

REASONABLE ACCOMMODATION BASED ON RELIGIOUS BELIEFS OR PRACTICES. A COMPARATIVE PERSPECTIVE BETWEEN THE AMERICAN, CANADIAN AND EUROPEAN APPROACHES¹

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Abstract: In certain situations, religious minority members ask for an exception to general rules because they could be discriminatory for this collective. These exceptions are called reasonable accommodations and have been recognised in different legal systems, but always conditioned not to the presence of certain circumstances (costs, safety, third-party rights, etc.). In this article, the regulations and case law on reasonable accommodation in Canada, United States and Europe are analysed.

Keywords: cultural diversity; religious beliefs and practices; reasonable accommodation; undue hardship.

Summary: I. CULTURAL DIVERSITY AND ACCOMMODATIONIST APPROACH; II. AMERICAN APPROACH TO REASONABLE ACCOMMODATION; III. CANADIAN APPROACH TO REASONABLE ACCOMMODATION; IV. EUROPEAN APPROACH TO REASONABLE ACCOMMODATION; IV.1. Recognition of implicit reasonable accommodation; IV.2. Religious days accommodations; IV.3. Religious signs accommodations; IV.4. Denying accommodation by the rights of others or public safety; V. CONCLUSIONS.

I. CULTURAL DIVERSITY AND ACCOMMODATIONIST APPROACH

One approach to religious freedom is based on impartiality, State neutrality and formal equality. However, in certain cases, there are legal solutions from a different approach based on an accommodationist view that combines substantive equality with the intention to avoid indirect discrimination. Anti-discriminatory Law has adopted new elements as reasonable accommodation measures that apply specifically to the disabled or to people with certain religious beliefs or practices.

Reasonable accommodation originates from the United States and from Canada. According to Nussbaum, there were the liberal and accommodationist approaches to religious freedom. The liberal approach is based on John Locke's works and holds that protecting equal liberty of conscience requires just two things: a) Laws that do not subject individuals to punishment for their religious beliefs; and b) Laws that provide for equal treatment for all religions and do not discriminate between practices (Nussbaum, 2012, 71).

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In the classical text *Letter concerning toleration*, Locke presented the principles of liberal toleration. These could be summarised as: a) No one should be obliged to have a religious faith (Locke, 2002, 123); b) Equality and non discrimination according to liberty of conscience and equal respect for every person (Locke, 2002, 123).; c) Separation between Church and State (Locke, 2002, 126); d) Neutrality towards religions (Locke, 20002, 128).

The accommodationist approach is inspired by Roger Williams' works. Laws in a democracy are always made by majorities and will naturally embody majority ideas of convenience. Even where such laws are not intentionally discriminatory, they may turn out to be very unfair to minorities. In cases relating to liberty of conscience, this tradition holds that a special exemption, called "accommodation", should be given to the minority believer. Nussbaum continued to affirm that "asking a person to pay a legal penalty for following conscience is like fining that person for having a minority religion -which of course is a grave offense against equal respect of conscience- "(Nussbaum, 2012, 74).

According to Foblets, under the classical conception of liberal democracy, the State treats all citizens equally and this is understood as it must be blind to cultural and religious identities. In certain cases, this blindness has had the paradoxical effect of excluding the person in question. In these situations, the technique of "reasonable accommodation" has been developed (Foblets, 2013, 245). According to Bossets and Foblets, this entails appropriate measures to prevent superficially neutral rules or standards from being discriminatory in effect, because their application is detrimental to particular categories of person (Bosset, Foblets, 2009, 37).

There are three main views on the moral relevance of cultural identity: *egalitarian liberals* -Barry-, *liberal culturalists* -Kymlicka- and *multiculturalists* -Pareck- (Pérez de la Fuente, 2005). These positions had analysed these exemptions based on religious and cultural grounds and they have some differences in their approach to them.

In *Culture and equality*, Barry referred to slaughter regulations to accommodate the beliefs of Jews and Muslims and the argument that Sikhs should be allowed to wear a turban instead of a helmet when on a motorbike. Despite his broad liberal view, not especially sensitive to cultural diversity, in these two cases, he accepted a rule-and-exemption approach for pragmatic reasons. He argued that "while the case for a universally applicable rule is strong, the particular circumstances make the balance-of-advantage argument for an exemption rather powerful" (Barry, 2001, 49). This rule-and-exemption approach must be limited to few cases because as Barry said "they are anomalies to be tolerated because the cure would be worse than the disease. But they provide no support for any extension to new cases" (Barry, 2001, 51).

In the liberal culturalist view, it should be recognised some group rights according the differentiated citizenship to the cultural minorities members. According to Kymlicka, one kind of this group rights are the *polyethnic rights*. He defined these

measures as “group-specific measures are intended to help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society” (Kymlicka, 1998, 31).

In the multiculturalist approach, Pareck states that in the context of cultural diversity, equal treatment could involve different or differential treatment and this is not necessarily akin to discrimination or privilege. In the sense, Pareck explained that “as a general rule would seem that different treatments of individuals or groups are equal if they represent different ways of realizing the same right, opportunity or in whatever other respect they are intended to be treated equally, and if as a result none of the parties involved is better-off or worse-off” (Pareck, 2000, 261).

According to Bossets, the concept of reasonable accommodation has been taken up in Canadian anti-discrimination Law as a vehicle for giving substance to the idea of equality through different treatment. The general idea has been famously expressed in a dictum by Judge Tanaka of the International Court of Justice:

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required³ (Bossets, 2011, 13).

The well-known principles of Aristotelian justice are: a) Equals must be equally treated and unequals must be unequally treated; b) Equality and justice are synonymous. These principles are consistent with the accommodationist approach and sometimes a different treatment could be justified by equality and justice requirements. As Comandé said:

a principle of equality which refuses equal treatment at all costs and fosters differential treatment for different situations to fulfil its goal. To use a metaphor, the notion of reasonable accommodation is the offspring of both the notion of equality and the notion of discrimination (Comandé, 2010,14).

Following this reasoning, Alidadi and Foblets coined 'deep diversity' and defined as “an open-ended engagement with the already-there factual heterogeneity in beliefs, practices and values on the ground in Europe, which is not *a priori* limited by conceptions and categories motivated by more common or majoritarian values in society” (Alidadi, Foblets, 2012, 389). The idea behind this notion is irrelevant if you belong to a majoritarian or minoritarian group in society you should be capable to fully enjoy the rights.

³ South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase, Judgment) [1966] ICJ Rep 6, 305 (Tanaka, J, dissent).

Following Bouchard, accommodations (or concerted adjustments) are not privileges, they are not designed solely for immigrants and they should not give free rein to values, beliefs, and practices that are contrary to the basic norms of society—they simply aim to allow all citizens to benefit from the same rights, no matter their cultural affiliation (Bouchard, 2011,438).

Analysing the notion of reasonable accommodation, Bossets distinguished a *profane*, a *generic* and a *technical* sense.

The *profane* meaning of reasonable accommodation refers to any form of arrangement that leads to the management of conflict, which may be of a cultural, religious or any other nature. Bosset explained that the accommodation then does not respond necessarily to a legal obligation (Bossets, 2009, 6).

These are the cases of what is called “concerted adjustments” in the Bouchard Taylor report terminology. These are “which is less formal and relies on negotiation and the search for a compromise. Its objective is to find a solution that satisfies both parties” (Bouchard, Taylor, 2008, 51). These are informal solutions to multicultural conflicts, usually of *modus vivendi* kind and out-of-court.

The second is the *generic* sense, more familiar to lawyers. Bossets defined it as an “adaptation of a standard of law, particular in order to mitigate or eliminate the impact that this standard can have on a constitutional right or freedom protected”. Examples of this generic sense are conscientious objection, “cultural defense” and constitutional exemption (Bossets, 2009, 6-7).

Finally, the *technical* meaning of the duty to accommodate reasonably is expressed in the Supreme Court of Canada case of *Simpson-Sears*, which focused specifically on the interpretation and application of anti-discrimination legislation in Canada. The Court, which recognised in this case the existence of “indirect” forms of discrimination, also enshrined a corresponding duty of reasonable accommodation, which it described as: “the obligation [...] is to take measures to reach agreement with the complainant, unless this is not causes undue hardship” (Bossets, 2009, 7).

