

GULBENKIAN IDEAS

Let's talk about the Future of Religion

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Let's talk about the Future of Religion(s)

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Abstract

I wish to address two distinct, if interrelated, perspective: a. The position of religion(s) within European society (Church and State); and b. The internal dynamics within religion(s) My written illustrations will address primarily the first perspective.

a. "Church and State" within Europe some salient 'pointers'

Within an increasingly secularized society – a process in place for two generations or more – the ability to comprehend the religious sensibility, the notion of the sacred and the holy, has diminished considerably. In public sensibility, religion and religious liberty have lost their privileged position (as evidenced in countless constitutions and human rights instruments) as deserving particular protection. Oftentimes religion, and the religious, are met with incomprehension at best, hostility at worse. Paradoxically, Christophobia is rife (because it is less politically incorrect) but incidence of Islamophobia and Antisemitism are at different level not only non-exceptional but on the rise. Different dynamics are in play with the sex scandals fueling (albeit mostly as an excuse) Christophobia, the association (real and illusory) of Islam with terrorism fueling Islamophobia and the Jewish/Israel (mostly false) equation fueling Antisemitism.

Both in policy matters and law there is a tendency to group all religions together, particularly noticeable in the (mis)treatment of Islam and Judaism through an historical Christian sensibility.

Looking at religion as a whole, whereas in all European societies the one time dominant Confessional State has been (blessedly) jettisoned both by our liberal order and religion itself, there is a tendency of the Secular State to emulate features of the Confessional State, the Confession in question being secularism.

Manifestations of such at the level of policy and judicial decisions include, to give but one example, a misunderstanding of the notion of the "neutral State", whereby laïcité is equated with neutrality.

Finally, in the polarized societies in which we live, religion has become a noticeable and oftentimes potent identitarian marker – and one of the principal cleavages of polarization. (Attitudes to Immigration is just one example)

b. Intra religious dynamics

Polarization is a useful tool to understand, too, intra religious dynamics. Within Christianity (Catholicism as well as the various Protestant and Orthodox denominations) as well as within Judaism and, to some extent at least, Islam we see cleavages which in several ways resemble and at times even reflect and coincide with general societal political cleavages: In all three religions we find contrasts, tensions and power struggles between “Conservatives” and “Liberals”. Since all Abrahamic religions claim incommensurate Truths, these tensions can be deep and deeply felt going to the very ontology of the respective faiths. The issues are well known – notably sexual identity and morality, same sex marriage and abortion to mention the most visible ones.

Just as in politics the religious cleavages coincide (oftentimes counterintuitively) with generational differences, gender differences, class differences and education differences. These overlapping political-religious cleavages enhance the polarization feeding each other. And all this, to one degree or another with a persistent trend of decline in faith and affiliation to institutional religions.

c. Illustrations

I want to focus here on two of these trends – the misunderstanding of Neutrality (which is at the root of what I called the Secular Confessional State) a brief comment on Secularism itself, and the tendency to conflate all religions as if they are the same and to look at them through Christian eyes, particularly noticeable when dealing with Islam.

A. Neutrality

The issue of ‘neutrality’ has come to the fore in various guises in many countries concerning the issue of displaying a crucifix in public school classrooms. The most famous of these cases is the Lautsi case which came before the Grand Chamber of the European Court of Human Rights. It was presented to the Grand Chamber on appeal by a 7 to 0 decision of a Chamber of the ECHR holding that by requiring the display of a crucifix in all public schools, Italy violated the duty of neutrality of the State and hence the European Convention on Fundamental Rights and Freedoms.

I can do no better than present here the crux of my Submissions before the Grand Chamber on appeal.

...

3. In its Decision the Chamber articulated three key principles with two of which the Intervening States strongly agree. They strongly dissent from the third.

4. They strongly agree that the Convention guarantees to individuals Freedom of Religion and Freedom from Religion (positive and negative religious

freedom) and they strongly agree on the need for a class room that educates towards tolerance and pluralism and is bereft of religious coercion.

5. The Chamber also articulates a principle of “neutrality:”

The State’s duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions. [paragraph 47]

6. From this premise the conclusion is inevitable: Having a crucifix on the walls of classrooms was obviously found as expressing an assessment of the legitimacy of religious conviction – Christianity – and hence violative.

