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Dipartimento di Giurisprudenza, Studi Politici e Internazionali

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**The collective negotiation of reasonable accommodation of the
religious acts in the company**

Prof. Antonio Ojeda Avilés

Sevilla University

Abstract

The problems of the religious manifestations in the workplaces and their multiple forms in the types of clothes, of festivities or of rejection to certain activities forbidden by the religion, have undergone an exponential increase with the beginning of the 21st century in the European countries, where immigration from countries with non-Christian

religions or, in general, different from the majority in each country, has produced innumerable judicial interventions in recent years. Old cultivator of the subject, the European Court of Human Rights (ECHR) has seen how recently also the European Court of Justice (CJEU) has come to prosecute also resonant cases. But the courts are overwhelmed, and the legal standards are too generic. It is necessary to analyze the private standards, and not so much the codes of corporate uniformity as the collective agreements, hitherto little inclined to enter into that subject, but gradually interested as the problems multiply.

Keywords

Collective agreements, hijab, Muslim religion, Hebrew religion, reasonable accommodation, Ramadan, Friday rest, Muslim and Jewish holidays, Directive 2000/78.

Summary

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A. The limits of judicial control

The technique of reasonable accommodation, imported from the United States and Canada, has allowed the courts to get out of the narrow limits in which the religious conflict was initially in the companies for the sake of greater freedom of action to achieve respect for all the religions and beliefs in their just limits. In general, the doctrine has welcomed the application of the theory as positive, and even as important, opening doors until then closed¹, although there are still some limits that lead to specific criticism, related to the reluctance to change the courts, with the application of less open methods. Thus, Valdés Dal-Re has criticized the rejection of the ECHR to ways of

¹ Thus, GOÑI SEIN J.L., "Libertad ideológica, libertad religiosa y empresas de tendencia", in BAYLOS A., CABEZA J., CRUZ J. and VALDÉS F., eds., *La jurisprudencia constitucional en materia laboral y social en el período 1999-2010*, La Ley, Madrid 2015, p. 279, who proposes that the Constitutional Court assume the criteria of accommodation of the job to the person of the worker, or from the company to the worker. For CAMÓS VICTORIA I., "La gestión de la diversidad religiosa", in CAMAS RODAS, ed., *La gestión de la diversidad religiosa en el ámbito del empleo y las empresas de tendencia*, Bomarzo 2016, p. 75, states that this is a good practice and a reasonable way to seek a compromise in a friendly negotiation promoted by the courts for the valuation of business measures in this sense, which Directive 2000/78/EC reserved for workers with disabilities (Article 5).

adaptation and reasonable adjustment and not simply to declare the interference, with regard to the judgment of February 12, 1981, case *Ahmad v. United Kingdom*, where the refusal to work on Friday afternoon of an English teacher of Muslim religion in order to go to prayer in the mosque was dismissed by the ECHR with the emphatic assertion that the corresponding article of the ECHR did not protect it². For its part, Rojo Torrecilla points out two certainly existing limits, the excessive respect of the ECHR to national peculiarities, materialized in the secularism of the French State, and the Spanish Constitutional Court in assessing as an ideological freedom of the company attitudes such as the refusal to sell the morning after pill³. It could also be understood that accommodation plays with ease in individual cases, but finds certain difficulties with regard to conflicts with religious entities, as we see in Spain or the United States⁴: if in Spain the conflict of professors of Catholic religion or in Catholic schools only reach a half solution with compensation from the State, in the United States a similar problem has generated an old reaction of the Supreme Court to create *motu proprio* an exception not contemplated legally in favor of the Catholic Church⁵.

However, as the courts have abandoned the rigidity of previous methods to deploy the broad horizon of reasonable accommodation, these criticisms have lost virtuality. For example, the two CJEU judgments of 14 March 2017, on the veil in France and Belgium in the *Achbita* and *Bougnaoui* cases respectively, have involved a change of judicial

² VALDÉS DAL-RE F., "Libertad religiosa y contrato de trabajo", in CASAS M.E., DURÁN F. and CRUZ J., eds., *La transformación del Derecho del Trabajo en el marco de la Constitución Española*, Madrid 2006, pp. 565 ss. For the author, the judicial attitude expressed a growing regression.

³ ROJO TORRECILLA E., "Aproximación al ejercicio del derecho de libertad religiosa en el ámbito de las relaciones de trabajo", in CAMAS RODA, ed., *La gestión de la diversidad religiosa*, cit., pp. 45 and 46.

⁴ In a similar sense, GOÑI SEIN J.L., "Libertad ideológica, libertad religiosa y empresas de tendencia", cit., p. 279, points out the poor effectiveness of art. 16 Const., preferably applied to the individual slope.

⁵ For GARDEN C., "Religious Employers and Labor Law: Bargaining in Good Faith?", *Boston University Law Review* 3 (2016), p. 110 ff., The exclusion of Catholic bishops as religious employers was introduced by the US Supreme Court through an "implausible" reading of the NLRA and a vague language that is difficult to apply to other cases; and, although there is also the Law of Restoration of Religious Freedom that allows exemptions to federal laws for sincere religious beliefs, its application poses many problems with accommodation. In light of which, the author poses the following dilemma: what does it prevail, the worker's rights under the NLRA, or the employer's religious commitments? Hence CORRADA R.I., "Religious Accommodation and the NLRA", *Berkeley Journal of Employment & Labor Law* 17 (1996), pp. 185 ff., proposes an amendment to the NLRA to resolve the numerous conflicts that have arisen around this issue, and exposes the cases that have taken place with respect to various religions that lead the respective Churches (Amish, Mennonites, etc.) to maintain their distance from the unions, with analysis of sentences such as those of Beatrice Linscott (1971), Larry Hardison (1977), or Carole Katz (1993). *Vid* also BRADY K.A., "Religious Organizations and Mandatory Collective Bargaining under Federal and Labor Laws: Freedom from and Freedom for", *Villanova Law Review* 77 (2004), pp. 49 ff.

attitude that the author could not foresee at the time, although he could not suppose the French law of 2010 imposing sanctions for the use of the veil in public places.

Of course, this does not end the shortcomings, but rather the most important ones are in sight. We have already spoken of the fact that the technique of accommodation also has limits, and of them the doctrine has been conscious, beginning with the places of origin⁶.