In this *technical* sense, the duty of reasonable accommodation is understood as:
a) *Corollary of the anti-discrimination rules*; b) *Transversal concept*; c) *Unintentional discrimination*; d) *Apparently neutral*; e) *Claim of an exemption*; f) *Internal limits*; g) *External limits*.

a) It is the corollary of the right to non-discrimination. This means the uselessness to seek an explicit basis for this obligation in the text of the law (Bosset, 2009, 8). In European law, there is only recognition for reasonable accommodation to people with disabilities, but the concept it is also applied to people with different religion or ethnic origin, for example Romany.

b) It is a "transversal" concept, likely to be applied to all prohibited grounds of discrimination (Bosset, 2009, 8).

f) It is unintentional discrimination. This means that it is not necessary to prove the intention to discriminate, but the effects to a collective's members.

g) It is apparently neutral, but adversely affects members of the minority. Sometimes statistical evidence is used. This is similar to indirect discrimination.

f) The measure consists of an accommodation or an exemption of the general rule. The minority claim to be treated differently as an exception due to its particular circumstances.

h) Internal limits: This exemption must be reasonable if it does not imply "undue hardship". These limits could be, for example, cost and safety. Elosegui included the costs of the accommodation, the obstacles in the company (effects to productivity or other employees, duration of the measure) and the rights of other employees (or other users) (risk to the health or safety of employees, of colleagues or the public, the collective agreement, conflicts of rights) (Elosegui Intxaso, 2013, 62-63).

i) External limits: This exemption must not restrict third-party rights. Elosegui included public order and security (the ECtHR based on the European Covenant affirmed the defense of public order, national security, public security and protection of morals), the democratic values (the ECtHR affirmed social cohesion, democracy, democratic society) and welfare state and third-party rights (the ECtHR affirmed the economic welfare of the country, the protection of rights and freedoms) (Elosegui Intxaso, 2013, 63-64).

A way to define these reasonable accommodation measures comes from an inherent characteristic, such as a disability or religion, whereby someone is prevented from performing a particular function, task or job or from having access to services or spaces in the conventional ways (Henrad, 2012, 62) (Bribosia *et. al.*, 2010, 138). Sledzinska-Simon extended this institution to the category of the persons with child-care obligations (Sledzinska-Simon, 2016, 216).

Reasonable accommodation involves measures that are conditional on a *test of proportionality*, the end result of which cannot result in a "disproportionate burden" – European terminology- or "undue hardship" –American and Canadian terminology-. There are some reasons or circumstances –costs, the right of others, public order or security, etc.- that justify not using reasonable accommodation in some cases. It should be noted that these specific reasons and how the courts strike a balance may vary between United States, Canada and Europe. This article analyses these States' case law and approaches on reasonable accommodation.

II. AMERICAN APPROACH TO REASONABLE ACCOMMODATION

In the First Amendment of the American Constitution, there are two clauses on religion freedom: Free exercise and Non-Establishment Clauses. They have different objectives, as Dworkin said “government may not burden the exercise of religion, but also must not discriminate in favour of any religion” (Dworkin, 2013, 129). These principles are usually understood as a version of the separation between Church and State. Following this principle, Ruan explained that “the Free Exercise Clause protects religious expression against governmental power, while the Establishment Clause bars government from adopting a religion itself” (Ruan, 2008, 3).

On the compatibility of the accommodationist approach and the Establishment Clause, McConnell affirmed that:

the hallmark of accommodation is that the individual or group decides for itself whether to engage in a religious practice, or what practice to engage in, on grounds independent of the governmental action. The government simply facilitates ("accommodates") the decision of the individual or group; it does not induce or direct, by means of either incentives or compulsion. The hallmark of establishment is that the government uses its authority and resources to support one religion over another, or religion over nonreligion (McConnell, 1991, 688).

Sherbert v. Verner was the first main case on reasonable accommodation in American case law. A Seven-Day Adventist worker was dismissed because she did not want to work on Saturdays, her holy day. She sought unemployment benefits because she was unable to find a job as she insisted she would not work on Saturdays. The State Commission rejected the claim. This case eventually arrived at the American Supreme Court, and later gave raise to the formation of the *Sherbert Test*, which is used as a guide for when a person’s religion and/or ideology is to be accommodated. The test is as follows:

- a) The worker cannot accept the employment because she cannot work on Saturdays because of her religious beliefs. Disqualification for unemployment compensation benefits creates an unconstitutional burden of the free exercise of her religion.
- b) There is *no compelling State interest* in the legislation that justifies this situation
- c) This decision does not foster the "establishment" of the Seventh-day Adventist religion in South Carolina contrary to the First Amendment.

The *Sherbert test* offered the option to allow an exemption for religious reasons for the claimant if there is *no compelling State interest*. The recognition of the claimant’s unemployment benefits didn’t mean to restrict others’ religious freedoms.⁴ The Supreme Court first had to clarify which situations are not included in the ruling.

⁴ *Sherbert v. Verner*, 374 U.S. 398 (1963).

People who are unemployed based on their religious beliefs have no constitutional right to unemployment benefits. The Court held that under the Constitution South Carolina could not obligate a worker to abandon his religious beliefs regarding the *Sabbath*. This decision confirmed the previous case of *Everson v. Board of Education*⁵ of 1947. The faith, or the lack of it, is not justification to exclude an individual to receive benefits of the legislation. In the dissenting opinion, Judges Harlan and White affirmed that an exemption was made for religious beliefs in this case, this would go against the State's neutrality imposed by the Establishment Clause (Intxaurbe Vitorica, 2015, 210).

It was approved in 1964 the Civil Rights Act that in the Title VII prohibits discrimination in employment on the basis of race, sex, religion and national origin. In cases of alleged religious discrimination,

[a] n employee establishes a prima facie case., by showing that:

- (1) the employee has a bona fide religious belief that conflicts with an employment requirement;*
- (2) the employee informed the employer of this belief;*
- (3) the employee was disciplined for failing to comply with the conflicting employment requirement.*

Interpreting this statute, Rosenzweig explained that “once the employee establishes her *prima facie* case, the burden shifts to the employer to show either that it offered any ‘reasonable accommodation’-and not necessarily the employee's preferred accommodation- or that any potential accommodation would cause the employer ‘undue hardship’” (Rosenzweig, 1996, 2517).

In the *Yoder* case, the *Sherbert test* is applied to the issue of the compulsory education in public schools for the Amish teenagers from 16 to 18. The Amish is a religious sect with a long history in America, with strong beliefs that are reflected in their way of life. They want to educate the Amish teenagers in their communities. The Amish have showed their education system and applying the *Shebert test* the State had to demonstrate a strong interest against this exemption of the compulsory public education in favour of the Amish education. Case *Wisconsin v. Yoder*⁶.

The concept of indirect discrimination was first established in *Griggs* in 1971 where a test adversely affected all black candidates for a job⁷. The law says that if it is possible to discriminate against someone because of their race throw artificial, unnecessary and arbitrary barriers, even unintentional, this behaviour must be prohibited. The Court held that what Congress had commanded was that any tests used must measure the person for the job, and not the person in the abstract.

The Duke Power Company only employed black people in the labour department of its Dan River plant (North Carolina), but not in the other four operating

⁵ *Everson v. Board of Education*, 330 U.S. 1 (1947)

⁶ *Wisconsin v. Yoder* 406 U.S. 205 (1972).

⁷ *Griggs v. Duke Power* 401 U.S. 424 (1971).

departments where the lowest salaries were higher. In 1965, the prohibition against black people was lifted and could be promoted to other higher positions. However, to be eligible for this promotion, the company created two requirements: to have completed secondary education and successfully to have passed two aptitude tests. Both requirements in practice involved the elimination of a disproportionately larger number of black than white candidates (Intxaurbe Vitorica, 2015, 213).

In the judgment established that not only was prohibited direct discrimination but also those practices that were formally scrupulous but discriminatory in their effects. In this case, it was first established the notion of *adverse effect discrimination*, which begins with the need for the plaintiff to show that an apparently neutral rule generated adverse effects in a group based on one of the prohibited causes of discrimination. It continued with the burden of proof that fell on the defendant to demonstrate that this measure was clearly related to the job and was necessary to achieve a non-discriminatory objective.

In some States there is legislation that permits a religious use of peyote. If something is permitted in some States or it is desirable, it is not constitutionally required. These decisions could come from the democratic process or the judicial process. In this case, The Court decided the prohibition of the use of peyote in Oregon was constitutional and the claimants had no right to unemployment compensation. Case *Employment division, Department of human resources of Oregon v. Smith*⁸.

In response to the national uproar generated by *Smith* case, Congress enacted Religious Freedom Restoration Act and restored the *compelling-interest test* to neutral laws of general applicability. According to Rosenzweig, RFRA represented a triumph of accommodationism, an interpretation of the Religion Clauses that requires, or at least encourages, the Government to accommodate individuals' religious beliefs and exercise (Rosenzweig, 1996, 2525). The wording of this Religious Freedom Restoration Act was the following:

- (a) ...Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection of this section.
- (b) ... Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-
 - (1) is in furtherance of a compelling governmental interest; and
 - (2) is the least restrictive means of furthering that compelling governmental interest (Rosenzweig, 1996, 2525).

Analyzing *Smith* case and the RFRA, Dworkin affirmed that the Court was right as a matter of political morality and Congress wrong. To justify this, the author used the floodgates argument stating that if an exception was made for one drug based on religious grounds then it could pave the way for the argument that the entire drug

⁸ Case *Employment division, Department of human resources of Oregon v. Smith* 494 U.S. 872 (1990).

control regime was a religious establishment. In his work *Religion without god*, Dworkin defends the general idea of ethical independence instead of the special notion of religious freedom. In both cases, the rationale for restricting freedom or independence should be highly justified (Dworkin, 2013, 133).

