Divergent Stepping-Stones Towards Equality? Indirect Discrimination and Reasonable Accommodation on the Basis of Religion Competing for Attention in the European Workplace

Katayoun Alidadi*

Introduction

On a law school final exam, I posed the question: "Please describe in your own words what indirect discrimination means, and provide an example of such discrimination on the basis of religion or belief."

The class was an upper-level Anti-Discrimination Law class at the Catholic University of Leuven in Belgium, and the European Law students taking the exam had been lectured on the concepts of direct and indirect discrimination in the context of the Directives of the European Union (EU) on discrimination in the workplace. Students had been lectured on the concept and given various illustrations of religious discrimination in the workplace, including examples of workers being discriminated against because they had worn religious attire, such as a hijab. Students' facial expressions and body language suggested that they had a grasp of the concept and understood the examples.

However, if these law students' answers to the question are to be any indication,[1] there remains much confusion and mystery surrounding the concept of indirect discrimination on the basis of religion, or on other bases. Under EU law, indirect discrimination occurs when "an apparently neutral provision, criterion or practice would put persons having a particular relig-

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* Assistant Professor of Legal Studies at Bryant University, Smithfield, Rhode Island. Comments are welcome at kalidadi@bryant.edu. An earlier version of this Essay was written in the frame of the April 18, 2020 workshop—convened by the Harvard Law School Human Rights Program (HRP), which sought to explore, in a comparative and cross-disciplinary manner, the concept of indirect discrimination on the basis of religion—and was published in the *HHRJ Online Journal*. I want to thank Professor Gerald L. Neuman for his generous invitation and insightful comments, as well as the student reviewers of the *Harvard Human Rights Journal*.

1. An alternative explanation is that the lecture failed to elucidate the concept sufficiently, but this, too, would demonstrate the unworkable complexity of a concept that is to be applied routinely in the workplace.

ion or belief" (or other protected characteristic) at a particular disadvantage compared with other persons.[2] A good example is a no-headdress policy that applies to all employees equally but, in effect, puts Muslim women who wear a headscarf or Sikh men who wear a turban in a particularly difficult situation. The result would be that minority employees may be excluded because of a policy that, on its face, is neutral. This kind of indirect discrimination is characterized by a *group* disadvantage and is only legally acceptable if it is objectively justified as being necessary and proportionate to a legitimate aim.[3] A more direct and positive way of addressing the issue is to award individuals the right to reasonable accommodations.

The concept and terminology of indirect discrimination are inherently complex and unintuitive. Yet, they are to be applied in everyday work situations by non-legal minds. How are we to expect human resources professionals, trade union representatives, or individual employees to comprehend and apply a concept that even the fledgling but focused legal mind struggles to grasp? EU scholar Dagmar Schiek raised the pertinent question: "[W]hy would a legislator introduce a concept as complicated as indirect discrimination?"[4]

This Essay focuses on the legal norm prohibiting indirect discrimination in the European workplace and how it differs from the concept of reasonable accommodation based on religion or belief in the same employment-related setting. I have argued that the complexity of, and the pejorative meaning associated with, the term "indirect discrimination,"[5] render the close concept, the duty to reasonably accommodate an employee's religion or belief, a more effective tool for protecting the rights of religious minority workers in Europe.[6]

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2. *See* Council Directive 2000/78, art. 2.2(b), 2000 O.J. (L 303) 16, 18 (EC). In the United States, the term "disparate impact" is more frequently used than "indirect discrimination." For subtle differences, see Ionna Tourkochoriti, *'Disparate Impact' and 'Indirect Discrimination': Assessing Responses to Systemic Discrimination in the U.S. and the E.U.,* Eur. J. Hum. Rts. 297 (2015/3). In particular, *see id.* at 299 ("The transplant of the concept of 'disparate impact' in the European context led to the elaboration of the idea of 'indirect discrimination' which operates differently in the European welfare system. . . . 'Indirect discrimination' and 'disparate impact' are concepts that have the potential to lead to an egalitarian conception of distributive justice.").

3. Case 170/84, Bilka-Kaufhaus GmbH v. Weber von Hartz, 1986 E.C.R. 1607, ¶ 35.

4. Dagmar Schiek, *Indirect Discrimination*, *in* Cases, Materials and Text on National, Supranational and International Non-discrimination Law 323, 324 (Dagmar Schiek et al. eds., 2007) (referring to the need to "prevent circumvention of specific prohibitions to discriminate," as well as the "social engineering rationale" of aiding "the attainment of the wider goals of discrimination law in social reality" as possible reasons, based on the aim of discrimination law to change socioeconomic reality).

5. Compare an employee who claims he or she would be discriminated against by a decision or policy of the employer with another employee who requests a reasonable accommodation. An employer could be expected to react more defensively in the former case than in the latter. *See infra* note 57.

6. *See generally* Katayoun Alidadi, Religion, Equality and Employment in Europe: The Case for Reasonable Accommodation (2017). For example, see the discussion in *id.* at 263.

