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Equality and the Market: the unhappy fate of religious discrimination in Europe

ECJ 14 March 2017, Case C-188/15, *Asma Bougnaoui & ADDH v Micropole SA*; ECJ 14 March 2017, Case C-157/15, *Samira Achbita & Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*

Stéphanie Hennette-Vauchez*

Rulings by the European Court of Justice are seldom as anxiously awaited as those delivered by the Grand Chamber in March 2017 in the *Bougnaoui* and *Achbita* cases.¹ To be sure, the preliminary references by both the French *Cour de cassation* and the Belgian *Hof van Cassatie* triggered much restlessness for at least three reasons. First, to put the matter in context, the topic of religious freedom (and religious discrimination) has become increasingly prominent in Europe and beyond; the topic of religious minorities (and Islam in particular) tends to occupy centre stage at many debates on integration, migration, and national identity, not to mention the issues of national security and terrorism. Second, the two referrals made in 2015 led to the first authoritative interpretation by the European Court of Justice of the meaning of ‘religious discrimination’ under the 2000/78 Directive – a mere 17 years after the text was passed. Finally, tension and attention were heightened by the strongly opposing opinions of Advocate Generals Sharpston and Kokott.²

The two questions addressed to the European Court of Justice did exhibit some differences in terms of their original formulation, but beyond the fact that they were delivered on the same day, the rulings do need to be read together in order to fully grasp the scope and meaning of the Court’s intervention. French legal authorities had

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¹ ECJ 14 March 2017, Case C-188/15, *Asma Bougnaoui & ADDH v Micropole SA* and ECJ 14 March 2017, Case C-157/15, *Samira Achbita & Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*.

² The opinions were delivered on, respectively, 13 July 2016 and 31 May 2016.

asked the Court whether the firing of a female worker who wore the veil on the basis of customer complaints voiced to her employer fell under the concept of religious discrimination in the sense of the Directive. Somewhat distinctively, the question emanating from Belgium concerned the admissibility of a company's internal rule that required workers to observe religious, political and philosophical neutrality: did such a rule amount to discrimination in any form, either direct or indirect?

It is argued here that the combined rulings may fall short of effectively combating the practice they deemed illegal, namely: a generalisation of religious discrimination in the workplace based on the pretext of customer preference – which is indeed the socio-political issue that lies below the surface of the facts in both cases.

The French *Bougnaoui* case directly echoes contemporary concerns about growing Islamophobia. A Muslim woman who wore the veil was hired by an IT company. Although warned by her employer that if her veil disturbed the company's customers she might be asked to remove it, she was able to work there for a year and a half without difficulties. In June 2009, however, one customer did complain, asking that service be provided in future by 'unveiled' workers, and she was fired after refusing to remove hers. Claiming that the termination of her contract was discriminatory, she took her case to court. Her claims were, however, rejected by both the Labour and appellate courts. The French judicial supreme court chose to refer the question of whether customer preference of the sort that had clearly dictated Ms Bougnaoui's employer's decision to terminate her employment constituted 'genuine and determining professional requirements' under Article 4§1 of Directive 2000/89. In a March 2017 Grand Chamber ruling, the European Court of Justice answered in the negative, thereby indicating that the decision to fire an employee because of a customer's distaste for her religion could amount to religious discrimination. Despite this unambiguous clarification, the Court's second intervention – in the Belgian referral – could potentially weaken the long-awaited judicial interpretation of EU anti-discrimination law's take on religion in the workplace. The *Achbita* ruling has its origin in a Belgian company's decision to fire a female Muslim receptionist who wore the veil on the grounds that the company was committed to a strict policy of political, philosophical, and religious neutrality that prohibited employees from expressing any such convictions at work. Referring to the right to conduct a business, the Court decided that internal policies of neutrality did not necessarily amount to either direct or indirect discrimination since the aim was legitimate, provided the policy was applied in a consistent and systematic manner. It is feared that the combination of these two rulings could be read as a signal to private undertakings that, although they ought not restrict their employees' freedom of religion on the grounds of their customers' prejudiced preferences, they can, however, legitimately anticipate such prejudices by internalising neutrality rules and policies – thereby avoiding any 'risk' of interfering with their employees' expression of beliefs and convictions. Accordingly,

the present case note presents a critical reading of these much-anticipated rulings,³ on the grounds that they can be read as posing a risk of neutralising anti-discrimination law in general, while simultaneously weakening the conception and operationality of religious discrimination in particular.

NEUTRALISING ANTI-DISCRIMINATION LAW?

