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Religious Time Accommodation Claims and Non-Discrimination in the Workplace

Portuguese constitutional case law in comparative perspective

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About this paper

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Religious Time Accommodation Claims and Non-Discrimination in the Workplace
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Patrícia Jerónimo[1]

1. Introduction

Portuguese courts are relative newcomers to legal debates on the rights of religious minorities and the accommodation of religiously based claims. Religious diversity is only now becoming visible as a result of recent immigration, and Portugal's traditional Catholicism is largely naturalised as part of the cultural landscape. Religiously based claims are rare in the case law of Portuguese courts and Portugal has never been brought before the European Court of Human Rights (ECtHR) for breach of Article 9 of the European Convention on Human Rights (ECHR), either alone or in conjunction with Article 14. Two Constitutional Court judgments from 2014,[2] however, brought Portugal up to speed with the international and foreign case law on indirect discrimination and reasonable accommodation of religion in the workplace. The cases concerned the interpretation of Article 14 of the 2001 Religious Freedom Act,[3] which explicitly allows for leaves of absence from work, classes and exams for religious reasons. Two members of the Seventh-Day Adventist Church (a factory worker and a Public Prosecutor) had invoked Article 14 to request leave of absence from work between sunset on Friday and sunset on Saturday, but the judicial and administrative courts interpreted the provision literally and denied its applicability to the appellants' cases as they were claiming leave from shift work which had fixed entry and exit times and was therefore understood as not falling under the definition of 'flexible working hours' within the meaning of Article 14(1)(a). The Constitutional Court held that such a strict

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[2] Judgments No. 544/2014 and No. 545/2014, both from 15 July 2014. Both judgments were adopted by unanimity and by the same panel of Justices, albeit with different rapporteurs (Justice Maria José Rangel de Mesquita, the former, Justice Carlos Fernandes Cadilha, the latter), which explains the differences in length and level of detail between the two.

[3] Adopted by Law No. 16/2001, of 22 June 2001, last amended by Law No. 159-C/2015, of 30 December 2015. The relevant part of Article 14 reads: 1. Public servants and state agents, as well as employees with a work contract, are entitled to, at their request, suspend work on the weekly day of rest, on the days of the festivities and on the time periods that are prescribed by their religion, under the following conditions: (a) The work is rendered under the regime of flexible working hours; (b) They are members of a registered church or religious denomination which has submitted to the competent member of the government, in the previous year, information on the days or rest, festivities and time periods for the current year; (c) There is full compensation for the period during which work is suspended.

interpretation would render Article 14 unconstitutional for breach of Article 41 of the Constitution[4] and issued an interpretative ruling of Article 14(1)(a) so that it is understood to also comprise shift work.

These judgments are arguably the highest point in the Portuguese Constitutional Court's 'multicultural jurisprudence,' to borrow a phrase from Marie-Claire Foblets and Alison Dundes Renteln.[5] For one, the Court sided with religious freedom, affirming the rights of religious minorities against a formalistic and restrictive interpretation of the statutory framework. Also, the Court engaged critically with different external influences, openly distancing itself from the former European Commission of Human Rights and the ECtHR case law on religious time, while seemingly endorsing the 'reasonable accommodation' rationale developed by the US and Canadian courts. This chapter discusses the Constitutional Court's reasoning against the backdrop of academic debates on indirect discrimination and reasonable accommodation of religion in the workplace, and by comparison with judgements by international and domestic courts in similar cases.

2. Working hours, religious holidays and indirect discrimination

None of the appellants in the cases before the Portuguese Constitutional Court argued that the laws governing working hours in the private and public sectors, which codify the Sunday rule, are as such discriminatory. They noted that Catholics are placed at a comparative advantage but seemed satisfied that an exemption such as that of Article 14 of the Religious Freedom Act, if properly drafted and interpreted, would provide the necessary accommodation of their needs.[6]

It is by now well established that states' legislatures are at liberty to choose the weekly day of rest and public holidays to reflect the cultural preferences of the majority. Under international law, states have not so much a prerogative as an obligation to make the weekly rest period coincide, wherever possible, with the day of the week established as a day of rest by the traditions or customs of the country.[7] As the European Commission of Human Rights matter-of-factly put it, in *X. v. the United Kingdom*, 'in most countries, only the religious holidays of the majority of the population are celebrated as public holidays.'[8] In fact, most national labour laws in Europe are premised on the Christian calendar, with observance of Christian holidays such as Christmas and Easter, and the establishment of Sunday as the official day of rest. Strict Sunday laws for commerce have become less common over the years, mostly

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[4] Under the heading 'Freedom of conscience, religion and worship', Article 41 of the Portuguese Constitution reads: 1. Freedom of conscience, religion and worship is inviolable. 2. No one may be persecuted, deprived of rights or exempted from civic obligations or duties because of his beliefs or religious observance. 3. No authority may question anyone in relation to his beliefs or religious observance, except to gather statistical data that cannot be individually identified, and no one may be hindered in any way for refusing to answer. 4. Churches and other religious communities are separate from the state and are free to organise themselves and to exercise their functions and form of worship. 5. The freedom to teach any religion within the ambit of the religious belief in question and to use the religion's own media for the pursuit of its activities is guaranteed. 6. The right to be a conscientious objector, as laid down by law, is guaranteed.

[5] See Marie-Claire Foblets & Alison Dundes Renteln, *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*, Oxford and Portland Oregon, Hart Publishing, 2009. For a detailed analysis of the Portuguese Constitutional Court's case law involving ethnic and religious minorities, see Patrícia Jerónimo, 'A jurisprudência multicultural do Tribunal Constitucional português: Mapeamento e análise crítica' [The multicultural jurisprudence of the Portuguese Constitutional Court: Inventory and critical assessment], *JusGov Research Paper Series*, SSRN, No. 2022-15.

[6] Both applicants started by relying on Article 14 of the Religious Freedom Act when requesting leave from their employers. It was the employers' interpretation of the cumulative requirements in Article 14(1) that led them to argue, before the judicial and administrative courts and later before the Constitutional Court, that Article 14(1) was unconstitutional for disproportionately restricting their freedom to manifest their religion as protected by Article 41 of the Constitution.

[7] Article 6(3) of ILO Convention No. 106, Weekly Rest (Commerce and Offices), of 1957, reads: 'The weekly rest period shall, wherever possible, coincide with the day of the week established as a day of rest by the traditions or customs of the country or district.' A similar provision is also found in Article 2(3) of ILO Convention No. 14, Weekly Rest (Industry) Convention, of 1921. At European level, Article 2(5) of the European Social Charter, of 1961, similarly requires states that they 'ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest.' States are also required, however, to respect the traditions and customs of religious minorities, as far as possible. Article 6(4) of ILO Convention No. 106.

[8] Application No. 8160/78, decision of 12 March 1981, para 28.

for economic reasons,[9] but seem to be making a comeback, as suggested by recent legal developments in Croatia and Poland.[10]

Domestic courts in Europe – like their US counterparts[11] – tend to downplay Sunday's and mainstream Christian holidays' religious connotations, finding that these festivities have, over time, acquired a secular (social and cultural) meaning.[12] The Spanish Constitutional Court, for example, in a judgment from 1985, held that the weekly day of rest is a secular institution and that the preference for Sunday is justified by respect for tradition. The Court acknowledged that the choice of Sunday as day of rest has religious origins – for Spaniards as for other 'peoples of Christian civilization' –, but rejected the claim that the institution of a day of rest, as enshrined in the Labour Code, was markedly religious, since the general Sunday rule could be set aside by provisions in individual or collective work contracts.[13]

In its judgment No. 544/2014, the Portuguese Constitutional Court cited passages from the 1985 Spanish Constitutional Court judgment but concluded that its 'perspective' was not suited to address the matter at hand. The Portuguese Constitutional Court admitted that the choice of Sunday as the official weekly day of rest is not a 'decisive' aspect when assessing the regime set by Article 14 of the Religious Freedom Act, since the establishment of a uniform day of rest is designed to protect other fundamental rights, i.e., the right to rest recognised by Article 59(1)(d) of the Constitution.[14] The Court added, however, that the choice of Sunday is nevertheless 'relevant,' since the day of rest is made to coincide with a day 'dedicated to religious worship' in the Catholic religion. The Court also noted that the religious public holidays in Portugal are holy days for the majority religion and that one of the public holidays' stated purposes is to allow workers to take part in religious festivities.[15] According to the Court, it is against this background that it is possible to understand the purpose of Article 14 of the Religious Freedom Act and its importance for the exercise of religious freedom in a 'plural community.' While generally applicable to all believers, irrespective of religion, the exemption carved out by Article 14 could only stem from a concern for religious minorities and their enjoyment of religious time in accordance with the precepts of their religion.[16]

The Portuguese Constitutional Court is therefore not of the opinion that the choice of the day of rest is *neutral*. The Court does not use the phrase 'indirect discrimination,' but hints at the disparate impact that the Sunday rule may have for religious minorities and at the importance of safeguarding religious minorities' needs through exemptions such as that which is established by Article 14 of the Religious Freedom Act.

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[9] In Portugal, for example, Decree-Law No. 10/2015, of 16 January 2015, lifted all restrictions to opening times for retail establishments, restaurants, bars, dance halls and places of entertainment and artistic performances, which was justified with the need to foster employment, improve productivity, respond to consumers' needs and adapt the market to the rise in tourism. On the overall trend, see Ruth Gavison and Nahshon Perez, 'Days of rest in multicultural societies: private, public, separate?', in Peter Cane, Carolyn Evans and Zoe Robinson (eds.), *Constituting Religion: Law, Society and Faith in the 21st Century*, 2009, pp. 202-203.

[10] In 2022, the European Sunday Alliance called again on EU leaders to establish Sunday as the common EU-wide day of rest, to promote work-life balance and healthy, safe and well-adapted work environments. Information available at https://www.cesi.org/posts/statement-of-the-european-sunday-alliance-on-the-annual-european-day-for-a-work-free-sunday-on-march-3-2022/ [03.06.2022].

[11] In 1961, the US Supreme Court famously held that Sunday Closing Laws were of a 'secular rather than a religious character,' as they were primarily designed to provide a uniform day of rest for all citizens. *McGowan et al. v. Maryland*, 366 U.S. 420, judgment of 29 May 1961.

[12] See Alejandro Saiz Arnaiz *et al.*, *Religious Practice and Observance in the EU Member States*, study commissioned by the European Parliament Directorate-General for Internal Policies, 2013, pp. 77-78.

[13] Spanish Constitutional Court judgment No. 19/1985, of 13 February 1985.

[14] The Court dismissed the relevance of the right to rest for the assessment of Article 14 of the Religious Freedom Act, since one of the requirements it sets is that workers compensate the work period in full. Citing a previous judgment – No. 602/13, of 20 September 2013 –, the Court also noted that the religious holidays are not designed to ensure the workers' right to rest, but to allow them to take part in religious festivities.

[15] The Portuguese Labour Code, adopted by Law No. 7/2009, of 12 February 2009 (last amended by Law No. 1/2022, of 3 January 2022), establishes Sunday as the default weekly day of rest, with a few exceptions (Article 232), and 13 mandatory holidays, of which eight are holy days for the Catholics – 1 January, Good Friday, Easter Sunday, Corpus Christi, 15 August, All Saints, 8 and 25 December (Article 234). Collective agreements and individual work contracts are not allowed to establish different holidays [Article 236(2)], but may add Carnival Tuesday (a ninth Catholic holiday) and the municipal holiday to the list [Article 235(1)].

[16] Some claim that the 2001 Religious Freedom Act's sole purpose was to protect religious minorities, since the state's relations with the Catholic Church were already governed by the Concordat with the Holy See and Article 58 of the Religious Freedom Act explicitly safeguarded the rules applicable to the Catholic Church. See José Joaquim Almeida Lopes, 'Direito eclesiástico português do séc. XXI' [Portuguese ecclesiastical law of the XXI century], *Revista da Faculdade de Direito da Universidade do Porto*, year 5, 2008, pp. 197-202.

We would say that neutrality is an illusion.[17] In any case, even if we accept that the Sunday rule is, for all intents and purposes, religiously neutral (and therefore not directly discriminatory), its potential for indirect discrimination would arguably be unmistakable, as it unfairly disadvantages members of religious minorities.[18] International and domestic courts have, however, been reluctant to acknowledge it.

As noted earlier, in *X. v. the United Kingdom*, the former European Commission of Human Rights observed that only the religious holidays of the majority are celebrated as public holidays, but failed to conclude from it that members of minority religions are thereby placed at a particular disadvantage compared with members of the majority religion.[19] Similarly, in *Konttinen v. Finland*, the Commission noted that it was true that the Finish legislation on working hours provided that the weekly day of rest is usually Sunday, but added – again matter-of-factly – that this legislation did not contain provisions which would 'guarantee to members of a certain religious community any absolute right to have a particular day regarded as their holy day.'[20] The Strasbourg institutions have been glaringly unsympathetic to the plight of members of minority religions in their effort to reconcile their contractual obligations with their wish to observe days of rest and celebrate holidays and ceremonies in accordance with the precepts of their religion.[21] In *Kosteski v. The Former Yugoslav Republic of Macedonia*, the ECtHR held that 'there is no right as such under Article 9 to have leave from work for particular religious holidays.'[22] In *Konttinen v. Finland*, the Commission found that the applicant had not been dismissed because of his religious convictions but for having refused to respect his working hours, even though his refusal had been religiously motivated. In *Sessa v. Italy*, the ECtHR was not convinced that the refusal by the Italian judge to reschedule a court hearing so not to coincide with a Jewish holiday

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[17] On the counterfactual and elusive character of the ideal of neutrality, see Ioanna Tourkochoriti, 'Religious headscarves at work: What can the CJEU learn from the US?', 2017, draft provided by the author; on the impossibility of neutrality, see Annalisa Verza, *La Neutralità Impossibile. Uno Studio sulle Teorie Liberali Contemporanee*, Milan, Giuffrè Editore, 2000, pp. 215-220.