In this Essay, I build on this argument. Whereas in the United States the duty of employers to accommodate their employees was first introduced in 1972 in the context of religious discrimination in Title VII of the Civil Rights Act of 1964,[7] in the EU framework, reasonable accommodations are still reserved for persons with disabilities.[8] However, by comparing the legal notion of indirect discrimination with the concept of reasonable accommodation, I hope to bring out characteristics and weaknesses of the indirect discrimination framework, to present the value that would be added by incorporating a duty of reasonable accommodation for employees' religion or belief into European workplace standards, and to reaffirm the role a duty of reasonable accommodation plays in workplaces in the United States.

I. Indirect Discrimination

First, let us examine the place of the prohibition of indirect discrimination on the basis of religion or belief in the EU. The prohibition of indirect discrimination is one of the cornerstones of EU non-discrimination law.[9] The right to treatment free of discrimination, including on the basis of religion or belief in employment, is firmly enshrined in EU law and domestic laws. These bodies of law draw on the jurisprudence of the Court of Justice of the European Union (CJEU), which developed non-discrimination law and indirect sex discrimination law before the Equality Directives of the EU, Directives 2000/43 and 2000/78, were adopted in 2000.[10] The language of "indirect discrimination" figures in the text of the Directive itself,[11] as well as in the domestic legislation that implements the relevant law across the EU.[12]

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7. The EEOC argued that the prohibition of discrimination on the basis of religion under the 1964 Civil Rights Act *implied* a duty of reasonable accommodations. In 1972, after U.S. courts did not accept this position in *Dewey v. Reynolds Metal Co.*, 429 F. 2d, 324 (6th Cir. 1970) (equally divided court), an explicit duty was included in the Civil Rights Act: 42 USCA s.2000e (j). *See* Marcia Swigart Hoyt, *Religious Discrimination and Title VII's Reasonable Accommodations Rule:* Trans World Airlines, Inc. v. Hardison, 39 Ohio St. L.J. 639, 640–42 (1978) ("In response to the Dewey decision, Congress in 1972 amended Title VII to incorporate the 1967 EEOC guidelines.").

8. *See* Council Directive 2000/78, art.5, 2000 O.J. (L 303) 16, 19 (EC).

9. *See* Council Directive 2000/78, art.2, 2000 O.J. (L 303) 16, 18 (EC); *see also* Christa Tobler, Limits and Potentials of the concept of indirect discrimination 5 (2008).

10. Alexandra Wengdahl, *Indirect Discrimination and the European Court of Justice. A comparative analysis of European Court of Justice case-law relating to discrimination on the grounds of, respectively, sex and Nationality* 15 (CFE Working paper series no. 15, 2001), https://www.cfe.lu.se/sites/cfe.lu.se/files/cfewp15.pdf.

11. *See* Council Directive 2000/78, art. 2.2(b), 2000 O.J. (L 303) 16, 18 (EC).

12. *See, e.g.*, Council Directive 2000/78, art. 2.2(b), 2000 O.J. (L 303) 16, 18 (EC) (calling for its transposition into national law by the 15 "old" EU Member States by December 2, 2003, by the 10 "new" EU Member States by May 1, 2004, and by Romania and Bulgaria by January 1, 2007); *see also* Memorandum from the Eur. Comm'n on The Employment Equality Doctrine (Jan. 31, 2008), available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_08_69). Note that Article 26 of the ICCPR does not use the language of indirect discrimination ("the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion"). International Covenant on Civil and Political Rights, art. 26, Dec. 19, 1966, 999 U.N.T.S. 171.

In particular, EU Council Directive 2000/78/CE ("Employment Equality Directive")[13] established a general framework for equal treatment in employment and occupation and aims to combat discrimination on the grounds of religion or belief, as well as disability, age, and sexual orientation. The twenty-seven EU Member States, as well as the United Kingdom, have implemented this Directive into their domestic legal systems, often going beyond the minimum requirements.[14] The Employment Equality Directive prohibits direct and indirect discrimination, harassment, and instruction to discriminate on the basis of religion or belief, disability, age, or sexual orientation, and applies to public and private sector employment.[15] It also mandates reasonable accommodations for individuals with disabilities,[16] but fails to do so on the ground of religion or belief, even though, as previously noted, the concept of reasonable accommodations was first developed in the context of religious discrimination law in the United States.[17]

In 2014, the European Commission explicitly acknowledged the difficulties faced by EU Member States in implementing indirect discrimination, noting that:

> The concept of indirect discrimination is complex and many Member States had initial difficulties in transposing it correctly. It is now enshrined in law, but its application in practice remains a challenge. To illustrate the problem, some Member States report that concerns have been expressed about the lack of clarity or lack of understanding of the concept of indirect discrimination in national courts. Other Member States point out that they do not yet have any case-law providing interpretation of indirect discrimination.[18]

The indirect discrimination concept was developed through the jurisprudence of the then-European Court of Justice, now called Court of Justice of the European Union, starting in the 1960s, in the area of sex discrimination,[19] and it has been essential to tackling structural barriers as well as

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13. *See* Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC).

