

Il principio di uguaglianza e non discriminazione sulla base delle convinzioni religiose: riflessioni basate su campioni giurisprudenziali

The principle of equality and non discrimination on grounds of religious convictions: reflections based on case law samples

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ABSTRACT

Questo articolo si propone di riflettere sui problemi derivanti dalla diversità religiosa e il suo impatto sui rapporti di lavoro. Secondo la giurisprudenza che fornisce i motivi di questa riflessione, ci concentriamo sui problemi riguardanti l'orario di lavoro e il tempo libero e anche l'uso di simboli religiosi. Questi problemi portano all'idea di ragionevole adeguamento delle condizioni di lavoro secondo le manifestazioni religiose. Portano anche a chiedere come concepiremo il principio della neutralità religiosa.

Paroli chiave: Credenze religiose ed espressione religiosa – tempo di lavoro – simboli religiosi – adeguamento ragionevole.

This article aims to reflect on the issues arising from religious diversity and its impact over employment relationships. According to the case law that provides the grounds of this reflection, we focus on problems concerning working time and time off and also the wearing of religious symbols. These issues lead us to the idea of reasonable accommodation of the working conditions according to religious manifestations. They also lead to ask how we shall conceive the principle of religious neutrality.

Keywords: Religious beliefs and religious expression – working time – religious symbols – reasonable accommodation.

SOMMARIO:

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Introduction

The relevance of the issues concerning the impact of religious beliefs on employment relationships is currently quite visible and it is foreseeable that it is going to be greater in

the near future¹. Being, on the one hand, a salutary reflect of the globalization phenomenon, and arising, on the other hand, from the well-known crisis felt in the middle-east countries, the migratory movements put before our eyes the need for reflecting over the multiculturalism challenges, among which those concerning religious convictions are perhaps the most delicate. In fact, it is interesting to observe that even in countries known by their religious homogeneity, this sort of conflicts began to arise in a more visible way in the near past². In Portugal, for instance, despite the great majority of the population is catholic or, at least, grew up within a catholic educational ambience, recent case law provides some very important rulings concerning that sort of conflicts, as we will mention forward. Further, in countries where religious tolerance has been socially achieved, like the United Kingdom, some voices ask if a tolerant behavior towards minorities is enough if we have in mind the ideal of equality; if we do, if we intend to launch a multi-cultural society in which minorities are not in disadvantage compared to the religious majority, then we shall adopt a positive attitude in order to grant «equal regard and respect»³.

If those challenges address the whole society – the civil society and the public bodies –, one of fields in which they become more delicate is the circle of employment relationships⁴; the integration of the employees in a complex organization headed by a different person, together with the asymmetry of positions, both factual and juridical, between the parties of the employment contract, justify that assertion. How shall the employer deal with religious expression behaviors, namely if they do not fit the habits of the majority and, therefore, launched in the workplace? May he establish a rule of religious neutrality? And does this decision produce an equal effect on all the employees? If we assume that there is a *right to diversity* emerging from religious plurality together with the principle of equality and non discrimination⁵, what is the true meaning of that assertion, as far as employment relationships are concerned? These are the main problems we intend to think about in the present article⁶.

¹ For example, in Portugal, S. SOUSA MACHADO, *A discriminação religiosa na perspetiva das relações laborais*, in *Contrato de trabalho e liberdade religiosa*, Editorial Jorúa, Porto, 2018, 13/14.

² Curiously, some literature reports that multi-culturalism policies put in action in some occidental countries in the 70 decade are now decaying, and some consider it is dead. See J. MACLURE/F. BOUCHER, *Conclusions générales: enjeux et perspectives de l'obligation d'accommodement raisonnable dans les sociétés pluralistes*, in E. Bribosia/I. Rorive (coord.), *L'accommodement de la diversité religieuse. Regards croisés – Canada, Europe, Belgique*, Peter Lang, Brussels, 2015, 343/344.

³ M. FREEDLAND/L. VICKERS, *Religious expression in the workplace in the United Kingdom*, in *Comparative Labor Law & Policy Journal*, 30, 2009, 600.

⁴ S. LAULOM, *Religion at work: European perspectives*, in *Hungarian Labour Law e-journal*, 2019, 1, 1.

⁵ R. K. APARICIO ALDANA, *Derechos a la libertad ideológica, religiosa y de conciencia en las relaciones jurídico laborales*, Aranzadi, Navarra, 2017, 171.

