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Discrimination on Grounds of Religion or Belief and Neutrality Requirements: Opinion of Advocate General Sharpston in *Bougnaoui*

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I. Introduction

The question of how best to regulate the role of religion in society in the context of increasing religious diversity has been one of the most controversial questions in European life in recent times. The choices made by states in this area have been challenged before the European Court of Human Rights (ECtHR) on several occasions, but until 2016, the Court of Justice of the European Union (the Court) had not had an opportunity to issue a major ruling in this area.[1] It is often said that you wait for ages for a bus, then two come along at once, and this was the experience of the Court in the area of religion. After waiting for decades to receive a major case, 2016 saw not one, but two landmark disputes come before the Court,[2] both in relation to the compatibility of rules that restricted the wearing of religious symbols by employees in the workplace, with the prohibition of discrimination on grounds of religion or belief contained in the framework directive on discrimination in employment.[3]

The question of religion's role in society is an emotive topic in its own right. In contemporary Europe, it is made all the more controversial so by the fact that this question has come to be mixed up with a host of other 'hot-button' issues such as migration, multiculturalism, national identity, feminism, and sexual orientation discrimination. States have taken very different approaches to these matters, often influenced by foundational constitutional principles ranging from recognition of state churches in a number of Member States, to strict separation of religion and state in others. Some states have followed an approach that facilitates individuals in expressing and adhering to the requirements of their religious identity in a wide range of contexts. Others have taken the view that coexistence is best

[1] See eg *Eweida and Others v United Kingdom* [2013] ECHR 37, and *Ebrahimian v France* [2015] 1041.
[2] Case C-157/15 *Achbita* ECLI:EU:C:2017:203 and Case C-188/15 *Bougnaoui* ECLI:EU:C:2017:204.
[3] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

pursued by encouraging and sometimes enforcing reticence in relation to religious expression in certain shared contexts.

Therefore, in interpreting Directive 2000/78 in these cases, the Court was faced with the difficult task of interpreting legislation that applied in 28 Member States, all of which have their own particular approach to regulating the role of religion in society, approaches which are often linked to fundamental constitutional and political principles. Writing in 1994, Mancini and Keeling noted how the Court was changed by the arrival of the British and Irish members, who brought their common law traditions with them, and 'enriched the conceptual patrimony of the Court with rules and notions drawn from the common law, sometimes with surprisingly positive results'.[4]

As the presence of the word 'sometimes' indicates, blending legal traditions in a single institution can be a challenge. But it can also be an advantage. Humans have a tendency to regard what they are used to as acceptable and normal, and they can struggle to see how established ways of doing things are not inevitable nor necessarily fair. Viewed in this light, while the diversity of Member States arrangements in relation to religion made the Court's task of interpreting Directive 2000/78 difficult, the multinational nature of the Court also had the potential to be a major asset. Debate on this issue is all too often a dialogue of the deaf, in which people from different intellectual and constitutional traditions fail to realise that their way of looking at the issues is not the only one, and thereby talk past each other. An international court made up of lawyers from a range of legal and constitutional traditions could be particularly well-placed to come up with an approach that takes due account of the strengths and weaknesses of different approaches to religion, rather than being blinkered by their familiarity with particular national ways of doing things.

In debates around religion, two of the most prominent alternative ways of looking at the role of religion in society are represented by an approach predominant in France, which is based on the tradition of *laïcité*, which, despite the fact that this tradition focuses on the relationship between religion and the state, combines with the French republican ideas on citizenship to produce a broader suspicion of identitarian politics and of religious expression in non-state shared contexts, such as the workplace; and an Anglosphere approach which places greater emphasis on multiculturalism and facilitation of the expression of identity. Mutual incomprehension is a key feature of many of the disagreements between these two poles. For many Anglophone critics, the French approach is unduly

[4] F Mancini and D Keeling, 'Language, Culture and Politics in the Life of the European Court of Justice' (1995) 1 *CJEL* 397, 403.

