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Neutrality in the business sphere: an encroachment on rights protection and state sovereignty?

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‘In [the *Achbita* and *Boungnaoui* cases], the Court is expected to give a landmark decision the impact of which could extend beyond the specific context of the main proceedings and be ground breaking in the world of work throughout the European Union, at least so far as the private sector is concerned.’

This was the prediction of Advocate General Kokott in her opinion for the Court of Justice of the European Union (CJEU) in *Achbita and another v G4S Secure Solutions NV* (Case C-157/15) 31 May 2016, paragraph 6, referring also to Advocate General Sharpston’s opinion in the parallel case of *Boungnaoui and another v Micropole SA* (Case C-188/15) 13 July 2016¹. Weiler describes the case as giving rise to ‘hugely difficult conceptual issues’.²

This case comment will explore the impact of these decisions, which are indeed likely to be ground breaking in the world of work throughout the European Union but in a way that could potentially be damaging to the cohesive fabric of the Union and its external policy.

The CJEU gave its rulings on 14 March 2017 establishing that in certain circumstances the freedom to conduct a business pursuant to Article 16 of the Charter of Fundamental Rights of the European Union may take precedence over religion as a protected characteristic, pursuant to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment

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¹ For a more in-depth discussion of the Advocate Generals’ opinions as well as some of the issues raised in the case, see my case comment Giles, J. ‘A hoped for coherent and permissive EU religious freedom policy: the *Boungnaoui* and *Achbita* cases’ [2017] PILARS CC 1: <http://law-school.open.ac.uk/sites/law-school.open.ac.uk/files/files/PILARS-CC-1-2017-Boungnaoui.pdf>

² Weiler, J. ‘Je Suis Achbita’. Editorial in *Eur J Int Law* (2017) 28(4): 989.

in employment and occupation (OJ 2000 L 303, p 16) ‘the Anti-discrimination Directive’. The cases were two independent references, one from Belgium (*Achbita*) and the other from France (*Bougnaoui*), providing the CJEU with the opportunity to examine religion as a protected characteristic under the operation of the Anti-Discrimination Directive. They sit against a background that Advocate General Kokott describes in her opinion at paragraph 2 as:

‘The legal issues surrounding the Islamic headscarf are symbolic of the more fundamental question of how much difference and diversity an open and pluralistic European society must tolerate within its borders and, conversely, how much assimilation it is permitted to require from certain minorities.’

Both cases concerned Muslim women employed in the private sector. Ms Samira Achbita, a Muslim throughout her contract of employment, was employed in Belgium by G4S Secure Solutions NV (G4S), a company providing, *inter alia*, security and reception services to customers from the public and private sectors. G4S had a policy, applicable at the commencement of Ms Achbita’s contract as an unwritten company rule and later incorporated into the employee code, that:

‘Employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from giving expression to any ritual arising from them’.

When she was dismissed for refusing to refrain from wearing her headscarf, Mrs Achbita brought a claim for wrongful dismissal seeking alternatively damages for infringement of the law to combat discrimination. Both the court of first instance and the appeal court dismissed her claim on the basis that there was no indirect or direct discrimination and her dismissal could not be regarded as manifestly unreasonable or discriminatory since G4S was not under an obligation to assume that its ban was illegal. On an appeal in cassation the Court of Cassation, Belgium, referred the following question to the CJEU:

‘Should article 2(2)(a) of Directive 2000/78/EC be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer’s rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace’.

Article 2 of the Directive reads:

‘Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’.

Article 1 provides that the purpose of the Directive is to combat discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation with a view to putting into effect in the Member States the principle of equal treatment. National implementing legislation incorporated these provisions into national law.

In the second case, Ms Asma Bougnaoui, a Muslim, was employed as a design engineer by Micropole SA. In her interview Micropole made it clear to her that she would not be able to wear her veil in all circumstances in the interests of the business and for its development.

At the request of a client, Micropole requested that Mrs Bougnaoui refrain from wearing her headscarf when she was in contact with customers of the business. Micropole cited the principle of necessary neutrality, which they required to be applied as regards their clients. Mrs Bougnaoui refused to comply with this request and Micropole terminated her contract of employment.

The national court of first instance and the appeal court found that the dismissal was lawful. On the claimant’s appeal to the Court of Cassation, the court referred the following question to the CJEU:

‘Must article 4(1) of [Directive 2000/78] be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic

headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?’

Article 4(1) of the Directive reads:

‘Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate’.

