



Amicus Curiae - Comment

Network against Discrimination and Islamophobia (Inssan e.V.)

in the case C 157/15

Samira Achbita

and

Centrum voor gelijkheid van kansen en voor racismebestrijding

versus

G4S Secure Solutions NV

**Evaluation of the Opinion of the Advocate General Juliane Kokott from the perspective of the
antidiscrimination consultancy practice**

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27 June 2016

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A. Introduction

The Network against Discrimination and Islamophobia (Inssan e.V.) herewith comments on the case before the European Court of Justice in the case of Samira Achbita and the Centrum voor gelijkheid van kansen en voor racismebestrijding versus G4S Secure Solutions NV (C157/15). The Network refers to the proposal of the Advocate General Juliane Kokott in her Opinion of 31 May 2016. The Network submits this comment as *amicus curiae* and asks for its consideration in the proceedings.

The Network against Discrimination and Islamophobia is a project by Inssan e.V. which advocates equal rights and participation and less discrimination and racism against Muslims.

This comment aims to emphasise that the Opinion of the Advocate General increases the existing discriminatory risks of women with head scarves in the job market and prevents their equal participation.

B. Acceptance and realisation of religious and philosophical diversity in society, especially of Islam

Religious diversity is on the increase in Germany. Although there is no precise statistical information and scientifically collected data for this claim the Theological Information Service (Religionswissenschaftlicher Informationsdienst or REMID)¹ which provides detailed information on religions in Germany, or the religious monitor of the Bertelsmann Foundation² which examines religions and their significance for societal development, confirm this trend. The social perception of this religious plurality needs to be examined. According to the results of the study on the perception of different religions³ it is manifest that potential threats are rarely ascribed to Buddhism and Hinduism. On the whole, Christianity is also seen as an enrichment rather than a threat. 19% of East and West Germans respectively see Judaism as threatening.⁴ 50% of the interviewees perceive Islam as threatening.⁵ Islam is seen by many people as something *'foreign, different and threatening'*.⁶ A study about perception and acceptance of religious diversity by the Westfälische Wilhelms-University Münster⁷ in 2010 also confirmed that in all examined West- European societies the attitude towards Muslims was more negative than towards Buddhists, Hindus or Jews. In Germany the opinions in relation to all non-Christian religious communities was considerably more critical than in the other countries, and this negative attitude was even higher especially towards Muslims.⁸

¹ Retrievable under <https://www.remid.de>

² Retrievable under <https://www.bertelsmann-stiftung.de/de/unsere-projekte/religionsmonitor/>

³ Religionsmonitor-Religiösität und Zusammenhalt in Deutschland, p. 36, 37, retrievable under https://www.bertelsmannstiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/GP_Religionsmonitor_verstehen_was_verbindet_Religioesitaet_und_Zusammenhalt_in_Deutschland.pdf.

⁴ Ibid, p. 37, Diagram 14.

⁵ Ibid, p. 37, Diagram 14.

⁶ Ibid, p. 56.

⁷ Studie „Wahrnehmung und Akzeptanz religiöser Vielfalt“ von Prof. Dr. Detlef Pollack, retrievable under https://www.unimuenster.de/imperia/md/content/religion_und_politik/aktuelles/2010/12_2010/studie_wahrnehmung_und_akzeptanz_religioeser_vielfalt.pdf

⁸ Ibid, p. 3.

The Leipziger Mitte-Study 2016⁹ which is based on representative polls, states that every second person (male or female) in 2016 felt *'like a stranger in my own country'* and more than 40% want to stop Muslims from migrating to Germany.¹⁰ In a representative poll by the Federal Anti-Discrimination Office¹¹ 25% of the interviewees stated a *'rather negative'* attitude towards Muslims and 8% declared a *'very negative'* attitude.¹² In comparison, below 10% of the interviewees had a *'rather negative'* attitude to Jews, Buddhists, Hindus and Christians, for example.

These negative attitudes and positions of a large section of society towards Muslims are not based on experiences, but on the *'transfer and displacement of a social conflict onto an already stereotypical and stigmatised religion and group which is depicted in the media discourse as radical, violent and hostile to women.'*¹³ Professor Dr Florian Kreutzer, professor of sociology, maintains in his study on the discourse of Islamophobia *'Stigma head scarf – on the racist production of otherness'* that the media, as well as the everyday discourse, *'leads to anti-Muslim racism and racial othering which stigmatises, devalues and isolates male and female Muslims.'*¹⁴ The head scarf is seen as *'an image of the suppression of Muslim women and serves as a symbol of fundamentalism or even potential violence of Islam.'*¹⁵

The rejection of Islamic religiosity by a large section of society, as demonstrated by these studies, is especially expressed in the discrimination of women in the job market, in the public as well as the private sector.

