ Churches and certain faith-based organisations often have special statuses under state law and enjoy a level of autonomy not awarded to non-religious organisations. One aspect of that autonomy is the ability to manage ‘internal affairs’ and (labour) relations with church staff.⁵

² Rees A., “Religion in the workplace described as ‘Cinderella’ discrimination issue,” Western Mail (UK), August 27, 2008 (director of the Employers Forum on Belief described religion in the workplace noting that that “no one wants to wade in and get it wrong.”)

³ Religion in the public workplace, while not our main focus, is considered as well. In particular, issues regarding teachers in public schools have been widely litigated and commented.

⁴ The term “reasonable accommodation” is used in the US and Canada, where there is a legal duty for certain employers to accommodate for the beliefs and religious practices of their staff. EU Directive 2000/78 only prescribes reasonable accommodation for people with disabilities, while some member states have adopted such duty to reasonably accommodate for reasons of religion (e.g. Flemish decree of 8 May 2002 regarding proportionate labour participation, as amended)

⁵ Arguably, the second cluster of labour law religious collectives deals less with diversification of religious convictions and beliefs, making it thus less central to the project’s goals. Diversification of religions within Europe has played a much larger role when it comes to presenting challenges by individual employees who want to reconcile their religious duties with job duties. Church and state problems involve the competing interests of religious communities, both established/dominant and (albeit to a lesser extent) emerging.

This paper and its accompanying bibliography make a modest attempt to describe the available research and recurring issues in the intersecting field of labour law, religious freedom and non-discrimination.

Method

The work of RELIGARE being organised in a number of phases, this paper fits within the first *status questionis* phase where we collect and review available materials. RELIGARE does not aim to ‘re-invent the wheel’ but rather to add value to the field by filling perceived gaps in the existing research. RELIGARE Policy recommendations will be based on the combination of comparative legal research and new sociological data derived from interviews conducted in a selected number of countries.

In most of the ten RELIGARE countries (Belgium, Bulgaria, Denmark, France, Germany, Italy, the Netherlands, Spain, Turkey, and the United Kingdom) the interaction and tensions between religion and secularism in the workplace have been addressed from a national perspective.⁶ Relevant legislation, case law, and commentary on a European level exist as well.⁷ The focus was on relatively recent (last 15 years) and mainly English-language legal and social science⁸ literature. After initial key term and author-based searches, a snowball method was used to find relevant literature for the bibliography.

State of the Art

3.1 General

There are various specialised labour law journals⁹ and a number of important labour law associations and organisations.¹⁰ In the law and religion field, there are also specialised journals and organisations.¹¹ At the initiative of the Consortium of Church and State Research, two very relevant but unfortunately largely outdated publications appeared in the early 1990s, one on labour law¹² and

⁶ For example, contributions from Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxemburg, Portugal, Spain, the Netherlands and the UK in European Consortium For Church-State Research, *Churches and Labour Law in the E.C. Countries/Les églises et le droit du travail dans les pays de la Communauté Européenne*, Milan, Giuffrè, 1993, p. 242; D. McGoldrick (2006), *Human Rights and Religion: the Islamic Headscarf Debate in Europe*, Hart Publishing, Oxford and Portland, Oregon, p. 320 (looks among others at the debates in France, Germany, Turkey, the UK, Spain, Italy, Belgium, the Netherlands – mostly focused on religious dress in education).

⁷ And is especially rich in the human rights and non-discrimination field, see below.

⁸ Other academic disciplines besides law contained relevant contributions to understanding the various aspects of religion in the workplace: gender studies (pointing to the “troubling connections between gender and culture”), religious studies, political science and cultural studies.

⁹ See the list of Journals on the site of the International Association for Labour Law Journals, <http://www.labourlawjournals.com> (e.g. *Industrial Law Journal* (Oxford) published by the Industrial Law Society).

¹⁰ For example, The International Industrial Relations Association, <http://www.ilo.org/public/english/iira/> that organizes congresses; *International Journal of Comparative Labour Law and Industrial Relations* (Kluwer publishing).

¹¹ For example, the European Consortium for Church-State Research; the Law and Religion Scholars Network (LARSN); *Publications: Ecclesiastic Law Journal* (Cambridge) published by the Ecclesiastic Law Society; *Religion & Human Rights: An International Journal* (Martinus Nijhoff Publishers, since 2006).

¹² European Consortium For Church-State Research, *Churches and Labour Law in the E.C. Countries/Les églises et le droit du travail dans les pays de la Communauté Européenne*, Milan, Giuffrè, 1993, p. 242.

another on conscientious objection.¹³ Symposia addressing the intersection of work and religion have generated important scholarship for the field. For instance, in spring 2009, the Comparative Labour Law and Policy Journal dedicated an issue to religion in the workplace.¹⁴ A recent Law and Religion Scholars Network (LARSN) conference also offered a forum for studies with regard to the employment position of clergy.¹⁵ American (international law) journals have been a fruitful venue for the dissemination of ideas and developments in Europe.¹⁶

Scholars with different backgrounds and perspectives have shown an interest in this intersectional field.¹⁷ First, the human rights focus is well-represented, with special attention on European level case-law and legislation.¹⁸ Discrimination, (gender) equality and balancing issues are special topics of interest, with an emphasis on individual religious freedom. The topic of religious symbols and dress (headscarf) are often addressed from this legal¹⁹ and social science perspective.²⁰

Second is the closely related focus is that of labour law scholars or lawyers look at issues of religion in the frame of equality, non-discrimination and inclusion in the workplace,²¹ the focus here being on individual religious freedom, labour law standards, and anti-discrimination law.