⁶ Obviously, there are many other that could be studied. For an overview, S. SOUSA MACHADO, *Reflexões iniciais sobre liberdade religiosa e contrato de trabalho – Reconhecimento da conflitualidade e perspectivação de um dever de adequação*, in *Contrato de trabalho e liberdade religiosa*, Editorial Jorúa, 2018, 43..., or P. ADAM/M. LE FRIANT/L. PÁCAUT-RIVOLIER/Y. TARASEWICZ, *La religion dans l'entreprise – L'art (difficile) des limites*, in *Révue de Droit du Travail*, 2016, 532...

A very special different range of issues arrives from the need for conciliation between individual religious beliefs and religious freedom entitled by religious ethos companies, such as catholic schools or daycare centers. We are not going to analyze these problems, despite their interest and the fact they have been recently addressed by the Court of Justice (of the European Union), in cases *Egenberger* (C-414/16) and *IR* (C-68/17). (see, among others, J. BROCKMANN, *Occupational requirements within Churches or religious organizations in Germany*, in *Hungarian Labour Law E-Journal*, 1, 2019, 72...) Even so, we dare to draw the attention to the very curious approach carried out by S. PISKO (*(Un)lawful religious discrimination*, in *Drexel Law Review*, 9, 2016, 101...): what if the decision of keeping members of other beliefs apart, even if covered by the freedom of religion of the institution, brings discriminations on different grounds, such as sex? «For example, if a religious institution had a policy to fire any person who became pregnant outside of marriage, that would affect only women and thus create a disparate impact» (120).

1. Equality and non discrimination on grounds of religious beliefs and the obligation of reasonable accommodation

One of the major ideas every time we think about religious beliefs and their impact on employment relationships is the principle of reasonable accommodation. In fact, this principle is wider than that and it is highly underlined even in the larger context of the reaction States shall adopt towards religious diversity. As for employment relationships, that principle appears as an employers' obligation, according to which they are charged with the duty of making working conditions adequate to their religious beliefs and expression, unless that effort requires a disproportionate burden, which shall be assessed regarding elements such as the dimension of the enterprise, the economic effort implied, the impact on other employers and, obviously, the type of functions of the employee in cause. We would admit that another item to be considered is whether the act of religious worship is mandatory according to religious prescriptions or not. That obligation would emerge as an immediate consequence of equality principle, as far as we face it as having a material content, rather than a mere formal significance. That is: a formal equal treatment might not be able to effectively secure equal opportunities, an equal position towards working conditions. Foreseeing the cases to be mentioned forward, is a member of Seventh-day Adventist church in the same situation as a catholic if he/she works in an organization that stops laboring on Sundays, but not on Saturdays?... Or, differently, to grant that equal situation, is it necessary to provide the former the possibility of taking as rest time the period between the sunset of Fridays and the sunset of Saturdays? The examples could obviously be taken to a larger extent.

This obligation of reasonable accommodation of working conditions is clearly recognized in the field of discrimination on grounds of disability. In what concerns European legal space, it is set forth in the Council Directive 2000/78/EC of 27 November 2000 (establishing a general framework for equal treatment in employment and occupation)⁷. As for religion, if we affirm that principle, it is necessary to clarify its source, since it is not recognized in the European or International positive law, as it is not in the Portuguese legal system, similarly to what occurs in other European countries. We have to recall that the context in which that idea was for the first time theorized – Canada and, after that, USA – has the characteristics of a common law system, relying on case law and working in very pragmatic terms⁸.

In the literature, that principle, as its relevance in the religious field, is strongly stressed and it is given the significance of an immediate result of freedom of religion, equality and non discrimination – to sum up, justice. It is held, both in what concerns disability and religion, that equality principle comprises the recognition that, when minorities are not able to achieve certain goods, services and employments, the problem might not be them, but the impairments created by an environment constructed according to the situation of the majority⁹. Despite some critics, mainly built on the argument that those accommodations would face an unfavorable public opinion and that, even in Canada, where it is deeply set, it

⁷ Referring to this point, M. ROUXINOL, *Notas em torno do imperativo de inclusão do trabalhador portador de deficiência*, in *Lex Social – Revista de Derechos Sociales*, vol. 7, 2017, 275...