7. This formulation of “neutrality” is based on two conceptual errors which are fatal to the conclusions.

8. First, under the Convention system all Members must, indeed, guarantee individuals freedom of religion but also freedom from religion. This obligation represents a common constitutional asset of Europe. It is, however, counter balanced by considerable liberty when it comes to the place of religion or religious heritage in the collective identity of the nation and the symbology of the State.

9. Thus, there are Members in which *laïcité* is part of the very definition of the State, such as France and in which, indeed, there can be no State endorsed or sponsored religious symbol in a public space. Religion is a private affair.

10. But no State is *required* under the Convention system to espouse *laïcité*. Thus, just across the Channel there is England (and I use this term advisedly) in which there is an Established State Church, in which the Head of State is also the Head of the Church, in which religious leaders, are members, *ex officio*, of the legislative branch, in which the flag carries the Cross and in which the National Anthem is a prayer to God to save the Monarch, and give him or her Victory and Glory.

11. In its very self definition as a State with such an established Church, in its very ontology, England would appear to violate the strictures of the Chamber for how could it be said that with all those symbols there is not some kind of assessment of the legitimacy of religious belief?

12. There is a huge diversity of State-Church arrangement in Europe. More than half the population of Europe lives in States which could not be described as *laïque*. Inevitably in public education, the State and its symbols have a place. Many of these, however, have a religious origin or contemporary religious identity. In Europe, the Cross is the most visible example appearing as it does on endless flags, crests, buildings etc. It is wrong to argue, as some have, that it is only or merely a national symbol. But it is equally wrong to argue, as some

have, that it has only religious significance. It is both – Given history that is part of the national identity of many European States. [There are scholars who claim that the 12 Stars of the Council of Europe has this very duality too!]

13. Consider a photograph of the Queen of England hanging in the classroom. Like the Cross, that picture has a double meaning. It is a photo of the Head of State. It is, too, a photo of the Titular head of the Church of England. It is a bit like the Pope who is a Head of State and Head of a Church. Would it be acceptable for someone to demand that the picture of the Queen may not hang in the school since it is incompatible with their religious conviction or their right to education since – they are Catholics, or Jews, or Muslims? Or with their philosophical conviction – they are atheists? Could the Irish Constitution or the German Constitution not hang on a class room wall or be read in class since in their Preambles we find a reference to the Holy Trinity and the Divine Lord Jesus Christ in the former and to God in the latter? Of course the right of freedom from religion must ensure that a pupil who objects may not be required actually to engage in a religious act, perform a religious ritual, or have some religious affiliation as a condition for state entitlements. He or she should certainly have the right not to sing God Save the Queen if that clashes with their world view. But can that student demand that no one else sing it?

14. This European arrangement constitutes a huge lesson in pluralism and tolerance. Every child in Europe, atheist and religious, Christian, Muslim and Jew, learns that as part of their European heritage, Europe insists, on the one hand on their individual right to worship freely – within limits of respecting other people's rights and public order – and their right not to worship at all. At the same time, as part of its pluralism and tolerance, Europe accepts and respects a France and an England; a Sweden and a Denmark, a Greece and an Italy all of which have very different practices of acknowledging publically endorsed religious symbols by the State and in public spaces.

15. In many of these non-*laïque* States, large segments of the population, maybe even a majority are no longer religious themselves. And yet the continued entanglement of religious symbols in its public space and by the State is accepted by the secular population as part of national identity and as an act of tolerance towards their co-nationals. It may be, that some day, the British people, exercising their constitutional sovereignty, will divest themselves of the Church of England, as did the Swedes. But that is for them, not for this distinguished Court, and certainly the Convention has never been understood as forcing them to do so. Italy is free to choose to be *laïque*. The Italian people may democratically and constitutionally elect to have a *laïque* State. (And whether or not the crucifix on the walls is compatible with the Italian constitution is not a matter for this court but for the Italian Court.) But the applicant, Ms. Lautsi, does not want this Court to recognize the right of Italy to be *laïque*, but to impose on her a duty. That is not supported by law.

16. In today's Europe countries have opened their gates to many new residents and citizens. We owe them all the guarantees of the Convention. We owe the decency and welcome and non discrimination. But the message of tolerance towards the Other should not be translated into a message of intolerance towards one's own identity, and the legal imperative of the Convention should not extend the justified requirement that the State guarantee negative and positive religious freedom, to the unjustified and startling proposition that the State divest itself of part of its cultural identity simply because the artefacts of such identity may be religious or of religious origin.

