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Wearing religious signs at work and the recent/pending cases at the ECtHR and at the CJEU in the context of European developments on discrimination on grounds of religion or belief.

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Current reflections on EU anti-discrimination law

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Outline

- ▶ **1. Development of a European framework on RB-based discrimination.**
- ▶ **2. RB-based discrimination in the ECtHR.**
- ▶ **3. RB-based discrimination in the CJEU. The AG opinion in the Achbita case (31 May 2016).**



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- ▶ **1. Development of a European framework on RB-based discrimination.**
- ▶ 1.1. Domestic developments
- ▶ 1.2. ECHR developments
- ▶ 1.3. EU developments



- ▶ **1. Development of a European framework on RB-based discrimination.**
- 1.1. Domestic developments

‘No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, **faith**, or **religious** or political **opinions**.’

Basic Law for the Federal Republic of Germany, 1949, article 3.3.



- ▶ **1. Development of a European framework on RB-based discrimination.**
- 1.2. ECHR developments

‘Everyone has the right to freedom of thought, conscience and religion (...) to manifest his **religion or belief** (...)’

ECHR, 1950, article 9.

‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as (...) **religion** (...)’

ECHR, 1950, article 14.



- ▶ **1. Development of a European framework on RB-based discrimination.**
- 1.3.1. EU developments: combating discrimination in the EU

‘In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on (...) **religion or belief** (...).’

TFEU, 2007, article 10.



- ▶ **1. Development of a European framework on RB-based discrimination.**
- ▶ 1.3.2. a) EU developments: employment and RB

‘(a) **direct discrimination** 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 (...); (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 (...) 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.’

Council Directive 2000/78/EC of 27 Nov 2000, establishing a general framework for equal treatment in employment and occupation, art.



- ▶ **1. Development of a European framework on RB-based discrimination.**
- 1.3.2. b) EU developments: employment and RB

‘Member States may provide that a difference of treatment which is based on a characteristic related to [among other things, **religion or belief**] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, article 4.1.



- ▶ **1. Development of a European framework on RB-based discrimination.**
- 1.3.2. c) EU developments: employment and RB

‘(...) this Directive shall (...) not prejudice the right of churches and other public or private organisations, the ethos of which is based on **religion or belief**, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.’

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, article 4.2



- ▶ **1. Development of a European framework on RB-based discrimination.**
- ▶ 1.3.3. EU developments: combating discrimination in the external action

‘(...) States have a duty to protect all persons within their jurisdiction from direct and indirect discrimination on grounds of religion or belief, **whatever the reasons advanced for such discrimination.** This includes the duty to rescind discriminatory legislation, implement legislation that protects freedom of religion or belief, and halt official practices that cause discrimination, as well as to protect people from discrimination by state and other influential actors, whether religious or non-religious.’

EU Guidelines on the promotion and protection of freedom of religion or belief, 2013, n. 35.



- ▶ **2. RB-based discrimination in the ECtHR.**
- ▶ 2.1. Religious autonomy empowers religious employers vis-à-vis employees. The Fernández Martínez case.
- ▶ 2.2. Balancing and proportionality empower religious employees vis-à-vis non-religious employers. The Eweida case.
- ▶ 2.3. The ‘objective and reasonable justification’ test empowers the State vis-à-vis religious persons. The S.A.S. case.



- ▶ **2. RB-based discrimination in the ECtHR.**
- ▶ 2.1. Religious autonomy empowers religious employers vis-à-vis employees.

‘Article 9 of the Convention does not enshrine a right of dissent within a religious community; in the event of any doctrinal or organisational disagreement between a religious community and one of its members, the individual’s freedom of religion is exercised by the **option of freely leaving the community** (...) religious communities can demand (...) a **heightened duty of loyalty.**’

ECtHR, Grand Chamber, Fernández Martínez v Spain, 2014, at paras 128 and 131.



- ▶ **2. RB-based discrimination in the ECtHR.**
- ▶ 2.2.1. Balancing and proportionality empower religious employees vis-à-vis non-religious employers.

‘(...) where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the **overall balance** when considering whether or not the restriction was **proportionate**.’

ECtHR, Grand Chamber, Eweida and ors v UK, 2013, at para 83.



