

Freedom of religion versus freedom of business management in Spain: Spanish Case-law analyzed in the light of “reasonable accommodation” figure according to Canadian Case-law¹

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Abstract

The Canadian case-law figure of reasonable accommodation has not found a favourable reception in the Spanish Case-law. Proof of this is the STC 19/1985 judgement of the Spanish Constitutional Court, which affirms that the giving of a different weekly rest because of a religious belief would be a reasonable exception, but it is not imperative for the entrepreneur to grant it. Accommodation is not compulsory neither for Canadian courts, since this obligation to accommodate must be within the limits of “reasonability”. Even if several justified reasons can be put forward to refuse the accommodation, Canadian courts opt for the imposition of this legal duty to reconcile religious practice demands with labour market needs. Taking into consideration that accommodation does not happen spontaneously and that *bona fide* in labour relations is not enough, it is advisable to look for good practices in comparative Law to deal with this kind of conflicts.

Key words: Reasonable accommodation, religious minorities, real equality, indirect discrimination, diversity management.

Resumen

La figura de acomodamiento razonable de la jurisprudencia canadiense no ha encontrado una acogida favorable en la jurisprudencia española. Prueba de ello es la sentencia STC 19/1985 del Tribunal Constitucional español, que establece que el otorgamiento de un descanso semanal distinto en base a creencia religiosa supondría una excepcionalidad razonable, pero su imposición no es imperativa para el empresario. El acomodamiento tampoco es obligatorio para los tribunales canadienses, ya que esta obligación de acomodar debe ajustarse a los límites de la «razonabilidad». Aun cuando aunque se puedan esgrimir diversos motivos justificados para la no concesión del acomodamiento, los tribunales canadienses optan por la imposición de este deber legal con el fin de reconciliar las exigencias de la práctica religiosa y las necesidades del mercado laboral. Teniendo en cuenta que el acomodamiento no se produce espontáneamente y que no basta la buena fe en las relaciones laborales, es aconsejable buscar buenas prácticas en el derecho comparado para hacer frente a este tipo de conflictos.

Palabras clave: Acomodo razonable, minorías religiosas, igualdad real, discriminación indirecta, gestión de la diversidad.

¹ This paper contains several translations of the Case Law from Spanish to English. Also other quotations are translated, since a big part of the bibliography is in Spanish. These are not official, but my own translations.

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Introduction

In this paper I will start by introducing the north-American legal figure of reasonable accommodation, which stems from the principle of equality and non-discrimination. I will continue by contrasting two case-law decisions issued the same year in Canada and Spain, in which facts are very similar but rulings are completely different. Finally I will explore the feasibility of importing the reasonable accommodation figure into the Spanish context taking into account the Spanish legal framework, and the civil Law judicial system.

Reasonable accommodation is far away from being applied by the Spanish Courts. Proof of this is the judgement of the Spanish Constitutional Court STC 19/1985³, which affirms that “the giving of a different weekly rest because of a religious belief would be a reasonable exception, but its imposition is not imperative for the employer”.⁴

The granting of the accommodation is not imperative neither for Canadian Courts, since this obligation to accommodate must be within the limits of “reasonability”. Therefore there are several reasons that can justify a refusal of the accommodation. However, Canadian courts have opted for the establishment of a legal and social duty to make the effort to reconcile religious practice demands with labour market needs, whenever it is possible. This means a step forward compared to the 1992 Agreements⁵ between the Spanish State and the religious minorities with evident presence in Spain, since these agreements just allow religious accommodation in the professional field “whenever there is previous agreement between parties”. This free agreement wrongly presupposes that the parties that negotiate a labour contract are on an equal footing while agreeing terms concerning working time, paid holidays

and other regulations. Since spontaneous accommodation in labour relations rarely exists, it is advisable to explore which solutions are being used in other countries and societies to manage this kind of conflicts.

1. The concept of reasonable accommodation in a technical legal sense

In 2007 a Consultation Commission on Accommodation Practices Related to Cultural Differences co-chaired by Charles Taylor and Gérard Bouchard was established to solve out the crisis of perception of reasonable accommodations in Québec. Fruit of the Commission’s work is a valuable report that puts an end to the misconceptions on reasonable accommodation and helps us to clear concepts up, and to delimit the scope and limits of the accommodation practices.

According to the glossary of terminology of the Bouchard-Taylor report, *Reasonable accommodation* is “an arrangement that falls under the legal sphere, more specifically case law, aimed at relaxing the application of a norm or a statute in favour of an individual or a group of people threatened with discrimination for one of the reasons specified in the Charter”⁶. So reasonable accommodation is a legal instrument of jurisprudential origin, which, from the starting point of situation of discrimination prohibited by the declarations of rights, allows bringing a lawsuit to restore equality in a particular case. This request must be addressed as far as possible, or as far as reasonable, as we will see later on.

We could synthesized the features of reasonable accommodation as follows:

³ STC stands for Sentencia del Tribunal Constitucional (Constitutional Court Judgment). The Spanish Constitutional Court (TC) is an extraordinary Court to deal with important cases that need an interpretation of the Spanish Constitution. The TC is the highest interpret of the Constitution.

⁴ STC 19/1985 of February 13th 1985. Second division of the Constitutional Court. Judge-Rapporteur: Jerónimo Arozamena Sierra. Fundamento Jurídico (FJ) 3.

⁵ In 1992, to promote religious pluralism, the Spanish State signed three Agreements of Cooperation with the religious minorities with evi-

dent presence in Spain, which are the Federation of Israelite Communities of Spain (BOE, 1992, 272). the Islamic Commission of Spain (BOE, 1992, 272) and the Federation of Evangelical Religious Entities of Spain (BOE, 1992, 272).

⁶ Bouchard, Gérard and Taylor, Charles (2008): *Building the future. A time for reconciliation*, Québec. Complete report of the Consultation Commission on Accommodation Practices Related to Cultural Differences. Only available online in pdf format: <http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>

1.1. Characteristics of reasonable accommodation

a) IT IS A REQUIREMENT THAT FOLLOWS DIRECTLY FROM THE PRINCIPLE OF EQUALITY

As stated by WOEHLING, it is the corollary of the prohibition of indirect discrimination⁷. It is not stipulated as such in any law, that is, there is no *reasonable accommodation law*. It is a jurisprudential concept stemming directly from the article 15 of the *Canadian Charter of Rights and Freedoms*⁸ and article 10 of the *Charter of Rights and Freedoms of Quebec*.⁹

As reported by AÑÓN ROIG, reasonable accommodation “in a technical legal sense can be understood as an obligation that results, even if implicitly from the principle of non discrimination and the demands of realization of the constitutional rights of the person”.¹⁰

b) THE BASIC ASSUMPTION IS THE EXISTENCE OF A DISCRIMINATORY SITUATION

It is not only religious discrimination which can lead to demands for accommodation, but they can be also based on any of the grounds of discrimination described in the charters of rights, such as race, colour, sex, pregnancy, sexual orientation, marital status, age, religion, political convictions, language, ethnic or national origin, social status, disability, or analogous.