Samira Achbita started working at G4S as a receptionist in 2003. In 2006, she expressed the wish to start wearing an Islamic headscarf in the workplace – a choice that conflicted with an until-then unwritten policy that required all workers to refrain from expressing any political, philosophical or religious beliefs while at work. In front of her persistence, the unwritten rule was formalised by means of an amendment to the workplace regulations adopted by the G4S work council – and Achbita was subsequently dismissed. She claimed that the dismissal was discriminatory and her case eventually led the Belgian *Hof van Cassatie* to refer the matter to the European Court of Justice, posing the question of whether an internal policy demanding workers' neutrality amounted to a form of (direct) discrimination outlawed by Directive 2000/78.

The Court answered in the negative, following a problematic line of argumentation that could be summed up colloquially by saying that, in matters of discrimination, 'more' somehow amounts to 'less', or: if you discriminate against all members of a group (for their religion or convictions), you discriminate against none (I.1.). When it subsequently examined the question of whether employer-imposed neutrality policies could amount to *indirect* discrimination, the European Court of Justice further enhanced the legitimacy of companies' choice to institute policies that imposed political, philosophical and religious neutrality on their workers on the grounds of freedom to conduct a business. Such policies are only subject to the double condition that they be pursued by means both appropriate and necessary for achieving neutrality (I.2.). As it subsequently disregarded the relevance of the concepts of both direct and indirect

³ Criticism seems to be the dominant tone of the first wave of scholarly commentary triggered by these cases. *See*, for instance, E. Brems, 'European Court of Justice Allows Bans on Religious Dress in the Workplace', <<https://iac-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/>>, visited 11 October 2017; T. Ufarte, 'La liberté de conscience face au culte de la liberté d'entreprise prôné par la CJUE : Une nouvelle guerre de religion ?', *Revue des droits de l'homme* [En ligne], Actualités Droits-Libertés, available at <[http:// revdh.revues.org/3056](http://revdh.revues.org/3056)>, visited 12 July 2017; S. Jolly, 'Achbita & Bougnaoui: A Strange kind of Equality', available at <www.cloisters.com/blogs/achbita-bougnaoui-a-strange-kind-of-equality>, visited 11 October 2017; S. Ouad Chaib and V. David, 'European Court of Justice keeps the door to religious discrimination in the private workplace opened', available at <<https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/>>, visited 11 October 2017.

discrimination in terms of their ability to curtail, if not prohibit, the kind of internal company rule that was at stake in the *Achbita* case, it could reasonably be stated that the European Court of Justice may well have weakened or effectively neutralised EU anti-discrimination law.

More is less? Failing to see an instance of direct discrimination

In the course of examining the internal rule that required all workers to refrain from wearing signs expressing their political, philosophical or religious beliefs, the European Court of Justice found that it treated all workers the same way by requiring them to dress neutrally (§30). As it paid more specific attention to how the rule precipitated Achbita's dismissal, it found that it had not been applied to her any differently than it would have been to any other worker. The Court thus concluded that there was no instance of direct discrimination: 'it must be concluded that an internal rule such as that at issue in the main proceedings does not introduce a difference of treatment that is directly based on religion or belief, for the purposes of Article 2(2)(a) of Directive 2000/78' (§32).

In a classic levelling down of the very concept of non-discrimination,⁴ the Court here neutralises much of the promise of Directive 2000/78, potentially favouring outcomes that are at odds with EU anti-discrimination law's very *raison d'être*. The Court puts forth a reasoning by which the fact that the ban adopted by G4S's work council concerned *all* convictions (religious, political or philosophical) made it discrimination-proof: it could not be claimed that religious convictions were subjected to a harsher regime than political or philosophical ones. This is, however, hardly a convincing line of reasoning. As has already been noted, the Court's reasoning rests on a debatable if not flawed choice of comparator; a situation that entails discrimination on the grounds of *religious* beliefs should not only be assessed by comparing it to the treatment of persons expressing *other* beliefs, but also to persons expressing *no* belief. The Court insists that 'the internal rule at issue in the main proceedings refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction' and that 'the rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs' (§30). But this is akin to saying that, say, since all disabled workers are subjected to any given restriction of their rights (for instance, different treatment in the calculation of their paid work hours based on the fact that disabled workers need more time to reach their workstation within the work

⁴ On which, see for instance T. Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2014) in particular p. 153.

premises), none is in fact discriminated against.⁵ The rationale here is really perverse, in the sense that it amounts to considering that if you discriminate against *all* members of a group, you actually no longer are discriminating at all. Anti-discrimination law is, in other words, neutralised⁶ in its very capacity to cover certain realities and social practices it was initially set up to help combat. Some authors even consider that discrimination has now in fact been legitimised; the Court has provided employers with a ‘recipe for discrimination of their employees on the basis of their religious or other beliefs’.⁷

Neutrality policies as marketing and the demise of the right to non-discrimination in the workplace

