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***OP v Commune d'Ans*. The 'Entirely Neutral' Exclusion of Muslim Women From State Employment**

By Gareth Davies

In [*OP v Commune d'Ans*](#), the Court of Justice determined that a rule maintained by a Belgian municipality, which prohibited the showing of any signs of religious faith in the municipal workplace, could be justified by the cause of preserving an 'entirely neutral administrative environment'. The measure primarily affected Muslim women who wished to wear a headscarf, and the effect is to *de facto* exclude such women from municipal employment, but the Court considered this less important than the preservation of this neutrality.

There were a few provisos. Firstly, the rule had to be imposed strictly and universally. The practice of tolerating discreet crosses on a necklace, and so on, common in Europe, could not be accepted. It was all or nothing. Secondly, the judgment only says that EU discrimination law does not prohibit such a rule. The Court emphasised that it is primarily for the Member States to determine the balance between religious freedom and other interests. Their courts and legislatures remain free to decide that the banning of all religious signs in public or other workplaces would amount to prohibited discrimination. They may, following Article 8(1) of [Directive 2000/78](#), give greater protection to equality than the Directive requires. Or not. This judgment essentially washes its hands of the issue, and perhaps the Court felt it had no choice. The idea of the neutrality of the state has a quasi-religious status in some Member States – ironic given that it is used to exclude religion. However, we are shaped by our enemies – and, if the Court had found it contrary to EU law, they might have been faced with non-compliance, not to say revolution, led by a coalition of historically minded constitutional lawyers and Islamophobes.

There is thus something to be said for decentralising this kind of value balancing. Dictating that states must respect values such as equality is gratifying for the one who dictates but not always the most effective way of achieving that result. Sometimes it is better to let communities find their own way to overcome the shadows of their past and rethink their constitutional *idées fixes*. Nevertheless, for better or for worse, the EU has in fact adopted equality legislation, which precludes direct discrimination, and requires Member States to justify measures which exclude or disadvantage particular groups. That justification process requires them to show the measures actually meet some genuine need.

Circular justifications

Viewed from that legal perspective, there are some oddities to the judgment. For one thing, this was arguably a case of direct discrimination. The Court found it was not, because the prohibition on religious signs was not inextricably linked to Islam (see paras 26-28). However, that is an incomplete definition; in [CHEZ](#), the Court noted that direct discrimination also occurs when a prejudice against a group is what causes a rule to be adopted, even if that rule also affects others. Motivation counts. In *Commune d'Ans*, the municipality only drew up its neutrality rules after the applicant requested permission to wear her headscarf. As a matter of fact – which it is for the referring national court to investigate – the intention of the rules was probably primarily to exclude headscarves, something further evidenced by the practice of tolerating discreet Christian signs. If so, then the rule is prohibited *per se*, and there is no need to consider justifications or the value of neutrality. Most cases in Europe where a neutrality rule has recently been introduced should also be treated as direct discrimination, for it is no secret that they are all about headscarves and Islam, and not a sudden fear of resurgent Christianity, or for that matter any other religion.

Nevertheless, the Court chose to follow the path of indirect discrimination, which requires a rule of unequal effect to be justified. In this case, we have the unusual situation that the idea of the neutral workplace is both the source of the inequality, and its justification. The municipality did not allow headscarves because they wanted neutrality. That created a disparate impact. Could it be justified? Yes, by the fact that they wanted neutrality (see para. 32). It is as if a rule requiring a certain qualification is justified by the desire to have that qualification. It is not necessarily nonsense, but it is significantly incomplete as reasoning. Given the contested nature of the neutrality concept, when the Court moved to justification it really should have unpacked it some more. What is the public interest in this? Why is it a good which justifies the exclusion of a certain segment of the population?

They did address this in [WABE](#), the leading previous case, which concerned similar rules by private companies. The companies too said they wanted to maintain a policy of neutrality towards their customers and the users of their services. The Court also allowed them this privilege, despite its disparate impact, but explained why neutrality was a legitimate goal. In that case, customer resistance to interactions with Muslims might lead to a loss of custom and so of profit. Given that businesses want, and need, to make money, [it was justified to make concessions to prejudice](#), even at the cost of equality. The Court may have used more avoidant language, but this was the substance of what they said.

Nevertheless, while hardly a moral high point in the history of the Court, *WABE* did emphasise that it was not enough to just want a neutrality policy. The employer had to show a genuine need – which, in this case, was preventing the loss of business. Neutrality was not a magic word in *WABE*, but a means to an end.

