

## Public Servants and Signs of Conviction: A Tale of Double Standards

ECJ (Grand Chamber) 28 November 2023, Case C-148/22,  
*OP v Commune d'Ans*

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### INTRODUCTION

In Case C-148/22, *OP v Commune d'Ans*,<sup>1</sup> the Court of Justice (ECJ) has been called upon for the first time to consider the issue of a public body prohibiting its employees from visibly wearing religious signs in the workplace. The legal question the Court had to address was whether the prohibition of discrimination on the grounds of religion or belief, as laid down in the Employment Equality Directive,<sup>2</sup> makes it unlawful for a public employer to establish such a ban.

It was written in the stars that, one day, the ECJ would have to rule on this sensitive question. Five cases in which a private employer dismissed, or refused to hire, a female Muslim employee because she insisted on wearing her headscarf

<sup>1</sup>ECJ (GC) 28 November 2023, Case C-148/22, *OP v Commune d'Ans*, ECLI:EU:C:2023:924.

<sup>2</sup>Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303.

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at work had been presented to the Court in as many years.<sup>3</sup> In those cases the Court set the conditions on which the Employment Equality Directive permits a corporate ban on the wearing of visible religious signs. It remained uncertain, however, whether the Court would hold on to its doctrine, developed in relation to the private sector, in a case involving a public employer, given the nature and particular features of the public service and the high degree of diversity amongst Member States in this respect.<sup>4</sup> In *OP v Commune d'Ans* the Court was finally given the opportunity to elucidate its position on the matter. Contrary to the Advocate's General suggestion, the Court decided to stray from the path it had designed for the adjudication of disputes between private parties, according every Member State and, more accurately, every single public body within a Member State, a very wide margin of discretion in adopting the internal neutrality policy it sees fit, under supervision of the national courts.

The angles from which the Court's ruling can be criticised are many. As is shown below, the Court could have done better on at least three counts: moral principle; coherence with its previous case law; and process rights. For a start, the Court gave a reading to the Employment Equality Directive which is difficult to reconcile with the moral values that underpin the Directive, because it does not offer sufficient protection against dress codes inspired by illiberal sentiments or preferences. Furthermore, the Court applied double standards, most notably in comparison with its approach to corporate bans on the wearing of signs of conviction. Finally, the Court could have been more transparent about the arguments advanced in the proceedings, and could have provided more accurate reasons for the conclusions reached. A more dialectic and empathic style of adjudication would be a welcome step forward in delicate and hard cases like these, even if the outcome remained unaltered. This is a missed opportunity, especially since the Opinion of the Advocate General presented a reading of the Directive that does live up to these three standards of judicial decision-making, while not being insensitive to the constitutional divergence in the Union regarding State neutrality.

<sup>3</sup>ECJ (GC) 14 March 2017, Case C-157/15, *Achbita v G4S Secure Solutions*, ECLI:EU:C:2017:203; ECJ (GC) 14 March 2017, Case C-188/15, *Boungaoui v Micropole*, ECLI:EU:C:2017:204; ECJ (GC) 15 July 2021, Joined Cases C-804/18 and C-341/19, *WABE and MH Müller Handel*, ECLI:EU:C:2021:594; ECJ 13 October 2022, Case C-344/20, *SCRL (Religious clothing)*, ECLI:EU:C:2022:774.

<sup>4</sup>And also given the Court's reasoning in the private-sector cases, which relied strongly on the freedom to conduct a business, as enshrined in Art. 16 of the Charter. This freedom seems *a priori* irrelevant when public authorities are involved (*cf infra*).

## FACTUAL AND LEGAL BACKGROUND

Ms OP worked as a lawyer at the municipal authority of Ans, a small town in the Walloon Region of Belgium. She was responsible for handling the municipal authority's public contracts and primarily performed her duties without being in contact with the public.

Nearly five years after joining the municipal authority, Ms OP informed her employer that she wished to start wearing an Islamic headscarf at work. In a first decision, the municipality provisionally prohibited her from doing so 'until general regulations are adopted on the wearing of signs of conviction within the administration'. Shortly after, this decision was replaced by a second interim decision, which confirmed the ban. A few weeks later, the municipality amended its terms of employment, introducing a general principle of neutrality which prohibited workers, *inter alia*, 'from wearing any overt sign which might reveal their ideological or philosophical affiliation or political or religious beliefs'. This was a general and absolute requirement, as it applied regardless of the nature of the employee's duties (a position of authority or executive work), and of the context in which they were carried out (whether or not in direct contact with the public). However, it was apparent from the file, as described in the judgment of referral, that the wearing of discreet signs of conviction had been tolerated by the municipal authority (both before and after the aforementioned amendment to the terms of employment).<sup>5</sup>

In reaction to the developments described above, Ms OP filed a series of lawsuits against the municipality of Ans, before both administrative<sup>6</sup> and civil courts.<sup>7</sup> Of interest to us here is the case brought before the Labour Court of Liège for discrimination on the grounds of religion and gender.<sup>8</sup> Relying on the relevant Belgian and Walloon Anti-Discrimination Acts,<sup>9</sup> Ms OP petitioned the Labour

<sup>5</sup>Tribunal du travail de Liège, 24 February 2022, No. RF/21/27/C, [www.unia.be/files/Ordonnance\\_TT\\_Li%C3%A8ge\\_juriste\\_-\\_24\\_f%C3%A9vrier\\_2022.pdf](http://www.unia.be/files/Ordonnance_TT_Li%C3%A8ge_juriste_-_24_f%C3%A9vrier_2022.pdf), visited 20 December 2024.

<sup>6</sup>Conseil d'État 27 August 2021, No. 251.394. Having received a negative report of the *Auditeur* to the Council of State, Ms OP withdrew her actions for suspension and annulment before the Council of State could rule on the matter.

<sup>7</sup>Président du tribunal de première instance de Liège en référé, 4 May 2021. This judicial decision has not been published, but a summary can be found in the judgment of the referring court (*see supra* n. 5).

<sup>8</sup>Tribunal du travail de Liège, *supra* n. 5.

<sup>9</sup>Ms OP invokes the (federal) General Anti-discrimination Act, the (federal) Gender Equality Act, and the Walloon Anti-discrimination Decree. The Labour Court of Liège made a reference to the Belgian Constitutional Court for a preliminary ruling, because it was uncertain whether the federal or the regional legislation was applicable to the facts. However, the Constitutional Court found the question referred inadmissible (Const. Court 7 July 2022, No. 95/2022, paras. B.1-B.4). Two other questions referred were also declared inadmissible.

Court to declare null and void the municipality's interim decisions and its subsequently adopted neutrality rule.

As far as the interim decisions are concerned, the Labour Court upheld Ms OP's claim, finding that they were directly discriminatory on the basis of religion. According to the Labour Court, it was sufficiently established that the wearing of discreet signs of conviction was tolerated at the time, so that only signs of *particular* religions, such as the Islamic headscarf, were targeted in practice. In the Court's view, this direct distinction on the ground of religion was not justified by a genuine and determining occupational requirement, since Ms OP primarily performed her duties 'in the back office'.

By contrast, the Labour Court had lingering doubts as to the compatibility of the general neutrality rule, adopted by the municipality, with the Employment Equality Directive. The Court therefore decided to seek clarification from the ECJ, referring two questions for a preliminary ruling. By its first question the Labour Court sought to ascertain whether the municipality's neutrality rule gave rise to direct or indirect discrimination on the grounds of religion or belief, contrary to Article 2(2)(a) and (b) of the Employment Equality Directive. By its second question the referring court asked the ECJ whether its answer to the first question would be any different if it turned out that the neutrality rule affected women more than men, and might therefore constitute disguised discrimination on the grounds of gender.

Since the referring court found that the municipality's newly introduced neutrality rule was, *prima facie*, indirectly discriminatory on the grounds of religion, it authorised Ms OP, on a provisional basis, to wear her headscarf at work when she was not in contact with users of the public service or exercising positions of authority. The referring court observed that, apparently, the neutrality rule had not been applied equally to all members of staff of the municipality of Ans, and that the rule may be considered overbroad and therefore disproportionate to its aim.

