

**Comments concerning the Opinion and Recommendations of the Advocate General,
Juliane Kokott, delivered on 31 May 2016**

Case C-157/15, Samira Achbita

and

Centrum voor gelijkheid van kansen en voor racismebestrijding

versus

G4S Secure Solutions NV

If the Court follows the recommendations of the Advocate General this would be, in my view, contrary to the spirit of the anti-discrimination directives and previous jurisdiction of the Court.

The request for a preliminary ruling by the European Court of Justice (ECJ) refers to the case of Muslima Samira Achbita who worked as a receptionist at the company G4S Secure Solutions NV. After having worked some years without wearing a headscarf she then refused to take off the hijab at work. She was consequently dismissed. The further question is whether it is possible under European law to establish a general operational rule within a company stipulating that all employees behave in a neutral way in respect to their religious beliefs or philosophical and political convictions by having a neutral appearance. In order to fulfil this obligation they are prohibited from wearing visible signs, symbols or clothes of their religious, philosophical or political beliefs at work.

The Advocate General's line of reasoning

In her published Opinion the Advocate General examines the question whether the company's ban on visible signs of faith is compatible with European law and whether Mrs. Achbita's dismissal was legal. The Advocate General's legal analysis is based on European Union law, in particular Directive (Dir.) 2000/78/EC, the relevant norm for the area of employment and occupation concerning both direct and indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation (see Article 1 and 2 Dir.).

The Advocate General comes to the conclusion that this case is not a question of direct discrimination because all employees are equally prohibited from expressing their religious, philosophical or political convictions in a visible way. In her opinion the prohibition is rather a case of indirect discrimination on the grounds of religion, because the ban on headscarves, kippas, turbans or religious jewelry can be justified by an objective reason: the company's 'neutrality policy'. The policy stipulates such a ban and comprises the prohibition of visible signs of religions, beliefs or political opinions. The ban pursues a legitimate aim, as the neutral appearance of employees may constitute a professional requirement within the meaning of Article 4 para. 1 Dir. The justification must be 'a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'. In the Advocate General's view the bar set for justifying differences of treatment based on religion is high but not insurmountable (para 78).

In the specific case of the receptionist Achbita at the security firm G4S, which explicitly operates a 'neutral policy' in terms of religion, philosophy and politics, the Advocate General assesses the company's ban and employee's dismissal as justified (para. 78-84). The prohibition of a headscarf may be an 'essential and determining professional requirement' if a company in its own right (see Art. 16 of the Charter of Fundamental Rights of the European Union, Charter) wants its employees to display a neutral appearance.

Furthermore, the Advocate General examines whether the company's 'neutrality policy' and its prohibitory regulations are themselves legitimate. First, these regulations must not be based on prejudices against certain religions or beliefs or against religion as such. Second, the principle of proportionality must be respected in the implementation of this neutrality policy. Therefore the operational regulations must be appropriate, necessary (less restrictive measures are not available) and proportionate (in a narrow sense). The basic rights of the European Union are also to be applied in favour of the employees, in particular Article 10 of the Charter in regard to the freedom of thought, conscience and religion. But when it comes to exercising one's religious customs employees have to demonstrate reasonable restraint at the workplace. They could be asked to transfer religious practices to their leisure time. With this comment the Advocate General agrees with the legal reasons for the ban (in a narrow sense) and with the termination of the employment in this specific case. However, at the end she concedes room for differentiation with regard to the proportionality of the enforcement of company regulations in individual cases. Hence it is 'especially' relevant how large and conspicuous the religious symbols are. The proportionality of banning a visible symbol and dismissing a person also depends on the specific activity of the employee and the hierarchical context of the job. Finally, the national identity of each Member State has to be taken into account as well.

I now want to draw attention to **three aspects of the Advocate General's Opinion** and submit some critical comments:

- about direct and indirect discrimination,
- about the occupational requirement of 'religiously neutral behaviour',
- about the differentiation of individual cases within general company regulations.

1. Direct or indirect discrimination?

The Advocate General's line of reasoning is essentially based on the negation of direct discrimination. However, she thinks a prohibition of visible religious signs would be justifiable even if this were considered direct discrimination (para. 27), but she admits that this would be rather controversial.