[18] In his 2018 report, the UN Special Rapporteur on Freedom of Religion and Belief, Ahmed Shaheed, gave the observance of days of rest as an example of 'hidden or indirect forms of discrimination.' *Report of the Special Rapporteur on Freedom of Religion and Belief*, A/HRC/37/49, 28 February 2018, para 61. See also Cécile Laborde, 'Egalitarian justice and religious exemptions', in Susanna Mancini and Michel Rosenfeld (eds.), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality*, Cambridge University Press, 2018, p. 122; Marie-Claire Foblets and Katie Alidadi, *Summary Report on the RELIGARE Project*, 2013, p. 12, available at https://cordis.europa.eu/docs/results/244635/final1-religare-final-publishable-report-nov-2013-word-version.pdf [08.12.2022].

[19] Curiously enough, the applicant had only invoked Article 9 and it was the Commission which decided to consider the application also under Article 14. The Commission concluded that there was no appearance of a violation of Article 14, since the applicant had neither individually nor as a member of his religious community been treated less favourably by the education authorities than individuals or groups of individuals placed in comparable situations (paras 24-29). Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive suggest that the Commission may have implicitly acknowledged that the challenged regulation had a different impact on an individual's freedom of religion depending on whether one belongs to the majority religion or to a minority one. This is, in our view, an overly benevolent take on the Commission's reasoning. See Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Reasonable accommodation for religious minorities: a promising concept for European antidiscrimination law?', *Maastricht Journal of European and Comparative Law*, Vol. 17, No. 2, 2010, p. 153.

[20] Application No. 24949/94, decision of 3 December 1996. For reasons that are not entirely clear, the Commission expressed uncertainty as to whether the applicant 'could be considered to be in a situation comparable to that of members of other religious communities', but, assuming that he could, found that he had not been treated differently in comparison with such members.

[21] A wish that corresponds to a dimension of the right to freedom of thought, conscience, religion or belief, according to Article 6(h) of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, of 1981. The UN Human Rights Committee, in its 1993 General Comment on Article 18 of the International Covenant on Civil and Political Rights, similarly included the observance of holidays and days of rest in the concept of 'worship'. *General Comment No. 22 (48) (art. 18)*, CCPR/C/21/Rev.1/Add.4, 27 September 1993, para 4.

[22] Application No. 55170/00, judgment of 13 April 2006, para 45. It should be noted, however, that this case did not concern the disparate impact of the Sunday rule. In fact, what was at stake was the enjoyment by the applicant of a public holiday established in Macedonia, where the Orthodox Church is the largest religious community, for the citizens of Muslim faith. The ECtHR did not dispute the state's legitimacy to establish an exemption for a minority religion. It simply found that, since the applicant was making a claim to a 'privilege or exemption' to which he was not qualified unless he was a member of the faith concerned, it was not unreasonable for the authorities to require some level of substantiation that he was actually of that faith (paras 39 and 46).

amounted to an interference with the applicant's freedom of religion.[23] To say that the protection for days of rest or holidays has been 'insubstantial'[24] is to put it mildly.

The ECtHR is no stranger to the concept of indirect discrimination – at least since *Thlimmenos v. Greece*[25] – and this was hoped to lead to a 'more demanding proportionality test with respect to the accommodation of religious needs.'[26] However, in order for the ECtHR to apply the proportionality test under Article 9(2), it first has to find an interference with the applicant's religious freedom, which is yet to happen with a religious time workplace case brought before the Strasbourg institutions.

The only instance in which the ECtHR found an interference with an applicant's religious freedom for failure to accommodate his religious time needs – *Korostelev v. Russia*[27] – did not concern a workplace but a prison setting, where an inmate was reprimanded for performing acts of worship at night time in breach of the prison schedule. The ECtHR concluded that there had been a violation of Article 9, noting inter alia that the domestic courts had failed to carry out a balancing exercise.[28] The prison context and the specificities of the case – namely the fact that the acts of worship were performed while the applicant was in solitary confinement and did not produce any noise or other disturbing factors[29] – make it an unsuitable precedent for any future religious time cases set in a workplace environment.[30] Besides, in *Korostelev v. Russia*, the ECtHR did not make explicit use of the concept of indirect discrimination and did not refer back to *Thlimmenos*, even though it noted that it could not accept the domestic authorities' 'formalistic approach' to the prison schedule, which required full and unconditional compliance by every prisoner.[31]

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[23] Application No. 28790/08, judgment of 3 April 2012, para 37. In a prior similar case – *S.H. and H.V. v. Austria* (application No. 18960/91, decision of 13 January 1993) –, the Commission seemed to allow that the national judge could have rescheduled the hearing if the applicants had requested the adjournment earlier, but refused to consider the applicants' claim that they had been discriminated against because of their religion and that a Catholic or a Protestant would not have been expected to attend a court hearing on a Sunday.

[24] This is the adjective used by Katayoun Alidadi, who also points out that the Strasbourg case law takes for granted a public calendar solely based on the majority's holidays. See Katayoun Alidadi, *Religion, Equality and Employment in Europe: The Case for Reasonable Accommodation*, Oxford and Portland Oregon, Hart Publishing, 2017, p. 47.

[25] Application No. 34369/97, judgment of 6 April 2000. The ECtHR affirmed that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (paras 44 and 47). *Thlimmenos v. Greece* is heralded in the literature as having effectively introduced the concept of indirect discrimination into the Convention's equality jurisprudence. See Patrick Macklem, 'Minority rights in international law', *ICON*, Vol. 6, Nos. 3 and 4, 2008, p. 543. The ECtHR would come to refer to indirect discrimination explicitly in a case concerning the schooling of Roma children – *D.H. and others v. the Czech Republic*, application No. 57325/00, judgment of 13 November 2007, paras 183-195. *Thlimmenos*' duty to differentiate was reaffirmed in *Eweida and Others v. the United Kingdom*, which concerned the wearing of the crucifix at work and the rendering of services considered to condone homosexual union (applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013, paras 87-88), and in *Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, which concerned a tax exemption for religious buildings, where the ECtHR made explicit use of the phrase 'indirect discrimination' (application No. 7552/09, judgment of 4 March 2014, paras 27-28 and 31). In *S.A.S. v. France*, which concerned the wearing of a full-face veil in public, the ECtHR noted, citing *D.H. and Others v. the Czech Republic*, that 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and there is no discriminatory intent' (application No. 43835/11, judgment of 1 July 2014, para 161). This was reiterated in *Izzettin Doğan and Others v. Turkey*, which concerned the recognition of the religious nature of the Alevi faith and access by Alevi citizens to religious services (application No. 62649/10, judgment of 26 April 2016, para 157) and in two judgments of 11 July 2017 – *Dakir v. Belgium* (application No. 4619/12, para 65) and *Belcacemi & Oussar v. Belgium* (application No. 37798/13, para 66), which concerned the wearing of a full-face veil in public. More recently, in *Religious Denomination of Jehovah's Witnesses in Bulgaria v. Bulgaria*, which concerned measures preventing the construction of a house of worship, the ECtHR acknowledged, without using the phrase 'indirect discrimination', that '[e]ven the enforcement of generally applicable neutral provisions, such as urban planning regulations, can in some cases amount to an interference with the exercise of religious freedom' (application No. 5301/11, judgment of 10 November 2020, para 101).

[26] See Alejandro Saiz Arnaiz *et al.*, *Religious Practice and Observance in the EU Member States*, *op. cit.*, p. 76.

[27] Application No. 29290/10, judgment of 12 May 2020.

[28] *Korostelev v. Russia*, para 64.

[29] *Korostelev v. Russia*, para 62.

[30] The specificities of the prison context in ECtHR's Article 9 case law – namely the 'captive' position of prisoners and the existence of an European consensus on prison rules – are pointed out by Kristin Henrard, 'Duties of reasonable accommodation on grounds of religion in the jurisprudence of the European Court of Human Rights: A tale of (baby) steps forward and missed opportunities', *ICON*, Vol. 14, No. 4, 2016, pp. 973-974.

[31] *Korostelev v. Russia*, para 59.

In EU law, the concept of indirect discrimination was built into Directive 2000/78/EC of 27 November 2000, which established a general framework for equal treatment in employment and occupation to combat discrimination based on, inter alia, religion or belief.[32] So far, the Court of Justice of the European Union (CJEU) had only one occasion to rule on a religious time case by reference to Directive 2000/78 – *Cresco Investigation GmbH v. Markus Achatzi*[33] –, and this turned out to be a case of direct discrimination. From the Court's previous case law on religious time and religious discrimination, it is not easy to predict whether (and if so, how) it might use the concept of indirect discrimination if called to rule on cases similar to *X. v. the United Kingdom* or *Konttinen v. Finland*. The signals are mixed. On the one hand, the Court has not condoned the choice of Sunday as the EU-wide official day of rest,[34] and expressed sympathy for Vivien Prais' religious reasons for not being able to take an exam on a date coinciding with a Jewish holiday, even if it ultimately rejected her appeal.[35] Also, in cases concerning the use of the Islamic scarf during working hours, the Court has held that a general prohibition on the visible wearing of any political, philosophical or religious sign may amount to indirect discrimination on grounds of religion,[36] and that such a prohibition is liable to constitute direct discrimination if limited to the wearing of conspicuous, large-sized signs of political, philosophical or religious beliefs.[37] Furthermore, the Court rejected that the willingness of an employer to take account of the wishes of a customer not to be assisted by a worker wearing an Islamic scarf could be considered a genuine and determining occupational requirement for the purposes of Directive 2000/78.[38] On the other hand, the Court has accepted as legitimate an employer's 'policy of neutrality,' in the pursuit of which certain restrictions may

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[32] According to Article 2(2)(b)(i), indirect discrimination based on religion or belief occurs where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief at a particular disadvantage compared with other persons unless, that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

[33] Case C-193/17, judgment of 22 January 2019. The case concerned Austrian legislation which established Good Friday as a public holiday only for employees who are members of certain Christian churches, and entitled only those employees to extra payment for work done on that day. We will come back to this case in the next section.

[34] In *United Kingdom v. Council*, the Court annulled the provision in Article 5 (second sentence) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, which prescribed that the rest period of twenty-four hours in each seven-day period should, in principle, include Sunday. The Court found that the Council had failed to explain why Sunday, as a weekly day of rest, was more closely connected with the health and safety of workers than any other day of the week, and concluded that the matter of whether to include Sunday in the weekly rest period should be left to the assessment of Member States, 'having regard, in particular, to the diversity of cultural, ethnic and religious factors in those states.' *United Kingdom v. Council*, case C-84/94, judgment of 12 November 1996, para 37. In an earlier judgment, on the compatibility with the EEC Treaty of a ban on Sunday trading, the ECJ had stated that it was up to the Member States to set the rules governing opening hours of retail premises to ensure that working and non-working hours are arranged as to accord with national or regional socio-cultural characteristics. *Torfaen Borough Council and B & Q plc (formerly B & Q (Retail) Limited*, case C-145/88, judgment of 23 November 1989, para 14.

[35] *Vivien Prais v. Council of the European Communities*, case 130/75, judgment of 27 October 1976. The Court held that, if a candidate in a recruitment procedure informs the nominating authorities that his or her religious beliefs prevent him/her from taking the exam on certain dates, the authorities should take that information into account and make an effort to avoid scheduling the exams for those dates. The Court even said that ideally the authorities would inform themselves of the dates that might be unsuitable for religious reasons so to avoid them. However, Ms Prais had failed to provide the information in time and the other candidates had already been notified of the date of the exam. Since the exam had to take place under the same conditions for all candidates, she could not be allowed to take the exam on a different date.

[36] To be ascertained by the referring court. *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, case C-157/15, judgment of 14 March 2017, para 34; joined cases *IX v. WABE eV* (C-804/18) *and MH Müller Handels GmbH v. MJ* (C-341/19), judgment of 15 July 2021, paras 59 and 74; *L.F. v. SCRL*, case C344/20, judgment of 13 October 2022, para 37. In *WABE and MH Müller Handels*, the Court noted that the referring court had found that the rule at issue in case C804/18 concerned, statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith, and therefore started from the premise that the rule constituted a difference of treatment indirectly based on religion (para 59).

[37] *WABE and MH Müller Handels*, paras 73 and 78. By seeing the bans on wearing of conspicuous, large-sized religious signs for what they are, the CJEU goes further in its protection of religious freedom than the ECtHR case law on the ban of religious symbols in French schools. Consider, e.g., *Bayrak v. France*, application No. 14308/08, decision of 30 June 2009; *Gamaleddyn v. France*, application No. 18527/08, decision of 30 June 2009; *Jasvir Singh v. France*, application No. 25463/08, decision of 30 June 2009.