Third, there is growing literature on Islam in Europe that addresses the problematic socio-economic status of Muslims, looking at problems with access to quality schools and job opportunities for Europe's largest religious minority group.²²

¹³ European Consortium For Church-State Research, *Conscientious Objection in the EC Countries/ L'obiezione di Coscienza nei Paesi della Comunità Europea*, Milan, Giuffrè, 1990, p. 306.

¹⁴ For example, Vickers, L. and M. Freedland (2009), "Religious Expression in the Workplace in the United Kingdom", *30 Comp. Lab. L. & Pol'y J.* 597; L. Sossin, "God At Work: Religion in the Workplace and the Limits of Pluralism in Canada", *30 Comp. Lab. L. & Pol'y J.* 485 (2009); K. D. Wald, "Religion and the Workplace: A Social Science Perspective," *30 Comp. Lab. L. & Pol'y J.* 471-483 (2009), etc.

¹⁵ LARSN Conference 11 May 2010 at Cardiff University; J. Rivers, "The Legal Position of Ministers of Religion," conference paper Law And Religion Scholars Network (LARSN) Conference May 11, 2010; Duddington, J., "The employment status of ministers of religion in the light of the debate on the role of the State in the affairs of Churches," conference paper Law And Religion Scholars Network (LARSN) Conference May 11, 2010

¹⁶ For example, *Emory International Law Review* (2005) on European permissible scope of legal limitations; *Brigham Young Law Review*,...

¹⁷ Arguably this is not (yet) its own independent discipline, but draws heavily from various legal traditions such as employment law, discrimination law, law and religion, and comparative law, as well as other social sciences.

¹⁸ For example, Evans, C. (2001), *Freedom of Religion under the European Convention on Human Rights*, Oxford, Oxford University Press, p. 222.

¹⁹ McGoldrick, D., supra; L. Barnett and Canada Law And Government Division (2008), *Freedom of Religious and Religious Symbols in the Public Sphere*, Canada Library of Parliament, p. 42, (<http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0441-e.pdf>); E. Bribosia, I. Chopin & I. Rorive (2004), "Rapport de synthèse relatif aux signes d'appartenance religieuse dans quinze pays de l'Union européenne", Migration Policy Group, p. 30 (http://www.cestim.it/argomenti/16interculturala/16interculturala_rapporto%20sui%20simboli%20religiosi.pdf); K. Berthou (2005), "The Issue of the Voile in the Workplace in France: Unveiling Discrimination," *Int. J. Comp. L.L.I.R.* 21(2), pp. 281-320.

²⁰ Joppke, C. (2009), *Veil: Mirror of Identity*, Polity, p. 276; Guy, A. and M. Banim (2000), "Personal Collections: women's clothing use and identity," in *Journal of Gender Studies*, Volume 9, Issue 3, pp. 313 – 327; T. Grant and G. Nodoba (2009), "Dress Codes in Post-Apartheid South African Workplaces," *Business Communication Quarterly*, p. 72; pp. 360-365.

²¹ Blanpain, R. (ed.) (2008), *Diversity, equality and integration: beyond the law: a comparative study*, Brugge: Vanden Broele, p. 427; For example, Bayart, C. (2004), *Discriminatie tegenover differentiatie. Arbeidsverhoudingen na de Discriminatiewet. Arbeidsrecht na de Europese Ras -en Kaderrichtlijn*, Gent, Larcier.

²² Open Society Institute, *Muslims in Europe: A Report on 11 EU Cities* (Chapter 5: Employment), OSI 2009, www.soros.org; J. S. Fetzer. and J.C. Soper (2005), *Muslims and the State in Britain, France and Germany*, Cambridge, Cambridge University Press, p. 228; D. Bouzar (2008), *Allah, mon boss et moi*, Paris, Editions Dynamique Diversité, p. 200.