The complexity acquired by such evaluations allows to guess in a greater number of cases, probably almost all. But by doing so, a greater balancing act is thrown up, as other fields arise where the precise adjustment of the court's extensive efforts to find the precise coupling with the least damage to both parties, including the valuation of compensatory offers outside the conflict itself, which can get to force the reasoning to extremes that move to disbelief. As Elósegui Itxaso indicates, the judges must assess the evidence, the arguments, that the conviction be linked to the plaintiff's moral integrity and that concrete action be required, and reason and justify the petition⁷. Finally, as the ECHR itself admits in the Eweida and others judgment, the set of arguments for and against lead the judges to solve a simple dilemma: if the reason to prohibit is greater than the reason to allow⁸. But the margin of discretion of the court ends up being very broad, combining how aspects and elements of very diverse condition are made.

⁶ See BOSSET P., "Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable", in JÉZÉQUEL M., dir., *Les accommodements raisonnables: quoi, comment, jusqu'où?*, Editions Yvon Blais, Québec, 2007, p. 3-28; JÉZÉQUEL M. and HOUDE L., "Accommodements religieux en milieu de travail: jusqu'où?", *Effectif*, April-May 2007; ESTEBAN C. and LÓPEZ-SALA A.M., "La crisis de los acomodamientos razonables en Quebec: la Comisión Bouchard-Taylor", *Revista Internacional de Filosofía Política* 33 (2009), pp. 191-209; RUIZ VIEYTEZ E. and URRUTIA G., eds., *Derechos humanos en contextos multiculturales. ¿Acomodo de derechos o derechos de acomodo?*, Alberdania, San Sebastián 2010, pp. 39-65; RUIZ VIEYTEZ E., "Acomodo razonable y diversidad cultural: valoración y crítica", in SOLANES CORELLA ed., *Derechos humanos, migraciones y diversidad*, Tirant lo Blanch, Valencia 2010, pp. 65-103; BORGES BLÁZQUEZ M.D., "Derechos e integración: el acomodo razonable como instrumento para la igualdad material", *Cuadernos Electrónicos de Filosofía del Derecho*, 23 (2011), pp. 47-73.

⁷ ELÓSEGUI, *El concepto jurisprudencial de acomodamiento razonable*, p. 106.

⁸ ECHR Eweida judgment (2013), cited, §§ 100-101. He was referring to the second plaintiff, Mrs. Chaplin, who was warned to remove the cross she was carrying at the public hospital Royal Avon & Exeter, whose policy of uniformity prohibited the wearing of jewelry for health reasons: the court must first decide whether to exhibit a cross was a clear aspect of a generally recognized Christian practice, if the size of the cross—quite small—allowed or did not pass it by, and if carrying it was an attempt against health, which needed to be tested by the hospital, taking into account moreover, other religious symbols, in particular another cross, two Kipans Sikhs and a loose hijab, had also been forbidden. To all the questions the court responds with the concession, and notes that the hospital has not proven the harmfulness to health, ending however by declaring that the prohibition responds to health reasons and that it does not violate articles 9 and 14 of the ECHR.

Not in vain Galvez, commenting on the Bougnaoui case and the court's insistence that the employer try to assign the Muslim employee a position without contact with the public where she can wear the veil, points out that the insistence on this accommodation mechanism promises to be a nest of judicial wasps - "a litigation bees' nest"⁹ -. For even when evaluating compensatory alternatives or not simply restricting rights, the judge must assess to what extent the accommodation measure is not a measure of compensation, and if it is, if it is adequate or simply monetizes a damage , as in the field of occupational risk prevention, the famous "risk bonuses" of collective agreements have survived to some extent.

If we add to this the fact that the religious conflict has experienced an exponential increase in the labor courts since at least the 90s of the last century, coinciding with globalization and massive migrations, the advances that the doctrine of accommodation has brought have been compensated by the massification of these litigations, to the point that we could think of a succession of fashions or waves of conflicts, which in Europe have gone from litigation for labor risks to those of discrimination based on gender, to present a strong increase of those due to religious discrimination, together with those for qualifying the contract (digital platforms and others). Surprisingly the rise of the religious factor in companies does not correspond to the figures of believers, but with the formation of conscience groups that defend their beliefs against the majority. This is indicated by Kefer in Belgium in the "amazing number of cases on the use of Islamic veil at work" resolved by the Belgian courts in the last ten years, and the incoming tide of demands, being a hot topic in private companies , even though scarves or hijabs also abound in schools. Faced with this, Belgian population statistics show a low incidence of religious diversity, compared to 50% of Catholics and 32% without religious affiliation, in Belgium 9% of atheists, 5% of Muslims and 0.4% of Jews¹⁰. The same could be said of the other European countries just looking at the jurisprudence repertoires or dealing with the most famous cases¹¹.

⁹ GALVEZ G., "Politiques de neutralité au sein des entreprises: a feu vert de la CJUE?", SSL March 27, 2017, p. 6. Refers to the CJEU Bougnaoui judgment of March 14, 2017 C-188/15.

¹⁰ KÉFER F., "Religion at Work. The Belgian Experience ", Hungarian Labor Law E-Journal 1 (2019), pp. 41, 43, 49 and 50.

¹¹ In Spain, it is enough to examine the astonishing number of judgments of all levels compiled by ARASTÉY DE SAHAGÚN L., "Jurisprudencia laboral en materia de libertad religiosa", in CAMAS RODA, ed., El ejercicio del derecho de libertad religiosa en el marco laboral, Bomarzo, Albacete 2016, passim.

The conjunction of new qualifications with the rapid increase in conflict suggests that Galvez's fears are not trivial. The Eweida 2013 case, already cited several times, allows us to detect the difficulties of the act of judging on these issues. Introductory of a substantial change in the approximation of the ECHR judges to discriminatory cases by requiring the justification of limitations from the principle of proportionality¹², the Eweida case is also notorious for having accumulated four issues of religious discrimination in the United Kingdom against citizens of Christian religion, matters that nevertheless studies and sanctions separately¹³. Well, in the first case, Mrs. Eweida had refused to remove the cross from her neck or even to hide it under her uniform tie, claiming that it was a generally recognized way of practicing Christianity (§ 64), and then of three warnings had been returned home without pay until he decided to comply with the uniformity code; He was later offered administrative work without contact with the public, which he rejected. The matter reached the press, which criticized the uniformity policy of British Airways, and it changed the rules, allowing Eweida to return without objections, but now she claimed in court the salary losses suffered by her forced inactivity of four months and indirect discrimination, finding the application of the uniform code deeply humiliating and offensive (§ 65).