The rulings of the Court of Justice of the European Union

Bougnaoui

The Court ruled in *Bougnaoui* that if the claimant’s dismissal was based on indirect discrimination³ pursuant to Article 2(2)(b) of Directive 2000/78 it could be objectively justified by a legitimate aim, such as the implementation, by the respondent undertaking, of a policy of neutrality vis-à-vis its customers, provided the means of achieving that aim were appropriate and necessary. By contrast, if the claimant’s dismissal was not based on the existence of an internal rule but upon the wishes of a customer that an employee should not wear an Islamic headscarf on their site, such interference with the religious freedom rights of an employee amounted to direct discrimination and could only be justified if, by reason of the nature of the particular occupational activities concerned or of the context in which they were carried out, such a characteristic constituted a genuine and determining occupational requirement, provided that the objective was legitimate and the requirement was proportionate. It was for the member states to stipulate that a difference of treatment which was based on a characteristic related to any of the grounds referred to in Article 1 of the Directive did not constitute discrimination. That appeared to be the situation in the present case, under Article L. 1133-1 of the French Labour Code. It was, however, for the referring court to ascertain. The Court emphasized that it had repeatedly held that it was clear from Article 4(1)

³ Which was not, according to the Court, entirely clear from the facts referred by the national court.

of Directive 2000/78 that it was not the ground on which the difference of treatment was based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement and that, in accordance with recital 23 of Directive 2000/78, it was only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement. A characteristic might constitute such a requirement only 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out'. The concept of a 'genuine and determining occupational requirement', referred to a requirement that was objectively dictated by the nature of the occupational activities concerned or of the context in which they were carried out. It could not, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer. Consequently, Article 4(1) of Directive 2000/78 had to be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf could not be considered a genuine and determining occupational requirement within the meaning of that provision.

Achbita

In the *Achbita* case the Court found that the undertaking's internal rule prohibiting the wearing of visible signs of political, philosophical or religious beliefs covered any manifestation of such beliefs without distinction. It treated all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally. It was not evident from the material in the file available to the Court that the internal rule at issue in the main proceedings was applied differently to the first claimant employee as compared to any other worker. Accordingly, the Court ruled that such an internal rule did not introduce a difference of treatment that was directly based on religion or belief, for the purposes of Article 2(2)(a) of Directive 2000/78. However, the Court went on to consider that on the facts of the case the referring court might conclude that the internal rule at issue did introduce a difference of treatment indirectly based on religion or belief, for the purposes of Article 2(2)(b) of Directive 2000/78, such that the apparently neutral obligation it encompassed resulted in persons adhering to a particular religion or belief being put at a particular disadvantage. Under Article 2(2)(b)(i) of Directive 2000/78, such indirect discrimination was objectively justified if it pursued a legitimate aim and if the means of

achieving that aim were appropriate and necessary. The Court held that the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality was a legitimate aim within the meaning of Article 2(2)(b)(i). An employer's wish to project an image of neutrality towards customers related to the freedom to conduct a business pursuant to Article 16 of the Charter and was, in principle, legitimate, notably where the employer involved in its pursuit of that aim only those workers who were required to come into contact with the employer's customers. The fact that workers were prohibited from visibly wearing signs of political, philosophical or religious beliefs was appropriate for the purpose of ensuring that a policy of neutrality was properly applied, provided that that policy was genuinely pursued in a consistent and systematic manner, which was for the referring court to ascertain.

As regards the question whether the prohibition was necessary, it was for the referring court to ascertain whether, taking into account the inherent constraints to which the undertaking was subject, and without G4S being required to take on an additional burden, it would have been possible for G4S, faced with such a refusal by the claimant to take off the veil when visiting customers on site, to offer her a post not involving any visual contact with those customers, instead of dismissing her. It was for the referring court to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary.