[38] *Asma Bougnaoui, Association de defense des droits de l'homme (ADDH) v. Micropole SA*, case C-188/15, judgment of 14 March 2017.

be imposed on the employees' freedom of religion,[39] and held that the right to freedom of thought, conscience and religion guaranteed in Article 10(1) of the EU Charter of Fundamental Rights corresponds to the right guaranteed in Article 9 of the ECHR, which, in accordance with Article 52(3) of the Charter, means that it 'has the same meaning and scope.'[40] There are those who argue, moreover, that the CJEU tends to show less sympathy for religious freedom claims of minorities than the ECtHR.[41] At the same time, however, the proportionality test under Directive 2000/78 is said to be more stringent, 'in the sense of more favourable to an employee,' than that which has been applied in relation to Article 9 of the ECHR.[42] The future will tell.

At domestic level, the finding that the Sunday rule is secular usually goes hand-in-hand with the conclusion that there was no infringement on appellants' freedom of religion nor discrimination based on religion.[43] A textbook case from the US is *Braunfeld et al. v. Brown, Commissioner of Police of Philadelphia, et al.*,[44] where the Supreme Court held that the 1959 Philadelphia criminal statute which forbade retail sale on Sundays did not violate the Equal Protection Clause of the Fourteenth Amendment and did not prohibit the free exercise of the appellants' religion. The appellants were members of the Orthodox Jewish faith and had argued that the mandatory Sunday closing would either compel them to give up their Sabbath observance, impeding their free exercise of religion, or would put them at a serious economic disadvantage vis-à-vis their non-Sabbatarian competitors, impairing their ability to earn a livelihood. The Supreme Court conceded that the appellants and all other persons who wished to work on Sunday would be burdened economically by the state's day of rest mandate,[45] but found that what was relevant was that the statute did not make criminal the holding of any religious belief and did not force anyone to embrace any religion in conflict with his religious tenets. While the indirect nature of the burden did not, in and of itself, exclude that a law might be deemed unconstitutional, if its purpose or effect were to impede the observance of religion or to discriminate invidiously between religions, the statute at bar was held to be valid since its purpose and effect was to 'advance the State's secular goals.'[46]

However influential and disseminated, this is not the only possible take on the matter, as hinted at by judgment No. 544/2014 of the Portuguese Constitutional Court and thoroughly attested by the long-standing case law of

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[39] *G4S Secure Solutions*, paras 37-39; *WABE and MH Müller Handels*, paras 63 and 76; *L.F.*, para 39. In a positive development, the Court has been increasingly demanding with what employers can claim in the name of neutrality. In *WABE and MH Müller Handels*, the Court clarified that the mere desire of an employer to pursue a policy of neutrality is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is a genuine need on the part of that employer, which it is for that employer to demonstrate (para 64). In *L.F.*, the Court added that this interpretation is 'inspired by the concern to encourage, as a matter of principle, tolerance and respect, as well as acceptance of a greater degree of diversity, and to avoid abuse of a policy of neutrality established within an undertaking to the detriment of workers who observe religious precepts requiring the wearing of certain items of clothing' (paras 40-41).

[40] *G4S Secure Solutions*, para 27; *WABE and MH Müller Handels*, para 48; *L.F.*, para 35.

[41] That is the opinion held by John Witte Jr. and Andrea Pin, 'Faith in Strasbourg and Luxembourg? The fresh rise of religious freedom litigation in the pan-European courts', *Emory Law Journal*, Vol. 70, No. 3, 2021, p. 592. The authors compare the CJEU and ECtHR religion-related case law, covering religious dress, religious time, animal slaughter, data protection, tax exemptions, etc. However, at times, the authors seem to misunderstand the Strasbourg and Luxembourg systems and misrepresent some of the cases discussed, such as ECtHR's *Kosteski* at pp. 624-625.

[42] As pointed out by Justice Maurice Kay of the England and Wales Court of Appeal in *Mba v. Mayor and Burgesses of the London Borough of Merton*, [2013] EWCA Civ 1562, para 20.

[43] See Alejandro Saiz Arnaiz *et al.*, *Religious Practice and Observance in the EU Member States*, *op. cit.*, pp. 77-78.

[44] 366 U.S. 599, judgment of 29 May 1961. A similar case, decided on the same day, with the same line of arguments, was *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617.

[45] The Supreme Court noted that the list of legislation likely to impose an 'indirect burden' on religious observance was nearly limitless, giving as an example the statutes which required the courts to be closed on Saturday and Sunday, which similarly burdened the religious observance of the trial lawyer whose religion required him to rest on a weekday. *Braunfeld*, p. 606.

[46] The Supreme Court reached a different conclusion in *Sherbert v. Verner et al., Members of South Carolina Employment Security Commission, et al.*, 374 U.S. 398, judgment of 17 June 1963, where it found that the disqualification of the appellant for unemployment compensation benefits, solely because of her refusal to accept employment in which she would have to work on Saturday, contrary to her religious beliefs, imposed an unconstitutional burden on the free exercise of her religion. *Sherbert* is said by some commentators to have overruled *Braunfeld*, as noted by Justice Walsh in the Irish Supreme Court judgment *Quinn's Supermarket*, discussed below. However, a few decades later, Jeff B. Cromwell was still referring to the 'imposing power' of *Braunfeld*. See Jeff B. Cromwell, 'Cultural discrimination: The reasonable accommodation of religion in the workplace', *Employee Responsibilities and Rights Journal*, Vol. 10, No. 2, 1997, p. 163.

Canadian courts. In *R. v. Big M Drug Mart Ltd.*,[47] the Supreme Court of Canada held that the Lord's Day Act, which prohibited all labour, commerce and fee-based recreation on Sunday, could not be found to have a secular purpose on the basis of changed social conditions, since its acknowledged purpose was to compel religious observance.[48] The Supreme Court further held that the Lord's Day Act 'gave the appearance of discrimination' against non-Christian Canadians and infringed their religious freedom, since it prohibited them, for religious reasons, from carrying out otherwise 'lawful, moral and normal activities.' By binding all to a 'sectarian Christian ideal,' the Act protected one religion over the others, which imported a 'disparate impact' destructive of the religious freedom of the collectivity and inconsistent with the preservation and enhancement of the multicultural heritage recognised in the Canadian Charter of Rights and Freedoms.[49] In *Ontario Human Rights Commission v. Simpsons-Sears*,[50] the Supreme Court elaborated further on this concept of 'disparate impact.' It held that an employment rule, honestly made for sound economic and business reasons and equally applicable to all whom it is intended to apply, may nevertheless be discriminatory if it affects a person or persons differently from others to whom it is intended to apply. The case concerned a member of the Seventh-Day Adventist Church who had alleged that her employer had discriminated her on the basis of her creed by periodically requiring her to work Friday evenings and Saturdays as a condition of her employment, which had led her to accept a part-time work position. The Supreme Court relied on the 'adverse effect discrimination' concept developed by the US courts for race discrimination cases and dismissed the need to find an intent to discriminate on the part of the employer. The Court was satisfied that the appellant had showed a *prima facie* case of discrimination based on creed. As such, it held that it was up to the employer to show that he had taken reasonable steps to accommodate the employee as were open to him without undue hardship – an onus the employer in the case at bar had failed to discharge.[51]

3. Religious time exemptions as unfair privilege

It is often noted that, in increasingly diverse societies, the accommodation of the religious time needs of religious minorities is unfeasible. Ruth Gavison and Nahshon Perez, for example, argue that days of rest must be shared by the people living in the same geographical space and that full accommodation of pluralism is not practical.[52] Few commentators suggest that states should overhaul the current public holiday schedule to grant members of religious minorities the benefit of not working when their religion so dictates without needing to request days off from their

[47] [1985] 1 S.C.R. 295, judgment of 24 April 1985.

[48] *R. v. Big M Drug Mart*, paras 78-85. The Supreme Court acknowledged that the purpose of the Lord's Day legislation could be characterised as religious (securing public observance of the Sabbath) and as secular (providing a uniform day of rest from labour). It also admitted that both elements might be present in any given enactment (para 48). Although the Supreme Court went on to hold the Lord's Day Act unconstitutional, the acknowledgement is similar to the one we found in the Portuguese Constitutional Court judgment No. 544/2014, where the Court did not find it useful to discuss the constitutionality of the Sunday rule as such.

[49] *R. v. Big M Drug Mart*, paras 97-99.

[50] Full reference *Ontario Human Rights Commission and Theresa O'Malley (Vincent) v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 536, judgment of 17 December 1985.

[51] *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536, pp. 550-552 and 558-559.

[52] See Ruth Gavison and Nahshon Perez, 'Days of rest in multicultural societies…', *op. cit.*, pp. 207-208. The authors do advocate for the accommodation of minorities' days of rest, subject to limitations designed in particular to avoid the creation of social enclaves detrimental to social integration.

employers,[53] and no one seems to suggest that states should grant religious minorities a similar number of public holidays to that which is enjoyed by members of the majority religion.[54]

Exemptions are generally more palatable,[55] but they still raise concerns. For example, in *Braunfeld*, the US Supreme Court remarked that the US is a 'cosmopolitan nation made up of people of almost every conceivable religion,'[56] and that the provision of religious exemptions would lead to enforcement problems, since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring. This argument had little resonance, however, since at that time in the US there were already many states which provided exemptions to the Sunday laws without facing major difficulties, as pointed out by Justice Brennan in his dissent.

Another common – and more resonant – objection to religious exemptions to official days of rest, also found in *Braunfeld*,[57] is that exemptions may lead to unfair advantages and discrimination based on religion. A couple of examples from European national legislatures' attempts at establishing exemptions for the benefit of religious minorities suffice to attest to this risk.

In Ireland, the Minister for Industry and Commerce issued an Order – the Victuallers' Shops (Hours of Trading on Weekdays) (Dublin, Dun Laoghaire and Bray) Order, 1948 – restricting the hours of trading applicable to meat-shops and exempting the proprietors of Kosher-meat shops from those restrictions.[58] In *Quinn's Supermarket v. The Attorney General*,[59] the Irish Supreme Court found this to be unconstitutional. Not because of the discrimination (i.e. 'distinction'[60]) as such, but because it exceeded what was necessary to safeguard religious freedom. The Court held that a discrimination on the ground of religious profession, belief or status would be valid if considered neces-

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[53] According to Katayoun Alidadi, such an overhaul would be required if we want to press for more radical and transformative equality, and would certainly aid employees, but may well be impossible. Even modest proposals to add (minority) or cancel (mainstream) religious holidays have proven to be exceedingly contentious in Europe. See Katayoun Alidadi, 'Reasonable accommodations for religion and belief: Adding value to Article 9 ECHR and the European Union's anti-discrimination approach to employment?', *European Law Review*, No. 6, 2012, pp. 712-713.

[54] As Ruth Gavison and Nahshon Perez put it, members of minority religions do not have a right that the state in which they live will recognise their religious-cultural day of rest as the official day of rest for all. See Ruth Gavison and Nahshon Perez, 'Days of rest in multicultural societies…', *op. cit.*, p. 210. Similarly, Dieter Grimm notes that, although most holidays that are observed in European countries have Christian roots, 'this does not support a claim of other religious groups for a similar amount of their holidays.' See Dieter Grimm, 'Conflicts between general laws and religious norms', in Susanna Mancini and Michel Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford University Press, 2014, pp. 10-11.

[55] Dieter Grimm, for example, is favourable to exemptions, noting that the legal order is full of them without it undermining the trust in the law. See Dieter Grimm, 'Conflicts between general laws and religious norms', *op. cit.*, p. 10. Cécile Laborde makes an even stronger case for exemptions. Pointing out the 'majority bias' that leads to minority citizens being unable to combine pursuit of a core societal opportunity with an 'integrity-protecting claim', she argues that exemptions are permitted and even required by justice, when denying them would gravely violate equal liberty. See Cécile Laborde, 'Egalitarian justice and religious exemptions', *op. cit.*, p. 113.

[56] So it could not be expected, much less required, that legislators enact no law regulating conduct that might result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. *Braunfeld*, p. 606.

[57] The US Supreme Court found that to allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day, and that it might cause the Sunday observers to complain that their religions are being discriminated against. *Braunfeld*, pp. 608-609. The conflation of religious accommodation with preferential treatment was also present in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, judgment of 16 June 1977, where the US Supreme Court found that the employer had made reasonable efforts to accommodate the employee and that to grant the requested Saturdays off would have been discriminatory vis-à-vis other employees and amount to undue hardship. Justice Marshall (joined by Justice Brennan) dissented, criticising the majority for essentially holding that employers need not grant even the most minor special privilege to religious observers to enable them to follow their faith. In their view, such an interpretation made a mockery of the statute (Title VII of the Civil Rights Act) which required employers to accommodate employees' religious beliefs.

[58] Article 2 of the Order read: In this Order the expression 'victualler's shop' means any shop in which the business of selling any one or more of the following, namely, fresh beef, mutton, lamb, and veal, is carried on (whether any other business is or is not carried on in that shop), but does not include any shop in which the only business carried on therein is that of selling meat killed and prepared by the Jewish ritual method.

[59] *Quinn's Supermarket Limited and Fergal Quinn v. The Attorney General, James O'Leary and the Minister for Industry and Commerce*, [1972] IR 1, judgment of 2 April 1971.