Fourth, church and state scholars occasionally look at employment issues, as part of the general chapter on autonomy of religious collectives, in particular with regard to established or more dominant Christian churches in Europe. The focus is thus on collective religious freedom. This literature is sometimes part of a collective effort to address identical questions from various national contexts, but unfortunately comparisons beyond juxta-positioning are rare.²³

Last, religion in the workplace is a preferred topic for multiculturalist and egalitarian political scientists who discuss the topic of accommodations and exemptions from apparently religiously neutral general laws.²⁴

There is ample American literature dealing with diversity and religious interests in society and the workplace.²⁵ Thus, not surprisingly, the American experience has provided inspiration or a point of comparison with Europe.²⁶

The mounting role of fundamental rights and non-discrimination is apparent in the private as well as in the religious workplace.²⁷ With the freedom of religion as the basis of both exemptions for individual religious adherents in the workplace and for the claims of churches and ethos-based organisations, publications dealing with freedom of religion treat individual and collectivity issues. This could be a fruitful strategy to “discover the roots of similarities and differences in judicial stances on religious freedom issues.”²⁸ For instance, Uitz provides a good overview of European human rights and constitutional case law on freedom of religion as an individual right as well as the rights of religious communities and associations (mainly religious instruction).²⁹

Vickers’ highly relevant and informative *Religious Freedom, Religious Discrimination and the Workplace*,³⁰ an important scholarly addition to our area of research, looks at the extent that “religious interests”³¹ are protected in the workplace, and in particular the relations between the freedom of religion and the right not to be discriminated against on grounds of religion both by secular employers and religious groups. The author looks at the European Convention on Human Rights, the UK’s Employment Equality (Religion and Belief) Regulations 2003, and brings in comparative perspectives from the US, Canada and the rest of Europe in the penultimate chapter. She also develops a proportionality framework for providing a measure of protection for religious interest, which comes

²³ For example, Caparros, E. (2002), introduction article in Caparros, E. & Christians, L.L (eds.), *Religion in Comparative Law at the Dawn of 21st Century*. (15th Congress of the International Academy of Comparative Law), Bruylant, p. 500.

²⁴ For example, Barry, B., supra; A. McColgan, infra; B. Parekh (2000), *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, Harvard University Press; Paul Kelly, ed. (2002), *Multiculturalism Reconsidered*, Polity Press.

²⁵ Wolf, M., B. Friedman and D. Sutherland (1998), *Religion in the Workplace: A Comprehensive Guide to Legal Rights and Responsibilities*, Chicago, American Bar Association, p. 288.

²⁶ See bibliography. On the other hand, Americans have also looked at European experiences and management of diversity: J.S. Fetzer and J.C. Soper, supra.

²⁷ Torfs, R. (1995), *A Healthy Rivalry: Human Rights in the Church*, Leuven, Peeters Press/W.B. Eerdmans, p. 125; J.D. Van Der Vyver & J. Witte, Jr. (eds.) (1996), *Religious human rights in global perspective: legal perspectives*, The Hague: Nijhoff p. 670.

²⁸ *Idem*.

²⁹ Uitz, R. (2007), *Freedom of Religion in European Constitutional and Conventional Case-law* (Series: Europeans and Their Rights) Council of Europe Publishing, chapter 9.

³⁰ Vickers, L. (2008), *Religious Freedom, Religious Discrimination and the Workplace*, Oxford, Hart Publishing, p. 240.

³¹ Vickers (at p. 29) prefers the term “religious interests” over “religious rights”, because it “avoids the suggestion that the right exists in an absolute sense, reflecting the fact that the rights are operating in the limited sphere of the workplace.”

into conflict with competing interests such as the economic freedom of the employer and the interests of co-workers.³²

However, there are important conceptual differences between the varied strands of literature, which is not surprising since it treats such wide-ranging issues as working time or dress code accommodations for individual religious employees³³ and the employment status of clergy.³⁴ In particular, the public law background of church-state scholars can be contrasted with the private law background of employment discrimination scholars.³⁵ Simplified, the first – often looking at the established institutions and practices of Christian churches and Faith-based organisations – are frequently staunch defenders of the autonomy of collectivities based on constitutional church-state arguments and the principle of non-intervention in internal affairs of the Church. The latter face a more unsettled area of the law which seeks to address the problematic integration, socio-economic status, and confronting practices (and the link between these!) of new migrant groups and European Muslims in particular, and where the EU is emerging as an important actor. While the law and religion scholar can appear *in the defense of established prerogatives*, individual religious rights scholars tend to *push for better accommodations* for minorities.

Tensions between individual employees' protection of religious rights and collective organisations' prerogative exemptions of employment law are clear. For example, it has been argued that US government regulations fail to protect religious employees from discrimination in the secular workplace while providing religious collectives wide managerial prerogatives as employers.³⁶

3.2 Challenges to the special status of religion and the problematic concept of group rights

Certain underlying premises of our proposed research are contentious and have been fiercely challenged. In our research proposal, we state that we want to set up an inventory of 'good practices' with regard to exemptions on the basis of religious claims. Our assumption is that religion merits protection in the workplace and that certain exemptions from generally applicable laws are warranted because of the importance of religious identity and to achieve more substantial equal opportunities. Still, we must acknowledge that both the "specialty claim of religion"³⁷ and the concept of group rights and exemptions from generally applicable laws have been criticized, i.e. from gender and liberal perspectives.³⁸

³² Vickers, p. 54 et seq.