⁸ E. BRIBOSIA/I. RORIVE, *Introduction – au-delà de «Dr. Jekyll et Mr. Hyde»*, in E. Roriva/I. Rorive (coord.), *L'accommodement de la diversité religieuse. Regards Croisés – Canada, Europe, Belgique*, Peter Lang, Brussels, 2015, 19; O. FERNÁNDEZ ALVAREZ, *Liberdad religiosa y trabajo asalariado: condiciones y criterios de articulación*, in *Revista Española de Derecho del Trabajo*, 133, 2007, 108/109.

⁹ X. DELGRANGE/H. LEROUXEL, *L'accommodement raisonnable, bouc émissaire d'une laïcité inhibitrice en Belgique*, in E. Bribosia/I. Rorive (coord.), *L'accommodation de la diversité religieuse. Regards croisés – Canadá, Europe, Belgique*, Peter Lang, Brussels, 2015, 205.

had been drawn by an overbold judicial attitude¹⁰, the principle of reasonable accommodation has solid grounds to be constructed on. Firstly, the idea of a non supportive public opinion becomes a very fragile argument if we think that the aim of non discrimination law is, precisely, fighting bias and preventing them from undermining social relationships. Further, as MACLURE and BOUCHER¹¹ point out, «the obligation of reasonable accommodation arises also from the verification that the regular application of general rules may, given certain circumstances, be discriminatory towards people with particular physical or cultural (such as [...] language or religion) characteristics. In a pluralist society, it is highly expectable, even normal, that certain rules concerning public services and workplaces, reflect the history, the values, the culture and the identity of the majority». This way, that obligation is a tool for securing minorities' social integration. From a pragmatic point of view, it would be an instrument for «managing religious diversity»¹².

Obviously, conceiving such an obligation charging employers does not make any sense if we do not recognize the so-called *forum externum* of the religious freedom, that is, its external dimension, its visible expressions. Personal beliefs (*forum internum*) may be revealed in external manifestations – clothes and accessories; prayers, eating choices, etc. –, according to the rituals proposed or imposed by the religion in cause. In fact, we would say, with J. GOMES, that if it was not to grant the right to manifest each one's beliefs, the legal recognition of religious freedom would be worthless; «not even the worst dictators – Hitler, Stalin, or Pol Pot – could prevent (and it is not secure they would be interested in doing it) each one from believing in what they wanted in his/her personal sphere»¹³.

However, it seems to us that the protection of this external dimension of religious freedom has been, in some occasions, too shy. We have in mind some rulings of the European Court of Human Rights. Article 9.º, §2, of the European Convention of Human Rights setting forth that «freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others», the Court has, in our opinion, held an extremely restrictive vision of the right to manifest religion, namely in cases like *Konttinen v. Finland*¹⁴. In this case, an employer, who had made an employment contract with the Finnish State Railways, in 1986, joined the Seventh-day Adventist church in 1991 and asked the employer to be given the possibility of observing the *Sabbath*, from sundown on Friday to sundown on Saturday. This request caused difficulties only on Fridays in which the sunset fell early, which happened very few times in winter months. According to his religious obligations, Mr. Konttinen started leaving work at the time of the Friday sundown and he told the employer he could work longer in the summer weeks. He was dismissed. The Commission has considered that «the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours. This refusal, even if motivated by his religious convictions, cannot as such be protected by Article 9 Para. 1. Nor has the applicant shown that he was pressured to change his religious views or prevented from manifesting his religion or belief». And also «the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion. In sum, there is no indication that the applicant's dismissal interfered with the exercise of his rights under Article 9 para. 1».

¹⁰ J. MACLURE/F. BOUCHER, *Conclusions generals...*, 345.

¹¹ *Idem*, 347. Translation was made by the author.

¹² *Idem*, 351.

¹³ J. GOMES, *Direito do Trabalho – volume I, Relações individuais de trabalho*, Coimbra Editora, Coimbra, 2007, 297.

¹⁴ Of 3/12/1996.

The decision is in clear contrast with the position adopted by Canadian or American courts in similar cases (the Canadian case of *O'Malley*, of 1985, is paradigmatic, since it is considered to have given birth to the principle of reasonable accommodation; the Supreme Court found that the employer had not made a reasonable effort to adjust Mr. O'Malley's working time to his worship¹⁵), and also with Portuguese Constitutional Court no. 544/2014 and no. 545/2014¹⁶.