Once it ruled that neutrality policies could formally be put in place by private undertakings without causing *direct* discrimination, the European Court of Justice examined whether the concept of *indirect* discrimination could nonetheless apply. Recalling the definition of indirect discrimination in the sense of Directive 2000/78, the Court explained that indirect discrimination would ensue if the neutrality policy resulted in particular disadvantage for persons adhering to a particular religion or belief.⁸ It further insisted that such disadvantage would, however, not qualify as indirect discrimination if the policy pursued a ‘legitimate aim’ by means ‘appropriate and necessary’. It is argued here that, well beyond the particulars of either the *Bougnaoui* or *Achbita* cases, the Court’s interpretation of these notions could potentially turn the very *concept* of indirect discrimination vis-à-vis *any* kind of neutrality policy into a paper tiger.⁹ This is particularly true since the Court

⁵This point is also made by S. Laulom, ‘Un affaiblissement de la protection européenne contre les discriminations’, *Semaine Sociale Lamy*, 27 March 2017, n°1762; see also Ouad Chaib and David, *supra* n. 3.

⁶Some have argued in comparable instances that discrimination is ‘covered’: see K. Yoshino, *Covering: the Hidden Assault on our Civil Rights* (Random House 2007).

⁷Ouad Chaib and David, *supra* n. 3; see also E. Brems, *supra* n. 3: ‘In that sense, the judgment can be read as a “how-to” for employers wishing to discriminate against headscarf wearers: introduce a neutrality policy that applies to all types of religious dress; apply it consistently; apply it only to front-office employees; and if you want to dismiss a person, make sure to motivate why you cannot offer that person a back-office job’. Note also the provocative title of the *New York Times* article: ‘Legalizing Discrimination in Europe’, 15 March 2017.

⁸In §34 of the *Achbita* ruling, the ECJ expresses the view that ‘it is conceivable’ that such a rule might affect some religions more than others. As Gareth Davies notes, this is largely absurd, for what really is inconceivable is that it would not: G Davies, ‘Achbita v. G4S: Religious Equality Squeezed Between Profit and Prejudice’, *European Law Blog* (6 April 2017) available at <<https://europeanlawblog.eu/2017/04/06/achbita-v-g4s-religious-equality-squeezed-between-profit-and-prejudice/>>, visited 11 October 2017.

⁹To the extent that ‘the ruling could be understood as confirming that the *mere wish* of a company to present itself in a neutral way is an objective justification for a different treatment of

chose to rule that an employer's 'desire to display, in relation with both public and private sector customers, a policy of political, philosophical and religious neutrality' is *a priori* legitimate (§37). The Court here refers to Article 16 of the EU Charter of Fundamental Rights, insisting that the 'right to conduct a business' encompasses an employer's right to impose a policy of strict neutrality. The Court thus expressly condones possible choices for neutrality in so far as they have to do with private undertakings' self-defined image – and consequently, marketing strategy.¹⁰ Such a choice 'must be considered legitimate [...] notably where only those workers who are required to come into contact with customers' – i.e. those who convey the company's *image* – are subjected to the neutrality requirement.

This section of the Court's ruling is of utmost importance from both an anti-discrimination law and human rights perspective. In its consideration of the referrals made by the French and Belgian courts, the Court read Directive 2000/78 in light of the Charter, but chose to do so only to interpret the 'legitimate aim' that would allow a company to indirectly discriminate, and only with respect to the fundamental rights of private undertakings (in particular, their freedom to conduct a business) rather than those of individuals. As a result, the 'fundamental rights' perspective is hardly relevant to the rulings, which remain essentially silent on individuals' rights to spiritual integrity, religious freedom, autonomy, and dignity. As far as anti-discrimination law is concerned, the Court's reasoning in the *Achbita* case makes the scope and strength of EU anti-discrimination law subordinate to marketing considerations and the freedom to conduct a business. Indeed, confirmation that a desire to display an image of neutrality is to be considered a legitimate aim for the differential treatment of workers under Article 2§2b) of the Directive reverses the hierarchy between the principle of the Directive's Article 2 (a principle of non-discrimination) and exceptions thereto (except if/when the discrimination – differential treatment – pursues a legitimate aim). The very fact of enunciating that, as a general rule (i.e. as a matter of principle) a neutrality policy ought to be considered legitimate regardless of the particular circumstances, settings, impact etc., potentially reverses the relationship between principle and exception. In fact, one might now wonder: what prevents private undertakings from reading this instrumental part of the *Achbita* ruling as allowing them to require and implement policies of neutrality as a matter of free enterprise – except if and when those policies would appear to be inappropriate or unnecessary and excessive?

employees' [emphasis added]: M. Steijns, 'Achbita and Bougnaoui: Raising More Questions Than Answers', available at <<https://eutopialaw.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/>>, visited 11 October 2017.

¹⁰C. Wolmark, 'Peut-on concevoir la neutralité dans l'entreprise?', *Revue de droit du travail* (2017) p. 235: 'la neutralité, une politique marketing'.