⁷ “Le corollaire de l’interdiction de la discrimination indirecte consiste plutôt en une obligation d’accommodement, c’est à dire un devoir pour celui qui est à l’origine de la discrimination de prendre tous les moyens raisonnables pour soustraire les victimes de la discrimination indirecte aux effets de celle-ci.”

Woehrling, José (1998): “L’obligation d’accommodement raisonnable et l’adaptation de la société à la diversité religieuse”, *Revue de droit de McGill*, 43, p. 330.

⁸ The *Canadian Charter of Rights and Freedoms*, is the preamble of the Canadian Constitution of 1982. Art.15 “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

⁹ Art. 10 de la *Charte de droits et libertés de la personne*: “Toute personne a droit à la reconnaissance et à l’exercice, en pleine égalité, des droits et libertés de la personne, sans distinction, exclusion ou préférence fondée sur la race, la couleur, le sexe, la grossesse, l’orientation

sexuelle, l’état civil, l’âge sauf dans la mesure prévue par la loi, la religion, les convictions politiques, la langue, l’origine ethnique ou nationale, la condition sociale, le handicap ou l’utilisation d’un moyen pour pallier ce handicap”.

It is worth mentioning that although the burden of proof to avoid the obligation to accommodate falls on the respondent, the complainant must show a minimal probative evidence of discrimination.

c) THE OBLIGATION TO ACCOMMODATE AFFECTS THE PUBLIC AND THE PRIVATE SECTOR

Although the principal context of claims is the exercise of freedom of religion in the workplace, the accommodation can occur in many other environments, such as hospitals, schools, universities ... or any other situation where a conflict caused by a uniform treatment of diversity may arise. Because “the concept of reasonable accommodation is inherent to the right to equality, the application of this concept outside the realm of labour relations was embedded in their genetic code.”¹²

It is worth noting that *reasonable accommodation* itself is the legal figure applied by the courts, whereas when the matter is resolved between the parties without the intervention

sexuelle, l’état civil, l’âge sauf dans la mesure prévue par la loi, la religion, les convictions politiques, la langue, l’origine ethnique ou nationale, la condition sociale, le handicap ou l’utilisation d’un moyen pour pallier ce handicap”.

¹⁰ Añón Roig, María José (2010): «Multiculturalidad y derechos humanos en los espacios públicos: diversidad cultural y responsabilidad pública» in Ruiz Vieyetz, Eduardo and Urrutia, Gorka (eds.) (2010): *Derechos humanos en contextos multiculturales. ¿Acomodo de derechos o derechos de acomodo?*, 1ª ed., Alberdania, San Sebastián, p. 63.

¹¹ Jézéquel, Myriam (2010); “L’obligation d’accommodement raisonnable : ses potentiels et ses limites”, in *Institutional accommodation and the citizen: legal and political interaction in a pluralist society. Trends in social cohesion 21*, Council of Europe Publishing, Brussels, p. 26. http://www.coe.int/t/dg3/socialpolicies/socialcohesiondev/trends_en.asp

¹² Bosset, Pierre (2007): “Les fondements juridiques et l’évolution de l’obligation d’accommodement raisonnable”, in Jézéquel, Myriam. (2010) (dir.): *Les accommodements raisonnables : quoi, comment, jusqu’où ?*, 1ª ed., Editions Yvon Blais, Cowansville, Québec, p. 8.

of a judge, it is called *concerted adjustment*. According to the glossary of terminology of the Bouchard-Taylor report: “Concerted adjustment is similar to reasonable accommodation except that the handling of the request falls under the citizen sphere while the former falls under the legal sphere. It is usually granted by the manager of a public or private institution following amicable agreement or negotiation with users such as patients, students or customers, or with employees. Concerted adjustment can also apply to situations that do not involve discrimination. The obligation to adjust may be of a legal, ethical, administrative or other nature.”¹³

If the parties were a public institution and a particular person, it would still be a concerted adjustment, whenever the matter is not referred to a court. We can say that the logical sequence would be to try first a concerted adjustment and, just in case it is ineffective, then referring the demand of reasonable accommodation to a judicial process. The courts will impose the duty to accommodate whenever is not sufficiently proved an undue hardship, as we will see in the next section. Obviously, concerted adjustments are preferred and promoted, since they mean a self-management of the conflicts by the actors themselves.

d) THIS IS A PERSONAL AND INDIVIDUAL CLAIM, WHICH IS MADE AT THE REQUEST OF THE INTERESTED PARTY, AND DOES NOT OPERATE AUTOMATICALLY

When we talk about reasonable accommodation, we are in the particular and specific level, not in the general and abstract one. In the words of WOEHRLING “reasonable accommodation as currently known in Canada is an essentially jurisprudential construction, progressive, case by case and pragmatic”.¹⁴

¹³ Also note the concept of “Informal agreement: In the realm of intercultural harmonization practices, the informal agreement refers to any agreement concluded between individuals outside the framework of institutions and organizations.”, Bouchard, Gérard and Taylor, Charles, *op. cit.*, p. 286.

¹⁴ Woehrling, José, *op.cit.*, p. 400.

¹⁵ Jackson Preece, Jennifer (2010): “Emerging standards of reasonable accommodation towards minorities in Europe?”, in *Institutional accommodation and the citizen: legal and political interaction in a pluralist society. Trends in social cohesion 21*, Council of Europe Publishing, Brussels, p. 120. http://www.coe.int/t/dg3/socialpolicies/socialcohesiondev/trends_en.asp

Moreover, reasonable accommodation is not a collective right, because it must be demanded individually. In this sense, it gives protection to people that belong to minorities without protecting the minority itself. As stated by JACKSON PREECE:

“Reasonable accommodations are not block exemptions. They are directed at the individual member of the group and not the group per se, prescribed only where necessary, and are tailored to the specific characteristics of each and every case.”¹⁵

e) POSSIBILITY TO REFUSE THE REQUEST FOR ACCOMMODATION WITH JUSTIFICATION: THE UNDUE HARDSHIP, UNFAIR OR DISPROPORTIONATE BURDEN

This last point allows us to link with the limits on the legal obligation to accommodate.

