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Reasonable Accommodation for Age

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Introduction

The prohibition of age discrimination was brought to the agenda under numerous legal regimes when it was revealed that certain generalized assumptions on the grounds of age prevent vulnerable age groups from fully participating in public life.[1] These assumptions included the view that older people resist change, are uninterested in using technology, or have lower physical and mental capacity.[2] Young people, on the other hand, were considered immature, uncultured, or reckless.[3] The resulting legislation has mostly been used to avoid unfavourable *actions* (direct or indirect) stemming from these stereotypes. This paper will analyze whether current legislation on age discrimination should stretch beyond sanctioning unfavourable actions and address *inactions*, i.e., failure to treat an

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1. For example, the first age-discrimination act in the United States, the *Age Discrimination in Employment Act* (*ADEA*) of 1967 was adopted following the data presented by the Secretary of Labour which revealed the incidence of unemployment of older workers (above the age of 40) because of the widespread age-discrimination. See US, Equal Employment Opportunity Commission, *The older American Worker: Age Discrimination in Employment: Report of the Secretary of Labour* (Washington DC: US Government Printing Office, 1965). The European Union *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ, L 303/16 was introduced with a similar motivation—to ensure the equal participation of vulnerable age groups, both younger and older workers, in the labour market. (See also EC, European Commission, *Age Discrimination and European Law* (2005.)) Canada's legislations prohibiting age discrimination have been grounded in section 15 of the *Canadian Charter of Rights and Freedoms*, which is the general equality clause. *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Most jurisdictions in Canada (British Columbia, Manitoba, New Brunswick, Northwest Territories, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan, in particular) have their own specific age discrimination laws. Some of these jurisdictions set upper or lower age limits, namely, Alberta, Ontario, and Saskatchewan. For example, Ontario's age discrimination legislations were the first of its kind in Canada, and they follow a similar path to that of the U.S. since it has protection only for the older employees (age 40-65) under the sections 5 and 15. See *Human Rights Code*, RSO 1990, c H19, ss 4, 15.
2. Erdman Palmore, *Ageism: Negative and Positive*, 2nd ed (Springer, 1999) at 108.
3. Mark Bauerlein, *The Dumbest Generation: How the Digital Age Stupefies Young Americans and Jeopardizes Our Future* (Tarcher/Penguin Group, 2008); Michael S North & Susan T Fiske, "An Inconvenienced Youth? Ageism and Its Potential Intergenerational Roots" (2012) 138:5 Psychological Bulletin 982 at 992.

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individual more favourably than others when this person is disadvantaged due to an age-related justification, rather than a stereotype. This is the case, for instance, when an older individual with a physical incapacity asks for an adjustment in the workplace. Such requests in law are defined as demands for "reasonable accommodation".

Currently, legislation that involves reasonable accommodation primarily concerns religious minorities and the disabled. There are legal systems which do consider reasonable accommodation for age, but their number is very limited.[4] Moreover, the contours of reasonable accommodation and the plausibility of extending the scope of reasonable accommodation have been argued from different perspectives in the philosophical and legal literature.[5] This paper aims to combine the existing philosophical knowledge on and legal approaches to reasonable accommodation in order to see if such an extension is appropriate. It focuses on two main questions:

(1) Should "reasonable accommodation" be extended to age issues?
(2) If it should, how can age be accommodated under the European Union (EU) law?

In the first section, I elaborate on reasonable accommodation as it pertains to religion. In the second section, I offer a framework for disability accommodation based on the assessments made on religious accommodation. In the third section, I apply this framework to age accommodation and compare and contrast age accommodation to religious and disability accommodation. Finally, in the fourth section, I look at reasonable accommodation in positive law and, specifically, discuss possible strategies in EU law to accommodate age. The aim of this paper is to offer a novel perspective on the interaction between age and reasonable accommodation and its legal consequences.

1. Reasonable Accommodation in the Case of Religion

1.1. What Does Reasonable Accommodation Mean?

Consider the following religious accommodation example: Sikhs, who believe in the holiness of carrying a *kirpan*, a special knife, might request to be allowed to

4. See, e.g., article 305 of the *Labour Code of Bulgaria*, the State Gazette, No 26 & 27/1986; section 10 of the *Young Workers' Act of Finland* (998/1993); articles 179 and 180 of the *FYR of Macedonia Labour Relations Law* (167/2015).
5. For philosophical arguments see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press, 2002); Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press, 2011). For legal arguments, see Frank Bowe, *Rehabilitating America: Toward Independence for Disabled and Elderly People* (HarperCollins, 1980); Malcolm Sargeant, "Older Workers and the Need for Reasonable Accommodation" (2008) 9:3 Int'l J Discrimination L 163; Helen Meenan, "Age Discrimination—of Cinderella and 'the Golden Bough'" in Helen Meenan, ed, *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge University Press, 2007) 278; Gabrielle Mastin & Mark Priestley, "Disability and Age Discrimination" in Malcolm Sargeant, ed, *Age Discrimination and Diversity: Multiple Discrimination from an Age Perspective* (Cambridge University Press, 2011) 160.

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carry their knives in a school environment, where it is forbidden to carry sharp objects. The school administration would consider at least three types of costs before accepting such a demand: the economic costs, the social costs, and the practical costs. The economic cost arises when the administration must take necessary precautions, like hiring security guards, to make sure that these objects are not misused. The social cost comes from other students being uncomfortable with the knives, the believers, and all the favourable adjustments that are made for a group. The practical cost appears when accommodating Sikh students constrain the school from reaching its institutional objective of education. Reasonable accommodation is a concept which requires that religious groups, e.g., Sikh students, should not be excluded from public or private space, e.g., the school environment, unless their demand for special consideration causes an undue burden.

The phrase "reasonable accommodation" was initially used as a legal tool in the United States (U.S.), in the 1940s, in the context of governing religion. It referred to the reconciliation of competing demands of the government and religious minorities when a governmental stance or the public interest clashes with individual interests in religious liberty.[6] In the 1960s, the principle was codified but with one limitation. It was not reasonable accommodation when an adjustment created an *undue burden* to a responsible person or an institution.[7] When the term reasonable accommodation was introduced into Canadian law in the 1980s, it was interpreted in a similar way. Reasonable accommodation analysis met the demand of flexibility along with the demand for religious freedom, as long as it did not cause an undue burden.[8]

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6. This definition comes from the dissenting opinion of Justice Stone in *Minersville School Dist v Gobitis*, 310 US 586 at 603 (1940). The case concerned several Jehovah's Witness children who had refused to salute the flag as required as part of a daily school activity and, thus, were expelled from the school. All the justices supported the school's punishment except Justice Stone who used the term reasonable accommodation for the first time and defined it. He explained that "... where there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both and that it is the function of courts to determine whether such accommodation is reasonably possible."

7. "Undue burden" is also referred to as "undue hardship". The principle was codified as part of the Equal Employment Opportunity Commission (EEOC)'s *Guidelines on Discrimination because of Religion: Observance of the Sabbath and Other Religious Holiday* 29 CFR § 1605.1 (1967). It states that "The duty not to discriminate on religious grounds, required by §703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." The Supreme Court, for the first time, interpreted "undue hardship" in *Trans World Airlines v Hardison*, 432 US 63 (1977). The Guidelines of EEOC were revised in the *Guidelines on Discrimination because of Religion*, 29 CFR § 1605.2 (1980). This principle is also used in the *Guidelines on Discrimination because of Religion or National Origin*, 41 CRF § 60-50.3. These sections focus on accommodations to religious observance and practice.

8. Lori G Beaman, *Reasonable Accommodation: Managing Religious Diversity* (UBC Press, 2012) at 2. Two Supreme Court decisions in the 1980s mentioned employers' duty to accommodate the religious needs of their employers as long as it does not cause undue hardship. *Ontario Human Rights Commission v Simpsons-Sears Ltd*, [1985] 2 SCR 536 [*Sears*]; *Bhinder v Canadian National Railway Co*, [1985] 2 SCR 561 [*Bhinder*].

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When the term was introduced, the case law suggested that the reasonableness of accommodation was to be assessed by the courts.[9] For example, in the case of the kirpan, the Canadian Supreme Court (SCC) considered the following:

> In the circumstances of the instant case, the decision to establish an absolute prohibition against wearing a kirpan does not fall within a range of reasonable alternatives . . . . The risk of G using his kirpan for violent purposes or of another student taking it away from him is very low . . . there are many objects in schools that could be used to commit violent acts and that are much more easily obtained by students, such as scissors, pencils and baseball bats . . . . Accommodating G and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects . . . . [T]he appropriate and just remedy is to declare the decision prohibiting him from wearing his kirpan to be null.[10]

Here, the Court adopted a positive perspective about carrying a kirpan in schools. Yet, a different assessment may appear, for example, about carrying kirpan during flights. Indeed, the Canadian Human Rights Tribunal did not consider carrying kirpans on aircrafts as reasonable when it issued the following order: "we cannot conclude that modifying the respondent's policy with respect to weapons and dangerous items so as to permit kirpans with blades of under four inches on board Canada 3000 aircraft is a reasonable way to accommodate the spiritual needs and aspirations of members of the Sikh community."[11] As it appears, reasonable accommodation is a balance that needs to be established between the members of a religion and those who will bear the cost of accommodating their religious practices.[12]

There is wisdom in this approach. Since reasonableness is relative, it seems plausible to answer the question of "what is an undue burden" on a case by case basis rather than having an overarching rule. Whether carrying a kirpan is an undue burden in a school or on an airplane are two different questions. Yet, various normative frameworks exist that assist in assessing reasonableness. Alan Schwartz, for example, suggested that the social cost of religious accommodation is reasonable if it does not encourage people to change their beliefs by "imposition of religion".[13] In other words, it should not constitute a risk for society to preserve a religious way of life. Therefore, the reasonableness of the social cost requires ensuring that nobody is deprived of their freedom while accommodating the religious liberty of a given group.