Alongside the requirement that they pursue a legitimate aim, neutral provisions, criteria or practices must thus also appear to be *appropriate and necessary*, lest they qualify as forms of indirect discrimination that place persons who adhere to a particular religion or belief at a disadvantage when compared with other persons. But will such requirements effectively manage to *contain* the scope of the ruling? Should they be understood to mean that not *all* such policies are to be considered admissible under EU anti-discrimination law? Although some scholars express this view,¹¹ it remains essentially unclear as the very definition given by the Court – of both these additional hurdles containing the concept of indirect discrimination – also remains fuzzy and imprecise.

As to the condition of *appropriateness*, the Court rules that internal rules and policies that require neutrality of convictions can constitute ‘appropriate means’ towards a legitimate aim provided the policy is pursued in a ‘consistent and systematic’ manner (§40). The precise meaning of such criteria remains, however, imprecise. In the *Achbita* case, the Court established that application of the neutrality policy – to all workers in contact with customers, for all convictions (religious but also philosophical and political) – was to be interpreted, even prior to its formalisation in the internal rules of the company, as an indication that it was indeed a ‘consistent and systematic’ policy. But other cases will undoubtedly arise that question the meaning of these criteria. For instance, what about supermarkets and food chains that choose to sell halal, kosher or otherwise religiously vetted products: would it be ‘consistent and systematic’ for such undertakings to simultaneously require religious neutrality from their personnel? Would it be ‘consistent and systematic’ to offer diversity to customers while denying the expression thereof to the workforce? Arguably, both the choice of what one sells and who interacts with customers for the purposes of selling it can be framed as pertaining to a business’s ‘image’.

As to the condition of *necessity*, the European Court of Justice insists that as long as the neutrality policy covers only those workers who interact with customers, it is to be deemed necessary (§42). Two observations can be made. First, the latter criterion, that can impede application of the qualification of indirect discrimination, is somewhat tautological with respect to the first. The reasoning of the Court does indeed amount to saying that a policy of neutrality must be considered to pursue a legitimate aim if and when *it is necessary to require neutrality from workers to convey a policy of neutrality*. In other words, the condition of ‘necessity’ and that of the ‘legitimate aim’ coincide in the Court’s reasoning. Second, it remains – again – a rather fuzzy criterion; a great amount of leeway is left for national judicial determinations of which categories of workers are considered to ‘interact with customers’: are these only the front desk personnel who effectively represent the company, or should they include janitors who

¹¹ G. Calvès, ‘Religion au travail: que nous enseigne la CJUE ?’, 8 *Feuille de Rapide Social* (2017).

operate on premises that are accessible to customers? Is it even possible to identify categories of workers who never come in contact with a company's customers? In fact, the insistence by many companies that technical, sanitary or logistical personnel wear uniforms could be read as an indication that they do consider their companies to be represented by those personnel categories. At any rate, even if it were the case that certain worker categories never interact with customers and therefore would need to be exempted from a requirement of neutrality since they do not convey the company's image, one wonders: would such an understanding of the Court's position not lead to 'closeting' workers who wish to express their convictions (religious or otherwise) in back-office jobs¹² – and would it encourage employers to conceal any diversity that might be present in their workforce?

WEAKENING THE CONCEPT OF RELIGIOUS DISCRIMINATION

Among the grounds of discrimination that define the scope of EU anti-discrimination law, religion is probably the most hotly contested. In fact, some authors even argue that anti-discrimination law is ill-adapted to operate in the field of religion and expressions thereof.¹³ The 2017 *Achbita* and *Bougnaoui* rulings certainly strengthen this view; they illustrate the Court's difficulty in legally grasping and dispensing justice in religious discrimination cases. In both rulings, however, the European Court of Justice displays a relatively robust understanding of how 'religion' ought to be defined under the 2000/78 Directive (II.1.). The Court also clearly rules that the notion of 'genuine and determining occupational requirement' that may exempt differences of treatment from anti-discrimination claims must rely on objective considerations only – thus discarding subjective views held by employers. This invocation of a basic tenet of anti-discrimination law (customer preferences are not to be used to justify instances of discrimination), however, risks falling short of its promise (II.2.).

'Religion' under anti-discrimination law

Remarkably, the 2017 rulings are the first by the European Court of Justice that deal with issues of religious discrimination. The comparably small number of

¹²On this issue see K. Alidadi, 'Out of sight, out of mind? Implications of routing religiously dressed employees away from front-office positions in Europe', 1 *Quaderni di diritto e politica ecclesiastica* (2013) p. 87.