1.2. Limits to reasonable accommodation

As applied by Canadian courts, the limit to this obligation to accommodate is the concept of *undue hardship (contrainte excessive)*¹⁶. It applies when a demand causes obligations that the other party cannot or does not want to assume because it implies a disproportionate effort. Let’s see some examples of what the Case law in Quebec accepts as grounds for rejecting demands for accommodation.

To be considered undue hardship, the accommodation has to cause:

- Financial constraints: excessive cost, whether financial, material or human.

¹⁶ “Undue hardship: the examination of an accommodation or adjustment request centres primarily on an assessment of undue hardship. The notion covers a variable number of factors, the most frequently mentioned ones being the financial and administrative burden stemming from the request, the extent to which other people’s right are infringed, and impact to security and public order.”, Bouchard, Gérard and Taylor, Charles, *op. cit.*, p. 290.

A very similar term would be *disproportionate burden*, which is currently used by European Case-law.

- Functional limitations: an obstacle to the proper running of the company or institution.
- Conflict with the objectives or deontology of the institution or company.
- Violate the collective interest, democratic values or public policy.
- Damage other people's rights and freedoms.

As we can see, the concept of undue hardship is not noticeable in the abstract, but by examining the particular case. For example, to determine which financial costs may be considered excessive, we would need to know the turnover of the company in question.

In any case, compelling reasons are required to deny the arrangement because, as stated by the Case law, "minor inconveniences are the price to pay for freedom of religion in a multicultural society".¹⁷

2. The doctrine of the decision STC 19/1985 of the Spanish Constitutional Court and the doctrine of the decision *O'Malley v. Simpsons-Sears Ltd.* of the Supreme Court of Canada: two similar cases, two different rulings

The decision 19/1985 of 13 February resolved an appeal (*recurso de amparo*¹⁸) before the Spanish Constitutional Court, which is the last and highest court having jurisdiction in matters related to fundamental rights. The cause of the appeal must always be an infringement of a fundamental right, which in this case was freedom of religion. The fact provoking the infringement was the dismissal of an employee who, due to the fact of becoming a member of the Seventh-day Adventist Church, failed to meet the normal working hours to comply with her religious beliefs, which demanded the observance of the Sabbath (from Friday's sunset to Saturday morning). The worker attempted to reconcile her new faith with the demands of her job, requesting a shift change or a justified absence with a corresponding loss of salary or compensation at other time outside the agreed working hours. The conclusion reached by the Spanish Constitutional Court is that

the granting of a different weekly rest on the basis of religious belief would be a reasonable and legitimate exception, but it is not imperative for the entrepreneur to grant it. Considering this, it was lawful for the company not to offer any accommodation. Thus, when the worker repeatedly and systematically was failing to work in order to fulfil their religious observance, she was breaching her work contract. For this reason, the dismissal was deemed appropriate, and the *amparo*, was rejected.

That same year, the Canadian Supreme Court was judging the *O'Malley v. Simpsons-Sears Ltd decision*¹⁹. A worker in a clothing store, which opened every Saturday, and in which all employees worked three Saturdays out of four in rotating shifts, became afterwards a member of the Seventh-day Adventist Church. From then on, she had to comply with the religious observance on Saturdays. When she reported this change to the entrepreneur, he was forced to dismiss her, arguing that he could not give her all Saturdays off, since it was a key day for business. Finally, they agreed on a part-time job, with the consequent reduction of wage. The worker claimed before the Courts for the economic losses due to part-time work, arguing that she had suffered discrimination on religious grounds. In the end, the Supreme Court reversed the decisions of all previous courts and ruled that the worker had actually been the victim of indirect discrimination caused by a working rule, in principle neutral, which obliged to work on Saturdays.

As a natural consequence of the prohibition on indirect discrimination, a duty of accommodation arises. Owing to that, the employer is obliged to take measures to accommodate the employee, unless this would involve an unreasonable burden (*undue hardship*). In this case, since it has not been proved that he made the effort to accommodate the employee's religious needs, or that such accommodation would have resulted in an undue hardship on him, the court ruled against the employer and condemned him to pay a compensation to the worker.

Let's see a table that reflects the similarities and differences between the two decisions.

¹⁷ Central Okanagan School District No. 23 c. Renaud, [1992] 2 R.C.S. 970, p. 984 and 985.

¹⁸ In Spanish Constitution, the hardcore of human rights are known as fundamental rights, and they are contained within the articles 14 to 29. One of the safeguards for these fundamental rights is the possibility to appeal

to an extraordinary Court, once all the ordinary tribunals have unsuccessfully been held. This is the Constitutional Court, and the appeal is known by "recurso de amparo", "amparo constitucional" or just "amparo".

¹⁹ Ontario Commission of Human Rights and Theresa O'Malley (Vincent) v. Simpsons- Sears Ltd., [1985] 2 S.C.R. 536.

Table comparing STC 19/1985 and Simpsons-Sears Decision

	STC 19/1985	O'Malley v. Simpsons- Sears Ltd., [1985]
Date of sentence	February 13 th , 1985	December 17 th , 1985
Tribunal Court	Spanish Constitutional Court	Supreme Court of Canada
Previous Courts' decisions and final judgment	Labour Court No. 2 of Vigo. The employee is right: nullity of the dismissal. Central Labour Court, The employer is right: the dismissal is legal. Constitutional Court: the employer is right: the dismissal is legal.	Board of Inquiry of Ontario Human Rights Code. The employee's complaint is dismissed. Divisional Court: The employer is right; the employee's appeal is dismissed. Ontario Court of Appeal: The employer is right; the employee's appeal is dismissed. Supreme Court of Canada: the employee is right, employer must indemnify.
Legal Issue	Incompatibility between the freedom of religion of the employee and the right of the employer to proceed with the lawful conduct of business.	
Position held in the company	Specialized printer in Company "Industrial Dik, SA."	Saleswoman in Simpsons-Sears (ladies wear department)
Years worked in the company	From 1971 to 1982	From 1971 to 1978
Date of conversion	September 1982	October 1978
Date of dismissal	December 9 th , 1982	October 20 th , 1978
Reason for dismissal	Letter of dismissal for abandonment of the job and absenteeism.	The employer discharged the complainant from full-time employment because of her refusal to work on Saturdays, but he immediately rehired her as a part-time employee, on reduced hours.
Complainant legal basis	The dismissal occurred violates freedom of religion in the aspect of worship and practice, since the company does not make possible the fulfilment of her religious duties. Violation of art. 16.1 of Spanish Constitution (CE) ²⁰ , freedom of religion, in connection with art.14 CE, which prohibits discrimination based on religion.	Discrimination on the basis of her creed. The s. 4 (1)(g) of the Ontario Human Rights Code prohibited not only employment conditions, which are discriminatory on their face, but also those that have the practical consequence of discriminating on a prohibited ground. That is, indirect discrimination protection is also included in the Ontario Human Rights Code provisions.