## THE OPINION OF THE ADVOCATE GENERAL

Advocate General Collins started his analysis with the second question referred, concerning the neutrality rule's gender impact. He took the view that this question was inadmissible, citing two reasons for this conclusion. First, the order of reference would not contain sufficient factual information for the ECJ to be able to assess whether there was any indirect discrimination on the basis of gender in the instant case. Second, the order of reference failed to explain how a possible discrimination on the grounds of *gender* could be of any relevance to the interpretation of the prohibition of discrimination on the grounds of *religion*

contained in the Employment Equality Directive. Gender discrimination does not fall within that Directive's scope anyway.<sup>10</sup>

Turning then to the referring court's first question, the Advocate General first considered whether the municipal neutrality rule constituted direct discrimination on the grounds of religion or belief. The Advocate General based his analysis in this regard on the case law developed by the ECJ in relation to the private sector. He saw no reason why a different approach should be adopted on this issue as far as the public sector was concerned.<sup>11</sup> This would mean that an internal rule that required a public authority's staff, in a general and undifferentiated way, to dress neutrally, precluding the wearing of signs manifesting a belief, including religious belief, applied without distinction to any manifestation of belief. Such a rule therefore did not constitute direct discrimination on the grounds of religion or belief, as prohibited by the Employment Equality Directive.<sup>12</sup> However, such direct discrimination would occur if only the wearing of conspicuous, large-scale signs was targeted, or if the municipality did not treat Ms OP in the same way as any other member of staff who had manifested his or her beliefs at work by wearing visible signs of conviction. It is ultimately for the referring court to determine whether the neutrality rule was understood and applied in practice without distinction, but the Advocate General highlighted that the order for reference contained evidence to the contrary.<sup>13</sup>

Next, the Advocate General examined whether the municipal authority's neutrality rule gave rise to *indirect* discrimination on the grounds of religion or belief. Once again, he began his analysis by recalling the case law developed by the ECJ with regard to the private sector. He considered that while the municipality's internal rule was 'apparently neutral, it is possible that, in practice, it affects, more specifically, the municipal authority's employees who observe religious precepts requiring them to wear certain clothing, in particular female workers who wear a headscarf on account of their Muslim faith'.<sup>14</sup> That being said, according to settled case law, such a difference of treatment may be objectively justified if a legitimate aim was pursued and the means of achieving that aim were appropriate and necessary.<sup>15</sup> Although it was for the referring court to verify if those conditions – which must be interpreted strictly – are met, the ECJ may provide guidance.<sup>16</sup>

Regarding the existence of a legitimate aim, the Advocate General admitted that 'the desire of a public body, such as the municipal authority, to pursue a

<sup>10</sup>Opinion of AG Collins in Case C-148/22, *OP v Commune d'Ans*, EU:C:2023:378, paras. 31-39.

<sup>11</sup>*Ibid.*, paras. 49-52.

<sup>12</sup>*Ibid.*, para. 53.

<sup>13</sup>*Ibid.*, paras. 54-56.

<sup>14</sup>*Ibid.*, paras. 57-59.

<sup>15</sup>*Ibid.*, para. 60.

<sup>16</sup>*Ibid.*, paras. 60-61.

policy of political, philosophical or religious neutrality is, in absolute terms, capable of constituting a legitimate aim'.<sup>17</sup> Unlike in cases involving private companies, that wish of a public authority cannot be tied to the freedom to conduct a business as guaranteed in Article 16 of the Charter of Fundamental Rights of the European Union. According to the Advocate General, however, that desire could be grounded upon 'the need to protect the rights and freedoms of others, which entails, in particular, respect for all the philosophical or religious beliefs of citizens and the non-discriminatory and equal treatment of users of the public service'.<sup>18</sup>

Yet the Advocate General warned that, as in private sector cases, it did not suffice for a public sector employer to merely state that it wished to put in place an 'entirely neutral administrative environment'. The employer should also show a 'genuine need' for such a strict (or 'exclusive') conception of State neutrality.<sup>19</sup> Although it was for the referring court to verify this, the Advocate General noted that the municipality of Ans did not seem to provide any specific evidence of such a genuine need. On the one hand, as the Advocate General correctly pointed out, an exclusive conception of State neutrality did not follow from the Belgian Constitution, nor from any other piece of national legislation,<sup>20</sup> let alone that it could be regarded as part of Belgium's national identity for the purposes of Article 4(2) TEU (a proposition the Belgian Government did not even proffer before the Court).<sup>21</sup> On the other hand, it had not been demonstrated by Ans that there

<sup>17</sup>Ibid., para. 63.

<sup>18</sup>Ibid., para. 64.

<sup>19</sup>Ibid., paras. 67-68.

<sup>20</sup>In fact, this was confirmed by the Belgian Constitutional Court in its preliminary ruling requested by the Labour Court of Liège in the same case (Const. Court, 7 July 2022, No. 95/2022, para. B.7: 'Une question préjudicielle n'appelle de réponse de la Cour que si l'inconstitutionnalité alléguée trouve directement son origine dans la ou les dispositions législatives en cause ou, dans le cas d'une lacune législative, si celle-ci se rattache à une disposition législative identifiée. Or, les dispositions à propos desquelles le juge a quo interroge la Cour sont tout à fait étrangères à la question de la neutralité des pouvoirs publics, et en particulier à la possibilité pour une commune d'interdire à ses agents le port de signes convictionnels. La circonstance que ces dispositions sont muettes sur une telle possibilité n'est pas assimilable à une autorisation donnée explicitement ou tacitement mais de manière certaine par le législateur compétent').

<sup>21</sup>Opinion of AG Collins, *OP v Commune d'Ans*, *supra* n. 10, paras. 69-72. In support of his view, the Advocate General invoked '[the] apparent absence in Belgium of any constitutional definition of the scope and content of the principle of State neutrality, together with the fact that the Belgian Government neither proposed an answer to the first question referred, leaving that issue over to the Court's discretion, nor attended the hearing' (ibid., para. 72). Furthermore, the AG mentioned several Belgian municipalities where administrative staff were unconditionally allowed to wear signs of conviction in the workplace (ibid., para. 73). To this it could be added that, in its written observations, the Belgian Government expressly referred to multiple opinions of the (General Assembly of the) Belgian Council of State, in which the Council of State dismissed as

were strong community tensions or serious social problems on its territory, nor was there any proof of proselytising activities or a specific risk of conflicts between employees linked to such beliefs within the actual administration.<sup>22</sup>

Yet even if the municipality managed to demonstrate that the internal neutrality rule pursued a legitimate aim, and that its desire to create an entirely neutral administrative environment responded to a genuine need on the part of the municipality, it must still be shown that the difference of treatment was appropriate and necessary to achieve that aim.<sup>23</sup> As regards the appropriateness of the measure, the Advocate General recalled that the neutrality policy must be genuinely applied in a consistent and systematic manner, and that the referring court doubted that that condition is met here.<sup>24</sup> As regards the necessity requirement, the Advocate General observed that the neutrality rule applied irrespective of the nature of the work performed by the employee and of the context in which that work was carried out. He left it to the referring court to assess whether such a generally applicable prohibition went beyond what was necessary, taking into account the abovementioned factual circumstances of the particular municipality involved.<sup>25</sup>

Lastly, the Advocate General considered whether the municipality could rely on any of the derogations provided for in the Employment Equality Directive, more precisely the derogation for ‘measures laid down by national law’ (Art. 2(5)) and the derogation for ‘a genuine and determining occupational requirement’ (Art. 4(1)). Both derogations require strict interpretation, according to settled case law.<sup>26</sup>

Pursuant to Article 2(5) of the Employment Equality Directive, the Directive does not affect national legal provisions which are necessary in a democratic society for, *inter alia*, the protection of the rights and freedoms of others. The Advocate General observed that the ECJ required ‘a sufficiently precise rule to that effect’.<sup>27</sup> Although he left the final judgment on this issue to the national court, the Advocate General did not discern any national legislation or rules in the

unconstitutional bills of law seeking to introduce a prohibition on the wearing of signs of conviction that would be applicable to all employees of a public service, regardless of the nature of their occupational duties. See especially Conseil d’État, 20 May 2008, Opinion No. 44.521/AV/AG; 20 April 2010, Opinion No. 48.042/AG; 13 July 2010, Opinion No. 48.146/4/AG. See also, more recently, Conseil d’État, 12 May 2022, Opinion No. 69.726/AV/AG.