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9. *Minersville School Dist v Gobitis*, 310 US 586, at 603 (1940).
10. *Multani v Commission Scolaire Marguerite-Bourgeoys*, 2006 SCC 6 [*Multani*].
11. *Nijjar v Canada 3000 Airlines Ltd*, [1999] 3 CHRD 36 at para 127.
12. Jamal Mahmud, "Freedom of Religion in the Supreme Court: Some Lessons from Multani" (2006) 21 NJCL 291 at; Allison N Crawford, "Learning Lessons from Multani: Considering Canada's Response to Religious Garb Issues in Public Schools" (2007) 36:1 Ga J Int'l & Comp L 159.
13. Alan Schwarz, "No Imposition of Religion: The Establishment Clause Value" (1968) 77:4 Yale LJ 692.

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In this regard, the statutory obligation for reasonable accommodation can be positioned under "the right to equal liberty" and "right to non-discrimination".[14] Reasonable accommodation must be secured for fundamental liberties. For instance, Sikh students with a kirpan have a fundamental right to education, and also to have non-fundamental liberties. For example, if individuals have the liberty to use a swimming pool with an obligatory swimming hat, Sikhs with turbans should have a right to equally benefit from liberty to swim. Therefore, they should be able to demand reasonable accommodation to be able to wear their turban instead of a swimming hat.

For the purpose of this analysis, I adopted the definition of reasonable accommodation as a *set of adjustments*. These could be adjustments in the social environment or an adjustment of rules. The adjustments must be based on the *genuine needs* of certain individuals. A genuine need could be about fundamental and other liberties that are not equally available to some individuals in relation to others. A genuine need is not necessarily a religious object or practice, like carrying a kirpan, but rather the right to exercise certain liberties without abandoning a religious practice. Moreover, genuine needs are different from mere preferences, as it will be explained later. Lastly, adjustments can be put in place if they have a *reasonable cost*.[15] A cost is reasonable when accommodation does not deviate from its purpose of balancing competing liberties and, inevitably, promoting neutrality. In the following section, I will address how reasonable accommodation became an essential part of a liberal society that aims to be impartial toward different beliefs and lifestyles by promoting neutrality.

1.2. Why is it Necessary to Accommodate Religion?

There are two streams of justifications for why we need reasonable accommodation: economic efficiency and neutrality. Economic efficiency justifications of accommodating diversity usually stem from the idea that diversity fuels growth, i.e., accommodating people with different characteristics and backgrounds benefits the economy. This is because minorities would possess a different perspective embedded in their personal experiences partly shaped by who they are. Non-traditional workers, such as those with disabilities, racial minorities, etc., can contribute to the workforce by cultivating creativity and innovation.[16] Yet, it is sometimes hard to foresee, at least in the short term, whether the benefits

14. Discrimination law requires the Aristotelian conception of equality, which is treating like cases alike, and unlike cases differently. Reasonable accommodation is a way of treating unlike cases differently.

15. This definition is akin to the following definition adopted by the ENAR (European Network Against Racism): Reasonable accommodation is "an adjustment made in a system to accommodate or make fair the same system for an individual, based on a proven need." European Network Against Racism, *Reasonable Accommodation of Cultural Diversity in The Workplace* (Brussels: ENAR, 2011) at 7.

16. Koïchiro Matsuura, *Investing in cultural diversity and intercultural dialogue: UNESCO world report* (UNESCO Publishing Paris, 2009).

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of diversity outweigh the burden of accommodating particular groups.[17] Efficiency-oriented reasons can be used to justify, for example, a special praying room for religious people at the workplace, presuming that it will make them more efficient in the working environment.[18] Economic justification, however, is not sufficient to show why these individuals should have access to a praying room in a public theatre or a park. There might not be substantive evidence in every case showing the direct societal or economic benefits of adjustments that could be made for the sake of their inclusion.[19] Moreover, putting too much emphasis on the benefits of accommodation may lead to the *instrumentalization/commodification of diversity* which may under-benefit some disparate characteristics and over-benefit others.[20] Lastly, I believe that appreciating the intrinsic value of diversity and personal freedom can help the process of social cohesion, integration and solidarity. For the reasons presented above, while discussing the motivations behind accommodating diversity, I will leave efficiency-oriented justifications aside and mainly concentrate on neutrality-oriented ones.[21]

Neutrality is considered an ideal for ensuring the neutral–meaning *impartial*–treatment by the state of all citizens from diverse backgrounds. In late Western history, neutrality had been discussed since the era of the religious wars between Catholics and Protestants in the context of the principle of religious tolerance.[22] John Locke has been referred to as the canonical philosopher of the liberal idea of neutrality. Locke defended the value of tolerating different religious groups by the impartial execution of laws, even if their lifestyle contradicts with the general rules.[23] This approach maintains its importance today in pluralistic societies where citizens coexist with different and, to some extent, contending beliefs and lifestyles. Hence, it is represented in numerous liberal constitutions, usually

17. According to Ian Goldin and his co-researchers, although diversity has been shaping long-term economic growth, the short-term impact of it on economies is uncertain, since it is dependent on various variables, e.g., how the diverse population is treated and opportunities for social mobility. Ian Goldin, Geoffrey Cameron & Meera Balarajan, *Exceptional People: How Migration Shaped Our World and Will Define Our Future* (Princeton University Press, 2011).

18. The Royal Tobacco Factory of Seville has a chapel for women workers. Elizabeth Nash, *Seville, Córdoba, and Granada: A cultural history* (Oxford University Press, 2005) at 116. This chapel was built to make sure that women worked more efficiently.

19. In the book edited by Philippe Van Parijs, François Grin argued that even if cultural diversity is not as costly as it is thought to be, it still has a cost, and its benefit to the economy might decrease at an increasing rate (just like the environmental quality). Yet, we should accommodate diversity since being different is something legitimate and cannot be privatized. His approach showed that a costs and benefits analysis alone cannot help to justify diversity. See François Grin, "On the Costs of Diversity" in Philippe Van Parijs, ed, *Cultural Diversity Versus Economic Solidarity: Is There a Tension? How Must It Be Resolved* (De Boeck Supérieur, 2003) 189.

20. Miikka Pyykkönen, "Unesco and Cultural Diversity: Democratisation, Commodification or Governmentalisation of Culture?" (2012) 18:5 Int'l J Cult Pol'y 549.

21. Here, I take an idealist rather than a practical stance to explain the main motivations behind reasonable accommodation.

22. Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton University Press, 2003); John Coffey, *Persecution and Toleration in Protestant England 1558-1689* (Routledge, 2014).

23. John Locke, *A Letter Concerning Toleration and Other Writings*, ed by Mark Goldie (Liberty Fund, 2010) at 4-12.

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through the concept of secularism.[24] Moreover, it is still contended by leading political philosophers that the liberal state should be neutral in order to treat all individuals as free and equal.[25]

In contemporary political philosophy, the separation point among the defenders of neutrality has been the question of what kind of neutrality do liberal states require, i.e., in which respects should the state policy-making be neutral?[26] John Rawls, a leading scholar in this field, distinguished two traditional approaches to neutrality: *neutrality of effects* and *neutrality of intentions*.[27] The supporters of *neutrality of effects* regard the state's policies as neutral if they are designed to produce equal effects on different conceptions of the good life.[28] The advocates of *neutrality of intention* argue that the state's policies are neutral if they do not involve a judgment about the superiority of a particular conception of the good life and, thus, intend to favour it.[29]

The critics of neutrality reject both of these approaches by claiming that, in practice, strict political neutrality is impossible.[30] Yet, even the most prominent critics have not denied that there is something intrinsically good about believing that states *should be* neutral (impartial), enabling citizens to be autonomous when choosing their own way of life.[31] They just strongly emphasized that no practical

24. In some cases, it is also represented through a stricter form of secularism called laicism: For example, Article 1 of *La Constitution du 4 octobre 1958*, JO, 3 June 1958; Art 2 Constitution of Turkey 1982 (Turkey). Charles Taylor, "Foreword: What is secularism?" in Brahm Levey & Tariq Modood, eds, *Secularism, Religion and Multicultural Citizenship* (Cambridge University Press, 2009); Emir Kaya, *Secularism and State Religion in Modern Turkey: Law, Policy-making and the Diyanet* (Bloomsbury, 2017) at 6.

25. Jeremy Waldron, *Legislation and Moral Neutrality* (Routledge, 1989).

26. Ronald Dworkin, *A Matter of Principle* (Clarendon Press, 1985) at 191; John Stuart Mill, "On Liberty" in John M Robson, ed, *A Selection of His Works* (University of Toronto Press, 1966); Barry, *supra* note 5. Charles Taylor, *Multiculturalism and "the Politics of Recognition"* ed by Amy Gutmann (Princeton University Press, 1992); Maclure & Taylor, *supra* note 5; Roberto Merrill & Daniel Weinstock, *Political Neutrality: A Re-Evaluation* (Springer, 2014).

