LECTURES

THE MANY AND THE FEW: CLASH OF VALUES OR REASONABLE ACCOMMODATION?*

MARTA CARTABIA**

Moral conflicts, cultural diversity, religious pluralism: we – the Courts – are often called to solve very divisive controversies on the place of religion in the public sphere. Religious obligations may conflict with legal rules and we, the Courts, are bound to enforce the legislation in force. Yet, among the legal and constitutional principles that Courts are expected to protect, freedom of religion takes a relevant place. Courts are in the uncomfortable position of being required to enforce general legislation and to protect freedom of religion at the same time.

Indeed, Courts in liberal democratic countries of the XXI century are committed to religious freedom, pluralism and religious minorities.

However, a comparative analysis show that different courts take

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** Vice President, Italian Constitutional Court

different approaches and come up with different outcomes, even if they are committed to the same basic values of constitutional democracies.

Let us take two recent, very similar cases on religious headscarves in the workplace. The United States Supreme Court decision in *Abercrombie* (2015)[1] and the decision of the Court of Justice of the European Union in *Achbita* (2017).[2]

Abercrombie refused to hire a practicing Muslim woman because the headscarf that she wore in light of her religious obligations conflicted with Abercrombie's dress policy.[3] The Supreme Court responded by making a clear statement in favor of religious freedom, articulating, "An employer may not make an applicant's religious practice . . . a factor in employment decisions. Although an employer is surely entitled to have a no-headwear policy as an ordinary matter, such-neutral policies are required to give way to the need for an accommodation."[4]

Achbita was a case that originated in Belgium, where a Muslim receptionist had been dismissed because she refused to take off her religious veil, which was forbidden by her company's internal rule that prohibited the use of visible religious, political, or philosophical signs.[5] In this case, the decision of the European Court of Justice was unfavorable to the worker.[6] The European Court finds no direct discrimination because all workers were treated in the same way, all being required to dress neutrally. The Court accepts that there might be a case of indirect discrimination, because of the disparate impact

1. Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015).

2. Case C-157/15, Achbita v. G4S Secure Sols. NV, (Mar. 14, 2017), http://curia.europa.eu/juris/document/document.jsf?text=&docid=188852 &pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=554787 (concerning the issue of employment discrimination related to an employee's decision to wear a veil).

3. *Abercrombie & Fitch*, 135 S. Ct. at 2031 (citing evidence that the district manager advised against hiring a woman because her headscarf violated the company's "look policy").

4. *Id.* at 2033-34.

5. Case C-157/15, *Achbita*, paras. 11-16.

6. *Id.* para. 45 (holding that a private entity may establish internal rules prohibiting the practice of displaying religious or political affiliation).

that the general policy has on some religious groups such as Muslims and Jews; nevertheless, the Court concludes that the image of neutrality of the company amounts to a legitimate purpose that might justify a restriction of freedom of religion.[7]

As these cases show, all western countries are facing the challenge of living together in a plural context, in shared spaces, without erasing diversity nor scarifying equality. However, different countries are exploring different avenues.

Here I would like to contrast the European "hard line" based on strict neutrality and antidiscrimination law, as Lady Brenda Hale has recently put it, with the model of accommodation – notice: not exemption - based on the language of balancing and reasonableness.

I. PLURALIST SOCIETY AND NEUTRALITY

Neutrality and antidiscrimination are hallmarks of the mainstream approach to religion in the public space in Europe. History matters. After the reformation, the old continent has been ruled for centuries under the principle of *cuius regio eius religio*.[8] Each country had an official or, a majoritarian religion: most protestant countries in the north of Europe, most Catholic in the South, the Anglican in England. After the Revolution at the end of the XVII century, France became strictly secular.

In such a context, for a long time, the constitutional glossary of pluralism has focused on the majority-minorities relationship: the many and the few. Minority groups were under strain because the general legislation was framed following the dominant ethical values and beliefs. In that context, the mission of Courts was clear. They had to open the door to diverse cultures and religions.