14. For instance, by adding discrimination grounds beyond those covered under EU law. *See* "Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')," EUROPEAN COMMISSION (Jan. 17, 2014).

15. Council Directive 2000/78, art. 3, 2000 O.J. (L 303) 16, 19 (EC).

16. Council Directive 2000/78, art. 5, 2000 O.J. (L 303) 16, 19 (EC).

17. 42 U.S.C. § 2000 (e)–(j). The United States is the first place known to have developed the concept. *See* Emmanuelle Bribosia, Julie Ringelheim & Isabelle Rorive, *Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?*, 17 MAASTRICHT J. EUR. COMP. L. 137, 139 (2010) ("United States law was the first to acknowledge a duty of reasonable accommodation on the grounds of religion and later on the grounds of disability.").

18. EUROPEAN COMMISSION, *supra* note 14, at 8.

19. *See* TOBLER, *supra* note 9, at 5–6.

more covert practices and norms that limit or disadvantage certain vulnerable groups.[20] Whereas direct discrimination occurs when one person is treated less favorably than another on the basis of one of the protected characteristics, "indirect discrimination," under the Directive, refers to "an apparently neutral provision, criterion or practice" that places persons who have certain protected characteristics at a particular disadvantage compared with other persons.[21] A claim of indirect discrimination requires showing two elements: (1) that a measure has a detrimental effect and (2) that it lacks an objective justification.[22] The standard of justification for direct discrimination is different than for indirect discrimination. Differences in treatment *directly* based on religion or belief cannot be justified unless the conditions for a "genuine occupational requirement" are met and "the objective is legitimate and the requirement is proportionate."[23] In contrast, when such treatment is indirect, it is subject to an open justification regime, i.e., the measure can be justified by showing that it serves a legitimate goal and that the means of achieving this goal are appropriate and necessary.[24] This open justification regime gives local judges substantial leeway to determine the outcomes of disputes, because it obviates the need to demonstrate the presence of a genuine occupational requirement. With respect to allegations of direct discrimination, the judge's hands are much more tied. In the EU context, the stricter analysis applied to these claims means that more uniformity or harmonization across EU Member States' domestic legal systems can be expected if a certain practice is considered to constitute direct discrimination. This is desirable both because it facilitates the free movement of persons and because it promotes the protection of minorities in the workplace.

Now, when a European employer adopts a workplace policy that prohibits *all* employees from wearing headgear, including the hijab, does this constitute direct or indirect discrimination? The answer to this question, and the corresponding standard of review, are critical. Given that so-called company "neutrality policies" are on the rise in various EU Member States,[25] this is a question the law must address. To a significant extent, the answer will determine who wins, as between the employer and employee, and what

20. *See* Schiek, *supra* note 4.

21. Council Directive 2000/78, art. 2, 2000 O.J. (L 303) 16, 18 (EC).

22. Schiek, *supra* note 4, at 372.

23. Council Directive 2000/78, art. 4, 2000 O.J. (L 303) 16, 19 (EC).

24. Council Directive 2000/78, art. 2.2(b)(i), 2000 O.J. (L 303) 16, 18 (EC).

25. *See* Amnesty International, Choice and Prejudice: Discrimination against Muslims in Europe 34 (2012); *see also* Katayoun Alidadi, *The 'Integrative Function' of Labour Law in Ebb? Reasonable Accommodation for Religion or Belief and Company 'Neutrality Policies' in Belgium*, *in* 93 Reasonable Accommodation in the Modern Workplace. Bulletin of Comparative Labour Relations 119, 133 (Roger Blanpain & Frank Hendrickx eds., 2016).

the chances are for religious employees to be included in the mainstream labor force.[26]

As a high court, the CJEU can provide guidance to the EU Member States.[27] Religious discrimination cases have become a staple for some domestic courts, but it was not until 2017, seventeen years after the adoption of the Employment Equality Directive, that the CJEU's role in developing the law in this area was on display. Indeed, on March 14, 2017, the CJEU issued two highly anticipated judgments interpreting the prohibition of religious discrimination under the Employment Equality Directive.[28] In both the *Achbita* and *Bougnaoui* cases, a Muslim woman lost her job because she refused to follow her employer's request to refrain from wearing her headscarf in the workplace. Whereas Ms. Achbita's dismissal was based on the neutrality policy of a Belgian company, Ms. Bougnaoui was asked by her French employer to remove her headscarf after the company received a complaint from a client that her headscarf had "embarrassed" certain employees.[29]

Surprisingly, since these first religious discrimination cases reached the CJEU, guidance on the issue of religious dress in the workplace has been far from clear. Notably, the CJEU judgments were preceded by two conflicting Advocate General (AG) opinions, by German AG Juliane Kokott and British AG Eleanor Sharpston. In its now infamous *Achbita* judgment, the CJEU partially followed the advice of the German AG, holding that the prohibition on employees wearing any visible signs of their political, philosophical, or religious beliefs in the workplace did not give rise to direct discrimination as long as certain conditions were met.[30] It found so-called private company neutrality policies constitute not direct discrimination, but, rather, indirect discrimination, which can be legitimized under an open justification regime.