[60] Justice Walsh rejected that 'discrimination' within the meaning of Article 44, s 2, sub-s 3 of the Constitution was only 'discrimination against' and held that it should instead be interpreted as meaning 'to create a difference between persons or bodies or to distinguish between them on the ground of religious profession, belief or status.'

sary to give effect to the guarantee of free profession and practice of religion given in Article 44, s. 2, sub-s. 1, of the Constitution. Justice Walsh noted that it would be completely contrary to the spirit and intendment of the provisions of Article 44, s. 2, to permit the guarantee against discrimination on the ground of religious profession or belief to be made the very means of restricting or preventing the free profession or practice of religion. Equating religious freedom with non-discrimination based on religion, Justice Walsh said that the primary purpose of the guarantee against discrimination was to ensure the freedom of practice of religion. He then added that any law which by virtue of the generality of its application would by its effect restrict or prevent the free profession and practice of religion by any person or persons would be invalid, unless it contained provisions which saved from such restriction or prevention the practice of religion of the person or persons who would otherwise be so restricted or prevented.[61] The motives behind the exemption in the impugned Order had been a desire to enable Jews to buy Kosher-meat on Saturday evenings[62] and to compensate Jewish shopkeepers for the loss of Saturday as a trading day and so to make it easier to observe their rules. The Supreme Court found that, while the exemption from the trading hours on Saturdays would not be invalid, as it would avoid the possibility of a member of the Jewish Community having to choose between the practice of his religion and the sale or purchase of meat on that day, the exemption in respect of every weekday was invalid because it was greater than was necessary in the circumstances to guarantee their freedom of conscience and free profession and practice of religion. Justice Kenny dissented, saying that the Order should be held to be valid, among other reasons, because it eased the burden for Jews of the observance of the Sabbath without causing any loss to other victuallers, for they did not want to sell Kosher-meat. In the literature, this judgment is criticised for having founded a line of constitutional jurisprudence where courts weight their decisions 'too much in favour of freedom of religious practice'[63] to the detriment of protection from religious discrimination.

In Austria, a 1983 federal Law on Rest Periods and Public Holidays established Good Friday as a paid public holiday for members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church, to allow them to practice their religion on a religious holiday that is particularly important to them without having to agree with their employer that they would take a day's leave for that purpose.[64] The same federal law also established a number of general public holidays – most with religious conno-

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[61] In his dissent, Justice Kenny, likewise, argued that the Court should adopt a 'purposive, in preference to a literal interpretation of the Constitution,' if this made it possible to achieve the aim of ensuring that no citizen would be under any legal disadvantage because of his beliefs. Echoing *Braunfeld*, Justice Kenny noted that Ireland was a 'pluralist society made up of people of many persuasions and beliefs' and that it was likely that parts of legislation would occasionally indirectly affect the practice of some religion. Since the state could not simply abstain from law-making on matters which indirectly affect the practice of religion by some of the citizens, it had to exempt from the application of some of its legislation those whose practice of their religion would be affected by it. So, he added, while the state was under no obligation to remove all disadvantages which the practice of any religion may involve — for this would be an impossible task —, any attempt by the state to carry out the guarantee of free profession and practice of religion by means of a distinction should be held to be valid.

[62] In observance of the Jewish Sabbath, Jews could not buy meat in the interval between sunset on Friday and sunset on Saturday and the result, in 1938, when domestic refrigerators were rare, would have been that they would be without meat from Friday evening until Sunday morning unless the shops selling it could open on Saturday evening. Justice Walsh made a point of clarifying that an exemption such as the one under review would only be valid 'so long as the present dietary laws remain a biding part of the Jewish tradition', and would not be valid in respect of 'pious customs or practices which linger on after they have ceased to be a binding part of religion and, *a fortiori*, in respect of purely secular activities or restrictions which historically had their origins in religious observance.'

[63] See e.g. Niamh Cleary, 'The interaction between religious freedoms and non-discrimination in Irish constitutional jurisprudence', *University College Dublin Law Review*, Vol. 7, 2007, p. 52. Cleary criticises, among other aspects, the fact that, by equating religious freedom with non-discrimination based on religion, the Court had failed to acknowledge that the right to freedom from discrimination is a right in and of itself, paving the way for treating the constitutional guarantee of religious equality as a secondary guarantee of religious freedom (pp. 53-54). He also notes that, while *Quinn's Supermarket* made discrimination conditional on a 'test of necessity,' the subsequent application of the doctrine of proportionality 'has not given rise to a uniform standard of review where Article 44 is concerned' (pp. 54-55). Cleary nevertheless prefers the approach taken in *Quinn's Supermarket*, where the Order was ultimately declared invalid, than the more lenient one taken in *Re Employment Equality Bill*, from 1997, where the Court upheld provisions which allowed religious institutions to discriminate in their employment practices in order to preserve the ethos of the institution (pp. 57-58).

[64] As explained by the Austrian Supreme Court, the referring court in *Cresco* (paras 16, 19). The Court also noted that some collective agreements contained provisions comparable to the one establishing Good Friday as a public holiday, in particular with regard to Yom Kippur in the Jewish religion and Reformation Day in protestant churches (para 20).

tations with Christianity[65] –, which were paid days off for all employees irrespective of religion. Members of certain Christian churches were therefore entitled to one additional day of rest and to extra pay in case they worked on that day. In *Cresco*, the CJEU found that this constituted direct discrimination on grounds of religion within the meaning of Article 2(2)(a) of Directive 2000/78. The referring court had acknowledged that workers who were not members of the designated Christian churches were treated less favourably on grounds of religion,[66] but expressed doubts as to whether the situation of the two categories of employee was comparable. The referring court was uncertain whether the difference in treatment should be considered as constituting a measure that is necessary to protect the rights and freedoms of others,[67] within the meaning of Article 2(5) of Directive 2000/78, or a positive action intended to eliminate existing disadvantages,[68] within the meaning of Article 7(1) of Directive 2000/78. The CJEU answered in the negative. Interestingly, the CJEU paid attention to the fact that the grant of the public holiday on Good Friday was not subject to the condition that the employee should perform a particular religious duty during that day. The CJEU found that, in such circumstances, the situation of an employee who is a member of one of the designated churches is no different from that of all other employees who wish to have a rest or leisure period on Good Friday, regardless of whether or not they have a religion.[69] The stress put by the CJEU on the religious use of the day suggests that it may be willing to find that a different treatment is legitimate if it is justified by needs related to actual religious observance, as is the case with Sabbath obligations for Jews and Seventh Day Adventists. In any case, the CJEU made clear that any exceptions justified by the need to protect individual rights and freedoms must be interpreted strictly. It found that the measure at issue in the main proceedings could not be considered necessary for the protection of freedom of religion, since Austrian law did not grant an additional public holiday to employees not belonging to the designated churches, but instead imposed a duty of care on employers to ensure to their employees, if they so wished, the right to be absent from work for the amount of time necessary to perform certain religious rites.[70] With regard to 'positive measures,' the CJEU stressed that derogations to the right to equal treatment must comply with the principle of proportionality, i.e., 'remain within the limits of what is appropriate and necessary in order to achieve the aim in view,' so that the principle of equal treatment is as far as possible reconciled with the requirements of the aim pursued.[71] The CJEU did not find it necessary to determine whether the fact that Good Friday did not correspond to any of the general public holidays constituted a 'practical disadvantage' in the working life of members of the designated churches, thereby eschewing the indirect discrimination question of Christian-Catholic holidays being the norm. It was enough to observe that the measure at issue did not meet the principle of proportionality nor the principle of equal treatment, since employees belonging to other religions whose important festivals do not coincide with the general public holidays would only be able to absent themselves from work if they were so authorised by their employer. Similarly to the Irish Supreme Court in *Quinn's Supermarket*, the CJEU concluded that the measure in the Austrian legislation went beyond what was necessary to compensate for the alleged disadvantage.[72]

In Portugal, lawmakers attempted to compensate the practical disadvantages faced by religious minorities in their working life by establishing a general provision applicable to members of all churches and religious denom-

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[65] Eleven out of thirteen public holidays are linked to Christianity and two of these are exclusively linked to Catholicism. Noting that the majority of the Austrian population belongs to the Roman Catholic Church, the referring court in *Cresco* observed that employees who are members of the Roman Catholic Church are able to practice their religion without having to agree with their employer that they will take a day's leave for that purpose, since the holidays which are associated with their religion are days off for all employees. *Cresco*, para 19.

[66] Even though Mr. Achatzi, the appellant in the main proceedings, was not claiming that his religious needs were not taken into consideration on Good Friday, the referring court took the view that it was necessary to take account of the fact that the religious needs of some employees were not taken into consideration by the legislation, which left them largely dependent on the goodwill of their employer. *Cresco*, para 20.

[67] I.e., the freedom of religion and the right to practise a religion of employees who are members of one of the designated churches.

[68] The only possible disadvantage being, according to the referring court, the obligation to work on one of the most important days for their religion, by comparison with the members of the Roman Catholic Church, who are not required to work on the most important days for their religion, since those are days off for all employees. *Cresco*, para 25.

[69] *Cresco*, paras 46-47. The comparability with all other employees was further evidenced by the financial nature of the benefit of a public holiday pay for those employees who, being members of one of the designated churches, worked on Good Friday, irrespective of whether or not they felt any obligation or need to celebrate that religious festival (paras 48-50).

[70] *Cresco*, paras 55 and 60-61.

[71] *Cresco*, para 65.

[72] *Cresco*, paras 66-68.

inations registered in the country. Article 14 of the Religious Freedom Act was explicitly designed to balance the employee's right to religious freedom[73] with the employer's right to free economic initiative and business management, under the aegis of the principle of equality. In its general applicability, Article 14 would seem to be the best way to minimise the disparate impact of the Sunday rule, on the one hand, and avoid claims of unfair privilege, on the other. However, as the cases that led to the Constitutional Court judgments No. 544/2014 and No. 545/2014 suggest, members of religious minorities are still likely to be perceived as trying to claim a privilege to the detriment of the rights of others, including the right to equal treatment. Both the Lisbon Court of Appeal, in the first case, and the High Council for the Public Prosecutor's Office, in the second, reasoned that to grant the appellants' requests would amount to an unfair privilege, in breach of the principle of equality in Article 13 of the Portuguese Constitution. The Lisbon Court of Appeal noted in particular that the shift swap requested by the appellant – to allow her to always work the morning shift on Fridays – would require that another employee take the burden of more Friday night shifts, and that the appellant's exemption from all supplementary work on Saturday would constitute negative discrimination against employees belonging to other religions or with no religion at all.[74] The High Council for the Public Prosecutor's Office similarly argued that the shift swap requested by the appellant would require that her Saturday shifts be forced on her colleagues.

The Constitutional Court did not pick up on this line of argument, focusing instead on the obligations placed on the (private and public) employer and on the balancing exercise conducted by the appealed courts. In judgment No. 544/2014, the Constitutional Court found that the Lisbon Court of Appeal had sacrificed the appellant's right to religious freedom in favour of the employer's right to free economic initiative and business management, by making the conditions for the exercise of the right established in Article 14 entirely dependent on the employer's managerial decision regarding working times.[75] Such an interpretation had the effect of narrowing the pool of employees covered by Article 14 to a small fraction of the universe of employees bound by a work contract, rendering the provision practically useless.[76] The Constitutional Court noted that the constitutional mandate to protect religious freedom is designed to ensure the actual – not just theoretical – possibility of individuals exercising this right vis-à-vis their employers[77] and that restrictions to employees' religious freedom to safeguard the employer's right to free economic initiative must comply with the principle of proportionality. It found that the Lisbon Court of Appeal's interpretation of Article 14 led to an unreasonable and excessive restriction of religious freedom in terms that were incompatible

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[73] Article 10(c) of the Religious Freedom Act explicitly recognises that freedom of worship includes the right to publicly celebrate the religious festivities of one's religion, in accordance with the respective religious leaders and norms of the chosen church or religious community.

[74] Dismissing the appellant's religious reasons, the Lisbon Court of Appeal remarked that there are many situations in which employees belonging to the Catholic religion are requested to render supplementary work on Sunday and other religious holidays.

[75] The Constitutional Court pointed out that the Lisbon Court of Appeal's interpretation of Article 14(1)(a) of the Religious Freedom Act meant that employees would only be entitled to suspend their work for religious reasons if the employer – in its own interest and for efficiency reasons – adopted a regime of working hours that allowed for a variation in the employees' entry and exit times.

[76] The Constitutional Court noted that, under the legislation in force, the expression 'flexible working hours' only appeared in Articles 15(1)(a) and 16 of Decree-Law No. 259/98, of 18 August 1998, which applied to civil servants, and in Article 56 of the Labour Code, which had an even narrower application, covering only employees with specific family obligations (children under the age of 12 or older if disabled or with a chronic disease). Outside of these cases, flexible working hours could only be instituted if so agreed by the employer and the employee in the work contract. The Constitutional Court held that the reference to 'flexible working hours' in Article 14 could not be interpreted literally to mean only the cases that were covered by statutory provisions using that same expression. In the Court's view, an interpretation of Article 14 in accordance with the Constitution necessarily led to include in the concept of flexible working hours all situations where it is possible to combine the duration of work with the employee's leave of absence for religious reasons, with compensation for the work missed. That would clearly be the case with shift work, given its rotating and variable configuration, but also with other regimes such as part-time and exemption of working hours (*isenção de horário*). In judgment No. 545/2014, the Constitutional Court noted, in addition, that Article 14(1)(a) of the Religious Freedom Act could not be understood as a blank provision which merely referred to other legal instruments the definition of 'flexible working hours', since that would mean that a fundamental right could at any time be impeded by the legislator's option to eliminate the modality of flexible working hours from the Labour Code or the laws governing working hours in the public administration. The phrase in Article 14(1)(a) could not be made to coincide with a specific modality of work schedule, nor to correspond to the technical legal meaning of the phrase 'flexible working hours' as adopted by the legislator in other legislative acts and for other purposes. In the Court's view, the phrase has a wider scope which needs to be defined and assessed on a case-by-case basis. Both judgments, however, limit the reach of their interpretative ruling to the clarification that shift work is encompassed by the reference to flexible working hours in Article 14(1)(a).