27. John Rawls, "The Priority of Right and Ideas of the Good" (1988) 17:4 Philosophy & Public Affair 251 at 260-64. There is also *neutrality of justification*. However, it is usually packaged with neutrality of intentions by the advocates of neutrality. See, for example, Alan Patten, "Liberal Neutrality: A Reinterpretation and Defense" (2012) 20:3 J Political Philosophy 249 at 255.

28. Rawls abandons this view as impractical by claiming that political principles inevitably encourage some ways of life and discourage others and in some cases exclude certain lifestyles altogether. *Ibid* at 264.

29. Ronald Dworkin was among the main advocates of this approach to neutrality. He believed that "[g]overnment must be neutral on what might be called the question of the good life," and explains that "political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life." Dworkin, *supra* note 26 at 191. For other notable advocates of neutrality of intentions see Bruce Ackerman, *Social Justice in the Liberal State* (Yale University Press, 1980) at 11; Jeremy Waldron, "Autonomy and Perfectionism in Raz's Morality of Freedom" (1988) 62 S Cal L Rev 1097; Will Kymlicka, *Liberalism, Community, and Culture* (Oxford University Press, 1991) at 76-85. To my mind, neutrality of intentions can be also considered impractical. Every legal stance is based on a conception of the good, and therefore undermines other conceptions of the good in its methodology, if not in terms of its social visibility. For example, forbidding sharp objects in schools involves a negative judgement about sharp objects, which undermines the Sikh people's belief that considers this specific sharp object as holy.

30. Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) at 110-30.

31. *Ibid* at 140.

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normative system can be merely neutral because such a system is not abstract but real and partial.[32] However, this has not led political systems, constitutions, and courts to abandon the ideal of neutrality. On the contrary, neutrality is revived by remedying non-partiality and non-neutrality experienced in real legal life through reasonable accommodation.

A two-fold approach provides a better solution to this problem. First, both neutrality of effects and neutrality of intentions matter to a certain extent to achieve the ideal of neutrality depending on the context. Second, reasonable accommodation should be perceived as a tool to achieve neutrality of effects. To my mind, reasonable accommodation is not an exception to neutrality but an inevitable conclusion of it. While such a consideration stems from an assumption that a given political system is already neutral, I believe that neutrality is an ideal. If it had already been achieved, people would not be seeking tools like reasonable accommodation, because they would be fully autonomous under an existing political system without a need for so-called "exceptions."[33] Such a perception of state neutrality is similar to the "even-handed approach" that is defended by Joseph Carens. Carens suggested that states should approach demands based on different conceptions of the good with even-handedness rather than a hands-off approach that would prohibit states from referring to religion.[34] After all, not referring to any religion comes with a bias in favour of secular conceptions of good, non-religious or secular beliefs. Neutrality requires even-handedness, i.e., the state intervening in the expressions of different beliefs, religious or secular, to correct inequalities. Reasonable accommodation is such an intervention.

Based on this theoretical framework, this paper explores whether reasonable accommodation can be similarly justified in the case of disability, as an essential ground in reasonable accommodation law. Then, it will be discussed how "age" is related to and different from these grounds.

2. Reasonable Accommodation in the Case of Disability

Consider that a learning-disabled child, e.g., with dyslexia, wanted to attend a public school. The child would need intensive remediation to learn to read and continue his or her education. A range of support services, including

32. A similar point is also emphasized in a recent U.S. case which clarified that the religious freedom clause "does not demand mere neutrality." *Equal Employment Opportunity Commission v Abercrombie & Fitch Stores Inc*, 575 US 6 (2015). A more realistic view is the "generalist view." Legal systems may claim to be general, which confesses that they do not readily answer to every specific scenario. See Frederick Schauer, "The Generality of Law" (2004) 107:1 W Va L Rev 217.

33. Reasonable accommodation is mostly referred to as an exception to a general but a controversial and legitimate rule, which indirectly discriminates against certain individuals. See Emmanuelle Bribosia et al, "Reasonable accommodation for religious minorities: A promising concept for European antidiscrimination law?" (2010) 17:2 MJECL 137 at 139.

34. Joseph H Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford University Press, 2000) at 8-14.

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after-school courses, would also be required. The school administration must deal with the economic cost of funding special adjustments in the school program. Unless such adjustments cause an undue burden, reasonable accommodation, in the case of disability, requires making necessary adjustments for the sake of accommodating a disabled student's access to the right to public education on an equal basis with others.[35]

In this section, I will explore whether the justifications behind accommodating the disabled are similar to those related to accommodating religion. The prevailing understanding of disability has two different approaches: *the medical model* and *the social model*.[36] The medical model considers disability as an *impairment* that comes endogenously from an individual. This implies that disabled individuals are suffering because of their own personal limitations. By contrast, the social model of disability puts forward the idea that disability is akin to an *identity* that is constructed exogenously by society. This implies that the problem is not a particular impairment, but the failure of responsible authorities to build an environment that is structured to accommodate all individuals with different abilities. I will refer to this as an *ability-neutral* environment.[37] For example, in the case presented above, an emphasis on the learning impairment or special accommodation would not be needed if the school had an ability-neutral curriculum that was diverse enough to address the needs of students with different learning abilities. In other words, imagine that the public-school curriculum was designed only for the learning disabled. In such a case, *non-disabled* children would be at a disadvantage because they would not benefit from a program that is not compatible with their learning ability. They would likely be bored and uninterested. Therefore, the disabled people are excluded not because of their impairment but because of an environment that does not accommodate them.

The recognition of environmental exclusion fosters the identity facet of the social model of disability. When a given individual feels like an outsider in society and does not want to appeal to an impairment, the alternative is to frame the difference as a social identity. Indeed, in the disability literature, the social model is also referred to as the "social minority model," the "socio-cultural model" or "disability as a mere difference".[38] In this context, disability accommodation is

35. For a related case from Canada see *Moore v British Columbia (Education)*, 2012 SCC 61. For a case from the European Court of Human Rights see *Dh v Czech Republic* [GC], no 57325/00, [2008] 47 EHRR 3.

36. Barbara M Altman, "Disability Definitions, Models, Classification Schemes, and Applications" in Gary L Albrecht, Katherine D Seelman & Michael Bury, eds, *Handbook of Disability Studies* (SAGE, 2001) 97; Jonas-Sébastien Beaudry, "Beyond (Models of) Disability?" (2016) 41:2 J Med & Philosophy 210.

37. Mike Oliver, "If I Had a Hammer: The Social Model in Action" in John Swain, ed, *Disabling Barriers—Enabling Environments* (SAGE, 2004). Phillip Cole, "The Body Politic: Theorising Disability and Impairment" (2007) 24:2 J Applied Philosophy 169.

38. Karen P DePauw, "Social-cultural context of disability: Implications for scientific inquiry and professional preparation" (2000) 52:4 Quest 358. Elizabeth Barnes, "Valuing disability, causing disability" (2014) 125:1 Ethics 88. Defenders of the mere difference view argue that disability is similar to gender or race. They avoid referring to disability as a harm. This approach is criticized by Greg Bognar. See Greg Bognar, "Is Disability Mere Difference?" (2016) 45:1 J Medical Ethics 46.

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not a favour but a tool to correct the existing environment which has been excluding and discriminating against the disabled. Therefore, reasonable accommodation is not employed to make an exception, but to refine the existing structure to achieve an ability-neutral environment.

The social model-based disability accommodation uses a similar logic to that of religious accommodation, which is about creating a neutral environment for different beliefs. Both religion and disability make it costlier to live for the religious and disabled individuals and require reasonable accommodation. The main difference between them is that religious accommodation concerns the *conscience (or cultural) differences* while disability accommodation is mostly about *ability differences*.[39] However, certain cases bring the two versions more in line with each other—for example, the "deafness as culture" movement. This recently emerged movement develops a novel approach to deafness by considering deaf people as having a social/cultural specialty.[40] Deafness is viewed as a trait which involves common values of the deaf people like a common heritage, language, literature, and art. Such a view highlights the social values within the deaf community, which was historically seen as having an unfavourable impairment. Deafness, therefore, is more akin to a religion rather than a disability.

The international and legal sphere adopts a view that is built on the social model of disability. Namely, the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) acknowledged that disability is

> an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.[41]

The Convention further elaborated:

> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[42]

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39. Here, one can argue with luck egalitarian intuitions that an important difference between disability and religion is that the former is unchosen and the latter is chosen. I believe that a luck egalitarian approach equally justifies or does not justify religious accommodation and disability accommodation. This is because religion can be considered an unchosen cultural value as Will Kymlicka famously argues. See Kymlicka, *supra* note 29. On the other hand, disability can be considered as chosen in the case of people who do extreme sports, take a risk, and are injured. Reasonable accommodation should not be justified with luck egalitarian intuitions which require very hard, if not impossible, determinations about what is chosen what is not. Such an approach leads to unjust legal consequences before the courts. See Jonathan Quong, "Cultural Exemptions, Expensive Tastes, and Equal Opportunities" (2003) 23:1 J Applied Philosophy 53.