Strikingly, the British AG took an entirely different approach, one much more protective of religious manifestations.[31] AG Eleanor Sharpston in her July 2016 opinion considered the dismissal of Asma Bougnaoui, a Muslim design engineer, for wearing a headscarf about which a client had com-

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26. Similarly, under U.S. constitutional law, few norms or practices will pass strict scrutiny, whereas cases reviewed under the rational basis standard will often pass the test. *See* Nicholas Walter, *The Utility of Rational Basis Review*, Villanova L. Rev. 79 (2018).

27. Strictly speaking, CJEU cases do not constitute precedent, because civil law legal systems, used by most European countries, do not know a system of stare decisis. As a practical matter, however, CJEU cases are generally followed, not least by the CJEU. *See generally* Marc Jacob, Precedents and Case-based Reasoning in the European Court of Justice (2014).

28. *See* Case C-157/15, Achbita v. G4S Secure Solutions NV, ECLI:EU:C:2017:203 (Mar. 14, 2017); Case C-188/15, Bougnaoui v. Micropole SA, ECLI:EU:C:2017:204 (Mar. 14, 2017).

29. Imane El Morabet, *Neutrality Policies in Commercial Companies*, Law Society of Scotland (Jun. 19, 2017), available at https://www.lawscot.org.uk/members/journal/issues/vol-62-issue-06/neutrality-policies-in-commercial-companies/ (last visited Nov. 14, 2020).

30. *See Achbita,* ECLI:EU:C:2017:203, ¶ 45; Opinion of Advocate General Kokott, *Achbita*, Case C-157/15, ECLI:EU:C:2016:382, ¶ 27 (May 31, 2016).

31. *See Bougnaoui*, ECLI:EU:C:2017:204.

plained to constitute direct discrimination based on religion.[32] In contrast, rejecting the stance that employment exclusion based on religious dress (the headscarf) could amount to direct discrimination, AG Kokott reasoned in her *Achbita* opinion:

> [I]n its previous case-law concerning various EU-law prohibitions on discrimination, the Court has generally adopted a broad understanding of the concept of direct discrimination, and has, it is true, always assumed such discrimination to be present where a measure was inseparably linked to the relevant reason for the difference of treatment. . . . However, all of those cases were without exception concerned with individuals' immutable physical features or personal characteristics—such as gender, age or sexual orientation—rather than with modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering at issue here.[33]

This distinction led AG Kokott to conclude that the company neutrality policy adopted by the employer after[34] the employee headscarf dispute "cannot properly be classified as constituting direct discrimination."[35] For AG Sharpston, a different characterization of religious manifestation, combined with interpretations of EU anti-discrimination law that seek to be "effective," led to a different outcome.[36]

The CJEU's approach in these two cases left some commentators perplexed: While it became clear that so-called "neutrality policies" could be justified under certain conditions in the EU (if, for example, they consistently and systematically applied and limited to employees who interface with customers),[37] the CJEU had also advanced a limited form of reasonable accommodation (e.g., the option of a back-office position as an alternative to dismissal).

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32. *See* Opinion of Advocate General Sharpston, *Bougnaoui*, Case C-188/15, ECLI:EU:C:2016:553, ¶ 88 (Jul. 13, 2016). AG Sharpston also reasons that the protection provided by EU law from direct discrimination is stronger that provided by the ECHR, which does not know the direct–indirect discrimination dichotomy. *See id.* at ¶ 63.

33. *See Achbita,* ECLI:EU:C:2017:203; Opinion of Advocate General Kokott, *Achbita*, Case C-157/15, ECLI:EU:C:2016:382, ¶ 44–45 (May 31, 2016).

34. It is argued that prior to this explicit policy being enacted, there was an "unwritten rule" banning religious symbols. *See, e.g.*, "Achbita v. G4S Secure Solutions," Columbia Global Freedom of Expression (last visited Mar. 30, 2021), https://globalfreedomofexpression.columbia.edu/cases/achbita-v-g4s-secure-solutions/ ("When Achbita started working for G4S the company had an unwritten rule that no worker could wear visible signs of their political or religious beliefs while working.").

35. *See Achbita,* ECLI:EU:C:2017:203; Opinion of Advocate General Kokott, *Achbita*, Case C-157/15, ECLI:EU:C:2016:382, ¶ 46 (May 31, 2016).

36. *See* Opinion of Advocate General Sharpston, *Bougnaoui*, Case C-188/15, ECLI:EU:C:2016:553, ¶ 72 (Jul. 13, 2016).