²⁰ Note that CE stands for Constitución Española (Spanish Constitution).

	STC 19/1985	O'Malley v. Simpsons- Sears Ltd., [1985]
Respondent legal basis	Dismissal was for breach of contract. No discriminatory dismissal. Freedom of religion is not an absolute right, but limited by 35.2 CE. Sunday is a holiday by tradition, and not to favour one religion over another. Contract was born from the free will of both parties: changes cannot be imposed on a one-sided criterion to the other party. Not granting favourable treatment does not imply discrimination. On the contrary, to grant it would be discriminatory against the other workers because their weekly rest would last longer.	From Thursday evening to Saturday evening was considered "the time for selling". Accommodation would involve preferential treatment against the other workers, because they all work on a rotational basis.
Grounds for the decision (Ratio Decidendi)	The rule that establishes the Sunday weekly rest (37.1 ET ²¹) can be changed by the initiative of the parties. It is possible that they come to an agreement on another day of rest, but this can never be imposed unilaterally. The granting of a weekly rest period on the basis of different religious belief would be a reasonable and legitimate exception, but its granting cannot be compulsory for the entrepreneur. Moreover, Sunday is the holiday not only because of religious reasons, but also for historical and secular, but above all, is not established with the intention of favouring the Roman Catholic Church and discriminating against other faiths.	There is no evidence in the record bearing on the question of undue hardship to the employer. And onus of the proof is on the respondent. The first reaction of the employer was to offer her a part-time job, which was accepted. Also to consider Mrs. O'Malley for other jobs that not require to work on Saturday. However, there was no evidence regarding the problems which could have arisen as a result of a real and serious intention to accommodate, such as in what expense he would have incurred in rearranging working periods for her benefit, or what other problems could have arisen if further steps were taken towards her accommodation. There was therefore no evidence of how further steps would have caused undue hardship for the respondent and thus have been unreasonable.
Rule of Law	Denial of protection. Judgment Confirming the Central Labour Court: just cause of dismissal.	Appeal accepted. The Supreme Court reversed the decisions of all previous courts, because they did not prove that the employer took all the reasonable steps at his disposal to accommodate the employee.
Sentence		The respondent pay to the complainant as compensation, the difference between the sum of her earnings while engaged as a part-time employee of the respondent from October 23, 1978 to July 6, 1979 ²² , and the amount she would have earned as a full-time employee during that period.

²¹ ET stands for Estatuto de los Trabajadores (Workers' Rights Statute). BOE 29th March 1995, n. 75, p. 9654.

²² The complainant is just indemnified until this date because she stated that since her marriage (1979), she did not want to work full-time any-

more, but she would prefer working part-time. Therefore, she just claimed for compensation for the period in which she do wanted to work full-time and she could not due to the reasons already mentioned.

Now we will analyze in detail the doctrine in these two decisions.

2.1. *The Spanish Constitutional Court decision STC 19/1985*

The problem is the alleged²³ incompatibility between the religious practice and the compliance with labour obligations.

The employee claimed violation of art. 16.1 CE, freedom of religion, in the aspect of the practice of worship, since the company does not make possible the fulfilment of their religious obligations. She also claimed violation of art. 14 CE, which prohibits discrimination based on religion.

The appeal was also based in the art. 2.1 of the Organic Law on Freedom of religion 1980 (LOLR)²⁴, and art. 3.1 in relation to this limits.²⁵

The worker believes that the practice of religion is part of the essence of freedom of religion and that this freedom must prevail over the right of the employer to conduct his business. Therefore, she required the employer to reconcile the organization of the work with her religious practice, since in her opinion, this was possible without imposing a serious disorder or an operational constraint for the company. Article 3.1 of the LOLR points as limits the protection of the rights of others and the safeguarding of safety, health and public morality. The complainant stated that the rights of other workers were not hurt by the fact that he agreed to a schedule change, since similar changes had already been made for other workers of the company. Of course, her request did not breach the second limit.

The worker also mentioned the Universal Declaration of Human Rights (art. 18), the International Covenant on Civil and

Political Rights (art. 18), the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 9).

Moreover, she put forward an erroneous transcription of the s. 6.3 of the ILO Convention 106, by which "religion is mistaken for region". Therefore the Central Labour Court reasoning was based on a misunderstanding²⁶. She also added that s. 6.4 of the ILO Convention was not included in the judgment.

For the complainant, the dismissal should be considered null and void according to art. 54.2b²⁷ of the Workers' Rights Statute. That would imply the immediate reinstatement of the worker and the remuneration of all the unpaid wages.

The Constitutional Court in accordance with the public prosecutor²⁸, confirmed the decision of the Central Labour Court. The ruling was based in the fact that the dismissal was because of the breach of contract, and not at all a discriminatory dismissal on religious grounds.

On the one hand, the Constitutional Court agreed with the Central Labour Court, as for the interpretation of Article 37.1 of the Workers' Rights Statute in relation to Convention 106 of ILO, which stated that the weekly rest must coincide whenever possible with the day fixed by tradition or customs of the country or region. Moreover, the fact that Sunday is the holiday is not only because of religious reasons, but also historical and secular, and above all, is not established with the intention of favouring the Roman Catholic Church or discriminating against other faiths.

"Weekly Rest is a secular and labour institution. It is Sunday because it is a general rule settled by tradition. (...)

*The purpose of a general preference is evident, because matching the ordinary weekly rest of workers with the one of public offices, schools, etc., facilitates a better achievement of the objectives of the rest."*²⁹

In the Spanish translation, district was translated by *región*, which was mistaken for *religión*. We can see that according to the English version of the ILO Convention district and religion cannot easily be mistaken.

²⁷ At present it is art. 55.5 ET. "It will be null and void the dismissal based on any of the discrimination grounds forbidden by the Constitution or the Law, as well as the dismissal provoked by violation of fundamental rights and liberties of the worker".

²⁸ In Spain, the Ministerio Fiscal is the institution in charge of promoting the action of justice to defend public interest and citizen rights.

²⁹ STC 19/1985, FJ 4 y FJ 5.

²³ I say *alleged* because its incompatibility has not been proved. In fact, the minimum attempt to make it compatible has not even been tried.