The ECHR considers the exhibition of the cross as a directly religious act, as it is not required by Article 9 ECHR that religion requires it as a duty, and therefore admits it to be treated as a religious conflict and possible discrimination. However, if a person is able to take measures to avoid a limitation, it is not possible to speak of interference and the limitation does not require as a duty, so it admits treating it as a religious conflict and possible discrimination. However, if a person is able to take measures to avoid a limitation, it is not possible to speak of interference and the limitation does not need to

¹² In this way, ROJO TORRECILLA E., "Aproximación", cit., p. 43, quoting HILL and CALVO. In the EU, for its part, the CJEU already had what was established in that sense by art. 2.2.b) of Directive 2000/78/EC, according to which the particular disadvantages will be considered as indirect discrimination unless they are objectively justified by a legitimate purpose and that the means to achieve this purpose are adequate and necessary.

¹³ The first two deal with prohibitions of carrying a cross to the neck to Mrs. Nadia Eweida (employee of British Airways) and Shirley Chaplin (employee of the public hospital Royal Devon and Exeter NHS), while the two seconds were about refusal to attend homosexual couples of Mrs. Lillian Ladele (employee of the Islington Civil Registry) and Mr. Gary McFarlane (employee of the company Relate Avon Ltd., dedicated to confidential sexual advice). The respective companies had resolved, after repeated attempts at composition, job transfers in the first three cases and dismissal in the last. In all four cases, there were dress codes, ethical codes or equal opportunities policies in companies.

be justified, especially when the affected person can change his company¹⁴; however, this approach had not been applied in conflicts of other types of rights, such as the right to life, freedom of expression or freedom of association. Given the dilemma, the ECHR declares that the best approach to discriminations as important as religious ones is to "consider in the total balance if the restriction was proportionate or not" (§83). But it is reiterated case law of the ECHR, it affirms immediately, leaving to the States a certain margin of appreciation to decide if, and to what extent, an interference is necessary, although, of course, under "European" control of whether the States have guaranteed the rights in question by the companies of the country.

We have seen the Court reflecting from one end of the argument to the other when considering the four demands as a whole. Then his equilibrium exercises become more radical when he enters into each particular case. Mrs. Eweida had not justified her insistence on carrying the cross in view as motivated by her desire to bear witness to her Christian faith, but the ECHR nonetheless accepts that it was a manifestation of her religious belief. However, it also admits that the legitimacy and proportionality of the uniform code and the measures adopted by British Airways were beyond doubt (§ 93), which served to "mitigate the extent of the interference suffered by the applicant", but not to eliminate it totally, because the business motivation to project a certain corporate image is legitimate, but it can not be given excessive weight. In addition, Mrs. Eweida's cross was discreet, in other cases the use of religious garments such as turbans and hijabs had been authorized, and no evidence had been provided that their use had damaged that image. In addition -remained in §95- the fact that the company was able to modify the uniform code to allow the visible use of religious symbolic jewelry demonstrates that the prohibition was not of crucial importance. In this way, the Court understands that an adequate balance between damages and compensation has not been reached, and declares the applicant worthy of equitable satisfaction under Article 41 ECHR. But she does not consider that her claim for damages of £ 30,000 has been sufficiently proved by her, since in fact she was the one who decided not to go to work with a loss of salary, and she had rejected the offer of change of position, because to mention that during the period of inactivity "he was known" that he had enjoyed an

¹⁴ In this regard, he cites the ECHR rulings *Konttinen v. Finland* (1996), and *Stedman v. United Kingdom* (1997).

income of more than twice his salary losses, thanks to gifts and donations or income from other sources (§ 114). However, the ECHR understands that the violation of her right to manifest her religious belief should have caused Ms. Eweida considerable anguish, frustration and anxiety, for which she is awarded compensation for moral damages of 2,000 euros. On the other hand, the plaintiff claims costs and procedural costs 37,000 euros, although the British Government questions them. But given that the latter does not provide details (evidence?) Of such doubts, the ECHR considers it reasonable to grant Eweida 30,000 euros for procedural costs (§§ 115-117).

The reader has the feeling, at this point, that the Court has used, also he, all the means available to reach a procedural average, and suspects that even the chapter on costs and expenses has been applied to such finish. The legal arguments appear in the argument in constant precarious balance, refuted by others of the same legal nature or of opportunity, opinion or economic profile, whose contrast and assessment sometimes becomes authentic proof of faith. On the other hand, the parties have arrived perfectly prepared for the trial, especially with the very mature code of uniformity of the company - in seven years there had been no complaints - perhaps because previously all the national instances had been exhausted, including the Supreme Court British, in which British Airways had obtained unanimous support¹⁵.

The time has come to orientate ourselves towards alternative ways, if they were possible, to a judicial path that is quite saturated. The Eweida judgment v. The United Kingdom is a paradigm of exhaustion to which the courts, for one reason or another, are arriving on the matter. The task of matching arguments on both sides, and even arguments of their own, puts judges in a strong decision-making capacity in situations marked by fait accompli, and they are not always in a position to resolve what previously they might have had. an adequate response. On the other hand, the legislation, both state and international, has reached high levels of consensus and its extensive scope does not allow for more details. Let's see some options beyond the public media.

¹⁵ §17. The High Court had inadmitted the appeal, and warned the plaintiff about the ECHR jurisprudence regarding the possibilities of changing jobs as a reason to justify the restriction. However, in November and December 2006 the subject had gained a great resonance at the national level, and from the BBC to The Guardian many media outlets had echoed the criticisms against the judgments, criticisms that came even from a prominent archbishop. Anglican. The photograph of Mrs. Eweida showing the chain with the cross had appeared in the press.