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7. *Id.* para. 38 (clarifying that a practice which has disparate effects is allowed as long as the practice has an objective and legitimate aim such as the pursuit of religious and political neutrality for those who work with customers).

8. James Turner Johnson, *Live & Let Die: Can Political Indifference To Mass Atrocity Be Overcome By Law or Responsibility To Protect?: Humanitarian Intervention, the Responsibility To Protect, and Sovereignty: Historical and Moral Reflections*, 23 MICH. ST. J. INT'L L. 609, 619-20 (2015) (describing the term as recognizing the right for rulers to establish the parameters for religious practice within their domain).

As a response, *neutrality* became the fundamental tenet of pluralistic liberal democracies. Neutral public institutions and legislation appeared to be the logical solution to the problems of the clash of cultures as they offer a legal framework aiming at safeguarding equi-distance towards different ideas of a good life.]

Overtime, historical experience showed that neutrality was defective and deceptive. It was neither able to fix the conflicts of pluralistic and fragmented societies, nor to provide solutions respectful of the rights of believers and non-believers alike. This was for two reasons. First, because neutral legislation can have a "disparate impact" on different groups and, therefore, produce a discriminatory effect (as in the cases of *Abercrombie* and *Achbita* quoted above).

Second, because, although it is advanced as promoting an open space for all, in fact "neutral legislation" is still approved by the dominant majority culture; in some cases it may produce deliberate or unintended "neo-assimilationist" effects, inimical to diversity and pluralism. The case law on religious symbols is a good example. To this end, we can identify two sets of cases.

First, the cases concerning religious symbols in public buildings: The preference for a neutral policy suggested to clean up the walls of all public buildings such as courts, tribunals, schools, hospitals, etc.[9] Generally speaking a neutral doctrine of the public space has been adopted by courts. As a result, religious icons and signs have been removed.

Later, a second type of cases came to the bench. This second wave comprises cases concerning personal religious symbols.[10]

9. *See* Cty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 590-91 (1989) (explaining that the government cannot convey or attempt to convey a preference for any particular religion); *see also* McCreary Cty. v. Am. Civil Liberties Union, 545 U.S. 844, 860 (2005) (explaining that the First Amendment mandates government neutrality in regards to religion and nonreligion); Lautsi v. Italy, App. No. 30814/06, Eur. Ct. H.R. para. 60 (2011), http://hudoc.echr.coe.int/eng?i=001-104040 (explaining that only a small number of European Union states proscribe religious symbols including France, Georgia, and the Former Yugoslav Republic of Macedonia).

10. *See* Şahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. para. 158-62, 166 (2005), http://hudoc.echr.coe.int/eng?i=003-1503367-1572572 (holding the rights

Teachers and students wearing their religious headscarves in schools, in universities and at the workplace; the kirpan in schools and in the streets; the turban and the niqab at the airport; the cross and other ostensible religious images worn by workers that are required to follow a neutral dress code (nurses, hostesses, etc.). These and other cases are keeping international, European, and national supreme and constitutional courts busy all over the world. In many of these cases, courts have applied the same principles that were used in controversies regarding the religious symbols in public buildings. The result was that in many European countries the religious symbols were forbidden. In England nurses and hostesses cannot wear a cross. In Italy, Sikh believers cannot carry a kirpan, according to a recent decision of the Supreme Court of Cassation.[11] In France, no ostensible religious symbol is admitted in public, and the niqab is utterly forbidden.[12]

A neutral approach applied to cases on personal religious symbols simply does not work, because it amounts to an undue restriction of freedom of religion. In fact, the problem with strict secular neutrality is that it is inhospitable to religious believers, as Cole Durham has repeatedly highlighted.[13] Others, like Joseph Weiler,

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of the applicant to access educational institutions was not infringed when university officials refused to enroll her in lectures due to her decision to wear a headscarf in compliance with her religious duties); *see also Abercrombie & Fitch*, 135 S. Ct. at 2028 (explaining Title VII does not demand mere neutrality but requires an affirmative obligation on employers not to fail, refuse, or discharge any individual due to their religious observance).