17. The position adopted by the Chamber is not an expression of the pluralism manifest by the Convention system, but an expression of the values of the *laïque* State. To extend it to the entire Convention system would represent, with great respect, the Americanization of Europe. Americanization in two respects: First a single and unique rule for everyone, and second, a rigid, American style, separation of Church and State, as if the people of those Members whose State identity is not *laïque*, cannot be trusted to live by the principles of tolerance and pluralism. That again, is not Europe.

18. The Europe of the Convention represents a unique balance between the individual liberty of freedom of and from religion, and the collective liberty to define the State and Nation using religious symbols and even having an established Church. We trust our constitutional democratic institutions to define our public spaces and our collective educational systems. We trust our courts, including this august court, to defend individual liberties. It is a balance that has served Europe well over the last 60 years.

19. It is also a balance which can act as a beacon to the rest of the world since it demonstrates to countries which believe that democracy would require them to shed their religious identity that this is not the case. The decision of the Chamber has upset this unique balance and risks to flatten our constitutional landscape robbing of that major asset of constitutional diversity. This distinguished Court should restore the balance.

20. I turn now to the second conceptual error of the Chamber – the conflation, pragmatic and conceptual, between secularism, *laïcité*, and neutrality.

21. Today, the principal social cleavage in our States as regards religion is not among, say Catholics and Protestants, but among the religious and the 'secular'. Secularity, *Laïcité* is not an empty category which signifies absence of faith. It is to many a rich world view which holds, *inter alia*, the political conviction that religion only has a legitimate place in the private sphere and that there may not be any entanglement of public authority and religion. For example, only secular schools will be funded. Religious schools must be private and not enjoy public support. It is a political position, respectable, but certainly not "neutral." The non-*laïque*, whilst fully respecting freedom of and from religion, embrace some form of public religion as I have already noted. *Laïcité* advocates a naked

public square, a classroom wall bereft of any religious symbol. It is legally disingenuous to adopt a political position which splits our society, and to claim that somehow it is neutral.

22. Some countries, like the Netherlands and the UK, understand the dilemma. In the educational area these States understand that being neutral does not consist in supporting the secular as opposed to the religious. Thus, the State funds secular public schools and, on an equal footing, religious public schools.

23. If the social pallet of society were only composed of blue yellow and red groups, than black – the absence of colour – would be a neutral colour. But once one of the social forces in society has appropriated black as its colour, than that choice is no longer neutral. Secularism does not favour a wall deprived of all State symbols. It is religious symbols which are anathema.

24. What are the educational consequences of this?

25. Consider the following parable of Marco and Leonardo, two friends just about to begin school. Leonardo visits Marco at his home. He enters and notices a crucifix. ‘What is that?’, he asks. ‘A crucifix – why, you don’t have one? Every house should have one.’ Leonardo returns to his home agitated. His mother patiently explains: ‘They are believing Catholics. We are not. We follow our path.’ Now imagine a visit by Marco to Leonardo’s house. ‘Wow!’, he exclaims, ‘no crucifix? An empty wall?’ ‘We do not believe in that nonsense’ says his friend. Marco returns agitated to his house. ‘Well’, explains his mother, ‘We follow our path.’ The next day both kids go to school. Imagine the school with a crucifix. Leonardo returns home agitated: ‘The school is like Marco’s house. Are you sure, Mamma, that it is okay not to have a crucifix?’ That is the essence of Ms. Lautsi’s complaint. But imagine, too, that on the first day the walls are naked. Marco returns home agitated. ‘The school is like Leonardo’s house,’ he cries. ‘You see, I told you we don’t need it.’

26. Even more alarming would be the situation if the crucifixes, always there, suddenly were removed.

27. Make no mistake: A State-mandated naked wall, as in France, may suggest to pupils that the State is taking an anti-religious attitude. We trust the curriculum of the French Republic to teach their children tolerance and pluralism and dispel that notion. There is always an interaction between what is on the wall and how it is discussed and taught in class. Likewise, a crucifix on the wall might be perceived as coercive. Again, it depends on the curriculum to contextualize and teach the children in the Italian class tolerance and pluralism. There may be other solutions such as having symbols of more than one religion or finding other educationally appropriate ways to convey the message of pluralism.