restrictive, and insufficiently cognisant of the discriminatory impact of facially neutral rules against religious expression in certain contexts.[5] For many French critics, much Anglophone commentary is based on ignorance and mischaracterisation of French traditions of secularism and citizenship, as well as a regrettable tendency to apply an American (and sometimes, but less often, British) frame of reference to all situations.[6]

In these circumstances it was fortunate that, when faced with its first two major cases on religious expression at work, a francophone court such as the Court which is likely to be well-acquainted with French approaches, allocated one of the two cases (*Bougnaoui*) to an AG from the Anglophone world, AG Sharpston,[7] thus ensuring that the eventual decision would benefit fully from common law and Anglosphere insights, and holding out the prospect that the Court may have been able to come up with a ruling that drew on the strengths of both approaches (the other case (*Achbita*) was allocated to AG Kokott, who is German).

II. Background, Context, and Facts

Both cases related to the provisions of the framework directive on discrimination in employment – Directive 2000/78. The facts of the two cases were similar, but subtly different. In *Achbita*, the claimant, who worked as a receptionist at G4S, informed her employers in April 2006 that she intended to wear an Islamic headscarf at work, and was told that she could not do so because this violated G4S's unwritten rule requiring philosophical and religious neutrality in their employees' attire. In May 2006, G4S adopted a written rule banning visible signs of political, philosophical or religious belief a written rule, and in June 2006, Ms. Achbita was dismissed for her insistence on wearing the headscarf at work.[8]

In *Bougnaoui*, the claimant was informed by a representative of Micropole at an October 2007 student recruitment fair that wearing an Islamic headscarf may pose problems when she was in contact with customers. She began to work at Micropole in February 2008, initially wearing a bandana, and then a headscarf. In May 2009, a customer of Micropole's with whom Ms Bougnaoui had worked,

[5] See JW Scott, *The Politics of the Veil* (New Jersey, Princeton University Press, 2010).
[6] See B Haddad, 'France's War on Islamism Isn't Populism. It's Reality' (*Foreign Policy*, 3 November 2020). There are, of course, supporters and opponents of each approach in the US, the UK, and France.

[7] Opinion of AG Sharpston in Case C-188/15 *Bougnaoui* ECLI:EU:C:2016:553.
[8] Case C-157/15 *Achbita*, paras 10–21.

informed her employers that Ms Bouganoui's wearing of the headscarf had upset some of their employees, and requested that there be 'no veil next time'. Ms Bougnaoui refused her employers request to confirm that she would agree not to wear the headscarf on future occasions, and was dismissed in June 2009.[9]

The Belgian and French Courts of Cassation both referred questions relating to the prohibition on discrimination in employment on grounds of religion or belief to the Court, which, given their importance, decided to attribute both cases to the Grand Chamber.

In *Achbita*, the Belgian court asked whether a ban on a female Muslim employee wearing the headscarf at work should be regarded as direct discrimination when the employer in question bans all employees from wearing any outward sign of political, philosophical or religious beliefs at work. This was important as under the Directive, a directly discriminatory rule can only be justified by a 'genuine and determining occupational requirement'.[10] Indirectly discriminatory rules, on the other hand, can be accepted if it is shown that they serve a legitimate aim, and are pursued by proportionate and necessary means.[11]

In *Bougnaoui*, the French court asked the Court whether the wish of a customer not to have services supplied by an employee in an Islamic headscarf could be seen as a genuine and determining occupational requirement under the Directive (seemingly, assuming that the restriction in question was directly discriminatory). Therefore, both claims focused on the issue of direct discrimination. However, in addition to ruling on the issue of direct discrimination, the Court decided to give significant guidance in relation to the question of justification of bans on religious symbols as indirectly discriminatory measures.

Given the similarity of the issues at stake, the Grand Chamber of the Court heard both cases jointly, and delivered its ruling in respect of each on the same day but, interestingly, the two Advocates General (AGs) came to sharply differing conclusions on key issues.