[77] The phrasing echoes – without citing – the point often made by the ECtHR about the ECHR that it 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.' See e.g. *Glor v. Switzerland*, application No. 13444/04, judgment of 30 April 2009, para 76.

with the principle of proportionality. In judgment No. 545/2014, the Constitutional Court likewise noted that the state fails to ensure religious freedom if it recognises citizens the right to have a religion but then places them in conditions that prevent them from practicing it. Considering that the shift work required from the appellant as Public Prosecutor did not fall only on Saturdays, nor on every Saturday, but instead fell also on public holidays and during court holidays, the Constitutional Court found that it was flexible enough and entirely within the scope of Article 14(1)(a) of the Religious Freedom Act. The Court pointed out that the body in charge of arranging the rosters could allocate the Public Prosecutors who request a leave of absence for religious reasons to judicial districts with less shift work on Saturdays in order to harmonise, as much as possible, the exercise of the right with the fulfilment of professional obligations. It added, furthermore, that in case it was utterly impossible to compensate all Saturday shifts by work rendered on other days, it would still be possible to grant the leave of absence for as many Saturday shifts as could be compensated. In any event, the impossibility to fully meet the requirement in Article 14(1)(c) of the Religious Freedom Act did not detract from the characterisation of shift work as work rendered under flexible working hours within the meaning of Article 14(1)(a).

The requirement that the duration of the leave is compensated in full is a telling sign of the distance that separates exemptions designed to accommodate the religious time needs of religious minorities from actual or strict equality in the workplace. In effect, neither the targeted nor the general statutory exemptions to the Sunday rule and the public holiday schedule achieve more than an approximation to equality with the majority religion. The fundamental (formal and substantive) inequality underlying the official calendar is left unchallenged. Paraphrasing Shelagh Day and Gwen Brodsky, we must acknowledge that exemptions are mere concessions by those in power to those who are 'different', within the boundaries of what the majority is willing to 'tolerate'; they do not eliminate religious favouritism in the workplace, only soften its impact.[78] Nevertheless, while we accept that there are limits to what can be achieved through exemptions and accommodation of religious time more broadly, we still believe that reasonable accommodation, as developed in the US and Canada, has potential to advance equality for religious minorities in the workplace and should be considered as blueprint for legal developments in anti-discrimination in Europe.[79] We will elaborate on that next.

4. Beyond direct and indirect discrimination: the case for reasonable accommodation

In *Cresco*, the CJEU was asked to point the best course of action in case of a finding of discrimination in breach of Directive 2000/78 and Article 21(1) of the EU Charter of Fundamental Rights. The question was whether the Good Friday holiday and holiday pay should be extended to all employees irrespective of religious affiliation or if instead the provision establishing that specific public holiday should be disapplied in its entirety so that no employee would be entitled to enjoy it.[80] The CJEU did not pick one solution or the other, noting that Member States are free to choose, from among the different solutions suitable to restore equal treatment, the one which appears to them to be the most appropriate for that purpose, depending on the situations which may arise.[81] The Court held, in any case, that until such time as compliant legislation was introduced, observance of the principle of equality could only be ensured by granting the same advantages to all. Employers were therefore obliged to recognise that employees who were not members of the designated churches were entitled to a public holiday on Good Friday, provided that, prior to that day, those employees informed their employer that they did not wish to work on that day; also, if denied

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[78] Referring to the Canadian context, the authors note that the problem is the 'implicit acceptance that social norms should be determined by more powerful groups in the society, with manageable concessions being made to those who are "different"'. See Shelagh Day and Gwen Brodsky, 'The duty to accommodate: Who will benefit?', *La Revue du Barreau Canadien*, Vol. 75, 1996, p. 435; see also pp. 461-467. At p. 465, the authors use the phrase 'second class version of equality' to refer to the protection offered by accommodation to those who are discriminated against and warn against the risk that the concept may not only not 'assist in dismantling structural discrimination against groups, but rather reinforce it.' In a similar vein, Lori G. Beaman criticises the work done by the concepts of accommodation and tolerance in maintaining the status quo and in watering down the meaning of equality. See Lori G. Beaman, 'Deep equality as an alternative to accommodation and tolerance', *Nordic Journal of Religion and Society*, Vol. 27, No. 2, 2014, pp. 92-93.

[79] Which does not mean that we must give up on efforts to bring about more transformative changes to workplace settings and society in general. Stressing the complementary and not alternative character of accommodations, see Katayoun Alidadi, 'Reasonable accommodations for religion and belief…', *op. cit.*, p. 715.

[80] *Cresco*, paras 26-28.

[81] *Cresco*, para 88.

their request to be absent from work on that day, employees not belonging to one of the designated churches had the right to receive the corresponding holiday pay.[82] In complying with the *Cresco* judgment, Austrian authorities opted to level up, introducing a 'personal holiday (*persönlicher Feiertag*)' which all employees irrespective of religion can enjoy once a year, provided that they ask to take the day off three months in advance – the day off is then detracted from the employee's annual holidays, but if the employee (at the request of the employer) decides to work on that day, he or she is entitled to extra holiday pay.[83]

When faced with direct or indirect discrimination in matters of religious time, the option to level up by granting the same advantages to all may not always be available to national legislatures. As noted earlier, no one suggests that religious minorities should be granted a similar number of public holidays to that which is enjoyed by members of the majority religion. The referring court in *Cresco*, for example, pointed out that employers would oppose an excessive increase in the overall number of general public holidays.[84] At the same time, levelling down by eliminating all religious public holidays (if at all politically feasible[85]) would be an equally undesirable outcome, as it would jeopardise the public interest in the existence of a common day of rest and curtail the freedom of worship for religious minorities and majority alike.

So far, our focus has been on the disparate impact of the Sunday rule and Christian/Catholic public holidays for employees who are members of minority religions, but of course respect for the right to observe holidays and days of rest in accordance with the precepts of one's religion is also a concern for employees who are members of the majority religion. With the relaxation of Sunday laws, it is more and more the case that Christian employees are required to work on Sunday and some find that it conflicts with their right to religious observance. Although members of the majority religion are in principle better placed than those of minority religions in their enjoyment of religious time and in their ability to live their lives according to their religious beliefs more generally, they may also claim to be discriminated against on the basis of their religion, particularly when they hold more conservative views than those of their coreligionists.[86]

Among the best-known examples of religious time cases brought by Christians against the obligation to work on Sunday are *Louise Stedman v. the United Kingdom*, decided by the European Commission of Human Rights,[87] and *Mba v. Mayor and Burgesses of the London Borough of Merton*, decided in a final judgment by the England and Wales Court of Appeal.[88] The applicant in the first case was assistant manager at a travel agency. She had been dismissed after refusing to sign a new employment contract that included Sunday as a normal working day, on a rota basis, for she considered Sunday to be 'a day devoted to non commercial, family and religious activities.' Before the European Commission of Human Rights, the applicant complained that her dismissal was the result of her exercise of the Christian faith and therefore constituted a violation of her freedom to manifest her religion in worship, practice and observance as accorded by Article 9 of the ECHR. She also claimed to have been discriminated against since Christians were not given the status of a minority racial group and had thus less protection than, for example, Muslims in respect of religious holy days. Recalling its findings in *Konttinen*, the European Commission held that the applicant had not been dismissed because of her religious convictions as such, but because she had failed to agree to work certain hours, and noted that the applicant was free to resign and had in fact resigned from her employment. As for

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[82] *Cresco*, paras 79-87, 89.

[83] This account of Austrian legal developments post-*Cresco* is taken from Mathias Möschel, 'Anti-discrimination law and freedom of religion in Austria and Germany', 2022, draft provided by the author. The need to request the personal day off and the fact that the day is detracted from the employee's annual holidays again show that the measure, while leveling up, does not bring about full equality in the enjoyment of religious time for religious minorities.

[84] *Cresco*, para 26.

[85] Which is highly unlikely. See, in this regard, Katayoun Alidadi, 'Reasonable accommodations for religion and belief…', *op. cit.*, p. 713.

[86] As is notably the case with religious views on same-sex relationships, which have been at the centre of notorious court cases in the UK, the US, and the ECtHR in the past decade. For an overview and commentary of the case law, see Christopher McCrudden, 'Marriage registrars, same-sex relationships, and religious discrimination in the European Court of Human Rights', in Susanna Mancini and Michel Rosenfeld (eds.), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality*, Cambridge University Press, 2018, pp. 414-462; IDEM, 'The *Gay Cake* case: What the Supreme Court did, and didn't, decide in *Ashers*', *Oxford Journal of Law and Religion*, No. 9, 2020, pp. 238-270.

[87] Application No. 29107/95, decision of 9 April 1997.

[88] [2013] EWCA Civ 1562.

the complaint of discrimination, the Commission simply held that there was no appearance on the facts as submitted by the applicant that she had been treated in any way differently from employees of any other religious conviction.

In *Mba*, the appellant was a care assistant at a children's home run by the London Borough of Merton. She had declined to work on Sundays, invoking a 'deep and sincere belief that Sunday is a day for worship and not for work,' which led to disciplinary proceedings and ultimately to her resignation. Before the Employment Tribunal she alleged unfair dismissal and indirect religious discrimination. In carrying out the proportionality exercise, the Employment Tribunal had remarked that the employer had made efforts to accommodate Mrs. Mba for two years prior and was prepared to arrange the shifts in a way that enabled her to attend church each Sunday, adding that the belief that Sunday should be a day of rest and worship upon which no paid employment was undertaken, whilst deeply held, was not a core component of the Christian faith. The Employment Appeal Tribunal referred to these remarks merely as 'inelegant phraseology,' but the England and Wales Court of Appeal found that there had been an error of law, albeit not one that would warrant granting the appeal. The errors consisted, first, in according weight to the employer's efforts to accommodate Mrs. Mba, which the Court of Appeal held to be irrelevant to the issue of proportionality. Justice Elias accepted that the efforts weighted by the tribunal showed that the employer was acting in good faith and had travelled some way towards meeting the appellant's concerns, but held that these efforts 'did not help at all' in answering the question at bar, which was whether the employer 'had gone far enough': 'The fact that the [employer] made efforts to accommodate the appellant for two years is no answer to her contention that they should have done so permanently. Equally, the fact that the [employer] would accommodate church worship was no answer to her claim that they should accommodate her genuine held belief that she should not work on Sunday.'[89] The other error was to give weight to a finding that the belief that Sunday should be a day of rest and worship was not a core component of the Christian faith. Justice Kay pointed to the diversity of beliefs between and within religions, finding that, while it was obvious that some Christians have no inhibition to work on Sunday, it was also clear that for other Christians working on Sunday is unacceptable and that the appellant's religious belief genuinely embraced this injunction.[90] There was – in Justice Kay's view – no point in 'opening the door to a quantitative test' by establishing that all or most Christians were not or would not be put at a particular disadvantage by the obligation to work on Sunday.[91] Justices Elias and Vos took a different view on this point, holding that the tribunal was entitled to consider the potential extent of the impact of the requirement that staff work Sunday shifts and therefore consider whether or not the belief was widely held amongst the Christian population. They found, however, that, since the employer was a public body, the case was not a purely domestic indirect discrimination case, but instead engaged Article 9 of the ECHR, which they understood as not requiring that the appellant establish any group disadvantage.[92] This understanding of Article 9 seems to come from the Justices' reading of the ECtHR judgment in *Eweida and Others v. the*

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[89] *Mba*, para 29. A similar point was made by Justice Kay at para 22.

[90] *Mba*, paras 13-14 and 18. The Court of Appeal's acceptance that Sunday observance was core to the appellant's faith was later greeted as a victory by Mrs. Mba and as a significant legal advance by Christian activists, as reported by Owen Bowcott for the *Guardian*, on 5 December 2013, available on https://www.theguardian.com/law/2013/dec/05/christian-care-worker-sundays-legal-fight [26.12.2022].

[91] Justice Kay was not convinced that there was a requirement of group disadvantage and argued that, even if there was such a requirement, it was not clear whether it would favour the employer or the employee in a case such as the one at bar. 'If there are only one or two employees in the particular workplace who subscribe to the particular belief, it may make the application of the [provision, criterion or practice] either easier or more difficult to justify, depending on the circumstances.' *Mba*, paras 17 and 19.

[92] *Mba*, paras 31-37 and 39-41. Justice Elias remarked that, if the concept of justification was read compatibly with Article 9 of the ECHR, it did not matter whether the appellant was disadvantaged along with others or not, and it could not in any way weaken her case with respect to justification that her beliefs were not more widely shared or did not constitute a core belief of any particular religion, which was why the tribunal had been wrong to make reference to this factor as one assisting the employer. He noted, nevertheless, that the number of employees sharing a particular belief was not necessarily irrelevant to a justification challenge where Article 9 is engaged, since the greater the number of employees affected the more difficult it would likely be for an employer to accommodate those beliefs in a way compatible with his business objectives. 'So paradoxically, if a belief is not widely shared, which is more likely to be the case where it is not a core belief of a particular religion, that is a factor which under Article 9 is likely to work in favour of the employee rather than against' (paras 35-36). As noted earlier, Justice Kay made a somewhat similar point about the possible outcome of a quantitative reasoning. However, he did not see the need to engage Article 9 of the ECHR, as he found that it was not necessary to resort to reading down, for ECHR reasons, a domestic provision which was compliant with the EU Directive from which it was derived (i.e., Directive 2000/78), and he was, in any case, not convinced that giving the domestic provision its natural meaning would involve a breach of Article 9 (para 21).