40. Paddy Ladd, *Understanding Deaf Culture: In Search of Deafhood* (Multilingual Matters, 2003).

41. *Convention on the Rights of Persons with Disabilities*, 3 May 2008, 2515 UNTS at 3 Preamble (e) (entered into force December 13 2006).

42. *Ibid* at art 1.

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The Convention refers to the dynamic interaction between impairments of the individual and the environment just like in the social model, but at the same time, it does not overlook the role of the impairments like those who promote deafness as culture do. In other words, persons with disabilities are referred to as those who are different in terms of their impairments. Impairments are perceived as biological facts. This is a less moderate version of the social model.[43] This convention was ratified both by the EU and Canada, and therefore it is a part of their disability law. This means that identity is always involved in disability law, even if it does not always appear as radical as in the movement for deaf culture, which propounds deafness as a cultural difference or an ability difference rather than an impairment.

It appears that disability accommodation movements arose from a neutrality problem. Just as the need for religious accommodation stems from policies which placed at their centre the secular human, the need for disability accommodation stems from the centralization of a healthy human. In this regard, exclusive policies could be justified by a "neutrality of intentions". Exclusive policies are not aiming to favour the able-bodied over the disabled but to make general policies without referring to particular impairments. Yet, the disabled people are demanding "neutrality of effects" when they ask for accommodation.[44]

Three points developed in this section are crucial to understanding the case for accommodating age. First, there is a distinction between disability as an impairment and disability as an identity. Second, the identity facet is a common point between disability and religion. Third, the international community approaches disability mainly as an identity. Therefore, disability is related to religion. The next section will explore accommodating age in light of these discussions. I will explore how the duty to accommodate age is comparable to each aforesaid ground, and whether there are weaker or stronger reasons to accommodate age.

3. Reasonable Accommodation in the Case of Age

3.1. Is Reasonable Accommodation Relevant for Age Based on the Religion and Disability Framework?

Consider the following case of two different groups of elderly people demanding priority seats in public transport for age-based reasons. The first group is the *proud elderly* who believe that the elderly people are entitled to respect from

43. Arlene S Kanter, "The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities" (2006) 34 Syracuse J Int'l L & Com 287; Paul Harpur, "Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities" (2012) 27:1 Disability & Society 1.

44. The full neutrality of effects is a difficult ideal when considering the complexity and cost of accommodating every kind of disability, yet it has been argued that social policies should do better. See Jonathan Wolff, "Cognitive Disability in a Society of Equals" (2009) 40:3-4 Metaphilosophy 402.

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younger people, so they want to be sure that there are empty seats for them. The second group is the *weak elderly* who demand designated seats since they do not feel strong enough to remain standing on their feet. Is reasonable accommodation relevant for proud elderly, weak elderly, neither or both?

In order to see whether reasonable accommodation is relevant for age, this section answers the two questions. The first subsection asks: can we approach age in the same way as religion and disability with respect to reasonable accommodation? If the answers to the two questions are affirmative, it indicates that reasonable accommodation for age can be justified based on the framework that has been developed in the case of religion and disability. The second subsection asks: can we justify reasonable accommodation for age independently of religion and disability frameworks?

Age can be defined from at least three fronts: chronological, biological, and psychological. Chronological (or calendar) age is the number of calendar years that a person has lived since birth.[45] Biological (or physical) age is described as the bodily condition of an individual based on the molecular or cellular events at a certain time of the chronological age.[46] Psychological (or cultural) age is about how old one feels, acts, or behaves.[47] I assert that reasonable accommodation on the grounds of age requires recognition of the demands based on all forms of age.

Reasonable accommodation demands based on psychological or cultural age of an individual are associated with accommodation demands based on religious convictions and deaf culture. An individual may develop certain convictions and cultural lifestyle based on chronological age. For example, the proud elderly in our initial example developed the particular belief that because of their age they should be respected more than others.[48] They think that the many numbers of years that they left behind should give them a special status. This is a belief like Confucianism's "filial piety", which requires that the elderly should be respected.

The ways in which age affects people's beliefs have become the subject of social and scientific studies.[49] Indeed, young age is associated with less mature thoughts about life and more liberal views, as is highlighted in the "youth culture"

45. Nathan Kogan, "Chronological Age" in Neil J Salkind, ed, *Encyclopaedia of Human Development* (SAGE, 2005) 267.

46. Jacques Demongeot, "Biological Boundaries and Biological Age" (2009) 57:4 Acta Biotheoretica 397.

47. Douglas K Symons, "Psychological Age" in Sam Goldstein & Jack A Naglieri, eds, *Encyclopaedia of Child Behavior and Development* (Springer US, 2011).

48. Priority seats for the elderly in some Asian countries, e.g., Korea, exist for the traditional reasons of respecting the elderly. See Seo Ji-eun, "Hey, Whippersnapper! Don't Take That Seat", *Korea Joongang Daily* (27 July 2010), online: http://koreajoongangdaily.joins.com [perma.cc/SF8D-7GJL].

49. Brent Roberts, Kate Walton & Wolfgang Viechtbauer, "Patterns of Mean-Level Change in Personality Traits across the Life Course: A Meta-Analysis of Longitudinal Studies" (2006) 132:1 Psychological Bulletin 1; Ilse Cornelis et al, "Age Differences in Conservatism: Evidence on the Mediating Effects of Personality and Cognitive Style" (2009) 77:1 J Personality 51.

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literature.[50] By contrast, old age is seen as the period of life where people become more mature and conservative. Psychologists explain age-related increases in conservatism with the decline of intellectual curiosity as people age.[51] For instance, the divide between the young and old over social values becomes apparent in elections where old people tend to support conservative parties.[52] One may think that the generational effects, the fact that old people have been aging in a less liberal generation, are the main factor. Yet, political scientists support the view that conservative vote choices appear to be "largely driven by aging, not generational, effects."[53]

There are also other values highly correlated with one's age. Studies show that many old people are in need of quiet environments not only because they become more vulnerable to noise, but because they seek quietness to feel peaceful, i.e., for inner peace.[54] It is also true that both the elderly and children may seek the companionship of a pet not due to medical reasons but for emotional or spiritual reasons.[55] These people may demand reasonable accommodation to keep their pet in condominiums which forbid pet ownership.

There are also cases where an age culture that an individual adopts is not correlated with their chronological age. Studies show that many old people feel much younger than they actually are.[56] Robert P. Harrison argues that current societies are witnessing "juvenilization" with an increasing number of adults, and old people adopting youth culture.[57] Some old people feel psychologically and culturally younger and think that retirement will harm their integrity. They may ask for special rules to continue their working life. Can such demands be valued in the same way as religious accommodation?

Different from personal preferences, religion embodies the crucial values that are important for a believer's integrity.[58] In the legal and philosophical literature,

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50. Andy Furlong & Fred Cartmel, *Young People and Social Change* (Open University Press, 2006) at 80-85; Mike Brake, *Comparative Youth Culture: The Sociology of Youth Cultures and Youth Subcultures in America, Britain and Canada* (Routledge, 2013). Some authors argue that children simply have a different culture not a less mature one. See Anca Gheaus, "The 'Intrinsic Goods of Childhood' and the Just Society" in Alexander Bagattini & Colin Macleod, eds, *The Nature of Children's Well-Being* (Springer, 2015).

51. Curiosity is very high during childhood and usually diminishes as one grows older. Brent Roberts, *supra* note 49.

52. John A Vincent, Guy Patterson & Karen Wale, *Politics and Old Age: Older Citizens and Political Processes in Britain* (Routledge, 2017) at 19-20; Cornelis et al, "Age Differences in Conservatism: Evidence on the Mediating Effects of Personality and Cognitive Style", *supra* note 49.

53. James Tilley, "Hard Evidence: Do We Become More Conservative with Age?", *The Conversation* (October 4, 2015), online http://theconversation.com [perma.cc/74FX-K6UQ].

54. Nora-Beata Erichsen & Arndt Büssing, "Spiritual Needs of Elderly Living in Residential/Nursing Homes" (2013) 2013 Evidence-Based Complementary Alt Med 1; Carlos Ignacio Man-Ging et al, "Reporting Spiritual Needs of Older Adults Living in Bavarian Residential and Nursing Homes" (2015) 18:10 Mental Health, Religion & Culture 809.

55. *Nahrstedt v Lakeside Village Condominium Assn*, 33 Cal Rptr 2d 63 (1994); *Niagara North Condominium Corp No 46 v Chassie*, [1999] 173 DLR (4th) 524.

56. Tara Parker-Pope, "Getting Old but Still Feeling Young", *New York Times* (December 3, 2008), online: https://well.blogs.nytimes.com [perma.cc/P9UX-Y8KW].

57. Robert Pogue Harrison, *Juvenescence: A Cultural History of Our Age* (University of Chicago Press, 2014).

58. Michael J Perry, *Morality, Politics, and Law* (Oxford University Press, 1990) at 101.

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some authors support the special valuation of religion in the law.[59] Yet some argue against an exclusive status for religion and explain that it is not religion *per se* but the conscience, which mostly exists in religious contexts, that is special.[60] Therefore, any kind of sincere belief or conviction is relevant to religious accommodation as long as the beliefs are sincere.[61] If this view is adopted, then pacifism, atheism, vegetarianism, and other similar convictions can be covered by religious accommodation as long as they are sincere. They can be considered as so-called "secular religions". Such an approach would lend itself to consideration of sincere age-based convictions, not mere preferences, under the religious accommodation framework.