III. The Opinions of AGs Sharpston and Kokott

[9] Case C-188/15 *Bougnaoui*, paras 13–19.
[10] Article 4(1) of Directive 2000/78.
[11] Article 2(2)(b)(i) of Directive 2000/78.

Both AGs were of the view that, where a ban on religious symbols at work is found to be indirectly discriminatory, a balancing exercise had to be carried out. However, they proposed giving contrasting indications to the national courts as to whether, on the facts, the actions of the employers ought to be found to have been proportionate. The AGs also disagreed as to whether such a ban could be found to constitute direct discrimination. Notably, the contrasting conclusions on both of these points were underpinned by very different characterisations of religion, a difference that reflects wider debates about the role of religion in contemporary Europe.

IV. Analysis

A. Neutrality as an Occupational Requirement

As noted above, whether a ban on religious symbols at work amounts to direct or indirect discrimination is of considerable importance, as, under Directive 2000/78, if a measure is found to be directly discriminatory, it can only be justified if it represents a 'genuine and determining occupational requirement'. For AG Sharpston, the answer in this case was clear. She noted that the Court has held that the derogation from the prohibition on direct discrimination in respect of genuine and determining occupational requirements must be interpreted strictly and, according to the recital of the Directive should apply only 'in very limited circumstances'.[12] Thus, she argued, the derogation 'must be limited to matters which are absolutely necessary in order to undertake the professional activity in question'.[13] AG Sharpston therefore concluded that:

> There is nothing in the order for reference or elsewhere in the information made available to the Court to suggest that, because she wore the Islamic headscarf, she was in any way unable to perform her duties as a design engineer – indeed, the dismissal letter expressly refers to her professional competence. Whatever the precise terms of the prohibition applying to her, the requirement not to wear a headscarf when in contact with customers of her employer could not in my view be a 'genuine and determining occupational requirement.[14]

AG Kokott, found that in Ms Achbita's case, the refusal to allow her to wear her headscarf, belief amounted to indirect discrimination because:

> [T]he ban at issue applies to all visible religious symbols without distinction. There is therefore no discrimination *between religions*. In particular, all of the information available to the Court indicates that the measure in question is *not* one directed specifically against employees of Muslim faith, let

[12] Para 95 of Opinion of AG Sharpston.
[13] ibid, para 96.
[14] ibid, para 102.

> alone specifically against *female* employees of that religion. After all, a company rule such as that operated by G4S could just as easily affect a male employee of Jewish faith who comes to work wearing a kippah, or a Sikh who wishes to perform his duties in a Dastar (turban), or male or female employees of a Christian faith who wish to wear a clearly visible crucifix or a T-shirt bearing the slogan 'Jesus is great' to work.[15]

Contrary to AG Sharpston in *Bougnaoui*, AG Kokott in *Achbita* also concluded that, even if the ban were found to be directly discriminatory, it could be said to amount to a genuine and determining occupational requirement on the basis that a neutrality policy was in principle legitimate and because:

> an employer may require its workers to behave and dress in a particular way at work in other circumstances too, which may be part of a company policy which it has formulated. This is particularly true if the work of the employees concerned – like that of Ms Achbita here – brings them into regular face-to-face contact with customers.[16]

AG Kokott therefore concluded that:

> taking into account the employer's discretion in the pursuit of its business, by no means unreasonable for a receptionist such as Ms Achbita to have to carry out her work in compliance with a particular dress code – in this case, by refraining from wearing her Islamic headscarf. A ban such as that laid down by G4S may be regarded as a genuine and determining occupational requirement.[17]

B. Neutrality as a Proportionate Aim?

The disagreement of the AGs also extended to the question of justification of indirectly discriminatory measures. Under Directive 2000/78, indirect discrimination occurs 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'. However indirect discrimination will not be found to have occurred if 'that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.[18]

Both AGs recommended giving a clear steer to the respective national courts as to how it should exercise its power to apply the Court's ruling to the facts before each of them. AG Sharpston stated that:

> Whilst the question is ultimately one for the national court having the responsibility for reaching a final decision in the matter and while there may be other matters relevant to any discussion on proportionality of which this Court has not been informed, I consider it unlikely that an argument based on the proportionality of the prohibition imposed under Micropole's workplace regulations –

[15] Para 49 of Opinion of AG Kokott (italicisation in the original).
[16] ibid, para 82.
[17] ibid, para 84.
[18] Articles 2.2(b) and 2.2.(b)(i) of Directive 2000/78.