United Kingdom,[93] but is far from consensual in the literature.[94] In any case, the three Justices agreed that the errors were a 'peripheral part of the proportionality analysis'[95] and did not materially affect the conclusion that the requirement that the appellant work on certain Sundays as rostered, in accordance with her contract, was proportionate, since the employer had established that it pursued a legitimate aim and that there was really no viable or practicable alternative way of running the children's home effectively.[96]

Although there was no consensus in *Mba* as to the implications of the 'solitary' nature of the appellant's disadvantage, this case is pointed out by Elisabeth Griffiths as illustrative of the difficulties of pursuing direct and indirect discrimination claims under the complex legal framework of the UK Equality Act 2010 (which has similarities with Directive 2000/78), due in large measure to indirect discrimination's reliance on a demonstration of group disadvantage.[97] The problem, we would argue, is bigger than that, particularly when it comes to religious time. As noted earlier, even where there is a demonstrable group disadvantage – which is arguably the case with religious minorities' holidays and days of rest in countries whose laws are premised on the Christian/Catholic calendar –, the ECtHR and many domestic jurisdictions in the West have been reluctant to acknowledge the existence of an interference with employees' religious freedom that could amount to indirect discrimination. Not to mention the fact that, when an interference with employees' freedom of religion is found, employers tend to be accorded ample room to justify their (indirectly discriminatory) policies by reference to reasons of efficiency and economic expediency.

We agree with Griffiths when she suggests that a positive duty of reasonable accommodation of religion in the workplace might be preferable to a mere negative duty of 'do not discriminate', since 'indirect discrimination alone does not always address the difficulties faced by religious individuals in the workplace' and a 'more individual and nuanced approach to the needs of religious employees' might be a better way of achieving substantive equality.[98] Also, as noted by Bribosia *et al.*, the standard course of action following a finding of indirect discrimination – i.e., removing the provision or practice and replacing it by a non-discriminatory measure – may not always be feasible or the best one.[99] It is argued, therefore, that 'in certain cases, where the controversial measure seems the best way to achieve a certain legitimate objective, the adjustment of that measure by means of an exception may be the only way to eliminate the discriminatory character without compromising the measure's purpose.'[100] As we see it, that is

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[93] Justice Elias referred to paras 79-84 of the ECtHR judgment in *Eweida* (*Mba*, para 34). Justice Kay, for his part, while agreeing that Article 9 does not carry a requirement of group disadvantage, expressed doubts that the appellant's case would be strengthened by the ECtHR decision on *Eweida*, because Ms. Eweida's win of the proportionality argument had been entirely fact-sensitive (*Mba*, paras 20-21). We will come back to *Eweida* below. At this point, it suffices to note that, at paras 79-84, the ECtHR did not explicitly state that the protection conferred by Article 9 does not require a claimant to establish any group disadvantage. It did state, however, that the manifestation of religion or belief is not limited to acts of worship or devotion that form part of the practice of a religion or belief in a generally recognised form. *Eweida and Others v. the United Kingdom*, para 82.

[94] Elisabeth Griffiths, for example, is of the opinion that the issue of whether or not there is a need for group disadvantage in claims of indirect discrimination was not resolved by *Eweida*. See Elisabeth Griffiths, 'The "reasonable accommodation" of religion: Is this a better way of advancing equality in cases of religious discrimination?', *International Journal of Discrimination and the Law*, Vol. 16, Nos. 2-3, 2016, p. 170.

[95] *Mba*, para 37.

[96] *Mba*, para 24. The Justices accepted the Employment Tribunal's conclusion that none of the courses that had been suggested by the appellant could have been undertaken without significant disadvantage to the employer in terms of costs, quality and efficiency of service delivery (para 7). As reported by Owen Bowcott for the *Guardian*, *cit.*, Mrs. Mba had offered to take unpopular shifts and work anti-socials in order to protect Sundays.

[97] Griffiths notes that it is 'ostensibly easier' to make a claim of indirect discrimination if one can demonstrate that a particular way of thinking is '*required* by the religion rather than a mere individual preference'. Since 'religious belief is complex' – she later adds –, 'the requirements of indirect discrimination do not allow for a particular nuanced or individualized approach to the manifestation of religious belief.' See Elisabeth Griffiths, 'The "reasonable accommodation" of religion…', *op. cit.*, pp. 167-169 and 171.

[98] See Elisabeth Griffiths, 'The "reasonable accommodation" of religion…', *op. cit.*, pp. 162, 174. A propos *Mba*, for example, Griffiths remarks that the employer 'could consider making an accommodation for such beliefs when working time is rostered,' rather than excluding Sabbatarians from the workplace (p. 169).

[99] Shelagh Day and Gwen Brodsky seem to disagree with this assertion, as they criticize the concept of accommodation for leading to discriminatory rules being upheld, rather than struck down. Their concerns, however, seem to regard primarily the application of the accommodation rationale to gender and race, where they argue that equality should be '*un*modified', whereas for religion they merely say that broader solutions (instead of individual accommodation) *may* be necessary. See Shelagh Day and Gwen Brodsky, 'The duty to accommodate: Who will benefit?', *op. cit.*, pp. 462 and 467-469.

[100] See Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Reasonable accommodation for religious minorities…', *op. cit.*, p. 139.

certainly the case with the rules on days of rest and public holidays, which serve a legitimate objective of ensuring common days of rest and the celebration of holidays deeply rooted in the country's traditions. Instead of doing away with Sunday as common day of rest and Christian/Catholic holy days as public holidays, what is preferable is that, first, we acknowledge the disparate impact of these rules on religious minorities and, secondly, seek to accommodate the religious time needs of minorities within what is reasonable.[101]

There has been no shortage of calls for instituting a duty of reasonable accommodation of religion in the workplace,[102] and the concept has long been codified into the equality laws of the US and Canada,[103] where reasonable accommodation was originally conceptualised to deal with religious diversity and only later extended to other grounds. In international and EU law, however, the concept is still limited to disability. Article 5 of Directive 2000/78, which introduced the concept into EU law, requires that reasonable accommodation be provided in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, which means that employers are required to 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 the employer.[104] We see no reason why a similar provision could not be applicable to other grounds of discriminatory treatment, including religion or belief. Paraphrasing Kristin Henrard, we would argue that the underlying rationale of equal opportunities, substantive equality, and full participation is equally valid here.[105] The principle of human dignity, which is the foundation of all human rights, can also be relied upon to the same effect.[106] Furthermore, when it comes to accommodating religious needs, a duty of reasonable accommodation can be justified by the states' positive obligations to secure the effective enjoyment of the right to freedom of religion or belief, as attested by the case law of Canadian courts.[107] This seems to also be the intuition underlying the Portuguese Constitutional Court's reasoning in judgment No. 544/2014, as will be detailed below.

The codification of a duty of reasonable accommodation of religion in the workplace would have, among others, the advantage of strengthening the position of individual employees and of contributing to legal certainty by

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[101] This focus on religious minorities is of course without detriment to the case for reasonable accommodation of the religious time needs of 'isolated' members of the majority religion, who instead of opposing the Sunday rule wish to abide by it and be exempted from work on that day.

[102] See e.g. Katayoun Alidadi, *Religion, Equality and Employment in Europe…*, *op. cit.*, pp. 231-260; Matthew Gibson, 'The God "dilution"? Religion, discrimination and the case for reasonable accommodation', *Cambridge Law Journal*, Vol. 72, No. 3, 2013, pp. 589-616.

[103] In the US, since 1972, Title VII of the Civil Rights Act of 1964 requires an employer, once on notice, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship. The text of Title VII, *as it appears in volume 42 of the United States Code, is available at* https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964 *[04.01.2023]. The Canadian Human Rights Act of 1985 prescribes that* any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is not a discriminatory practice if it is established by an employer to be based on a *bona fide* occupational requirement, which will only occur if it is established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost [section 15(1)(a) and (2)]. The *Canadian Human Rights* Act, as *amended on 31 August 2021, is available at* https://laws-lois.justice.gc.ca/PDF/H-6.pdf *[04.01.2023]. For a comparison of the evolution of the concept in the two legal systems, with a finding that 'it is in Canada that the right to reasonable accommodation has expanded the most,' see* Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Reasonable accommodation for religious minorities…', *op. cit.*, pp. 139-150 and 159.

[104] The last sentence in Article 5 clarifies that the burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned. With a more laconic phrasing, the UN Convention on the Rights of Persons with Disabilities, of 2006, prescribes that, in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided [Article 5(3)].

[105] See Kristin Henrard, 'Duties of reasonable accommodation on grounds of religion…', *op. cit.*, p. 962. Henrard explains that, as manifestations of the right to equal treatment, duties of reasonable accommodation can be considered a particular type of duties of differential treatment and also a means to counter or prevent a disproportionate impact and a finding of indirect discrimination (p. 964).

[106] See Matthew Gibson, 'The God "dilution"?...', *op. cit.*, pp. 583-585 and 610-611; Christopher McCrudden, 'Marriage registrars, same-sex relationships, and religious discrimination in the European Court of Human Rights', *op. cit.*, pp. 452 and 458.

[107] Bribosia *et al.* indicate that, in some cases, Canadian judges have inferred the duty of reasonable accommodation from the right to religious freedom instead of from the principle of equality and non-discrimination. See Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Reasonable accommodation for religious minorities…', *op. cit.*, pp. 146-147. Looking into the case law of the ECtHR, Kristin Henrard similarly suggests that positive state obligations aimed at the effective enjoyment of fundamental rights provide an additional rationale for duties of reasonable accommodation. See Kristin Henrard, 'Duties of reasonable accommodation on grounds of religion…', *op. cit.*, pp. 962, 964 and 968-969.

allowing for a clear procedure for submitting accommodation requests. In Europe, however, that does not seem to be a likely prospect, at least in the near future, neither at EU nor at domestic level.[108] For example, in its latest report on the subject of religion or belief, the UK Equality and Human Rights Commission flat out rejected that possibility, finding that the existing indirect discrimination model and the concept of balancing competing rights in human rights law provide sufficient protection for people manifesting a religion or belief.[109]

Short of establishing an explicit enforceable duty to accommodate religion or a general right to reasonable accommodation of religious needs, the concept of reasonable accommodation can still be used by international and domestic courts to advance equality in the workplace as a factor or criterion in the proportionality analysis that courts are required to conduct if they find an interference with the right to religious freedom and/or discrimination based on religion or belief. In *Glor v. Switzerland*, the ECtHR held that, in order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.[110] If it is established that an employer could have accommodated the employee's religious needs without incurring a disproportionate burden nor compromising the legitimate aim pursued by the contested measure and refused to do so, then the measure interfering with the employee's religious freedom is arguably not the least restrictive means of attaining that aim.

Many commentators have pointed out this (largely untapped) potential with respect to the ECtHR's case law under Articles 9 and 14 of the ECHR and to the CJEU's labour equality case law.[111] In *Eweida and Others v. the United Kingdom*, the ECtHR mentioned the concept of 'reasonable accommodation' as developed by the US and Canadian courts, in the 'relevant comparative law' section of the judgment,[112] but did not make an explicit use of the concept in its reasoning. It reiterated the principle that a failure to treat differently persons in relevantly different situations is discriminatory if it has no objective and reasonable justification, i.e., if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[113] With regard to the wearing of a cross visibly at work, the ECtHR focused primarily on the aims pursued, finding that the domestic authorities had struck a fair balance in the case of Ms. Chaplin, in view of the aim to protect health and safety on a hospital ward, and had failed to do so in the case of Ms. Eweida, where they had accorded too much weight to British Airways' wish to project a certain corporate image.[114] The ECtHR mentioned the offers made by the employers in trying to accommodate the applicants' needs[115] and seemed to attach some relevance to them, as it noted, a propos British Airways, that the offer of non-uniformed administrative work and other steps taken in the interim combined to 'mitigate the extent of the interference suffered by the applicant' and had to be taken into ac-

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[108] Even though there are states – such as Portugal and Italy – that already have legislation allowing for some measure of accommodation of specific aspects of employees' religious needs. See Katayoun Alidadi, 'Reasonable accommodations for religion and belief…', *op. cit.*, p. 694.

[109] See Equality and Human Rights Commission, *Religion or Belief: Is the Law Working?*, 2016, pp. 5-6, available at https://equalityhumanrights.com/en/publication-download/religion-or-belief-law-working [04.01.2023].

[110] *Glor v. Switzerland*, para 94. The case concerned the violation of Article 14 taken in conjunction with Article 8, resulting from the requirement that the applicant (who had a minor disability preventing him from performing military duty) pay a tax in order to be exempted from compulsory military duty, despite the fact that he had been willing to do any form of national service, military or otherwise, compatible with his disability. Even though the European consensus on reasonable accommodation for disability is not matched by a consensus on reasonable accommodation for religion, we see no reason why the observation made by the ECtHR in *Glor* at para 94 should not be applicable to cases assessed under Article 9. This seems to also be the view held by Judges Tulkens, Popović and Keller in their joint dissent in *Sessa v. Italy*, as will be detailed below.