37. Lucy Vickers, Achbita *and* Bougnaoui*: One Step Forward and Two Steps Back for Religious Diversity in the Workplace*, 8(3) Eur. Labour L.J. 232, 249–51 (2017); *see also* El Morabet, *supra* note 29.

It should be clear that characterizing such policies as direct discrimination would have fostered not only much more robust protection of religious employees but also more uniform treatment of them across EU Member States. As things stand, when adjudicating indirect discrimination cases, domestic courts can and do adopt divergent approaches, producing dissimilar outcomes in similar disputes, making for a jurisprudence that is in flux and protection that is, at best, precarious. In light of these concerns, when we discuss the concept of indirect discrimination and its role in making anti-discrimination law an effective tool for employees vulnerable to discrimination on the basis of their religious beliefs or practices, in Europe or elsewhere, a conversation about the alternatives to indirect discrimination is indispensable.

II. Reasonable Accommodation: Adding Value?

The concepts of reasonable accommodation and indirect discrimination are related, and may even be seen as functionally equivalent, but they are characterized by important differences.[38]

For one, the concept of indirect discrimination may be regarded as more encompassing, typically placing a much higher burden or duty on employers in comparison with a duty to reasonably accommodate one or more employees. After all, when a policy or measure is thought to disadvantage an entire group by its very design, it should be corrected so as not to exclude potential and future employees. A one-off accommodation for current employees would not suffice. Also, in cases of discrimination, including indirect discrimination, economic-cost arguments are poised to fail under the justification test because employers cannot invoke the losses they would incur to justify discriminating against employees. They must argue that the challenged policy or measure was somehow objectively justified. In contrast, employers routinely cite the defense that a reasonable accommodation would carry a "disproportionate burden," which explicitly allows consideration of factors such as costs.[39] In this sense, contingent on the standard adopted for assessing reasonable accommodations, indirect discrimination may be considered a stronger tool for minority employees.[40] What's more,

38. On the relation between the two concepts, see generally Lucy Vickers, *Religion and Belief Discrimination in Employment - the EU law*, European Commission (2007).

39. Lisa Waddington, *Reasonable Accommodation*, *in* Cases, Materials and Text on National, Supranational and International Non-discrimination Law 629, 644 (Dagmar Schiek et al. eds., 2007).

40. For an illustration of the U.S. context, see Roberto Corrada, *The Supreme Court and title VII*, Liberty Magazine (Jan.–Feb. 2003) (describing a case involving an air traffic controller, Don Reed, winning a $2.25 million verdict in a Denver district court: "but he won because the jury found disparate treatment, that Reed's employer had treated him differently because of his religion . . . . If Reed had been left to argue only that his employer refused a reasonable accommodation, Reed might not have prevailed."). For an illustration of the European context, in regards to persons with disabilities who benefit from the indirect discrimination law as well as a duty of reasonable accommodation, see Lisa

reasonable accommodations could be seen as *limiting* a duty not to indirectly discriminate if employers take them to delimit their obligations under anti-discrimination law.[41]

Notwithstanding these concerns, the tool of reasonable accommodations has distinct strengths and potential to address minority exclusion in the workplace. For one, discrimination, whether direct or indirect, requires the showing of a group disadvantage through a comparison exercise. A plaintiff must show that a requirement would put "persons of a particular religion or belief at a particular disadvantage compared with others."[42] Because of this legal-technical group disadvantage requirement, certain claims have been blocked from receiving appropriate consideration under the discrimination framework.[43] In contrast, a claim for reasonable accommodations requires no such showing of *group* disadvantage, because the remedy is tailored measures that meet *individual* needs and situations.[44] This is significant because:

> [D]isadvantage is not necessarily experienced by all or most members of a particular group, but is . . . experienced on the individual level depending on both individual and environmental factors. Such individual forms of disadvantage can only rarely be revealed by making of group comparison, which is characteristic for both direct and indirect discrimination standards. Reasonable accommodation discrimination therefore requires a different approach to do justice to the particularities of an individual in a given situation.[45]

That accommodations are not predicated on group disadvantage implies that they are a symmetrical remedy, not only empowering minorities but also benefitting members of the majority in some cases. This is illustrated by the four accommodations cases concerning Christianity in the United Kingdom. The *Eweida* case[46] illustrates how the *group* disadvantage require-

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Waddington & Aart Hendriks, *The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination*, 18 INT'L J. COMP. LAB. L. & INDUS. REL. 403, 403 (2002) (calling reasonable accommodation "potentially a powerful tool . . . leav[ing] unchallenged and unaffected underlying discriminatory policies and practices").

41. Gwen Brodsky & Shelagh Day, *The Duty to Accommodate: Who Will Benefit?*, 75 CAN. B. REV. 433, 433–73 (1996) (criticizing the Canadian jurisprudence in this respect).

42. Council Directive 2000/78, art. 2.2(b), 2000 O.J. (L 303) 16, 18 (EC).

43. *See, e.g.*, Eweida v British Airways (2010) EWCA (Civ) 80; *see also* Waddington, *supra* note 39, at 745.