28. It is clear that given the diversity of Europe on this matter there cannot be one solution that fits all Members, all classrooms, all situations. One needs to take into account the social and political reality of the locale, its demographics, its history and the sensibilities and sensitivities of the Parents.

30. There may be particular circumstances where the arrangements by the State could be considered coercive and inimical but the burden of proof must rest on the individual and the bar should be set extremely high before this Court decides to intervene, in the name of the Convention, in the educational choices made by the State. A one rule fits all, as in the decision of the Second Chamber, devoid of historical, political, demographic and cultural context is not only inadvisable, but undermines the very pluralism, diversity and tolerance which the Convention is meant to guarantee and which is the hall mark of Europe.

The Grand Chamber reversed the decision of the Chamber and by a majority of 15 to 2 held that Italy had not violated the principle of neutrality and was not in violation of the Convention.

B. Secularism

I want to suggest here a cost of Secularism which is not always noted. Let me be clear: this observation is not an evangelical rebuke. I do not judge a person based on his or her faith or lack thereof. And even though, for me, it's impossible to imagine the world without the Lord—The Holy Blessed Be He—I also know many religious people who are odious and many atheists of the highest moral character.

This process of accelerated secularism began with World War II. Who among us, after having seen the mountains of shoes from millions of assassinated children at Auschwitz, didn't ask the question: God, where were you?

The importance of secularism or the disappearance of religion as a central voice in our public plaza is in the fact that a voice which was at one time universal and ubiquitous. This was a voice in which the emphasis was on duty and responsibility and not only rights. On personal responsibility in the face of what happens to us, our neighbors, our society and not the instinctive appeal to public institutions – the Mayor is at fault, the Region, the State, the Government, the European Union. This voice has all but disappeared from social praxis.

In Church you do not hear about your entitlements from the State and others but on your duty towards society and others. No politician today in Europe could or would repeat the famous Kennedy Inauguration speech of 1960 – Don't ask what your country can do for you but what you can do Etc. Anything that goes wrong in our society is always the responsibility of others, not of us. The Citizenship chapter of the European Treaties are a poignant example. They speak of rights and duties which the citizen enjoys and owes – but then no duties are ever mentioned.

C. Judaism, Christianity and Islam – All of a Same Cloth?

Here is a run of the mill case, Achbita, decided by the Court of Justice of the European Union which is a good illustration of the dangers inherent in viewing all religious cases and all religions as if they are ontologically the same. They are not.

Achbita, decided in March 2017 is not a run of the mill case. It raised what I think are hugely difficult conceptual legal issues. It also comes at a delicate moment in the social and political life of Europe, where the Court of Justice of the European Union is an important actor in shaping the climate and defining the moral identity in and of Europe. I do not believe the Preliminary Ruling of the ECJ comes even close to what one may expect from the supreme judicial voice of justice of our Union in a case of this nature. The case concerned, as you will know, a Muslim woman whose employer insisted in the name of a neutrality policy of the Company that she may not wear the hijab (a head scarf) to work, and thus she lost her job. I think it is a fair reading of the ruling sent back to the referring Belgian Court that other than checking that the company, without overly burdening itself, could not find a place for Achbita in a back office which would not bring her into contact with the public, the Court had no major problems with the company's policy compliance with the specific Directive bringing the case within the jurisdiction of European Law and the overriding human rights controlling norms such as the ECHR and the EU Charter of Fundamental Rights.

I will present the case, for reasons which I will explain below, with a slightly different factual matrix. Chaya Levi lives in Antwerp. She is part of the large Jewish Hassidic community in that town. She, like other members of that community, follows the strict norms of Orthodox Judaism. Some refer to them as Ultra-Orthodox. She works as a receptionist in a general services company which, inter alia, offers reception services to customers in the private and public sectors. As a receptionist she comes into contact with customers. No fault is found with her job performance. Chaya Levi falls in love and marries Moses Cohen of her community. Under Jewish law she now must wear a scarf covering her hair, not unlike the Islamic headscarf. In Antwerp this is an immediate tell-tale sign that she is an observant Jewess.