Age-based accommodation demands can also be related to biological age. Age can be a source of age-based impairments or weaknesses, which require a need for special accommodation similar to disability accommodation.[62] The interaction between age-based impairments or weaknesses and an exclusive social structure may lead to special accommodation for certain age groups. In this regard, chronological age can be a proxy for the biological abilities and disabilities of an individual. For example, the belief of the weak elderly above is the main motivation behind reserving priority seats for the elderly, disabled, or pregnant women in public transport. In addition to mobility problems, the older people face type 2 diabetes or macular degeneration which could require, for example, accommodative working environments for the elderly. Age-related issues are not only a problem for older people.[63] For example, small children do not have the mental capacity to visit and understand museums, so, they may ask for special sections which present the content in a children-friendly way. Can the demands based on age be valued in the same way as disability accommodation?

The main obstacle to considering age-based vulnerabilities as disabilities is the "atypicality" of impairments covered by disability accommodation. Most disability theorists recognize that impairments are an atypical embodiment or functioning.[64] Although age-based vulnerabilities are very similar to disabilities,

59. Maclure & Taylor, *supra* note 5; Paul Bou-Habib, "A Theory of Religious Accommodation" (2006) 23:1 J Applied Philosophy 109.

60. Brian Leiter, *Why Tolerate Religion?* (Princeton University Press, 2014). But see François Boucher & Cécile Laborde, "Why Tolerate Conscience?" (2016) 10:3 Crim L Phil 493.

61. In the U.S., this idea gained recognition legally in *United States v Seeger* and was reaffirmed in *Welsh v United States*, which concerned a refusal to submit to induction into the armed forces. In *Welsh*, it was decided that individuals can ground their opposition to war not only on religious beliefs but on any "sincere and meaningful" conviction that occupies an important place in their life as does a religious belief. In these cases, Seeger and Welsh were basing their convictions on a secular ideology, namely the idea of pacifism. See *United States v Seeger*, 380 US 163 (1965); *Welsh v United States*, 398 US 333 (1970).

62. Linda P Fried et al, "Frailty in Older Adults Evidence for a Phenotype" (2001) 56:3 J Gerontology Series A M146; Jeremy S Tilstra et al, "Nf-Kb in Aging and Disease" (2011) 2:6 Aging and Disease 449; Anna Biernacka & Nikolaos G Frangogiannis, "Aging and Cardiac Fibrosis" (2011) 2:2 Aging and Disease 158.

63. Karl HE Kroemer, *'Extra-Ordinary' Ergonomics: How to Accommodate Small and Big Persons, the Disabled and Elderly, Expectant Mothers, and Children* (CRC Press, 2005) at 1-10.

64. David Wasserman et al, "Disability: Definitions, Models, Experience" in Edward Zalta, ed, *The Stanford Encyclopedia of Philosophy* (The Metaphysics Research Lab, 2011).

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age-based impairments or weaknesses might be typical. In this regard, considering children's incapacity to visit museums as a disability seems epistemologically problematic since such an incapacity is not atypical for children. On the contrary, it would be atypical if a child comprehended everything in the museums as adults do. Another example is that it is not atypical for babies to need someone to feed them, but it is atypical when adults and even the elderly have such a need. Even if old age limits the functioning of the body, most of the elderly do not develop an incapacity to eat independently. In other words, even though there is a strong connection between aging and the development of bodily impairments, a person does not have an impairment directly because of old age. Indeed, perceiving certain age-based impairments as typical causes the ignorance of disability discrimination in old age.[65]

If one adopts the atypicality view, children's vulnerability stemming from their age-based incapacities cannot be considered a disability. On the other hand, most of the elderly who have certain weaknesses can be considered disabled depending on the level of their weakness. So, even if an age-related accommodation for children and the elderly is similar, accommodation for the elderly interacts with disability accommodation more often. For example, two elderly people demand reasonable accommodation. The first person asks for a special course on using computers since the company this person is working at has decided that computer knowledge is necessary because of the change in the working organization. This person wants the accommodation because it will take too much time to learn how to use the computer alone, since learning is harder when you get older. Indeed, scientists have reached a consensus on the fact that learning functions wear down in the aging brain, i.e., it is solely an age issue that older adults learn more slowly than the younger people.[66] The second person asks for an elevator as an accommodation. It is true that most of the muscles, including legs, weaken as body ages.[67] Yet, losing the ability to climb stairs is an atypical weakening for most elderly. So, while some of the age-based vulnerabilities are relevant to disability accommodation, others do not meet the "atypical" criteria of disability impairments.

One may argue that the atypicality criteria are a poor justification and that disability accommodation should be available regardless of the group identity.[68] So, without evaluating the person's functional limitations, its typicality or severity, any demand for meaningful access should be covered under disability accommodation.[69] Imagine an employee proves that he or she is "unable" to come to work unless a company bus service exists. The employee has no physical

65. Mastin, *supra* note 5.
66. Naftali Raz, "Aging of the Brain and Its Impact on Cognitive Performance: Integration of Structural and Functional Findings" in FIM. Craik & TA Salthouse, eds, *The Handbook of Aging and Cognition*, 2nd ed (Mahwah, NJ: Lawrence Erlbaum, 2000); Robert B Hudson, "Bringing Science and Seniors Together" (2007) 17:1 Pub Pol'y Aging R i.
67. Michelle M Porter, Anthony A Vandervoort & Jan Lexell, "Aging of Human Muscle: Structure, Function and Adaptability" (1995) 5:3 Scandinavian J M & Sci Sports 129.
68. Michael Ashley Stein et al, "Accommodating Every Body" (2014) 81 U Chicago L Rev 689.
69. *Ibid*.

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or mental impairment, but since there are no means of transport, the employee has a "disability" regarding traveling to the job. Following this approach, the employee can demand disability accommodation. This approach also addresses age-based vulnerabilities under disability accommodation regardless of whether children, the elderly, or adults demand them.

Consequently, the distinction between typical and atypical embodiment is important to determine whether an age accommodation can be addressed as a disability accommodation. If only atypical embodiments are considered as a disability, then children's age-based vulnerabilities cannot be considered as a disability. Hence, they would need a different type of accommodation.

Just as in the case of religion and disability, age has particularities that may conflict with a given general structure and require favourable accommodation. I have highlighted that age-based accommodation demands can both stem from age-based convictions and age-based impairments or weaknesses. The frameworks that have been developed for religion and disability can be relevant for age accommodation, depending on how religion and disability are perceived. Yet, it needs to be discussed further whether age has an independent character as a ground for accommodation. The next section explores this issue.

3.2. Should "Age" be an Independent Accommodation Ground?

There is not much controversy on whether age can be a ground for discrimination because age-based discrimination cases are not always related to discrimination on other protected grounds. For example, it is discriminative when job applicants who are young or old are treated less favourably based on a stereotype even if they have enough competence. This discrimination can only be addressed on the grounds of age. Yet, whether age should be an accommodation ground is controversial, since an accommodation demand based on age, as was explained in the previous section, can also be related to accommodation based on religion and disability. So, the question is what justifies having age as an independent accommodation ground?

The perception of age in our society is socially constructed in a problematic way. Most of the time chronological age is considered as a proxy for biological and psychological age. That is why the current policies and age discrimination cases are mostly based on chronological age. For example, in pension policies, retirement age is determined by the years that individuals have lived. These policies do not take into consideration the biological path that an individual follows nor how old the individual feels. Even if an individual who is 65 can prove that biologically and psychologically the individual resembles someone who is 20 years younger, the company's retirement policy would still apply.[70] Similarly, even if a 15-year-old child can prove that he or she is physically and psychologically

70. Emil Ratelband, a Dutch comedian, who proved to be biologically and psychologically 20 years younger applied to the Court to change his legal age but did not succeed. See Court of Gelderland, Arnhem, 3 December 2018 (2018), C/05/335902 (Netherlands).

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competent to drive, the 16 to 18 years old age threshold for receiving a driving license still applies to him or her. The use of age as a proxy limits the liberty of all individuals but might result in limitations that are unjust in the case of individuals whose biological or psychological ages do not align with their chronological age.

Age threshold policies based on the chronological age can be justified based on the neutrality of intentions, since policymakers may intend to practically and impartially regulate labour markets or legal authorizations. Yet, these policies do not produce neutrality in effects by not neutralizing the different effects of age on an individual's social life. They have a narrow approach to age which denies the effects of biological and psychological age.

In this regard, the main motivation behind having age as an independent accommodation ground is the necessity of building age-neutral environments where people from various chronological, biological, or psychological ages are not precluded from exercising their liberties. "Reasonable accommodation for age" aims to neutralize the disadvantages that come with age, value the age culture, and challenge the narrow approach of public policies on age. Age being an independent accommodation ground is crucial to realizing such aims.

Indeed, many of the age-based convictions and impairments can be addressed by religious or disability accommodation law. In order to make a plausible argument for the need for particular accommodation based on age, cases in which age is not redundant need to be identified even if a particular age-based case seems relevant to religion or disability. There are four reasons to indicate a need for particular accommodation based on age.

