

Dear Member of Parliament,

On **29th January**, a draft resolution and recommendation on "**The protection of freedom of religion or belief in the workplace**" will be put to the vote of the Parliamentary Assembly of the Council of Europe, during its plenary session in Strasbourg.

Those proposals are part of a continuous effort to promote "reasonable accommodation" by conservative MPs and impose it on Member States, even though this concept is not recognised as such in any. Under the guise of combating discrimination, reasonable accommodation seeks to give a privilege to claims based on religious arguments. It thus endangers equality of all citizens, and may restrict fundamental rights and freedoms of others.

Giving a greater weight to arguments grounded in religious practice may in particular cause violations of women's sexual and reproductive rights and the rights of LGBTI people. **Religiously grounded arguments are often been used to justify refusals of legal reproductive health care or to discriminate against LGBTI people.**

Far from enhancing the guarantee of equal human rights for all, the texts proposed to the vote of the Assembly are likely to endanger the rights of some of the most vulnerable members of society.

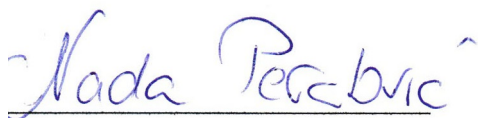
Together with the European Humanist Federation, we from the Center for Civil Courage (Centar za građansku hrabrost) Croatia believe that it is crucial to oppose these attempts, and insist on a clear promotion of non-discrimination and the guarantee of equal rights for all.

Therefore we ask you, as a Member of the Parliamentary Assembly of the Council of Europe, to refuse the adoption of the draft resolution and recommendation as they stand.

You may find a more detailed presentation of our arguments as well as our amendments proposals in this document below.

Yours in free thought,

Zagreb, 27.01.2020.



Nada Peratović

President of Center for Civil Courage, Croatia

www.civilcourage.hr

Comments on the Draft resolution “The protection of freedom of religion or belief in the workplace”

By EHF secretariat

Draft resolution “The protection of freedom of religion or belief in the workplace”¹, presented at the Parliamentary Assembly of the Council of Europe.

- Adopted by the Committee on Legal Affairs and Human Rights
- Vote in Plenary 29 January 2020

The Rapporteur is Mr. Davor Stier, EPP (Croatia, HDZ, conservative) and the Rapporteur for Opinion in the Equality and Non-Discrimination Committee is Sir Jeffrey Donaldson, European Conservatives Group and Democratic Alliance (UK, Democratic Unionist Party).

This draft resolution is the next in a line of recent efforts to promote “reasonable accommodation” in the Council of Europe Parliamentary Assembly. It is highly problematic from a humanist perspective, based on equal human rights for all.

The draft resolution is an attempt to introduce this concept in Member States law in order to give a privileged position to claims based on religious belief using the argument of non-discrimination. It could restrict fundamental rights and freedoms, especially women’s sexual and reproductive rights and the rights of LGBTI people. For instance, freedom of religion or conscience has often been invoked to justify refusals of legal reproductive health care or discrimination against LGBTI people.

This briefing sets out the main proposals of the draft and the objections of the European Humanist Federation to this text. It also proposes alternatives.

1. The draft

The rapporteur proposes a draft resolution addressed to Member States, a draft recommendation addressed to the Committee of Ministers of the Council of Europe, and an explanatory report.

The draft resolution first reaffirms fundamental principles of the Council, to which the EHF also fully adheres, in particular the obligation to respect the right to freedom of thought, conscience and religion and the need to combat discrimination based on religion or belief. From this premise, the draft calls on Member States to

- “consider taking legislative or any other appropriate measures, in order to ensure that employees may lodge requests for reasonable accommodation of their religion or belief”² and
- “establish appropriate adjudication or mediation mechanisms in cases of disputes related to the employer’s refusal to accommodate an employee’s request based on their religion or belief”³

The draft resolution also mentions the “specific needs of employees belonging to religious groups” and the need to accommodate them.

¹ Doc. 15015, 17 December 2019, Committee on Legal Affairs and Human Rights

² 9.2

³ 9.3

The draft recommendation calls on the Committee of Ministers to “reflect on the ways in which reasonable accommodation in the workplace can be best introduced in order to ensure everyone’s freedom of religion or belief”.

2. EHF objections to the draft resolution and recommendation

First, the draft presents reasonable accommodation as if it were a logical consequence of the principles mentioned in the first part (the right to freedom of thought, conscience and religion, prohibition of discrimination based on religion or belief), whereas it is clearly not the case. Reasonable accommodation is only a way to regulate religious claims, which is not recognised as a right in any Member State of the Council of Europe in the matter of freedom of religion and belief (as noted by the Report itself).

In international human rights law, Reasonable accommodation is only part of the Convention on the Rights of Persons with Disabilities. Similarly, EU law requires a duty of reasonable accommodation with regard to persons with disabilities in the employment context. The concept has been developed solely in relation to the rights of persons with disabilities and it would be inappropriate, given the specific situation of persons with disabilities, to draw any such analogy with freedom of religion or belief. Persons making claims based on religion or belief are in a clearly different situation from the situation of persons with disabilities.