B. Private regulations as conflict prevention

a) Differences and characteristics

The Canadian Bouchard-Taylor report distinguished between reasonable judicial accommodation and concerted adjustment between private or between administrations through friendly negotiation and compromises. Between the two formulas, he pointed out an important difference: the first one refers to the application of laws, while the second is of lesser importance, since it seeks to avoid conflict and is usually "guaranteed by the manager of the public or private institution before the courts. patients, students, consumers or employees"¹⁶. But both are similar, to the point that denominating them in different ways seems unnecessary, since ultimately they pursue the same objective in the flexible solution of the problem. And above all, they come from the same duty attributed by the law to the managers of public and private organizations - from the State to the small entrepreneur - to avoid any form of discrimination through the adoption of harmonizing measures, as the authors indicate in the glossary that close the document¹⁷. The duty is prior to the conflict, because it comes from both international and national standards.

The same Report also pointed out something important: it is advisable to use the negotiation route avoiding judicialization as much as possible in the search for solutions, since ordinarily in judicial decisions there is a party that wins and another that loses. Although not only because of this, or not because of it, because often the "concerted adjustment" between private parties leads to solutions that in themselves are considered to show the same defeat of one of the parties, although there will always be external compensation, usually in the reputation of the entity, to explain it¹⁸. There are

¹⁶ Report of the Bouchard-Taylor Commission, cit., p. 19.

¹⁷ Report, p. 289, concept of reasonable accommodation. See about it ELÓSEGUI ITXASO, op. cit., pp. 59-61.

¹⁸ In 2012, the International Amateur Football Federation reached an agreement to allow Muslim players to use the veil in football matches, which led to a widespread [and sarcastic] comment by ESPINOSA A., "Jugar al fútbol con velo para no incitar al pecado ", newspaper El País of March 23, 2012. The case was only in appearance of victory of a minority of Muslim players against, say, European clubs, as the reality was that many Muslim countries did not allow to play unveiled the female players and could not compete for it internationally.

other reasons to encourage private rules, whether unilateral or bilateral, among which the following three should be highlighted:

1. Prior and general nature. The private solution, like the legal solution, contains a didactic or preventive effect under whose influence is saved what from that moment is considered a pathology and is subject to sanctions. A business rule or an agreement on, say, the weekly rest, can avoid a good number of conflicts, mainly because it will ordinarily consist of, or at least will be accompanied by, a measure of adjustment or reasonable solution.

2. Knowledge of the land. The judicial response has the great advantage of the impartiality of the judge, but also the inconvenience that can lead to solutions, we would say, extravagant because of that same distancing. Historical experience has shown how in labor matters judges have evidenced a clear ignorance of reality in companies, if not a predisposition towards one of the parties, which led in many countries to the creation of specialized courts. The private norm, which in these cases is not so much the arbitral -a posteriori- as the one of the company itself or of the agreement with the personnel representatives, avoids such inconvenience.

3. Practical sense. Hypnotized by the interpretation of the law, the courts may lose sight of the practical application of the measures adopted, while the first objective of the private rule will consist in the harmonious functioning of the company or institution, and therefore it will flee from solutions theoretical

Not all are advantages, of course, especially because in private labor standards there is sometimes frivolity in compliance with public norms or some interested deviation that would actually be to the detriment of the religious minority. Such a seemingly respectful decision with a certain minority, for example, that of the Royal Canadian Mounted Police to allow the replacement of the helmet by the turban with the agents belonging to the Sikh religion, could be considered as an attack on safety at work¹⁹.

¹⁹ Modification of the uniformity requirements of the said police by the federal government on March 15, 1990 at the request of an officer. The reform was challenged by two retired officers before the Federal Court of Canada, which in a July 8, 1994 decision rejected the appeal. The appeal to the judgment before the Court itself was not successful, nor was the appeal before the Supreme Court: Report pp. 48-49. Instead, the judgment of the Court of Justice of Ontario of March 6, 2008, refused to admit the exception in the use of a motorcycle helmet to a Sikh in order to carry the typical turban for religious reasons: Report, p. 60. However, the Canadian High Court, in a May 17, 2002 ruling in the Multani case, authorized a young student of Sikh religion to carry the small symbolic knife called kirpan, despite its obvious danger; the decision was reviewed in the Court of Appeal by judgment of March 4, 2004, and again reviewed by the

The universal acceptance of the advantages leads the legislators to repeatedly propose the promotion of these solutions, especially in their collective bargaining variant. Thus, the ILO Convention 111 (1958) on discrimination states that States must obtain the cooperation of the social partners, in parallel with Directive 76/207 / EC that promotes social dialogue to promote equal treatment through collective bargaining, codes of conduct, good practices etc. As for Directive 2000/78 / EC, not one, but three articles are dedicated to the social partners, since 9, by which states must ensure that organizations and associations with a legitimate interest in compliance with it can initiate any judicial or administrative procedure to demand compliance in the name or support of the complainant and with his authorization; Article 13, which is more focused on social dialogue, calls on the Member States to promote agreements for the control of practices, collective agreements, codes of conduct, exchange of experiences or good practices, and in particular the negotiation of collective agreements with standards anti-discrimination; Lastly, Article 14 urges the Member States to dialogue with non-governmental organizations with a legitimate interest, in order to promote the principles of equal treatment.

In Spain, legislation has focused more on gender equality than on religious equality, due to the influence of Organic Law 3/2007, on effective equality of women and men, and also in part on the care of the disabled based on Law 39/2006, on the promotion of personal autonomy and care for people in situations of dependency, but in matters of religious conflicts in employment, something similar to Article 27 of the Canadian Charter of Rights and Freedoms of 1982²⁰ or the Article 43 of the Charter of Rights and Freedoms of the province of Quebec of 1975²¹. Instead our legislator has preferred a particularized regulation, where, in addition to the usual enumeration of the grounds

Supreme Court in a judgment of March 2, 2006 in favor of Multani, considering compatible the safety of the other students and the professors with the religious freedom of the young Multani: Report, pp. 50 and 53. The conflict had arisen from the agreement adopted by the school management and the parents of the student in the same sense in December 2001, reviewed several times.

²⁰ "27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".

²¹ "43. Persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group".

for discrimination²², there are specific rules for some grounds of discrimination in which he frequently forgets religious freedom.

