

Companies' policies of neutrality and the principle of non-discrimination

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1. The workplace as battlefield between cultures.

Can the willingness of pleasing customers' (potential or expressed) uneasiness about some religious beliefs lead to dismiss an employee?

This kind of question is often analysed with respect to (female) workers wearing their Muslim headscarf at work. Not only the issue involves economic freedoms, fundamental rights, and anti-discrimination law. It also concerns the a real or presumed antagonism between people who follow or practice Islam and a supposedly incompatible European identity. This would result from an opposite understanding of the place reserved to religious convictions in irreconcilably different societies¹².

In a globalized society³ the workplace becomes an “intrinsically multiple” environment⁴. Thus, it tends to be also a privileged point of view of those

¹ Y.N. HARARI, *21 Lezioni per il XXI Secolo*, Saggi Bompiani, 2019 [*21 Lessons for the 21st Century*, 2018].

² F. OLIVIERI, *La critica dei pregiudizi sui migranti come strategia contro le discriminazioni razziali*, in T. CASADEI, *Lessico delle discriminazioni tra società, diritto e istituzioni*, Diabasis, Reggio Emilia, 2008, 73 ff.

³ M. McLUHAN, B.R. POWERS, *Il villaggio globale: trasformazioni nella vita e nei media*, Sugarcro, Milano, 1989 [*The Global Village: Transformations in World Life and Media in the 21st Century (Communication and Society)*, Oxford UP, New York, 1989]

⁴ M. RANIERI, *L'abbigliamento nei luoghi di lavoro: dalla tuta blu al velo usa e getta*, in

ambiguities that come along with the mentioned contraposition between cultures. Since several mystifications might cover the legal reasoning, a clarification of some concepts seems to be an appropriate and even necessary premise (par. n. 2). The analysis of ECJ case law (par. n. 2) and some comparative remarks will complete the study of “religious neutrality” at work (par. 4).

2. *Policies of neutrality and the rise of islamophobia.*

2.1. *Cultural racism.*

The spreading Islamophobia⁵ – increasingly built upon, among other factors, immigration from Islamic countries and notorious terror attacks⁶ – is hardly recognized as manifestation of racism⁷. Traditionally racism is defined as idea that a certain group of people – more or less arbitrarily chosen – should be considered biologically better than another one. Needless to say, this preference is not grounded on any scientific proof; nonetheless it has been often confectioned in the political arena in order to justify or promote a certain (unequal) power and wealth distribution. Nowadays the fear and unease shown towards Muslim people has to be understood as an insidious variant of a similarly racist approach. Clearly, it doesn't focus on physical or ethnical characteristics. More subtly, it is based on *cultural* differences⁸. Its inconsistency, aims, and consequences are nonetheless identical. What has been already recognized among sociologists as “cultural racism” acritically promotes the idea that a certain culture should prevail over another one for it represents a more evolved product of the humankind. Therefore, it should be defended from any possible contamination⁹. In a time

C.S.D.L.E. “Massimo D’Antona”, n. 100/2010, 2010, 2.

⁵ V. PACILLIO, *La discriminazione nei rapporti fra Stato e confessioni religiose: il caso dell’“islamofobia”*, in T. CASADEI, *Lessico delle discriminazioni tra società, diritto e istituzioni*, cit., 95 ff.; A. HAJAT AND M. MUHAMMED, *Islamophobia*, La Découverte, 2016.

⁶ F.M. CORRAO AND L. VALENTE (edited by), *L’islam non è terrorismo*, Il Mulino, Bologna, 2018. Y.N. HARARI, *op. cit.*, 193-250.

⁷ Similar suggestions to our discourse have been already stressed in the USA at least since the forties, G. MYDRAL, *An American Dylemma*, Hareper and Brothers, New York, 1944.

⁸ É. BALIBAR, *Le retour de la race*, in *Mouvements*, 2007/2 (n° 50), 162 ff., also available open access on <https://www.cairn.info/revue-mouvements-2007-2-page-162.htm>; Y.N HARARI, *op. cit.*, 225 ff.

⁹ P.-A. TAGUIEFF, *La forza del pregiudizio. Saggio sul razzismo e antirazzismo*, Il Mulino, Bologna, 1994 [*La force du prejudice : essai sur le racisme et ses doubles*, La Découverte, Paris, 1987]; É. BALIBAR, *Y a-t-il un « neo-racisme »*, in É. BALIBAR AND I. WALLERSTEIN, *Race*,

when tolerance and inclusion are strategic values given the irreversible social transformations, the perilousness of this reasoning is increased by its tendency to assimilate different populations, traditions, and interpretations of the sacred writings as well¹⁰, in a rather vague comprehension of “Islamic”¹¹.