<sup>22</sup>Opinion of AG Collins, *OP v Commune d’Ans*, *supra* n. 10, para. 73.

<sup>23</sup>*Ibid.*, para. 74.

<sup>24</sup>*Ibid.*, para. 75.

<sup>25</sup>*Ibid.*, para. 76.

<sup>26</sup>*Ibid.*, paras. 80 and 88.

<sup>27</sup>*Ibid.*, paras. 81–84. See eg ECJ (GC) 13 September 2011, Case C-447/09, *Prigge a.o.*, ECLI:EU:C:2011:573, paras. 59 and 61; ECJ 7 November 2019, Case C-396/18, *Cafaro*, ECLI:EU:C:2019:929, para. 44.



Belgian legal order that could be regarded as authorising the municipality to adopt such a strict neutrality rule.<sup>28</sup> The mere fact that the Belgian Constitution authorised the municipalities to regulate matters of municipal interest was not sufficient for that purpose, he submitted.<sup>29</sup> Hence, the derogation of Article 2(5) of the Directive was not applicable here.

As regards the derogation provided for in Article 4(1) of the Employment Equality Directive, the Advocate General arrived at the same conclusion: the conditions under which it applies were not all met. More precisely, the Advocate General did not see how '[Ms] OP's wearing of the Islamic headscarf would in any way prevent her from fully carrying out her duties as a lawyer employed by a municipal administration'. This is all the more true since other municipalities in Belgium do allow staff to perform similar tasks without being subject to such a dress code, even when they are in direct contact with the public.<sup>30</sup> Furthermore, also under Article 4(1) of the Directive, it must be shown that the difference of treatment pursued a legitimate aim and was proportionate to that aim. In that respect, the Advocate General referred back to his analysis as summarised above.

## THE COURT'S JUDGMENT

The hope the Advocate's General Opinion created for Ms OP and countless other Muslim women working – or aspiring to work – for public authorities in Europe was nipped in the bud by the ECJ. Although the Court, like the Advocate General, left the final decision to the referring court, it provided the latter with little legal material on which to ground a conclusion that Ms OP had been discriminated against.

The Court first considered the question of whether Ans' neutrality rule amounts to direct discrimination on the grounds of religion or belief. The Court started its analysis by recalling the case law it has developed in relation to the private sector. It follows from that case law that an internal rule decreed by an employer which prohibits the wearing in the workplace of *any* visible sign of beliefs does not constitute direct discrimination on the grounds of religion or belief for the purposes of the Employment Equality Directive.<sup>31</sup> By contrast, a rule which prohibits only the wearing of conspicuous, large-scale signs of beliefs may constitute such direct discrimination where that criterion is inextricably

<sup>28</sup>See also Const. Court, 7 July 2022, No. 95/2022, para. B.7, cited *supra* n. 20.

<sup>29</sup>Opinion of AG Collins, *OP v Commune d'Ans*, *supra* n. 10, para. 84.

<sup>30</sup>*Ibid.*, para. 91.

<sup>31</sup>*OP v Commune d'Ans*, *supra* n. 1, paras. 26-27, referring to *Achbita v G4S Secure Solutions*, *supra* n. 3, paras. 30 and 32; *WABE and MH Müller Handel*, *supra* n. 3, paras. 52; *SCRL (Religious clothing)*, *supra* n. 3, paras. 33-34.



linked to one or more specific religions or beliefs. Yet the neutrality rule under review was not of that type, the Court said.<sup>32</sup> The Court therefore concluded that Ans' neutrality rule was not directly discriminatory on the grounds of religion or belief, unless the referring court found that, in practice, the rule had been applied differently to Ms OP than to other employees, who had been permitted to wear signs of conviction.<sup>33</sup>

Also with regard to indirect discrimination, the Court began by citing its settled case law concerning the private sector. Referring to its judgments in *Achbita* and *WABE and Müller*, the Court reiterated that a dress code for employees, although formulated and applied without distinction, may in fact be particularly detrimental to persons adhering to a particular religion and therefore constitute a difference of treatment *indirectly* based on religion or belief. Such a difference in treatment did not constitute discrimination, though, if it was an appropriate and necessary means of achieving a legitimate aim.<sup>34</sup> Whether those conditions are met was ultimately for the referring court to ascertain, but the ECJ may provide guidance.<sup>35</sup> So far the parallel with private-sector cases holds. But then the ECJ suddenly left the path it had designed in those earlier judgments, and which the Advocate General had followed carefully in his Opinion.

For one thing, the Court does not require a public-sector employer, contrary to an undertaking,<sup>36</sup> to show a 'genuine need' for a neutrality policy. The subjective desire of the public employer to pursue a neutrality policy, whether it be an 'exclusive' or a (more or less) 'inclusive' one, is sufficient, and all those neutrality policies are considered equally legitimate under Union law. What is more, *every* public administration is in principle allowed to pursue the neutrality policy it sees fit, since not only Member States, but also its 'infra-State bodies' must be afforded a margin of discretion in designing the neutrality of the public service which they intend to promote in the workplace.<sup>37</sup>

In addition, and as an inevitable result of the Court's benign assessment of the legitimacy of the aim invoked, the Court's proportionality review, more precisely its monitoring of the necessity of the measure, was much less demanding than in private-sector cases. In the latter type of case, the Court has found that a prohibition on the wearing of signs of conviction, aimed at projecting a corporate image of neutrality towards customers, is not limited to what is strictly necessary if

<sup>32</sup>*OP v Commune d'Ans*, *supra* n. 1, para. 25, referring to *WABE and MH Müller Handel*, *supra* n. 3, paras. 72-73; *SCRL (Religious clothing)*, *supra* n. 3, para. 31.

<sup>33</sup>*OP v Commune d'Ans*, *supra* n. 1, para. 28.

<sup>34</sup>*Ibid.*, paras. 29-30.

<sup>35</sup>*Ibid.*, para. 31.

<sup>36</sup>The additional requirement of a 'genuine need' was introduced in *WABE and MH Müller Handel*, *supra* n. 3, paras. 64-67 and 76. See also *SCRL (Religious clothing)*, *supra* n. 3, paras. 40-41.

<sup>37</sup>*Ibid.*, paras. 32-36.

it also covers employees who have no visual contact with said customers. Furthermore, in that situation, the employer must consider offering the employee an alternative, back-office job before dismissing her.<sup>38</sup> Only in situations where the aim of the measure at issue is to avoid social conflicts within the undertaking, particularly in view of tensions which occurred in the past, has the Court so far accepted that it may be necessary for a private-sector employer to prohibit workers from wearing any sign of conviction, not only when they are in contact with customers, but also when interacting with colleagues.<sup>39</sup> By contrast, in *OP v Commune d'Ans*, the Court found that, given that it was a *per se* legitimate objective to pursue a policy of exclusive neutrality, a prohibition applying to all workers, whether or not they are in contact with the public, must be considered necessary to achieve that aim. Hence there was no need to limit the ban to public sector employees who were in contact with users of the public service.<sup>40</sup>

Perhaps in an attempt to compensate for this more lenient necessity review, the Court added a third limb to the proportionality test, requiring the referring court 'in the light of all the factors characteristic of the context in which [the neutrality] rule was adopted, to weigh up the interests at stake', taking into account, on the one hand, the Charter right to freedom of thought, conscience and religion (Article 10) and the Charter's prohibition of religious discrimination (Article 21) and, on the other hand, the principle of neutrality.<sup>41</sup> This third step mandated the referring court, in other words, to ascertain that a public administration's neutrality rule, which was found to be appropriate and necessary to a legitimate aim, did not have excessive effects on the applicant's fundamental rights as guaranteed by the Charter.

Lastly, the Court addressed the second question referred, concerning the gender impact of the municipal neutrality rule. In this respect, the ECJ did follow the Advocate's General suggestion to declare the question inadmissible.<sup>42</sup> The Court stressed, in particular, that sex discrimination did not fall within the scope of the Employment Equality Directive, which was the only act of Union law mentioned in the question referred.<sup>43</sup> Furthermore, the order for reference would be insufficiently clear when it came to the facts on which the second question was based, as well as the reasons why an answer to that question would be necessary to resolve the dispute in the main proceedings.<sup>44</sup>

<sup>38</sup>*Achbita v G4S Secure Solutions*, *supra* n. 3, paras. 42-43.