11. *Italian Court Upholds Ban on Sikhs Carrying Knives*, BBC (May 15, 2017), http://www.bbc.com/news/world-europe-39928912 (illustrating the Italian Supreme Court's reasoning that migrants who choose to live in Italy should follow Italian laws).

12. *See* Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulaion du visage dans l'espace public (1) [Law No. 2010-1192 of October 11, 2010 on Prohibiting the Concealment of the Face in Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Oct. 11, 2010, p. 1834; *see also* Ioanna Tourkochoriti, *The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.*, 20 WM. & MARY BILL RTS. J. 791, 803-04 n.75 (2012) (pointing out that despite a report released by an advisory council, which delineated circumstances under which the niqab could be banned, the French Parliament enacted a law which banned concealing one's face in public).

13. *See Durham, W. Cole, Jr.*, BYU RELIGIOUS STUDIES CENTER,

have stressed that religious neutrality, in fact, endorses one of the competing worldviews, precisely one without God.[14] More recently, Ayelet Shachar, commenting on the French ban of religious veils, noticed that neutrality measures may inadvertently become a variant of "indirect persuasion," even rising to "direct compulsion" reminiscent of the kind that occurred in the past when the State would use authority to advance the symbols and the practice of a majority religion, though now such methods are applied to the "new church" of secularism.[15]

II. EXCEPTIONS, OBJECTIONS, EXEMPTIONS

In front of these undesirable effects of neutral policies, many legal systems are making room for new forms of "fair inclusion," based on exemptions and accommodation. Here I would like to draw a distinction between religious exemptions (or conscientious objection in the European language) on the one hand and reasonable accommodation on the other.

Moreover I would like to insist that in a time of fragmentation, reasonable accommodations have a number of virtues to be elevated to ordinary approach to pluralism, whereas I would consider religious exemption (and objection) as *last resort measures*.

Let's first consider exemptions. The first move of individuals and groups that happen to feel that "neutral legislation" - like antidiscrimination provisions - oblige them to compromise their ethical integrity and to behave contrary to their religious convictions is to ask for exemptions. Christian doctors that do not want to

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https://rsc.byu.edu/authors/durham-w-cole-jr (last visited Mar. 10, 2018) (highlighting author's work in religious freedom law and international comparative law).

14. Alan Brill, *Joseph Weiler, Traditional Jew, Defends the Freedom to Affix a Crucifix*, THE BOOK OF DOCTRINES AND OPINIONS: NOTES ON JEWISH THEOLOGY AND SPIRITUALITY (July 6, 2010), https://kavvanah.wordpress.com/2010/07/06/joseph-weiler-traditional-jew-defends-the-crucifix/ (demonstrating that secularity's claim of neutrality is disingenuous).

15. *See* Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49, 80-81 (2005) (criticizing "neutral" legislation that prioritizes the concerns of the majority group as restrictive and burdensome on members of society that do not conform with the majority group's perspective and ideology).

practice abortions, young men committed to peace that do not want to join the army, religious charities that do not want to place children for adoption in same sex couples: the list is well known and can go on. All these subjects are in a very uncomfortable position; they are torn: obedience to a religious command is incompatible with compliance with the law.

In most cases, the legal order grants exemption so that the religious freedom of minority groups is preserved. Nobody would like to live in a community that imposes on people the obligation to commit a sin, to act against their own ethical beliefs, or to infringe upon a religious duty. But exemptions and objections have some important downfalls.