She is told by her supervisors that under company policy this headscarf would not be tolerated because the visible wearing of political, philosophical or religious signs was contrary to the company's policy of neutrality.¹

Chaya Cohen (née Levi) refused to remove the scarf and was dismissed. She lodged an appeal before the competent Belgian courts and eventually comes by way of Preliminary Reference to the ECJ and is considered primarily under Directive 2000/78.² The Directive refers in Recital 1 to fundamental rights protected under the ECHR which provides in Article 9 that everyone has the right to freedom of thought,

¹ Cf. Case C-157/15, *G4S Secure Solutions ('Achbita')* (ECLI:EU:C:2017:203), para. 15.

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303.

conscience and religion, a right which includes, in particular, freedom, either alone or in conjunction with others, and in public or private, to manifest her religion or belief in worship, teaching, practice and observance.

The Court points out that these same rights are reflected in Article 10(1) of the Charter. The reference to the Charter and the ECHR are important since whereas the Directive is concerned specifically with non-discrimination, the Charter and the ECHR more capaciously refer to freedom of religion. Both principles come into play in this decision.

The Framing of the Factual Matrix

As cited, approvingly, by the ECJ, the Belgian Higher Court ‘... noted ... that it was common ground that [Chaya Cohen] was dismissed not because of her [Jewish] faith but because she persisted in wishing to manifest that faith, visibly, during working hours, by wearing [a Jewish] headscarf’.³ The first major problem with the approach of the Court is rooted in this very framing of the case. I invite you to consider two variations of the factual setting as presented above.

Variation 1. Chaya Cohen, in addition to her scarf, also sports a Star of David pendent. Variation 2. Moses Cohen also works at the company. He, too, sports a Star of David pendent, but in addition wears a yarmulke (skull cap) and has long dangling side locks, which are required under similar strict Jewish law. (You have seen these men around in airports, etc.)

When told of the policy of the company that they may not ‘manifest’ their faith visibly during working hours, both immediately offer to remove the Stars of David. That indeed is an identity marker which manifests their Jewishness. Moses offers to wear a hat and to try and hide his side locks behind his ears. His supervisors are dubious: Who wears a hat indoors if he is not a Jew, they ask? That, too, is a clear tell-tale sign, he is told, and thus contrary to company policy. His side-locks, it turns out, are too long and, alas, are still visible. Reach for the scissors if you wish to keep your job.

Be that as it may, Moses and Chaya try to explain that in wearing the scarf, the yarmulke and the side locks they are not ‘wishing to manifest their faith’. The Star of David can come off at the blink of an eye. But in relation to the scarf and yarmulke they are practising their faith. They have no option by law the observance of which in their eyes overrides, quelle horreur, even European law. Grant me that there is, phenomenologically-speaking, a difference between the wish to manifest one’s religious identity and the practising and observing of such. Or, put differently, between forbidding someone from manifesting his or her religious identity and actually coercing them to violate religious norms which they consider sacred. Here are two examples to underline the difference. It is one thing to tell a vegetarian or vegan that they may not show up at work wearing a lapel button proclaiming their belief in animal rights but quite another to coerce them to eat meat. Or telling a gay man or woman that they may not show up with a rainbow tie and telling them they may not actually practise homosexual love.

³ *Ibid.*, para. 18. I say ‘approvingly’ because when the ECJ analyses the case its entire focus is on the right under the different legal norms, international and European, to ‘manifest’ one’s religion. See e.g. para. 28. Nowhere does it consider other provisions in the same norms to freedom of practice and observance. (Cf. para. 26 with references therein).

It follows, in my view, that the ‘common ground’ to which the Belgian Court alluded and which seems to underlie the judgment of the ECJ should not be that:

[Chaya Cohen] was dismissed not because of her [Jewish] faith but because she persisted in wishing to manifest that faith, visibly, during working hours, by wearing [a Jewish] headscarf.

But instead quite differently:

Chaya Cohen was dismissed precisely because of her Jewish faith – a faith which manifests itself in a Nomos which includes (to the bewilderment of some) a duty and commitment to wear a scarf once married.

Or, put differently:

She was dismissed not because she persisted in wishing to manifest her faith but because she persisted in wishing to practise what she, as an adult woman, or her husband (variation 2), as an adult man, held to be their religious legal duty as an expression of loyalty to, and love of, the Almighty and, born into an eternal Covenant to which they choose to remain loyal..