In these rulings, which reveal quite clearly that the Court recognizes religious freedom shall not be closed within each one's spirit, the Portuguese constitutional judges interpreted a set of prescriptions of the Religious Freedom Act (Statute 16/2001), concerning the need for accommodating working time in order to allow employees' acts of religious worship. This interpretation is made at the light of constitutional prescriptions and the tension between religious freedom and the principle of non-discrimination on those grounds and, on the other hand, the employers' right to manage their economic units according to their interests.

The two cases are very similar. The former regarded a private employer (a medical tools factory) and the latter a public employer (the employer was a public prosecutor). Both the employees requested to be given time off from Friday sundown until Saturday sundown, in accordance with the prescriptions of the Seventh-day Adventist church. In the first case, the employee was dismissed on grounds of unjustified absences, because she refused to work during that period; she sued the employer due to this termination act. As for the prosecutor, she asked in court to be given this period off. All the judicial instances held that these employees were not in conditions of legally refusing work during those hours, because they were not covered by article 14/1 of Religious Freedom Act. This rule provides that employees are entitled with this right if they benefit from a *flexible timetable* («horário flexível»). This concept, which, curiously, is not legally defined, is used in the Labour Code in the strict context of parenthood protection. In the mentioned cases, both the factory worker and the prosecutor worked in shifts (the latter only on weekends, for urgent cases) and, in some occasions, they would have to work between the sunset of Friday and the sunset of Saturday.

The Constitutional Court found that article 41 of the Portuguese Constitution, which sets forth the principle of religious freedom, did not allow the rulings held by ordinary courts in those cases. In fact, a strict interpretation of the concept of flexible timetable would not be in compliance with the content of article 41 of the Constitution. On the contrary, this prescription requires a wide interpretation of that concept, with the consequence that employees have the right of refusing work during the periods of their religious worship in any case their working time is not organized in terms that make possible for the employer to make arrangements.

What makes this constitutional decision very interesting, rather than only a ruling on a particular Portuguese legal prescription, is that it clearly arises from the principle of reasonable accommodation. This principle is reflected by article 14/1 of the Religious Freedom Act, although only in the chapter of working time, but, according to Constitutional Court's understanding, it is also a commandment imposed by the principle of religious freedom set forth in the Portuguese Constitution¹⁷.

¹⁵ X. DELGRANGE/H. LEROUXEL, *L'accommodement raisonnable...*, 205/206. S. For further developments and references, see L. VICKERS, *Approaching religious discrimination at work: lessons from Canada*, in *International Journal of Comparative Labour Law and Industrial Relations*, 20, 2004, 188... Referring to British experience, also L. VICKERS, *Religious freedom in the UK...*, 16/17.

¹⁶ S. SOUSA MACHADO, *Do direito de o trabalhador observar períodos de guarda impostos pela religião que professa*, in *Contrato de trabalho e liberdade religiosa – Gestão da diversidade religiosa no universo laboral*, Joruá, Porto, 2018, 121...

¹⁷ *Idem*, 126...

In what concerns hours of work, we would conclude that the principle of reasonable accommodation implies that the employer's refusal of requests to be given time off, made by employees who are put in a religious disadvantage if they comply with a certain timetable, shall be justified and that refusal is not acceptable unless a relevant effort is made in order to satisfy employee's needs. This effort extends until the point it is disproportionate, which shall be assessed taking into account, in particular, factors like the length and frequency of the required absences, if the job requires constant presence or not, if it adjustable to flexible timetables, if it is possible to switch shifts or if it possible to cover employees' absences in a different way, the cost of cover, etc¹⁸.

2. *Sequitur: other working time issues*

In fact, working time issues are at the origin of many religious conflicts concerning employment relationships. Besides weekly rest, there are other aspects of the regulation of working time that cause disadvantage to religious minorities. We have in mind the recognition of religious public holiday; in Europe and other countries with similar cultural patterns, those days, like it happens with weekly rest day (Sunday), have been defined in line with the Christian history, which puts in disadvantage those of other faiths, whose religious festivals are not treated the same way¹⁹. In fact, they are in disadvantage compared to those who benefit from time off according to their religious worships. In these terms, both legal rules defining those holidays and the employer's decision not to give employees with other faiths time off in the days of their celebrations may be considered to be indirectly discriminatory. Shall employers be obliged to switch days off in accordance with religious minorities' festivals? In reality, this would also be a consequence of the principle of reasonable accommodation. Like in the field of discrimination on grounds of disability, we could consider that an indirectly discriminatory rule could not be justified unless employers were obliged to seek an accommodating solution, and an indirectly discriminatory behavior of the employer would only be justified if he proved to have made an effort in order to find such solution.