- ▶ **2. RB-based discrimination in the ECtHR.**
- ▶ 2.2.2. Balancing and proportionality empower religious employees vis-à-vis non-religious employers.

‘(...) On one side of the scales was Ms Eweida’s desire to manifest her religious belief. (...) On the other side of the scales was the employer’s wish to project a certain corporate image. (...) while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida’s cross was **discreet** and cannot have detracted from her professional appearance. (...) the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that **the earlier prohibition was not of crucial importance.**’

ECtHR, Grand Chamber, Eweida and ors v UK, 2013, at para 94.



- ▶ **2. RB-based discrimination in the ECtHR.**
- ▶ 2.3.1. The ‘objective and reasonable justification’ test empowers the State vis-à-vis religious persons.

‘The Court notes that the applicant complained of indirect discrimination. It observes in this connection that, as a Muslim woman who for religious reasons wishes to wear the full-face veil in public, she belongs to a **category of individuals who are particularly exposed to the ban in question** and to the sanctions for which it provides. (...) a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and there is no discriminatory intent.’

ECtHR, Grand Chamber, S.A.S. v France, 2014, at paras 160-161.



- ▶ **2. RB-based discrimination in the ECtHR.**
- ▶ 2.3.2. The ‘objective and reasonable justification’ test empowers the State vis-à-vis religious persons.

‘This is only the case, however, if such policy or measure has no **“objective and reasonable” justification**, that is, if it does not pursue a **“legitimate aim”** or if there is not a “reasonable relationship of **proportionality**” between the means employed and the aim sought to be realised. In the present case, while it may be considered that the ban imposed by the Law of (...) 2010 has specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full-face veil in public, this measure has an objective and reasonable justification for the reasons indicated previously.’

ECtHR, Grand Chamber, S.A.S. v France, 2014, at para 161.



- ▶ **2. RB-based discrimination in the ECtHR. Key features.**
- ▶ 2.1. Cases related to wearing religious garb at work to be understood in the broader context of litigation: a) on wearing religious garb; and b) on religion at work
- ▶ 2.2. Margin of appreciation plays a key role
- ▶ 2.3. Balancing and proportionality v objective, legitimate and reasonable justification
- ▶ 2.4. Reference to EU Directive 2000/78 prompts convergence between ECHR and EU law



- ▶ **3. RB-based discrimination in the CJEU. The AG opinion in the Achbita case (May 31, 2016).**
- ▶ 3.1. The Samira Achbita case
- ▶ 3.2. Direct or indirect discrimination
- ▶ 3.3. Genuine and determining occupational requirements based on objective criteria
- ▶ 3.4. Legitimate objective and the business approach
- ▶ 3.5. Proportionality



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.1. The Achbita case. Request for preliminary ruling by Cassation Court of Belgium (see also Bougnaoui)

‘Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer’s rule prohibits all employees from wearing outward **signs of political, philosophical and religious beliefs** at the workplace?’

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at para 22.



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.2. Direct or indirect discrimination

'The deciding factor for the purposes of assuming the presence of direct religious discrimination (...) is that, *on account of religion*, one person 'is treated less favourably than another is, has been or would be treated'. There is nothing in the present case to indicate that an individual was 'treated less favourably'. (...) there is no evidence here either of discrimination perpetrated **against the members of one religious community** as compared with the followers of other religions, or of discrimination perpetrated against religious individuals as compared with **non-religious individuals** or professed atheists. '

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at paras 47-48.



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.3. Genuine and determining occupational requirements based on objective criteria

'The question of whether, in view of the **nature** of the activity concerned or the **context** in which it is carried out, specific occupational requirements can be regarded as being genuine and determining, and, if so, which ones, must be assessed in accordance with **objective criteria**, taking into account all the relevant **circumstances** of the case in question.'

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at para 80.



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.4.1. Legitimate objective and the business approach. Freedom of the employer

'(...) the employer must be allowed a degree of discretion in the pursuit of its business, the basis for which lies ultimately in the fundamental right of **freedom to conduct a business** (Article 16 of the Charter of Fundamental Rights). Part of that freedom is the employer's right, in principle, to determine how and under what conditions the roles within its organisation are organised and performed and in what form its products and services are offered.'