2.2. European identity and its supposed antagonists.

The urgency to defend the European identity against a supposed Islamic invasion is often related to the assumption that the first one should be considered superior, inasmuch it would be more democratic. This would (also) rely on the minor relevance conferred to religious practices¹².

Defining European identity is at least problematic¹³, since Europe consists of different nations and cultures, including a certain variety of religions and approaches to the expression of them in public¹⁴. When the (ineffable) notion of European identity coincides with the contrast democracy/tolerance vs Islam/intolerance, its political outcomes become paradoxically undemocratic¹⁵. If anything, European identity can be searched in the process of realizing what has

nation, classe. Les identités ambiguës, La Découverte, Paris, 2007, 25 ff.

¹⁰ A. DE OTO, *Precetti religiosi e mondo del lavoro. Le attività di culto tra norme generali e contrattazione collettiva*, Ediesse, Roma, 2007, 133 ff.

¹¹ A. FACCHI, *Comunità musulmane e il “problema” dell’identità culturale*, in F.A. CAPPELLETTI and L. GAETA (edited by), *Diritto del lavoro e alterità. Figure della diversità e modelli culturali*, ESI, Napoli, 1998, 265 ff.

¹² Y.N. HARARI, *op. cit.*, 215.

¹³ T. TORODOV, *Identità europea*, Milano, Garzanti, 2019 [*L’identité européenne*, 2009]; T. TORODOV., *Lo spirito dell’illuminismo*, Garzanti, Milano, 2006 [*L’esprit des Lumières*, 2006]; EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR RESEARCH & INNOVATION, *The Development of European Identity/Identities: Unfinished Business. A policy review*, Brussels, 2012, available on https://ec.europa.eu/research/social-sciences/pdf/policy_reviews/development-of-european-identity-identities_en.pdf; D. SLIKERMAN, *The Mirage of European Culture*, Paper prepared for the 7th Euroacademia International Conference Europe Inside-Out: Europe and Europeaness Exposed to Plural Observers, Porto, 28 – 29 April 2017.

¹⁴ H. KNIPPENBERG (edited by), *The changing religious landscape in Europe*, Het Spinhuis, Amsterdam, 2005.

¹⁵ M. RANIERI, *Identità, organizzazioni, rapporti di lavoro*, CEDAM, Milano, 2017, 14. The Author refers to the thesis elaborated by A.K. SEN, *Identità e violenza*, Laterza, Roma-Bari, 2006 [*Identity and Violence. The Illusion of Destiny*, W.W. Norton & Company, New York - London 2006]. See also Z. BAUMAN, *Intervista sull’identità a cura di Benedetto Vecchi*, Laterza, Roma-Bari, 2003 [*Identity. Conversations with Benedetto Vecchi*, Polity Press, Cambridge-Malden, 2004].

be described as the most relevant multicultural experiment of human history so far¹⁶. However, it is true that (a) European countries are striving to define their common core of values and principles¹⁷; (b) this process mostly moves from ideals that have been affirmed almost everywhere in Europe after the Enlightenment; (c) they include: tolerance, rationality, equality, respect of free will, and *secularism*¹⁸. Apart from the discussion on the (true or false) decline of religion in Europe¹⁹, this narrative often lacks a clear distinction between religious freedom and secularism. Secularism is the separation of the State from Churches²⁰. Whether Europeans are religious or not – *rectius*, tend to manifest their personal beliefs or not²¹ – does not impact on secularism. Intolerance towards private citizens who manifest their Muslim faith in public does not relate in any way with defending any European identity.

2.3. *Varieties of secularism and neutrality.*

Neutrality and secularism in (respectively) private institutions/public workplaces or performing a private/public service²² can be understood in two

¹⁶ This is one of the main theses elaborated by Y.N. HARARI, *op. cit.* About the crisis of multiculturalism in Europe, due to the rise of populism, R. CHIN, *The Crisis of Multiculturalism in Europe. A History*, Princeton University Press, Princeton, 2017.

¹⁷ Which is crucial for the elaboration of the notion of EU Citizenship. A. SCHRAUWEN, *Citizenship of the Union*, in P. J. KUIJPER, F. AMTENBRINK, D. CURTIN, B. DE WITTE, A. McDONNELL, & S. VAN DEN BOGAERT (Edited by), *The Law of the European Union*, 5th ed., Alphen aan den Rijn, Wolters Kluwer, 2018, 611 ff.