Analysis

The rulings of the CJEU present a number of fundamental problems for the operation of rights frameworks within and beyond the borders of the EU. These include first, that they take the member states well beyond anything already envisaged in the denial of religious freedom rights at a national or international level. This is because in allowing private business the possibility of applying a policy of neutrality they take a leap in the incremental approach taken within European nation states and within the European Court of Human Rights. According to Daly, *laïcité* is generally understood to be a policy applicable within the public, not the private, sector. It is a

‘principle of constitutional secularism [and] is most readily associated with the separation of church and state and the religious neutrality of the state’.⁴

Second, that if it is deemed wrong and consequently unlawful to discriminate against one individual on the grounds of their religion, it must surely be equally if not more wrong and consequently unlawful to discriminate against everybody on grounds of their religion or belief. While the *Boungaoui* case forbids singling out one individual for wearing a hijab, the *Achbita* case legalizes mass discrimination. The fact that the manner in which legislation is formulated allows the court to structure its reasoning so as to find discrimination against a single individual unacceptable whereas mass discrimination is not, does not alter the illogicality of the comparative outcome of both cases. This is unless one takes a strictly positivist approach to law adjudication untampered by rules of judicial interpretation permitting a teleological approach leading to a more holistic reasoning⁵.

Third, the CJEU judgments must be applied uniformly throughout the union in order to create the conditions that facilitate factor mobility and integration. The effect of the uniform application of the judgment is that a business can force compliance with its policy of neutrality in a country which does not necessarily have a laic form of government or constitutional settlement between citizens and the state. This then creates a form of *laïcité* by the back door, ultimately allowing business to dictate the conditions of constitutional settlement to government. In the *Achbita* and *Boungaoui* cases the member state governments making representations did not themselves support the ultimate ruling given by the court. No doubt precisely because it would allow business to create an employment ethos which even in laic states was reserved for the public, not private, employment. The CJEU judgments involve the Court in an indirect interference with affairs close to member state sovereignty and outside the purview of the European Union (at least until it is agreed in Treaty form between member states). A consequence of this is that the judgments provide

⁴ The increased blurring of the distinction between the application of *laïcité* in the public and private spheres is discussed by Daly, E. ‘*Laïcité* in the Private Sphere? French Religious Liberty After the Baby-Loup Affair’ (2016) OJLR 5(2): 211.

⁵ For an analysis of the impracticalities of a policy of neutrality see Vanoni, L. P. and Ragone G. (2018) ‘From secularisation theory to the pluralistic approach: reconciling religious traditions and modernity in Italian case-law’ in Giles, J., Pin A. and Ravitch, F. *Law, Religion and Tradition*. Springer. Forthcoming 2018. For an exploration of the impact of the failure of the Court to balance the employee religious freedom rights against the employers rights to conduct a business see: Adams Z. and Adenitire J O. ‘Ideological Neutrality in the Workplace.’ (2018) 81(2) MLR 348-360.

a strong rationale for a clean break BREXIT. This is because any form of union, such as a European Economic Area, involves acceptance of the *acquis communautaire*, including the *Achbita* and *Bougnaoui* jurisprudence. This would open the door for multinational businesses to insist on the enforcement of neutrality policies in states within an EEA. An addition problem is that, if, by way of a thought experiment, one considers the ultimate effect of this – in 10-20 years time it might be that religious symbols were banned in all forms of employment. The question then arises - what other forms of religious expression might be incorporated into a policy of neutrality? What about the exercise of behavior based on religious precepts that in unspoken and spoken ways govern relationships between individuals and groups? Will forgiveness as a relational tool eventually be excluded?⁶

Fourth, the understanding of religion is flawed. The judgments treat religion as something that can be left at the door by an individual when they arrive at work. Weiler discusses this in his recent article, arguing that this is to misunderstand the nature of obligations mandated by religion⁷. Not only this, but it creates a disconnection between a long held theological and philosophical understanding of religion as a foundational right, essential to human dignity and human flourishing.

Fifth, linked to this is the idea that religious freedom is a lesser type of protected characteristic than other protected characteristic and worthy of weaker protection. Consequently, it then weighs less heavily when balanced against other rights, in this case the right to conduct a business.

Sixth, and again linked to the above, is the idea that religious freedom as a fundamental right can be balanced against the right to conduct a business, *as a fundamental right*. The rights frameworks established post World War II were created to protect civil and political rights within a framework designed to balance competing *fundamental* rights. The Charter of Fundamental Rights of the European Union expanded the list of rights capable of protection⁸. This expansion of rights in and of itself is problematic since it establishes a moral basis for rights protection in economic interests rather than in human dignity. This problem is exacerbated if the balance built into the Charter is

⁶ The potentially negative effects of rights frameworks being the extent of our moral and relational frameworks is discussed by Hauerwas, S. 'What's Wrong with Rights. Christian Perspectives Pro and Con'. A presentation at Emory University School of Law. 31 March 2014: <https://www.youtube.com/watch?v=o9Sz0TOZEAI>

⁷ Op cit. FN 2.