> whether the ban involved the wearing of religious signs or apparel generally or the Islamic headscarf alone – would succeed in the case in the main proceedings.[19]

In this regard, AG Sharpston distinguished between the headscarf and face veils, and between customer and non-customer facing roles, stating:

> Western society regards visual or eye contact as being of fundamental importance in any relationship involving face-to-face communication between representatives of a business and its customers. It follows in my view that a rule that imposed a prohibition on wearing religious apparel that covers the eyes and face entirely whilst performing a job that involved such contact with customers would be proportionate. The balancing of interests would favour the employer. Conversely, where the employee in question is asked to work in a role which involves no visual or eye contact with customers, for example in a call centre, the justification for the *same rule* would disappear. The balance will favour the employee. And where the employee seeks to wear only some form of headgear that leaves the face and eyes entirely clear, I can see no justification for prohibiting the wearing of that headgear.[20]

Having found that a ban on all religious symbols satisfied the much more demanding test of being a 'genuine and determining occupational requirement', it was not surprising that AG Kokott concluded that such a ban could satisfy the less demanding test set out for indirect discrimination. On her analysis, neutrality was a legitimate aim for businesses, other approaches (such as an option for a uniform with a hijab) would not achieve neutrality, the ban in question was capable of affecting both men and women and those of all ethnic backgrounds and required merely neutrality from employees, it did not involve an active obligation to espouse particular views or act in accordance with a particular doctrine.[21]

C. What is Religion?

The divergent approaches of the two AGs flowed from their differing characterisations of what religion is. Scholars of religion and law have noted that our concept of religion covers two rather different phenomena.[22] Religion can be seen as a set of beliefs that are chosen, can be changed, and which can be analogised to other kinds of philosophical or political beliefs. It can also be seen as a form of identity that is rarely changed or chosen (it is usually inherited from parents), and which overlaps with other identities such as racial, ethnic, and national identities. Which definition one adopts will largely determine one's conclusion as to whether restrictions on religious expression are legitimate. If one regards religion as a form of belief, then restricting an employee from wearing a

[19] Para 132 of Opinion of AG Sharpston.
[20] ibid, para 130.
[21] Paras 112–25 of Opinion of AG Kokott.
[22] See C Laborde, *Liberalism's Religion* (Cambridge, MA, Harvard University Press, 2017).

headscarf or crucifix is no different from restricting an employee from wearing the badge of a political party while working. On the other hand, if you regard religion as a form of largely immutable identity, then a 'no religious symbols at work' rule appears little different from a rule excluding a particular racial group from a particular job.

For AG Sharpston:

> to someone who is an observant member of a faith, religious identity is an integral part of that person's very being. The requirements of one's faith – its discipline and the rules that it lays down for conducting one's life – are not elements that are to be applied when outside work (say, in the evenings and during weekends for those who are in an office job) but that can politely be discarded during working hours. Of course, depending on the particular rules of the religion in question and the particular individual's level of observance, this or that element may be non-compulsory for that individual and therefore negotiable. But it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not.[23]

AG Kokott, on the other hand, characterised religion as a matter of belief and ideology, thereby distinguishing it from other protected characteristics such as gender or race. She noted that the ban in question covered all religious and political signs and that:

> That requirement of neutrality affects a religious employee in exactly the same way that it affects a confirmed atheist who expresses his anti-religious stance in a clearly visible manner by the way he dresses, or a politically active employee who professes his allegiance to his preferred political party or particular policies through the clothes that he wears (such as symbols, pins or slogans on his shirt, T-shirt or headwear).[24]

This allowed her to distinguish between:

> immutable physical features or personal characteristics – such as gender, age or sexual orientation – rather than with modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering at issue here.[25]

The Court therefore benefitted from two contrasting opinions, each flowing from a view of religion that makes sense in its own terms. However, the real trick for multi-national courts, whose members come from a variety of different legal traditions, is not just to be open to the different perspectives that those members bring, but to be able to synthesise a coherent and fair approach that takes on board the insights of those different perspectives. From this point of view, the two Opinions leave one with a sense of a missed opportunity. The main reason so many of the issues arising in the regulation of the role of religion in society are so tricky is that religion is both a set of beliefs, and a form of identity,

[23] Para 118 of Opinion of AG Sharpston.
[24] Para 52 of Opinion of AG Kokott.
[25] ibid, para 45.

and the form of treatment that is appropriate for a set of beliefs is often very different to the form of treatment appropriate for a form of identity.

AG Sharpston argued that religion is a form of immutable identity, and set out the conclusions that flow from that characterisation. AG Kokott characterised religion as a form of belief and ideology, and set out the conclusions that flow from that view. This leaves one with the impression of two intelligent people talking past each other. Because religion is *both* identity *and* belief, what was needed were criteria to work out when it is right to treat religion as belief, and when it is right to treat it as identity. Both approaches can be appropriate at times. In relation to laws criminalising apostasy, it is probably best to treat religion as a form of chosen belief. In relation to the right to receive goods and services, it is probably best to see it as a form of identity. In relation to the wearing of religious symbols at work, what was needed were reasons why, in this instance, religion ought to be treated as either opinion or identity (and reasons why the Directive should or should not be seen as requiring a uniform approach from member states in this area).

D. The Judgments

The Court issued its rulings in the two cases on the same day, and though not joined, it indicated that the two should be read together by engaging in a significant degree of cross-referencing between the two rulings. Citing the right to conduct a business covered by Article 16 of the Charter of Fundamental Rights (the Charter),[26] the Court found that, in principle, an employer's wish to project an image of neutrality 'must be considered legitimate' (…) 'notably' when the restriction on religious expression only applies to workers who are 'required to come into contact with […] customers'.[27]

However, in order to be indirectly rather than directly discriminatory, a restriction on religious symbols or attire had to be part of a neutrality policy that 'is genuinely pursued in a consistent and systematic manner' that covered all symbols of religious, philosophical or political belief'.[28] As this approach sees restrictions on religious and political symbols as equivalent, it is much closer to AG Kokott's characterisation of religion than AG Sharpston's.

However, the Court also found that a policy that targeted the symbols of one particular faith (Ms. Bougnaoui had been told 'no veil next time'), would amount to direct discrimination that could only

[26] Charter of Fundamental Rights of the European Union [2016] OJ C202/391.
[27] Case C-157/15 *Achbita*, para 38.
[28] ibid, para 40.

be justified if it was regarded as fulfilling a 'genuine and determining occupational requirement'. On this point, the Court preferred the approach AG Sharpston, finding that it was that only in very limited circumstances can characteristics related to religion constitute a genuine and determining occupational requirement. Compliance with a client request, such as that made in Ms Bougnaoui's case, did not meet the Directive's requirement that a discriminatory rule be justified 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out'.[29]

In common with the AGs, the Court gave a strong steer to the national courts as to how they ought to apply the legal tests it had set out. Though emphasising that the application of the rulings was a matter for the national court, the ruling nevertheless stated explicitly that if a genuinely and systematically applied (and therefore indirectly discriminatory) prohibition on the wearing of symbols of religious or philosophical belief was applied only to workers with customer facing roles, then 'the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued'. On the other hand, it was also clear that in the case of a directly discriminatory rule that targeted the symbols of one faith, then compliance with client desires could not be seen as the 'genuine and determining occupational requirement' required to justify such a directly discriminatory approach.[30]