¹⁸ This is the thesis elaborated by T. TODOROV, *L'esprit des Lumières*, Paris, Robert Laffont, 121 ff.

¹⁹ R. HENKEL AND H. KNIPPENBERG, *Secularisation and the rise of religious pluralism*, in H. KNIPPENBERG (edited by), *The changing religious landscape in Europe*, cit., 3 ff.

²⁰ With some differences in terms of the understanding what secularism means in practice. For example, Article 1 of French Constitution (1958) establishes that France is an indivisible, secular, democratic and social Republic, whereas Article 7 of Italian Constitution (1948), when affirming the separation between Italian State and Catholic institutions, specifies also that their relationships will be further regulated by a specific agreement.

²¹ Article 9 ECHR establishes that the right of freedom of thought, conscience and religion includes the right to manifest his religion or belief, in worship, teaching, practice and observance. This is literally the same content of Article 10 EUCFR; this Charter is recalled by (by reference to the constitutional traditions common to the Member states) within the very first preamble of Directive 2000/78/EC. In accordance with Article 52 (3) of the EUCFR, the right guaranteed by Article 10 has the same meaning and scope of Article 9 ECHR.

²² In this paper we consider secularism only with respect to public workplaces. More

different ways²³. On one hand, their outcome can be the absence of any symbol of religious beliefs; on the other, they can result in a complete freedom of showing whatsoever sign of them. Secularism (in a public institution or in the exercise of a public service) is conceived – to simplify on this – in the second way in some countries, and in the first in some others²⁴. It depends on the existence or not of a legal duty of public entities to show no preferences towards any religious institution²⁵. A different problem occurs when neutrality in the sense of no-symbol policy is required in a relationship among privates; this is the issue that will be further analysed.

3. *Internal rules of neutrality: meaning and limits according to ECJ case law.*

3.1. *Is the will to exhibit an image of neutrality with customers a mere sophism to bypass direct discrimination?*

The expression “policy of neutrality” is crucial for understanding the reasoning of the ECJ in two fundamental decisions, namely the cases known as *Achbita* and *Bougnaoui* (decision of 14 March 2017, case C-157/15, *Achbita v. G4S Secure Solutions NV*; decision of 14 March 2017, case C-188/15, *Bougnaoui v. Micropole SA*).

Interestingly, this word in those cases wasn’t used by the defendant, as one would expect²⁶, being explicitly introduced for the first time by the Court itself in the case *Achbita*. The dispute concerned a receptionist who had been dismissed for her decision (taken after three years of employment relationship) to wear a Muslim headscarf at work. The company affirmed that there was an unwritten rule according to which workers could not wear any visible sign of their

generally on the subject, C. DEL BÒ, *Il rapporto tra laicità e neutralità: una questione concettuale?*, in *Stato, Chiese e pluralismo confessionale*, n. 33/2014, available on https://www.statoechiese.it/images/uploads/articoli_pdf/delbm_laicit.pdf?pdf=il-rapporto-tra-laicita-e-neutralita-una-questione-concettuale.

²³ On this, J.H.H. WEILER, *Je suis Achbita*, in *Rivista trimestrale di diritto pubblico*, 2018, 1113 ff.

²⁴ L. SALVADENGO, *Il divieto per i dipendenti di imprese private di esibire simboli religiosi all’esame della Corte di Giustizia della Corte Europea*, in *Rivista di diritto internazionale*, 2017, 808 ff.

²⁵ For the definition of public service in the French legal system, C. WOLMARK, *op. cit.* 729. In Germany, F. NEUGEBAUER, S. SURÄ, *op. cit.*, 351.

²⁶ P. DORSSEMONT, *op. cit.*, 101.

political, philosophical or religious beliefs in the workplace. Following the decision of Ms Achbita to wear the headscarf at work anyway, the employer informed her that this behaviour could not be tolerated. Ms Achbita did not change her mind. The works council²⁷ subsequently approved an amendment to the workplace regulation, prohibiting the wearing of any visible signs of political, philosophical or religious beliefs. Ms Achbita was dismissed on the ground of her insistence to behave against the wishes of the employer, who claimed to have the right of avoiding customers' possible uneasiness towards manifestations of religious belief. The ECJ declared that an internal rule as such would not introduce a difference of treatment *directly* based on religion or belief, for the purposes of Article 2(2) (a) of Directive 2000/78, because all workers would have been treated in the same way: the internal rule was requiring them, in a general and undifferentiated way, to dress *neutrally*.