<sup>39</sup>*WABE and MH Müller Handel*, *supra* n. 3, paras. 75-77.

<sup>40</sup>*OP v Commune d'Ans*, *supra* n. 1, para. 39.

<sup>41</sup>*Ibid.*, paras. 40-41.

<sup>42</sup>*Ibid.*, para. 50.

<sup>43</sup>*Ibid.*, para. 48.

<sup>44</sup>*Ibid.*, para. 49.

## COMMENTS

It is important to stress at the outset that the present case is not about just any piece of Union legislation, but about an act of Union law implementing a *human right*, namely the right not to be discriminated against on the basis of religion or belief in the field of employment. This has implications for the reasoning of the ECJ.

First, since human rights are founded on moral values, the Court must take account of those underlying values when interpreting the Employment Equality Directive.<sup>45</sup> Second, such a reading based on moral considerations may be expected to produce judgments which are mutually coherent. If the ECJ's judgments on the Employment Equality Directive are found to be incoherent, this may therefore imply that one of those judgments is inconsistent with the moral background principles. Also for other reasons, such as the realisation of rule of law values, coherence in adjudication is crucial.<sup>46</sup> Lastly, not solely but especially in human rights cases, it is critical that courts reason their judgments in a way that assures all parties involved, including religious parties, that their arguments were diligently examined by the judges. To this end, it is not enough for courts merely to provide reasons which can lead logically to their substantive conclusion. The judgment should also be transparent about the arguments pleaded, and contain an intelligible and trustworthy explanation for their rejection. For little is more damaging to the perception of fairness of a party who makes a serious but unsuccessful human rights claim before a judicial institution than to be sent off without a proper explanation.<sup>47</sup>

Unfortunately, the judgment in *OP v Commune d'Ans* does not live up to these requirements of sound judicial reasoning. To show this, we focus our analysis on the two major components of the judgment: direct and indirect discrimination on the grounds of religion or belief. The question of the gender dimension of Ans' neutrality rule, though of major importance, falls outside the scope of this annotation.

<sup>45</sup>R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996); J. Raz, *The Authority of Law* (Oxford University Press 1979) p. 180-209. While the exact moral values on which discrimination laws are founded are subject to scholarly debate, personal autonomy, personal liberty to pursue a good life, and human dignity are often cited as underlying liberal values. See for example S. Fredman, *Discrimination Law*, 2<sup>nd</sup> edn. (Oxford University Press 2011) p. 19-25; J. Gardner, 'On the Ground of Her Sex(uality)', 18 *Oxford Journal of Legal Studies* (1998) p. 167; T. Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) p. 121-139. See also, about human rights more generally, C. McCrudden, *Litigating Religions* (Oxford University Press 2018) p. 131.

<sup>46</sup>J. Raz, *Ethics in the Public Domain*, revised edn. (Oxford University Press 1994) p. 314-319.

<sup>47</sup>See also McCrudden, *supra* n. 45, p. 144-145; Yale Law School – The Justice Collaboratory, 'Procedural Justice', [law.yale.edu/justice-collaboratory/procedural-justice](https://law.yale.edu/justice-collaboratory/procedural-justice), visited 20 December 2024.

*Direct discrimination on the grounds of religion or belief*

As noted above, the ECJ found that the wording of Ans' neutrality rule did not give rise to direct discrimination on the grounds of religion or belief, since all manifestations of belief came within its ambit. Only if it turned out that – despite its general wording – the rule had been *applied* differently to Ms OP than to her colleagues, would Ms OP have suffered direct discrimination on the basis of her religion. Although the Court did not depart here from its settled case law on corporate neutrality rules,<sup>48</sup> it is noteworthy that it did not give any further attention to the latter hypothesis (i.e. of a differentiated application of the neutrality rule in practice). This is in sharp contrast to the Advocate's General Opinion,<sup>49</sup> and also to the Court's own approach in previous cases.<sup>50</sup> The Court's (near) neglect of the matter is all the more striking, since it was alleged by the applicant in the main proceedings, and formally recognised by the Labour Court of Liège in its order for reference, that Ms OP had been treated differently, in practice, from her non-Muslim colleagues who wore signs of conviction, and this also *after* the neutrality rule had been inserted in the terms of employment.<sup>51</sup> This allegation was, moreover, reiterated by Ms OP in her written observations before the Court. Also, the Swedish Government, which intervened in the preliminary ruling procedure, shared the applicant's view that, given the particular facts of the case, the municipality's neutrality rule amounted to direct discrimination. The Commission's observations, too, highlighted that this could be the case. To this, it could be added that the Labour Court had already ruled, in its order for reference, that the interim decisions concerning Ms OP were directly discriminatory, because other signs of conviction than the Islamic headscarf, more particularly

<sup>48</sup>WABE and MH Müller Handel, *supra* n. 3, paras. 52-54; SCRL (Religious clothing), *supra* n. 3, paras. 34 and 36.

<sup>49</sup>Opinion of AG Collins, *OP v Commune d'Ans*, *supra* n. 10, para. 55.

<sup>50</sup>WABE and MH Müller Handel, *supra* n. 3, para. 54; SCRL (Religious clothing), *supra* n. 3, para. 36.

<sup>51</sup>The terms of employment were amended on 29 March 2021. See the order for reference, *supra* n. 5, p. 27-28: 'En effet, Madame [OP] soutient aussi être traitée de façon différenciée de ses collègues, et dépose divers documents à l'appui de ses dires (voir photographies en pièces 32 et 33 du dossier de la partie demanderesse : ces clichés ont été pris les 9 juin et 11 juin 2021, selon sa thèse). . . . Les autres éléments invoqués semblent antérieurs au 29/3/2021, mais éclairent la situation et son évolution de 'coutume' à règle claire inscrite dans un règlement. Bref, la pratique apparemment neutre ne semble pas l'être tout à fait, et le besoin social impérieux invoqué pour justifier l'ingérence dans la liberté de religion ne paraît pas si évident, lorsqu'il s'agit d'imposer la neutralité exclusive et absolue dans des fonctions de bureau sans contact avec les usagers. Il semble bien que la Commune d'Ans pratique une neutralité à géométrie variable dans l'espace et dans le temps, exclusive en ce qui concerne Madame [OP] et moins exclusive, ou plus inclusive, pour ses collègues d'autres convictions. Le président du tribunal considère que Madame [OP] apporte à ce stade des éléments probatoires suffisants, constituant des présomptions graves, précises et concordantes de cette situation factuelle.'

Christian signs, were tolerated at the time.<sup>52</sup> The very reason why the neutrality rule was subsequently inserted in the Ans' terms of employment was exactly Ms OP's request to wear her headscarf in the workplace (and not any compelling higher principle of neutrality or a social conflict in the workplace).<sup>53</sup>

Given the specific evidence adduced by the applicant about the application of the neutrality rule in practice – evidence rubber-stamped by the referring court – and given the factual background against which that rule came into being, the Court's silence on the matter is remarkable. While it is of course true that the ultimate decision was left to the referring court, the ECJ could have been more transparent about the arguments advanced. This approach also fuels suspicion that the Court dwells on a neutrality rule's practical application only if it transpires from the file that the rule had indeed been applied in a general and undifferentiated way to all workers,<sup>54</sup> but not if the file says otherwise. One might, moreover, wonder what evidence of direct discrimination would suffice in cases where there is an internal rule phrased in general terms, if it turned out that is not enough that the rule was inserted after – and *because* – a female Muslim worker asked to wear her headscarf at work, and that pictures show that other signs of belief have always been tolerated by the employer.<sup>55</sup>

All in all, it seems fair to conclude that the Court had not given serious thought to the option of direct discrimination in the present case. For, unlike the Advocate General, the Court did not turn to the derogations provided for in Article 2(5) and Article 4(1) of the Directive, which may be of relevance should the referring court find that the neutrality rule is directly discriminatory. Instead, the Court went on to examine the existence of indirect discrimination.