Issues of this sort have recently been under analysis in the European case law. Indeed, in the case of *Cresco Investigation*²⁰, the Court of Justice was called to answer a set of questions related to the association of public holidays to celebration days for some religions, yet not for others. The main question to be solved was the following: there was a holiday (the Good Friday) that, according to the Austrian regulation, was only recognized to members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church; if an employee (belonging to one of those churches) worked, despite that day being a holiday, he would be entitled, in addition to the pay received as he/she was allowed not to work on account of the day being a public holiday, to payment for the work actually done, whereas other employees, who were not members of those churches, did not have any such entitlement. Is it in accordance with the European Law that a holiday is given only to members of some Christian religions, and other employees do not benefit from a similar advantage? And, if subject to a legislation like such, is a private employer required to grant the same rights and entitlements in respect of Good Friday to all employees, irrespective of their religious affiliation, or must the national provision referred to in the first question be disapplied in its entirety, with the

¹⁸ Obviously, that does not inhibit the adoption of legal rules imposing concrete positive actions to employers, as happens in Belgium. See FABIENNE KÉFER, *Religion at work. The Belgian experience*, in *Hungarian Labour Law E-Journal*, 1, 2019, 45...

¹⁹ In Belgium, the legal definition of Sunday as the day of weekly rest has been subjected to constitutional assessment, but it has been decided that there was no violation of freedom of religion because the provision did not intend to force anyone to observe catholic worships or faith. See FABIENNE KÉFER, *Religion at work...*, 44.

²⁰ Process C-193/17; ruling of 22/01/2019.

result that the rights and entitlements in respect of Good Friday set out in the first question are not to be granted to any employee? The Court of Justice has answered negatively to the former question and positively to the latter.

Despite the relevance of this ruling, a wider and very important question remained unanswered: considering, as said before, that, at least in Europe, religious holidays are always related to Christian festivities and reflect Christian history, which puts employees of other churches and beliefs in a position of disadvantage, since they do not benefit from time off to celebrate their own religious happenings, is this type of regulation to be considered discriminatory? In other terms, in order to secure the compliance with equality and non-discrimination principle, is it enough to recognize a certain religious holiday to all employees, or is it necessary to identify each employee's religion and give him/her a day off in accordance? From such point of view, this question is very close to the one analyzed above. In both cases, of weekly rest and public holidays, we think that obliging an employee to work on festive days according to his/her religion, if this does not occur with employees of other beliefs may, in fact, be discriminatory²¹.

And we would dare to say that the answer to give shall also be close to the one given to that former problem. The key point is, in our view, the obligation of reasonable accommodation, once again. In fact, the possibility of observing days of rest and celebrating holidays and ceremonies in accordance with the precepts of one's religion is comprised in religious freedom, which is expressly recognized in article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief²².

3. The wearing of religious symbols: is neutrality in compliance with equality principle?

A different range of problems linked to religious expression in workplaces comes from the wearing of religious symbols, such as a catholic crucifix, like in the case of *Eweida and others*, of the European Court of Human Rights²³, or an Islamic veil, like in the case of *Samira Achbita*²⁴, or that of *Asma Bougnaoui*²⁵, of the Court of Justice²⁶. We are going to focus on these, since they draw our attention to a point that seems very important to us, that is, the reasonableness of giving employers the right to impose a rule of religious (or even ideological) neutrality in the working place.

As for the former case, in 2003, Samira Achbita started to work, as a receptionist, for G4S, a private undertaking which provided reception services for customers in both the

²¹ S. ARRIBAS, *Retribución de festividades religiosas e igualdad laboral – Sentencia del Tribunal de Justicia de 22 de enero de 2019, Asunto C-193/17: Cresco Investigation GmbH v. Markus Achatzi*, in *La Ley Unión Europea*, 70, 2019, 10.