Article 2 para. 1 a) of the Directive defines direct discrimination as follows: this *'shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1'* (religion etc.).

According to lit. b) indirect discrimination *'shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'*.

Under the Directive 2000/78/EC no possible justification is provided for direct discrimination on the grounds of religion. According to Article 4 para. 2 only churches or religious and philosophical organisations are exempt, which is not relevant here. Whether direct disadvantage can be justified as an exception under very limited conditions is regarded as controversial in law and literature. In the case of direct discrimination in respect of one of the prohibited categories, the person is treated 'less favourably' in a 'comparable situation' (Art. 2 para. 2 lit a), whereas in the case of indirect discrimination the person faces disadvantageous treatment, which cannot be justified on reasonable, functional and proportionate grounds (Art. para. 2 lit b Directive). With a superficial view of the matter, indirect discrimination could be the favourite diagnosis, because the apparently neutral criterion of the visibility of religious, philosophical or political symbols formally treats all stakeholders equally. However, if we consider more details we realise that it depends on the comparability of the situation. We must admit that 'religion' is directly addressed in the case of the Islamic headscarf because it is a visible piece of cloth worn because of religious reasons: The 'Islamic headscarf' is indeed the most contentious visible sign of the religion and the largest group of affected persons are Muslim women who feel obliged to cover head, neck and shoulders. Therefore, on the issue of comparability of situations, it must be taken into account that there are relevant differences between the religions of the world and between the particular obligations on their members and followers in respect to visible symbols.

Why does the Advocate General deny direct discrimination on the grounds of religion in the case of Mrs Achbita? She writes that, on cursory examination, the ban could constitute direct discrimination because Mrs Achbita was prohibited from wearing visible signs of her religious belief as a Muslim woman at work. The ban is directly linked to the Islamic faith (para. 43). This also corresponds to the broad interpretation of the Court of direct discrimination based on religion (para. 44). However, the Advocate General's decisive reason for denying a case of direct discrimination is the fact that in other cases the Court confirmed direct discrimination when 'immutable physical features or personal

characteristics - such as gender, age or sexual orientation' were at issue, rather than 'modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering'. In other words, the Advocate General says that it is not a question of unchangeable characteristics but of behaviour (para.45).

This difference can be easily explained by the fact that the European Court of Justice in Luxembourg (ECJ) has not yet decided any headscarf cases or any other cases about visible religious symbols or clothing - in contrast to the European Court of Human Rights in Strasbourg (ECtHR). This also means that the distinction, which the Advocate General advocates here and on which basis she rejects a case of direct discrimination, cannot comply with the broader lines of arguments and decisions by the Court. It seems to be a distinction the Advocate General has introduced ad hoc to justify her decision: the ban on visible signs does not constitute direct but indirect discrimination and can be justified more easily. This reasoning is not very convincing. Although the 'forbidden' discrimination categories of Article 1 of the Directive are in fact different in their disadvantaging effects, they do not represent a hierarchical order, neither do they allow such differentiation in respect to direct and indirect discrimination. European law does not protect immutable body characteristics against discrimination any better than differences in behaviour or beliefs (see Art. 19 Treaty on the Functioning of the European Union, TFEU, and the anti-discrimination Directives).

The controversial operational ban is of course not directed against the Islamic faith or any other religion as such. However, it prohibits showing any religious, philosophical or political commitment by wearing specific clothes, symbols or icons on the body. But to do so is part of the religious practice for some Muslim women who follow certain spiritual doctrines in reference to several Koranic verses. According to the interpretation of some religious schools of Islam women should cover their hair, neck and shoulders. Therefore some faithful Muslim women wear the headscarf (hijab) in the public sphere. In reality the headscarf is identified with the Islamic practice of Muslim women, as the obligation to cover head, neck and shoulders only refers to women. Although not all Muslim women feel obliged to wear the headscarf we can draw an analogy to the unchangeable body features which are cited by the Advocate General. The subjectively perceived obligation to wear a hijab usually leads to a permanent observance of this practice. As a result the practice is constantly observed. Of course a headscarf can be taken off, as well as a Jewish yarmulke or a Sikh turban; the woman would, however, be forced to do so against her religious conviction, as long as she acts under pressure of the operational ban. We can conclude that the woman will not be treated equally, she undergoes a 'less favourable treatment' because of her religious belief. We also notice that there is a direct reference to religion. This is exactly what the European Directives and the anti-discrimination laws of the Member States want to protect against.