The first point is that the nature of the age accommodation would be different than religious accommodation. Age-based convictions and age culture are not as marginalized in many societies as religious convictions, because most societies experience different age cultures through individuals who constantly change their age. It was pointed out above that in Western democracies, separating religion from the state was considered essential for the establishment of the state. The result was that certain practices and convictions that are not widespread had to become tolerated by society. A central conception does not need accommodation, but values of outsiders which have been marginalized by society and the legal/political system do need accommodation because they take up an important space in people's lives. The structures against religious beliefs are more visible and established than structures that constrain age-based convictions. For example, while there are constitutional principles addressing the separation of religion and state, principles against age-based convictions cannot be identified as easily. A more robust and consistent link between religion and accommodation has been established for the sake of neutrality. Not surprisingly then, reasonable accommodation is mostly discussed and developed with regard to religious convictions rather than age-based ones. Age, in this respect, is different than religion.

Second, age accommodation differs from disability accommodation in that disability has an impairment in its core. Age accommodation may be needed to accommodate strength rather than weakness. The 15-year-old child's accommodation demand for an allowance to get a driver license is not based on any

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dysfunctionality. This is also the case for a chronologically old person who does not want to retire because the person is healthy and fit. Moreover, age accommodation may be needed to accommodate age-based health risks rather than current impairments. For example, an aging worker makes a demand for an ergonomic assessment at a job requiring heavy lifting because of the likelihood of getting an orthopaedic injury.[71] Healthy older employers can also demand special diets to lower their risk of heart disease. The weakness that comes with age is, in this respect, different than a disability. In these examples, such demands would be based on age rather than disability. Therefore, there is a place for independent age accommodation.

Moreover, characterizing children's incapacity based on their natural biological development as an impairment may have undesirable results. In the driving example above, young children generally do not have the competence to drive, because they are in the early stages of their physical and mental development. So, a driver's license is only given to those who reach the legal age of 16 to 18 years. If a 15-year-old child is not mature or tall enough to drive a car, should the child have a right to drive with special cars or tools that would enable the child to drive even without the necessary competence? After all, adult disabled people are provided driver licenses such that they are able to drive special cars with hand controls or by using pedal extenders. If we accept childhood vulnerabilities as a disability, this would give children the right to demand accommodation for certain things that they do not have the competence for, such as demanding a driver license albeit for driving special cars with physical and mental supporting tools. This could be problematic when we consider that certain regulations which limit the liberty of children aim to protect children by alienating them from risky environments, like traffic, even if they can handle driving.

Age being a valid proxy in such situations should not abolish a reasonable accommodation duty for age. For example, there is nothing unexpected about women being pregnant. However, we still want to accommodate pregnancy since it can be a vulnerability, especially when pregnant women are interacting with an unaccommodating social structure.[72] Analogous to this, society still wants to be able to accommodate natural situations like childhood incapacities that are only temporary impairments. The characterization of accommodation should not be "disability" but "age" in such cases.[73] This approach would allow us to evaluate the reasonableness of accommodating certain vulnerabilities of children while maintaining a protective and cautious mindset.

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71. Melissa J Bjelland et al, "Age and Disability Employment Discrimination: Occupational Rehabilitation Implications" (2010) 20:4 J Occupational Rehabilitation 456 at 467.

72. The characterization of pregnancy as a disability has been supported by some academics, see Colette G Matzzie, "Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act" (1993) 82 Geo LJ 193. However, most feminist argue against labelling pregnancy as a disability. They consider it problematic to associate a normal biological function of the women as an impairment. See Jeannette Cox, "Pregnancy as Disability and the Amended Americans with Disabilities Act" (2012) 53 BCL Rev 443.

73. It is important not to see old age as equal to disability or dependence. Having an age accommodation law different from a disability law can help resisting *apocalyptic demography*, which means seeing the negative aspects of ageing only.

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If impairments are not considered as dysfunctions but only as cultural differences, then disability accommodation would be dissimilar not only from age but all other grounds, including religion and gender. In such a case, structural suffering based on any difference would be considered as a disability. That is why each accommodation ground is categorized according to the core differences that had led to social exclusion. Conscience, culture, and convictions are differences that appear in the context of religious accommodation. Impairments which are based on dysfunctionality and long-term diseases appear in the context of disability accommodation. Age, in some cases, intersect both with religious and disability accommodation. Yet, it also has its own context which is mainly based on tensions between the chronological, biological, or psychological ages and age-based risks.

Third, an independent age accommodation would be significant in intersectionality cases. Age and disability are connected in a way that disability and gender, disability and race, disability and religion or age and gender, are not connected.[74] Considering gender or race-based differences as a disability is problematized as an invalid connection.[75] On the other hand, in the way age and disability interact, age can be considered as a valid proxy for disability. The fact that accommodating based on age as well as disability may be considered redundant does not overshadow the fact that the individual may have an impairment that limits her life activities. Age factors would have an added value when its direct effects are distinguishable. For example, Article 7/3 of the United Nations Convention on the Rights of Persons (UNCRP) said:

> Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

This article exists in the convention because children with disabilities are more marginalized in comparison with children with no disabilities and adults with disabilities.[76] For this reason, not only disability but also age-appropriate accommodation should exist for them. Here, age is not a proxy for disability. Instead, it has an individual direct effect on the disabled person's life. Age can also be a factor that interacts with religion. For example, when religion-related demands of the elderly are more tolerated than similar demands made by teenagers. This can stem from the fact that older people are more religious than the young, and they are more associated with traditional religions.[77]

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74. Douglas Baynton argued that gender and race were considered proxies to disability on the basis of excluding and discriminating against women and minorities. Yet women and minorities argued against such a label and rejected the perceived connection between disability and their identity. See Douglas C Baynton, "Disability and the Justification of Inequality in American History" in Lennard Davis, ed, *The Disability Studies Reader*, 5th ed (Taylor & Francis, 2016) at 17.

75. *Ibid*.

76. UNICEF, "Promoting the Rights of Children with Disabilities" (2007) 13 Innocenti Digest. See a related case *Blokhin v Russia* [GC], No 47152/06, [2016] HUDOC.

77. Grace Davie & John Vincent, "Religion and Old Age" (1998) 18:1 Ageing & Society 101.

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Therefore, their religious demands could be more welcomed. The intersectionality perspective suggests that invoking age is not always redundant when we already have religious or disability accommodation.[78] In the given cases, we should not see age accommodation as unnecessary. Instead, we should consider disability accommodation together with age accommodation. In this way, the major needs of certain age groups to contribute to their leading a good life is recognized more strongly.

The last point is not about age being redundant, but whether age accommodation is more lenient than other grounds for accommodation. Obviously, age changes more often than religion or disability. The "complete-life" view proposed by Dennis McKerlie proposes that the different treatment of people at different ages does not constitute inequalities if it is systematically applied to the lifespan of every individual.[79] This theory is criticized for being insufficient to justify age-based differential treatment.[80] Yet, this theory is not discussed with respect to age accommodation, which is based on a demand for favourable treatment. One can argue that a person whose conception of the good or their impairment develops with age could feel less like an outsider if we refer to the fact that everybody will go through the same steps when they are aging. After all, all of us will have a chance of becoming part of each age. However, a religious or disabled person would feel competently foreclosed since one's belief or disability would depend on a customary basis and have effects not only in a particular stage of life (like age) but throughout life. This leads to the conclusion that a religious or permanently disabled person who is not accommodated is deprived of more, and a specially designed accommodation for age which can be altered over time must be adopted.

Many age-based accommodation demands can be addressed by religious or disability accommodation if religion and disability are interpreted widely. However, this section highlighted the particularities of age that can justify considering reasonable accommodation for age. The next section questions whether the law of the EU incorporates age accommodation and what my theoretical framework suggests.

4. Age and Reasonable Accommodation in Positive Law with a Focus on the EU

4.1. Does EU Law Require Reasonable Accommodation with Respect to Age?

Certain age discrimination laws entitle individuals not only to the right to be free from age discrimination but also to the right to demand favourable action

78. Malcolm Sargeant, "Disability and Age: Multiple Potential for Discrimination" (2005) 33 Int'l J Soc L 17.

79. Dennis McKerlie, "Justice Between the Young and the Old" (2001) 30:2 Philosophy & Public Affairs 152; Axel Gosseries, "What Makes Age Discrimination Special: A Philosophical Look at the ECJ Case Law" (2014) 43 Netherlands J Legal Philosophy 59.

80. *Ibid*.