### *Indirect discrimination on the grounds of religion or belief*

If the hypothesis of direct discrimination is off the table, the question becomes whether the neutrality rule under review, which then creates a difference of

<sup>52</sup>Manifestations of Christian belief were even *promoted* by the municipal authority on the occasion of Christian feasts, such as Saint Nicolas and Christmas. See the order for reference, *supra* n. 5, p. 22-25.

<sup>53</sup>See G. Davies, 'OP v Commune d'Ans: The "Entirely Neutral" Exclusion of Muslim Women From State Employment', *European Law Blog*, 14 December 2023, [www.europeanlawblog.eu/pub/op-v-commune-dans-the-entirely-neutral-exclusion-of-muslim-women-from-state-employment/release/1](http://www.europeanlawblog.eu/pub/op-v-commune-dans-the-entirely-neutral-exclusion-of-muslim-women-from-state-employment/release/1), visited 20 December 2024.

<sup>54</sup>WABE and MH Müller Handel, *supra* n. 3, para. 54; SCRL (*Religious clothing*), *supra* n. 3, para. 36.

<sup>55</sup>Opinion of AG Collins, *OP v Commune d'Ans*, *supra* n. 10, para. 25 ('it is . . . clear from several photographs produced by OP that the wearing of discreet signs of conviction was tolerated').

treatment *indirectly* based on religion or belief, is objectively justified by a legitimate aim, to which it is proportionate.

### *Legitimate aim*

Concerning, first, the existence of a legitimate aim, the Court recognised that the municipality's aim to create a neutral public service was indeed legitimate. The Court added that the principle of neutrality of the public service 'has its legal basis in Articles 10 and 11 of the Belgian Constitution, in the principle of impartiality and in the principle of neutrality of the State'.<sup>56</sup>

Unfortunately, the way this paragraph of the judgment is phrased may give the wrong impression that a policy of 'exclusive' neutrality, as pursued by the municipality of Ans, has a firm constitutional foundation in Belgium. This is far from the truth, however. That the Court presented Belgian constitutional law in this way is all the more striking, since the Belgian Government, in its written observations submitted to the Court, cited at length from multiple (advisory) Opinions of the Belgian Council of State which utterly refuted the idea that the Belgian Constitution would adhere to an 'exclusive' conception of State neutrality, as propounded by the municipality of Ans. In those Opinions, the Council of State held unconstitutional several bills of law purporting to introduce a prohibition on the wearing of signs of conviction that would be applicable to all employees of a public service, regardless of the nature of their occupational duties.<sup>57</sup> The municipality of Ans, by contrast, relied in its written observations primarily on a single judgment of the Belgian Constitutional Court, delivered in 2020, which allowed for a stricter neutrality conception in the specific sphere of education.<sup>58</sup> However, in a recent Opinion of 12 May 2022, the General Assembly of the Council of State reaffirmed its settled view, according to which public sector employees must in principle not be subjected to an absolute ban on the wearing of visible signs of belief. The 2020 judgment of the Constitutional Court could not alter the Council's stance, given the particular educational

<sup>56</sup>*OP v Commune d'Ans*, *supra* n. 1, para. 32.

<sup>57</sup>See especially Conseil d'État 20 May 2008, Opinion No. 44.521/AV/AG; 20 April 2010, Opinion No. 48.042/AG; 13 July 2010, Opinion No. 48.146/4/AG. See also Conseil d'État 21 December 2010, Judgment No. 210.000, para. 6.7.2: 'La Constitution belge n'a pas érigé l'État belge en un État laïque. Les notions de laïcité, conception philosophique parmi d'autres, et de neutralité sont distinctes. L'article 24, § 1er, alinéa 3, de la Constitution a spécialement garanti le principe de la neutralité dans l'enseignement communautaire.' On the difference between the French and Belgian constitutional conceptions of State neutrality, see F. Dhondt, 'Configuraties van kerk en staat sinds de verlichting', in P. Nihoul et al. (eds.), *Réflexions autour de la laïcité* (die Keure 2022) p. 15-32; J. Ringelheim and S. Smet, 'Secularism and State Neutrality in Constitutional Adjudication. A Comparative Analysis of Belgium, Germany and France', in *ibid.*, p. 45-78.

<sup>58</sup>Const. Court 4 June 2020, No. 81/2020.

context that was at issue there.<sup>59</sup> Although it is, of course, difficult for the ECJ to know which party's understanding of the national constitution is the correct one, it would have been proper for the Court at least to be transparent about the fact that the municipality's reading of State neutrality was not confirmed by the Belgian Government in its written observations, as well as about the fact that the doctrines of the highest national institutions do not necessarily accord.

In the next paragraph, the Court then seemingly sought to circumvent the tension between the written observations submitted by the municipality and by the Belgian Government, by stating that, 'where appropriate [and] in compliance with the powers conferred on them', also *infra-State* bodies 'must be afforded a margin of discretion in designing the neutrality of the public service which it intends to promote in the workplace'.<sup>60</sup> The Court went on to say that each and every public administration, in the case at hand a municipal authority, can exercise its discretion as it sees fit, 'depending on that administration's own context and within the framework of its competences'. The administration can choose to prohibit the wearing of visible signs of beliefs under all circumstances, to permit it under all circumstances, or to prohibit it only when the worker is in contact with users of the public service: all of these policy choices are presented as equally legitimate under Union law.<sup>61</sup> That the boundaries of the Belgian constitutional principle of State neutrality are somewhat unclear, and internally contested, was then no longer an objection to the municipal authority of Ans adopting the neutrality policy it wished. On the contrary, absent a higher national law which unequivocally *denied* the municipality the power to adopt the neutrality policy of its own choice,<sup>62</sup> the municipality's own vision of neutrality became decisive by the grace of Union law. As a logical consequence, it was irrelevant that other municipalities in Belgium adhered to a different neutrality conception.

Once again, this is in stark contrast to the Opinion of the Advocate General, which endorsed the view of the Commission on the matter. The fact that neither the Constitution nor any other piece of Belgian legislation *compels* Ans to adopt such a strict conception of neutrality was regarded as a signal that there was no

<sup>59</sup>Conseil d'État 12 May 2022, Opinion No. 69.726/AV/AG, paras. 23–26. As a matter of fact, the Labour Court of Liège offered the Constitutional Court the opportunity to elucidate its understanding of State neutrality outside the educational context, but the Court found the questions referred inadmissible. See *supra* n. 20.

<sup>60</sup>*OP v Commune d'Ans*, *supra* n. 1, para. 33.

<sup>61</sup>*Ibid.*

<sup>62</sup>Such a higher national law may be found to exist in France, for example. See e.g. French Conseil d'État 21 June 2022, No. 464648, ECLI:FR:CEORD:2022:464648.20220621, in which the Conseil affirms that the city of Grenoble had violated the constitutional principle of neutrality of the public service by permitting the wearing of the burkini in municipal swimming pools.



‘genuine need’ on the part of the municipality to do so. This was corroborated by the fact that several other Belgian municipalities unconditionally allowed their staff to wear signs of conviction in the workplace. Yet, as already mentioned, the requirement that an employer must not merely desire to pursue a neutrality policy, but also demonstrate a genuine need for such a policy, was entirely abandoned by the Court in relation to the public sector.

The relinquishment of the requirement of a genuine need for a neutrality policy in public-sector cases is problematic, for it does not rest on a moral and coherent reading of the Employment Equality Directive. Let us recall why this requirement made its entry into the ECJ’s case law in the first place. The Court used this criterion for the first time in *WABE and Müller*,<sup>63</sup> thus tightening the legitimacy test it had developed in *Achbita*.<sup>64</sup> From then on, a private employer’s subjective desire to pursue a policy of (political, philosophical and religious) neutrality towards customers was no longer sufficient, as such, to justify objectively a difference in treatment indirectly based on religion or belief. In addition, the private employer must demonstrate a ‘genuine need’ for such a policy, taking into consideration the rights and legitimate wishes of customers or users, as well as the adverse consequences that he would suffer in the absence of that neutrality policy, given the nature of its activities and the context in which they are carried out.<sup>65</sup> In *SCRL (religious clothing)* the ECJ reiterated this requirement, adding that it ‘is inspired by the concern to encourage, as a matter of principle, tolerance and respect, as well as acceptance of a greater degree of diversity, and to avoid abuse of a policy of neutrality established within an undertaking to the detriment of workers who observe religious precepts requiring the wearing of certain items of clothing’.<sup>66</sup>

The requirement that the employer demonstrate, referring to objective elements, a genuine need for a neutrality policy is thus a guarantee against abuse of neutrality as a fig leaf for prejudice. Given that religious minorities – to which public opinion may be hostile – are particularly affected by such a neutrality policy, the risk of abuse for illiberal purposes is real. It is therefore of paramount importance that *the reasons* motivating the adoption of the neutrality policy are subjected to judicial scrutiny. It is difficult to see why such a judicial assessment of the employer’s reasons would be redundant in the public sector. Is it utterly inconceivable that a national public administration – let alone the administration

<sup>63</sup>*WABE and MH Müller Handel*, *supra* n. 3, paras. 64–67. See E. Howard, ‘Headscarves and the CJEU: Protecting Fundamental Rights and Pandering to Prejudice: the CJEU Does Both’, 29 *Maastricht Journal of European and Comparative Law* (2022) p. 245.