It is obvious that the ban on religious symbols infringes the person's religious integrity and has the same effect as an intrusion on the freedom of thought and conscience. It is not by chance that the freedom of thought, conscience and religion are protected liberties within the same European constitutional laws (see Article 10 of the Charter and Article 9 of the Convention for the Protection of Fundamental Human Rights and Freedoms, ECHR). In the German Constitution the protection of belief, conscience and religion is equally combined in one section (Art. 4 Basic Law/Grundgesetz). Nobody shall suffer from disadvantages because of unalterable body characteristics or personal capacities, neither should this happen because of legitimate inner convictions. Only political opinions do not necessarily enjoy this

protection to the same extent.¹ However, religion is protected everywhere in the Union and recognised by anti-discrimination laws. Therefore it is prohibited to disadvantage a person because of her/his religion or because of practising such obligations in a visible way. The legal situation is the result of our historic insights due to the devastating religious wars in early modern Europe and in other parts of the world. Therefore respect for the freedom of religion or belief is crucial. Even in the private employment sector religious obligations are relevant and must be considered. Opposing rights and interests of employer and employees, however, must be weighed against each other.

It should be noted that the distinction between unchangeable physical characteristics and inner religious convictions is not a suitable criterion for answering the question whether a ban against headscarves and other visible symbols constitutes direct or indirect discrimination. The significance for the person's identity and connection to their human dignity may be the same. The Advocate General characterises headscarves as a form of 'custom' and therefore suggests that wearing it in public is dispensable. By arguing this way she misses the normative character of the problem. A female Muslim employee is unlikely to put her job at risk because of a dispensable ritual, a habit, a mere fad, thus endangering her economic livelihood.

The 'Islamic headscarf' and any related discrimination are typical examples of multidimensional and intersectional discrimination against Muslim women. The elements of direct discrimination on the grounds of religion converge with indirect discrimination related to gender or ethnic origin. In her Opinion the Advocate General does not adequately take into account this context of social discrimination (see para. 114-116).

Further justifications by the Advocate General, why banning visible signs of a religion or belief at the workplace should not be seen as direct discrimination, are not convincing either. Of course the prohibition of visible religious symbols is not linked to the affiliation of a particular religion, but to the symbolic expression of a belief. Thus, it does not affect all Muslim women, but some who feel obliged to wear to cover their head and would be disadvantaged in direct connection to their religious belief. The fact that members of other religions or convictions can be – theoretically – sanctioned the same way when they make their faith visible through symbols or clothes, makes no difference and does not change the discriminatory nature of the prohibition.

2. What does 'religiously neutral behaviour' mean?

At this point we come to the second crucial element of the Advocate General's reasoning, the significance of a 'neutrality policy' within private-sector companies. Juliane Kokott examines the question of whether an operating ban on visible signs of a religious, philosophical or political conviction is legitimate, and whether its implementation is proportionate. In other words, she asks whether the absence of visible religious signs can be regarded as a 'genuine and determining occupational requirement' within the meaning of

¹ EU Individual member states have included in their anti-discrimination laws partly political opinions under protection against discrimination. See EU Commission 2006: Religion and belief Discrimination in employment - the EU law. (Author: Lucy Vickers, published by the direction general Employment, Social Affairs and Equal Opportunities, Ref G.2), p. 29/30.

Article 4 para. 1 of the Directive 2000/78 / EC. As a particular requirement in the sense of the Directive the Advocate General identifies 'religious, philosophical and political neutrality' which means in reference to the headscarf: 'religiously neutral behaviour'.

She emphasises that the owner of the private enterprise has the right to define the corporate identity of the business and the guidelines for the human resources management. The concept may be a policy of diversity, but can also be a policy of strict neutrality (para. 76). Especially in laic states like France the latter could be adopted by private-sector companies. For a company in the security industry the Advocate General assumes this to be especially evident (para. 93).