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(reasonable accommodation) because of their age. Reasonable accommodation for age is required in several legal systems, notably in Canada. In Canadian law, the right to reasonable accommodation was initially recognized in the case of religion following debates concerning cultural and religious minorities.[81] Yet, by virtue of judicial opinions that embed a duty of reasonable accommodation within the equality provision, a duty to accommodate exists on any protected ground.[82] As age is a protected ground under Canadian law, non-compliance with the reasonable accommodation duty is only allowed when it has been "established that accommodation of the needs of an individual or a class of individuals affected would impose *undue hardship* on the person who would have to accommodate those needs, considering health, safety and cost."[83]

This section evaluates whether EU law has followed a similar course and allowed reasonable accommodation demands on the grounds of age. In the EU, an explicit right to demand reasonable accommodation was first established by the Employment Equality Directive. The relevant article stated:

> In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.[84]

This regulation is limited in two respects. It is restricted to disability grounds and to the employment domain. However, this regulation is the only one in the EU to incorporate a duty to provide reasonable accommodation.[85] Realizing such a gap in 2008, the European Commission submitted a proposal to implement the principle of equal treatment on broader grounds. The Commission proposed:

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81. *Sears*, *supra* note 8; *Bhinder*, *supra* note 8; Quebec, Commission de Consultation sur les Pratiques d'Accommodement Reliées aux Différences Culturelles, *Bringing the Future: a Time for Reconciliation*, Gérard Bouchard & Charles Taylor (Quebec, 2008). It is useful to note that "reasonable accommodation" was initially used in U.S. law as a part of 1966-1967 Guidelines on the development of the religious accommodation requirement of Title VII of the Civil Rights Act of 1964. This law obliges employers to make reasonable accommodation of the religious needs of employees where such accommodation is possible without undue hardship. See Guidelines on Religion, *supra* note 7. Reasonable accommodation rights of the disabled were recognized almost after 10 years with 1973 U.S. Rehabilitation Act. See *Rehabilitation Act*, 29 USC § 701 (1973).

82. See *Sears*, *supra* note 8; *Grant v Canada (Attorney General)*, [1995] 125 DLR (4th) 556; *Multani*, *supra* note 10. Also see *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

83. *Charter*, *supra* note 82 s 15(2).

84. See EC, *Commission Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, [2000] OJ, L 303/16 at art 5 [*Directive on Equal Treatment*].

85. European Union, *Reasonable Accommodation Beyond Disability in Europe* by Emmanuelle Bribosia, Isabelle Rorive & Lisa Waddington (Luxembourg, 2013) at 5.

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> Legislation should prohibit discrimination based on religion or belief, disability, age or sexual orientation in a range of areas outside the labour market, including social protection, education and access to and supply of goods and services, including housing.[86]

Moreover, in the same proposal, the Commission included a denial of reasonable accommodation in the general definition of 'discrimination':

> Discrimination is understood to include direct and indirect discrimination, harassment, instructions to discriminate and denial of reasonable accommodation.[87]

This proposal remains under discussion and has not made a substantive progress. Therefore, age accommodation law is non-existent under EU law. However, EU law does have a special stance with respect to age accommodation. Indeed, Article 6(1) of the Employment Equality Directive states:

> Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.[88]

The allowance of differential treatment on the grounds of age is based on the fact that sometimes age-based distinctions are rational and serve legitimate economic and social purposes. This approach of the EU law regarding age may undermine the cause of several age discrimination claims, but it provides an allowance for reasonable accommodation on the grounds of age. Article 6(a) has regulated that differences of treatment on grounds of age shall not constitute discrimination if

> the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection.[89]

In the 2005 *Mangold v. Helm* case, the Court of Justice of the European Union (CJEU) asserted that this article does not require a duty to accommodate age, but a duty to authorize reasonable accommodation on the grounds of age.[90] Therefore, according to EU law, individuals do not have a right to demand reasonable accommodation because of their age based on the Employment Equality Directive if necessary regulations do not exist under national law. Yet, member states are permitted to make regulations that favour a group of workers because of

86. EC, *Commission Proposal for Directive, 2008/0140 (CNS) of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation* at para 9.
87. *Ibid* at para 12.
88. *Directive on Equal Treatment*, *supra* note 84.
89. *Ibid*.
90. *Mangold v Helm*, C-144/04, [2005] ECR I—10013.

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their age. It is not against the law to treat certain groups more favourably than others if it is for the sake of accommodating differences to protect an individual's liberty or ensure equal participation. The *Mangold* case was not discussed in the literature from this point of view since the more striking issue about the case was its recognition of age discrimination as an integral aspect of the general clause on equal treatment, i.e., age was considered as a core value of the EU legal order just as the other discrimination grounds were.[91] This may also entail that, the member states are allowed to see age as an equivalent to other protected grounds and have extensive protection measures on age, including reasonable accommodation.

EU law thus "allows" but does not "require" reasonable accommodation with respect to age. In other words, member states are allowed to make national regulations for requiring reasonable accommodation on the grounds of age. However, if there is no such regulation, an individual cannot invoke EU law to demand such protection. Does EU law require reasonable accommodation with respect to disability or religion and would this allow a duty of religious accommodation in most age-related cases? The next sub-section addresses this question.

4.2. Age Accommodation Through Religious or Disability Accommodation

This paper has developed the theoretical possibility of addressing age-based convictions under the umbrella of religious accommodation and age-based impairments under disability accommodation. In EU case law, such an approach is not available. However, in the U.S. (with respect to religion) and in Canada (with respect to disability) there are cases regarding pets that address this issue.

In *Nahrstedt v. Lakeside Village Condominium Assn*., the defence of the plaintiff who had three cats was grounded on the "spiritual, benefit from their [the pets] presence . . . for people of all ages, but particularly the elderly and the young".[92] The majority of the judges held that the pet restriction was not unreasonable, i.e., the claim was admissible for accommodation but deemed unreasonable. However, the dissent argued that "while technical merit may commend the majority's analysis . . . its application to the facts presented reflects a narrow, indeed chary, view of the law that eschews the human spirit in favor of arbitrary efficiency." Therefore, "the provision known as the "pet restriction" contained in the covenants, conditions, and restrictions (CC&R's) governing the Lakeside Village project [is] patently arbitrary and unreasonable."[93]

In this regard, pet restriction in the U.S. was discussed in reference to the spiritual needs of the elderly, thereby approaching reasonable accommodation demands to own a pet as a religious accommodation. By contrast, in Canada, a disability

91. See, e.g., Dagmar Schiek, "The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation" (2006) 35:3 Indus LJ 329; Marlene Schmidt, "The Principle of Non-Discrimination in Respect of Age: Dimensions of the Ecj's Mangold Judgment" (2006) 7:5 German LJ 505. Thanks to Christa Tobler for this point.

92. *Nahrstedt v Lakeside Village Condominium Assn*, 13 Cal Rptr 2d 510 (1992) at 393.

93. *Ibid*. Arabian J, dissenting at 390.

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accommodation issue was found in a similar case. In *Niagara North Condominium Corp. No. 46 v. Chassie*, an elderly woman's demand to keep her cat was justified based on the fact that she needed the emotional support of her cat to avoid depression.[94] The Court decided that the defendant's "treatment for her mental disorder, depression, is the emotional support provided by her cat." Justice MacDonald held that "the cat is a therapy utility animal, and that its ouster would constitute discrimination against Mrs. Chassie because of her handicap."[95]

These pet restriction cases are important because the reasonable accommodation demand for an emotional support animal was approached from two different perspectives. In the U.S., it was seen as a spiritual need of the elderly and, therefore, was considered akin to religion. In Canada, on the other hand, the emotional need was taken as a mental disorder that was akin to disability. Although these are not age accommodation cases, they allow us to see the line of legal arguments that can be developed to demand accommodation for age-based convictions or impairments under religious or disability accommodation law.

In Canadian law, no case based on religious accommodation was used in an age accommodation context. Yet, there are examples of addressing certain non-age-based convictions, e.g., vegetarian diets under religious accommodation law. *Maurice v. Canada* concerned a person who demanded a special vegetarian diet based on their "freedom of conscience". The person held the belief that eating certain food items is "morally reprehensible and poisonous to society as a whole".[96] It was ordered that "just as the entitlement for a religious diet may be found . . . a similar entitlement for a vegetarian diet exists based on the right to freedom of conscience."[97] Considering that religious accommodation has such a wide application, age-based discrimination may find a home in religious accommodation law. However, if one wants to use religious accommodation law to demand a reasonable accommodation on the grounds of age, it is important to show that the age-based convictions are more than just a preference. They need to be crucial for the individual in order to lead a good and authentic life.

These American and Canadian cases show that age accommodation demands can be developed under religious or disability accommodation law. Is a similar strategy possible under EU law?

Religion, just like age, is not a protected ground under the reasonable accommodation law of the EU. Yet, indirect discrimination, which is usually explained as the discriminatory results stemming from a neutral rule, can be used for demanding religious accommodation in Europe. For example, the European Court of Human Rights (ECtHR) recognized the state's positive duty with respect to the non-discrimination clause in *Thlimmenos v. Greece*.[98] In this religious freedom case, the Court ruled that Article 14 "is also violated when States without an objective

94. *Niagara North Condominium Corp No 46 v Chassie*, [1999] 173 DLR (4th) 524 (OntSC).
95. *Ibid* at para 115.
96. *Maurice v Canada (Attorney General)*, 2002 FCT 69 at para 3.
97. *Ibid* at para 12.
98. *Thlimmenos v Greece*, No 34369/97 [2000] HUDOC.

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and reasonable justification fail to treat differently persons whose situations are significantly different."[99] A similar approach exists in the CJEU's case law. For example, in *Vivien Prais v. Council*, a person who objected to the date of a written test which was scheduled on the first day of her religious holiday.[100] The court assessed the requirements of the principle of equality and held that "if a candidate informs the appointing authority that religious reasons make certain dates impossible for him the appointing authority should take this into account in fixing the date for written tests, and endeavour to avoid such dates."[101] These cases show that indirect discrimination claims were successful in demanding religious accommodation.