The argument seems controversial. What does it mean to dress neutrally if not *prohibiting* to wear any symbol of religion or beliefs? Isn't there any contrast to the EU general principle of freedom of thought, conscience and religion? The latter is one of constitutional traditions common to Member States referred to by Article 6 TFUE, and guaranteed by Article 10 EUCFR, and Article 9 ECHR. It is also recognized as such by Directive 2000/78/EC. Under EU law, being religious or believing in a certain *Weltanschauung*²⁸ is fully permitted both in private and in public: in *Achbita* (the reasoning is repeated in *Bougnaoui*) the Court declared that the meaning of "religion" in Article 1 of Directive 2000/78 has to be based on the interpretation of Article 9 ECHR (Case of

²⁷ According to the Belgian law, it is a joint body, chaired by the employer.

²⁸ For a restrictive interpretation of the word *belief* under Directive 2000/78/EC, R. SANTA-GATA, *Discriminazioni nel luogo di lavoro e «fattore religioso»: l'esperienza tedesca*, in *Riv. it. dir. lav.*, 2011, I, 353 ss. The Author retains that the term concerns only convictions related to opinions about God and the meaning of life. An opposite approach is followed by V. DE STEFANO, *Tutela antidiscriminatoria e affiliazione sindacale: una possibile lettura "multilivello"*, in *Arg. dir. lav.*, 2014, 1045 ff. The Author underlines that the directive recalls various supranational sources (preamble n. 4: «The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights»): this should lead to consider, among others, also political and trade union views (Art. 7, UDHR; Art. 26, UN Covenant, Art. 14 ECHR). I personally agree with this approach, according to which the directive protects the freedom to follow and manifest any belief that can be relevant for ones' conscience in his or her thought. This approach would be coherent with the literal formulation of Article 9, ECHR, that refers to the freedom of *thought, conscience and religion* in a broad sense.

Eweida and Others v. The United Kingdom, 27 May 2013, applications nos. 48420/10, 59842/10, 51671/10 and 36516/10), according to which the notion includes the right to *manifest* religious beliefs. To be noted that the same can be said about other personal convictions and beliefs. The concept of *neutrality* is on the contrary unknown to the mentioned legal sources, being rather a-technical and not univocal (see above, par. n. 1.3). Only an understanding of it that guarantees the *freedom of behaving* according to personal thoughts, conscience, and religious beliefs seems to be consistent with the respect of fundamental rights among EU Member States.

The Advocate General Kokott in *Achbita* retained that «the Court has generally adopted a broad understanding of the concept of direct discrimination (...). However, all of those cases were without exception concerned with individuals' immutable physical features or personal characteristics» (§§ 44-45). Therefore, there would be no direct discrimination towards Ms Achbita because *she could behave differently*.

In my opinion, it is not other private's (in this case, employers) non judges²⁹ to decide which personal beliefs are inherent to one's personality: this is the point of establishing freedom of thought, religion, and conscience and a principle of equal treatment regardless to their manifestation. The ECtHR in *Eweida*³⁰ declared that the right to freedom of thought, conscience and religion denotes views that attain a «certain level» of cogency, seriousness, cohesion and importance, such as, for example, «an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form» (§§ 81-82). That is pretty clearly the case of the Muslim headscarf. It does not count whether it seems to non-religious (or to employers' customers...) that wearing it is avoidable, since «there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question» (§ 82), unless when it comes to circumvent an *illegal* behaviour under national criminal law (§ 83).

To justify her reasoning, Kokott compares Ms Achbita with other religious workers, forgetting not only that the *right comparator* is someone who has no wish to make use of the freedom of thought, conscience and religion. From this point of view, it is almost self-evident that the applicant was treated less favourably than another engineer working with the same employer who had not chosen to manifest his or her religious belief by wearing specific clothes (this might occur also because practicing a certain religion or being consistent with a certain

²⁹ V. NUZZO, *La Corte di Giustizia e il velo islamico*, in *Riv. it. dir. lav.*, 2017, II, 436 ff.

³⁰ Case of *Eweida and Others v. The United Kingdom*, 27 May 2013, cit.

belief not always implies a dress code as it is the case of some people of Muslim faith)³¹. The idea that the adequate *tertium comparationis* is not another worker who is willing to show his or her religious beliefs through the clothing, but rather another worker *who is not willing* to manifest his or her religious beliefs wearing recognizable symbols³² has been expressed by the Advocate General Sharpston in *Bouagnaoui* (see further, in the following paragraph). The same Sharpston, in another case, described pretty clearly the distinction between direct and indirect discrimination in these terms: «I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification»³³. If the employer establishes a policy of neutrality concerning any manifestation of religion and belief, this actually affects only those workers who should be protected from the prohibition to unequal treatment based on religion or belief³⁴. No one could argue that *other opinions* would fall under the same employers' prescriptions, for two reasons: first, the notion of belief protected

³¹ Agrees with this perspective L. SALVADENGO, *op. cit.* The Author underlines the broad interpretation of direct discrimination in the previous case law of the ECJ.