Overall, the Court went further than AG Kokott, had suggested in protecting religious expression at work, but not as far as AG Sharpston would have liked. The Court upheld the compatibility of rules prohibiting the wearing of religious symbols at work with the Directive, thus making room for an approach that sees reticence about religion in certain contexts as the best way of coexisting, while leaving states free to adopt other approaches if they choose to do so. But, by ruling that any restrictions must cover all religions and beliefs equally, the Court also took steps to ensure that such rules do not become a means to target adherents to minority or unpopular faiths.

E. Reaction and Effect on Future Case Law

The Court's two rulings has been criticised by a number of scholars who felt that the Court ought to have been less accommodating of attempts to restrict the wearing of religious symbols at work. Spaventa argued that the Court's analysis of the discriminatory nature of restrictions on religious symbols was 'rather superficial', and gave insufficient thought to the fact that protecting a principle

[29] Case C-188/15 *Bougnaoui*, paras 30–40.
[30] ibid, para 40.

of neutrality might have 'a more pronounced effect on people from a certain ethnic background or a certain gender'.[31] In a similar vein, Weiler criticised the failure of the Court to engage in meaningful analysis of whether the goal of neutrality satisfied the third limb of the proportionality test, faulting the ruling for failing to 'explore and weigh the value of the company policy of neutrality as against at least the presumed liberty of *manifesting* one's religious beliefs if not *practising* them. And […] in addition, if the company policy actually creates a discrimination among religions to further weigh whether the importance of the policy is such as to justify such discrimination'.[32]

AG Sharpston herself was critical of the Court's approach. For her, the ruling 'confused mandatory requirements of practising certain (non-Christian) religions with the optional choice of manifesting (or not manifesting) one's Christian belief in an overt way in the workplace'.[33] A similar point was also made by Weiler, who felt that the Court ought to have distinguished between expression of one's religion (as in the case of a Christian who wishes to express their faith by wearing a cross at work), and observing one's religion (as in the case a Muslim or Jew for whom wearing a headscarf or yarmulke is part of their faith).[34]

AG Sharpston also contrasted the approach in *Achbita* and *Bougnaoui* with the much more restrictive approach taken by the Court in cases such as *Egenberger* and *IR v JQ*,[35] in which it imposed a test of proportionality that was much more demanding in relation to rules on the part of employers that required employees either to be of a particular faith, or to live in accordance with the tenets of the ethos of the employer.[36]

Spaventa further worried that the invocation of the right to run a business in Article 16 of the Charter as a reason to permit employers to pursue a neutrality policy may limit the scope of Member States to pursue policies more protective of religious rights in the workplace.[37] This concern was also expressed in the aftermath of a subsequent Opinion on the question of religious symbols at work from AG Rantos.[38] Van den Brink notes how the Court's approach in *Achbita*, which sees neutrality as a

[31] E Spaventa, 'What Is the Point of Minimum Harmonization: Some Reflections on the Achbita Case' (*EU Law Analysis*, 21 March 2017).
[32] JHH Weiler, 'Je Suis Achbita' (Editorial) (2017) 28 *EJIL* 989.
[33] E Sharpston, 'Religion in the Workplace: When is Enforcing a Religious Ethos Acceptable? and When is Neutrality Discrimination?' in K Lenaerts, J-C Bonichot, H Kanninen, C Naômé and P Pohjankoski (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Oxford, Hart Publishing, 2019) 248, 255.
[34] Weiler (n 32) 991.
[35] Case C-414/16 *Egenberger* ECLI:EU:C:2018:257; Case C-68/17 *IR* ECLI:EU:C:2018:696.
[36] Sharpston (n 33) 257–60.
[37] Spaventa (n 31).
[38] Opinion of AG Rantos in Joined Cases C-804/18 and C-341/19 *WABE* ECLI:EU:C:2021:144.