Commune d'Ans seems to abandon this evidence-based approach and turn neutrality into a trump-card which requires no further explanation and ends the conversation. On the contrary, it is helpful to examine what interests such a neutrality policy, as embodied in a prohibition on signs of religion, might actually serve. Is it so self-evidently legitimate as the Court claims?

It may be noted as a preliminary, that what the policy in *Commune d'Ans* is *not* about is the neutral functioning of the state: removing the signs does not change the substance. The employees are the same people, with the same beliefs, whether they show them or not. A rule on signs of religion is purely about how people perceive and are perceived.

Neutrality as mere appeasement

That leaves two interests which might be served. One could be the avoidance of workplace conflict. Perhaps if everyone wears their beliefs openly it creates a tenser, more polarised environment, and if everyone is essentially in secular uniform their workplace interactions become less charged. This is a somewhat depressing view of the municipality's own staff, that they are unable to get along in a civilised and professional way with those who may have different religions or politics, and frankly, if it is genuinely the case then it seems unlikely that removing signs will solve the problem: Ans needs new employees. At any rate, if they want to make the claim that the rule in question is a necessary and effective means of avoiding conflict, they do – if decades of law are not to be abandoned – need to provide some evidence of this. Given that in many employment environments diverse groups of people function together well, from banks to shops to universities to the governments of more liberal states, good luck with that. The empirics are against them.

The other possible public interest served, somewhat similar to the situation in *WABE*, is that of preserving the trust of the public in the state. Even though the situation in *Commune d'Ans* covered the entire municipal workplace, not just employees interacting with the public, perhaps in a broad sense the place of religion in that workplace affects public perceptions of it, and the rule helps to maintain public faith that the state is neutral in its functioning.

This argument is often made but becomes odder the closer one examines it. What exactly is it that suspicious citizens might think? Would they think that the employment of a woman wearing a headscarf indicates that the state endorses Islam and has adopted its values and codes? That would be bizarre, at best. It is quite obviously the individual who has the belief, not the institution.

Rather, they might think that this individual is no longer 'neutral'. Yet presumably any citizen who actually thinks about this is aware that the state employs people who have religious and political beliefs. Indeed, it has never been any part of neutrality or *laïcité* that it should not – these doctrines go purely to the expression of that belief. But then, if one thinks that such belief contaminates decision-making, that risk is not removed by removing the signs of the belief, for the person remains intact, and unchanged. If anything, the risk is made worse, because such contamination is concealed. The absence of any indications of belief will protect the status quo from scrutiny, and the status quo of state organisation may be that it contains various belief-based power networks, whether Christian or political. A neutrality doctrine does not just make extracurricular beliefs invisible, but in practice makes it taboo to examine their influence and extent within the organisation, a situation with which established believers and their networks may be very content.

Thus, typically, where conflicts of interest may arise, it is transparency that is called for, not concealment. Professors have to make their various non-academic roles public, to enable appropriately critical scrutiny of their pronouncements. If there is a serious risk that religious people will be biased decision-makers, then there are then two possible solutions. One would be to make religious signs compulsory – everyone should be obliged to display their normative commitments in public, so that supervision is possible. The other would be to simply not employ religious people, because they apparently cannot be trusted. Under no plausible logic does hiding religious belief, without eliminating it, contribute to fairer decision-making. It can only increase public trust in as much as the public are wildly irrational. Perhaps they are easily panicked by headscarves. Is this then all that state neutrality is, just a mechanism to avoid triggering majority anxieties about the presence of Islam?

There are some problems with this, apart from its sheer grubbiness. A realpolitik approach of this type does not have any natural boundaries. If the exclusion of signs of religion is not because of objective interests, but just because people don't like what the signs remind them of, then that same reasoning could be applied to race, or sex. If the population are racist, or antisemitic, or sexist, then *Commune d'Ans* implicitly endorses the idea that it would be justified to exclude black people, or Jewish people, or women from certain functions, in order to avoid conflict with majority preferences. To be fair to the Court, it would most probably not allow such rules. But this just highlights rather starkly how some equalities are more equal than others, and that the equality of Muslims is currently at the bottom of the pile.

Applying Catholic neutrality to Muslims

Actually, state neutrality can be given a [more substantial meaning](#), although one wouldn't know it from the judgment. The origins of the idea are in preventing the capture of the state by [religious power, in particular by the Catholic church](#), and vice versa. One could not exclude believing Catholics from public service, since they were the majority of the population, but one could prevent them from corrupting the secular nature of that service with their beliefs. The essential ban was thus on proselytising, making religious statements or claims.