Commenting on the Smith case, Sakaria affirmed this accommodation was not compulsory under the Free Exercise Clause, but could be permissible under the Establishment Clause (Sakaria, 2002, 484). She proposed an *endorsement test* to determine when legislative accommodations breach the Establishment Clause. The *endorsement test* is focused on “whether a legislative accommodation symbolically endorses a particular religion by sending a message to those not accommodated that their religion is disfavoured” (Sakaria, 2002, 488). With regards to RFRA, Rosenzweig stated that this rule established that any law, from the Congress or the states, must not impede the free exercise of religion (Rosenzweig, 1996, 2535).

In the case of *Hardison*, it was decided that giving Saturdays off for religious reasons is an undue hardship if it involves more than *de minimis* cost. The Court held if there were some costs to accommodate the day off of a worker with religious beliefs, and there were no costs to accommodate the day off of a worker without religious beliefs, then this is discrimination. *Trans World Airlines v. Hardison*⁹.

In applying this standard, Rollins wrote that the Court that decided the *Hardison* case had held that the employer had no obligation to accommodate the employee’s request when doing so would require the payment of overtime for a voluntary replacement. In other words, the cost for the payment of overtime was more than *de minimis*. The Court went further in holding that when a *bona fide* seniority system existed, the employer was not obligated to make an exception to help the employee meet his religious obligations (Rollins, 2007, 4).

In the case of *Philbrook*, which followed the *Hardison* decision, the Court confirmed the possibility of taking unpaid leave to accommodate the Sabbath if there is more cost than established in the collective agreement. Doing this, it is possible to observe religious practices but, on the other hand, not at all costs. Case *Ansonia Board of education v. Philbrook*¹⁰.

Unpaid leave could be a good solution unless it is used only for cases of religious reasons but not the rest. If the normal solution is paid leave except for religious cases, it is discriminatory and against reasonableness¹¹.

In the case of *Caldor*, it was considered the constitutionality of a statute that gives an absolute right to the *Sabbath* entitled observers not to work on their holy day. This absolute right takes priority over the employer’s and the other employees’ rights and decisions. In the end, the Supreme Court held that this statute went against the

⁹ *Trans World Airlines, Inc. v. Hardison* 432 U.S. 63 (1977).

¹⁰ *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

¹¹ *Idem*.

Establishment Clause of the First Amendment of the American Constitution. Case *Estate of Thornton v. Caldor Inc.*¹².

The American Supreme Court held there is no obligation to accommodate if it is more than *de minimis* cost, either in terms of financial cost or in terms administrative inconvenience. The idea of spiritual hardship is emphatically rejected by the Court of Appeal (Gibson, 2012, 135-136). In cases of religious dress code, non-economic hardship given the employer's commitment – without exception – to values such as religious neutrality.

Under an “undue burden” standard, Ruan affirmed that limits on religious expression would be lawful only if such limitations were not a direct legal obstacle to expressing one's religion, or put another way, if the limitations on religious expression had a purpose or “effect of placing a substantial obstacle in the path”. Accordingly, laws or employer policies and practices that were a substantial obstacle to religious expression in the workplace would be struck down (Ruan, 2008, 26).

In the American context, the economic aspect of the reasonable accommodation is very important to consider the “undue hardship”. The Equal Employment Opportunity Commission (EEOC) defined undue hardship when the accommodation ‘is costly, compromises workplace safety, decreases workplace efficiency, infringes the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work’. This is usually understood as the level of “undue hardship” above which employers are not obligated to provide accommodation has been set at the level of a *de minimis* (Gibson, 2012, 133-134).

There are new cases on reasonable accommodations established by the American Supreme Court according to Berg. For instance, the Native American student who got the right to wear his hair long in *A.A. v. Needville Indep. School Dist.*¹³, the Santeria Folks who got to continue their religious rituals sacrificing animals in *Merced v. Kasson*¹⁴ and The Jehovah's Witness who got a bloodless liver transplant that was necessary to keep her alive in *Stinemetz v. KHPA*¹⁵ (Berg, 2015, 112).

III. CANADIAN APPROACH TO REASONABLE ACCOMMODATION

In Canada, the application of the “undue hardship” should be done on a case-by-case basis using a test of proportionality. There is a broad principle of application according to “the employers must demonstrate that they have made every effort to accommodate an employee and that it would be impossible to modify or eliminate a particular requirement without undue hardship” (Gibson, 2012, 107). The Canadian terms on reasonable accommodation are different from the United States context because some views consider that, in Canada, the employer has a duty to accommodate

¹² *Estate of Thornton v. Caldor Inc.* 472 U.S. 703 (1985).

¹³ *A.A. v. Needville Indep. School Dist.* 611 F.2d 248, 272-73 5th Cir. 2010

¹⁴ *Merced v. Kasson* 577, 578, 595, 5th Cir 2009.

¹⁵ *Stinemetz v. KHPA*, 252, 141, 161 Kan. Ct. App. 2011.

unless there is undue hardship. It is important the justification of Bona Fide Occupational Qualification (BFOQ) that could be used as an excuse not to permit individual accommodations by religious convictions in the workplace.

The first Canadian precedent was *Simpson-Sears* case. A worker became member of the Seven Day Adventist Church and claimed to observe strictly the *Sabbath* from sundown Friday to sundown Saturday. She could no longer embrace her new faith whilst continuing to work for her employer on Saturdays. Case *Ontario Human Rights Commission, Theresa O'Malley. v. Simpsons-Sears*¹⁶.

Employment rules that are equal applicable to everybody could be discriminatory if affects some people differently. It is the result or effect, not the intention, what is relevant in human rights legislation. The main approach of the Ontario Human Rights Code does not focus on the discriminator, rather on the victim of discrimination.

In cases of indirect discrimination, the employer has the duty to accommodate unless there is undue hardship. If the issue complained of forms an integral part of the job, the Court held that logic dictates this cannot be discrimination. If no reasonable compromise can be reached, the complainant must choose between his religion or his employment. First the employee had to show there was discrimination. Second, the employer had to prove it had attempted to accommodate the employee. Case *Alberta Human Rights Commission v. Central Alberta Dairy Pool*¹⁷.

According to De Campos, the Canadian Court established six factors to be considered when determining “undue hardship” in the workplace: a) financial costs; b) impact on collective bargaining agreements; c) problems of employee morale; d) interchangeability of workforce and facilities; e) size of the employer; f) safety. In real situations, an analysis is made of the weight to be conferred to each of these factors (de Campos Velho Martel, 2011, 95).

The Supreme Court of Canada emphatically refused to adopt the U.S. constitutional standards of interpreting “undue hardship” based on the *de minimis* test for two reasons: “(a) the *de minimis* test is not compatible with the concept of undue hardship formulated by the Court; (b) the legal term is not hardship alone, but hardship qualified as undue. The *de minimis* test, however, leads to the recognition of only the hardship and there will always be some hardship; it is the cost of protecting the fundamental rights and shaping an inclusive society” (de Campos Velho Martel, 2011, 96).

The Bona Fide Occupational Qualification (BFOQ) defence favours a general application of a rule without taking into account individual exceptions. If the employer cannot explain why the individual accommodation is not possible without undue

¹⁶ *Ontario Human Rights Commission, Theresa O'Malley. v. Simpsons-Sears* 81985) 2 S.C.R. 536.

¹⁷ *Alberta Human Rights Commission v. Central Alberta Dairy Pool* (1990) 2 S.C.R. 489.

hardship, the BFOQ is not established. If a company has many employees of different religions, the employer could adopt a generic policy respect religious diversity. Such a policy could be an alternative to individual accommodation. If the employer has no such policy and has not shown undue hardship, he must respond to the complaint. Then he could raise the BFOQ defence.

According to Hatfield, the *Meiorin* case facts were a forest fire fighter failed the three new tests introduced by the government and she was dismissed. An arbitrator found that this was a case of sex discrimination. The Court developed the three-step Meiorin Test to determine if the employer has established a standard that is a Bona Fide Occupational Requirement.

The employer must:

1. *Demonstrate the standard was adopted for a purpose rationally connected to the performance of the job;*
2. *Honestly believe the standard is necessary to fulfil the legitimate, work-related purpose; and*
3. *Show the standard is reasonably necessary to the accomplishment of the legitimate, work-related purpose, so must demonstrate it is impossible to accommodate workers without undue hardship to the employer (Hatfield, 2005, 24).*

One application of the BFOQ principle is the case of *Bhinder* in relation to Sikh turbans in the workplace. The Canadian Railway Company introduced a rule that all employees must wear a hard hat at a particular worksite. *Bhinder*, a Sikh employee, refused to comply because his religion did not allow the wearing of headgear other than the turban. The Canadian Supreme Court decided there was no duty to accommodate since it was declared no discriminatory practice here because *Bona Fide Occupational Requirement* existed. Case *K.S. Bhinder, Canadian Human rights commission v. Canadian Railway company*¹⁸.

In Canada, a so-called 'reasonable accommodation crisis' took place and Bossets explained that the concept was suddenly propelled into the heart of a heated debate on Quebec's sense of identity (Bossets, 2011, 16). According to this author, in fact this highlighted that there was a conflict between reasonable accommodation and the values of Quebec society. The official remit listed the following values as counterweights to reasonable accommodation: equality between the sexes; separation between Church and state; the primacy of the French language; the protection of human rights and freedoms; justice and the rule of law; the protection of minority rights, and the rejection of racism and discrimination (Bosset, 2011, 17).