²⁴ LO 7/1980, de 5 de julio (RCL 1980\1680), de libertad religiosa (art. 2.1),

²⁵ Art. 3.1 LOLR: "Exercise of rights that arise from freedom of religion and worship has as only limit the protection of the rights and freedoms of the others, and the safeguarding of safety, health and public morality, essential elements of public order protected by the Law within a democratic society".

²⁶ The ILO Convention 106 states: "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."

On the other the 37.1 ET places Sunday within the scope of the non-mandatory provisions: it means that by agreement, the contract may settle another day of rest, but this cannot be imposed unilaterally.

*"Workers are entitled to a minimum weekly rest of day and a half uninterrupted, which as a general rule will include Saturday afternoon or, if necessary, Monday morning and the whole Sunday". However, this general rule non-mandatory may be amended by collective agreement or contract of employment (also by law or authorization of the competent authority), so that the will of the parties can set another resting day (...) The granting of a weekly rest period on the basis of different religious belief would be a reasonable and legitimate exception, but granting it cannot be not compulsory for the entrepreneur."*³⁰

The problem is that the judgment did not assess the compatibility of religious freedom with the characteristics of the workplace in particular. Instead, it focused on the fact that contractual changes cannot be imposed, but agreed. But we should not forget that parties are not on an equal footing to negotiate.

The judgment also focused too much on the fact that there was no discrimination because if Sunday is the day preferred (unless otherwise agreed) it is not to establish a favourable regime to some believers and unfavourable for others, but because it is the day fixed by tradition. Although this preference had religious origin, now it can be considered secular. As SEGERS comments, "it is kind of a 'religious-secularized' day"³¹, because "the long-standing cultural tradition tends to dissociate the festivity from its origin. For the State's part there is not here and 'internal bond' to anything but 'external confirmation' of something".³²

However, the important thing is not the reason why Sunday is the holiday³³: what matters is that this situation results in indirect discrimination and violation of freedom of religion.

It is obvious that the right to freedom of religion (like all other rights) is not absolute, but it has limits, as the rights and freedoms of others, or public order. The Court understood that the complainant was trying to impose her beliefs to the other party by demanding unilaterally a change in the contractual

relationship, when the contract was pre-existing and resulting of the free will of both parties. Given that no machine was free nor she could work for the company any other day instead of Saturday, the Court thought that meeting her request, would really involve discrimination with regard to the other workers, since her weekly rest would last more than the rest of the others. The Court concluded that not to give a favourable treatment, did not entail any discrimination.

*"What the complainant seeks is not the total or partial cancellation of the contract, but being excused from the obligations she freely accepted and which are considered according to law, so that despite her non-compliance, she would not be dismissed. This shows that the whole line of argument of the appellant is that a purely factual change (in her ideas or religious beliefs), being a manifestation of a constitutionally guaranteed freedom, causes a modification of the contract signed by her, whose performance will only be enforceable to the extent it is not inconsistent with the obligations of her new religious faith. No doubt concerning her good faith and deeply religious feelings, but that leads to unacceptable extremes the subjection of all to the Constitution (art. 9.1), being contrary to principles, such as legal certainty, which are constitutionally guaranteed (art. 9.3)."*³⁴

From my point of view, this reasoning entails a misinterpretation of the employee's demand. When the Court stated that she was trying to impose her beliefs unilaterally, it is not true, since she did not try to impose her beliefs to the employer's beliefs, but to obtain the permission to exercise hers. On the other hand, she did not expect neither to obtain more favourable treatment than other workers, since her adaptation request was an exemption of Sabbath hours to exercise religious worship, being willing to recover those hours in another time, or even to lose the proportional part of the wage.

2.2. The decision *O'Malley vs. Simpsons-Sears Ltd.*

In the Simpsons-Sears decision, the Supreme Court interpreted the Ontario Human Rights Code, which prohibits discrimination on religious grounds. The Court distinguished be-

³⁰ STC 19/1985, FJ 3.

³¹ Seglers Gómez-Quintero, Alex (2004): "La acomodación de las festividades religiosas y nueva protección por discriminación indirecta en el orden laboral", *Ius Canonicum*, vol. XLIV n.º 88, p. 669.

³² Rodríguez de Santiago, Jose María (2008) "El estado aconfesional o neutro como sujeto 'religiosamente incapaz'. Un modelo explicativo del

art. 16.3 CE", *Repertorio Aranzadi del Tribunal Constitucional*, 14, Aranzadi, Pamplona, p. 126.

³³ Note that the word holiday itself, is not secular at all. (día santo).

³⁴ STC 19/1985, FJ 1º in fine.

tween direct discrimination, which would not be a problem, and indirect discrimination. It adopted exactly the same reasoning as the U.S. Supreme Court, which took as a precedent: should the law fill the legal loophole in the Human Rights Code of Ontario?

"[...] the duty to accommodate, referred to in the American cases, in the case that it is shown that a working rule has caused discrimination, it is incumbent upon the employer to make a reasonable effort to accommodate the religious needs of the employee, short of undue hardship to the employer in the conduct of his business. There is no express statutory base for such a proposition in the Code. Hence, the vacuum is the Code and the question: Should such a doctrine be imported to fill it?"³⁵

Finally, in this case the Canadian Supreme Court reversed the rulings of the lower courts, and stated that the employer had not met its burden of proving that the accommodation would have involved for him and undue hardship.

This figure of reasonable accommodation was constructed jurisprudentially to save indirect discrimination caused by a seemingly neutral and standard rule, *a priori* in accordance with the laws. In this case, an employment contract which includes Saturday working hours.

In short, the doctrine stated in Case Simpsons-Sears could be synthesized as follows: to safeguard equality, direct discrimination needs justification; indirect discrimination needs accommodation (or a justified denial of this accommodation).

3. STC 19/1985 analysed in the light of the figure of reasonable accommodation

It is striking that from two such similar cases can follow completely different ways of reasoning, which consequently lead to such divergent and conflicting rulings. "Unlike the Canadian Jurisprudence, Spanish Courts have not required any effort on the employer to accommodate workers in cases of indirect religious discrimination."³⁶

³⁵ Ontario Commission of Human Rights and Theresa O'Malley (Vincent) v. Simpsons- Sears Ltd., [1985] 2 S.C.R. 536. Paragraph 20

³⁶ Seglers Gómez-Quintero, Alex, *op.cit.*, p. 672

³⁷ Proulx uses that in a different context (discrimination on the retirement age), but this reasoning is perfectly applicable to our case: "L'accommodement individuel, qu'il se présente en situation de discrimination directe ou indirecte, consiste à prendre des mesures raisonnables

In the Spanish case, the fact of the discrimination itself is not even accepted. Consequently it is not considered either the possibility that the employer has a minimum obligation (beyond the moral one) to try to satisfy the demand of the employee. Quite the opposite, it distorts the worker's demand accusing her of trying to unilaterally impose her belief on the employer.