³² Opinion of Advocate General Sharpston delivered on 13 July 2016, Case C-188/15, *Bouagnaoui*, cit., § 34. This is also stressed by P. DORSEMONT, *op. cit.*, 100, who points out that the same Court of Justice affirmed direct discrimination based on gender not comparing workers that had been undergoing an operation of gender assignment, but comparing workers that did not change their gender and workers who did (ECJ, 30 April 1996, Case C-13/94, *P v S and Cornwall County Council*). Similarly, C. WOLMARK, *La neutralité du salarié*, cit., 734.

³³ Opinion of Advocate General SHARPSTON delivered on 25 June 2009 (1), Case C-73/08, *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française*, § 54.

³⁴ In other terms, this kind of rule is not similar to the case of requiring a minimum height or physical structure for performing a certain task: the latter could be considered indirect discrimination based on sex (unless the criterion is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary), because, even though women are usually shorter than men, the requirement might also affect some (fewer than women) men. If a neutrality policy is established, on the contrary, there will be no impact on those workers who are not wishing to show any particular religious belief or opinion. In the notorious case *Dekker*, for example, the worker was told that she did not get the job (she was the best candidate) not because of her pregnancy but for the financial consequences that this would cause. The Court concluded that «only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex» ECJ, 8 November 1990, Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum)*, §§ 10, 12, 14. This approach has been followed in several other cases. See Opinion of Advocate General SHARPSTON delivered on 25 June 2009, cit., §§ 51 ff.

by the same anti-discriminatory rule is rather broad; any reasoning based on this would be intrinsically weak. Second, and more importantly, direct discrimination must be evaluated *for each* prohibition considered within the employer's prescription. In this case, religion.

Thus, a religious worker must be compared with a non-religious one or with one whose religion or belief (or personal understanding and practice of it) does not imply the use of symbols. It would be easier to imagine the same reasoning relating to differences of treatment traditionally considered to be racist. Coherently, Sharpston observes that freedom of religion is protected under EU law because «it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not»³⁵.

3.2. *The not so legitimate aim of complying with customers' desires*

In *Achbita* the ECJ pointed out that an internal rule *could amount to indirect discrimination* if the national referring Court ascertained that the apparently neutral obligation encompassed actually a difference of treatment.

This might actually be the case for those Muslim communities that consider wearing a headscarf not only compulsory but more importantly a way to *practice* their religion³⁶. It is *usually* not the same for most Christians. But in case some Christian communities followed their ancient traditions (needless to say, a similar use of female clothing was common in the past)³⁷? Would it be offensive to anybody, even though Christianity is in some contests so diffused to appear somewhat in compliance with the normality?³⁸ Or not, because customers have a problem only towards Islam and other non-majoritarian religions?

³⁵ Opinion of Advocate General Sharpston delivered on 13 July 2016, Case C-188/15, *Bouagnaoui*, cit., § 118.

³⁶ J.H.H. WEILER, *op. cit.*

³⁷ A. DE OTO, *op. cit.*; T. CASADEI, *op. cit.*

³⁸ Usually *the unsaid* is that the headscarf would be offensive against women. As said by the ECtHR in *S.a.S. v. France*, Judgment of 1 July 2014 (§ 120) «However essential it may be, respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places. The Court is aware that the apparel in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy». *Contra*, but less recently, *Dhab v. Switzerland*, Decision of 15 February 2001. Another argument could be a not welcome proselytising and the need to respect others' freedom to not be informed above a certain limit of tolerance. For the distinction between proselytising and professing ones' religion, Opinion of Advocate General Sharpston delivered on 13 July 2016, Case C-188/15, *Bouagnaoui*, cit., §§ 73 ff.

Would it be legitimate to comply with their desires? The ECJ clarified that there would be no indirect discrimination if the difference could be justified through a *legitimate aim*. According to the Court «the desire to display, in relations both with public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate (...) notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employers' customers» since it «relates to the freedom to conduct a business that is recognised in Article 16 of the EUCFR».