On this Canadian reasonable accommodation debate, Banting and Kymlicka commented that:

¹⁸ *K.S. Bhinder, Canadian Human rights commission v. Canadian Railway company* (1985) 2 S.C.R. 561.

some commentators have pointed to Quebec's recent 'reasonable accommodation' debate as evidence of growing polarization. Stirred up by media reports of 'excessive' accommodations of minorities, newspapers and radio shows in Quebec were dominated for a period of time by calls for a new, tougher approach to immigrants, and surveys showed widespread support in Quebec for this idea. For the first time in many years in Canada, a major political party (the Action Democratique du Quebec) ran on an anti-immigrant and anti-multiculturalism platform, and this proved to be a successful tactic, increasing their share of the vote and of seats. To avoid further loss of electoral support, both the Quebec Liberals and Parti Québécois engaged in 'get tough' rhetoric, denouncing 'excessive' multiculturalism. For some commentators, this is the first crack in the wall, the first real sign of a European-style retreat from multiculturalism, and a harbinger of what is likely to happen in the rest of Canada (Banting, Kymlicka, 2010, 48).

As an answer and analysis of the consequences of this debate, the Professors Bouchard and Taylor wrote in 2008 the report called *Building the future. A time for reconciliation. Abridged report*. They explained that there are two conceptions not of the right to equality, but the procedures for its application, i.e. a) a formal, doctrinal, very rigid conception, or b) a modulated, flexible conception that is more inclusive because it is more attentive to the diversity of situations and individuals (Bouchard, Taylor, 2008, 25). In the Bouchard Taylor report, the conditions for undue hardship in cases of reasonable accommodation in medical contexts are explained:

- 1. A request for the personalisation of care must not run counter to clinical judgement, best practices and the professional code of ethics and must be evaluated in light of clinical urgency.*
- 2. A request for personalisation must not run counter to safety rules, e.g. the prevention of infection, risk management, etc.*
- 3. A request for personalisation must not engender undue costs or costs that exceed organisational limits from a human, physical and financial standpoint.*
- 4. A request for personalisation must not be harmful to the rights and freedoms of other users and interveners (Bouchard, Taylor, 2008, 52-53).*

The Canadian approach on reasonable accommodation has a judicial specification of the cases of undue hardship and these can vary from case to case. In this context, it is important the employer's justification of the *Bona Fide Occupational Qualification (BFOQ)* that is sometimes opposed to individual accommodations. Bossets affirmed as the flip side of reasonable accommodation, the notion of undue hardship calls for a balance between the right to accommodation and the interests of others concerned. Canadian courts apply three types of test to determine whether an accommodation entails undue hardship: financial costs, impact on the organisation's functioning, and infringement of other rights. Third-party attitudes that are inconsistent with human rights are irrelevant (Bosset, 2011, 15).

On March 24 2010, the Bill 94 was passed in the National Assembly. The bill was called *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions* (Government of Quebec 2010) (Conway, 2012, 195). The bill's text was short, containing only 10 clauses. The first clause defined "accommodation" as an "adaptation of a norm or general practice, dictated by the right to equality, in order to grant different treatment to a person who would otherwise be adversely affected by the application of that norm or practice," while the following clauses defined which representatives of the government were affected (clauses 2 and 3). Clause 5 defined "reasonable" as "not impos[ing] on the department, body or institution [from which an accommodation is requested] any undue hardship with regard to, among other considerations, related costs or the impact on the proper operation of the department, body or institution or on the rights of others" (Conway, 2010, 200).

Analyzing this rule, Conway affirmed that Clause 4 was controversial because of the apparent hierarchy of rights it established (equality of rights taking precedence over religious rights). The Bill 94 established that an accommodation must comply with the Charter of human rights and freedoms, in particular as concerns to gender equality and the principle of religious neutrality of the State. Apart from this, Conway also pointed out that Clause 6 was controversial because of the way it appeared to target Muslim women. In the Clause, it is established that if an accommodation involves an adaptation of that practice and reasons of security, communication or identification warrant it, the accommodation must be denied (Conway, 2010, 201).

IV. EUROPEAN APPROACH TO REASONABLE ACCOMMODATION

The European approach to reasonable accommodation for religious reasons and practices is an implicit framework, because actually this kind of measures is only explicitly established for cases of disability. However, there are several cases from the European Court of Human Rights and from the European Union Court of Justice that have been decided with arguments linked with reasonable accommodations, but mostly the cases were rejected.

Art. 5 of the European Union Directive 2000/78 establishes a general framework for equal treatment in employment, explicitly establishes reasonable accommodation will be provided for people with disabilities:

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. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

As an example of the European terminology of the *proportionality test* on reasonable accommodations, there is this example on a the full-face veil been worn in

public case: “this is only the case, however, if such policy or measure has no “objective and reasonable” justification, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised” (*SAS v. France*¹⁹).

In European Law, reasonable accommodation is the other side of indirect discrimination for religious minorities. This implies that formal equality is not sufficient and the religious neutrality of laws and rules adversely impacts to the minority members. In these cases, if there is no “disproportionate burden”, the application of the substantial equality is recommended, treating different differently. This is the accommodationist approach that is always applied on a case-by-case basis using a test of proportionality case by case.

According to Alidadi, the concepts of reasonable accommodations and indirect discrimination may be seen as functional equivalents, but there are differences. On the one hand, indirect discrimination could be regarded as more encompassing and implying a much higher burden on employers. When a measure or situation is considered to disadvantage a certain group by its very design, it should be corrected so that it does not hurt potential and future employees. A simple accommodation for a current/individual employee would not seem to suffice. Also, if there is talk of discrimination, economic cost arguments are unlikely to succeed under the justification test. In this sense, depending on the standard adopted for assessing reasonable accommodations, indirect discrimination could be considered a stronger tool for employees in some cases (Alidadi, 2012, 707).

The three models of equality are defined, following to De Schutter, at the current stage of development of European anti-discrimination law:

A first question concerns the aim of this body of law. In the implementation of the principle of equal treatment, do we seek to protect all individuals from being discriminated against, or do we seek to ensure an equal representation of the diverse social groups composing society in its different sectors, and to ensure a roughly equal distribution of all social goods among those groups? This alternative is sometimes presented as an alternative between *formal (or de jure)* equality and *substantive (or de facto)* equality (De Schutter, 2006, 1).

Under a *first model*, discrimination is prohibited, but there is no obligation to ensure a proportionate representation of the diverse social groups whose members are protected from discrimination. Nor is there an effort to monitor the situation of these groups with respect to the global allocation of social goods in order, if necessary, to take remedial action where imbalances are found to exist. Such imbalances as such are not seen as problematic, as long as each individual has not been discriminated against in identifiable ways, by particular agents.

¹⁹ *SAS v France* (2014) ECtHR, 1 July, app. no. 43835/11.

Under a *second model*, the prohibition of discrimination extends to the prohibition of disparate impact discrimination: any measure which disproportionately and negatively impacts upon certain groups which are already underrepresented (or which already receive a less-than-proportionate share of the social good to be allocated), should be revised, unless it can be demonstrated that such measure, although presumptively suspect, aims to realize a legitimate objective by means which are both appropriate and necessary.

Under a *third model*, that of affirmative equality, the aim of ensuring equal treatment is not only to avoid instances of discrimination, but also to make progress towards a fair share of social goods among the different segments of the population. Under this model, affirmative policies are pursued which seek to improve the representation of certain groups in the areas or at the levels where they are underrepresented, and to arrive not only at a situation where discriminatory rules, policies or practices are outlawed, but where, moreover, social goods are distributed more equitably between the diverse groups composing society. Indeed, as clearly illustrated by the debate concerning the admissibility of affirmative action policies, still sometimes referred to as “reverse” or “positive” discrimination, the objective pursued under the model of affirmative equality may conflict with the objective of non-discrimination: where the application of neutral rules or procedures does not fulfil the objective of ensuring a fair distribution of social goods among different groups of the population, it will be required to make further steps towards the full realization of equality; and this may imply treating differently individuals because of their membership in certain groups defined by “suspect” characteristics they present (De Schutter, 2006, 4).

During the last decade, the ECtHR started to develop a substantive conception of equality. In contrast to formal equality, a substantive conception takes into account how victims experience the reality of discrimination. The central question is not whether the law makes distinctions, nor whether the state is motivated by prejudice, but whether the effect of the law is to perpetuate disadvantage, discrimination, exclusion, or oppression. A substantive equality doctrine responds to the effects of structural inequality where it is not possible to identify a specific “wrongdoer” who causes the discrimination (O’Connell, 2009, 129). The Strasbourg jurisprudence is reluctant to accept reasonable accommodations in the field of religious diversity as happens with linguistic diversity. Ruiz Vieytez explained that the Court of Strasbourg accepts a very broad conception of margin of national appreciation, sometimes accompanying certain evaluative prejudices of certain religious expressions, with a concept of strict secularism from the interpretation of countries like France or Turkey (Ruiz Vieytez, 2009, 13).