Thus, the Workers' Statute, in its article 17 in fine, authorizes collective bargaining to establish positive action measures for *women's* access to all professions, with reservations and preferences, as well as regulating positive discrimination measures "European way", on equal terms between genders, and establish equality plans in companies in accordance with the Law on effective equality of women and men; in article 64.3 of the same law, workers' representatives see their right to receive regular information on the situation of equal treatment and opportunities between men and women, and the promotion measures and equality plans adopted; and in article 85, it orders collective agreements to contemplate measures to promote equal treatment between men and women, or in their case equality plans with the same motive.

On the other hand, the Law of prevention of occupational risks includes within the general duty of prevention the obligation to adapt the work to the person..., in contemplation of accidents and illnesses.

Regarding the Law of Infractions and Sanctions in the Social Order (RDLeg. 5/2000), it qualifies as serious infringement of the employer the breach of the equality plans referred to above, and as a very serious infraction the decisions of the employer that imply direct discrimination or indirect for several reasons, including - finally - religion or convictions, as well as harassment for similar reasons, among which is also religion or convictions²³. In a long article 46 bis awards to employers specific responsibilities in equality matters, where very serious discrimination as a whole, including that of religious motivation, entails the loss of the incentives granted as aids to employment and the possible exclusion to receive them for as maximum two years.

There is little, as what has been said, in the general laws on the matter at hand, and we must go to special norms, such as the laws where cooperation agreements are translated with various religious communities in Spain (Evangelical, Islamic, Israelite)²⁴,

²² For example, article 14 of the Constitution (article 16 is specifically dedicated to ideological, religious and cult freedom, but it is clearly outdated); Articles 4 and 17 ET; Organic Law of Religious Liberty 7/1980, article 2.1; Law 30/1995, on prevention of occupational risks, article 15.1.d).

²³ Articles 7 and 8. The latter, paragraph 17, returns to the singularity again, considering the breach of the equality plans to be very serious.

²⁴ Cooperation agreements of the Spanish State with Evangelical entities (Law 26/1992 and RD 369/1999), with the Spanish Islamic community (Law 26/1992) and with Israelite communities (Law 24/1992).

or the Royal Decree 593/2015, of standardization of the requirements and declaration of notorious rootedness of the religious confessions in Spain²⁵, where we can find some very soft labor indication, such as Article 12 of Law 26/1992 on cooperation between the State and the Islamic Communities, by which Muslims may request their companies one day or one hour less for the exercise of their religious duties, although the agreement of both parties will be necessary.

To summarize, there is nothing or almost nothing in the state legislation on private standards for referring to the religious act in the company, in line with the general silence on the subject in those laws. Thus, private standards are made of every necessary point, protected only by a slight legal umbrella regarding religious freedom.

b) Unilateral private standards

As usual, the State arrives late in the regulation of social phenomena, following the conflicts that have arisen and some early-morning solutions implemented by private initiative. In our case there have been, and in good number, but born of the management power of companies and the drive to preserve the good corporate image from the usual noise pollution in these conflicts. The situation outlined in the Eweida judgment, that in the four applications joined by it there was a corporate code of uniformity and clothing, beyond which two of the companies prosecuted were public and the other two private, resurfaced by all countries in a good number of cases, and the courts accept these codes as a sign that there has been an approach to the problem worthy of praise because in a large part of them the position of minorities has been taken into account, and in any way has clarified the situation to allow the counterparty to challenge the business decision. However, some problems arise, as we will see.

1. The pioneering business codes of dress and behavior.

For the most part these regulations or codes raise the business position regarding a common aspect in Europe, the use of Muslim religious clothing in workplaces, and public spaces in general, while the issue of festivities and acts of religions minority, in conflict

²⁵ Statements of notorious rootedness that had already occurred regarding the Protestant confessions (1984), Judaica (1984), Jesus Christ of the Saints of the last day (2003), Jehovah's Witnesses (2006), Buddhism (2007) or Orthodox Church (2010).

with the majority festivities turned into secular traditions in all countries, finds more difficult treatment and barely appear regulated in these codes.

Let's see as an example two important sentences of the CJEU of March 14, 2017 in the Achbita and Bougnaoui cases, object of numerous comments because, among other advances and as indicated by Contreras Mazarío, it is the first time that the Court has addressed the theme of symbols religious in general, and the Islamic handkerchief (hijab) in particular²⁶, although obviously, neither the CJEU had stopped dealing with it before, nor had the ECHR been delayed in important cases such as 1 July 2014, SAS v. France case, on prohibition of the Islamic headscarf in public places for reasons of social coexistence under the French Law of 2010²⁷. For its part, the national courts had also got up early in the matter, according to the judgments of the German Constitutional Court BVerfGE of September 24, 2009, the House of Lords in the case Begum R (Begum) v. Denbigh High School 2006²⁸, the Spanish Supreme Court in judgments of November 2, 2011 in the Barik case (expulsion of Muslim lawyers for carrying the hijab), or February 14, 2013 in the Ordinance of Civic Case of Lleida, of the that we will talk about later; or of the judgment of the French Supreme Court of March 19, 2013 in the well-known Baby Loop case²⁹.

In the Achbita case, the Belgian courts dismiss this woman, because of the hijab, by a company whose internal regulations prohibited the use of religious symbols, while in the Bougnaoui case the French courts raise the issue because the employee fired,

²⁶ CONTRERAS MAZARÍO J.M., "El TJUE no prohíbe el uso del velo islámico. Comentario a las sentencias del TJUE de 14 de marzo de 2017, casos C-157/15 and C-188/15", in *Revista de Derecho Comunitario Europeo* 57 (2017), p. 149. Of "four fundamental judgments", does S. LAULOM speak on the cases of years 2017 and 2018 in the CJEU Achbita, Bougnaoui, Egenberger and IR v. JQ cases, in "Religion at work: European Perspectives", in *Hungarian Labor Law E-Journal* 1 (2019). It could be said that the CJEU, except rare occurrences in the matter such as the cases Van Duyn (1974), Price (1976) or -until to a certain point- Feryn NV (2008), makes its massive entry in matters of religious freedom with these four cases, to which must be added the Cresco case of January 22, 2019.