goal that can be pursued partly to avoid offence to customers, influenced AG Rantos, and that small, discreet signs ought to be permitted, as they would not cause offence to customers, a view that for Van den Brink amounts to holding that 'it is not the perpetrator of discrimination who must change his intolerant attitudes, but rather the victim of discrimination who must change her religious practices'.[39] Similar criticisms were made by Sharpston when she took the unusual step of authoring a 'shadow opinion' on this case which she published online after AG Rantos had delivered his advice to the Court.[40]

There is something to some of these criticisms. The treatment of the right to be free of discrimination on grounds of religion, as equal in importance to the right to run a business, is somewhat troubling. On the other hand, much of the responsibility for this lies with those who insisted on including a very broad range of rights in the Charter. With such a range, the potential for them to come into conflict is high, with the result that, as in these cases, everything becomes a matter of balancing, and the narrower range of rights previously seen as fundamental, ironically, lose their fundamental status to some degree.

However, the Court is responsible for the emphasis it places on the question of customer preferences, something which raises more questions than it solves. For one thing, it fails to take account of the fact that employers' desire to restrict religious (or philosophical) expression at work may as often be motivated by a desire to avoid conflict or harassment between employees as to avoid difficulties with customers. In the well-known case of *Ladele* before the ECtHR, for example, the objection to accommodating the religious beliefs of a civil registrar who refused to register same-sex couples came from gay fellow employees, rather than any couple.[41]

Even focusing on customers alone, taking offence at a symbol of religious or other belief can be a matter of pure bigotry, but as religion and belief can encompass beliefs and opinions that a customer might legitimately find offensive, it is wrong to suggest, as Van den Brink does, that the Court's approach is equivalent to allowing businesses to pander to the prejudice of racist customers. It may often be the case that a customer's negative reaction to a religious symbol amounts to bigotry, but

[39] M Van den Brink, 'Preserving Prejudice in the Name of Profit: AG Rantos' Opinion in IX v Wabe and MH Müller Handels GmbH' (*Verfassungsblog*, 1 March 2021).

[40] E Sharpston, 'Shadow Opinion of former Advocate-General Sharpston: Headscarves at Work (Cases C-804/18 and C-341/19)' (*EU Law Analysis*, 23 March 2021).

[41] *Eweida and Others* (n 1). Ladele's case was one of the four cases decided together in the *Eweida* decision.

there may be circumstances when a belief is legitimately seen as offensive, and therefore negative reaction to that symbol would be understandable.

Indeed, despite her criticism of the Court's more permissive approach to restrictions on religious expression at work, the Opinion of AG Sharpston stated that customer preferences and upholding cultural norms could be relied on to prohibit the wearing of face-veils at work. If cultural norms can be relied on to prohibit the wearing of face-veils, why can a cultural norm that religious and political expression at work is to be avoided not be similarly enforced? There may be good reasons to distinguish between these situations, but the answers are not easy or obvious and the case for a multi-national Court making that determination is far from conclusive. That said, having invoked customer preferences, it was incumbent upon the Court to give guidance as to when it may or may not be legitimate to cater to customer preferences and its failure to do so in *Bougnaoui* and *Achbita* is regrettable. While the rulings in *Egenberger* and *IR v JQ* do indeed, as AG Sharpston noted, require much stronger justifications from employers for rules requiring employees to adhere to the employer's ethos, it is surely relevant that these cases related to attempts to regulate employee behaviour away from work, while *Achbita* and *Bougnaoui* related exclusively to conduct while on the job.

Weiler and Spaventa are correct that the Court could have provided more justification for its conclusion that the pursuit of a neutrality policy can satisfy the third limb of the proportionality test. On the other hand, this third limb is where judges engage in a form of merits review, by assessing whether the objective pursued by the restriction of the right justifies the restriction in question. This reluctance of the judges of the Court to definitively pronounce on whether a policy of neutrality can justify restrictions on religious expression at work is understandable. There are good reasons why the judges in such a court might be reluctant to pronounce on the merits of whether the goal of neutrality is sufficiently weighty to outweigh any indirect discrimination or restriction on religious liberty.