First, in many cases exemptions conflict with other individual rights. Exemption can shift the burden of the religious commitment of one individual onto another individual, whose rights are, or might be, undermined. Examples include women looking for abortions, gay couples that are discriminated against by service providers such as hotels, bakeries, and religious charities that do not want to offer their services to them. Granting exemptions means that government actors say no to civil rights; denying exemptions directly sanctions groups and individuals for beliefs. Second, as Davide Paris writes, if not properly regulated, exemptions may turn from a liberal to an antidemocratic institution, i.e., a sabotage of the law, a form of predominance of minorities of the majority.[16] Exemptions cannot be granted without ensuring the law's effectiveness. Third, exemptions cultivate the sentiment that religion and other ethical beliefs do not fit in with a modern civilization and liberal democracies, based on human rights and antidiscrimination principles. Invoking exemptions also has some costs for those who benefit from them, because it puts the minority groups, the few, apart, in a position of marginalization. In other words, following a useful distinction made by Ayelet Shachar, exemptions head towards a "privatized diversity" rather than to a "fair inclusion."[17] Fourth, they are a divisive

16. Davide Paris, *Il diritto all'obiezione di coscienza all'aborto nel Regno Unit: Nota a Greater Glasgow Health Board v. Doogan and another [2014] UKSC 68*, 3 BIO L.J. – RIVISTA DI BIODIRITTO 199, 199-207 (2015).

17. *See* Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale From*

instrument. They oppose different groups and tend to deepen the cleavages among them; the many, who claim the rights protected by the legislation, and the few that move apart from the social rules and lock themselves into closets. They bring fragmentation rather than social cohesion. They do not help living together but keep groups apart.

Make no mistake, I consider that, indeed, exemptions and conscientious objection are necessary instruments, as Antigone has taught over the centuries.[18] But they are for exceptional cases (army, abortion, capital punishment). Moreover, they are last resort possibilities, invoked when all other ways out have failed. They cannot become the ordinary approach to disagreement.

III. ALTERNATIVES TO NEUTRALITY AND EXEMPTION: REASONABLE ACCOMMODATION. LESSONS FROM CANADA

Is there any other alternative to be explored apart from sheer neutrality and exceptional exemptions? Courts need new solutions and are looking for them. We are going through times of fragmentation, clashes of cultures, suspect, and distrust. The kind of instruments that Courts are looking for are those that can bridge groups and people together; that foster cohesion.

The Canadian constitutional approach to reasonable accommodation has important virtues, worth taking into high consideration. Let's review once again, the first representative leading decision on reasonable accommodation: the well known Multani decision (2006), a case involving an 11 year old Sikh, who

Religious Arbitration in Family Law, 9 THEORETICAL INQUIRIES L. 573, 580-81 (2008) (indicating the difference of focus between public accommodation, in which a state's focus is on inclusion, and privatized diversity when parties in dispute turn to private dispute resolution for resolution of legal disputes in accordance with a group's religious principles).

18. *See* Robert P. Lawry, *Ethics in the Shadow of the Law: The Political Obligation of a Citizen*, 52 CASE W. RES. L. REV. 655, 690-91 (2002) (acknowledging Sophocles' Antigone as an exemplar of civil disobedience when faced with a decision between obeying an order not to bury her dead brother and the religious obligation to ensure he was given a proper burial).

was enrolled in a public school in Quebec.[19] The Court considered whether the boy should be allowed to carry a kirpan, a ceremonial dagger, in accordance with his religious beliefs, even though this created potential safety risks for other students and teachers and was in conflict with the, very reasonable, school board's prohibition on weapons and dangerous objects. The kirpan was at the same time an important, mandatory religious symbol for Multani, and a weapon for the school.

An approach based on neutrality would have led to the prohibition for Multani to carry the kirpan, as was decided by the Supreme Court of Cassation in Italy a few months ago.[20] No student should be allowed to carry a weapon at school. An approach based on exemption would have led to the opposite result, to the detriment of the observance of the school's rules, and to the safety of other students. The result would be either the sacrifice of religious freedom, or the sacrifice of safety concerns.

The response in the Multani case was more nuanced. The Canadian Supreme Court did not follow the absolutist approach of the total ban, nor did it ignore the requirements of security.[21] The Court cultivated instead an inclusive approach based on balancing that seeks to mitigate tensions between competing values and interests. As a result, the Court rendered a decision establishing that when he goes to schools, the young Multani Sikh is not necessarily required to remove the kirpan. However for security reasons Multani was asked to wear the knife under certain conditions: sew it in an

19. *See* Multani v. Comm'n scolaire Marguerite-Bourgeoys, [2006] S.C.R. 256, 317 (Can.) (describing reasonable accommodation as the process through which the parties to a dispute engage in discussion about the circumstances and their respective positions in an attempt to find a mutually agreeable solution).