¹³Furthermore, among those who do not attempt to invoke the relevance of the concept of religious discrimination as such, the normative reasons for its validity remain debated. For a recent contribution denying the foundational nature of the concept of 'autonomy' for religious freedom, see F. Ahmed, 'The Autonomy Rationale for religious freedom', 80(2) *Modern Law Review* (2017) p. 238.

judicial interpretations of racial discrimination under Directive 2000/43¹⁴ reminds us that social reality must not be confused with litigated reality. We should indeed wonder why there has been such a limited amount of litigation. Does this testify to the efficiency of national mechanisms – judicial, as well as those that are offered by non-judicial ‘Equality’ bodies? Or does it rather hint at broader issues: hindered access to legal remedies for victims of discrimination, or possibly even a more general failure of the goal of anti-discrimination to appear valuable and pertinent to the very groups it seeks to protect most?

At any rate, these pioneering interpretations of the Directive were impatiently awaited if only because of a number of expressions of doubt, scholarly opinions included, as to the relevance of anti-discrimination law to religion. In particular, several authors have expressed the view that, since religion is not an inalterable or immutable feature of one’s identity, it cannot easily seek shelter under the protective umbrella of anti-discrimination law.¹⁵ In fact, this view surfaces in the opinion of Advocate General Kokott in the Belgian case. She considers that ‘unlike sex, skin color, ethnic origin, sexual orientation, age or a person’s disability, the practice of religion is not so much an unalterable fact as an aspect of an individual’s private life, and one, moreover, over which the employee concerned can choose to exert an influence. While an employee cannot “leave” his sex, skin color, ethnicity, sexual orientation, age or disability “at the door” upon entering his employer’s premises, he may be expected to moderate the exercise of his religion in the workplace, be this in relation to religious practices, religiously motivated behavior or (as in the present case) his clothing’¹⁶.

Such reasoning of course raises many questions. First, because it suggests that all elements of identity that are ‘chosen’ by individuals could be considered to fall outside the scope of protection granted by anti-discrimination law for that reason. Yet the reach and implications of this line of reasoning, when applied to grounds other than religion, easily show how excessive and debateable it is. Take, for instance, issues of health and disability: one could easily predict that all protection would be revoked if employers were allowed to take into consideration whether, or the extent to which, workers’ medical conditions were a result of their own choices. Such a line of reasoning could easily jeopardise the right to have a say in one’s medical treatment (or the right to refuse medical treatment altogether). Second, it must be noted that the ‘differential’ interpretation suggested by Advocate General Kokott – between religion and the other prohibited grounds of

¹⁴ See ECJ 10 July 2008, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*.

¹⁵ See for instance G. Calvès, ‘Les discriminations fondées sur la religion : quelques remarques sceptiques’, in E. Lambert-Abdelgawad, T. Rambaud (eds.), *Les discriminations religieuses en Europe* (SLC 2009) p. 9.

¹⁶ §116. AG Sharpston, by contrast, argues in her opinion that religion ought not to be distinguished from sex or skin colour.

discrimination mentioned by the Directive – lacks any formal ground in the Directive itself. Rather, the whole point of the Directive is to protect workers from discrimination ‘on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation’ – and precisely, without any distinction being made among the listed grounds. To that extent, the notion that religious beliefs should never be expressed on work premises introduces a distinction that finds no support in the legislative framework. Finally, such interpretations of ‘religion as choice’ run afoul of the necessity, for anti-discrimination law and its interpreters, to take religion seriously. For, indeed, if religious discrimination is to be prohibited, it is not for secular judicial interpretations thereof to decide that religion is a matter of choice – or of anything else for that matter; for instance, a calling. For deeply religious individuals, the very notion that religious beliefs and the sartorial (or other) expressions thereof can be set aside and relegated to the coatrack the same way a political sticker, pin, or button can be temporarily removed or hidden, is outrageous – and fails to grasp the very stuff that religious belief is made of. Not to mention the fact that ‘for many people the right to share their beliefs with others, or to live publicly according to their religious convictions, is not merely a basic human right but also a sacred duty’.¹⁷

For all these reasons, it was of great importance that the Court define the notion of religion as it ought to be understood in the sense of Directive 2000/78. And in fact, the concept adopted by the Court is a relatively robust one. After referring to both Article 9 of the European Convention on Human Rights and Article 10 of the EU Charter of Fundamental rights (§§28-29), the European Court of Justice makes it clear that EU law includes ‘the freedom of persons to manifest their religion’ and that the term religion under Article 1 of the Directive encompasses both the *forum internum* and the *forum externum*, i.e. the right to the ‘manifestation of religious faith in public’ (§30). Although it may seem a very banal (re)affirmation to some, it does have greater resonance in a number of national settings where the very possibility of expressing one’s religious beliefs in public has been increasingly challenged in recent years. France, to be sure, is a case in point where the tension surrounding the constitutional principle and republican value of *laïcité* has significantly curtailed individuals’ freedom of religion in recent years¹⁸ (much to the specific disadvantage of Muslim women¹⁹),

¹⁷ P. Cumper, ‘The public manifestation of religion or belief: challenges for a multi-faith society in the 21st century’, 4 *Current Legal Issues: Law and Religion* (2001) p. 311.