C. Discrimination of Muslim women in Public Service

In several Bundesländer (German States) Muslim teachers at state schools, for example, were prohibited to teach with a head scarf according to the prevailing law of the respective Länder until the decision of the Federal Constitutional Court in 2015.¹⁶ This regulation excluded the affected women and worked effectively as a ban from their occupation since there were hardly any Muslim-sponsored private schools.

In its most recent decision the Federal Constitutional Court has declared a general prohibition of religiously connected clothing for teachers at state schools as unconstitutional.¹⁷ With this decision

⁹ Die enthemmte Mitte, Autoritäre und rechtsextreme Einstellung in Deutschland-Die Leipziger Mitte-Studie 2016, Oliver Decker, Johannes Kiess, Elmar Brähler(Ed.), retrievable under https://www.boell.de/sites/default/files/2016-06-mitte_studie_uni_leipzig.pdf

¹⁰ Ibid, p. 10.

¹¹ Antidiskriminierungsstelle des Bundes, Akzeptanz religiöser und weltanschaulicher Vielfalt in Deutschland, March 2016, retrievable under http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Umfragen/Bericht_zur_Umfrage_Akzeptanz_religioeser_und_weltanschaulicher_Vielfalt_in_Deutschland.pdf?__blob=publicationFile&v=2

¹² Ibid, p. 6, Diagram 3.

¹³ Stigma „Kopftuch“- zur rassistischen Produktion von Andersheit, Florian Kreutzer, 2015, p. 10.

¹⁴ Ibid, p. 24.

¹⁵ Ibid, p. 24.

¹⁶ BVerfG (Federal Constitutional Court), Decision of 27. January 2015, Az. 1 Bv R 471/10 and 1 BvR 1181/10.

¹⁷ Federal Constitutional Court, Decision of 27.01.2015, 1 BvR 471/10 und 1 BvR 1181/10, retrievable under http://www.bverfg.de/e/rs20150127_1bvr047110.html

the Federal Constitutional Court has strengthened the individual religious freedom of teachers and especially the right of Muslim women to non-discriminatory access to professions. One of the fundamental statements of this decision is that the requirement of religious-philosophical neutrality of the state is not violated by the visibility of the religious denomination of individual teachers. The decision also contains further important comments on the protection against discrimination. The previous controversial prohibition in the North Rhine-Westfalian school regulations *'affects, under the current circumstances, primarily Muslim women in Germany who wear a head scarf for religious reasons'*.¹⁸

Since the decision by the Federal Constitutional Court several Bundesländer have made changes to their laws.

Despite this decision the interior administration in Berlin decided not to change the Berlin Neutrality Law (Neutralitätsgesetz, Art. 29 of the Berlin Constitution), which generally prohibits Berlin public servants from wearing any religious clothing and symbols.¹⁹ The prohibition refers to public servants who are employed in the administration of justice, in prisons or the police, as well as teachers and other employees with pedagogical tasks in state schools. Exceptions are made for public servants in teacher training and other people in training.

An expert's report by the Scientific Parliamentary Service of the House of Representatives (Wissenschaftlicher Parlamentsdienst des Abgeordnetenhauses) however, came to the conclusion that the law is unconstitutional.²⁰ A Muslim teacher with a head scarf is currently taking legal action against the standard prohibition of the Berlin Neutrality Law. The Network against Discrimination and Islamophobia is supporting her lawsuit in a consultancy role.

D. Discrimination of Muslim women in the private work sector²¹

In the private work sector the head scarf ban has been seen by German legislation as inadmissible for quite a long time. The Federal Labour Court²² decided in 2002 that the dismissal of a sales woman because of – an Islamic – head scarf was not permitted. When defining the clothing rules the employer has adequately to consider the religious freedom of the employee which is protected by Art. 4 of the Basic Law (GG). The prohibition of wearing a head scarf represents a significant infringement of the religious freedom of the employee which cannot be justified by general entrepreneurial interests.

The General Equal Treatment Law (Allgemeines Gleichbehandlungsgesetz, AGG) which came into force in 2006 and was, inter alia, designed to implement the guideline which is relevant in this case, meant an improvement of the legal position of the affected women wearing a head scarf. The law

¹⁸ Ibid, ref. 143.

¹⁹ <http://www.berlin.de/aktuelles/berlin/4172182-958092-kopftuch-bleibt-bei-hoheitlichen-aufgabe.html>

²⁰ Abgeordnetenhaus von Berlin-wissenschaftlicher Parlamentsdienst-, Expert report on the consequences of the 'head scarf decision' („Kopftuch-Entscheidung“) of the Federal Constitutional Court of 27. January 2015 on the legal situation in Berlin, 25.06.2015, retrievable under

<http://www.tagesspiegel.de/downloads/12753284/2/gutachten-zum-neutralitaetsgesetz.pdf>

²¹ Comments by FAIR International-Federation against Injustice and Racism e. V.