³³ For instance, Skeje, H., "Headscarves in Schools: European Comparisons," in Loenen, M. L. P. and J.E. Goldschmidt, (eds.) (2007), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, Antwerp/Oxford: Intersentia, pp. 129-165 (pp. 139-141 on hijab in the workplace);

³⁴ European Consortium For Church-State Research, supra (1); J. Duddington, "God, Caesar and the employment rights of ministers of religion," *Law & Just.* 2007, pp. 129-159; J. Duddington, Conference paper supra; J. Rivers, Conference paper, supra.

³⁵ Marshall, W.P. (2000), "Religion In The Workplace: Proceedings of The 2000 Annual Meeting of The Association of American Law Schools Section on Law And Religion," 4 *Employee Rts. & Emp. Pol'y J.*, p. 87

³⁶ Gregory, D. L. (1992), "Government Regulation Of Religion Through Labor And Employment Discrimination Laws," 22 *Stetson L. Rev.* 27, p. 28.

³⁷ Bedi, S. (2007), "What is so Special About Religion? The Dilemma of the Religious Exemption", 15 *Journal of Political Philosophy*, p. 235.

³⁸ Okin, S.M. (1999), *Is Multiculturalism Bad for Women?*, Princeton University Press, p. 146 pp.; B. Barry, supra.

There is no agreement as to what extent a liberal democratic state should accommodate the religious practices of individuals and collectivities.³⁹ For instance, McColgan has argued that it is a mistake to protect religion and belief in a similar way as sex, race, sexual orientation and disability, that this is not required by the European Convention on Human Rights and not justified by any special quality of religion. Rather, accommodation of certain ‘religious’ practices or beliefs will perpetuate practices and beliefs problematic on equality and other grounds.⁴⁰ Liberal egalitarian Barry, in his *Culture and Equality*,⁴¹ addressed exemptions from liberal laws for religious individuals and groups. He argues that accommodating culture and religion excludes other liberal values and actually bolsters discrimination and injustice. He would, however, allow for certain exemptions on pragmatic grounds. Feminist Okin in 1999 pointed to the fact that claims of religious minorities can clash with the norm of equality between sexes, which has been achieved to a higher level in Western liberal societies than in the often patriarchal cultures that claim special rights. She notes that culture-based claims of immigrant groups rarely involve non-gender-related claims but mainly examples of gender oppression and inequality, thereby challenging Kymlicka’s plea for group rights.⁴²

American moral theorist Hicks, in his *Religion and the Workplace: Pluralism, Spirituality, Leadership*, develops a moral framework “to transform workplaces that are characterized by religious diversity into workplaces governed by the spirit of respectful pluralism.” This would allow employees within certain restraints to express their religious and other commitments in the workplace and avoids undue preference or prioritization of certain religious traditions.⁴³ The guiding principle of his model is the presumption of inclusion,⁴⁴ which is also prominent in the RELIGARE project.

These concerns can help us reformulate our working hypothesis. Religion and other convictions are but one element in a complex net of interests – such as gender equality and tolerance – that play out in the workplace. Claims for exemptions because of religious interests frequently seem to conflict with the freedom of enterprise of the employer and other interests of co-workers, but this is not necessarily always the case. Courts are only called upon to second-guess the often unguided actions of the employers caught between “the rock of a religious discrimination claim and the hard place of a claim on other protected grounds.”⁴⁵ Arguably the case law has not been able to provide clear direction and RELIGARE’s role could be to add to the understanding and legal certainty by facilitating the flow of information on decisions in case of (perceived) conflict and to identify ‘good practices’ that facilitate a “respectful (and sustainable) pluralism” in the context of a diverse European workforce.⁴⁶

³⁹ Brierton, T.D. (1991), “An Unjustified Hostility toward Religion in the Workplace,” 34 *Cath. Law*, 289.

⁴⁰ McColgan, A. (2009), “Class Wars? Religion And (In)Equality In The Workplace,” 38 *Indus. L.J.* 1.

⁴¹ B. Barry, *supra*.

⁴² S.M. Okin, *supra*.

⁴³ Hicks, D.A. (2003), *Religion And The Workplace: Pluralism, Spirituality, Leadership*, Cambridge University Press, p. 159; Hicks argues that Rawls’ liberal concept of public reason has to be extended into the workplace, since corporations as “major institutions of American public life” have “tremendous public power and the capacity to influence employees’ lives.” to understand the workplace as being part to the public sphere or at least a “quasi-public” entity, that may be measured in terms of public reason (A. Seifert (2004), “Respectful Religious Pluralism In The Workplace, Book Review of Douglas A. Hicks, *Religion and the Workplace: Pluralism, Spirituality, Leadership*,” 25 *Comp. Lab. L. & Pol’y J.* 463)

⁴⁴ Seifert, A., *supra*

⁴⁵ McColgan, A, *supra*

⁴⁶ It must be noted that national employers in search of guidance on how to deal with religion in the workplace have also organized themselves. For example, The UK Employer’s Forum on Belief (EFB) is an independent network of large employers developed by employers themselves to share good practices in religion, belief and non-belief in order to make the