44. *See, e.g.*, Council Directive 2000/78, art. 5, 2000 O.J. (L 303) 16, 19 (EC) ("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.").

45. Waddington, *supra* note 39, at 745. One might also note that the reasonable accommodation framework may have the added benefit of being able to address intersectionality situations that may be difficult to capture (and properly remedy) within an indirect discrimination framework, which typically involves one-dimensional group comparisons.

46. *Eweida*, EWCA (Civ) 80.

ment[47] for a showing of indirect discrimination can be paralyzing for (true or alleged) "sole believers," notwithstanding that it could be argued that the Court of Appeal erred in qualifying the employee's request to visibly wear a crucifix as an idiosyncratic wish.[48] The Court of Appeal of the United Kingdom dismissed Eweida's claim of indirect discrimination, despite having found that Muslim women could wear a headscarf and Sikh men could wear turbans on the job.[49] In fact, unlike in an earlier workplace religious symbol case,[50] the court never reached the justification stage for analyzing the indirect discrimination claim. This approach resembles that taken to cases brought under Article 9 of the European Convention on Human Rights, which are filtered before the assessment of whether the restriction is justified, necessary, and proportionate is even reached.[51]

There are also other, less tangible differences that are also significant. For one, the complexity and indirectness of the concept of indirect discrimination detract from its meaning in everyday life. Given its complexity, there is a need to continuously demystify its importance and rationale, for example, through information campaigns in the classroom and directed at employers and employees.[52] In contrast, the language of reasonable

47. Schiek, *supra* note 4, at 330 ("[G]roup disadvantage is the starting point of indirect discrimination . . . . [But] just establishing group disadvantage is not enough to establish a claim for indirect discrimination."). The group disadvantage requirement for indirect discrimination claims is, on this view, seen as a disadvantage, because it is ill-suited to addressing certain situations arising in practice. However, the lack of a (robust) group requirement may also be vulnerable to concerns that persons will be turned "into laws upon themselves." In regards to the EU Racial Equality Director, see Schiek, *supra* note 4, at 331 ("This [individual-oriented] interpretation would conflate the concepts of direct and indirect discrimination.") (citing Catherine Barnard & Bob Hepple, *Substantive Equality*, 59 CAMB. L.J. 562, 568–69 (2000)).

48. *Eweida*, EWCA (Civ) 80, ¶ 8. Arguably, this is not a correct reading of either the claimant's belief or the indirect discrimination concept, so this problem is not inherent to the tool of indirect discrimination. However, this is a standard that is derived from the concept of indirect discrimination as formulated in the Employment Equality Directive. A duty of reasonable accommodation that, in its formulation, recognizes the individualistic nature of measures is less likely to be read to require such group disadvantage. *See, e.g.,* Council Directive 2000/78, art. 5, 2000 O.J. (L 303) 16, 19 (EC).

49. *Case of Eweida and Others v. the United Kingdom*, 2013-I Eur. Ct. H.R. 215, ¶ 16.

50. *Azmi v Kirklees Metropolitan Borough Council* (2007) ICR 1154 (Employment Appeal Tribunal, UK). In this case, a school instructing a bilingual support worker to remove her veil (which covered all but Ms. Azmi's eyes) when carrying out her duties was found to constitute neither direct nor indirect discrimination on grounds of religion and belief. *Id*. The EAT accepted that there was a legitimate aim (providing quality education) and that the instruction to remove the veil while teaching was a proportionate means of achieving that aim. *Id.*

51. See, for example, *X v. United Kingdom*, App. No. 8160/78 (Mar. 12, 1981), in which a schoolteacher of Islamic faith working for the Inner London Education Authority (ILEA) sought a (modest) time accommodation to be able to attend collective Friday prayers at the local mosque. His claim was dismissed as inadmissible based on the reasoning that the employer could rely on the terms of the contract the employee had signed and committed to as well as his freedom to resign. *Id.*; *see also Konttinen v. Finland*, App. No. 24949/94 (1996) (Eur. Comm'n on H.R.) (involving a civil servant of Seventh-day Adventist faith who was dismissed for his refusal to continue working after sunset on Fridays); *Stedman v United Kingdom*, App. No. 29107/95, 23 Eur. H.R. Rep. 168 (1997) (Eur. Comm'n on H.R.) (involving a Christian who refused to sign a new employment agreement requiring regular work on Sundays).