In order to achieve such a corporate identity under the rules of the European Directive the guidelines of the company must pursue a legitimate aim that complies with European law. It must not be based on prejudice, misanthropic ideology or simply be a reaction to the requests and preferences of its customers. At least the company must not follow these wishes blindly and unthinkingly (para. 90), otherwise it would contradict the leading decision in the case of Feryn of 10.07.2008 (C-54/07). From the perspective of the Advocate General a headscarf ban by the company fulfils those legal requirements. It is an expression of a self-imposed policy of religious, philosophical and political neutrality (para. 93).

This line of reasoning can, however, be criticised because the Advocate General equates the wearing of an 'Islamic headscarf' implicitly with the behaviour of a person who cannot be religiously neutral. The question, how a woman wearing a headscarf 'behaves' differently in her job, does not seem to be relevant. Such a concept of behaviour is implausible. Behaviour does not only constitute the outer appearance of an employee - on the contrary - most parts of one's behaviour consist of speaking and acting. A Muslim woman can wear a headscarf while exhibiting through words and actions a properly neutral behaviour in relation to religion, philosophy and politics.

The Advocate General's interpretation represents a shortcut version of neutrality – some sort of non-visibility of religious belief. This is problematic because neutrality should be expressed in one's conduct and the whole behaviour. A symbol or a piece of clothing is only part of it. A headscarf does not determine the overall character of the person's attitude.² The company and its customers may expect politeness, equal treatment, courteous responsiveness to the customers' legitimate wishes and refrain from any religious, ideological or political influence and change of the customers' opinions. Wearing a headscarf does not prevent a person from fulfilling these expectations at all.

It is one of the professional requirements for employees with a headscarf to show their neutrality through words and actions and to refute any fears that a Muslim woman would disadvantage Christians, Jews or non-believers as customers or colleagues and prefer Muslims by fulfilling these sensitive requirements. If despite her correct behaviour the Muslim woman does not succeed in defeating the stubborn prejudices of her counterpart in the communication process this should be regarded as the problem of the communication

² In the case of a burqa or niqab it is different because those concealments cover the face and obstruct an 'undisguised communication' face to face. In case of the headscarf, however, the person is not prevented from fulfilling her work contract.

partner, not of the covered woman. The Feryn-judgment of the ECJ from 2008 can be interpreted in this sense and transferred to the headscarf issue.³

The European legal struggle against discrimination supports the idea that a Muslim woman wearing a hijab - like a Sikh wearing a turban or a Jew wearing a kippah - must have the right to express her faith as a free and equal citizen and also as a worker and employee in the labour force, as long as this does not infringe the occupational requirements or the rights of customers, colleagues and the company owner. If her behaviour is correct, including words and actions, the process of consideration will likely end up in favour of the right to wear a headscarf, as there is no issue of any concrete danger or impediment to the rights or integrity of other people or the interests of the company. The same may also apply to employees, who – for example as a Christian woman with a golden or silver cross necklace - make their faith visible at the workplace without necessarily feeling obliged to follow a religious rule.⁴

The employee's right to practise her/his faith – together with the correct 'neutral' conduct (as expressed through speech and action) – should in general have a bigger normative weight, since Article 19 TFEU and the anti-discrimination Directives of 2000 (2000/43/EC, 2000/78/EC) were created in order to protect against discrimination of this kind. It would be self-contradictory of European law if a (general) occupational rule including a ban of visible religious signs and symbols would be permitted as a legitimate exception to the prohibition of discrimination. This is also true if in this case the ban is considered – e.g. by the Advocate General - as indirect discrimination on the grounds of religion.

The company is entitled to request a religiously, philosophically and politically 'neutral behaviour' of its employees. But as mentioned above: A neutral attitude should be expressed through words and actions. The ban on visible symbols would be directed against Muslims enforcing the prejudice that Muslim women wearing headscarves would not be able to behave in a 'religiously neutral' way.

