Muslims Headscarves before the Court of European Justice and EU institutions

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Achbita and Bougnaoui Can Muslim headscarves be banned from a private workplace? According to the Court of Justice's Grand Chamber, the answer is yes. In *Achbita* (Case C-157/15), a company rule barring all employees from wearing "any visible signs of their political, philosophical or religious beliefs" was found not to amount to direct discrimination on grounds of religion under Framework Directive 2000/78. Furthermore, the Court of Justice explained that such a rule could also be justified by the company's desire to display to customers a policy of neutrality. In *Bougnaoui* (Case C-188/15), on the other hand, a customer's wish not to have technological services provided by an employee wearing a headscarf, did not qualify as an occupational requirement allowing for different treatment.

The judgments clarify specific issues of EU anti-discrimination law. First, discrimination based on "religion" includes discrimination based on "religious affiliation" and on "religious exercise". Second, *Achbita* narrows the concept of "direct" discrimination, which does not cover the abovementioned company rule if applied equally to all employees. In other contexts, measures have been held to amount to direct discrimination not only if they relied on a suspect criterion (e.g. sex or sexual orientation), but also if they relied on a factor sufficiently linked to such a criterion (e.g. pregnancy or a registered partnership reserved for same-sex couples). Third, *Bougnaoui* rejects a reasoning based on – alleged – customer preferences (not to be served by foreigners or by Muslims, for example). The Court of Justice rightly emphasizes that occupational requirements have to be defined from an objective perspective. Otherwise anti-discrimination standards would be qualified by the very stereotypes and prejudices they are meant to combat.

At a more general level, *Achbita* shows that the Court of Justice is open to restrictions of religious manifestations based on a company's policy of "neutrality" (an outcome which corresponds to the French notion of "*laicité*" and the opinion of Advocate General Kokott in *Achbita*) instead of pressing for religious accommodation (a solution favoured by Advocate General Sharpston in *Bougnaoui*, but also by the ECHR in *Eweida* or the German Federal Constitutional Court in its second Headscarf Judgment). The Court of Justice, when examining the criteria that justify a different treatment indirectly based on religion, acknowledged, first, that a company's policy of neutrality constitutes a legitimate aim, second, that a corresponding internal rule which is applied in a consistent and systematic manner is appropriate, and, third, that the rule is necessary if it only affects employees who interact with customers.

This outcome is regrettable. First, one has to question the assumption that religious "neutrality", implying the absence of any representation of religion, is a legitimate aim in itself. If companies enjoy full discretion, based on the freedom to conduct a business, to set their own policies including a ban on religion, this will also replicate the stereotypes and prejudices the EU anti-discrimination law intends to combat. Considering the absence of religion as a common good, however, is even more questionable as it severely curtails freedom of religion and one-sidedly associates religion with proselytism or strife. Second, a solution based on the consistent and systematic application of company rules favours an all-or-nothing approach and prevents case-by-case solutions which are less harmful to religious freedom. Third, the particular burden inflicted upon Muslim women who feel genuinely compelled to wear a headscarf is nowhere taken into account in the necessity test. Advocate General Kokott even claims that "we should not rush into making the sweeping assertion that such a measure makes it unduly difficult for Muslim women to integrate into work and society".

However, the Court of Justice does not abolish the idea that religious needs have to be accommodated. First, it emphasizes that characteristics related to religion may only in very limited circumstances constitute an occupational requirement allowing for different treatment. Second, by affirmatively referring to the ECHR's decision in *Eweida*, it seems to take for granted that a private employee's right to wear a discreet religious sign is established under EU law as well. Finally and most importantly, the Court of Justice stresses the need to find solutions short of a dismissal of the religious employee, for example offering her a post not involving visual contact with customers.

What does this judgment mean for EU institutions? Can they bar their employees from wearing religious signs? EU institutions and organs are bound by the right to non-discrimination under Article 21(1) EU Charter of Fundamental Rights (the "Charter"). Even if the Framework Directive is more specific and, in part, possibly stricter than the general guarantee of non-discrimination, it seems that the reasoning in *Achbita* and *Bougnaoui* also applies to the Charter. The Framework Directive and Article 21(1) Charter both cover direct and indirect forms of discrimination and allow for justification based on the pursuit of a legitimate aim, proportionality and necessity (Article 52 Charter). In substance, one might argue that a private employer enjoys the freedom to conduct a business and has a much stronger legal basis for setting a policy of neutrality than a public employer such as the EU. Given the Court of Justice's inclination to see neutrality as a common good, however – an inclination shared by the ECHR in *Dahlab*, *Sahin* or *Ebrahimian* – one can expect the Court

of Justice to approve a similar policy by EU institutions aimed at promoting public faith in their neutrality and impartiality. Thus, EU institutions could lay down such a policy in Staff Regulations or Conditions of Employment (thereby satisfying the requirement of a "law" according to Article 52(1) Charter), but they would have to accommodate the needs of religious adherents as far as possible and to limit such a ban to employees who work in (visual) contact with the public.