52. See, for example, the RELIGARE project, a comparative legal study addressing religious or belief discrimination in employment and reasonable accommodations for employees' religious or philo-

accommodations and framing of issues in terms of the concept are more intuitive and straightforward,[53] even if applying specific elements (e.g., reasonableness and disproportionate burden) raises questions of interpretation.[54] The terminology of reasonable accommodations is more direct because its specific goal is to advance solutions in terms of accommodations that meet individual needs in each individual context. More indirect provisions seem less reliable for securing this type of thinking. Thus, the reasonable accommodations route seems to achieve in a more direct and effective fashion what indirect discrimination indirectly aims to achieve by way of a legal fiction. In this respect, language, as a crucial element pleading in favor of reasonable accommodations, cannot be overlooked. Language is a key element in debates on discrimination and equality: "foreigner," "outsider," "stranger," "alien," and "minority" are all terms used to denote certain groups, some with more stigmatizing connotations than others.[55] Language is also indispensable to law and its application.[56] From the perspective of the sociology of law, when the addressees of a legal rule do not *understand* a rule, it is bound to be ineffective *in practice*.

Finally, the "reasonableness rhetoric" resonates more in a conciliatory mode of resolution than the conflict-based discrimination framework and is, for that reason, more likely to avoid the litigation route, yielding better results in practice.[57] Being approached for failing to reasonably *accommodate*[58] an employee may mean the same thing in legal parlance as being alleged to have *discriminated against* the employee, but it will be perceived differently by an employer. The former framing may trigger a less defensive

sophical beliefs or practice. RELIGARE European Policy Brief, European Commission (May 2012), at 8 (recommending "[d]emystify[ing] the concept of indirect discrimination using information campaigns and informational resources directed at employers and employees").

53. Waddington, *supra* note 39, at 670–71.

54. *See generally id*.

55. In Belgium, a debate on the term "*allochtoon*" ("immigrant") erupted when a leading newspaper, *De Morgen*, announced that it would ban the term from its reporting. *See* Wouter Verschelden, *Waarom wij, De Morgen, 'allochtoon' niet meer gebruiken (opinie)* [Why we, De Morgen, no longer use "immigrant" (Opinion)], De Morgen (Sept. 20, 2012), https://www.demorgen.be/nieuws/waarom-wij-de-morgen-allochtoon-niet-meer-gebruiken~bdb769b8/?referrer=https%3A%2F%2Fwww.google.com%2F

56. John Griffiths, *The Social Working of Legal Rules*, 48 J. Legal Pluralism 1, 7, 55 (2003).

57. For a good example of such a defensive response by an employer subject to a discrimination claim, see Floris Vermeulen, *Challenges of Religious Accommodation in Family-law, Labour-law and Legal Regulation of Public Space and Public Funding* 35 (unpublished Dutch socio-legal research report for RELIGARE project, 2012) (regarding ETC opinion nr. 2006-215, October 27, 2006 (headscarf/call center) (Neth.)). In this report, a commissioner in his interview said, "the employer was extremely offended that he was accused of discriminating against people because he was very conscious about providing people with equal opportunities . . . . And to add insult to injury, an anti-discrimination agency got involved. . . . Because of all the anger, the people in question weren't able to think creatively for themselves." *Id.*

58. Even though the failure to provide accommodations can fall under the definition of discrimination, the term does not necessarily acquire a pejorative connotation by association.

response that conserves space for negotiation.[59] Of course, once a *legal* claim has been presented, this subtle difference in connotations is largely immaterial, but it may shape negotiations while they are still pending. That the reasonable accommodations terminology allows a potential conflict situation to be framed in *positive* language makes it a powerful instrument for employees, because it may allow them to circumvent defensive employer reactions. Thus, it could help redress the thorny problem of "self-excluding" behavior on the part of employees, who may anticipate and avoid conflicts by limiting their own options.[60] For Somek:

> [R]ecognizing the role of accommodation marks a shift from the distributive towards the decommodifying dimension of anti-discrimination law. . . . Anti-discrimination law protects, where inequality arises, the most fundamental interest of people to stay who they are within society, even if that society is strongly inclined to force them into self-denial or send them away.[61]

In other words, provision of reasonable accommodations signals to employees that they can "stay who they are" and not be "forced into self-denial" when there is no compelling reason justifying such restrictions.

Despite its promising beginnings, the achievements of the concept of indirect discrimination have been deemed disappointing.[62] Though it has the potential to unmask rules that are taken for granted but that, in effect, produce structural disadvantage, indirect discrimination can "never bring about the changes required to eliminate structural discrimination, but only allows individuals to challenge the results of such practices in limited circumstances."[63] Schiek argues that this "disappointment is due to overburdening the prohibition of indirect discrimination with the expectation of

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59. This pejorative connotation of the term "discrimination" is one reason the Dutch Equal Treatment Act avoids the term and uses "distinction" (*onderscheid*) instead. However, the European Commission has sent "reasoned opinions" to the Netherlands urging it to correctly transpose, among other things, the terminology used in the Equality Directives into its national law, which has not happened yet. As an *ultimum remedium*, the Commission could refer the matter to the CJEU. *See* Rikki Holmaat, *Netherlands Country Report on Non-Discrimination for Reporting period 1 January 2015 – 31 December 2015*, European Commission (2016), at 6 ("The Dutch equal treatment laws (GETA, DDA and ADA) cover the grounds mentioned in Article 19 TFEU and some other grounds, including nationality and marital status. Specifically, the GETA covers race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status. In contrast to any other area of Dutch anti-discrimination law and in contrast to EU law, these acts are [centered] on the concept of 'distinction' (*onderscheid*) instead of 'discrimination' (*discriminatie*). Distinction does not have the same negative connotation, and there may be a suggestion that it is possible to justify such distinctions. In practice, however, the laws are interpreted in line with the directives and the case law of the CJEU.").