[111] See e.g. Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Reasonable accommodation for religious minorities…', *op. cit.*, pp. 150-158; Kristin Henrard, 'Duties of reasonable accommodation on grounds of religion…', *op. cit.*, pp. 961-983.

[112] *Eweida and Others v. the United Kingdom*, paras 48-49. It would have been impossible for the ECtHR to ignore the concept entirely, given the phrasing of the claims in *Ladele* and *McFarlane* (paras 26, 39, 70, 72) and particularly the contributions by third party interveners (para 78).

[113] *Eweida and Others v. the United Kingdom*, paras 87-88.

[114] *Eweida and Others v. the United Kingdom*, paras 94-95 and 98-99. According to the ECtHR, the reason for asking the applicant to remove her cross was 'inherently of a greater magnitude' in *Chaplin* than in *Eweida* (para 99).

[115] The possibility of wearing a cross in the form of a brooch attached to the uniform or tucked under a high-necked top worn under her tunic, in the case of Ms. Chaplin; an administrative post which would not have required the wearing of a uniform, in the case of Ms. Eweida. *Eweida and Others v. the United Kingdom*, paras 90 and 98.

count.[116] In its assessment of the second set of cases, concerning the refusal to provide services to same-sex couples, the ECtHR barely took notice of the applicants' accommodation claims, let alone the possible courses of action open to employers to address those claims. Again, it focused primarily on the aim pursued by the employers (provision of services without discrimination based on sexual orientation) and relied on the states' wide margin of appreciation when striking a balance between competing Convention rights to find that there had been no breach of the Convention.[117]

While *Eweida and Others v. the United Kingdom* is viewed as a missed opportunity to derive reasonable accommodation duties from Articles 9 and 14 of the ECHR,[118] the idea that 'special arrangements' may be necessary to address specific religious needs – within reasonable – is by no means absent from the ECtHR's case law, as attested by a series of cases concerning the exercise of religious freedom by prison inmates. In *Jakóbski v. Poland*, for example, the ECtHR found that the domestic authorities had breached Article 9 for refusing to provide a Buddhist inmate with a meat-free diet. In its 'reasonableness assessment,' the ECtHR noted that the special arrangement requested by the applicant would not have entailed any disruption to the management of the prison nor any decline in the standards of meals served to other prisoners, since the meals did not have to be prepared, cooked and served in a prescribed manner, and did not require any special products.[119] Going further, in *Abdullah Yalçin v. Turkey (No. 2)*, the ECtHR found that the refusal to allocate a room in a high-security prison to a Muslim prisoner for congregational Friday prayers had been unjustified and in breach of Article 9.[120] When examining the reasons adduced by the prison authorities to reject the applicant's request, the ECtHR attached importance to the fact that the domestic authorities did not appear to have carried out an individualised risk assessment in respect of the applicant, and had not sufficiently assessed whether the gathering of a certain number of inmates for Friday prayers could, in the individual circumstances of the

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[116] *Eweida and Others v. the United Kingdom*, paras 93-94. The other steps included reinstating Ms. Eweida in her old job and amending the dress code to permit the wearing of visible religious symbols. The amendment of the dress code seems to have been the most relevant aspect in the ECtHR's assessment, as it was taken as indication that the earlier prohibition was not of crucial importance. The fact that Ms. Eweida had been offered non-uniformed administrative work and had chosen not to accept was nevertheless considered by the ECtHR in its finding that the respondent state should not be required to compensate her in respect of her lost earnings (para 114).

[117] *Eweida and Others v. the United Kingdom*, paras 104-106 and 109. Judges Vučinić and De Gaetano dissented from the majority with regard to *Ladele*, which they viewed as a case of freedom of conscience, noting inter alia that the law and practice of other local authorities 'allowed for the possibility of compromises which would not force registrars to act against their consciences' (para 5). In their view, it was incumbent upon the local authority to treat Ms. Ladele differently from the registrars who had no conscientious objection to officiating at same-sex unions, 'something which clearly could have been achieved without detriment to the overall services provided by the Borough' (para 7).

[118] See e.g. Kristin Henrard, 'Duties of reasonable accommodation on grounds of religion…', *op. cit.*, pp. 978-983.

[119] *Jakóbski v. Poland*, application No. 18429/06, judgment of 7 December 2010, para 52. The ECtHR also pointed out what the authorities could have done, noting that the applicant had not been offered any alternative diet and that the Buddhist mission had not been consulted on the issue of the appropriate diet. This was by comparison with an earlier decision by the Commission, in *X. v. the United Kingdom*, application No. 5947/72, of 5 March 1976, where it was found that the domestic authorities had respected the applicant's beliefs 'as far as possible', since he had been offered a Kosher diet, had had contacts with a lay-Jewish visitor, and had been advised by the Jewish Visitation Committee to accept the vegetarian Kosher diet. Besides, the Chief Rabbi had also been consulted and had approved the authorities' efforts. The *Jakóbski* reasoning was reiterated in *Vartic v. Romania (No. 2)*, application No. 14150/08, judgment of 17 December 2013, paras 48-52, with a similar finding of a breach of Article 9. The case also concerned a Buddhist inmate who had been refused a vegetarian meal, but here the prison was already providing a similar diet free of animal products for Christian Orthodox inmates observing fasting requirements. The ECtHR stressed in particular the fact that the Government had not indicated whether there were alternative measures available for the applicant to access vegetarian food after the Minister of Justice had prohibited food parcels being received by post. In *Jakóbski* and *Vartic*, the fact that the special arrangements had practically no financial implications for the prison management proved key. That was not the case in *Erlich and Kastro v. Romania*, applications No. 23735/16 and 23740/16, judgment of 9 June 2020, where the ECtHR found that there had been no breach of Article 9. Here, the applicants complained of the failure of the prison authorities to provide them with kosher meals, which the ECtHR noted had to include specific ingredients obtained following very precise rules and had to be prepared separately (with separate containers and utensils) in a specific manner and under the supervision of a religious representative (para 37). The ECtHR was persuaded that the domestic authorities had honoured, to a reasonable degree, their positive obligations under Article 9, considering in particular that the prison authorities had implemented a court ordered customised solution tailored to the applicants' specific needs, by fitting out a separate kitchen for cooking kosher meals (in consultation with a Jewish religious foundation) and by authorising the applicants to acquire specific foodstuffs to be cooked on site, in derogation of the rules applied to other inmates (paras 38-40, 43-44). In two judgments of 10 November 2020, also about Romanian prisons, the ECtHR found that the domestic authorities had breached Article 9 by refusing to provide the applicants with meals in accordance with their religion because they had changed religion from the one declared at the time of their admission and had not submitted a written statement by a representative of the new religion attesting to the conversion. *Neagu v. Romania*, application No. 21969/15, and *Saran v. Romania*, application No. 65993/16.

[120] Application No. 34417/10, judgment of 14 June 2022.

case, generate a security risk warranting a different treatment to that which was accorded to collective gatherings for cultural or rehabilitative purposes, which were permitted by law. Significantly, the ECtHR attached decisive weight to the fact that the domestic authorities did not seem to have explored any other modalities, including those which were less restrictive of the applicant's rights under Article 9, as regards the alleged absence of appropriate premises for Friday prayers at the prison and the claim that realising the applicant's request would only have been possible by opening the doors of all the cells.[121]

On the other hand, there are also many cases attesting to the ECtHR's unwillingness to reproach domestic authorities when they fail to take the less restrictive route and refuse to grant relatively minor requests that would allow the accommodation of religious needs. Emblematic examples are the French cases involving religious symbols, where the ECtHR condoned the refusal by the consular authorities to assign a female officer to carry out the identification of the applicant who had requested it in order to be able to remove her veil,[122] and the refusal by school authorities to accept the replacement of the Islamic veil and the Sikh turban by religiously-neutral or more discreet equivalents (a cap or a keski) as had been suggested by the students.[123]

With the exception of *Korostelev v. Russia*, the religious time cases mentioned earlier are similarly illustrative of the Strasbourg institutions' reluctance to even consider that the domestic authorities' refusal to grant the applicants' accommodation requests might have been disproportionate. In *X. v. the United Kingdom*, the applicant had requested that the school authorities re-arrange the school timetable to allow his absence for about 45 minutes at the beginning of the afternoon sessions on Fridays so that he could attend Friday prayers at the mosque. He had argued that, since he had free periods during the week, his time-table could easily be arranged to insert a free period for the first part of Friday afternoon.[124] In *Konttinen v. Finland*, the applicant had proposed to have his occasional Friday evening shift in the wintertime exchanged for the Friday morning shift (which concerned a maximum of three and a half hours on five Friday afternoons per year), and to compensate the lost working hours by relinquishing an equivalent part of his vacation or days off, among other arrangements.[125] In both cases, the Commission accepted the domestic authorities' vague assertions about the 'requirements of the education system' and the 'inconveniences' that

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[121] *Abdullah Yalçin v. Turkey (No. 2)*, paras 32-34. In another judgment of 2022, the ECtHR dealt with restrictions imposed in response to the COVID-19 pandemic, finding that the domestic authorities had not breached Article 9 by temporarily refusing a prison inmate to attend church outside of the prison for the Sabbath religious services. The ECtHR concluded that the domestic authorities had made reasonable efforts to counteract the restrictions imposed during the health crisis, noting in particular that they offered the applicant the possibility of attending religious services online, which he had refused without giving any explanation as to why. *Constantin-Lucian Spînu v. Romania*, application No. 29443/20, judgment of 11 October 2022, para 69. The applicant's refusal of the prison authorities' proposed arrangements was similarly relevant in an earlier inadmissibility decision, where the inmate had complained that he had not been given access to a room where he could pray, meditate and read religious literature undisturbed. The ECtHR took into account the fact that the prison authorities had, at least on one occasion, offered him the use of separate premises for performing religious rituals and he had refused the offer without any apparent reason. *Kovaļkovs v. Latvia*, application No. 35021/05, decision of 31 January 2012, para 67. In this case, the applicant also complained of the fact that incense sticks had been taken away from his cell. The ECtHR took into account information provided by members of the Rīga Vaishnavist congregation, according to which the obligation to observe the religious tradition of burning incense sticks depends on the circumstances of the person in question, noting furthermore that the burning of incense sticks typically creates a powerful odour which might be disturbing to other inmates (para 68). An outlier in the ECtHR generally well-reasoned case law with regard to access to an adequate place to pray is *Saran v. Romania*, where, after finding a breach of Article 9 for refusal to provide the applicant with meals in accordance with his religion, the Court concluded that there was no need to examine the applicant's allegations with regard to the prison authorities' refusal to allocate an adequate room for his prayers (para 45).

[122] *El Morsli v. France*, application No. 15585/06, decision of 4 March 2008.

[123] *Dogru v. France*, application No. 27058/05, judgment of 4 December 2008, para 75; *Kervanci v. France*, application No. 31645/04, judgment of 4 December 2008, para 75; *Bayrak v. France*; *Gamaleddyn v. France*; *Jasvir Singh v. France*; *Ranjit Singh v. France*, application No. 27561/08, decision of 30 June 2009; *Ghazal v. France*, application No. 29134/08, decision of 30 June 2009; *Aktas v. France*, application No. 43563/08, decision of 30 June 2009.

[124] In the summary of facts, it is indicated that, in one school, the applicants' colleagues had not objected to his having time off to attend the mosque and were prepared to accommodate him in this respect, in another school the adjustment to the Friday afternoon teaching periods was not difficult, although other staff had to accommodate the applicant all the time, and that at a third school there had been 'grumbles' from the staff. *X. v. the United Kingdom*, paras 6-7 and 11.

[125] In the summary of facts, it is indicated that out of the eight members of the Board of Civil Servants which had upheld the applicant's dismissal one had dissented, noting, inter alia, that his absence during the Friday evening shift had had only minor effects, no damage having been caused either to his employer or any third party, he had undertaken to compensate the relevant number of working hours and, since he had been trained in various tasks, it would have been possible to transfer him to another post. Also, before the Supreme Administrative Court, the State Railways had not argued that the arrangement proposed by the applicant would have been unreasonably difficult to implement.

a change in schedule would have for the employer and the applicants' colleagues, without requiring that the domestic authorities demonstrate to have seriously considered the applicants' proposed arrangements and explored solutions that would have been less restrictive of their rights under Article 9. In *Stedman v. the United Kingdom*, there were no proposals from the applicant, who simply refused to work on Sundays as rostered, but the Commission could have nevertheless been more demanding vis-à-vis the domestic authorities, which had apparently given no consideration to the possible viability of less restrictive solutions, such as allowing the applicant to compensate her occasional Sunday shifts with an equivalent part of her vacation or days off. In all three cases, the Commission held that there had been no interference with the applicants' rights because they had been free to resign from their posts when their contractual obligations became incompatible with their religious duties – a reasoning which was almost universally derided for its excessive formalism[126] and was eventually reversed by *Eweida and Others v. the United Kingdom*.[127]

In *Sessa v. Italy*, the last religious time case in a workplace setting to date, the ECtHR was again complacent with the domestic authorities' dismissiveness of the applicant's religious motives and their failure to accommodate a simple request that would have ensured the compatibility between the applicant's professional obligations and his religious duties without significant harm to the authorities' purported aim of ensuring the good administration of justice by preventing excessive delays in court proceedings. The applicant had requested, four months in advance, that a court hearing that he was supposed to attend as counsel for one of the parties did not fall on the two dates proposed by the judge, as they coincided with two Jewish holy days.[128] The ECtHR was not persuaded that there had been an interference with the applicant's freedom to manifest his religion, since the domestic judge's refusal to reschedule the hearing had been based on the applicable provisions of the Italian Code of Criminal Procedure, which did not require the presence of the counsel for the plaintiffs, and the applicant had had the option to ask a fellow attorney to replace him at the hearing.[129] In their joint dissent, Judges Tulkens, Popović and Keller pointed out that in order to pass the proportionality test, domestic authorities are required to choose, among several means of attaining the legitimate aim pursued, that which is the least restrictive of human rights. They held that, under certain circumstances, such as those of the case at bar, the search for a reasonable accommodation would have been the least restrictive means of attaining the aim of ensuring the good administration of justice without imposing a disproportionate burden on the judicial authorities. They noted in particular that the applicant had raised the issue as soon as the court date was announced, giving the judicial authorities enough time to organise the hearings' schedule with consideration for the competing rights at play.[130] In their view, Article 9 had been breached since the domestic authorities had failed to prove that they had made a reasonable effort to ensure respect for the applicant's right to manifest his religion, and to convincingly demonstrate that granting the applicant's request would have disturbed the justice system beyond a mere administrative inconvenience. After all, they said, the hearing was not urgent, since there were no defendants in custody, and the disturbance caused by the need to send new notifications to the parties in the dispute was minimal and a modest price to pay for respecting religious freedom in a multicultural society.