¹⁸ S. Hennette-Vauchez, ‘Is French *laïcité* still liberal? The Republican project under pressure (2004-2016)’, 17 *Human Rights Law Review* (2017) pp. 285-312.

¹⁹ From among the many references, see J.W. Scott, *The Politics of the Veil* (Princeton University Press 2007); M. Fernando, *The Republic Unsettled* (Duke University Press 2014); S. Hennette-Vauchez, ‘Genre et religion: le genre de la ‘nouvelle *laïcité*’, in S. Hennette-Vauchez, M. Pichard, D. Roman (eds.), *REGINE: La loi & le genre. Etudes critiques de droit français* (CNRS) p. 715.

and where, subsequently, it is not uncommon to hear or read prominent political actors expressing the (juridically erroneous) notion that expressions of religious faith ought to be banished to the private sphere. And others countries seem to be witnessing a progression of anti-religious sentiment as well.²⁰

This relatively robust conception of religion as far as Directive 2000/78 is concerned remains essentially toothless or idealistic, however, as it is not brought to bear during the further steps in the Court's reasoning – i.e., when the Court moves on to examine the question referred by the French *Cour de cassation*, namely: could the firing of a female Muslim employee on the grounds that customers had expressed their dislike of the headscarf qualify as discriminatory on the grounds of religion?

Customer preferences and 'genuine and determining occupational requirements'

In the *Bougnououi* case, the European Court of Justice establishes that if and when a private undertaking has formalised its neutrality policy in a formal rule – and granted the rule is indeed neutral in that it does not refer to one religion in particular and fails to distinguish between religious and other beliefs – indirect discrimination *may* ensue. But in such cases, the reasoning to be applied is the one developed in the *Achbita* case, where the Court explains that such rules may cause indirect discrimination unless they are found to pursue a 'legitimate aim' and are

²⁰ In fact, as is noted by Eva Brems, it is quite astonishing that the Court should silence this contextual element of the rulings. In her words: 'It is bewildering to read a judgment of a supranational court ruling on fundamental rights that discusses the issue of Islamic headscarf bans without any reference to either the Europe-wide context of Islamophobia, or the widespread existence of negative stereotypes about Muslim women, and in particular those who wear Islamic dress. (...) What some may perceive as remaining on "neutral technical ground" is for others an expression of an ivory tower mentality. As illustrated by the following anecdote: when ECJ President Lenaerts read the judgment aloud in his native language Dutch, he read "Islamist headscarf" instead of "Islamic headscarf". In Dutch, this is only one letter extra (Islamitisch/Islamistisch), yet anyone who has some degree of familiarity with debates on Islam is aware of the crucial difference. Not the ECJ President, apparently'. In fact, the criticism can be made harsher still, for not only does the Court not refer to the concerns raised by anti-religious sentiment in general and Islamophobia in particular: AG Kokott seems to have herself participated in the legitimization of a number of amalgams, as the opening lines of her opinion inexplicably insist on 'the social sensitivity inherent in [the] issue' at stake (the firing of Muslim women for wearing their headscarves at work) and 'the current political and social context in which Europe is confronted with an arguably unprecedented influx of third-country migrants and the question of how best to integrate persons from a migrant background is the subject of intense debate in all quarters'. On that note, it is worth noting that far from having anything to do with issues of integration, the two cases that reached the ECJ pertained to two female workers who were well-integrated, notably through their employment. If at all, the issue here is one of the judicial contribution to dis-integration, as the Court creates a legal framework in which these female workers can be fired.

implemented by means both ‘appropriate and necessary’.²¹ It also examines an alternative situation, namely: when there is no such formalised internal rule requiring neutrality, differential treatment could, under very limited circumstances, be justified for reasons pertaining to ‘genuine and determining occupational requirements’ as foreseen by Directive 2000/78’s Article 4§1. In this particular case, the referring court was asking the European Court of Justice to establish whether the willingness of an employer to take account of a customer’s wish to no longer have services provided by a worker who, like Ms Bougnaoui, wore an Islamic headscarf constituted a ‘genuine and determining occupational requirement’ within the meaning of Article 4§1 of Directive 2000/78.

That the French *Cour de cassation* should refer that question to the European Court of Justice is in and of itself quite remarkable, for it indeed sheds light on an interesting paradox pertaining to the socio-political meaning of anti-discrimination law in contemporary societies.²² On one hand, the issue of customer preference might appear to raise such fundamental questions (‘anti-discrimination law 101’²³?) that the fact of it being referred to the European Court of Justice in 2017 could be read as a formidable leap backwards from what we thought was commonly understood about anti-discrimination law. What, indeed, did the Greensboro Four²⁴ and many others fight for if, well over 50 years later, the question – can customer preference justify the implementation of discriminatory practices? – is still so fraught that France’s highest judicial court would refer it to the European Court of Justice? On the other hand, the issue of customer preference does in fact echo theoretical questions of profound complexity pertaining to the scope of anti-discrimination law. In fact, it is highly interesting that the European Court of Justice should choose to define the ‘legitimate’ desire of employers to impose a rule demanding neutrality of

²¹ See above.