20. *See* Yudhvir Ranal, *Italian Sikh to Move European Court of Justice in Kirpan Ban*, TIMES INDIA (May 19, 2017, 7:34 AM), https://timesofindia.indiatimes.com/city/amritsar/italian-sikh-to-move-european-court-of-justice-in-kirpan-ban/articleshow/58741439.cms (conveying the Italian Supreme Court of Cassation's decision to ban the carrying of kirpans in public and its ruling that "migrants in the western world must also conform to the values of the society they had chosen to settle in").

21. *See* Multani v. Comm'n scolaire Marguerite-Bourgeoys, S.C.R. at 259-60 (acknowledging the importance of carefully balancing evidence or threat of violence or concerns of safety with infringing on a constitutional right).

inside pocket in such a way that it cannot be easily taken out.[22] Since the decision was released nobody has heard of security problems in Canadian schools due to the kirpan and the Sikh. This is, for sure, a successful example of reasonable accommodation.

I see three main attractive features in a judicial approach based on accommodation, rather than neutrality or exemption, as far as I can understand the practice of the Canadian court. First, it moves the controversy from the theoretical to the practical level. Second, it requires a collaborative disposition from all the parties. Third, it is a win-win approach.

At the theoretical level, religious cases are often times "hard cases" if not "tragic cases" (Guido Calabresi[23]). When we, at the theoretical level, discuss clashes of values or clashes of rights, we are easily trapped in a discussion aimed at ranking different values. Should religious freedom trump security interests? Or should it be the other way around? Even more sensitive, should religious beliefs prevail over antidiscrimination rules? Framed at the theoretical level these issues are toxic for Courts and have no acceptable solutions. Values are tyrannical, as has often been reiterated by Carl Schmitt.[24] They tend to impose themselves in a one-takes-all dynamic. But this is not acceptable in a constitutional system. We do not want to protect freedom of religion at any price. Nor do we want to overlook it, even when other individual rights or other relevant public interests are at stake. Conflicts of values often drive courts into a deadlock, if framed in a doctrinal style. However, if we move from the doctrinal discussion to the practical level, we can see more than two answers, as we have seen in Multani; what is impossible to reconcile at the doctrinal level, can be accommodated in practice, in a *Praktischen Konkordanz* (K. Hesse): "[t]here are more things in heaven and earth,

22. *See id.* at 305 (explaining the reasonable accommodation to permit Multani to wear his kirpan to school so long as it was sewn inside his clothing).

23. *See* GUIDO CALABRESI & PHILLIP BOBBITT, TRAGIC CHOICES 17-18 (1978) (defining tragedy as the coexistence of differing values within society).

24. *See* CARL SCHMITT, THE TYRANNY OF VALUES (Simona Draghici ed. & trans., Plutarch Press 1996) (1959), https://www.counter-currents.com/2014/07/the-tyranny-of-values-1959/ (recognizing that the existence of both objective and subjective values necessitates the valuation of certain values at the expense of other values creating a "tyranny of values").

Horatio, than are dreamt of in your philosophy," Shakespeare would say.[25]

Following an accommodationist approach, everybody gains, although everybody has to accept a sacrifice, without impairing the essence of the value she or he is defending. The Sikh student from the Canadian case had to fix the knife to the jacket, and the school has to accept him bringing a weapon to class.[26] Everybody hands something over, but nobody surrenders or capitulates. Reasonable accommodation is based on the idea that we all want to live together. It is not the result of armchair reasoning; it can only work in practice, face to face. It requires taking into account the specific details of the circumstances, and the disposition of the parties. It is based on cooperation and the presence of a third impartial party, who facilitates reconciliation of opposing positions and helps in finding common ground. We cannot stress enough the power of encountering people face to face for bridging different worlds.