Also the Spanish Constitutional Court insists too much on the idea that the worker was bound to the company because she freely accepted its conditions. The changes in beliefs are not considered reason enough to request an adjustment of any kind. It degrades the exercise of religious freedom to a change in preferences. The doctrine of the Constitutional Court contains the idea that if for any reason, including the exercise of a fundamental right as the religious freedom is, the employee ceases to be satisfied with their working conditions, no one forces him or her to continue working: in no case it is considered, the possibility of requiring neither the employer nor the authorities an accommodation to their new needs.

As stated by PROULX "the individual accommodation, either for direct or indirect discrimination, is to take reasonable steps to prevent that competent and skilled workers excluded by a personal characteristic that has nothing to do with the effective performance in a particular job."³⁷

From my point of view, the fact that the employee has been working for 10 years for the company, shows more than enough her competence and suitability for this job in particular. Unfortunately, it happens that, indeed, an intimate and personal issue completely unrelated to the technical characteristics of the job, which is her adherence to the beliefs of a new creed, is the cause (although indirect³⁸) of a dismissal, which ends with the professional opportunities of a fully capable worker in question.

This is not about to impose the precepts of the religion to the business organization, but about trying to reconcile the new circumstances. Compatibility is not mandatory, what is

afin d'éviter que des gens compétents et aptes au travail ne soient injustement exclus à cause d'une caractéristique personnelle qui n'a rien à voir avec l'exécution sûre et efficace d'un emploi donné.", Proulx, Daniel (1996): "L'accommodement raisonnable, cet inconnu: Commentaire de l'arrêt Large c. Stratford", *Revue de Droit de McGill*, vol. 41, p. 702.

³⁸ We should remind that the direct cause of the dismissal was the breach of the contract due to unjustified and systematic absenteeism.

mandatory is the attempt to reconcile. The legal obligation of reasonable accommodation is an obligation of means, not of results. If you are obliged to the result, then you would be forcing the employer to grant preferential treatment, which would "place the categories of people protected against discrimination, not on an equal footing with other employees, but on a pedestal, upon giving them a preferential treatment comparing to the other workers."³⁹ But on the contrary, if nothing forces to try to achieve an outcome that satisfies both parties, there would be too much indolence to harmonize interests as important as the right to work and the right to exercise religious freedom. Failure to establish this legal duty to accommodate, is indirectly infringing the right to work, and produces ghettoization of work because religious minorities could work only in companies in which the compatibility between the right to work and the full exercise of their religious freedom is ensured. That is, they are doomed to working in companies run by members of the same religion or minority culture. This results in a lack of integration into society of religious minorities⁴⁰.

A way to force this attempt is the mechanism established by the figure of reasonable accommodation: there is a legal obligation to accommodate, unless it involves an excessive demand, a disproportionate burden on the other side. The mere fact of reversing the burden of proof constitutes in itself an effective guarantee on the symbolic level and on the pragmatic front, since it compels at least to devote time and energy to consider the ways to allow the exercise of a fundamental right.

In case the facts related in the judgment 19/1985 had occurred in Canada, it would have been considered first whether the discrimination is direct or indirect. Indeed, it would have been appreciated that there is no direct intention by the employer to discriminate against the employee in particular, or against members of the Seventh-day Adventist Church in general. On the contrary, the rule is in principle neutral. But for all practical purposes, this obligation of including Saturday as a working day has detrimental effects on a worker in question.

³⁹ Proulx, Daniel, *op.cit.*, p. 703. "Cela place les catégories de personnes protégées contre la discrimination non pas sur un pied d'égalité avec les autres employés, mais sur un piédestal, en leur accordant un traitement de faveur auquel n'ont pas droit les autres employés".

⁴⁰ This example could be extrapolated to the religious symbols in schools, another example of reasonable accommodation. If it is not al-

That is exactly how accommodation was born, as an essential part of the obligation to avoid indirect discrimination.

According to this north-American doctrine of accommodation, the Spanish employer should have also tried by all means available to accommodate the employee so that she continued working in the company. In case this accommodation entailed an unreasonable effort, the employer should have shown why, and only then, if it is true that the burden was disproportional, he or she would have been exempted from the legal obligation to accommodate.

In this particular case, the employer would have argued one of the options consolidated in Canadian case-law: the affectation of the rights of other workers. The employer declared that to grant the accommodation was discriminatory with regard to other workers, because it meant preferential treatment, since his weekly break would last longer: "it would lead to discrimination against the other producers of the company since their weekly break would last from Friday afternoon until the following Monday, while the other co-workers would only have the Saturday and Sunday; altering also the regime of work, since the workers use at every turn, the entire machinery in the workshop, so neither is free machine that could be used out of the day, nor the employee can work in the company out of this day".⁴¹

If all this were proved, then that would be a valid reason for denying the accommodation. The problem is that there was no evidence that the employer had tried to accommodate the running of his business to the working hours required by the employee; it was not demonstrated that there were not any free machine available to compensate for the hours not worked; nor it was proven that the failure to work these hours with the proportional decrease in her salary would have entailed a serious disruption for the normal running of the company. The proof was therefore crucial, and even more considering that the complainant claimed as proven fact, just the opposite: "the other workers or the company were not affected by a change in schedule,

lowed, those concerned could feel forced to renounce to public education in order to turn to religious private schools where it is actually permitted. This results in a lack of integration and interaction with the majority culture.

⁴¹ STC 19/1985 FJ.4º

which, as reported in the facts of the sentence, had already been established for other workers.”⁴² By applying the reasonable accommodation doctrine as in the *Simpsons-Sears* decision, the Spanish employer would have been condemned to pay compensation to the employee since he could not demonstrate that he had undertaken all the possible steps to accommodate the employee. Or, on the contrary, he would have been discharged if indeed he had demonstrated that any machine was free and that there was not any other way for the employee to compensate the Saturday hours exempted, so it was totally incompatible to comply with her religious practice without a serious disruption for the company or for the workers rights.

4. The applicability of reasonable accommodation in the Spanish context

The figure of RA has been very successful in Canada thanks to its jurisprudential and doctrinal development, its importance in the quantity of decisions on it, and its popular dissemination. However, it was not born in this country, but it had its origin in the United States⁴³. The special features of Canada allow reasonable accommodation to flourish. According RUIZ-VIEYTEZ it is in Quebec where “this idea finds a fertile ground for the exercise of competences on immigration and for the recognition of the maintenance of minority cultures”.⁴⁴

In fact, the legal reasoning of the decision *Simpsons-Sears*, first case in applying the reasonable accommodation in Canada, refers to United States Courts, the ones who first faced up to this problem and applied this newborn concept of “duty to accommodate”, which later became institutionalized as “reasonable accommodation”. American Courts needed for this creation to introduce in year 1972 an Amendment to the Civil Rights Act of 1964.