²² According to S. CAÑAMARES ARRIBAS, *Retribución de festividades religiosas...*, 9, «The right to religious rest is covered, by the so-called right to reasonable accommodation». The translation was made by the author.

²³ 15/01/2013. On this case, in Portugal, S. SOUSA MACHADO, *Quando fé e trabalho não se compatibilizam – Comentário ao Acórdão Eweida e outros vs. Reino Unido do Tribunal Europeu dos Direitos do Homem*, in *Contrato de trabalho e liberdade religiosa – Gestão da diversidade religiosa no universo laboral*, Joruá, Porto, 2018, 69...

²⁴ Process C-157/15, ruling of 14/03/2017.

²⁵ Process C-188/15, ruling of 14/03/2017.

²⁶ For a very interesting reflection on these cases, B. MESTRE, *A jurisprudência do TJUE e do TEDH sobre a exibição de símbolos religiosos no local de trabalho: uma leitura à luz do pensamento de Jürgen Habermas*, in *Julgar (online)*, 1/2018, 1..., F. KÉFER, *Religion at work...*, 49..., and Y. PAGNERRE, *[Liberté de] Religion vs. [Liberté d'] Entreprise*, in *Droit Social*, 5, 2017, 450...

public and private sectors. At the time, there was an unwritten rule within G4S according to which workers could not wear visible signs of their political, philosophical or religious beliefs in the workplace. In 2006, the employee informed her superiors that she intended, in future, to wear an Islamic headscarf during working hours. She was told that would not be tolerated because the visible wearing of political, philosophical or religious signs was contrary to G4S's position of neutrality. After a period of absence from work due to sickness, in May 2006, Samira Achbita notified her employer that she would be returning to work and that she was going to wear the Islamic headscarf. In the same month, the neutrality policy was set on the workplace written regulations, that began to establish that «employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs». In June, Samira Achbita was dismissed on account of her continuing insistence to wear the Muslim headscarf, breaching the neutrality policy followed by the enterprise.

The Court of Justice found that: (i) Article 2/2-a) of Council Directive 2000/78/EC of 27 November 2000 must be interpreted as meaning that the prohibition on wearing an Islamic headscarf arising from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that directive; (ii) but such an internal rule may constitute indirect discrimination if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim (such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the national court to verify).

In the case of *Bougnaoui*, the story is quite similar. The employee was dismissed after having worn a Muslim headscarf. The undertaking, Micropole, provided informatic services and Asma Bougnaoui was sent several times to contact with customers of Micropole. At some of those occasions, she wore the headscarf. She was dismissed with the argument that, although the enterprise respected freedom of opinion and religion, it had to take into account customers' preferences. In fact, before this happened, a customer had told the Micropole representative that the fact that Asma Bougnaoui had worn of a veil, during a meeting, had upset a number of its employees. It also requested that there should be «no veil next time».

The Court of Justice decided that article 4/1 of Directive 2000/78/EC should be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision²⁷.

This decision is in line with the conclusion already laid down on the ruling of the *Feryn* case²⁸ and we find it fair and necessary. If the occupational requirement covered social preferences, then the premises of the equality and non discrimination principle would entirely fall down. But, in respect of the *Bougnaoui* case, the Court repeated a set of considerations already laid down on the previous decision, which constitute, in our view,

²⁷ An example of a serious occupational requirement may be found in the British case of *Azmi v. Kikless Metropolitan Borough Council* (2007; ICR 1154. See L. VICKERS, *Religious freedom in UK...*, 14/15, and M. FREEDLAND/L.VICKERS, *Religious expression in the workplace*, 614). Azmi was a teaching assistant who was dismissed for refusing her employer's instruction to remove the niqab during classes. The restriction on wearing the *niqab* was found proportionate due to the need to protect children's interest in having an adequate education, which implied they saw teacher's face. In fact, the school had monitored the quality of teaching and had concluded it was reduced when Azmi wore the *niqab*.

²⁸ Process C-54/07, ruling of 10/07/2008.

the problematic core of this ruling. The court considered that if the wearing of the veil was a breach of an internal regulation prohibiting the use of any visible sign of political, philosophical or religious beliefs, then the case would have to be analyzed from the point of view of indirect discrimination; in fact, that prohibition would be an apparently neutral rule that could result, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, which would be for the national court to ascertain. In these terms, such a difference of treatment does not amount to indirect discrimination if it is objectively justified by a legitimate aim, such as the implementation, by Micropole, of a policy of neutrality vis-à-vis its customers, and if the means of achieving that aim are appropriate and necessary.