Reasonable accommodation is not the realm of absolutes. It is based on the language of balancing, flexibility, reasonableness, and requires "practical imagination" (Pierre Bosset[27]). For all these characteristics, accommodation is not the equivalent of exemption. Whereas exemption is an either or approach, accommodation is both in one. Whereas exemption keeps groups apart, accommodation bridges people. Whereas exemption can be established in the abstract (by law), accommodation requires a practical exercise. It is performative. It is not a pattern that can be repeated but an avenue that is to be walked each time anew.

IV. CONCLUSION

Some ten years ago, Martha Minow published an interesting

25. WILLIAM SHAKESPEARE, HAMLET act 1, sc. 5.

26. *See* Multani v. Comm'n scolaire Marguerite-Bourgeoys, S.C.R. at 305 (balancing security factors, freedom of religion, and the right to equality in holding that Multani was permitted to wear his kirpan to school so long as it was sewn inside his clothing).

27. *See* Pierre Bosset, *Complex Equality, Ambiguous Freedoms*, 29 NORDIC J. HUM. RTS. 4, 13-15 (2011) (discussing the multi-dimensional process of reasonable accommodation includes an analysis of many factors in an effort to establish "equality through different treatment").

article in the Boston College Law Review, where she expresses deep concern for the growing conflicts of competing values in this Country and the insufficient answer so far provided by the legal order.[28] The dominant atmosphere all over the world has not improved since then. She discussed the case of Catholic Charities placing children for adoption facing the antidiscrimination rights of same sex couples. She compared different reactions to the same difficult problem. In some cases, Catholic charities made their tragic choice, and terminated the adoption practice rather than betray their firm beliefs.[29] They saved their moral coherence, and the state was not required to grant exemption. But, she commented it was a lose-lose solution; both sides now have left very vulnerable children with fewer resources and friends.

In other cases, the same kind of charities have started cooperative referral arrangements with other agencies, although they withdrew from direct child placement services. Same case, two different attitudes. The same case can be approached as a matter of principle, it becomes a clash of absolutes and brings about a general impoverishment for everybody and for the society as a whole, or as a matter of reasonableness and practical accommodation, it favors inclusion, connections and human flourishing for everybody.

Indeed, reasonable accommodation is not an easy model to follow. A Euclidean geometrical mind will be not satisfied by reasonable accommodation. Indeed it is not panacea and sometimes it might not be able to solve the problem at hand. Sometimes, "tragic choices" cannot be avoided (Calabresi, Bobbit, Brian Barry[30]). The idea of tragic, in the Greek classical culture, occurs when to polarized

28. *See* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 787-89 (2007) (observing that accommodations to one group of persons may appear as governmental preference or favoritism toward one group and that exemptions to general rules undermine the governmental purpose of imposing the general rule).

29. *See id.* at 831-41 (detailing Catholic Charities fight against pressure to permit adoption by same-sex couples and the ultimate termination of its adoption practice in response to the pressure by social and civil rights groups).

30. *See* Brian Barry, *Tragic Choices*, 94 INT'L J. SOC. POL. & LEGAL PHIL. 303, 305 (1984), https://doi.org/10.1086/292534 (describing a tragic situation as "a situation in which, according to some given set of values, unresolvable value conflicts come into play").

position are irreconcilable. Creonte and Antigone cannot find an agreement, as we can read in the evergreen text by Sophocles. Tragic choices cannot be always avoided, but are to be limited. As the Ancient Greek civilization reminds us, tragic positions always bring about death and destruction for everybody.

Avoiding tragic choices implies an open disposition of both parties and, indeed, it is not for a court or for the law in general to generate such a positive attitude. It is for the individual, the groups, the people, the communities, the public officers. But yes, it is for the court and for the law to create the legal framework where these attitudes can come forth, be praised, encouraged and become good practices to be followed. Making room for reasonable accommodation within the wording of the legal precepts is indeed in the power of Courts.