3.3 Individual religious rights: Religion as a high-profile workplace issue

Europe must find ways to offer real opportunities for worthy and meaningful employment to its (new) citizens who hold beliefs different from the majority. These citizens often belong to minority groups which challenge the legal system of the receiving states, and in particular various perceived cornerstones of labour laws and practices. Like a number of family law institutions, labour law in various ways is appended to Christian roots. A prime example is the European work calendar which (generally) leaves employees free on Sundays and holidays such as Christmas and Easter.⁴⁷ It is obvious that adhering to this calendar creates more hardships for individuals of minority or new European faiths, and will result in proportionately more requests for exemptions and legal challenges. When the presuppositions of longstanding institutions are questioned and challenged by newcomers, the defensive response can be instinctive. There may be good reasons to base societal organisation and timelines on majority practices, if it is acknowledged that treating different cases the same stands in the way of integration and substantive equality. In the absence of adequate conciliation, this situation holds the risk of escalation.

Under this cluster, as previously stated, we looked at non-discrimination law, reasonable adjustments, conscientious objections and positive action; techniques that allow for exemptions or other ‘special treatment’ in the workplace on the basis of religion on a case by case basis.

It is clear that there already exists a magnitude of materials on non-discrimination⁴⁸ (both national and European): “the new two equality directives based on Article 13 EC in 2000 have spawned a wealth of academic comment in a comparatively short period.”⁴⁹ EU publications⁵⁰ and European Network of Experts in the non-discrimination field have certainly played a role in this. As stated, religion in the workplace issues present a variety of conflicts between competing interests, without there being an (overt) hierarchy between interests. The relative inequality between the various protective grounds in the Directives has given rise to interesting debates.⁵¹ Waddington and Bell have analyzed the different treatment accorded to the various grounds of discrimination under European law, and without suggesting a hierarchy argue that there are good reasons to adopt different approaches in order to promote equality for various groups. They note the different treatment of women during maternity, people with disabilities as opposed to followers of (minority) religions and younger and older

most of their diverse workforces. The forum offers employers practical guidance and shares good practice around issues such as dress codes, religious holidays, the inter-relationship between religious belief and other diversity strands and conflict in the workplace. Also, religion and workplace relations are a focal point for HR managers and their professional organisations. See practical publications catering to employers facing diversity issues amongst their workforce: Ius Laboris, Global Human Resources Lawyers, *Religious Discrimination in the Workplace*, Ius Laboris Publications, 2010, p. 220, www.iuslaboris.com; A.P. Brief (ed.) (2008), *Diversity at work*, Cambridge companions to management Series, Cambridge : Cambridge University Press, p. 365.

⁴⁷ Lünemann, K. D., M.L.P. Loenen and A.G. Veldman (eds.) (1999), *De onzichtbare standaard in het recht. In- en uitsluiting van vrouwen, etnische minderheden en homoseksuelen in het familierecht, arbeidsrecht en strafrecht*, Deventer: Gouda Quint p. 175.

⁴⁸ As a new equality directive is on its way so we can expect the literature to take off again.

⁴⁹ Bell, M. and L. Waddington (2003), “Reflecting on inequalities in European equality law,” 28 *European Law Rev.* 349, and references cited

⁵⁰ Vickers, L. (2007), *Religion and Belief in Employment – The EU Law*, European Network of Legal Experts in the non-discrimination field, European Commission, p. 69.

⁵¹ For example, Waddington, L.B. and M. Bell, supra; L. Waddington and A. Hendricks (2002), “The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation,” 18/3 *IJCLIR* 403.

employees.⁵² They state that encouraging religious belief and establishing a moral code is also good for society, similar to the general societal value of reproduction, but that the difference in treatment could lie in the ongoing need for religious-based accommodations as opposed to temporal maternity-based accommodations and differing levels of support for women's rights as opposed to accommodation rights for religious employees in Europe.⁵³

The emphasis in Europe on non-discrimination has (re)ignited the debate on the concept and meaning of the different concepts of equality. It is clear that there are inherent limitations to the European anti-discrimination approach based on the individual justice model.⁵⁴ This model (synonymous with formal equality) seeks to prevent individuals from unfair treatment on the basis of characteristics considered irrelevant in getting the job done, e.g. race or sex, so that decisions can be made on the basis of merits. Procedural techniques, such as sharing of the burden of proof and making equality bodies competent to litigate on behalf of the victims, have been devised to overcome hurdles.