The ECtHR has developed its own vocabulary and techniques to the reasonable accommodation cases. A first technique consists in the use of the *proportionality test*, which also applies to the social limits in the ECtHR (legal) as to the functional limits in the limitation of a right of the particular. The criteria of the ECtHR’s jurisprudence are three: first, the State must demonstrate in the case of a norm in dispute that said measure pursues a *legitimate good*; second, that there is a relationship reasonable proportionality

between the *means used and the purpose sought*; and third, that *there is no other measure* that, achieving same purpose, damage to a lesser extent the individual right, that is, less burdensome for the individual who is limited to the exercise of a legitimate right. The ECtHR merely examines the second and omits the analysis of the first and the third (Elosegui Itxaso, 2014, 86).

In the following lines, it is analysed the concept of reasonable accommodation from the European perspective. The cases of the ECtHR under this concept fall under the following categories: a) *Recognition of implicit reasonable accommodation*; b) *Religious days accommodations*; c) *Religious signs accommodations*; d) *Rejecting accommodation because affects third-party rights or public safety*.

IV.1. Recognition of implicit reasonable accommodation

States fail to treat differently persons whose situations are significantly different without an objective and reasonable justification. This was the case *Thlimmenos vs. Greece*. The candidate was disqualified for a public position because of having a criminal record, resulting from a conflict between the legal obligation to the military service and the Jehovah Witness conscience. Objection of conscience to the military service was not recognised at the time of the case and, despite being recognised later, did not affect the disqualification of the candidate. According to ECtHR, the reasons of the Jehovah Witnesses not to do the military service are different from the type of other criminals. Case *Thlimmenos vs. Greece*²⁰.

Sometimes, the Court identifies duties of differential treatment that aim at levelling the playing field, without mentioning either the Thlimmenos formula nor the ‘correcting factual inequalities’ line (Henrard, 2016, 166)

In the case *Glor v. Switzerland*, the applicant was diabetic and, because of this, he was unable to do military service and had to pay a tax. The complaint was the people with major disabilities didn’t have to pay this tax. The ECtHR considered this unequal treatment to be unreasonable and a case of discrimination. Case of *Glor v. Switzerland*²¹.

In the case *Muñoz Díaz v. Spain*, a Romany widow with 6 children claimed against the Social Security’s refusal to give a widow’s pension. The facts were they were married by the Romany rite, but not the Catholic or civil way of marriage. The Spanish Constitutional Court found there was no racial or ethnic discrimination in this rejection because the requirements for marriage are the same for everyone. However, the European Court of Human Rights found an accommodationist solution based on analogous reasoning. Therefore the Court compared these cases’ circumstances with the invalid marriages but with good faith of the spouses. Then this permits a solution for

²⁰ *Thlimmenos v. Greece* (2000) ECtHR, 6 April, app. no. 34369/97 par. 34.

²¹ *Glor v. Switzerland* (2009) ECtHR 30 April app. no. 13444/04.

this case, but did not recognise Romany marriage with general effects. Case of *Muñoz Díaz v. Spain*²².

In the case *DH v. Czech Republic*, there were special schools for people with special needs. These were used by people with disabilities and Roma people. According official data, more than half of the Romany children in Czech Republic attended these special schools. The ECtHR affirmed this is a case of indirect discrimination. The Court explained that although it was unintentional and it seemed neutral, it was a discriminatory measure that was disproportioned and highly prejudicial to a minority. Case of *DH. v. Czech Republic*²³.

The Court explained that an act is discriminatory if “it has no objective and reasonable justification” and there is not a “reasonable relationship of proportionality” between means and ends. “Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible”. Case of *DH. v. Czech Republic*²⁴.

In the *Orsus and others v. Croatia*, the ECtHR analysed the reasonable relationship of proportionality between the means and the ends of the Croatian authorities’ measures with the Roma only classes. The Court concluded that these measures had no objective and reasonable justification. Case of *Orsus and others v. Croatia*²⁵.

There are two similar cases on exemption to religious oriented education courses by different parents convictions and a lack of pluralism and neutrality in Norway and Turkey. In the first case, Norway has a State religion and a State Church, of which the 86% of the population are members. The Evangelical Lutheran Religion remains the State’s official religion. The applicant claimed for a total exemption of a course of *Christianity, Religion and Philosophy*, called KRL subject.

In the *Folgero* case, the ECtHR decided that the KRL subject was incompatible with the European Convention of Human Rights because it was not conceived in an objective, critical and pluralistic manner. The denial of an exemption to the parents was also against the European Convention. Case of *Folgero and others v. Norway*²⁶. In the case *Hasan et Eylem Zengin c. Turquie*, an Alevi confession’s claimant sought an exemption from the religious culture and moral knowledge course. This was justified under human rights legislation and the principle of secularism. Case of *Hasan et Eylem Zengin c. Turquie*²⁷.

²² *Muñoz Díaz v. Spain* (2009) ECtHR 8 December app. no. 49151/07.

²³ *DH and others v. Czech Republic* (2007) ECtHR 13 November app. no. 57325/00 parar. 184. .

²⁴ *Idem*, parar. 196.

²⁵ *Orsus and others v. Croatia* (2010) ECtHR 16 March app. no. 15766/03 parar. 184.

²⁶ Case *Folgero and others v. Norway* (2007) ECtHR 29 June app. no. 15472/02 parar. 102

²⁷ Case *Hasan et Eylem Zengin c. Turquie* (2007) ECtHR 9 October app. no. 1448/04 parar. 84.

Another case involved a Romany girl who was sterilized in Presov Hospital. The procedure was not an imminent necessity from a medical point of view. The applicant did not give her informed consent for it. Instead, she was pressured and deceived by the doctors so she would consent to sterilization. Case *V.C. v. Slovakia*²⁸. There was not sufficient objective evidence to convince the Court of the doctors' bad faith conduct or an intention to discriminate based on race or ethnic origin²⁹. Different human rights defenders identified serious legislative and common practice shortcomings in relation to sterilizations. Those shortcomings affect Roma people especially because they are a vulnerable and disadvantaged group. The Court found in favour of the claimant because the State failed to protect the effective enjoyment of her right to respect her private and family life as member of a vulnerable group. Case of *V.C. v. Slovakia*³⁰.

In Turkey, the claimant, a member of the Alevi faith, stated that his identity card contained a "religion" box that indicated "Islam", even though he was not a member of that faith. The claimant alleged that the refusal to include "Alevi" instead of "Islam" went against the European Convention. The Court affirmed that the indication of the one's religion on identity cards or in civil registers is contrary to the right not to show one's religion. In this sense, the elimination of the religion box would be a good solution to the breach of this right. Case of *Sinan Isik v. Turkey*³¹.

Another Turkish case concerning the Alevi faith is Case *Izzettin Dogan and others v. Turkey*. Although there is a constitutional and international provision to protect the freedom of conscience and religion, there is an official exclusion of the Alevi faith and its practice. The specific claims of the applicant are: a) Services connected with the practice of the Alevi faith constitute a public service; b) Alevi places of worship (*cemevis*) be granted the status of places of worship; c) Alevi religious leaders be recruited as civil servants; d) Special provision be made in the budget for the practice of the Alevi faith.

The Court concluded that the refusal to recognise the Alevi community as a religious community meant that the members of the Alevi faith were unable to effectively enjoy their right to freedom of religion. In particular, the refusal complained of has had the effect of denying the autonomous existence of the Alevi community and has made it impossible for its members to use their places of worship (*cemevis*) and the title denoting their religious leaders (*dede*) in full conformity with the legislation. The Court affirmed there is a breach of article 9 of the European Convention. Case of *Izzettin Dogan and others v. Turkey*³².

These ECtHR cases of recognition of a different treatment for those different could be considered reasonable accommodation cases. They have in common an initial

²⁸ Case *V.C. v. Slovakia* (2011) ECtHR 8 November app. no. 18968 parar. 117.

²⁹ *Idem*.

³⁰ *Idem.*, parar. 179.

³¹ Case *Sinan Isik v. Turkey* (2010) ECtHR 2 February app. no. 21924/05 parar. 60

³² Case *Izzettin Dogan and others v. Turkey* (2016) ECtHR 26 April app. no. 62649/10 parar. 185.

situation of lack of pluralism or neutrality that affects adversely to minority members and the solution is the accommodation of differences. In the great majority of these cases, there is indirect discrimination for certain groups. There is a balance under the principle of proportionality case by case between the means and the aims on these reasonable accommodation situations.

According to Henrard, interestingly, in a few judgments on complaints that pertain to the accommodation of the separate minority identity, the Court did explicitly engage in a non-discrimination analysis. However, these complaints were actually complaints about unjustified disadvantageous differential treatment and thus about invidious discrimination. These judgements show that the Court seems (increasingly) willing to engage in a non-discrimination analysis which balances the respective interests but only to the extent that the complaint concerns primarily the socioeconomic access-rights of the expression of that separate identity (access to a job = Thlimmenos; access to a survivor's pension = Munoz Díaz), and does not imply a restructuring of the public sphere or the visibility of these distinctive ways of life of ethnic and religious minorities. These cases rather confirm the heightened reluctance of the Court to address complaints that directly concern the manifestation of a separate minority identity (Henrard, 2016, 176).