A company has various opportunities and instruments in order to enforce its entrepreneurial profile with a specific code of conduct. It can make the variety of religions and cultures their base line or it can define itself as a religiously and ideologically neutral company. It may implement a code of conduct. Likewise, the company can obtain the best possible appearance through a company uniform, as the Advocate General suggests (para. 83). However, by prescribing a uniform for the company's employees the employer has to avoid discrimination against those persons who feel religiously obliged to wear a visible cover or to make their commitment visible. In this case a variation of the uniform must be provided which allows those persons to fulfil their obligation. From this perspective a policy of diversity among the staff and a policy of religious neutrality are not as opposed as it appears in the Opinion of the Advocate General. Private-sector companies must cope with the existing diversity in their workforce. This is also true for private companies in laïc states where religious issues, symbols and statements have to be kept out of the public sphere. This ban is, however, based on laws and constitutional principles of the state enforcing its self-definition as strictly secular and republican because it assumes it enables all citizens to participate as free and equal persons in the democratic public sphere. But the principle of religious neutrality is only applied to public institutions. At the workplace in private

³ This plays a role in the parallel proceedings (Bouagnaoui and ADDH, C-188/ 15) case of Achbita (C-157/ 15).

⁴ ECtHR Eweida and others ./. UK , Application no. 48420/10 et al.

companies the situation is different and the premises of the state's neutrality or even *laïcité* cannot be applied. The employer has rather to observe the anti-discrimination laws promoting religious and philosophical freedom and diversity, as long as the procedures at the workplace are not disturbed.

Difference, variety and to some extent inequality of opportunities are not only aspects of the religious and philosophical worlds, these differences are also expressed by the allocation of positions in respect to gender, age, ethnicity, sexual orientation and disability. 'Neutrality' in all respects is simply not possible and cannot be desired, because there is, for example, no neutral skin colour, sex or sexual orientation. The staff of a company cannot be neutral in relation to all these categories. An exclusion of job applicants due to race or sex would be incompatible with the directives of the European Union. Therefore, there is no reason why the selection on the basis of religious faith should be viewed differently. The issue of 'Church clauses' and rules for companies led by a specific ethos (see Art. 4 para. 2 of Directive 2000/78/EC) are not under consideration here. Even if - as the Advocate General assumes - the operational rule should 'merely' be seen as indirect discrimination, it would remain a blatant self-contradiction if, under the law of the European Directives, an exception to the prohibition of discrimination and an exclusion from the workforce would be justified. The result would mean exactly the opposite as stipulated in the directive's aim.

Consequently, the conclusion that not to wear a headscarf or other visible religious (or philosophical) symbols is a 'genuine and determining occupational requirement' if an explicit 'rule of neutrality' is imposed on the employees of the company, is not convincing. The ban on visible religious signs rather seems to infringe the employee's right not to be discriminated.

3. The principle of proportionality: Is it possible to differentiate in terms of the size of the symbol or the position of the employee?

The Advocate General describes the proportionality test as a 'delicate matter' (para. 99). She draws analogies to several decisions by the European Court of Human Rights (ECtHR) confirming a legal ban on headscarves in some (laïc) countries worn by civil servants or by pupils or students in schools and colleges or universities to be compatible with the ECHR of 1950. However, in Art. 9 of the ECHR the legal basis is significantly different from the anti-discrimination Directives and the underlying norm of Article 19 of the Treaty on the Functioning of the EU (TFEU, formerly the EC Treaty). Article 10 of the EU Charter and Article 9 of the ECHR are also different. Article 10 of the Charter does not - as Article 9 of the ECHR - contain a legal reservation, which allows a wide range of legal restrictions to save necessary conditions for a democratic society in order to maintain public safety and order, to protect health, morals or the rights and freedom of others (article 9 para. 2 ECHR).⁵ Within the range of Article 10 of the Charter of Fundamental Rights there is no such reservation, in cases of conflict the opposing rights have to be weighed carefully against each other. According to both articles religious customs and rituals are protected.

⁵ While Article 2, paragraph 5 of Directive 2000/78 contains a reservation for national action in order to maintain safety and order and other necessary goods in a democratic society, this does not entitle companies to overturn legal prohibitions of discrimination according to the Advocate General (para 136-140).