<sup>64</sup>*Achbita v G4S Secure Solutions*, *supra* n. 3, para. 37. See also *Bouguenou v Micropole*, *supra* n. 3, para. 33.

<sup>65</sup>*WABE and MH Müller Handel*, *supra* n. 3, paras. 65–67.

<sup>66</sup>*SCRL (Religious clothing)*, *supra* n. 3, paras. 40–41.

of a small village or town – would adopt an internal neutrality rule being guided by prejudice towards religious minorities? We all know the answer. By relinquishing the requirement of a genuine need, the Court in fact makes the meaning of the prohibition of religious discrimination in the field of public employment dependent on majoritarian preferences in a given Member State, region or town, preferences which may very well be biased against religious minorities. This is very hard to square with a moral reading of the Employment Equality Directive: the whole point of discrimination law, and of human rights more generally, is precisely to *protect* people against hostile majority preferences which may deny them access to basic goods, such as a job. A meaningful and objective review of the justification of a difference of treatment on the basis of religion must therefore always inquire into the reasons behind the administration's neutrality policy.<sup>67</sup> Furthermore, by subjecting public-sector employers to a different, more lenient standard of review, the Court's decision raises new questions, such as where to draw the line between the public and the private sector.

One might object to this, saying that the public sector differs from the private sector, because public authorities must remain neutral towards all citizens, and must treat them impartially and equally irrespective of their religion, belief or political preferences. Could this important principle, which is at least implicitly embedded in the constitutional law of many Member States (including Belgium<sup>68</sup>), not suffice for the purposes of demonstrating a 'genuine need' on the part of public employers who are subject to that constitutional principle? We believe it could, but not when a blanket ban on the wearing of signs of conviction, such as the one in the present case, is at issue. For it takes a huge leap from requiring a public authority, as such, to treat citizens equally and impartially, to obliging each and every worker of that authority to dress in a manner that does not reveal any personal conviction, including workers who are not in visual contact with users of the public service or who do not exercise authority over citizens.<sup>69</sup> If the neutrality principle is about treating (and being perceived to

<sup>67</sup>See, drawing on Dworkin's jurisprudence, M. Kumm, 'Political Liberalism and the Structure of Rights', in G. Pavlakos (ed.), *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy* (Hart Publishing 2007) p. 142-148; G. Letsas, 'The ECHR as a Living Instrument: its Meaning and Legitimacy', in A. Føllesdal et al. (eds.), *Constituting Europe* (Cambridge University Press 2013) p. 123-124; G. Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006) p. 705 at p. 717.

<sup>68</sup>See for example Conseil d'État 12 May 2022, Opinion No. 69.726/AV; 27 March 2013, Judgment No. 223.042; Constitutional Court 15 March 2011, No. 40/2011, para. B.9.5; 4 June 2020, No. 81/2020, paras. B.14.2, B.15.1, B.15.3 and B.17.5.

<sup>69</sup>See also J. Ringelheim, 'L'interdiction du port de signes religieux dans l'emploi public : les juridictions nationales dans le flou après l'arrêt *OP c. Commune d'Ans* de la Cour de justice de l'Union européenne', 136 *Revue de jurisprudence de Liège, Mons et Bruxelles* (2024) p. 326.

treat) all citizens in an equal and impartial manner,<sup>70</sup> including not giving (visible or audible) expression to personal beliefs and convictions, how could the apparel of ‘back-office’ workers or workers not exercising public authority possibly compromise that principle? In this regard, the ECJ also seems, yet again, to diverge from its own precedent, since the situation at hand would appear, *mutatis mutandis*, to be akin to that in *Achbita*, where a private company wished to project a corporate image of neutrality *towards clients*. Although this objective was considered legitimate by the Court, it was not sufficient as a justification for an obligation to dress neutrally which also extends to back-office workers.<sup>71</sup> It is difficult to see why public authorities should not, *ceteris paribus*, be held to similar standards. Hence, if a generalised, absolute ban is introduced by a public administration, there would arguably need to be *further* purposes at play which could warrant a limitation of individual rights (and which could be framed, in legal terms, either as a ‘genuine need’ for neutrality or as a different legitimate purpose altogether).<sup>72</sup> Otherwise the absolute ban should be considered disproportionate, as it would – if at all suitable<sup>73</sup> – go beyond what is strictly necessary to achieve the aim of ensuring that citizens are treated equally and impartially by the State.

For such a further purpose to be considered legitimate, it must suit the liberal values of the EU legal order and of the constitutional order of the Member State in question.<sup>74</sup> Such legitimate purposes could, for instance, consist of the need to protect the rights of other workers or of the users of the public service (e.g. when there is evidence of strong tensions or social problems in the workplace,<sup>75</sup> or

<sup>70</sup>Which seems to be the case in Belgium. In the words of the Constitutional Court, the neutrality principle is ‘closely related to the prohibition of discrimination in general and the principle of equality of use of public service in particular’ (Constitutional Court 4 June 2020, No. 81/2020, paras. B.14.2). See also Conseil d’État, 20 May 2008, Opinion No. 44.521/AG.

<sup>71</sup>*Achbita v G4S Secure Solutions*, *supra* n. 3, paras. 42–43. The Court even required the referring court to ascertain whether the company, without taking on ‘an additional burden’, had the possibility to offer ‘a post not involving any visual contact with those customers’, rather than opting for a dismissal.

<sup>72</sup>Hypothetically rendering the situation more analogous (again: *mutatis mutandis*) to the situation in *Müller*.

<sup>73</sup>Davies, *supra* n. 53: ‘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’. See also S. De Somer and J. Van Steenberghe, ‘Kan elke ambtenaar worden verplicht om “Zwitserland te zijn”?’ in Nihoul et al., *supra* n. 57, p. 179–180.

<sup>74</sup>A. Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press 2012) p. 245–246; Kumm, *supra* n. 67, p. 142–148.

<sup>75</sup>On the condition, of course, that those tensions are not the result of illiberal sentiments and prejudices of co-workers against religious minorities.

proselytising activities towards citizens). It could also consist of the pursuit of values which are part of a Member State's constitutional law, such as the principle of *laïcité* in France.<sup>76</sup> Yet, as already noted, Belgian constitutional law does not contain such a principle. At the same time, the freedom of religion has been considered a cardinal principle of Belgian constitutional law, being one of the cornerstones on which the Belgian State was founded in 1830.<sup>77</sup> There may well be other conceivable legitimate purposes for restricting a worker's individual rights, but a purpose that is clearly *not* legitimate in a liberal constitutional democracy is the wish of a public employer to meet prejudices or stereotypes against religious minorities held by users of the public service or by co-workers. Since there is a real risk that exactly such hostile feelings are at the basis of neutrality rules in the workplace, including in the public sector, it is of crucial importance that the ECJ and the national courts require an employer who has adopted such a rule to demonstrate the existence of social problems, constitutional values or other objective factors that could in principle justify the limitation of individual rights.