There is no consensus in Europe about what is the best way to manage the increase in religious diversity and the rising salience of religion as an issue in public life, and understandably so. Europe is living through the rapid rise of non-believers, the rapid decline of Christianity, and the rapid rise in the Muslim population, all at the same time. As these are all unprecedented developments. A store of precedents for how best to ensure coexistence in this situation does not exist. Different states have adopted different approaches. In the UK, the approach has been to permit religious expression in a wide range of contexts, whereas in France, the authorities have seen coexistence as best achieved by

requiring a degree of reticence in relation to religious expression in non-private contexts. Each approach has its critics. Some in France see the French approach as illiberal and conducive to alienation of minorities, while some in Britain feel that cohesion and coexistence have not been well-served by the UK's more permissive approach. Other states, such as the Netherlands, have switched from one approach to another in recent decades.[42] In a situation of unprecedented change and shifting political approaches, it would be immodest for the judges of the Court to decide that they knew best what approach will work for a Union of 27 (then 28) different Member States, especially given that particular approaches to religion are woven deeply into the constitutional orders of many of those states.

That said, it is easy to see why treating the wearing of a religious symbol simply as an expression of a political belief is unsatisfactory from the perspective of the person who may have no expressive intent in wearing that symbol. On the other hand, it is not clear how a religion-specific right to wear symbols reasonably associated with certain beliefs can be reconciled with the consistent commitment to equality of religious and non-religious beliefs seen in the Article 9 jurisprudence of the ECtHR.[43]

The Opinions in these cases show the loss that will be incurred by the loss of the British voice in EU law. The voice of the Anglosphere will sound less loudly in the Court going forward (and the Irish approach to these issues, which is influenced both by the English-speaking world and the French republican tradition within Irish nationalism, may be less divergent from the francophone approach than the British approach).[44] AGs Sharpston and Kokott each gave an analysis that made perfect sense in its own terms, and each of which influenced the ruling of the Court in some aspects. Though the way in which the two Opinions talked past each other does give a sense of a missed opportunity, this talking past each other was also in some ways, helpful, as it underlined the degree to which debates in this area can all too easily fall into a dialogue of the deaf. Religion is both opinion and identity, and any durable solution will have to cope with the reality that these different elements of religion often pull the law in opposite directions. By provided eloquent reasons for prioritising each element, the two AGs have helped to ensure that whatever solution ultimately emerges will take some account of each.

[42] I Buruma, *Murder in Amsterdam: The Death of Theo Van Gogh and the Limits of Tolerance* (London, Penguin, 2006).
[43] *Eweida and Others* (n 1) and *Ebrahimian v France* (n 1).
[44] R McCrea, 'Rhetoric, Choices and the Constitution' in E Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (London, Bloomsbury Professional, 2013).

Perhaps the most revealing feature of these cases is the fact that two distinguished AGs disagreed so sharply on the key issues. Ideally the Opinions would each have synthesised different national approaches and ways of looking at religion into a coherent EU approach. While neither Opinion managed to do that, the fact of their sharp disagreement itself gave useful advice to the Court, as it gave eloquent testimony to the lack of certainty in this area and the need for a pan-European court of law to tread carefully. That two experienced and longstanding members of the Court disagreed so profoundly shows perhaps that the Court was right to take the cautious approach of permitting different states to take different approaches in this developing area, though it ought perhaps to have been clearer about the fact that it was doing so. Given the increasing opportunistic use of secularist principles by those with exclusionary agendas to target religious minorities, the Court was also right not to be entirely permissive and to insist that any neutrality rules be applied in a way that does not target any individual faith. In an era of rapid change and uncertainty, that kind of gradualist, step by step approach to building a pan-European approach in this area is perhaps the most that can be expected.