²² V. Valentin, ‘Quelles perspectives pour la religion dans l’entreprise?’, *Revue des droits et libertés fondamentaux* (2017) available at <www.revuedlf.com/droit-social/quelles-perspectives-pour-la-religion-dans-lentreprise/>, visited 11 October 2017.

²³ In fact, a French labour law specialist has underlined the fact that the *Cour de cassation* had already ruled that customer preference could not be taken into account and that *direct* discrimination could not be justified by such considerations. Wolmark then further suggests that the French Court’s referral to the ECJ was thus to be understood as a willingness to disturb the solution reached in the much-debated *Baby Loup* case (on which see Hennette-Vauchez, *supra* n. 18), implicitly increasing the leeway of employers to restrict religious freedom in the workplace: see C. Wolmark, ‘Le foulard dans l’entreprise: la CJUE invitée dans le débat’, 7-8 *Droit Social* (2015) p. 648.

²⁴ In 1960 in Greensboro, North Carolina, Joseph McNeil, Franklin McCain, Ezell Blair Jr and David Richmond, four black men, organised sit-ins at the Woolworth department store’s lunch counter as a peaceful protest against the segregationist policies of the establishment. Whilst their sit-ins were neither the first nor the only ones, they have remained amongst the most famous of the civil rights movement.

conviction from their employees as a concept grounded in the freedom to conduct a business; framing it this way does indeed echo issues raised by Hannah Arendt in her important 'Reflections on Little Rock' on the scope and reach of anti-discrimination law.²⁵

Ultimately, however, the European Court of Justice answered the question referred by the French Cour de cassation in the negative. Reaffirming that anti-discrimination law extends to private relations – between employers and employees – thereby making them subject to the relevance and legitimacy of a juridical norm that constrains the former from discriminating against the latter on a number of forbidden grounds, the Court ruled that the exception carved out by Article 4§1 of the Directive should be interpreted narrowly. The notion of 'genuine and determining occupational requirements' ought thus to apply only to situations in which the nature of the activities concerned objectively demands that the employees' religion (or sex, ability...) be taken into account; it can never cover subjective considerations such as 'the willingness of the employer to take account of the particular wishes of the customer' (§40).

It now falls to national courts to draw conclusions from the European Court of Justice rulings of March 2017 – in both the *Achbita* and *Bougnaoui* cases, and beyond. As far as the French case goes, it is safe to predict that French courts will find the firing of Ms Bougnaoui discriminatory; it is hard to imagine that it could be convincingly argued that removal of the headscarf Bougnaoui had been wearing since day one was suddenly a 'genuine and determining occupational requirement' for the position of design engineer she had been holding, apparently to everyone's satisfaction, for over a year. But, from a wider socio-political perspective, however, it is unclear to what extent this most probable legal resolution of the case will truly have an impact on social practices inherent to the management of religious expression and diversity issues in the workplace. In fact, when read in combination with the *Achbita* case, the *Bougnaoui* ruling seems to lose its bite. For indeed, even though it follows from the *Bougnaoui* case that employers ought not be outspoken

²⁵ H. Arendt, 'Reflections on Little Rock', *Dissent*, 1959. This is a very stimulating, albeit complex and much-debated, text in which Arendt reacts to the deployment of federal troops to enforce *Brown v Board of Education* and the ensuing unrest in several Southern localities. Her text seeks to delineate the distinctions between 'the public', 'the social' and 'the political' and discusses the differentiated legitimacy of anti-discrimination laws to intervene in these three spheres. Although her text raises questions as to Arendt's insensitivity to issues of racial injustice and segregation (on which, see R. Ellison and H. Bentouhami, 'Le cas de Little Rock: Hannah Arendt et Ralph Ellison sur la question noire', 10 *Tumultes* (2008) p. 268 or, more recently: M. Burroughs, 'Hannah Arendt, Reflections on Little Rock and White Ignorance', 3(1) *Critical Philosophy of Race* (2015) p. 52), it shines an interesting light on many contemporary, contentious issues pertaining to the scope and legitimacy of anti-discrimination law. See M. Morey, 'Reassessing Arendt's "Reflections on Little Rock"', 10(1) *Law, Culture and the Humanities* (2014) pp. 88-110.

about basing decisions to dismiss personnel on customers preference, the ruling somehow incites or invites them to *anticipate* difficulties, anxieties or reluctance on the part of their clientele, and to *internalise* a possible solution *in the form of a neutrality requirement as a matter of internal company policy*. With the exception of the hardly insurmountable constraint of ensuring that the policy be enforced by means appropriate (consistent and systematic) and necessary, the *Achbita* ruling seems to provide a legal framework very favourable to such strategies.