IV.2. Religious days accommodations

There are several cases, in ECtHR case law, claiming for the lack of neutrality of the official calendar by different religious reasons. Until now, the ECHR has always denied this kind of accommodations. However, there is a dissenting opinion in the case *Francesco Sessa v. Italy* (2012) that for the first time the ECtHR has mention explicitly the term "reasonable accommodation".

In the case of *X v. United Kingdom* 1981 the applicant was a primary school teacher in a London public school who complained against the refusal by the school authorities to accommodate his working hours so as to allow him to take 45 minutes off at the beginning of the afternoon on Fridays to pray at the Mosque. The ECtHR denied this accommodation. Case of *X v. United Kingdom*³³

In the case of *Konttinen v. Finland*, a Seven-Day-Adventist sought not to work on Saturdays –from the sunset on Fridays- in line with his religious beliefs. The European Court refused to accommodate his petition because Finnish legislation usually established Sunday as day-off and there was no special provision concerning rest days for religious communities members. Case of *Konttinen v. Finland*³⁴.

In the case of *Stedman v. United Kingdom*, the ECtHR found that a dismissal was not discriminatory because it was not based on claimant's religious beliefs, but rather on her refusal to sign a contract that established that she would have to work on

³³ Case *X v. United Kingdom* (1981) ECtHR 12 March app. No. 8160/78.

³⁴ Case of *Konttinen v. Finland* (1994) ECtHR 3 December app. no. 24949/94 par. 2

Sundays. According to the ruling, there was no difference in treatment for people of different religious beliefs. Case of *Stedman v. United Kingdom*³⁵.

In the case of *Kostestki v. The former Republic of Macedonia*, Christian holidays were the official holidays and leaves of absence for certain Muslim festivals were recognised. The claimant sought the application of this privilege as he contended he was Muslim. However there were doubts as to his current faith. The Court affirmed, in this case, that it was not unreasonable for him to be asked to show evidence of his faith. Case of *Kostestki v. The former Republic of Macedonia*³⁶.

In the case of *Francesco Sessa v. Italy* the applicant was a Jewish lawyer. The applicant pointed out that the judge proposed hearing dates coincided with Jewish religious holidays (*Yom Kippur* and *Sukkot* respectively) and stated that he would be unable to attend the adjourned hearing because of his religious obligation. He claimed for an accommodation and the judge denied it.

The ECtHR's majority ruling found in favour the Italian judge. They justified this decision on the protection of rights of others, on public's right to the proper administration of justice, on the principle that cases be heard within a reasonable time and on the proportionality between means and ends *Francesco Sessa v. Italy*³⁷.

In this case there is a dissenting opinion that is especially relevant because for the first time the ECtHR used the term "reasonable accommodation" referring to a case. According to this view, a different solution of the case could be provided because it would not impose a disproportionate burden on the judicial authorities. This solution would be a compromise between no interference with the claimant's religious freedom and with ensuring the proper administration of justice. *Case Francesco Sessa v. Italy*³⁸.

There is a case on this topic in the Court of Justice of the European Union called *Vivien Prais*³⁹. According to Bosset and Foblets, a candidate in an open competition organised by the Council of the European Communities claimed to change the day of the examination because it coincided with a religious day, which prevented the candidate from sitting it. Her request to sit the test on another day was rejected. She alleged discrimination. The Court did not accept the argument but instead accepted that "it is desirable that an appointing authority itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests"(par. 18) Bosset and Foblets added "such a reasoning is surprisingly close to the concept of reasonable accommodation. This position was undoubtedly a precursor for its time" (Bossets, Foblets, 2009, 58-59).

³⁵ Case of *Stedman v. United Kingdom* (1997) ECtHR 9 April app. no. 29107/95 parar. 3.

³⁶ Case of *Kostestki v. The former Republic of Macedonia* (2006) ECtHR 13 April no app. 55170/00 parar. 46.

³⁷ Case of *Francesco Sessa v. Italy* (2012) ECtHR 3 April app. no. 28790/08 parar. 38.

³⁸ *Idem*, *Dissenting opinion of Judges Tulkens, Popovic and Keller*, parar. 10.

³⁹ Court of Justice European Communities, 27 October 1976, case 130/75.

IV.3. Religious signs accommodations

The cases on accommodation of religious signs have been decided by the ECtHR according to the margin of appreciation doctrine and the test of proportionality. Under this perspective, ECtHR has considered lawful the prohibition by the national authorities of Muslim veil or *Sikh* turban at schools or the use of the *burka* in public - *SAS v. France* (2014)-.

The first case was on a Muslim teacher that wanted to wear a Muslim veil while she taught in a primary school in Switzerland. The pupils were aged between four and eight and the Court stated that “in those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality”. There was a balance between the right of a teacher to manifest her religion in front of need to protect pupils by preserving religious harmony. The ECtHR ruled that the Geneva authorities didn’t exceed the margin of appreciation and the dismissal was lawful. Case of *Dahlab v. Switzerland*⁴⁰. Commenting this case, Chaid considered that the balancing exercise the Court is trying to make in its reasoning is incomplete and a more pragmatic approach would be more appropriate in this case (Chaid, 2012, 45).

Another leading case on religious signs was *Leyla Sahin v. Turkey* on the prohibition of the Muslim veil in Turkish universities. The ECtHR provide a proportionality test according to a means/ends judgment. In the sense, The Court affirmed “the university authorities judiciously sought a means whereby they could avoid having to turn away students wearing the headscarf and at the same time honour their obligation to protect the rights of others and the interests of the education system.” The conclusion of the ruling is for the ECtHR that “the restriction in question did not impair the very essence of the applicant’s right to education” Case of *Leyla Sahin v. Turkey*⁴¹.

However, the most famous case on ECtHR case law on religious signs was not on Muslim veil, but on Christian crucifix in public school classes. It was the *Lautsi v. Italy* case. The Court conceded that the regulations conferred on the country's majority religion preponderant visibility in the school environment. In the ruling decision, the ECtHR stated that “a crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality. It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities”. According to ECtHR, the presence of a crucifix in the classroom was not a process of indoctrination. Case of *Lautsi v. Italy*⁴².

⁴⁰ Case of *Dahlab v. Switzerland* (2001) ECtHR 15 February app. no. 42393/98.

⁴¹ Case of *Leyla Sahin v. Turkey* (2005) ECtHR 10 November app. no. 44774/98.

⁴² Case of *Lautsi v. Italy* (2011) ECtHR 18 March, app. no. 30814/06.

In the case of *El Morsi v. France* (2008), the Court ruled against a Muslim woman who argued she had been denied access to the French consulate in Marrakech because she has refused to remove her veil at security. The Court held that the refusal to provide a female agent for the identification of Ms. El Morsi did not exceed the State's margin of appreciation in matters of security. Case of *El Morsi v. France*⁴³.

There are some French cases concerning the prohibition to wear the Muslim headscarf at school. Once the Court had admitted that the ban was compatible with art. 9 ECHR, the only way applicants could try to convince the Court that their right had nonetheless been violated was arguing that the signs they wore were not 'ostentatious' or not religious. Cases of *Aktas v. France* (2009)⁴⁴, *Ghazal v. France* (2009)⁴⁵, *Bayrak v. France* (2009)⁴⁶ and *Gamaleddyn v. France* (2009)⁴⁷. Two similar cases concerning the prohibition to wear a Sikh turban at school *Jasvir Singh v. France* (2009)⁴⁸, *Ranjit Singh v. France* (2009)⁴⁹. In the cases of *Drogu v. France* (2008)⁵⁰ *Kervanci v. France* (2008)⁵¹, two girls refused to take off their headscarf during sports classes.

In the case of *SAS v. France* (2014) the applicant contended that the ban on wearing clothing designed to conceal one's face in public places, deprived her of the option of wearing the full-face veil in public.

The ECtHR considered "the Government indicated that it was a question of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of "living together". From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society". Case of *SAS v. France*⁵².

A recent case, the European Union Court of Justice affirmed that the prohibition of wearing the Muslim veil in the workplace is not direct discrimination by religion or belief. The Court also affirmed that this could be a case of indirect discrimination unless the employer had a political, philosophical and religious neutrality policy in its relations with customers and there is proportionality between means and ends⁵³.

⁴³ Case of *El Morsi v. France* (2008) ECtHR 4 April app. no. 15585.

⁴⁴ Case of *Aktas v. France* (2009) ECtHR 30 June app. no. 43562/08.

⁴⁵ Case of *Ghazal v. France* (2009) ECtHR 30 June app. no. 29134/08.

⁴⁶ Case of *Bayrad v. France* (2009) ECtHR 30 of June app. no. 14308/08.

⁴⁷ Case of *Gamaleddyn v. France* (2009) ECtHR 30 June app. no. 18527/08.

⁴⁸ Case of *Jasvir Singh v. France* (2009) ECtHR 30 of June app. no. 25463/08.

⁴⁹ Case of *Ranjit Singh v. France* (2009) ECtHR 30 of June app. no. 27561/08.

⁵⁰ Case of *Drogu v. France* (2008) ECtHR 4 of December app. no. 27058/05.