⁸ Charter rights piggy back on to existing EU rights such as, the rights to free movement of goods, services, persons or capital.

not properly carried out. This failure to balance other rights occurred in the *Achbita* and *Boughnaoui* cases. In those cases, the court balanced religious freedom and the right to conduct a business. But the Charter also includes Article 15 (freedom to choose an occupation and right to engage in work), Article 22 (the union shall respect cultural, religious and linguistic diversity) and, Article 31 (fair and just working conditions – the right to working conditions which respect an individuals’ health, safety and dignity). Had the Court properly considered the spectrum of rights protection built into the Charter it is unlikely that it would have come to the conclusion that it did. This takes the European Union into a realm where the Court has given a judgment which appears to be clearly contrary to the foundational Treaties upon which the Union is built. In particular because it is supposed to take a teleological approach to adjudication and account of rights protection in member states legal traditions which it did not do.

A seventh issue with the case is that the assessment of direct and indirect discrimination does not take into account the difference between religious and non- religious beliefs, nor does it take into account the significance of religious symbols and clothing within different religions. This leads the court to class all systems of religious, political or other belief as the same. It disregards European Court of Human Rights and national jurisprudence which protects the expression of non-religious beliefs, including philosophical and political beliefs pursuant to the right to freedom of expression, not freedom of religion. This is because the expression of political opinions and the manifestation of religion are considered to be worthy of a different type of rights protection. As protected characteristics within anti-discrimination legislation freedom of religion is protected whereas freedom of expression is not. Freedom of religion enjoys double protection under rights frameworks and as a protected characteristic. A blanket policy naming political and philosophical beliefs along with the manifestation of religious beliefs will consequently be discriminatory against religious individuals.

Eighth, the denial of religious freedom in public life within the European Union has implications for what can only be described as a potentially incoherent EU external policy. Annicchino and Ventura identify the problem that ‘Europe lacks the credibility and authority to denounce and

counter violations in other parts of the world' where its own internal policy is to prohibit the manifestation of religion in public life⁹.

Ninth, the driving out of religion from public life could be said, in part, to be a reaction against forms of extremism and terrorism. The fear that the Muslim community includes amongst its numbers those who would harm society may be a real one. However, this is not the case for the majority of Muslim's living in Europe who suffer equally if not to a greater extent as a result of the stigma consequently attaching to them as a result of the pervasive effects of terrorism. The refusal to allow the public manifestation of religion will not only not do anything to assist in solving this problem, it could also hinder the ability of society to counter it. This is because if religion is discouraged in public life it is more difficult for members of the public to understand what different religions stand for, and to discern for themselves truth from falsehood. Ignorance and discomfort about public expressions of faith is a real danger not only because it legitimises intolerance but because it creates conditions in which individuals can more easily become radicalised. Under such conditions there is no way for those who might be influenced by radical propaganda to learn about, discern between and see in action, peaceful forms of religion compared to violent expressions and manifestations of it.

Conclusion

Having identified some of the issues that arise consequent upon the *Achbita* and *Bouagnaoui* cases, and in the light of the uniform approach to the application of EU law, it is clear that concerns I raised after the Advocate General's opinions were given and subsequently expressed by Weiler and others over this judgment are well founded. The fact that it could force new constitutional settlements vis-à-vis religion on member states is, alone, likely to cause a fragmentation within the EU. This, in turn, is likely to impact on EU external relations. The case highlighted a microcosm of what is now the very different attitudes and approaches to religion in public life throughout Europe. To seek to harmonise these approaches threatens the core of national sovereignty and that which is closest to citizens sense of dignity and worth – namely the right to practice or manifest

⁹ Annicchino, P. 'Coherence (and Consistency) or Organised Hypocrisy? Religious Freedom in the Law of the European Union', in Foblets, M., Alidadi, K., Nielsen, J. S. and Yanasmayan Z., (eds) (2014) *Belief, Law and Politics, What Future for a Secular Europe?* Ashgate. Farnham, 257-268.

their religion or thought system. While it is now common place to credit economic interdependence as the tool for keeping the peace in Europe, the delicate balance within nation states constitutional settlements vis-à-vis religion is something that Europe interferes with at its peril. Constitutional imbalance within nation states may undermine the strong ties upon which Europe relies to maintain peaceful relations. It is hoped that in light of the damaging ramifications of this judgment the Court will take a step back when it next has the opportunity and right the wrongs it appears to have facilitated in this case.