²⁷ French law of October 11, 2010 on concealment of the face in public places. Impose fine and / or penalty of imprisonment of 1 to 7 days for wearing the face masked or disguised in whole or in part, or with clothing that does not allow identification. The cited SAS ruling admits the prohibition. Similar to the French law, the Belgian law of June 1, 2011. On the subject in the ECHR, vid. CALVO GALLEGOS J., "Libertad religiosa, códigos de vestimenta y objeción de conciencia en la más reciente doctrina del TEDH", on the internet.

²⁸ On both, FRAILE ORTIZ M., "Algunas actuaciones de las autoridades europeas sobre el uso del velo islámico en el ámbito educativo", *Cuadernos de Derecho Público* 24 (2005), pp. 203 ss.

²⁹ LLAMAZARES CALZADILLA M.C., *Ritos, signos e invocaciones: Estado y simbología religiosa*, Dykinson, Madrid 2015, p. 248. See also VICKERS L., *Religious freedom, religious discrimination, and the workplace*, Hart Publishing, Oxford 2016.

engineer, receives from his company the assistance to a project and meets several times with clients wearing the veil, which causes reluctance in his interlocutors; her company reminds her then of the initial agreement to respect the neutrality with the clients, to which she refuses, reason why they do without their services. In the Belgian case, the question arises around the possible direct discrimination of Achbita; In the French case, the central issue lies in the alleged indirect discrimination of the affected party. For the Court, for its part, there is no direct discrimination, since the Belgian company had a regulation of general prohibition of such symbols with express neutrality (§ 31), which did not happen in the French³⁰. Other important issues include the application of the horizontal effect of judgments, introduced by the Treaty of Lisbon in 2009, in such a way that the CJEU orders companies to apply their decision until timely state regulation arrives, and national courts do not apply internal legislation contradictory with the interpretation supported by Luxembourg³¹.

Despite the value granted to company codes or regulations, the courts have raised the question of the extent to which they can regulate at their will a fundamental right such as the one we are dealing with. The problem was solved negatively in Spain by the Supreme Court ruling of 2013³² when analyzing the Civic Ordinance of Lleida, which prohibited the integral veil (niqab) in public spaces, or access to them, as well as the prohibition of cards reduced in public transport to those who will take it and will not be identified: for the Supreme Court a municipal ordinance can not regulate fundamental rights, except for those aspects for which there is municipal competence, and furthermore, the veil does not disturb tranquility or order. In France, in turn, a Law of 2016 has authorized the internal orders of companies to regulate the use of religious clothing. We are facing an issue in full effervescence, where it seems to consolidate a

³⁰ CONTRERAS MAZARÍO, "El TJUE no prohíbe el uso del velo islámico", p. 171, understands, on the contrary, that in both cases there was direct discrimination according to the material criterion, even though the CJEU follows the formal criterion; in a similar sense, FOUVET F., "Expressions of religious faith in companies. Consequences of the judgments of the Court of Justice of the European Union for France", Hungarian Labor Law E-Journal 1 (2019), p. 37: "all convictions, be they religious, philosophical or political, are protected by the rules governing the prohibition of discrimination. Therefore, a prohibition does not become permissible on the grounds that it is sweeping, encompassing several protected characteristics".

³¹ Until now there was the direct effect of the Directives, in the event that the States delayed the internal rule of application beyond the period indicated by them; with Achbita and Bougnaoui it is the sentences themselves that acquire this direct effect.

³² Supreme Court Judgment of February 14, 2013 (Ap. 4118/2011), Watani Association for Freedom and Justice v. Agreement of the plenary session of the City council of Lleida of October 8, 2010.

limit in the use of full veils, niqab and burka, as well as the hijab in certain professions with close contact with neutrality (judges, professors), referring to public spaces and public sector³³.

Legislation aimed at promoting positive discrimination against the religious freedom of minorities is rare, and if we add that they can go beyond the usual, also with respect to the sensitive issue - if there is any more delicate subject in the matter than another - of religious holidays, the situation may lead to a strange response by the courts. This is the matter in the *Cresco Investigation GmbH* case of the CJEU in its judgment of January 22, 2019, C-193/17, when judging the Austrian weekly rest law of 1983 that recognized Good Friday as a feast paid to the adherents of certain religions minorities who considered it a day of worship, specifically the Evangelical Methodist, Augustinian confession and Helvetic confession, and the ancient Catholic Church. Mr. Achatz considered this precept discriminatory, since he did not belong to any of them, he had to work that day as a worker in the Cresco detective agency, for which he claimed his employer for 109 euros and was able to keep the stake until the Supreme Court of Austria. In that country Catholics have also recognized that day as a holiday, but not that of other religions, although in some conventions there is a recognition of the feast of the Reformation for the other evangelical churches, or of the Atonement for the Jewish religion, but with the rest there is a difference in treatment that can not be ignored. The CJEU understands that such measures are not necessary to protect freedom of religion,

³³ GUTIÉRREZ DEL MORAL M.J., "The manifestation of the religious faith in the public services of health, education and administration of justice", in CAMAS RODA, ed., *El ejercicio del derecho de libertad religiosa en el marco laboral*, Bomarzo 2016, p. 209, also cites the case of the regulation of the internal regime of the public school of Pozuelo de Alarcón, which prohibited the use of caps and other garments that covered the head inside the center, and based on it had admonished a minor for carrying the Islamic veil. The author expresses doubts that an internal regulation may prohibit a manifestation of religious faith (page 210). France, Belgium, the Netherlands, Latvia, Italy and some Federal States of Germany have legislated in some of these senses. An extreme case arises in the case *Azumi v. Kirklees Metropolitan Borough Council* (2007) ICR 1154, on a Muslim teacher of a school of the Church of England who refused to leave the niqab and was dismissed: the court considered indirect discrimination, but accepted the restriction. Another case of religious dress in positions of authority was the *Dhinsa v. SERCO*, about a Sikh prison officer who is prohibited from wearing a turban, and the court supports the business decision because SERCO had shown that it was necessary for the security of the prison. In contrast, in the *Noah v. Sarah Desrosiers* case, ET 2201867/2007, of a Muslim hairdresser who was not admitted to employment when the prospective employer asked her to remove her veil to work and she had refused, the court admitted the existence of indirect discrimination because the employer had not demonstrated the business need of the measure. See a commentary on the above and other cases and the corporate dress codes, in VICKERS L., "Religious Freedom in the UK Workplace: Promoting Diversity at Work," *Hungarian Labor Law E-Journal* 1/2019, p. 14 ss.

nor of positive discrimination aimed at compensating for disadvantages caused by religious reasons, so it concludes that it is direct discrimination, and that employers are obliged by this decision to pay all its employees on Good Friday as a holiday, as long as the State does not legislate in accordance with the provisions of the judgment.