⁵¹ Case of *Kervanci v. France* (2008) ECtHR 4 of December app. no. 31645/04.

⁵² Case of *SAS v. France* (2014) ECtHR 1 July app. no. 43835/1 par. 153.

⁵³ Case of *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* (2017) 157/15 European Union Court of Justice.

The European Court of Justice recent case is interesting because the employer's Muslim veil workplace prohibition is not considered direct discrimination under the European directive. However, there is an open door to consider it indirect discrimination for Muslim women if it is not objectively justified by a legitimate aim as a policy of political, philosophical and religious neutrality in the relations between the employer and the customers and the means to achieve that aim are appropriate and necessary. This neutrality purpose for the relations between employer and the customers could affect adversely to the minority members, for example the Muslim women who want to wear a veil in the workplace. This needs a special judgment of proportionality between purpose and means and it should be done case by case.

IV.4. Denying accommodation by the rights of others or public safety

There are some cases that it could be considered that there is an indirect discrimination for the people with certain religious beliefs, but it is not reasonable to accommodate them because this affects directly the rights of others or the safety. In the case of *Pichon Sajous v. France* 2001 the applicants claim affects the right of others and in the interesting case of *Eweida and others v. United Kingdom* (2013), the case of the applicant Ms Eweida pass the test of proportionality, the case of the applicant Ms Chaplin faces a problem with the clinical safety and Ms Ladele and Mr Farlane claims fail because affects directly the right of others.

In *Pichon and Sajous v. France* (2001), two pharmacists complained that they had been convicted for refusing, for religious reasons, to sell contraceptive pill in their dispensary. The ECtHR considers that, as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere⁵⁴.

In the case of *Eweida v. United Kingdom* (2013), there were judged 4 different situations concerning accommodations on religious beliefs and practices. The first applicant is Ms. Eweida, a practising Coptic Christian, that worked as member of the check-in staff for British airways. There is a wearer guide with some rules on the uniform although there were authorisations to wear Sikh turbans and Muslin hijabs. She decided to wear a cross openly and he was removed for her position. The ECtHR considered lawful to wear the cross in this case⁵⁵.

The second applicant is Ms. Chaplin, a practising Christian, and works as nurse. She wears a cross in her neck although there was a uniform code that affirms "jewellery must be discreet". The ECtHR considered that in this case wearing the cross affects the clinical safety and follow the margin of appreciation doctrine⁵⁶.

⁵⁴ Case of *Pichon and Sajous v. France* (2001) ECtHR 2 of October app. no. 49853/99.

⁵⁵ Case of *Eweida v. United Kingdom* (2013) ECtHR 15 of January app. no. 48420/10.

⁵⁶ Case of *Eweida v. United Kingdom* (2013) ECtHR 15 of January app. no. 598442/10.

The third applicant is Ms. Ladele is a Christian who believes that same-sex civil partnerships are contrary to God's law. She worked in the London Borough of Islington, local public authority as registrar of births, deaths and marriages. She refuses to carry out civil partnerships on the ground of the sexual orientation of the parties. The ECtHR affirmed that the applicant claim affects the rights of others and denied it.⁵⁷

The fourth applicant is Mr. McFarlane, a practising Christian, that holds the deep belief that the Bible states that homosexual activity is sinful. He worked in as giving confidential sex therapy and relationship counselling service. The applicant recognise that he has difficulties in reconciling working with couples on same-sex sexual practices and his duty to follow the teaching of the Bible. The ECtHR affirmed that the applicant claim affects the rights of others and denied it.⁵⁸

These cases *Pichon and Sajous* and the three applicants of *Eweida* case are good examples of principle of proportionality application and fundamental rights balance. The plaintiffs' claims could be considered legitimate by their religious faith perspective, but it cannot be considered legal because they affect the right of others. In the case of the check-in assistant who wants to wear a cross, it was no affected any important protected interest and was considered lawful.

V. CONCLUSIONS

Reasonable accommodation from the European perspective is a quite new notion. ECtHR case law is quite restrictive and is only applied in certain situations where no disproportionate burden is present. ECtHR case law clearly shows reasonable accommodation may be denied when third-party rights or public safety are affected. Although the law only expressly recognizes disability as grounds for reasonable accommodation, ECtHR precedent may be understood to incorporate religious reasons as just grounds. The European terminology and approach to this topic are different from American and Canadian cases, as it it focuses on avoiding indirect discrimination and on the judicial application of the principle of proportionality.

According to Ruiz Vieyetz, the generic valuation of reasonable accommodation as a legal instrument must necessarily be positive. It may not be so, however, the scarce extension that has so far and its constriction to certain areas of diversity. In this regard, we have argued that international law on human rights, in its current version, can serve as a basis for the reception of reasonable accommodation in European legal systems. The norms that prohibit discrimination, present in all relevant legal treaties, including the European Convention on Human Rights, can give legal coverage to the use of this concept in our continent. The ideas of complex equality, indirect discrimination and discrimination due to undifferentiation, already present in our systems, even in an incipient or fragmentary way, serve to this effect without the need to proceed with far-reaching regulatory reforms. On the contrary, it is necessary a jurisprudential and

⁵⁷ Case of *Eweida v. United Kingdom* (2013) ECtHR 15 of January app. no. 51671/10.

⁵⁸ Case of *Eweida v. United Kingdom* (2013) ECtHR 15 of January app. no. 36516/10.

interpretative work that advances in this line, helping to adapt the exercise of basic human rights to the plurality of existing identities (Ruiz Vieytez, 2009, 19).

One key difference between the Canadian and European situations is that in Europe, setting aside disabled persons' employment, there is currently no general principle governing reasonable accommodation for the whole society. The result is that there are far fewer requests for its application or assessments of its potential. However, Canadian experience shows how hard it is in practice to determine where the responsibilities lie in specific cases. It is very likely to determine that reasonable accommodation as a concept will undergo further changes in the years to come (Bosset, Foblets, 2009, 64).

According to Solanes, although harmonization practices have been largely linked to religious freedom, they are applicable within the broader framework of cultural diversity, taking into account cases that are related to linguistic issues, customs and traditions. In that sense, both in the public space as in private measures of this kind can be useful to avoid major disputes. For example, they are recommended in the management of public space (for example for the location of worship centers or the celebration of certain festivities), in the educational field (not only compulsory, but from a broad dimension that also includes the university), in health, in the workplace (beyond the temporary adjustment), in food, in funeral ritual, in the access and enjoyment of public services, etc.

Favoring practices such as informal agreement or concerted adjustment, always in line with democratic values, is the prelude to avoid judicializing conflicts that in many cases could be solved by way of prior negotiation. It is also a way to encourage people to manage their differences without increasing the work of the courts and promoting values such as exchange, negotiation and mutual respect on the basis of which they sustain policies based on interculturality. However, the proposals for the implementation of these practices have received, in the Canadian context, multiple criticisms that, as noted, reached a significant dimension in relation to the so-called crisis of accommodation (Solanes Corella, 2017, 327).

In an interesting essay, called *Litigating religions*, McCrudden characterised two legal approaches on religion and the State. The first approach –separationist–, the ‘wall of separation’, imagines two spheres one representing the state and the other representing religion, although this simple picture is quickly rendered more complex. The second approach –accommodationist– posits that there is and should be an element of co-existence and co-influence, even co-maintenance, between religion (or some religions) and the State. This approach may warm into an attitude of cooperation (McCrudden, 2018, 71).

McCrudden continued to add: “neither of these approaches is adopted wholesale in either the United States or the ECHR, but it is probably true to say that the separationist approach is closer to current US First Amendment doctrine, while the accommodationist approach is closer to the ECtHR’s position. But we should not regard either of these

models as set in stone in the respective jurisdiction. The position in each jurisdiction discussed continues to evolve, and it is conceivable that the interpretation in each could move closer to the other” (McCrudden, 2018, 71).

It is complex to use academic labels especially based on judicial cases, because several specific circumstances must be summarised in one word. Although McCrudden’s statement was not extreme, in reasonable accommodation case law it could be argued that the American Supreme Court has been based on an accommodationist approach and the European Court of Human Rights has been focused on a separationist approach. It is possible to find certain cases in another direction in these jurisdictions and the important point is the causes of justification of these different rulings. The cases will be reviewed to clarify links between them and these models of religion and State.

The American Supreme Court accepted some accommodations in certain cases, but not an absolute right to accommodate in all circumstances. In the American approach is especially relevant to the economic reasons from the benefit-cost analysis. The case of *Scherbert* found in favour of an Adventist of Seven Day believer that did not want to work on Saturdays if there was no compelling State interest. The case of *Yoder* found in favour of an exception to compulsory public education to Amish teenagers between 14 and 16. The case of *Griggs* was the first case of indirect discrimination based on the situation in a company of black candidates for job promotion and the origin of affirmative actions. The case of *Smith* found against of an exception for a religious use of peyote. The case of *Hardison* found against an accommodation if this involved more than minimal cost. Along the same train of thought, the case of *Philbrook* found against an accommodation if this involved more than minimal cost. The case of *Caldor* found against an absolute right to *Sabbath* observers not to work on their holy day. In some recent cases, they found in favour of accommodating: these are the cases of *Need Ind. School Dist.*, *Kasson* and *KHPA* in which there were no economic cost implications. From the accommodationist approach, there are the cases of *Scherbert*, *Yoder*, *Griggs*, *Need Ind. School Dist.*, *Kasson* and *KHPA*. On the other hand, from the separationist approach, the case of *Smith* and *Caldor* could be included. The cases of *Hardison* and *Philbrook* could be considered under a benefit/cost analysis’ pragmatic argument and don’t fit into the separationist/accommodationist classification. It could be argued that American Supreme Court reasonable accommodation case law is closer to the accommodationist approach although it includes some cases from other approaches.

