Protection with Hesitation: on the recent CJEU Decisions on Religious Headscarves at Work

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The Court of Justice of the European Union issued its much-anticipated decisions on two requests for preliminary rulings concerning whether the prohibition on wearing headscarves at the workplace constitutes discrimination (C-188/15 Asma Bougnaoui, ADDH v. Micropole SA and C-157/15 Achbita v. G4S Secure Solutions NV). The decisions are carefully written and trying to set out refined criteria, which would define the permissibility of limiting employees' headscarves at work. In both cases the court held that limitations on employees' religious headscarves can be acceptable if they are based on an internal policy of political, philosophical or religious neutrality set by the employer. Nevertheless, they are rather disappointing as they are not providing enough guidance to the national courts concerning the criteria that they need to take into consideration in their attempts to find a balance between the rights in conflict. The judgments do not provide any criteria for the admissibility of dress codes other than that they should be neutral and objectively justified. Even those terms though are not analysed by the court in a sufficient manner.

In *Asma Boungnaoui* the preliminary ruling involved the interpretation of Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16). Ms Boungnaoui is a design engineer working for a private company in France. As part of her work duties she had to provide her services in the customers' premises. The customer complained that her headscarf had upset some of its employees. Article 4(1) of the directive allows Member States to provide that a difference in treatment based on one of the forbidden criteria of discrimination is not discriminatory if it constitutes a "genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate". Although the CJEU notes the need to interpret exceptions to the principle against discrimination narrowly, it indicates that even a broad exception would be acceptable if presented as an occupational requirement objectively dictated by the "nature" of the duties of the employee. Nevertheless, the Court must be praised for not accepting that the wishes of the customer could constitute such an objective criterion (C-188/15 Asma Bougnaoui, ADDH v. Micropole SA).

In the second preliminary ruling Ms Achbita, was a receptionist who was dismissed by her employer for violating an unwritten rule that workers should not wear visible signs of their political, philosophical or religious beliefs in the workplace. In this decision the CJEU should be praised for noting that even a neutral policy can constitute indirect discrimination. It is not inconceivable, the CJEU notes, that the referring court may conclude that an apparently neutral policy may constitute indirect discrimination on the basis of religion when it "results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage" (C-157/15 Achbita, Centrom voor galijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV, Arrêt n° 630 du 9 avril 2015 (13-19.855). Indirect discrimination exists if there is no legitimate justification for the neutral policy. Nevertheless it held that the desire to display in relations with both public and private sector customers a policy of political, philosophical or religious neutrality must be considered legitimate, provided that the policy is genuinely pursued in a consistent and systematic manner and the prohibition must be strictly necessary to achieve the aim pursued. The court seems to be accepting a very broad definition of what constitutes "objective justification". In fact this definition is much broader compared to what would justify a similar policy in the US.

US federal antidiscrimination law largely inspired the EU antidiscrimination directives. U.S. legislation foresees the possibility for a reasonable accommodation for religious practices (43 U.S.C.§ 2000e (j)), which does not exist in the EU directives in the clauses protecting against discrimination on the basis of religion. The concept of reasonable accommodation appears in the EU directives only concerning disability (Article 5 of directive 2000/78/EC – 42

U.S.C. § 12112). The concept of “reasonable accommodation” guides the courts to look for ways to reconcile both the requirements of the employer and the rights of the employee. Although the term does not exist in the text of the directives as such, the courts could have referred to it as a tool of interpretation in order to strike a fair balance between the crucial interests at stake. It could have considered that it is a principle that is dictated by the logic of the directive as a whole in order to combat discrimination. In cases of conflicts of rights courts usually refer to intermediate concepts that help them strike a balance. The principle of reasonable accommodation, just like the principle of practical harmonization are principles embedded within the European legal culture which help courts find a solution to similar cases of righs in conflict.