However, the basic rights of the Union's treaties bind only the Member States and public authorities, they do not apply to direct obligations between private parties. When applying anti-discrimination laws, which were designed to transform the directives into national laws, and when interpreting the regulation in this case it is necessary to consider corporate rights and interests in relation to the rights and interests of employees. As the Advocate General writes in her Opinion, the company can ask its employees to show restraint in their religious practice in the workplace, in particular if religious commitments, customs and rituals disturb operational procedures or are contrary to the requirements of the business. When for example prayers would interfere with the business operation they should be postponed to breaks or to the employee's leisure time. Normally this does not cause any problems even for very faithful Muslims.

The Advocate General emphasises that the headscarf can be removed and that this could be expected from Muslim women as a form of restraint in their religious practice. This is different to the case of gender, skin colour, ethnic origin, sexual orientation, age and disability, as it is possible to leave the headscarf at the door, i.e. outside of the company. Wearing the hijab is no unalterable fact (para. 116). This metaphor, which at first makes sense, is not convincing at a second glance, because - as stated before - the religious belief has to be respected if a person feels obliged to follow its rules. This right to follow one's own faith cannot be abrogated by the company's ban.

At the end of her examination and after the proportionality test of the ban on visible religious symbols the Advocate General explains that the extent of restraint which can be reasonably expected of an employee - including a Muslim female employee - depends on the consideration of all facts and relevant circumstances of the case (para. 117). She then surprisingly points out, that the permission or prohibition of a particular symbol depends on its size and visibility. This comment has also become part of the recommendations. A small earring or a pin that is not conspicuous may be allowed, whereas a hat, turban or a headscarf might not. Employees working in higher positions will be treated more strictly than employees working in subordinate positions (para. 119).

It is very surprising that these criteria for a final proportionality test are introduced at the very end of the legal analysis, because it confounds the entire logic of the operating ban. The prohibition of visible symbols was introduced as a blanket ban because of a strict neutrality policy. Such a blanket ban implies that all visible signs, symbols and clothing of all religions should be treated equally. Thus the ban should not allow exceptions in relation to the size of the symbols or the hierarchical position of the employees. The visibility of symbols is easily ascertained and connected to legal consequences. However, if it is not defined or carried out as a blanket ban, it would contravene the objective of a neutral appearance of all employees and their neutral behaviour. If one assumed, hypothetically, that companies would be permitted to differentiate in such a way this would open the door for granting privileges to specific religions and their signs and symbols. By allowing this the entrepreneurial neutrality policy would be unattainable and lose its credibility.

This self-contradiction also proves that the opinion and the recommendations of the Advocate General are inconsistent in crucial issues and do not comply with the laws of the Union.

Berlin, June 19/September 26, 2016

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Selected Publications:

Sabine Berghahn and Petra Rostock (eds.): *Der Stoff, aus dem Konflikte sind. Debatten um das Kopftuch in Deutschland, Österreich und der Schweiz.* Transcript Verlag, Bielefeld 2009.

Several contributions, e.g.: *Deutschlands konfrontativer Umgang mit dem Kopftuch der Lehrerin.* S. 33-72

Sabine Berghahn: *Ein Quadratmeter Stoff als Projektionsfläche: Gesetzliche Kopftuchverbote in Deutschland und anderen europäischen Ländern.* 2009. Im Portal: [gender-politik-online.de](http://www.gender-politik-online.de), http://www.fu-berlin.de/sites/gpo/pol_sys/politikfelder/Ein_Quadratmeter_Stoff_als_Projektionsflaeche/index.html

In the context of the EU research project VEIL (Values, Equality and Differences in Liberal Democracies: Debates about Female Muslim Headscarves in Europe, 2006-2009) a book was published:

Sieglinde Rosenberger/Birgit Sauer (eds): *Politics, Religion and Gender. Framing and regulating the veil.* Routledge, London 2011.

Within this book there are two contributions by Sabine Berghahn:

- Legal regulations: Responses to the Muslim headscarf in Europe. pp. 97-115.
- Together with Gül Corbacioglu, Petra Rostock, Maria Eleonora Sanna: In the name of laïcité and neutrality: prohibitive regulations of the veil in France, Germany, and Turkey. pp. 150-168.