In the private sector, on the other hand, States leave ample space for autonomy to the codes where religious freedom standards appear, provided they meet the specific requirements of non-discrimination contemplated by international and national standards³⁴. We are talking about unilateral codes in its immense majority, and in the matter it does not seem that the unions show the same interest in converting them into negotiated norms as it has shown instead for other more directly labor aspects within the universe of corporate social responsibility.

2. Mentions in collective bargaining

Collective agreements have come to regulate religious freedom in all countries, but with the same respect - or, if you like, distancing - with which they have regulated other non-specific fundamental rights, which seems to have restricted the proliferation of clauses where find criteria for accommodation of this freedom. In appearance, the admonitions on respect for fundamental rights have been more influential than the desire to determine reasonable adjustments to multiculturalism, despite the pronouncements referred to in the norms of the highest rank in favor of their intervention.

Most of the times we find any reference to the subject in the agreements, it is a simple declaration of respect for workers' freedom of opinion and religion, without concrete measures, as we see paradigmatically in the French national collective agreement on open-air hostelry of 1993, to whose tenor

"The parties contractantes reconnaissent la liberté d'opinion ... Elles s'engagent à ne pas tenir compte ... des opinions politiques, philosophiques or religieuses, ni de l'origine sociale ou raciale, du sexe ou de l'âge pour arrêter leurs décisions, quelque nature qu'elles soient, intéressant le fonctionnement de l'entreprise, et notamment in ce qui concerne les

³⁴ For the ECHR, it would be the requirements to be an objective, legitimate limit, and proportional measures (Eweida et al. Case, for example); for the CJEU, essential, legitimate, justified limit and proportional measures (case IR v. JQ, for example). The professional relationship of the limit with the work done also arises sometimes.

employeurs, l'embauchage, les conditions de travail, rémunération et l'avancement, formation professionnelle, l'octroi d'avantages sociaux, les mesures de discipline et le licenciement "³⁵.

In the same sense, Polo Mercader has studied a certain number of agreements and speaks of the null frequency of the topic in them, in most cases only "didactic" mentions or insistence on the obligatory nature of the work equipment³⁶, so that his judgment "the negotiators have no interest in religious practice"³⁷.

However, and without denying the shortage of agreements where the problem appears, the clear interest of both parties to regulate it leads to overcome in some cases the difficulties - not only economic - of a norm of accommodation. From at least the decade of the 2000s³⁸, some agreements in Spain begin to establish types of swap in terms of holidays, quid pro quo in the simplest form of accommodation, with the replacement of some rights by others of the same nature -festives for holidays, permissions for permits, hours of rest for hours of rest-, with at most a change between types of day -from day to day continuous work-, without we have seen in them the amplitude displayed in singular agreements and in business dress codes thanks to mechanisms of greater radius such as, for example, the change of position to functions without contact with the public or with the activity rejected, without loss of category, salary or work center. The awakening of collective interest in the subject -even minimal- encompasses collective bargaining at all levels, from state-level agreements to business agreements, and it is even possible to observe until the beginning of collective bargaining articulated between agreements of different scope.

³⁵ Convention collective nationale de l'hôtellerie de plein air of June 2, 1993, extended by Decree of October 15, 1993 (JORF October 28, 1993), article 2.1, valid until today.

³⁶ Collective agreement of trade of the glass of Catalonia, of dental Prostheses, of laundries of Catalonia. It also analyzes 34 of the 61 sector agreements of Gerona, and 25 of the 85 of the same province: POLO MERCADER M., "El tratamiento del derecho a la libertad religiosa en la negociación colectiva", in CAMAS RODA, ed., *El ejercicio del derecho*, cit., pp. 97 ss.

³⁷ POLO MERCADER op. cit., p. 101. See also CELSI R., "Fattore religiosa e lavoratori di religione islamica. Aspetti riguardanti the contrattazione collettiva e gli accordi sindacali ", in CARDIA D. and Dalla TORRE G., eds., *Comunità islamiche*, Giapichelli, Turin 2015; GARCIA DÍAZ J.A., "La libertad religiosa en la negociación colectiva: el descanso semanal, festividades religiosas, permisos y llicencias", IELAT, University of Alcalá 6 (2012).

³⁸ So, Collective Agreement for agriculture activities in the Autonomous Community of the Balearic Islands (BOIB February 15, 2003), between CCOO and ASAJA and Unió de Pagesos, whose content we will see immediately. For a panoramic view, SOLIS PRIETO C., "Religión y derecho en el ámbito de las relaciones laborales y de Seguridad Social: algunas cuestiones puntuales", paper in the Permanent Seminar on Religion and Law, University of Extremadura, Cáceres May 5, 2016, unpublished.

Let's see some cases.

Consider, for example, the probably more complex aspect of regulating, the month of Ramadan of Muslims, which affects no less than a month of work and is also mobile. The situation becomes critical in companies where the number of Muslim religion workers reaches certain levels, but the number is not needed when the reputational factor enters the list: for example, as is the case of the company Escorxador (Gerona), whose production consists of the sacrifice according to the Islamic rite of cattle for the consumption of meat by the Muslims, and the workers of this faith add up a third of the workforce³⁹. In such cases the imagination overcomes all the difficulties until reaching a satisfactory accommodation for (almost) everyone: in the example cited, it is to allow a break before dawn to the Muslim operatives to fulfill their prayers, drink water and eat in abundance, because during the day they will not be able to do it; In return, they continue working when the other workers stop to have lunch around 9 in the morning. But not all have accepted the adjustment. The complaints about come from the Association of Atheists of Catalonia, for whom the schedules established by the legislation must be fulfilled.

Where Ramadan's greatest impact is, however, is the workers in the countryside, especially in the South, when the religious month coincides with the months of summer and the refusal to eat water and food during the day, the effects of working in full sun, which can cause failures and, in extreme cases, heat stroke that could be attributed to the failure of the general duty of prevention of employers.