The absence of a clause about reasonable accommodation in the text of the E.U. directive indicates less sensibility in Europe in favour of protecting freedom of religion, than in the US. Existing case law in the U.S. confirms this hypothesis. Courts usually will evaluate neutral dress policies in reference to the principle of reasonable accommodation, that is in reference to the need to find a solution that might be able to reconcile the conflicting interests at stake. Even neutral blanket bans as the ones at stake in the cases before the CJEU are evaluated in reference to whether they impede excessively upon the freedom of religion of employees. Employers have an *affirmative duty* to accommodate which requires them to do more than simply not discriminate (see Georg A. Rutherglen and John J. Donohue III, *Employment Discrimination Law and Theory*, Foundation Press 2012, p.508). Recently the U.S. Supreme Court reaffirmed this obligation (E.E.O.C. v. Abercrombie & Fitch Stores Inc. 575 U.S. __ (2015). The Supreme Court held that a refusal to hire a person because the headscarf she wore pursuant to her religious obligations conflicted with the employer’s neutral dress policy violates Title VII disparate treatment (direct discrimination) provision. Under US Title VII employers are obliged to reasonably accommodate to “a religious observance or practice” unless they are able to prove that there would be undue hardship on the conduct of the employer’s business (42 U.S.C. 9§2000e(j)). The Supreme Court interpreted the law to mean that there is an *obligation* for the employer to accommodate as mere neutrality is not enough (Id, at 6). Rather, the law affirmatively obliges employers not “to fail or refuse to hire or discharge any individual… because of such individual’s religious observance and practice” (Id, at 6,7). For the same Court when an applicant requires an accommodation as an aspect of religious practice, then “it is no response that the subsequent ‘failure to hire’ was due to an otherwise neutral policy” (Id, at 7). In other words, according to the court even “otherwise-neutral policies’” must give way to the need for an accommodation (Id, at 7). This means that employers are obliged to accommodate religious dress in the workplace unless there is serious obstruction with the accomplishment of the duties of the employee. For instance, the New York City Police Department was obliged to accommodate a traffic enforcement agent by allowing him to wear a turban on the job (see Jaggi v. New York City Police Department CHR Compl. No. M-EmC-02-1012382-E, NY Commission on Human Rights 1498/03, Apr. 28, 2004)).

Therefore, the CJEU could have instructed the national courts to investigate whether the employers could prove that wearing the headscarf prevents the employees from accomplishing their duties properly, or that here is a safety or other danger to the public that can be prevented and that justifies not accommodating the right of the employee to express her religion. Had it given such instructions it would have narrowed down even further the concept of “objective justification” which could justify a dress policy and could have made it compatible with the need to protect religious freedom.

The absence of a clause on reasonable accommodation for religion in the text of the E.U. directive indicates less sensibility in Europe in favour of protecting freedom of religion than in the US. In general, freedom of religion is protected more strictly in the U.S. than in Europe. Nevertheless, the Court could have brought it in through interpretation as the principle of neutrality is not enough. Neutrality is a fiction, a counterfactual ideal. The states in their attempts to implement “neutral policies” always give legal form to social rules that have emerged out of numerous cultural influences, among others religious. Therefore, the reference to neutrality is not enough in this context, because the understanding of neutrality is culturally defined. The risk of giving preference to one religious group among others under the shield of “neutrality” is always present (see Ioanna Tourkochoriti “The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.”, 20 *William & Mary Bill of Rights Journal*, 791-852, 2012). The long experience with trying to assure peaceful coexistence among various religious

communities in the US has made courts more sensitive to employees' needs for religious expression. This experience can be very edifying for the EU Member States. The mechanism of accommodation is probably a good medium to assure integration of immigrants by preventing the development of a sense of alienation (See Julius Grey, "The Paradoxes of Reasonable Accommodation", *Options Politiques*, Septembre 2007, repr. In David Oppenheimer, Sheila R. Foster and Sora Y. Han, *Comparative Equality and Anti-Discrimination Law*, Foundation Press 2012, p.36). The CJEU could have developed a more robust doctrine against religious discrimination in the workplace. Although it does point out the danger of indirect discrimination in neutral policies, as it stands, the decision fails to guide properly national courts in their efforts to tackle religious discrimination in the workplace. One can only hope that national courts will be able to go further and require reasonable accommodation between the relevant interests at stake.

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