This reference to Article 16 of the Charter is somewhat at odds with the decision of the ECtHR in the case *Eweida* (which was referred to by the ECJ itself for the defining “religion”). It is true that the Court considered this aim potentially legitimate, but the decision actually concluded that national authorities failed to protect Ms Eweida's faith³⁹. The desire to manifest a religious belief had to be given more weight in that case, since it is a fundamental right and the applicant was wearing a very discreet symbol. The employers' will to project a certain corporate image, on the contrary, was not considered to be based on evidences of any real encroachment of equal interests (§ 94)⁴⁰.

More importantly, I agree with those who focused on the scope of Article 16 of the Charter, reminding us that it must be read together with Article 52 (3) of the same Charter, according to which when the Charter contains rights included within the Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope shall be the same of the Convention. Since the latter guarantees the right to manifest personal beliefs or religious faiths and doesn't equally protect the freedom to conduct a business, this should be exerted only within the boundaries of Article 9 ECHR⁴¹. No prohibition of wearing

³⁹ States have a certain margin of appreciation when balancing the right of religion with others' freedoms or rights by the mean of Article 9 (2) ECHR. On this, T. LEWIS, *What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation*, in *International and Comparative Law Quarterly*, 2007, 395 ff. Also according to EU law States have a large margin of appreciation, when it comes to the proportionality test implied by Article 2 (b) (i) of Directive 2000/78.

⁴⁰ The question of proving *the cost* of discrimination remains rather controversial. See on this P. ADAM, N. MOIZARD, *L'évaluation économique du coût des discriminations*, in *Revue de droit du travail*, 3017, 205 ff. It also raises more general questions concerning the monetization of workers' rights and the balance of powers in the employment relationship. K.E. KLARE, *Abbigliamento e potere: il controllo sull'aspetto del lavoratore subordinato*, in *Dir. lav. rel. ind.*, 1994, 567 ff.

⁴¹ L. SALVADENGO, *op. cit.*; P. DORSSEMONT, *op. cit.*, 103, who underlines that the freedom to conduct a business, historically conceived against public powers, is nowadays understood rather against workers in the judgments of the ECJ (for instance, Case C-201/15, 21 December

religious symbols, when «the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers» (*Achbita*, § 38) should be considered “pursuing a legitimate aim”. Especially, as in *Eweida*, if no economic damage is proven.

3.3. From direct to indirect discrimination

Assuming – which is denied – that showing a certain corporate image to the customers were a legitimate aim, would it be also an *objective* one, as required by Article 2 (b) (i) of Directive 2000/78/EC?

Ms Bougnaoui, an engineer, had been dismissed because a customer claimed that her wearing of the veil had upset more than one among his employees. The employer considered that the refuse of not wearing the headscarf in contact with customers made impossible for her to carry out her functions on behalf of the company. The French *Cour de cassation* referred to the EJC the question whether Article 4(1) of Directive 2000/78 could be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have 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 *contest* in which they are carried out. The Court answered that this concept cannot «cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer».

It might be useful to remember that this this notion is to be used by Member States when their legislation is providing a legitimate difference of treatment based on the ground of Article 4 (1) of Directive 2000/78. Companies’ requirements would be of any use in the absence of a national legislation implementing the Directive to this respect. As it is pointed out by the Advocate General Sharpston, in this case the referring Court referred to Article L. 1133-1 of the Labour Code «without specifically stating that that is the provision of national law that is intended to give effect to Article 4 (1)»⁴². However, this article establishes only the need of a genuine and determining requirement if the aim is legitimate and the requirement is proportionate⁴³, whereas it would have been necessary

2016, *Aget Iraklis*).

⁴² Opinion of Advocate General SHARPSTON delivered on 13 July 2016, Case C-188/15, *Bougnaoui*, cit. § n. 91.

⁴³ K. BERTHOUS, *Différences de traitement : esquisse des « exigences professionnelles » après*

to refer also to Article 1121-1 of the Labour Code in order to consider also the nature and contest of the activity. Anyway, the literal transposition of the Directive seems to be rather generic⁴⁴; this makes it difficult to evaluate its consistency with preamble n. 23 of Directive 2000/78/EC, which establishes that the exception has to be interpreted restrictively.

In *Bouagnaoui* the ECJ points also out that, if the employer implemented a «policy of neutrality *vis-à-vis* its customers, and if the means of achieving it are appropriate and necessary» (*Bouagnaoui*, § 38) a similar difference of treatment would not amount to indirect discrimination, since the case *Achbita* already established that *neutrality vis-à-vis its customers is an objectively legitimate aim* (*Bouagnaoui*, § 33).