*Proportionality (in three steps)*

Turning then to the actual proportionality review, the Court's assessment was brief and limited to some fairly general statements. Concerning the first step of the proportionality test, the Court reiterated that, for the neutrality rule to be appropriate to its aim, the objective of 'exclusive neutrality' must be 'genuinely pursued in a consistent and systematic manner', which was for the referring court to verify.<sup>78</sup> Once again, contrary to the Advocate General's Opinion,<sup>79</sup> the ECJ made no mention of elements in the file which indicated that this condition had not been met in the case at hand. Although the requirement of consistency is a laudable implementation of the appropriateness test, which applies to private-sector employers too, one may wonder how it is operated in practice. Does it mean that every employer needs to monitor the (visible) clothes and jewellery of his employees constantly, to assure that not a single piece could possibly reveal a religious or philosophical belief (or a political belief, if the rule applies to political beliefs too)? This may prove a daunting task in practice, requiring plenty of time

<sup>76</sup>Art. 1 of the French Constitution provides: 'La France est une République ... laïque ...'.

<sup>77</sup>See for example Conseil d'État 17 June 2022, Judgment No. 254.041, para. 19; 8 December 2020, Judgment No. 249.177, para. 11 (and the references to the discussions of the Belgian founding fathers there).

<sup>78</sup>*OP v Commune d'Ans*, *supra* n. 1, paras. 37-38. This is settled case law since *Achbita v G4S Secure Solutions*, *supra* n. 3, paras. 40-41.

<sup>79</sup>Opinion of AG Collins, *OP v Commune d'Ans*, *supra* n. 10, para. 75.

and knowledge from the employer.<sup>80</sup> And what happens if a sign which may have a religious or philosophical connotation (e.g. a cross, a hand of Fatima, a skull) has not been printed on a t-shirt, but tattooed on a worker's arm? What is more, unless it is for the *employer* to prove that he pursues the neutrality policy in a genuinely consistent and systematic manner, this requirement is of little help to applicants for a job. Where should a jobseeker start to find evidence of a possible differentiated application of the neutrality rule if they have never worked in the place? True, pursuant to Article 10(1) of the Equal Employment Directive, it should be incumbent on the respondent employer to demonstrate that the objective of neutrality is pursued consistently and systematically with regard to all employees. Yet in spite of this provision, it occurs that domestic courts require the plaintiff, even if she is a candidate applying for a job, to prove that the employer has not applied the internal neutrality rule equally to all employees.<sup>81</sup> It would therefore be good if the ECJ took a clear stance on the issue of the burden of proof in this context.

Concerning, next, the necessity branch of the proportionality test, the Court arrived at the conclusion that the municipality of Ans' neutrality rule was indeed necessary to achieve the objective of an entirely neutral administrative environment.<sup>82</sup> This is only natural, since the Court allows every public administration to rely on a subjective and abstract wish to pursue an exclusive neutrality policy. It follows logically from that proposition that an absolute ban on the wearing of signs of conviction at work, regardless of the nature of a worker's tasks and the context in which they are carried out, meets the necessity test.<sup>83</sup> It

<sup>80</sup>This will be especially the case if lesser-known symbols are involved, which are recognised by members of the community concerned but not necessarily by the wider public (e.g. a Sikh bracelet, a wig worn by a Jewish married woman, etc). It may also be difficult for employers to discern the difference between a religious and a profane inscription on a t-shirt when the inscription is in a language or script that he does not understand (e.g. Arabic, Russian or Chinese script). Furthermore, certain clothes or jewellery with a religious or philosophical connotation can be worn merely as a fashion item (e.g. the yin-yang sign, skull rings, peace symbol earrings, the hand of Fatima, a cross on a necklace, a headscarf worn loosely).

<sup>81</sup>Cour du travail de Bruxelles, 15 February 2024, No. 2023/AB/24 and No. 2023/AB/755, [www.unia.be/files/2024\\_02\\_15\\_Cour\\_Trav\\_Bruxelles.pdf](https://www.unia.be/files/2024_02_15_Cour_Trav_Bruxelles.pdf), visited 20 December 2024: 'La Cour de justice subordonne, en outre, le caractère approprié de la mesure à la condition que l'objectif soit véritablement poursuivi de manière cohérente et systématique à l'égard de l'ensemble des membres du personnel [Arrêt Ville d'Ans, précité, n° 37-38]. . . . En l'espèce, le port de signes convictionnels, quels qu'ils soient, est interdit à tous les membres du personnel. Madame X. [the plaintiff] ne fait pas état d'une quelconque incohérence dans l'application de la politique choisie par la Ville. La mesure critiquée s'inscrit bien dans le cadre d'une politique cohérente et systématique.'

<sup>82</sup>*OP v Commune d'Ans*, *supra* n. 1, paras. 37 and 39.

<sup>83</sup>A similar view was expressed concerning the ECtHR's judgment in *Ebrahimian v France* in the partly concurring and partly dissenting opinion of Judge O'Leary: 'the more abstract proportionality assessment at the heart of the present judgment seems to be the inevitable result of reliance on

seems therefore fair to say that the necessity test has been rendered superfluous by the Court's broad acceptance of 'legitimate' aims which public-sector employers may pursue. Once again, this is not coherent with the case law relating to the private sector, where the Court has ruled that a ban on the wearing of signs of conviction which also applies to employees who are not in visual contact with customers in principle goes beyond what is necessary (*cf supra*).<sup>84</sup> Neither does it cohere with the Court's case law on the interpretation of other anti-discrimination directives in the context of the public sector. In *Kreil*, the Court had to decide whether Directive 76/207 'on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions' precludes the application of a German law which excludes women outright from military posts in the German Bundeswehr involving the use of arms, and which allows them access only to the medical and military-music services. It can hardly be denied that this was a politically sensitive case too. Nevertheless, while fully recognising that the member states have 'a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State', the Court found that they could not 'without contravening the principle of proportionality, adopt the general position that the composition of all armed units in the Bundeswehr had to remain exclusively male'.<sup>85</sup>

That said, even an absolute prohibition on the wearing of signs of conviction, though appropriate and necessary to achieve the aim of ensuring an entirely neutral administrative environment, could still turn out to be disproportionate in the end. For in this particular case the Court has enriched its classic proportionality test with a third limb, which mandates the referring court to ascertain a fair balance between the principle of neutrality and conflicting Charter rights,<sup>86</sup> namely the right to freedom of thought, conscience and religion, and the

abstract principles to justify the interference with the Article 9 right in the first place' (ECtHR 26 November 2015, No. 64846/11, *Ebrahimian v France*).

<sup>84</sup>See also *supra* nn. 38-39.

<sup>85</sup>ECJ 11 January 2000, Case C-285/98, *Kreil*, ECLI:EU:C:2000:2, paras. 24-25 and 29. Although *Kreil* concerned a direct – not an indirect – distinction on the basis of a protected characteristic, there is no obvious reason why this would automatically lead to a different evaluation of a general ban's proportionality.

<sup>86</sup>Why the ECJ only mentions Charter rights, and not constitutional rights, is unclear. First, the neutrality of the public service is not, as such, entrenched in the Charter. Hence if national courts are allowed to take into account their national constitution on that side of the balancing scales, the same must hold true for the other side, where the religious rights are placed. Second, as the ECJ made clear in *WABE and Müller*, national courts may take into account, in their proportionality review, national provisions more favourable to the protection of the principle of equal treatment laid down in the Equal Employment Directive, including national constitutional provisions protecting the freedom of religion: *WABE and MH Müller Handel, supra* n. 3, paras. 89-90. There is no reason to depart from this approach, which is based on Art. 8(1) of the Directive, in the present case. Third,

right not to be discriminated against on the basis of religion.<sup>87</sup> The referring court thus remains at liberty to tip the balancing scales in favour of the plaintiff if it is convinced that the benefits the public gains from the administration's exclusive neutrality policy are outweighed by the harm caused to the plaintiff's fundamental rights. Although this third branch of the proportionality test certainly bears the potential to soften harsh consequences that the ECJ judgment may have for Muslim women working – or aspiring to work – for public bodies, it remains to be seen whether national courts will take up the gauntlet.