Law 26/1992, in its article 12, determines an inappropriate adjustment rule for such risks, since it proposes the termination of the working day one hour before sunset, always with the agreement of both parties, and in exchange for recovery of the hours lost without any compensation. Along with this, the faithful may request the interruption of work on Fridays of each week, "mandatory and solemn collective prayer day for Muslims, from 1:30 p.m. to 4:30 p.m.", always after agreement and compensation of hours.

³⁹ I take the reference from GARCIA J., "Pacto en la empresa por el Ramadán", newspaper El País August 12, 2010.

Collective agreements prefer to grant the month as unpaid leave, provided it is previously requested and justified later, which can be combined with the reduction of one hour at the beginning and another at the end of the day in said month of Ramadan, with recovery of the form agreed or, where appropriate, by arbitration with the joint commission for interpretation of the agreement, as we see in the agreement of the field of Almeria⁴⁰ or the field sector of the Autonomous Community of the Balearic Islands⁴¹. Another form of reasonable adjustment refers to the exchange of holidays, changing some of the common ones for the specific one of the minority religion, a possibility established by the special laws of cooperation between the State and the diverse religious communities existing in Spain, and that for Muslims, according to the law just mentioned, allows prioritizing rest in six specific parties⁴². For its part, Law 25/1992, on State cooperation with the Israelite Communities of Spain, prefers to convert the weekly rest on Sundays (one and a half days, Article 37 ET) on sabbath rest (one and a half days, from the afternoon of Friday until the night of Saturday), although it also allows the exchange of the other official holidays for the own Israelite holidays⁴³, although there is no collective agreement, except for error or omission, which establishes it in general, for which it can be presumed that it comes by virtue of individual agreements. Although not very concessionary, the city of Ceuta's hostelry agreement contains an interesting aspect: although it only recognizes the possibility of replacing some of the official religious holidays with the culmination of the Ramadan fast (Idu Alfitir), and the procedure requires agreement between both parties, points to an open and elastic

⁴⁰ Provincial agreement for the years 2012 to 2015, Provincial Official Journal April 24, 2013, signed between ASAJA and COAG with CCOO and UGT, art. 23. The same agreement grants as unpaid leave the days of the "little party" and the "feast of the lamb".

⁴¹ More concise, art. 24 of the agreement, already cited, determines unpaid permits to celebrate up to two days of holidays - "for example, the Fiesta Chica and the Fiesta de Cordero," it says-, and may also enjoy a continuous day during the month of Ramadan.

⁴² Al Hyra, Islamic New Year; Achura, tenth day of Christmas; Idu Al-Maulid, day 12 of the birth of the prophet; To Isra Wa Al-Mi'ray, feast of the nocturnal trip and ascension of the prophet; Idu Al-Fitr, the last three days of fasting; Idu Al-Adha, or days 10, 11, and 12 of Du Al-Hyya, sacrifice of the prophet Abraham.

⁴³ Article 12: if there is agreement between both parties, they can exchange for the two days of the new year, the day of the Atonement, the four days of the feast of the cabins, the four days of Easter, and the two days of Pentecost.

criterion when establishing "as a general criterion the granting of the exchange of the parties whenever the needs of the service for customer service so permit"⁴⁴.

There is also another singularity in the short list of agreements with religious openness: the intervention of state-level agreements in the regulation of local peculiarities, either from the same state agreement, as in the case of collective restoration⁴⁵, or through the procedure of articulation with agreements of inferior scope, to whose virtue the state regulates the procedure and the one of minor scope resolves on the application of the same one, as it happens for example with the General Agreement of House Construction⁴⁶.

In view of the scarcity of references and their timid treatment in collective agreements, the expansion of a more standardized treatment can be assumed as globalization makes its way in Europe, in open clash with the contrary tendencies of rejection towards religious activity. There are still many possibilities to explore in the list of accommodation measures that only wait for the mists of suspicion to dissipate to other experiences. In this, the jurisprudence at all levels is playing a fundamental role, and the prudence of the corporate codes of dress, but the capillarity of the collective agreements is also necessary so that the phenomenon of multiculturalism acquires a

⁴⁴ Agreement of April 9, 2013 between UGT and the Confederation of Employers of Ceuta, art. 11, which qualifies them as payable and non-recoverable holidays.

⁴⁵ Signed by the FEADR with the unions CCOO and UGT and published in State Official Journal of March 22, 2016. Art. 26, on Holidays, contains a section referred to "Specialties", where, with the heading "Ceuta", provides: (...) "The festivities and commemorations that are expressed below that according to Islamic Law have the character of religious, they may substitute any of those established at the national or local level, with the same character as remunerated and not recoverable. The request for substitution will be through the faithful of the Islamic Communities of Spain, acting as a general criterion the granting of the exchange of the parties whenever the needs of the service for customer service so permit. The IDU ALFTIR day celebrates the culmination of Ramadan".

⁴⁶ V General Construction Industry Agreement 2012-2016 (State Official Journal of March 15, 2012), art. 68, section 5: "Each provincial or, as the case may be, regional collective agreement will establish a labor calendar distributing the agreed annual working day. Said calendar will operate whenever there is no agreement between the company and the legal representatives of the workers to adapt differently in the different work centers ". In response to the challenge, a Melilla Provincial Construction Agreement (Melilla Official Journal of August 5, 2014) between COADEME, UGT and CCOO, provides as follows: "In application of Article 68 of the V General Collective Agreement of the Construction Sector 2012- 2016, it is agreed to declare non-working and remunerated, exclusively for the year 2014, the following days: - 2 days at the end of Ramadan (if any coincided on Saturday or Sunday or holiday, would pass the next business day). - 2 days for the feast of the Lamb (if any coincided on Saturday or Sunday or holiday, would happen the next working day). - On September 5 and December 26".

letter of nature in the different countries. In this sense, and following Salas Porras⁴⁷, it is possible to propose the articulation of measures that, based on good faith, do not suppose an excessive tax and allow the exercise of religious freedom in the workplace.

⁴⁷ SALAS PORRAS M., "Ponderación y modulación del ejercicio del derecho a la libertad religiosa en el contexto obligacional laboral: una mirada a la jurisprudencia española", *Revista Crítica de Historia de las Relaciones Laborales y Política Social*, 9 (2014), p. 43.