Still, this model is regarded as unfit to address structural or institutional forms of discrimination. The substantive equality or group justice model,⁵⁵ on the other hand, recognizes unequal starting points and necessitates some type of compensatory measures towards a genuine equality of opportunity. Phillips argues convincingly that equality of opportunity is but a "chimera" if it does not generate (more) equality of outcome in the workplace.⁵⁶ "We can judge, that is, the extent of the equality by checking on the results, and should be reluctant to credit an initial equality of opportunity if the outcomes prove so dissimilar."⁵⁷ There is thus a need to focus on structural constraints for advancement of certain groups in addition to tackling overt discrimination. But there are problems here as well: positive action programs only work for certain groups and the stress on group membership undermines efforts to address multiple discriminations.⁵⁸

Under EU law there is currently no right to reasonable adjustments or accommodations for religious beliefs and practices in the workplace. In the literature on this topic, scholars have taken a large interest in the developments in the US⁵⁹ and Canada. In the US and Canada, various workplace issues such as dress code, prayer time and work duties incompatible with religious beliefs or practices are frequently addressed under this framework (although there is also an elaborate nondiscrimination framework). The question whether other concepts such as indirect discrimination or conscientious objections in Europe play the same role as reasonable accommodations across the Atlantic have received various answers. For instance, some authors regard reasonable accommodations as a sui

⁵² Idem. At p. 362.

⁵³ Idem. At pp. 360-361.

⁵⁴ Idem. At pp. 351-353.

⁵⁵ Idem. Besides these two models, other models have been suggested: e.g. equality as participation

⁵⁶ Phillips, A. (2004), "Defending equality of outcome", *Journal of Political Philosophy*, 12 (1), pp.1-19.

⁵⁷ Idem. At p. 9

⁵⁸ Waddington, L.B. and M. Bell, *supra*.

⁵⁹ In the US, Title VII of the Civil Rights Act was amended in 1972 to include reasonable accommodations for religion; employers with more than 15 employees have the duty to in good faith try to resolve the conflict between the employee's religious needs and job requirements unless that would cause an undue hardship to his business. Undue hardship has been interpreted by the US Supreme Court to mean anything more than a de minimis cost or organisational burden. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). Reasonable accommodations for persons with disabilities were later introduced in the Americans with Disabilities Act (ADA), which influenced the EU to adopt a similar measure in the Employment Equality Directive.

generis form of nondiscrimination while others claim it is the positively formulated corollary of the concept of indirect discrimination.⁶⁰

It could be argued that the concept of conscientious objection – which has its most fruitful function in the military context – has played or could play a role similar to reasonable accommodation in the US and Canada.⁶¹ Perhaps this concept could be revitalized to meet new needs of diversity in the workplace. Publications in this area, however, are scarce.⁶²

Positive action is allowed under the Employment Equality Directive, within limited scope:⁶³ Arguably, positive actions are still controversial, misunderstood and underutilized as a measure to improve the conditions of minority groups.⁶⁴ An EU publication on positive measures has looked at the experiences of Canada, the US and South-Africa.⁶⁵ Also, individual countries have invested in reports on prospects of positive measures:⁶⁶ these reports show that the Netherlands and Ireland have the most to offer when it comes to experiences with positive action for religious groups. In Europe, there is also a debate on ethnic monitoring,⁶⁷ because several countries do not allow for data to be collected on the basis of religion, and that data arguably would be necessary to design (but also to evaluate ex post) policies and measures.

Instead of litigating disputes through the courts, employers and employees may choose to conduct informal negotiations, mediation or arbitration as an alternative. Potential advantages of ADR may include lower cost, confidentiality, and greater control over outcomes. The literature on conflict management and alternative dispute resolution of religious conflicts in the workplace is rare, although we know ADR does take place in practice.⁶⁸

⁶⁰ Vickers, L., Debate reasonable accommodation is part of concept of discrimination (Jolls) or is sui generis (Waddington & Hendricks), p. 29.

⁶¹ Bosset, P. and M.-Cl. Foblets (2009), “Accommodating diversity in Quebec and Europe: Different legal concepts, similar results?” in *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society, Trends in Social Cohesion, No.21*, Council of Europe Publishing, pp. 37-65.

⁶² European Consortium for Church-State Research, supra (2).

⁶³ Article 7.1 Employment Equality Directive; D. Cuypers and C. Van Vyve, “De Criteria voor Positieve Actie in de Rechtspraak van de Hoogste Rechtscolleges,” in C. Bayart, S. Sottiaux, S. Van Drooghenbroeck (2010), *Actualités du droit de la lutte contre discrimination/ Actuele topics discriminatierecht*, Die keure/La charte, Bruges/Brussels, pp. 231-273.

⁶⁴ De Vos, M. “Positive Action and EC Discrimination Law: Concepts and Acquis,” in R. Blanpain (ed.) (2008), *Diversity, equality and integration: beyond the law: a comparative study*, Brugge : Vanden Broele, p. 51.

⁶⁵ European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (2009), *International perspectives on positive action measures. A comparative analysis in the European Union, Canada, the United States and South Africa*, EU publications EUR-OP, p. 72, (<http://ec.europa.eu/social/main.jsp?pager.offset=30&catId=738&langId=en>).

⁶⁶ UK report: Dhami, R.S., J. Squires, J. and T. Modood (2006), *Developing positive action policies: learning from the experiences of Europe and North America, Corporate Document Services for the Great Britain Dept. for Work and Pensions*, Leeds, p. 148, (<http://research.dwp.gov.uk/asd/asd5/rports2005-2006/rrep406.pdf>).