The position adopted by this Court in what concerns the establishment of such neutrality policies was very important, since national courts had already been confronted with similar cases in several situations. One of the most well-known is the French *Baby Loup* case²⁹. A nursery's director was dismissed for having worn a Muslin headscarf, breaching the internal regulations, according to which a duty of neutrality was imposed to all staff members, both on premises and outside when accompanying children. This case was analyzed by the Cassation Court twice and the court has reached to opposite decisions. Firstly, judges of the social section considered that internal bylaw to be too general and imprecise and, because of that, found the dismissal null and discriminatory. The case returned to Cassation Court a year later and this time, the plenary upheld the decision of the Court of Appeal and considered that the bylaw was precise enough, justified by the nature of tasks and proportionate to the aim of neutrality followed by the nursery. After this decision, a new prescription was added to the Labour Code (article L 1321-2-1), stating that bylaws may contain provisions prescribing the principle of neutrality if the implied restriction to religious freedom is justified and proportionate. In the French literature, the case was largely discussed; some asked if the nursery could be seen as an ideological undertaking, which brought to discussion the concept of *secularist ideology*, as if the undertaking was defined by spreading the ideal of neutrality. But that thesis was criticized, because an option of neutrality shall not be mistaken as an ideological object and aim: the nursery did not intend to spread secularism or neutrality; it wanted to offer an image of neutrality³⁰.

Finally, the case was brought to the Human Rights Committee (that monitors the implementation of the International Covenant on Civil and Political Rights, that provides freedom of religion in article 18) and this body has considered that the prohibition to wear the headscarf was, in this case, an obstacle to the exercise of the right to manifest religion. The Committee applied a strict test of proportionality, according to which the establishment of a neutrality policy is not enough to be a lawful reason to ban the use of religious symbols. It is necessary to demonstrate how this wearing may be an obstacle to the adequate accomplishment of the job³¹. In fact, some French literature had already drawn the attention to the fact that the decision of the Cassation Court relied on a sort of precaution

²⁹ Cassation Court, 19/03/2013, process 11-28845, and 25/06/2014, process 13-28369.

³⁰ P. ADAM, *Affaire Baby-Loup: vues du sommet (Cass., plén., 25 juin 2014, n.º 13-28.369, à paraître au Bulletin*, in *Révue de Droit du Travail*, 2014, 609...

³¹ Communication 2662/2015, of 10/08/2018.

«The Committee notes (...) that the author was dismissed without any severance payment because she wore a headscarf, without sufficient justification being given as to how it would prevent her from performing her functions or any assessment being made of the proportionality of that measure. The Committee therefore considers that the State party has failed to establish how the author's dismissal for wearing a headscarf served a legitimate aim or was proportionate to that aim. The Committee thus concludes that the author's dismissal, based on the internal regulations of the childcare centre imposing neutrality on employees and the Labour Code, was not based on reasonable and objective criteria and therefore constitutes intersectional discrimination based on gender and religion, in violation of article 26 of the Covenant» (§ 8.13).

principle: who could ascertain that the use of religious symbols would, in reality, damage children's freedom of thought³²?

We may say that such position followed by the Court of Justice in both cases – in *Bougnouli* it was not necessary; the Court has gone further than the decision of the case imposed – was expected, since it is in line with the case law of the European Court of Human Rights, which has for several times considered that the establishment of a neutrality policy is admissible as a consequence of secularity and, therefore, employers are allowed to dismiss employees who wear religious symbols (even in the *Eweida* case, the policy was found lawful; the condition that failed was proportionality)³³. We shall remind that, according to the Charter of Fundamental Rights of the European Union, the rights provided in the European Charter on Human Rights shall be taken into account in the application of that former instrument, as well as their interpretation³⁴.

However, as we said before, this comprehension of neutrality (and secularism) is, in our opinion, a very delicate issue. In fact, the establishment of such a policy may be very harmful to fundamental rights.