In the *Simpsons-Sears* decision, judges just “adopted” this concept:

⁴² STC 19/1985 FJ.2º

⁴³ I have written on the origins of reasonable accommodation in Borges Blázquez, Lola (2011): “Derechos e integración: el acomodo razonable como instrumento para la igualdad material”, *Cuadernos Electrónicos de Filosofía del Derecho* 23, pp. 47-73. <http://ojs.uv.es/index.php/CEFD/article/view/711>

“There is no express statutory base for such a proposition in the Code. Hence, the vacuum is the Code and the question: should such a doctrine be imported to fill it?”⁴⁵

Indeed, this void was filled by importing a case-law doctrine from the U.S.A, just because this doctrine was entirely consistent with the 4.1 Ontario Human Rights Code.

Taking these facts into account, what hinders this figure to be imported into the Spanish legal system?

First, the existence of common law and civil law systems implies an essential difference. Freedom of judges in United States and Canada to resolve on the basis of judicial precedents following the previous cases logician means a much wider margin of action compared to judges in Spain, who must adhere to current law in force, according to the system of sources of Law established by the Constitution. Therefore, the interpretation of the valid law is the only margin of freedom permitted to them.

In Canada there is no law that shows the parameters and limits of reasonable accommodation. Courts have constructed and elaborated this figure by means of its application, giving shape to it case by case. This construction would be totally unfeasible in the Spanish judicial system. I do not argue, therefore, that this culture of accommodation is easy to import to the Spanish context. However, the principles underlying the figure of reasonable accommodation and the effects derived from it, perfectly fit in with the legal and constitutional logician that prohibits direct and indirect discrimination and promotes freedom of religion, in the terms it is configured and guaranteed in the Spanish legal system.

To start with, the Spanish Constitution: article 14 prohibits direct and indirect discrimination; article 9.2 promotes real and effective equality; and religious freedom is enshrined in art. 16, and it is configured under the principles of open secularism and cooperation with the Catholic Church and the several religious denominations with representation in the Spanish society.

⁴⁴ Ruiz Vieytez, Eduardo (2010): “Acomodo razonable y diversidad cultural: valoración y crítica”, in Solanes Corella, Ángeles (2010): *Derechos humanos, migraciones y diversidad*, Tirant lo Blanch, Valencia, pp. 65-103.

⁴⁵ Ontario Commission of Human Rights and Theresa O’Malley (Vincet) v. *Simpsons- Sears Ltd.*, [1985] 2 S.C.R. 536, paragraph 20.

To continue with, the Spanish Organic Law on Religious freedom (LOLR 1980): article 1.2 that “Religious beliefs will not constitute reason for inequality or discrimination before the law. Religious grounds cannot be invoked to prevent anyone from exercising any work or activity or hold office or public functions”; article 2.1 “Freedom of religion and worship guaranteed by the Constitution includes, with the consequent immunity from coercion, the right of everyone:

- a. To profess religious beliefs freely choose or not to profess any, change or abandon the confession; express freely their own religious beliefs or the lack of them, as well as refrain from testifying about them.
- b. To practice acts of worship and receive religious assistance of his own denomination, celebrate their festivities, celebrate their marriage rites, to be buried with dignity, without discrimination on religious grounds, and not to be compelled to perform acts of worship or receive religious assistance contrary to his personal convictions”.

Also article 3.1 of LOLR contains the limits to the exercise, already mentioned in this paper: “The exercise of rights under freedom of religion and worship is just limited by the protection of the right of others to exercise their civil liberties and fundamental rights, as well as safeguarding the safety, health and public morality, elements which constitute the public order protected by law in the context of a democratic society”.

On the other hand, we must notice that the right to freedom of enterprise is not a fundamental right. Article 38 CE states: «It is recognized freedom of enterprise within the free market economy. The public authorities guarantee and protect its exercise and the safeguarding of productivity in accordance with the requirements of the general economy and, where appropriate, with economy planning”. Also the art. 20 of the ET confers management, organization and monitoring powers to the employer.⁴⁶

⁴⁶ Art. 20. Of Worker’s Rights Statute. Direction and control of work activity

1. The worker is required to perform the agreed work under the direction of the employer. and, failing that, by custom. In any case, the worker and the employer are subject in their mutual benefits to the requirements of good faith.

2. In compliance with the obligation to work undertaken in the contract, the worker owes the employer the diligence and collaboration at

However, we should think that if business management is not a fundamental right, in case of collision of rights, the tension should be easily solved in favour of freedom of religion. But it was not the case in STC 19/1985, because an alleged freedom on the moment of signing the labour contract made impossible to demand any accommodation afterwards, as if the change in the personal circumstances of the employee was a mere caprice. Did the situation change after 1985?

4.1. *Cooperation Agreements between the Spanish State and the religious minorities with presence in Spain: reasonable accommodation for religious diversity in the workforce?*

In 1992, the Spanish State signed three Agreements of Cooperation with the religious minorities with notorious presence in Spain, to promote religious pluralism, which were the Federation of Israelite Communities of Spain (FCIE), the Islamic Commission of Spain (CIE) and the Federation of Evangelical Religious Entities of Spain (FEREDE). These agreements did not mean a substantial progress concerning the accommodation of religious needs in the workforce.

To start with, these agreements were expressly restricted to three religious denominations. This lets aside any other demand of a religious minority which has not signed an agreement, what in the end means delegating effectiveness of freedom of religion to the diplomatic State level.

To continue with, the solution given by the agreements leaves a lot to be desired, in the sense that the wording of the agreements explicitly states:

Art. 12 1. “Members of Islamic Communities (there is an equivalent article for Israelite and Evangelical Churches), may ask for the interruption of their work every Friday, because of the collective obligatory and solemn prayer of Muslims, from 1.30 am

work, according to the laws, collective agreements and orders or instructions issued by him in the regular exercise of its directions powers.

3. The employer may take the appropriate actions of surveillance and monitoring to verify the compliance by the employee of his or her obligations and work duties, whenever its adoption and implementation regards for human dignity, and taking into account the actual capacity of disabled workers, if necessary.

until 4.30 pm, as well as the completion of the working day one hour before the sunset during the Fast month (Ramadán)".