After all, Moses wears his yarmulke even when alone at home. To whom is he manifesting his religion then? ‘To God’ would be the only dignified answer. One might raise the philosophical objection – replicating the debate of aims and effects in international trade law – that Chaya was not dismissed because of her Jewish faith but simply in ‘neutral’ application of company policy. I think this is splitting hairs. If, say, Columbia Law School had in place a similar policy of ‘neutrality’ it would mean that the illustrious Lou Henkin, one of the ‘fathers’ of international protection of human rights law, would have lost his job. I assure you he would not have removed his yarmulke. If asked why he lost his job, he most likely would have answered ‘because of my faith’; ‘because I am an observant Jew’. And if, hypothetically, the ECJ were to adopt a similar rule of neutrality as regards the attire of lawyers appearing before it, the distinguished British barrister, Shaheed Fatima QC would be excluded. I assure you she, too, would not remove her hijab.

And just as surely her exclusion would be because of her commitment to the observance of the precepts of her Muslim faith. ‘I can’t appear there’, she is most likely to say, “‘because I am an observant Muslim’.

Nota bene: Does this mean, automatically, that the Court was wrong in allowing the dismissal of Chaya as a receptionist?⁴ It certainly does not necessarily mean that. But this distinction, in my opinion, produces two salient legal consequences. In deciding the case, as part of the inevitable proportionality test, the Court would eventually have to balance the weight to be given to the company’s ‘wish to project an image of neutrality towards customers’, which is but an expression of the ‘... freedom to conduct a business that is recognised in Article 16 of the Charter [which] is, in principle, legitimate’,⁵ as against the weight to be given to the freedoms, guaranteed under Directive 2000/78, the Charter and the ECHR, to Chaya.

⁴ Or transferring her to a back office so that, God forbid, the public will not have to suffer her sight in public. See *infra*.

⁵ *Achbita*, *supra* note 1, para. 38.

In weighing the rights of the company as against the rights of Chaya, the first salient legal consequence would or should be that the Chaya side of the scale would be somewhat lighter if it concerned a simple manifestation of her faith than if it concerned her ability to practise and observe her faith or her need to violate her religion. Put differently, the Court (and the society for which it speaks) would have to imbue the right of the company ‘to project an image of neutrality towards customers’ with far more gravitas if it meant that she was forced to choose between losing her job or violating her religion than if it simply required her to tuck her Star of David under her shirt. I do not want to make light of the ‘right to manifest’. In *Eweida* the ECtHR qualifies such as a fundamental right and explains its importance as ‘... the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others.’⁶ But I am arguing that compromising or limiting the right of communicating one’s faith to others through the wearing of some sign is not quite as serious as preventing that same person from actually practising and living that faith or forcing them to violate it. (Recall, please, the vegan.)

Failure to make the distinction between preventing a person from ‘manifesting’ their faith and forcing them to violate it will, in my view, very substantially, perhaps even fatally, compromise the eventual proportionality test.

Let me, again, make it abundantly clear: the right to religious practice and observance is not sacred in our constitutional orders and there are instances aplenty where we rightly ride roughshod over religious liberties in the name of higher societal values – such as our prohibition, to give but one example, of religiously-driven female circumcision. Nonetheless, when we do allow the denial of so fundamental a right as religious liberty we would expect to find some weighty countervailing values to justify such.

Knowing that the Court failed to make that distinction and, erroneously in my view, considered that Chaya ‘...was dismissed not because of her [Jewish] faith but because she persisted in wishing to manifest that faith’, we should not expect too much ballast to be given by said Court to the countervailing value. But even framing the issue as simply denying her right to ‘manifest’ her religion (which in any event is explicitly protected) would require some serious countervailing argumentation.

The second legal consequence that flows from failure to note the distinction is that the Court will not be aware of the structural discriminatory effect the company policy produces among different religions. Indeed this possibility is only mentioned in passing as an hypothetical possibility and in a highly problematic way in the 23 brief paragraphs which constitute the operative reasoning of the judgment.⁷

Whence the discrimination?

We tend often to speak of the ‘Judeo-Christian tradition’ as if the two religions are sisters. In fact the sister religions from the perspective under discussion are Islam and Judaism for in both the presence of God for believers is felt primarily by the thick matrix of divinely ordained legal norms – *Nomos* – which accompany the faithful from the moment of waking to resting one’s head to sleep, through dress code, eating code,

⁶ ECtHR, *Eweida and Others v. United Kingdom*, Appl. nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013, para. 94.