⁶⁷ Ringelheim, J. and O. De Schutter (2010), *Ethnic monitoring. The processing of racial and ethnic data in anti-discrimination policies: reconciling the promotion of equality with privacy rights*, Bruylant - UCL publications, p.190.

⁶⁸ For example, UK’s ACAS (Advisory, Conciliation and Arbitration Service) a non-departmental body funded by the UK Department for Business Innovation & Skills (BIS) seeks to improve organisations and working life through better employment relations, also offers conciliation, mediation and arbitration services to employees and employers; perhaps the dearth of materials can be explained by confidentiality concerns do not allow for scientific access to procedures and decisions, thereby discouraging research and dissemination, similar to what seems to be the case for WP3 on Religious Diversity and the Family. See Rohe, M., “Alternative Dispute Resolution (ADR) in Europe under the Auspices of religious Norms,” London RELIGARE paper, 15.06.10, p. 1

3.4 Churches and faith-based organisations: In defense of autonomy

Church and state is the subject of a large body of scholarship that stresses the historical origins and developments in the relationship between state and religious powers within particular legal systems. Popular topics include the status of established churches, legal recognition of religions, legal status of churches and associated organisations, financial state support for churches, religious judicial mechanisms, and the cross-connections between state systems and religious legal systems (e.g. *Codex Iuris Canonici*). The issues of exemptions from general labour laws and the employment status of clergy⁶⁹ are at times addressed as they relate to the internal affairs of the church and thus fall under church autonomy. A variety of church-state models is present amongst the RELIGARE countries⁷⁰ and scholars stress that the topic can only be understood in its historical context and considering the complexity of related issues (e.g. the legal status of churches can make a big difference for employment litigation initiated by staff). The focus is on traditional European churches, although in certain jurisdictions the role of new European religious collectives (e.g. mosques and Islamic organisations) is also considered.⁷¹ However, the case of Islam would seem to present a challenge as liberal or western distinctions between the public and private sphere of religion often cause problems.⁷²

“Employers who believe that religious beliefs cannot be separated from secular activities, and who therefore see all of their employment policies and practices as an extension of their religious beliefs, present a particular challenge.”⁷³ In recent years, employees have challenged these employers under anti-discrimination law and other state laws, and religious employers have argued that applying those laws to them would be contrary to the free exercise of the employers' religious beliefs.⁷⁴

As far as the employment status of staff is concerned (the main topic in this cluster), the level of autonomy of staff depends on the function and position of staff. The question whether an employment contract is considered to exist does not receive the same answer in different countries. The consequences of characterising a relationship as an employment relationship can be considerable both for the ‘employee’ who can benefit from protection under state law (social security, nondiscrimination, abrupt dismissal) and for the religious ‘employer’ whose actions (and resources) can be curtailed considerably. In certain countries, this area of the law, which can be regarded as ‘fuzzy’, is undergoing important jurisdictional developments.⁷⁵ Generally, the application of secular labour and social security rules is a matter of degree, and distinctions are made between various

⁶⁹ Petchey, P., “Ministers of religion and employment rights: an examination of the issues,” *Ecc. L.J.* 2003, 7(33), pp. 157-175

⁷⁰ The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations.

⁷¹ Notably the Netherlands (where there is case law on the employment status of imams); the UK (Hindu priests).

⁷² March, A.F., “Are Secularism and Neutrality Attractive to Religious Minorities? Islamic Discussions of Western Secularism in the “Jurisprudence Of Muslim Minorities” (Fiqh Al-Aqalliyat) Discourse,” 30 *Cordozo Law Review* 6 (2821)

⁷³ Underkuffler, L.S. (1989), “Discrimination on the Basis of Religion: an Examination of Attempted Value Neutrality in Employment,” 30 *Wm. & Mary L. Rev.* 581, pp. 581-582.

⁷⁴ *Idem*.

⁷⁵ For example, in the UK: *Percy v Church of Scotland Board of National Mission* (2005) UKHL 73 and *New Testament Church of God v Stewart* (2007) IRLR 178.

categories of staff: 1. clergy working in the church; 2. clergy working outside of the church (in fact this does not involve church autonomy but is related); 3. pastoral workers in the church; and 4. other lay staff with general non-spiritual duties. Developments in various European countries are generally towards greater recognition of the existence of ‘employment relations’ subject to state law (and not regarding this as contradictory to the principle of church autonomy).