Until here we can think that it is a freedom protective legal provision. But the article continues: *In both cases, it will be necessary the previous agreement between parties. Hours not worked will have to be made up for without compensation.*

The same reasoning applies for religious festivities and holidays⁴⁷: the ones established by the Workers' Rights Statute in art. 37 may be replaced by others religious festivities, whenever there is previous agreement between parties.

We must note that the real and effective realization of the freedom of religion in the aspect of worship, and the equality of treatment in case of indirect discrimination is abandoned to the sphere of the employer's decision, without any effort requirement and thus, any guarantee. This vagueness turns this legal provision into worthless scrap of paper.

4.2. *European Equality Directives and the Spanish Act of transposal L62/2003*

More convincing protection is given by 62/2003⁴⁸ Law, which entered into force in 2003 to adequate the Spanish legal framework to the Equality Directives: the Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC) and the Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC).

Specifically, Council Directive 2000/78/EC of 27 November sets as purpose "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment" and continues like that: "For the purposes of this Directive, the 'principle of equal

treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

However the figure of reasonable accommodation is only explicitly stated for people with disabilities, in its art. 5:

"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer."

We could wonder why the others grounds of discrimination do not enjoy of this extra protection, so that the legal wording of the Directive could have been:

"Employers shall take appropriate measures, where needed in a particular case, to enable a person indirectly discriminated because of religion or belief, disability, age or sexual orientation 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".

Even though "It appears that reasonable accommodation practices, although not directly stipulated, are emerging within European Union member states as a consequence of EU prohibitions against indirect discrimination".⁴⁹

In Spain, the Act of transposal of the Equality Directives meant a step forward regarding the 1992 Agreements.

⁴⁷ Art. 12.2 of the 1992 Agreement between the Spanish State and the Islamic Communities, with an equivalent article for Evangelical and Israelite communities. "Religious festivities and holidays expressed here below may substitute, whenever previous agreement between parties, the ones established by the Workers' Rights Statute in art. 37, with the same character of paid and non-recoverable, at the Muslim Community members request".

⁴⁸ Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y del orden social. (L62/2003 Act, December 30th, of fiscal, administrative and social order measures).

⁴⁹ Jackson Preece, Jennifer, *op.cit.*, p. 124.

Art. 27.1 of the L62/2003 asserts that the purpose of the Act is “to establish measures for the real and effective implementation of the principle of treatment equality and non-discrimination, in particular for racial or ethnic origin, religion or convictions, disability, age or sexual orientation”.

Therefore, one of the modifications to achieve this goal is to add explicitly the wording indirect discrimination in the Consolidated Workers’ Rights Statute (1995), which now reads as follows:

Art. 4.2c) Not to be discriminated directly or indirectly for employment, or once employed, for reasons of sex, marital status, age within the limits established by this Act, racial or ethnic origin, social status, religion or beliefs, political ideology, sexual orientation, membership or not to an union, or use of language within the Spanish state.

Also the art. 17.1 declares null and void all regulation, clause of collective labour agreement, individual agreements or unilateral decision of the employer, which contain direct or indirect discrimination on employment, concerning salary, working hours, and the rest of working conditions based on the same grounds of the previous article.

However, if something similar to reasonable accommodation is being applied for cases of disability, there is still some reluctance to apply it for cases of cultural or religious discrimination.

As stated by HENRARD, “there is a lack of consensus among European States on the appropriate nature and scope of the necessary adaptation of religious practice to labour relationships”⁵⁰. So, even if indirect discrimination legislation is a good strategy to construct a legal duty to accommodate, there is still a long way to go.

5. Concluding remarks

It would not be necessary to create a reasonable accommodation law, since it would destroy the essence of reasonable accommodation. Maybe it would be enough if judges made a more guarantist interpretation of the existing legal provisions and rules, an interpretation aimed to proactively promote the

full exercise of religious freedom in the workplace in particular, and the compatibility of fundamental rights with other rights in a general sense, by means of allowing singular exceptions to rules that are in principle neutral and non-discriminatory, but that actually lead to indirect discrimination situations, and thus require an *ad hoc* solution.

In these cases, a change at the policy or legislative level in order to include each and every one of the exceptions needed is a slow, cumbersome and inefficient process to achieve the necessary results, at least in the short term. However, the jurisprudential tool of reasonable accommodation is an agile and dynamic solution, with immediate effects not only on individuals but also on society. Proof of this is the significant progress experienced in Canada, where there are less and less reasonable accommodations and more and more concerted adjustments (as already explained in this article, a kind of reasonable accommodation made between individuals without the intervention of a judge). That means a popularisation and generalization of these adjustments. In this way, society manages its own diversity by itself, turning less and less to the judicial system.

The ordinary granting of reasonable accommodations, such as allowing certain hours and facilities inside the company to pray, or altering the weekly working hours in order to make it compatible with worship, or something much more simple as providing appropriate menus to religious or spiritual needs, creates a medium-term normalization of these demands, as the same time as it promotes empathy with their requests. The more these practices become widespread, they less they are perceived as costly, disproportionate or impossible situations to reconcile. Moreover, it is verifiable that it has been carried out in other countries and the results have been positive. Now then, as JÉZÉQUEL, RUIZ VIEYTEZ and SANTORO conclude, “transposition of reasonable accommodation would make sense only with a political model that accepted a definition of plural citizenship and was based on inclusive social and economic structures. In other words, reasonable accommodation’s chances of success in Europe largely depend on support from inclusive policies. Hence the importance of linking the legal concept of accommodation with a political and ethical conception of plural democratic citi-

⁵⁰ Henrard, Kristin (2010): “Libertad de Religión y Minorías Religiosas: ¿una adaptación adecuada de la diversidad religiosa?”, in Ruiz Vieytez, Eduardo and Urrutia, Gorka (eds.): *Derechos humanos en contextos mul-*

ticulturales. ¿Acomodo de derechos o derechos de acomodo?, 1ª ed., Alberdania, San Sebastián, p. 265.

zenship, which alone is able to open up to otherness and secure genuine recognition of a plural identity. It is, in fact, the political model and ideological background that are likely to determine the application of RA".⁵¹

Just moving forward this direction we will evolve into a society more and more aware of diversity and above all, more willing to adapt to the essential needs of each and every one of its members.

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⁵¹ Jézéquel, Myriam. "Overview and Conclusions. Lessons to be learned", in *Institutional accommodation and the citizen: legal and political interaction in a pluralist society. Trends in social cohesion 21*, Council of Europe Publish-

ing, Brussels, p. 316. http://www.coe.int/t/dg3/socialpolicies/socialcohesiondev/trends_en.asp

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