²² Federal Labour Court (BAG), decision of 10.10.2002, Az. 2 AZR 472/01.

establishes wide-ranging protection against discrimination in the work place. It is important that the law not only prohibits direct discrimination, but also indirect discrimination. Many employers use the excuse of neutral rules, criteria or processes (e.g. uniform work clothes, hygiene rules) in order to discriminate against Muslim women in working life.

Since the enforcement of the General Equal Treatment Law some significant judgments in relation to the discrimination against Muslim women have been delivered. For example, the Berlin Labour Court²³ decided that an employer had to pay compensation to the affected person because of discrimination due to a head scarf in an application process. The Court accepted that the wearing of a head scarf is based on the requirement which is deemed compulsory and can therefore not be put on or off arbitrarily: *'This head scarf does not represent a usual piece of clothing or jewellery which the training provider can ask to be removed due to reasons of work safety, aesthetics, equal treatment or the standardisation of clothing rules. It is rather the direct expression of one's religiosity in relation to one's environment and its use is an act of religious expression. The wearing of a head scarf is not a preference of the plaintiff, but an essential part of her belief.'*

It is also remarkable what significance the Court assigns to the equal treatment law: *'The General Equal Treatment Law (AGG) constitutes the attempt of a societal education programme [...] It aims to have the effect that the subjects of the contractual freedom will not be guided by the thought that the potential contractual partner has a position which deviates from the majority. So basically, it should contravene a basic human evil, xenophobia. It also exists in a progressive cloak. The woman with a head scarf is seen as repressed and backwards. In reality, however, she is not wrong, just different; and a human being under the protection of the law.'*

Despite this 'positive legal development' women with a head scarf are still discriminated in the job market. This has several reasons: the effect of the head scarf ban in the public sector on the private job market and the employers' plain ignorance or disregard of the current law.

E. Effect of legislation in relation to the 'head scarf bans' on the general labour market – examples from our consultancy²⁴

The rejection of Islam and Muslims by a considerable section of society and the existing legislation in relation to the 'head scarf ban', especially in Berlin, is reflected in the employment practices of some employers.

Many employers reject applicants solely on the basis of their head scarf and consider this legal. From our consultancy work we also know that in many cases the racist or anti-Muslim dislike is expressed in direct discrimination. In a study on discrimination in companies the social scientist Prof Dr Albert Scherr showed that many firms would not employ women with a head scarf. In his study *'Discrimination in companies – why and how migrant applicants are disadvantaged in training and work places?'*²⁵ Prof Scherr determined that Muslim applicants are *'subjects of a direct and open*

²³ Labour Court (ArbG) Berlin, judgment of 28.03.2012, 55 Ca 2426/12.

²⁴ The examples were presented in connection with the consultancy FAIR International-Federation against Injustice und Racism e. V.

²⁵ Albert Scherr, Betriebliche Diskriminierung, retrievable under <http://library.fes.de/pdf-files/wiso/10470.pdf>

willingness to discriminate'. In the study's data on the provision of training places 35% said that they would not employ a woman with a head scarf and more than 10% stated that they would not employ Muslims in general.

When rejecting women with a head scarf it is not recognised that by wearing a head scarf many women follow a religious requirement which is deemed compulsory. It is an expression of the individual religious freedom which is not only a constitutionally guaranteed, but also a human right.

The Network against Discrimination and Islamophobia collects data on discrimination cases of Muslims living in Berlin within the project's framework. When evaluating the discrimination reports it is evident that in the employment sector (private job agencies, professional training, voluntary activities, work experience) primarily women experience discrimination. Almost 90% of these wear a head scarf.

Muslim women with a head scarf are especially discriminated against when looking for work or training places.

In many cases employers quite openly reject applications by women with a head scarf. Often the discriminating employers do not demonstrate any awareness of wrongdoing and feel their behaviour is right. So women who apply for a job without a photo on their CV are invited to an interview only to end up without having one, as the employer very quickly points out that they didn't imagine the applicant to look *'like that'*; in other cases the employers try to justify their rejection with alibi reasons.

Women who wear a head scarf are in many cases discriminated against by the 'argument' of equal treatment of women. Affected women tell us that employers justify their rejection by saying that women with a head scarf are suppressed and have been forced to wear it. A student who was rejected for a student job as a barista was told by the female branch manager that as an *'emancipated woman'* she would not like to *'legitimise'* the head scarf by employing a woman wearing one. She denied the Muslim woman her free religious decision of wearing a head scarf and used the old cliché of the suppressed Muslim woman.