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[126] See e.g. Katayoun Alidadi, *Religion, Equality and Employment in Europe…*, *op. cit.*, pp. 47-48. The Portuguese Constitutional Court was also critical of this line of jurisprudence in its 2014 religious time judgments, noting that the protection afforded by Article 9 of the ECHR was practically reduced to its negative dimension, i.e., the prohibition of the termination of work contracts for religious reasons. In judgment No. 544/2014, the Constitutional Court elaborated on this point noting that religious freedom is the object of a multilevel normative framework in which the highest level of protection must prevail and that, regarding the exercise of religious freedom in the workplace, Article 41 of the Portuguese Constitution ensured a higher level of protection than Article 9 of the ECHR. In distancing itself from the Strasbourg institutions, the Portuguese Constitutional Court took inspiration from the German Federal Constitutional Court which had likewise adopted a more protective (and accommodating) stance than the ECtHR with regard to the regulation of ritual slaughter.

[127] 'Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.' *Eweida and Others v. the United Kingdom*, para 83.

[128] *Sessa v. Italy*, paras 6-7.

[129] *Sessa v. Italy*, paras 36-37. The ECtHR nodded at the possibility that there had been an interference but was ultimately non-committal, holding without much ado that, even if that were the case, the interference had been proportionate to the aim pursued (para 38).

[130] They recalled, *a contrario*, the Commission's decision in *S.H. and H.V. v. Austria*, which seemed to suggest that if the applicants had requested the adjournment immediately after being notified (and not at short notice) the domestic court would have had been able to arrange a new date for the hearing.

The joint dissent's endorsement of 'reasonable accommodation' was remarked on approvingly by the Portuguese Constitutional Court in its judgment No. 544/2014. Noting that the idea of accommodation of religious freedom in a plural community had ample support in the case law of North American courts and was echoed in the joint dissent in *Sessa v. Italy*, the Constitutional Court held that the principles of tolerance and accommodation were, alongside equality and non-discrimination, part of the constitutional framework for the exercise of religious freedom in the workplace.[131] This meant that the legislator was constitutionally bound to ensure 'maximum effectivity' to religious freedom, while also giving weight to other rights and interests protected by the Constitution, such as the right to free economic initiative, subject to an assessment of reasonableness and proportionality. In the case at bar, the judicial courts' interpretation of the 'flexible working hours' requirement in Article 14(1) of the Religious Freedom Act had mischaracterized the wide protection granted to religious freedom in the Constitution by making the exercise of the right entirely dependent on a managerial decision by the employer. Furthermore, since the number of employees covered by that strict interpretation of 'flexible working hours' would be very low, most employees would be faced with the dilemma of meeting their contractual obligations or complying with their religious duties. A dilemma which, contrary to what was suggested by the Strasbourg institutions, could not be simply resolved by the employees' option to resign from their posts.[132] The Constitutional Court held that that option was not real, neither in fact nor in law, given the high levels of unemployment and the fact that, even if the employees were able to find employment elsewhere, they would continue to face obstacles to the exercise of their religious freedom, as the legal framework would be the same. It found that the balancing exercise conducted by the judicial courts had sacrificed the employee's religious freedom while leaving the employer's rights untouched, since the employer had been recognised the prerogative of freely defining the work schedule without having to consider the situation of its religious employees and without having to demonstrate an undue or excessive burden that could legitimately justify the restriction of the employee's religious freedom. The Court held that a 'constitutionally compliant' interpretation of Article 14(1) had to include in the concept of flexible working hours (provided that compensation of the work missed is possible) all situations in which the duration of work might be reconciled with the leave for religious purposes, which was clearly the case with shift work but could also be applied to other working times regimes, and had to require that employers search for management solutions capable of safeguarding (accommodating) their employee's fundamental rights.

In judgment No. 545/2014, which concerned a Public Prosecutor, the Court did not go into so much detail about the normative framework and did not make explicit use of 'reasonable accommodation' language but adopted the same rationale and was even more expansive in offering suggestions of less restrictive solutions that could be adopted to reconcile the employee's religious freedom with the needs of the judicial system. As noted earlier, the Court suggested that the body in charge of arranging the rosters could allocate the Public Prosecutors who request a leave of absence for religious reasons to judicial districts with less shift work on Saturdays and that, in case it was utterly impossible to compensate all Saturday shifts by work rendered on other days, the judicial authorities could still grant the leave of absence for as many Saturday shifts as could be compensated. The Court also gave more examples of working time regimes that could be understood as flexible working hours within the meaning of Article 14(1)(a) of the Religious Freedom Act.

While the Court was right to find that the judicial and administrative courts' interpretation of Article 14(1) of the Religious Freedom Act was constitutionally unsound and led to disproportionate results, judgment No. 544/2014 was not as helpful as its twin judgment in providing practical guidance to employers and judicial courts when assessing the viability of reasonably accommodating employees' religious time requests. Arguably, the specifics of the case in judgment No. 545/2014 made it easier for the Court to suggest alternative – less restrictive – solutions, since the number of Saturday shifts attributed to the appellant was not very high to begin with and could be compensated by work rendered on other equally undesirable shifts coinciding with public holidays and the summer holidays. Accommodating the appellant's request in the case of judgment No. 544/2014 was not so straightforward, for a number of

[131] The Court's knowledge of the North American courts' case law on reasonable accommodation of religion seems to be mainly based on secondary sources, since there are no references to specific US or Canadian court cases. On the other hand, the religious time cases of the Strasbourg institutions (*X. v. the United Kingdom*, *Konttinen v. Finland*, *Stedman v. the United Kingdom* and *Sessa v. Italy*) are directly mentioned and described in considerable detail.

[132] The Constitutional Court does not seem to have been aware that the 'freedom to resign' reasoning had in the meantime been reversed by *Eweida and Others v. the United Kingdom*. The Court makes no mention to this ECtHR judgment, probably because it did not concern religious time.

reasons: (a) she worked in a factory assembly line, which meant that she had to be replaced by another employee to avoid halting production; (b) the factory was closed on Sunday, so there were fewer equally undesirable shifts that she could take on from other employees; (c) the number of impacted shifts was considerably higher, given that the roster was organised to alternate morning and night shifts every other week; and (d) it was likely that other employees would feel unhappy with the fact that only the appellant would be exempted from extra work on Saturdays. Certainly, the employer's flat-out refusal to accommodate the appellant's religious needs by arguing that she did not meet the flexible working hours requirement in Article 14(1) of the Religious Freedom Act was disproportionate. However, the employer had also argued that accommodating the appellant's request would have resulted in a decrease in production and in discrimination against other employees, two points on which the Court was silent.

Continuing to take inspiration from the case law of North American courts, the Constitutional Court could have detailed the balancing exercise a bit more, by way of a blueprint for reasonable accommodation of religious time in the workplace. It could have noted, for example, that in order to justify its refusal to accommodate the employee's religious time request the employer was required to provide objective information about the actual costs and disruption that the requested accommodation would entail (rather than rely on potential or hypothetical hardship) and to demonstrate to have made good faith efforts to find an accommodation to the employee's needs, namely by allowing and not discouraging voluntary substitutions and shift swaps with co-workers[133] and by considering alternative methods of accommodation, such as a transfer to a different position (including a lower-paying position, if agreed to by the employee).[134] The Court could also have noted that general disgruntlement, resentment or jealousy of co-workers would not suffice to justify refusing to accommodate an employee's religious time needs, and that the employer was required to provide evidence that the accommodation would actually infringe on the rights of co-workers. While the employers' claims of a disproportionate burden should not be taken at face value, the assessment of what can be reasonably asked from employers as religious time accommodation must consider the specifics of the work context, such as the type of workplace, the size and interchangeability of the workforce, the nature of the employee's duties, and the number of employees sharing a particular belief.[135]

What the Constitutional Court definitely got right is that, all things considered, there should be no qualms in having freedom of worship take precedence over contractual obligations, since religious freedom is a fundamental right of key importance for individuals' autonomy and personality, and so it is not reasonable to expect let alone demand that employees simply forego or hide that aspect of their identity while at work. The Constitutional Court proved to be acutely aware of how difficult it is for some employees to give up so much of themselves and their religious beliefs when they enter the workplace.[136]

5. Concluding remarks

By siding with religious freedom and affirming the rights of religious minorities, the Constitutional Court set a landmark precedent in Portugal's process of coming to terms with religious diversity against a backdrop of largely naturalised and secularised Catholic values and traditions. The Court rejected the purported 'neutrality' of the Sunday rule and acknowledged the importance of safeguarding religious minorities' needs through exemptions such as that which is established in Article 14 of the Religious Freedom Act. Distancing itself from the religious time case law of the Strasbourg institutions, the Constitutional Court held that Article 41 of the Portuguese Constitution offers employees' religious freedom a higher level of protection than that which is accorded by Article 9 of the ECHR.

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[133] Employers and courts should not assume that there would be no co-workers willing to swap shifts, for reasons of sympathy or personal convenience (as noted by Justice Marshall in his dissent in *Trans World Airlines, Inc. v. Hardison*), or that the morning shift is universally preferred over the night shift.

[134] As recommended by the US Equal Employment Opportunity Commission, in its 2021 guidance on religious discrimination, employers should not assume that an employee would not be interested in a lower-paying position if that position would enable him or her to abide by his or her religious beliefs. Information available at https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination [30.01.2023].

[135] One factor usually pointed out as relevant in the reasonableness assessment is whether the accommodation request is addressed to a private or a public authority. See Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Reasonable accommodation for religious minorities…', *op. cit.*, pp. 147-148. This does not seem to have made a difference in the Constitutional Court's approach. Judgment No. 544/2014 concerned a private employer and judgment No. 545/2014 concerned the state, but the rationale underlying both judgments was the same.

[136] To paraphrase Elisabeth Griffiths, 'The "reasonable accommodation" of religion…', *op. cit.*, p. 163.

As noted in judgment No. 544/2014, the scope of Article 41 of the Portuguese Constitution is wider than the mere protection against discrimination based on religion, in that the legislator has a positive obligation to ensure, not only equality against discriminatory interference, but also the conditions for the exercise of religious freedom that employees cannot and should not be required to forgo when they take on paid employment. 'For what has been said, we cannot but give importance to the role of the state in ensuring the satisfaction of the freedoms protected by Article 41, in particular freedom of religion. It is first and foremost up for the state to protect action dictated by beliefs, not only in the fulfilment of an obligation to abstain (non-interference), but also by removing obstacles and creating conditions – in the social sphere – more favourable to the exercise of religious freedom.' In judgment No. 545/2014, the Court remarked that the state does not ensure religious freedom if it recognizes the right to have a religion but then places citizens in conditions that make it impossible for them to practice it.

The reasoning in both judgments is mostly based on the state's positive obligations to ensure the actual enjoyment and exercise of religious freedom, by allowing or enabling believers to fulfil their religious duties, even if we can find hints of an indirect discrimination rationale in judgment No. 544/2014.

The judgments are also interesting from a comparative perspective. They confirm that domestic courts can go further than the existing ECtHR and CJEU religious time (employment) case law. The Portuguese Constitutional Court proved willing to require employers to accommodate the religious time needs of their employees in the absence of a statutory provision on reasonable accommodation and (as shown in judgment No. 545/2014) even without explicitly resorting to 'reasonable accommodation' language. The judgments suggest that duties to accommodate employees' religious time needs can be easily derived from existing provisions on antidiscrimination and religious freedom, even though the legal certainty advantages brought by the codification of duties of reasonable accommodation for religion in the workplace should not be so easily discarded. On the other hand, the judgments attest that the existence of a statutory provision allowing employees to take leave from work for religious purposes is not enough to prevent conflict and ensure that employees can exercise that right, given the likelihood of resistance from employers, the widespread understanding that the leave is an unfair privilege (instead of a means of ensuring substantive equality), and the need to balance competing interests. In spite of their narrow scope – as they only ruled that shift work was comprised in the concept of 'flexible working hours' without making a broader assessment of the cumulative requirements set by Article 14(1) of the Religious Freedom Act –, the judgments pointed the way for dealing with religious time requests by holding that, as a fundamental right, religious freedom should be put on a higher footing and not be easily trampled by economic efficiency considerations or contractual obligations.