That does not seem unreasonable. Proclaiming your beliefs at work will generally be inappropriate and rude. However, applying this to headscarves is not easy. Most signs of religion, at least those displayed by Christians, are communicative acts – jewellery, stickers, wall-decorations, all are intended to make a statement about the person's belief. By contrast, the most traditional view of a Muslim headscarf is that its purpose is to prevent men from seeing the wearer's hair, out of modesty. It is not important that other people recognise it as a religious item of clothing. It is not intended to say anything to anyone, but just to conceal. The wearing of a headscarf is comparable with the situation of a Christian woman, who as a consequence of her religious beliefs, dresses modestly and chooses not to wear a short skirt, even when it is hot. She is not trying to announce, 'I am Christian'. She is just making a religiously-influenced decision on what to reveal.

In the light of this, a crucifix necklace is a far more problematic and even aggressive act than a headscarf. It is addressed to others and could be seen as an act of proselytising. It introduces religious statements into the workplace. By contrast, the headscarf does not have this intent at all – it is not proselytising. The headscarf wearer is not, unlike the crucifix wearer, behaving in a non-neutral way. She just has the bad luck that in a majority

culturally Christian country her religion is easy to spot. In another part of the world, it might be Christians or atheists who would be seen as violating neutrality by revealing their hair, and thereby revealing their beliefs.

On the other hand, the effect of applying neutrality rules to headscarves is much more dramatic than applying them to crucifixes. Whereas proselytising is generally seen as a choice, a voluntary act, the covering of hair is traditionally seen as an obligation. Thus, asking the Christian to remove their symbols is imposing a very small burden, whereas asking the Muslim to remove her headscarf is essentially asking her to choose between her job and her religion. 'Neutrality' does not ask Christians to make that choice, but then it is not fundamentally about being neutral between religions. Neutrality, as European states understand it, is the product of a [deal between the state and the Catholic church](#), which [reflected their interests and practices](#) and suited their needs, and into which ill-fitting form Muslims are now being squeezed. Traditional practices of neutrality cannot be cut-and-pasted coherently onto the headscarf.

However, if neutrality is apparently being reinvented as a European response to Islam, Islam is also changing within Europe. Many younger Muslim women present the wearing of a headscarf not so much as a religious necessity, [but as a choice](#) which they make, [perhaps even a statement](#). In *Commune d'Ans* the claimant had worked for the municipality for five years before she adopted her headscarf, and perhaps – the case does not tell us – she also saw it in this way.

The irony of this is that if the headscarf is a choice, and certainly if it is a statement, then it becomes legally easier to justify its restriction. As a simple act of religiously-dictated modesty, it was importantly different from wearing a crucifix, but as an expressive choice, it becomes rather more similar, more communicative, more proselytising, and the burden of prohibition is lighter. A preference, even strongly felt, requires less respect than an obligation (although see [Cornelissen](#) for thoughtful counter-arguments). The individualisation of religion weakens its normative force in society (although individualised Islam can also be [easier to accept](#) for non-Muslims).

The reality of course is that each woman who wears a headscarf will have her own thoughts on its meaning and importance, and they will not all be the same. But this just emphasises the complexity of religious regulation in a time of diversity, and how necessary it is to think about the effects of rules, and not just their intention. A one-size-fits-all extrapolation of the approach to 18th and 19th century Catholicism is just reflex conservatism, rather than the genuine pursuit of any serious policy goal.

Conclusion

The ideals of neutrality, *laïcité*, and church-state separation are still admirable ones. But the rules created to achieve them no longer work, now that they have to be applied to new religions, whose visibility takes different forms. Instead of making the state a neutral place, those rules now turn it into a religiously selective employer. Europe is therefore forced to choose between loyalty to the original ideals, or to the original method. It is obvious which is the more principled choice, but that is not the choice always being made.

Instead, the rules are being rediscovered with new enthusiasm precisely because of their selective and non-neutral effects. They may not serve any legitimate public interest, but they can still be useful for some ends. Notably, by excluding any consideration of religion in the workplace, they facilitate the concealment of networks of Christian, in particular Catholic, power which may well exist within the state apparatus of some Member States and of the EU. More importantly, they keep Muslim women out of public employment. Both of these, sadly, provide plausible explanations of why the rules are protected so well.