The fact that the reasoning only works if customers' possible reactions are concerned somehow reveals that "Emperor has no clothes": its logic consequences are pretty discriminatory if not racist. If there were an objective reason related to the kind of service or production (safety reasons, psychologically vulnerable patients of a clinic...⁴⁵), customer' opinions wouldn't be relevant⁴⁶. Thus, it seems to me that what is considered to be *subjective* and therefore leading to direct discrimination (customers' requests) oddly becomes legitimate as far as indirect discrimination is concerned (internal rule following customers' requests). It is true that exceptions to direct discrimination are narrower. Nonetheless both of them should be conceived objectively. Otherwise, companies have only to take account of customers' cultural racism and firmly prohibit the wearing of any symbol at the workplace. The more internal rules will be intolerant, the better: differences of treatment are legally "safer", ironically, in the worst scenario, that is, when they are foreseen and strictly implemented. Shifting the qualification from direct to indirect discrimination means nothing but shifting from objective to subjective justifications. These latter actually allow an enlargement of employers' powers of direction under the veil of the freedom to conduct a business, at the cost of limiting the exercise of fundamental rights.

4. Different understandings of neutrality among EU countries. Some

la loi du 27 mai 2008, in *Droit social*, 2009, 410 ff.

⁴⁴ P. DORSSEMONT, *op. cit.*, 101.

⁴⁵ See the case brought before the ECHR, *Ebrahimian c. France*, 26 February 2015, that concerned *vulnerable* patients of a *public* hospital. This example is ironically considered by P. DORSSEMONT, *op. cit.*, 104.

⁴⁶ For a new understanding of the enterprise in labour law, more in the sense of its place within the market than as functional unity of workers and production, P. DORSSEMONT, *op. cit.*, 103; C. WOLMARK, *op. cit.*, 728.

national examples.

The recently drafted Article L. 1321-2-1 of the French Labour Code (introduced by Article 2, law n. 2016-1088 of 8 August 2016) provides a «*mode d'emploi*» to those employers who are willing to prohibit any manifestation of religion or belief at the workplace⁴⁷: by the mean of this article, an internal rule can contain *clauses of neutrality* that limit employees' manifestation of their personal convictions if the restrictions are justified by the exercise of other freedoms or fundamental rights or in case they are necessary to “companies' performances” (*par les nécessités du bon fonctionnement de l'entreprise*) and if they are proportionate. Article L. 1321-2-1 has been introduced *after* the affaire *Baby Loup*, which decision has been criticized by a pronouncement of the Human Rights Committee⁴⁸. In that case a kindergarten teacher's dismissal for wearing the veil was judged legitimate by the *Cour d'Appel* of Paris on the basis of an internal rule of neutrality⁴⁹. It must be underlined that in France a principle of secularism imposes to *public servants* (or workers carrying a *public service*) a duty of abstention from showing any religious symbol. The decision was therefore considered rather controversial, because the teacher was carrying a service of general interest, but not a public service⁵⁰. After the ECJ sentence on the case *Bougnaoui* and the described statutory reform, the rule in France is nowadays similar to the *Baby Loup* decision: there is no prohibition to wear a religious symbol within private companies carrying on private services, *unless* it is provided by an internal rule. According to the *Cour de cassation*, policies of neutrality are justified when workers' duties involve contacts with customers⁵¹. To

⁴⁷ C. WOLMARK, *La neutralité, difficultés logiques et idéologiques*, in J. PORTA, T. SACHS (directed by), *Peut-on concevoir la neutralité dans l'entreprise ?*, in *Revue de Droit du Travail*, 2017, 238.

⁴⁸ Human Rights Committee for the implementation of the International Covenant on Civil and Political Rights. *F.A v. France*, (“Baby Loup” case), Communication 2662/2015, 10 August 2018.

⁴⁹ *Cour d'Appel de Paris*, decision of 27 November 2013, where the Court defended the «company wishes to impose on its employees the principle of neutrality to transcend multiculturalism».

⁵⁰ C. WOLMARK, *La neutralité du salarié*, cit., 729 ff. Of a different opinion on the issue of neutrality, I. DEBARATS, *De la neutralité des lieux de travail*, in *Revue de droit du travail*, 2015, 309.

⁵¹ *Cour de cassation*, n°2484 (13-19.855) decision of 22 November 2017. Moreover, the Court established a duty to provide reasonable accommodation; this has been only suggested in

be noted that the reform may concern *any* personal conviction or manifestation of it in a general way. This actually confers employer the power of putting in place an understanding of neutrality that can go well beyond the notorious seriousness of French secularism.