On the one hand, it is not even secure to assume that the aim of neutrality is entirely possible, for there is an infinite quantity of symbols that may, somehow, or for someone, reflect an ideology or belief: what if an employee wears a shirt with a cross printed on it? Is that a crucifix? Or with a star – is that the Star of David? On the other hand, there is a strict link between religion and other ideological choices and personal behaviors. If an employee wears a symbol of support of a social cause that is not neutral from a religious point of view, like a rainbow, that can be seen as a symbol of the LGBTI cause, may that be interpreted, for example, as a non catholic act? In fact, some convictions of other nature, such as philosophical or ethical, are able to reveal the adoption of a moral position that may not be neutral from a religious point of view³⁵. There is a space for subjectivity when the matter is symbols' interpretation. In a certain sense, everything has a symbolic significance.

Further, as some voices³⁶ point out, banning the use of any religious symbol does not affect all religions equally, because some religions' prescriptions do not impose the use of mandatory clothes or accessories. May the aim of neutrality, in itself, legitimate this?

This question leads to another, that is, what are the values and interest protected under neutrality. Unless the pursuit of atheism or any kind of religious nihilism is the aim of the employer's organization, the major purpose of a neutrality policy we can see is the willingness of the employer to not offend customers' susceptibility. But, if it is so, we are returning to what the Court of Justice has already declared to be unacceptable, that the occupational requirement criterion comprises customers' preferences! Further, the establishment of such a policy leads, at the end of the day, to denying the external forum of religious freedom, which is as paradoxical as said before: recognizing the internal dimension of that freedom means a little more than nothing.

These considerations may be extended to the ideal of secularism – secular State –, that usually appears as the justification of neutrality policies in public services. But does

³² P. ADAM, *Affaire Baby-Loup...*, 610.

³³ An analysis of this case law may be seen in B. MESTRE, *A jurisprudència recente...*, 26....

³⁴ *Idem*, 16/17.

³⁵ The symbolic ability of the rainbow has been recently brought to discussion on religious and ideological neutrality in Belgium, when a mayor declared that employees of public administration could not use t-shirts with that print because that did not comply with the imposition of neutrality in public services. See, on this point and the reflection this episode has led to, G. COENE, *Accommodement raisonnables, une réponse au texte de Cécile Laborde*, in E. Bribosia/I. Rorive (coord.), *L'accommodement de la diversité religieuse. Regards croisés – Canada, Europe, Belgique*, Peter Lang, Brussels, 2015, 43/44.

³⁶ F. FAUVET, *Expressions of religious faith in companies – Consequences of the judgements of the Court of Justice of the European Union for France*, in *Hungarian Labour Law E-Journal*, 1, 2019, 37; M.FREEDLAND/L. VICKERS, *Religious expression in the workplace...*, 614/615.

secularism actually or, at least, necessarily, mean «that individuals must hide or conceal their beliefs»? Or, on the contrary, «the secular Republic guarantees the freedom to express beliefs, in particular by wearing a cross, a *kippah*, a veil or even a burkini»³⁷? The main purpose of secularism is that the State shall not favor or put at disadvantage any individual due to their religion. And that principle was created to prevent public bodies to support a specific religion, precisely because that would put others, and their believers, in a position of disadvantage. Do public services have to show a neutral image – by means of banning the use of any religious symbol by their employees – to be in line with the ideal of secularism? Or shall those services assume pluralism as the natural consequence of not supporting a particular religion? This latter option corresponds to the so-called *open secularism*³⁸, a comprehension that assumes that secularism has had an emancipatory purpose and that a multicultural social life is easily acceptable within a secular State.

4. Conclusion

Accepting minorities under the condition that they keep their practices within their boundaries – segregation – or receive them as far as they are permeable to being assimilated – assimilation – are reactions to multiculturalism that shall not be mistaken as a pluralist approach. This latter, which seems to our eyes the most coherent with the major grounds of equality and non discrimination principle, demands us to take very seriously the principle of reasonable accommodation and imposes surpassing social bias and being receptive to difference as an ordinary phenomenon. Obviously, there have to be limits: in general, those arising from human dignity and principles of public policy (we would say that violent practices shall not be covered by any integration demand) and, especially in what concerns employment relationships, limits coming from the respect due to employers' economic interests, but only within the strict terms allowed by proportionality principle, which goes implied both in the obligation of reasonable accommodation and in the assessment of any economic decision that produces impact on employees' religious manifestations.

³⁷ F. FAUVET, *Expressions of religious faith...*, 30/31.

³⁸ MACLURE/F. BOUCHER, *Conclusions générales...*, 351.