⁷ See Achbita, *supra* note 1, para. 44 (second paragraph).

working code, making love code, etc. Sharia and Halakha are remarkably similar in this respect, in contradistinction with the Pauline revolution undergirding Christianity. Take Maria, a co-worker who, like Chaya, may wish to manifest her religious fealty by coming to work wearing a pendent with a cross similar to Chaya's Star of David. And Samira may wish to affix a half-crescent brooch to her shirt. In relation to such, the company policy will impact them equally. To oblige them to remove these visible signs of their faith may compromise some liberty of expression or conscience but not their religious – strictu sensu – observance. But with just a very few exceptions, affecting a very few Christians, the company policy will have a huge disparate impact on Jewish and Muslim women (and in other respects men too) – the very stuff of indirect discrimination – compared, say, to Christianity. It is hard to avoid this conclusion as a simple empirical observation. It might even rise to the status of judicial knowledge and not be left to fact-finding.

If this is so, the Directive itself, as well as the general law of discrimination in the field of human rights, mandates that there would have to be weighty reasons (which usually are canvassed in the third stage of proportionality analysis) justifying the acceptance of such discrimination. Failure to address this would constitute another grave flaw in the decision of any judicial instance.

2. A Brief Theological and Sociological Excursus

Before we move on to see how the CJEU deals (if it does at all) with the above two legal consequences I would like to make two sociological and theological observations.

It is not my intention at all to suggest that Christian believers, unlike their Jewish or Muslim brothers or sisters, leave their faith outside the precincts of the workplace. But the way they live their faith in the workplace is through their ethical conduct, their love of their fellow worker and the like, which constitute testimony to the living Christ. For the most part Christianity has abjured the myriad of ritualistic practices which characterize Islamic and Jewish Nomos. It is mostly a religion of the heart. Your Christianity in such circumstances is not manifested by what you wear, what you eat and the like, but how you behave. (It is perhaps necessary to dispel the common misunderstanding that Islam and Judaism are all about ritualistic practices: 'don't eat pork, but it's OK to cheat'; 'avoid alcohol but throw a bomb' – being classical anti-Semitic and Islamophobic tropes.) The moral law and the ethical imperative are a central part of Nomos and indeed render the ritual useless if the ethical is absent, as a brief excursion into Leviticus (where Love thy Neighbour originates) or prophets such as Isaiah and Amos well establish. This would also be the appropriate place to mention that in related cases where, for example, the vindication of one person's right, say to an abortion, would implicate the violation by another, say a Catholic, of their religion by violating in this example not a ritualistic rule but a firmly held divinely inspired moral rule, any court would have to engage in the same wrenching stage three proportionality analysis involving a clash of two conflicting protected rights. If there is a way of securing the abortion, without forcing someone to violate their religious convictions, it would probably be

indicated both under the stage two necessity test as well as stage three balance of values. It is the approach of ‘accommodation’ which is increasingly being used to resolve these divisive cases. (See *infra* in my discussion of Proportionality.)

I can understand why the Court – in total good faith (excuse the pun) – was oblivious to the manifest/practise distinction and does not even address it, even if to reject it. This is not surprising since in producing this blindness two massive civilizational forces – which often find themselves in opposition – combine to condition contemporary sensibilities on these issues. The two forces are the Christian Revolution of Jesus/Paul and the Laïque tradition of the French Revolution.

One (not the only one) central feature of the Christian Revolution was, as mentioned above, the teaching (in the Sermon on the Mount, for example) that the Law was accomplished and that the nature of the Covenant between God and (Wo)man had eternally changed. It was no longer important, to give but one emblematic example, what man put into his mouth but the words that came out of a man’s mouth and with that the intricate matrix of rituals which was and remains one (not the only one) central feature of Nomos was consigned to the dustbin of Christian religious understanding and practice as a relic of an earlier and more primitive stage in God’s world.