Differently, in Italy the *Corte d'Appello* of Milan recently qualified as direct discrimination the decision of a company to exclude a candidate from a job interview because it was based on her insistence to wear the Muslim veil (the job advertisement contained some esthetical requirements; loose hairstyle was indicated as preferred but not necessary)⁵². Moreover, if a company in Italy established an internal rule of neutrality, in the sense explained by the ECJ, its non-relevance in terms of indirect discrimination should be judged not only in the light of the transposition of the Directive 2000/78/EC (Law decree n. 216/2013) but also considering the rules contained in the previous Law decree n. 286/98. Together, they establish that there is indirect discrimination when a group of people is treated with a particular disfavour (Article 2 (1) (b), Law decree n. 216/2013) on the basis of requirement that are *not essential* for the task performed (Article 43 (2) (e) of Law decree n. 286/98). The formulation differs very slightly from the exception provided in case of direct discrimination. It might imply that an *objective* legitimate aim is anyway required under Italian Law⁵³. Other limits could be found in the Italian Constitution (artt. 13, 19, 21, 41)⁵⁴ or under the freedom of opinion and expression of personal conviction enshrined by Law n. 300/1970⁵⁵. Neutrality at the workplace should be conceived in respect for anybody's convictions, with some boundaries related

the already mentioned case law of the ECJ. Another problem is whether this kind of solution could be compatible with the prohibition of harassment by the mean of Article 2 (3) of Directive 2000/78/EC.

⁵² Decision of 20 May 2016, n. 579/2016. E. TARQUINI, *Il velo islamico e i diritti di discriminazione: spunti per alcune riflessioni sull'efficacia protettiva del principio paritario*, in *Labor*, 2016, 431 ff. The sentence reformed the previous decision of Tribunale di Lodi, order n. 15558/2014 of 7 July 2014. M. PERUZZI, *Il prezzo del velo: ragioni di mercato, discriminazione religiosa e quantificazione del danno patrimoniale*, in *Riv. it. dir. lav.*, 2016, 821 ff.

⁵³ M. AIMO, *Le discriminazioni basate sulla religione e sulle convinzioni personali*, in M. MARBERA (edited by), *Il nuovo diritto antidiscriminatorio*, Giuffrè, Milano, 2007, 43 ff. LAS-SANDARI L., *Le discriminazioni nel lavoro. Nozioni, interessi, tutele*, in *Trattato di diritto commerciale diretto da F. Galgano*, Cedam, Padova, 2010. V. NUZZO, *op. cit.*

⁵⁴ Despite their application can be made only case by case by the Judge, M. RANIERI, *L'abbigliamento nei luoghi di lavoro*, cit., 34 ff.

⁵⁵ PERA G., *Libertà e dignità dei lavoratori*, in *DL*, 1980, 195.

to objective circumstances.

Germany might be another example where clothing requirements are limited to very objective circumstances⁵⁶. In most cases, private employers have been considered obliged to guarantee a right to diversity, with the only limits of proven and relevant economic damages or safety reasons⁵⁷. In case of Churches or other *Tentenzbetriebe*, German law permitted their self-determination of the essential and determining requirement that could justify restrictions of religion or belief (Article 9, *Allgemeines Gleichbehandlungsgesetz*). This was due to an understanding of secularism – similarly to the German way to put in practice religious neutrality among privates – not in terms of indifference but rather of «comprehensive and respectful neutrality»⁵⁸, according to which State should protect Churches and other religious communities' right to follow their ethic convictions.

Examples could be countless and more deeply analysed. Anyway these brief remarks already show that neutrality can be understood in several manners. Therefore, defending *one version* of it as it were irrefutably legitimate, even when the point is following customers' irrational fears, seems to me a way to cover the aim of neutralizing workers' rights at the workplace. This way, neutrality is all but neutral.

⁵⁶ F. NEUGEBAUER, S. SURA, *Das Verbot religiöser Kleidung und Symbolik am Arbeitsplatz – Unternehmerisches Freiheitsrecht und öffentliches Desiderat einer neutralen Beschäftigungsgestaltung?*, in *RdA*, 2918, 350 ff.

⁵⁷ R. SANTAGATA, *op. cit.* German Courts tend to balance constitutional rights (freedom of religion, Article 4 *Grundgesetz*; freedom to conduct a business, Article 12 *Grundgesetz*) in the light of the principles of civil law of good faith and equity, leading to very moderate and balanced decisions.

⁵⁸ J. BROCKMANN, *Occupational requirements within Churches or religious organizations in Germany*, in *Hungarian Labour Law E-Journal*, 2019, 1, 79.