60. *See* Sonia Ghumman & Linda Jackson, *The downside of religious attire: The Muslim headscarf and expectations of obtaining employment*, J. Org. Behav., 4, 18 (2010) (finding that Muslim women who wear a headscarf have lower expectations of getting a job, particularly one that involves interacting with customers, and that this "might precipitate a self-fulfilling prophecy in which Hijabis act in ways that decrease the possibility that they will get a job offer").

61. Alexander Somek, Engineering Equality 185 (Oxford University Press 2011).

62. Schiek, *supra* note 4, at 332–33.

63. *Id.*

achieving all the substantive aims of discrimination law and policy at large, although indirect discrimination is only a small part of equality law and policy in their entirety."[64] In the end, positive duties to fight structural disadvantage must complement the discrimination framework.

The same risk of disappointment arises if too much hope is placed in reasonable accommodations. It may be objected that its inability to address structural discrimination is a weakness of the reasonable accommodation framework, but this framework makes no claim to address structural discrimination. Rather, it has a more modest, yet effective and urgent, goal: to address actually and potentially exclusionary practices in a less confrontational way than is achieved by the discrimination framework. Even so, by promoting inclusion of minority workers in workplaces, the impact of reasonable accommodation may be far-reaching. By facilitating incremental change, it may come to effect structural change, becoming an example of how discussing what is possible for a given person or group opens the conversation of what is possible for us all.

Conclusion

This discussion has, like the first two cases before the CJEU, focused on the often-polarizing issue of female religious dress. It should be clear that religious minorities face a much broader range of issues in the European workplace than just this one. In the organization of working time and space, the various rules, practices, and standards reflecting majoritarian consensus can unintentionally but effectively restrict, disadvantage, and even exclude employees who adhere to non-conformist beliefs and practices. To religious minorities such as Jews, Muslims, and Seventh-Day Adventists living in Europe, the Sunday closing laws and public holiday schedules are not designed with them in mind. Similarly, Muslims and Sikhs may feel disadvantaged by so-called "neutral" or professional work dress requirements that conflict with religious modesty and dress principles. Some communities have found creative ways around these obstacles. Consider, for example, the French "Bureau du Chabbath," set up to link Jewish job applicants with open positions that guarantee the Sabbath and days off for Jewish festivals.[65] More common are individual strategies to identify various coping mechanisms. These mechanisms, which often require personal and family sacrifices, may include adaptation, negotiation, choosing from a limited range of employment options, self-employment, or withdrawing from the labor market altogether.[66]

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64. *Id.*

65. As of 2017, the name of the Bureau du Chabbath is OVED (signifying "worker" in Hebrew). *See* Oved, http://www.oved.fr/qui-sommes-nous/notre-histoire/ (last visited Mar. 18, 2021).

66. *See* Efrat Tzadik, *Jewish Women in the Belgian Workplace: An Anthropological Perspective*, *in* A Test of Faith? Religious Diversity and Accommodation in the European Workplace 225

Law can help mediate these challenges for religious minorities. In this regard, the prohibition of indirect discrimination under the Employment Equality Directive can play a pivotal role. But so, too, can the reasonable accommodation framework, which in Europe is still restricted to persons with disabilities.

I have argued elsewhere that there are both tangible and intangible benefits of reasonable accommodations. The former respond to the legal–technical shortcomings of human rights and indirect discrimination jurisprudence, whereas the latter implicate the appropriateness of its language and framing to address the claims of religious individuals in workplaces.[67] Indeed, framing claims of religious employees in terms of requests for reasonable accommodations has the potential to move the debate away from the dominant and pejorative "discrimination talk," which is likely to trigger defensive reactions from "perpetrators." That words matter in the search for equality must be acknowledged. This is clear to People First disability advocates, who highlight that people-first terminology ("individual with disability") is preferable to terms that fit the social model ("disabled person"), because the former recognizes that a disability may be the result of external societal factors.[68] Just as how we describe people can help alter attitudes toward these individuals, how we describe the ways in which those people's situations in society should be addressed can effectuate changes in how they are treated. For these reasons, the reasonable accommodations framework should, at the least, play a role complementary to that of the discrimination law framework in order to help address the challenges faced by religious minorities in the European workplace.

(Katayoun Alidadi, Marie-Claire Foblets & Jogchum Vrielink eds., 2012) (providing accounts of various "coping mechanisms").

67. *See* Alidadi, *supra* note 6, at 232–35.

68. *People First Language and More*, Disability is Natural, https://www.disabilityisnatural.com/people-first-language.html (last visited Mar. 18, 2021).