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at para 81.



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.4.2. Legitimate objective and the business approach. Corporate identity.

'(...) may serve as justification for a difference of treatment based on religion only if that dress code and the corporate image or **corporate identity** to which it gives expression are themselves legitimate and, in particular, compliant with EU law. (...) For example, if an undertaking wished to create for itself a corporate identity that promoted an inhuman ideology, that course of action would be blatantly at odds with the fundamental values of the European Union.'

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at paras 88 and 89.



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.4.3. Legitimate objective and the business approach. Customers' rights.

'An undertaking can and must, by definition, take into careful account the preferences and wishes of its business partners, in particular its **customers**, in its business practices. It would otherwise be unable to sustain its presence on the market. It nonetheless cannot pander blindly and uncritically to each and every demand and desire expressed by a third party.'

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at para 90.



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.4.4. Legitimate objective, business and neutrality.

'(...) a policy of **neutrality** is absolutely crucial, not only because of the variety of customers served by G4S, but also because of the special nature of the work which G4S employees do in providing those services, which is characterised by constant face-to-face contact with external individuals and has a defining impact not only on the **image** of G4S itself but also and primarily on the public image of its customers.'

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at para 94.



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.4.5. Ban appropriate to achieving the objective.

'(...) an occupational requirement may not be appropriate for achieving the objective pursued if its content is not clearly and unambiguously **recognisable** to employees (...) [the ban] must not be **contradictory** and must be applied and enforced **consistently** by the employer in relation to all of its employees.'

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at paras 102-103.



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.4.6. Ban necessary to achieving the objective: no reasonable accommodation.

'(...) So far as other grounds for differences of treatment are concerned, in particular religion, however, it would be more consistent with the position adopted by the legislature in Directive 2000/78 for employers **not to be required** to make such provision [of reasonable accommodation].'

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at paras 110.



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.5.1. Proportionality stricto sensu. No undue prejudice to employees. Moderating the exercise of religion.

'(...) unlike sex, skin colour, ethnic origin, sexual orientation, age or a person's disability, the practice of religion is not so much an unalterable fact as an aspect of an individual's **private life**, and one, moreover, over which the employees concerned can choose to exert an influence. (...) [an employee] may be expected to **moderate the exercise of his religion in the workplace**, be this in relation to religious practices, religiously motivated behaviour or (as in the present case) his clothing.'

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at para 116.



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.5.2. Proportionality stricto sensu. No undue prejudice to employees. Assessing circumstances.

'(...) we should not rush into making the sweeping assertion that [the headscarf ban] makes it unduly difficult for Muslim women to integrate into work and society. (...) Ms Achbita worked as a receptionist for G4S for approximately three years without wearing an Islamic headscarf at work and was thus **fully integrated into working life as a Muslim woman, despite the headscarf ban**. It was not until after more than three years of working for G4S that she insisted on being allowed to come to work in a headscarf and, as a result, lost her job.'

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at para 124.



- ▶ **3. RB-based discrimination in the ECtHR.**
- ▶ 3.5.3. Proportionality stricto sensu. No undue prejudice to employees. Comprehensive assessment of circumstances.

'(...) the following factors in particular must be taken into account:

- the size and **conspicuousness** of the religious symbol,
- the **nature** of the employee's activity,
- the **context** in which she has to perform that activity, and
- the **national identity** of the Member State concerned.'

CJEU, Opinion of Advocate General Kokott, Achbita v G4S Secure Solutions NV, 31 May 2016, at para 141.



Outline and Conclusion

- ▶ **1. Development of a European framework on RB-based discrimination.**
- ▶ **2. RB-based discrimination in the ECtHR.**
- ▶ **3. RB-based discrimination in the CJEU. The AG opinion in the Achbita case (31 May 2016).**

‘ «European law courts are becoming a trans-national laboratory combining religious precepts, legal mechanisms, private interests and public policies in ever-more innovative ways,» [Marco Ventura] says. And, it might be added, the demands of private interests will probably fluctuate, given that corporations are often more responsive to shifting social reality than judges or law-makers.’

The Economist. Erasmus. Religion and Public Policy. June 3, 2016.