Also, extensive commentary is available on the issue of permissible (religious) discrimination by traditional religious institutions and organisations.⁷⁶

The issue of the extent of exemption from labour law will depend on the organic or functional view of the religious workplace.⁷⁷ Under the organic view, one sees any work for a religious ethos employer within the religious sphere, making it acceptable to impose strict religious requirements on all church staff. On the other hand, under a functional approach a distinction is made between staff who officiate at religious ceremonies and other staff who are outside the ‘religious sphere.’ Since the functional view looks at *functions* that are being fulfilled by various church staff, and the necessity of complying with religious or other rules are considered in that light, a much smaller range of jobs within the religious workplace are within the ‘religious sphere.’ Thus the church is not allowed to require a gardener (as opposed to a priest) to be of the same religious adherence since religion could have no bearing on his job function. If the workplace is considered organic in nature, it is considered that some employers view work as a form of worship, and “even the lowliest of workers can be fulfilling a religious function is well-established in Christian teachings”.⁷⁸

The issue of workplace spirituality also needs to be mentioned here as there is a growing literature on the spiritual/religious aspects in management and leadership studies where the focus is more on spirituality as a tool to increase efficiency, profitability and general workplace contentment. This seems less connected with the legal rights of individuals and shows more links with religious employers as the spiritual values are top-down.⁷⁹

Conclusion: Where to go from here?

Generally, it cannot be said there is an abundance of materials with regard to religion and religious symbols in the (private) workplace context. The field is perhaps just starting to blossom, receiving more attention thanks to a number of relatively new works (e.g. that of Vickers), but in general Europe is lagging behind the US in this field, where religion seems to have been debated in the public arena and the workplace for much longer.

⁷⁶ Under EU Directive 2000/78, in very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. This applies to churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, who can also require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.

⁷⁷ Vickers, L. and A. Esau (1993), “‘Islands of Exclusivity’: Religious Organisations and Employment Discrimination,” 33 *Univ. British Columbia L.R.* 719, pp. 74-75.

⁷⁸ L. Vickers, p. 75.

⁷⁹ Biberman, J. and L. Tischler (eds.) (2008), *Spirituality in business : theory, practice, and future directions*, New York : Palgrave Macmillan, p. 240; D.A. Hicks, *supra*; L. Lambert (1999), *Spirituality, Inc.: religion in the American workplace*, 2009 New York University Press, p. 216; I. Mitroff and E.A. Denton, *A Spiritual Audit of Corporate America: A Hard Look at Spirituality, Religion, and Values in the Workplace*, Jossey-Bass San Francisco, (Warren Bennis signature series), p. 259.

In the area of individual religious rights in the workplace, much attention has been paid to anti-discrimination, with reasonable accommodation and positive action following some way behind. But what seems to be missing is an approach that combines these techniques to come up with *a model* for adequate protection of religious interest in the workplace.⁸⁰ In the area of labour law collective religious rights, comparative literature is relatively scarce and RELIGARE could fill a gap by focusing on detailed comparative analyses.

One important goal of RELIGARE is to identify ‘good practices’ and ‘successful arrangements’ that could serve as inspiration for the formulation of policy recommendations towards the competent authorities, be it the EU or the individual states or localities. This should be based on the sociological research but also on thorough comparative legal research. In January 2011, Work package 4 will convene a Symposium meeting on Religious Diversity and the European Workplace to concentrate and elaborate on some of the above discussions with legal scholars and social scientists from a number of European countries.

⁸⁰ For example, K. Henrard, “De Verhouding tussen de concepten redelijke aanpassing, indirect discriminatie en proportionaliteit,” in C. Bayart, S. Sottiaux and S. Van Drooghenbroeck (eds.) (2008), *Les Nouvelles Lois luttant contre la discrimination/De Nieuwe Federale Antidiscriminatiewetten*, Die Keure/La charte, Brussels, pp. 257-295.

Project Identity

Title:	RELIGARE - Religious Diversity and Secular Models in Europe. Innovative Approaches to Law and Policy
Funding Scheme:	Collaborative Project (CP): small or medium-scale focused research project
Coordinator:	K.U. Leuven (Faculties of Law and Canon Law), Prof. Marie-Claire Foblets
Project Managers:	Dr. Jogchum Vrielink Dr. Myriam Witvrouw
Duration:	1 February 2010 – 31 January 2013 (36 months)
Contact e-mail:	info@religareproject.eu
Short Description:	The RELIGARE project is about religions, belonging, beliefs and secularism. It examines the current realities in Europe, including the legal rules protecting or limiting (constraining) the experiences of religious or other belief-based communities. Where the practices of communities or individuals do not conform to State law requirements, or where communities turn to their own legal regimes or tribunals, the reasons behind these developments need to be understood.
Partners:	13 (10 countries)
Consortium:	Centre for European Policy Studies (CEPS), Belgium Université Catholique de Louvain (UCL), Belgium International Center for Minority Studies and Intercultural Relations (IMIR), Bulgaria University of Copenhagen (UCPH), Denmark Centre National de la Recherche Scientifique: Politique, religion, institutions et sociétés: mutations européennes (PRISME), France Universität Erlangen-Nürnberg (UEN), Germany Università Degli Studi di Milano (UNIMI), Italy Vrije Universiteit Amsterdam (VUA), The Netherlands Universiteit van Amsterdam (UvA), The Netherlands Universidad Complutense Madrid (UCM), Spain Middle East Technical University (METU), Turkey Queen Mary, University of London (QMUL), U.K.
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