CONCLUSION

Clearly, the 2017 rulings have, for many, come as a disappointment.²⁶ They certainly confirm that religious discrimination is a contentious issue, not only socially but also legally. The European Court of Human Rights does not seem to be any more at ease; in several recent high-profile religious freedom cases, it disregarded allegations that Article 14 of the Convention had been violated.²⁷ The fact that both European courts seem to hesitate when faced with claims of religious discrimination has generated increasing attention and indeed provoked more and more theoretically sophisticated criticism from historians, sociologists, and gender theory scholars as well as from social and political theorists. From a more limited legal perspective, it seems that these cases suggest at least two main lines of investigation: one theoretical and the other, political.

Theoretically, the *Achbita* and *Bougnaoui* rulings confirm the need to deepen our understanding of the connection between human rights law on the one hand (and its capacity to protect religious freedom) and anti-discrimination law on the other. To be sure, it seems intuitive that not every restriction on religious freedom equals discrimination;²⁸ in fact, legal definitions of religious discrimination

²⁶ It is also in striking contrast with predictions, largely at odds with the merits of the rulings examined here, that Directive 2000/78 ought to be interpreted as carving out a duty that weighs on employers to accommodate employees' needs, comparable if not identical to the duty that the Directive expressly spells out with regard to disabilities; see for instance: J. Ringelheim, 'Adapter l'entreprise à la diversité des travailleurs: la portée transformatrice de la non-discrimination', 1(1) *Journal européen des droits de l'homme / European Journal of Human Rights* (2013) pp. 57-82; and K. Alidadi, *Religion, Equality and Employment in Europe: the Case for Reasonable Accommodation* (Hart 2017).

²⁷ For a critique of the ways the European Court of Human Rights has made 'neutrality' a central concept of its Art. 9 case law, see J. Ringelheim, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach', 6(1) *Oxford Journal of Law and Religion* (2017) pp. 24-47.

²⁸ Lucy Vickers agrees that 'despite the importance of religious freedom as a fundamental human right, its protection in the work context should be limited, because of its complex and contested interaction with the rights of other, whether they be employers, or those outside the religious group', but suggests that acknowledgment of an employers' duty to accommodate would achieve greater

invariably refer to a differential or unequal treatment that unjustifiably takes religion into account – and not to *any* restriction on religious freedom. The situation on the ground is often trickier, however; the common grammar of proportionality infuses both human rights law and anti-discrimination law, and thus in the process often obfuscates not only the legal actors' reasoning but, potentially, the very matter at stake as well (a matter of discrimination or a (dis) proportionate interference in one's religious freedom?).

Politically, the *Bougnaoui* and *Achbita* cases, as well as the issue of religious discrimination in contemporary Europe more generally, raise the question of the price we are willing to pay for the preservation of (largely mythical) homogeneity and uniformity. For indeed, it must be noted that although these cases went off to Luxembourg as 'headscarf cases', they return to us today with a much vaster reach – a boomerang out of control. Indeed, the general framework worked out by the European Court of Justice in its two rulings allows companies to require not only religious neutrality but, much more generally, political or philosophical neutrality, from their employees as well. To the extent that 'an image of neutrality' is defined as constituting an *a priori* legitimate aim grounded in the freedom to conduct a business, all convictions are susceptible of falling prey to neutrality policies maintained by private undertakings. Arguably, this raises the question of how far we are willing to cuddle – if not accommodate – the xenophobic/Islamophobic tendencies that are gaining momentum in many European societies. Strikingly, the *Achbita* and *Bougnaoui* rulings can be read as meaning that an employer's decision to decline to hire (or in this case, to fire) female Muslim employees who wear the headscarf is an acceptable answer to the anxieties raised by the growing visibility of diversity in contemporary society. In fact, they could even be construed to make the exclusion of female Muslim workers who wear the veil acceptable, or perhaps even desirable: should we be getting ourselves ready to accept further curtailments of our freedom of expression for the sake of making it possible? Both referrals that preceded the March 2017 rulings left their national settings as issues regarding the Islamic veil. They returned to France and Belgium (and by extension, all EU member states) framed to encompass much broader issues: the freedom to express any and all convictions in the workplace. This is indeed quite alarming.

clarity and fairness than the anti-discrimination law model as it exists in the EU (i.e. one that does not formulate such a duty in field of religion – as opposed to disability): see L. Vickers, *Religious Freedom, Religious Discrimination in the Workplace*, 2nd edn (Hart 2016).