There are also two prominent headscarf cases at the CJEU, which concern employers who wanted to work with their headscarf despite the "neutral" rule of their company about banning religious symbols. Considering such provisions, for an instance in *Samira Achbita*, the CJEU held that: "such an internal rule of a private undertaking may constitute indirect discrimination. . . . if it is established that the apparently neutral obligation it imposes 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 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."[102] The Court, therefore, accepted that unless it is objectively justified, an employer with a religious symbol should be accommodated.

In the legal literature, it has been discussed whether such recognitions amount to a duty of reasonable accommodation. Some argue that this is not a reasonable accommodation duty because the Court still requires justification of a group disadvantage through a comparison test. By contrast, a demand for reasonable accommodation does not require a group disadvantage but the proof of an individual disadvantage only.[103] Moreover, the successful indirect discrimination cases at hand allowed accommodation in cases where accommodation had virtually no cost and compelling interests.[104] On the other hand, some argue that indirect discrimination and reasonable accommodation are like two sides of the same coin, and there is no difference between them. Therefore to a very large extent, the objectives of reasonable accommodation can be reached by the application of indirect discrimination principles.[105] The latter approach is not an very

99. *Ibid* at para 44.
100. *Vivien Prais v Council*, 130/75, [1976] ECR 1589.
101. *Ibid* at para 2.
102. *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [GC], C-157/15 [2017] Digital Reports at paras 44-45.
103. Katayoun Alidadi, "Reasonable Accommodations for Religion and Belief: Adding Value to Article 9 ECHR and the European Union's Anti-Discrimination Approach to Employment?" (2012) 37:6 Eur L Rev 693 at 707; Bribosia, *supra* note 85 at 39.
104. Alidadi, *supra* note 103 at 714.
105. Andreas Stein, "Reasonable Accommodation for Religion and Belief: Can It Be Accommodated in EU Law without an Express Duty?" in Marie-Claire Foblets, Katayoun Alidadi & Zeynep Yanasmayan, eds, *Belief, Law and Politics: What Future for a Secular Europe?* (Routledge, 2016) 171.

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strong ground since indirect discrimination is still not well understood and interpreted differently by the judges.[106] To my mind, for example, the headscarf case is insufficient as a case concerning reasonable accommodation since the Court held that the headscarf can be refused if there is a concern about "philosophical and religious neutrality". I contend that reasonable accommodation is a tool to achieve neutrality, not a tool contrary to it.

In this regard, addressing age accommodation cases through disability accommodation would be a stronger ground, since disability is the only ground which is explicitly protected under EU reasonable accommodation law. Moreover, it seems that the source of disability does not matter for judges as long as it meets certain criteria. For example, *Fag og Arbejde (FOA) v. Kommunernes Landsforening (KL)* raised the question of whether obesity can amount to disability. The CJEU addressed the definition of disability and held that if obesity entails physical, mental, or psychological limitation which hinders the effective participation of an obese person in professional life on an equal basis with others, and if this limitation is long-term, then obesity can amount to disability within the meaning of the directive.[107] Notably, the important standard here is that the impairment must be "long-term". Thus, the CJEU does not consider an employer's sickness as a disability since it is short-term.[108] Therefore, one needs to make sure that age-based impairments are long term to be able to demand disability accommodation. The estimation of what is long-term would be made based on a facts and circumstances test.

There is always a possibility that the judges consider certain age-based impairments as short-term disabilities, like children's inability to understand museum texts, which will end as the children age. On the other hand, the long-term health problems of the elderly could have a greater chance to become the subject of disability accommodation law. In the U.S. for example, *"K" CARE, INC. v. Town of Lac Du Flambeau* concerned a refused permission for a community-based residence for the elderly. The court held that even if the handicap of an elderly person results from aging, the individual can still demand reasonable accommodation under disability law.[109] In CJEU, there is a possibility that judges adopt a similar approach since there is a relatively wide margin of impairments that can be addressed under disability accommodation law. Yet, neither in the EU nor in the other jurisdictions is there a case on disability accommodation for children's typical weaknesses. In the disability cases, judges did not refer to the atypicality versus typicality distinction. Therefore, it is hard to foresee the reaction of the judges. Currently, there does not seem to be a legal obstacle for challenging childhood vulnerabilities under disability accommodation law.

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106. Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia nv, 2005) at 39.
107. *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL)*, C-354/13, [2014] Digital Reports.
108. *Sonia Chacón Navas v Eurest Colectividades SA*, C-13/05, [2006] ECR I—6488 at para 25.
109. *"K" Care, Inc v Town of Lac Du Flambeau*, 510 NW 2d 697 (Wis App Ct 1993).

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I have demonstrated that a reasonable accommodation duty for age does not exist under EU law. Since the only explicit accommodation duty under EU law is disability, certain age accommodation issues can be temporarily solved by reference to disability.[110] For example, the pet's companionship claim could be accepted if the accommodation demand is based on medical reasons like a reported psychological impairment that requires the assistance of a pet.

On the other hand, a pet companionship case could be rejected by the CJEU if the elderly person only needed the pet for a spiritual purpose such as friendship. Yet, religious accommodation demands can be brought as indirect discrimination cases. If this approach is approved by EU law, it becomes possible to demand religious accommodation for age-based convictions. Furthermore, it also becomes possible to demand age accommodation, since age is a protected ground under EU law both against direct and indirect discrimination. Considering the current level of development of the EU case law, unfortunately, such a strategy may not bring success.

However, is there legislation within the EU that requires reasonable accommodation with respect to age? This is discussed in the next section.

4.3. Age Accommodation Under National Laws

This article has suggested that, theoretically, there could be age accommodation demands which cannot fall under religious and disability accommodation. Considering the EU case law, this concern is legally relevant. For example, protection of younger workers may require a special age accommodation measure since it is possible that the CJEU does not consider young age as a disability because of the "long-term" and "short-term" issues noted above. Moreover, when age accommodation measures do not exist, it is not possible to address accommodation demands based on multiple grounds, one of which being age. Therefore, it is necessary to turn to national laws to explore whether there are regulations addressing this gap.

EU law provides minimum protection. Thus, member states are not allowed to restrict the scope of EU law, but they are allowed to make more extensive laws.[111] Moreover, as stated in section 4.1, reasonable accommodation is allowed on the grounds of age. Therefore, there is no legal obstacle for member states to adopt laws requiring age accommodation.

Specific provisions on accommodating age do exist under certain European legal systems. For example, Article 305 of the Bulgarian Labour Code stipulates:

> The employer shall take special care of the work of persons who have not attained the age of 18 years by providing alleviated working conditions and opportunities for attainment of professional qualification and for upgrading of the said qualification.[112]

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110. When the accommodation demand is based on multiple grounds, such as age and disability, age would be seen as redundant by the Court since an accommodation duty on the grounds of age is non-existent.

111. EC, *Charter of Fundamental Rights of the European Union Official Journal of the European Communities*, [2000] OJ, L 364/01 at art 52.

112. *Labour Code of Bulgaria*, the State Gazette, No 26 & 27/1986, *supra* note 4.

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Section 10 of the Young Workers' Act Finland also has a similar requirement:

> The employer shall ensure that a young worker who does not have the necessary skill or experience for a job is given training and guidance for the purpose, together with such personal instruction as is necessary in view of the working conditions, his age and other factors, so that he is not a danger to himself or other persons.[113]

These are typical examples of reasonable accommodation in that they are designed to balance the negative effects of young age by requiring employers to treat younger workers more favourably than others. Similar protections in labour laws exist in many European countries for older employees. For example, Macedonian Labour Law regulates reasonable accommodation in favour of the elderly. Article 179 states that

> Female employees over 57 years of age and male employees over 59 years of age shall be afforded special protection in accordance with the present law and other laws.[114]

Such measures are especially important when they cover issues that are not possible to address through religious or disability accommodation law. If an age accommodation duty does not exist in the law, and there are no possible strategies to demand it, people remain dependent not on the judges but the discretion of the institutions in charge.

Conclusion

It is desirable to have to be able to accommodate everyone. Yet, it is only an ideal to have rules which do not challenge at least some people's lifestyle and abilities. Many ideas have arisen to address this problem. The first key message of this paper is that reasonable accommodation is a tool to adjust the existing flaws in the social and political structures so that these structures are more adaptable. In the philosophical and legal literature, religion and disability are at the centre of reasonable accommodation debates. The second key message is that many issues arise which suggest a need for accommodation on the grounds of age. There is a continuing concern on the international level about building more age-friendly societies. Yet, the connection between age and reasonable accommodation has not been well-established. This paper approached age from multiple perspectives and determined that age-based convictions or impairments have a strong connection with religious and disability accommodation. However, there are certain particularities of age that require considering age as an independent ground for accommodation.

113. The Young Workers' Act of Finland (998/1993), *supra* note 4.

114. FYR of Macedonia Labour Relations Law (167/2015), *supra* note 4. See also Declan O'Dempsey, Anna Beale & Mark Robert Freedland, *Age and Employment* (Publications Office of the European Union, 2011) at 39.

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Despite the identified need for an age accommodation law, neither EU law nor the laws of the member states have developed strong perspectives on age accommodation. Religion and disability accommodation laws can be adapted to address some of the age accommodation issues that have arisen, but not all of them. Therefore, the last key message of this paper is that an independent age accommodation law under EU law still needs to be developed.

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