Canadian case law on reasonable accommodation has been especially open and sensitive to cultural and religious diversity. However, it was not recognised an absolute right to accommodate in all circumstances. The employer was able to use a general policy, called *Bona Fide Occupational Qualification* (BFOQ), instead of using a system that it requires individual exceptions. The case *Simpsons-Sears* found in favour of accommodating an Adventist of the Seven Day believer. The case of *Meiorin* found in favour of recognising an indirect discrimination. The case *Central Alberta Dairy Pool* found in favour of recognising to the employer a duty to accommodate unless there is undue hardship. The case of *Bhinder* rejects an exception due to safety reasons and

because the employer was following a BFOQ. Canadian Supreme Court reasonable accommodation case law clearly embraces the accommodationist approach and, for instance, it established a duty to accommodate for the employer unless there is undue hardship.

European Court of Human Rights case law on reasonable accommodation has developed mainly from the concept of indirect discrimination that is explicitly recognised in European law. This Court has been reluctant, generally speaking, to admit exceptions for religious reasons, but this could be explained because those cases usually came from France and Turkey that are countries with an active secularism and the Court's application of the margin of appreciation of national authorities.

In the cases of *Thlimmenos vs. Greece* and *Glor v. Switzerland* the apparently neutral application of the law adversely affects the members of the minorities –Jehovah witnesses, diabetics- and a judgment was handed down based on the interpretation of the minorities differences.

In the cases on segregated schools for Romany children, called *DH v. Czech Republic* and *Orsus and others v. Croatia*, the Court interpreted the existence of indirect discrimination towards an ethnic group and these segregated schools for Romany are against human rights.

In the case of *Muñoz Díaz v. Spain* it was recognised an exception of the general application of the law interpreting that a marriage by the Romany rite has analogy with the void marriages but with good faith. This produced effects to concede a widow's pension in this case, but it was not a general recognition of marriages by the Romany rite.

In the case of *V.C. v. Slovakia*, which focused on the sterilization of a Romany girl, legislation on such operations was found to negatively affect minority groups, such as Romany women, despite doctors harbouring no ill will or having racially motivated reasons to harm them.

In the cases of *Folgero and others v. Norway* and *Hasan et Eylem Zengin c. Turquie*, an exemption from compulsory religion oriented courses by other convictions parents was claimed. It could be interpreted that the official State religion, and its mandatory teaching in schools, impacts adversely on the minority members that want their children be educated with other values. It is a criticism of the lack of the State pluralism and neutrality from the minorities' point of view.

There are two cases also linked with the lack of pluralism and neutrality of the Turkish State.: that are *Sinan Isik v. Turkey* and *Izzettin Dogan and others v. Turkey*. In *Sinan Isik v. Turkey*, there is lack of pluralism because on the national identity card there is a box for religion as "Islam" instead of "Alevi". The Court found it discriminatory to give information about religion on the identity card. In the *Izzettin Dogan and others v. Turkey* case, the issue of whether services connected with the

practice of the Alevi faith constitute a public service. In this case, the claimants sought public recognition of the Alevi faith by the Turkish State. There is “no objective and reasonable justification” to treat the Alevi community differently.

The ECtHR has a restricted view on reasonable accommodation regarding religious days. In all analysed cases, reasonable accommodations are denied. There is a mention of reasonable accommodations in the dissenting opinion of *Francesco Sessa v. Italy*. On these issues, it is important to consider that what appears as neutral came from a particular cultural and religious tradition. In America and in Europe, treatment of those who are different and role of minorities are diverse. The American approach accepts exemptions for the religious reasons in workplace whilst in Europe, equal treatment tends to be applied without exception.

The ECtHR also has a restrictive view of religious signs accommodations. The ECtHR considers the margin of appreciation of the State in different cases, in particular the French application of the *laïcité* principle. In a recent case, the European Court of Justice declared that the ban of the Muslim veil in the workplace did not constitute direct discrimination and gave some criteria to be considered when establishing indirect discrimination:

unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain.

In this case, it meant a justification was needed. If there was no justification, female Muslim workers who wore a veil would be found to have been indirectly discriminated against.

In other cases, the ECtHR was restrictive with the exemptions on religious grounds because the third party's rights or safety were affected. For example, in the case *Pichon and Sajous v. France* ECtHR found against a pharmacist that refused, on religious grounds, to sell contraceptive pills in their dispensary. The pharmacist attitude could affect third-party rights because these contraceptive pills were legal.

In the case *Eweida v. United Kingdom*, the ECtHR considered that an airways check-in assistant who wore a cross to be lawful, but not in the case of a nurse on public safety grounds. The third and fourth applicants sought exception on religious grounds at work with regards to homosexual couples. The ECtHR found against the applicants because their demand affects the third-party. This was a case of a “disproportionate burden” because in only considering a religious approach would imply a serious discrimination to another minority.

There were few cases on the accommodationist approach from the European Court of Human Rights. Basically, these were based on the application of the indirect discrimination concept. For example, the cases of *Thlimmenos vs. Greece* and *Glor v.*

Switzerland were based on the situation of a Jehovah witness and a diabetic and the indirect discrimination situations. Other cases were based on the situation of the Romany. For example, on the racially segregated schools, the cases of *DH v. Czech Republic* and *Orsus and others v. Croatia*, on the recognition of the widow pension to a Romany widow married by Romany rite, the case of *Muñoz Díaz v. Spain*, and on forced sterilisation, the case of *V.C. v. Slovakia*.

In the great majority of the other cases on reasonable accommodation case law, the European Court of Human Rights has followed the separationist approach. The case of *Folgero and others v. Norway* and case of *Hasan et Eylem Zengin c. Turquie* recognised the right to a plural and secular education in front of compulsory confessional courses. In the cases of *Sinan Isik v. Turkey* and *Izzettin Dogan and others v. Turkey* found in favour of recognising rights to Alevi community that implied a separation between church and State.

In case law on religious signs accommodations, in general terms, the European Court decided rulings from the separationist approach denying accommodations. Most of these cases came from France and Turkey that had an active secularism system and the margin of appreciation clause played a role. The only and main exception on religion signs accommodations was *Lautsi v. Italy* on the crucifix in public schools' classrooms. In this case, the European Court adopted an accommodationist approach. This is a controversial case on the interpretation of secularism and what that sign meant in the Italian society.

With regards to religious days accommodations, the European Court also followed the separationist approach and denied accommodations. In the case of *Francesco Sessa v. Italy*, the majority of the Court followed a separationist interpretation, but the dissenting opinion used the term and justified a reasonable accommodation for the first time in this Court,.

In the case of *Pichon and Sajous v. France*, the ruling affirmed the separationist approach. In the case, third party's rights were implied. The case of *Eweida v. United Kingdom*, the first two decisions on cross necklaces were based on an accommodationist approach, the second also considering the exception of public safety. The two other decisions of the *Eweida* case on not to perform professional services to homosexual couples were based on a separationist approach. McCrudden expressed the idea that, in these cases, it might be possible to find some solutions to accommodate religious conscience when third-party rights are clearly capable of protection (McCrudden, 2018, 121).

It could be concluded that the European Court of Human Rights reasonable accommodation case law was mainly based on the separationist approach. However, there have been some cases where indirect discrimination has been applied. On the other hand, the *Lautsi* case, which has become one of the leading cases, followed the accommodationist approach. *Lautsi* was a case of an accommodation of the majoritarian and traditional religion of Italy. This was clearly against the separationist approach.

The notion of reasonable accommodation is linked to substantive equality and to treating those who are different equally, as apparently neutral treatment actually discriminates against a group of individuals. Ordinarily, religious reason may exempt a member of a minority group from the general rules. In the European context, this must be interpreted by the principle of proportionality and the relationship between purpose and the means to achieving it.

Reasonable accommodation could be a promising concept in European law if there is a redefinition of the neutrality, pluralism and difference notions. The relationships between State and religion are complex and diverse in almost every European country. Some authors, like Habermas, have explained the current situation as post-secular societies. If religion still has an important role, minorities could demand a new definition of neutrality and pluralism and, in some cases, an exemption by religious reasons. This could only be possible attending the principle of proportionality, the respect of third-party rights, the respect of the public order and public safety, and how these exceptions for religious reasons affect the cost and other analysed usual conditions.

In Europe, it could be a positive evolution of reasonable accommodations if there is an emphasis in the indirect discrimination schema and the effects of neutrality for minorities, but, in any event, reasonable accommodations must always pass a proportionality test focusing on the means justifying the ends.

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