Reasonable accommodation of religious claims is part of the law in the USA and Canada, and it is not clear why this solution should be imported in the legal orders of Council of Europe (CoE) Member States. Moreover, the Canadian province of Québec has recently become aware of the drawbacks and issues caused by their broad application of reasonable accommodation. It changed its previous practice and adopted a Charter based on secular principles.

Moreover, all CoE members States are parties to the European Convention of Human Rights (ECHR), whose article 9 protects the “right to freedom of thought, conscience and religion”. This right includes the manifestation of one’s religion or belief, in worship, teaching, practice and observance. CoE States have devised their own methods to protect this freedom, including in the workplace, in accordance with their own Constitutions, the ECHR, and EU law as far as EU members States are concerned. Neither the ECHR nor EU anti-discrimination law require the adoption of reasonable accommodation.

Article 9 ECHR distinguishes an internal and an external aspect. The internal aspect protects the right to hold any religious belief and to change religion or belief; it is absolute and unqualified. The external aspect is the freedom to manifest one’s religion or beliefs. It can be subject to limitations, which must be prescribed by law, necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In this regard, the European Court of Human Rights has stated that a fair balance has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State. The Court’s approach has been overall favourable to the protection by the State of the rights and freedoms of others, including their right not to be discriminated against.⁴ The Court has also recognised that upholding the principle of secularism is an objective that is compatible with the values underlying the Convention, and that

⁴ Eweida and Others v. the United Kingdom, Nos. 48420/10, 59842/10, 51671/10, 36516/10, Eur. Ct. H.R. (2013)

States may rely on the resultant principle of neutrality in public services, to justify restrictions on the wearing of religious symbols by employees of public bodies.⁵

The Court of Justice of the EU decided that the prohibition of visible wearing of any political, philosophical or religious sign in the workplace does not constitute direct discrimination based on religion or belief. Such a rule may constitute indirect discrimination if it results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as a policy of political, philosophical and religious neutrality.⁶ The Advocate General has clearly defined the difference between “individuals’ immutable *physical features or personal characteristics* — such as gender, age or sexual orientation” and “*modes of conduct* based on a subjective decision or conviction, such as the wearing or not of a head covering...”⁷

In short, **there is no legal requirement to adopt the formal rule of reasonable accommodation in law.**

Whereas human rights law does not require reasonable accommodation of claims based on religion or belief, there are strong legal and political arguments against the adoption of this concept. The Report itself shows the underlying reasons to the draft proposals: “in some societies, believers may encounter difficulties in their everyday lives in relation to religious holidays, prescribed times for prayer, **conscientious objection of medical staff to abortion**, dietary laws or other requirements stemming from their religious beliefs.”⁸

There is thus a strong risk that reasonable accommodation of claims based on religion or belief in the workplace would come at the expense of the rights of others. The rights more at risk are sexual and reproductive health and rights, as accommodation may lead to limitation or even lack of access to care, and the rights of LGBTI persons, as religious claims could be used to discriminate against them.

Moreover, far from combating discrimination, reasonable accommodation puts employees’ requests based on religion or belief above all others, creating an inequality between religious and non-religious workers. The draft recommendation assumes that employees belonging to religious groups have “specific needs” and treats them more favourably than the needs of others. The Report itself actually mentions arguments *against* reasonable accommodation that we think compelling: “the creation of a ‘right to request accommodation’ would privilege religion over other protected characteristics. Moreover, it might lead to a risk of conflicting standards as between the right as it applies to religion, and the right to request flexible working for other workers.”⁹

Under the cover of non-discrimination, reasonable accommodation creates a privilege for people whose claims are backed by religious arguments. In this respect, the explanatory memorandum clearly display a bias in favour of religious rights to the detriment of other beliefs, contrary to the very definition of “Freedom of religion or belief”.

It also incites and fosters the most literalist and fundamentalist readings of religion, as it supposes that a certain religious practice has to be absolute and the believer cannot compromise on it, putting the entire burden to accommodate on the other party.

⁵ Ebrahimian v. France, no. 64846/11, Eur. Ct. H.R. 2015

⁶ CJEU, C-157/15, Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV, judgment of 14 March 2017

⁷ Opinion Kokott on the Achbita case, para. 45

⁸ Report, pt 5. Underlined by us

⁹ Report, pt 34

Finally, the methodology used to draft this report is questionable, as only experts favourable to reasonable accommodation were invited and no alternative voice was heard or even sought.

3. Amendment proposals

- a. Draft resolution 9.2: remove reference to reasonable accommodation. Replace “requests for reasonable accommodation of their religion or belief” by “claims that their right to non-discrimination has been breached”.
- b. Draft resolution 9.3: remove “in cases of disputes related to the employer’s refusal to accommodate an employee’s request based on their religion or belief”; replace by “to deal with claims of discrimination on grounds of religion or belief, or any other ground”.
- c. Draft resolution 9.4: remove “the specific needs of employees belonging to religious groups and how to accommodate the specific needs of such employees”
- d. Draft recommendation 1.1: remove reference to reasonable accommodation and replace by non-discrimination
- e. Draft recommendation 1.2: remove.