In our consultancy practice we learned recently that a doctor's surgery had an internal agreement with a medical staff agency not to place women with a head scarf. The personnel agency left a message on the applicant's voicemail explaining that *'the customers just express their wish not to employ somebody with a head scarf'*. The employer's discriminatory employment practice was naturally supported by the personnel agency. It is inconceivable and paradoxical at the same time that the company in its job advertisement wrote that it adheres to the general equal treatment rule.

In cases where women have been employed by an employer for years and who then decided to wear a head scarf at a later time, the affected women have reported an enormous increase in the pressure from the employers through company restructuring or threats of dismissal if they didn't take off their head scarf. In some cases it also happens in a subtle way, e.g. by transferring an employee who has been working without any problems for a long time to other work places after starting to wear a head scarf.

In other cases employers based their rejection of Muslim women on economic losses, either through (anticipated) negative customer reactions or fear of conflicts within the company. For example, an

employee of a pharmacy told us that her employer dismissed her after a customer had seen her and had threatened not to enter the pharmacy any more. In that case the employee was anyway only allowed to work in the back part of the pharmacy anyway.²⁶

In some cases the pressure on the affected colleagues becomes almost unbearable. A kindergarten teacher reported that she was not only criticised by her superior for wearing a head scarf, she was also banned from the premises when she refused to take off her head scarf. She was not allowed to enter the premises of the state kindergarten anymore, otherwise she would be reported to the police.²⁷

In addition, we documented cases where trainee teachers who were looking for a compulsory work experience were rejected because the Berlin 'neutrality law' stands in the way of doing a work experience with a head scarf. The 'neutrality law' constitutes, however, an exception for trainees so that they are not affected by the prohibition of wearing religious symbols.

Moreover, despite the latest decision by the Federal Constitutional Court, women from a different educational background who apply to work in schools in the so-called welcome classes for refugees are still rejected because of their head scarf. Some of these women are even over-qualified for the position. One Muslim woman reported that schools would like to employ more people due to the enormous staff shortages, but are not allowed to because of the regulation in the Berlin 'neutrality law'. In another case a graduate trainee teacher had an offer from a school principal to do her teacher training on the job, full-time and with a fixed contract at the end, under the condition that she would take off her head scarf. Again, the principal's office explained that it did not mind what the trainee teacher wore on her head, but that the Education Ministry had explicitly told the school to convey this condition to the trainee teacher.

Personnel decisions are often not based on performance, but on considerations which effectively lead to the discrimination of Muslim women with a head scarf. This is demonstrated, for example, in the case of a young, highly qualified Muslim woman who applied for a ramp-operator position, but was told by the training provider that taking part in a further education course was pointless as the applicant could not count on employment by an airline. This job had a certain '*dress code*' and the head scarf would '*not be suitable*' for that. Again, it is paradoxical that the company stipulated in its behaviour code that all staff members are expected '*to respect the personal dignity, the private sphere and the individual rights of every person*' and '*not to tolerate discrimination whatsoever or on the grounds of religion for example.*'

F. Conclusion

The Advocate General's claim that the head scarf ban would not hamper the integration of Muslim women into the job market is not conceivable. On the contrary, their professional and social life is made much more difficult by 'head scarf bans'. Based on our experience in the field we can confirm that in our society many employers see nothing wrong in discriminating against women with a head

²⁶ Case from consultancy practice of FAIR International-Federation against Injustice and Racism e.V.

²⁷ Case from consultancy practice of FAIR International-Federation against Injustice and Racism e.V.

scarf. A decision by the European Court of Justice in line with the Advocate General's Opinion would increase the discriminatory conditions even more.

A supposedly neutral company rule, as in the present case, practically only affects the members of a religion who comply with an outer manifestation of their religiosity; therefore it almost exclusively affects Muslim women. The prohibition is disadvantageous only for this particular group. When employers reject women wearing a head scarf due to a company rule *'not to wear visible signs of their political, philosophical or religious conviction and/or not to express any ritual resulting from this conviction'*²⁸, it forces Muslim women to relinquish their human right of religious freedom. This is humiliating. It is incomprehensible how the careful consideration between the religious/philosophical freedom and the entrepreneurial decision-making freedom can lead to the detriment of the religious freedom of the plaintiff.

It is only a minor consolation when the Advocate General writes that general prohibitions which affect individual religions or have derived from prejudices are discriminating and inadmissible. In practice it will be difficult for the affected women to prove that such motives are behind the supposedly neutral company rules. This will basically require the affected women to take legal action. Because of the personal and financial burden some of the affected will, however, desist from this path.

The discrimination against women with a head scarf should not be increased by allowing private employers the chance of establishing a company model of 'neutrality' so that they can 'legally' discriminate and exclude Muslim women by applying supposedly neutral company rules.

(Translation: Susanne Müller-Menckens)

²⁸ Opinion of the Advocate General Juliane Kokott of 31.05.2016, C-157/15, ref. 17.