A normative judgment was associated with this feature of the Christian Revolution: Ritualistic Nomos was the peel. The core of the religious fruit was the interior of the human subject. You do not circumcise your penis, as do Jews and Muslims, but your heart. This normative judgment was (and is) often accompanied by contempt for the primitiveness of those aspects of Islam and Judaism and, even as contempt dissipated – or at least we have learnt to conceal it – a total incomprehension of the profound spiritual significance of Nomos set in. The underlying blindness to the distinction emanates precisely from that intuitive, almost natural, sensibility conditioned by two millennia of Christianity that ‘surely it cannot matter all that much to Chaya if she is asked to remove her scarf. Surely that scarf is but the peel, not the real flesh of the fruit.’ And, yes, ‘surely it is but a manifestation of her faith, not the faith itself’.⁸

Add to that, now, the pervasive impact of the French Revolution of which, blessedly, we are all children and beneficiaries in so many ways. Gloriously, to give but one example close to this case, the French Revolution as part of the dismantling of the Confessional State emancipated the Jews, making them ‘libres et égaux’ in the famous phrase of that very Revolution. But it was accompanied by Be a Man Abroad and a Jew in your Tent, in total accord with the laïque vision which regards religion as a private matter. The appropriate

⁸ It is, of course, clear that Judaism and Islam just like Christianity are not monolithic and contain various streams and movements not all of which consider the wearing of, say, the Hijab or the Yarmulke as obligatory. But some clearly do and it is not for us to question the religious commitment of the faithful.

locus of religion is the home and Church, not the public space which must remain 'neutral'. Historically, Jews embraced this in part as a worthy price to pay for their emancipation (and many, even most, embraced it as a catalyst for emancipation from the yoke of Nomos...).

With this sensibility, to tell Chaya that she is welcome to wear her scarf to her heart's content in her private space but not on work premises, would seem the most natural and innocent requirement. Indeed, her insistence on keeping it could be seen – and the tenor of the decision betrays such a view – as irrational and unjustified obstinacy.

Combine these two forces which are the pillars of Western civilization, add a largely secular society that has lost its knowledge, sensibility and even patience with religion, and the total obliviousness of the Court to this central distinction should not surprise us.

....

From Chaya to Samira

I do not think, as indicated above, that the mores of any religion, not least Islam, should be shielded from criticism (and there can be plenty), nor that practices which are odious to our fundamental values need be accepted simply because they are rooted in religious faith. And we may legitimately expect from those who come to join us in the phraseology of the defunct Constitution '... along the path of civilisation, progress and prosperity, for the good of all ..., including the weakest and most deprived; [and] to remain a continent open to culture, learning and social progress...', that they embrace our dreams and values. But an essential component of those very values is our firm belief in pluralism, and our commitment to tolerance and religious liberty. Our liberal states should not behave like the confessional state of yore, and joining us should not require abandoning one's faith and religion or, without grave reasons, forcing one to violate such. Just as our commitment to freedom of expression is put to the test when the speech in question offends us, so our commitment to tolerance, pluralism and religious liberty is put to the test when challenged. Whatever you may think of, say, Islam, particularly odious is to paint an individual with a brush dripping with group hatred.

I hope no one is so uncharitable as to think that I switched from Samira the Muslim to Chaya the Jewess because of a concern of mine for my fellow Jews. For reasons which are well known, the Jewish population in Europe is, historically speaking, very small,

and among them the number of Orthodox observant Jews such as Chaya is miniscule.⁹ (If your impression is that they are numerous you may wish to check the prejudice scales in your bathroom.)

The policy of the company in our case feeds this. These posters, the intolerance and even generalized hatred they represent, follow the syllogistic slide which defines religious and racial prejudice and bigotry. Law apart, we have here a betrayal of common decency and humanity. The threshold for justification of such policies should be high. Sadly, in Achbita there seemed to be hardly any threshold at all.

I find it hard to understand how the hands of whoever drafted and signed the judgment in Achbita did not tremble when writing these words: An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is..., in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers. Or that the Company, should endeavor "...to offer her a post not involving any visual contact with ... customers'. (Emphasis added). Yes, in theory it is about everyone. In practice it is about the Achbitas of our European world. You are, we tell them, ok, provided you keep out of sight, conceal your identity and your religion and do not come into contact with us.

In my view, this decision, apart from serious legal errors and impoverished reasoning, does not reflect what Europe stands for.

⁹ It is, of course, clear that Judaism and Islam just like Christianity are not monolithic and contain various streams and movements not all of which consider the wearing of, say, the Hijab or the Yarmulke as obligatory. But some clearly do and it is not for us to question the religious commitment of the faithful.



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