For at least two reasons, prospects are rather dim. First, in civil law jurisdictions, discrimination law is often regarded as an external body of law that has been imposed top-down by the Union.<sup>88</sup> Empirical research shows that national courts are often not very favourable – if not to say hostile – to discrimination law, especially when the rights of religious minorities are at stake.<sup>89</sup> Second, even a national judge who is not *a priori* unfavourable to discrimination law may find it hard to declare a public administration's neutrality rule disproportionate after having found – pursuant to the ECJ's judgment in *OP v Commune d'Ans* – that the rule pursues a legitimate aim, which it is appropriate and necessary. The questions of whether a measure is an appropriate or necessary means to achieve its purpose are empirical or objective in nature.<sup>90</sup> The question of whether a measure causes excessive harm to a fundamental right, by contrast, requires a value judgment of the judge. Against the background of his own legal system, the judge must determine which interests or rights to put on both ends of the scale, accord a certain weight to each of them, and measure the extent of the harm that would be incurred by the plaintiff's rights as well as the extent of the benefits that would be gained by limiting those rights. It is the weight of this

it is not obvious what added value is to be expected from the Charter rights at this stage, given that the Employment Equality Directive implements those very rights and the ECJ has already established that an absolute neutrality rule constitutes an appropriate and necessary means to a legitimate end, in the sense of Art. 2(2)(b)(i) of that Directive. The ECJ would not have adopted this reading of the Directive if it believed it to be incompatible with the very Charter rights the Directive seeks to implement. It seems, therefore, that only national constitutional principles, not the Charter, could really be of any relevance at this third stage of the proportionality test.

<sup>87</sup>*OP v Commune d'Ans*, *supra* n. 1, para. 40. It is very rare for the ECJ to address this third component of the proportionality test. See P. Craig, *EU Administrative Law* (Oxford University Press 2006) p. 670–672; T.I. Harbo, 'The Function of the Proportionality Principle in EU Law', 16 *European Law Journal* (2010) p. 158 at p. 172–173.

<sup>88</sup>B. Havelková and M. Möschel, 'Introduction', in B. Havelková and M. Möschel (eds.), *Anti-Discrimination Law in Civil Law Jurisdictions* (Oxford University Press 2019) p. 3.

<sup>89</sup>*Ibid.*, p. 4–9. See also, concerning Flanders, E. Cloots et al., *Gelijk zijn versus gelijk krijgen. Een juridische evaluatie van het Vlaamse Gelijkekansendecreet* (Intersentia 2021) p. 235–237 and 264–267.

<sup>90</sup>R. Alexy, 'Constitutional Rights, Balancing, and Rationality', 16 *Ratio Juris* (2003) p. 131 at p. 135–136; Barak, *supra* n. 74, p. 315 and 327–328; Kumm, *supra* n. 67, p. 137–138.



marginal harm that should be compared to the weight of the marginal benefit resulting from the introduction of an absolute neutrality rule.<sup>91</sup> This third limb inevitably introduces a more subjective element into judicial proportionality review,<sup>92</sup> and not all national judges – most of whom deal with human rights cases only occasionally – will feel comfortable going down that road, especially since that may make them vulnerable to the charge of judicial activism. The fact that Article 2(2)(b)(i) of the Directive only mentions the first two branches of the proportionality test (i.e. appropriateness and necessity), the third component being entirely judge-made and employed only sporadically, obviously adds to this risk. For those two reasons, the chances of a national court going *beyond* what Union law requires with respect to non-discrimination on the basis of religion in the public sector are probably rather low.

A recent decision of the Brussels Labour Court of Appeal, which was delivered after the ECJ's judgment in *OP v Commune d'Ans*, seems to confirm this.<sup>93</sup> Making plenty of references to the ECJ's ruling, the Court of Appeal rejected the discrimination claim brought by the plaintiff, a Muslim woman who had applied for an administrative function at the city of Brussels. The city of Brussels was allowed to justify the obligation to dress neutrally, enshrined in its terms of employment, on the basis of its wish to pursue a policy of exclusive neutrality in the city's administration. Having found the dress code an appropriate and necessary means to advance that purpose, the Court of Appeal finally turned to the balancing stage (or proportionality *sensu stricto*). The Court of Appeal found that the measure struck a fair balance between the plaintiff's and the city's interest, stating, *inter alia*, that the ECJ grants local administrations a wide margin of appreciation, and that the plaintiff merely sought to exercise an individual right for herself whereas the city of Brussels pursued a collective objective. Blinded by the light of the ECJ's judgment in *OP v Commune d'Ans*, the Court of Appeal overlooked that, since 2008, the Belgian Council of State has relentlessly warned that a dress code covering all public sector employees, irrespective of the nature of their occupational activities, in principle constitutes a disproportionate interference with freedom of expression and freedom of religion, as guaranteed by the Belgian Constitution.<sup>94</sup>

<sup>91</sup>Barak, *supra* n. 74, p. 342-345 and 348-352.

<sup>92</sup>Especially because the ECJ gives the national court a very open-ended mandate in para. 40 of the judgment. See R. Alexy, *A Theory of Constitutional Rights* (J. Rivers trans.) (Oxford University Press 2002) p. 66-69; F. Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text', 4 *Law & Ethics of Human Rights* (2010) p. 34 at p. 35-37; Harbo, *supra* n. 87, p. 165.

<sup>93</sup>Cour du travail de Bruxelles, 15 February 2024, No. 2023/AB/24 and No. 2023/AB/755, *supra* n. 81.

<sup>94</sup>See *supra* n. 57.

*Margin of discretion and Strasbourg case law*

One might object, to the Court's credit, that although the judgment is not the morally best one, and is incoherent with the Court's reading of the Employment Equality Directive in private-sector situations, it is consistent with the case law of the European Court of Human Rights. The ECtHR, too, has accepted that States may rely on the principles of State secularism and neutrality to justify restrictions on the wearing of religious symbols by public servants,<sup>95</sup> and that the States must be left a large margin of appreciation in reconciling the principle of the neutrality of public authorities with religious freedom. The ECtHR finds a wide margin of appreciation proper, since there is no uniform conception throughout Europe of the significance of religion in society, and since the meaning or impact of the public expression of a religious belief may differ according to time and context. Whether a ban on the wearing of religious signs for public sector employees is necessary in a democratic society, is therefore primarily for national authorities to decide, albeit under European supervision.<sup>96</sup> Whilst the decision in *OP v Commune d'Ans* does not refer to any Strasbourg case law, the latter is clearly echoed in the 'margin of discretion' doctrine evoked in paragraphs 33 and 34.

It is true that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of the Charter rights shall be the same as those laid down by the ECHR (Article 52(3) Charter). Yet the said Charter provision 'shall not prevent Union law providing more extensive protection', which is exactly what the Employment Equality Directive does as regards the prohibition of religious discrimination at work (*cf infra*). Moreover, one should be mindful of the different role the ECJ and the ECtHR play. This difference means that the ECJ leaving a margin of discretion to the member states may have a much more profound and widespread impact on the rights of religious groups in Europe than the ECtHR's margin of appreciation doctrine.

A first important distinction between the two supranational courts is procedural and chronological in nature. The ECtHR only intervenes when all domestic judicial proceedings on the matter have come to an end. The Court

<sup>95</sup>See for example ECtHR 15 February 2001, No. 42393/98, *Dahlab v Switzerland*; 24 January 2006, No. 65500/01, *Kurtulmuş v Türkiye*; 26 November 2015, No. 64846/11, *Ebrahimian v France*, para. 53.

<sup>96</sup>See for example ECtHR 15 February 2001, No. 42393/98, *Dahlab v Switzerland*; 24 January 2006, *Kurtulmuş v Türkiye*; 26 November 2015, No. 64846/11, *Ebrahimian v France*, para. 65. There is also a recent decision involving Belgium to be mentioned here: ECtHR 9 April 2024, No. 50681/20, *Mikyás a.o. v Belgium*. Yet this case concerns the very specific field of public education in Belgium. It is solely with regard to this particular sector that the Belgian Constitution enshrines the principle of neutrality as such (Art. 24, § 1, 3<sup>rd</sup> al.), and that the Constitutional Court has ruled that a strict conception of neutrality is compatible with that constitutional principle (though not required by it). See also *supra* n. 58.

adjudicates at the request of a person who believes his or her religious rights have been violated, and merely reviews whether the national courts overstepped their – wide – margin of appreciation in deciding that Article 9 of the ECHR has not been violated. By contrast, the ECJ intercedes at the request of a national court *before* it has come to a final decision on the matter. Typically, the referring judge wants the ECJ to tell him what *he* needs to decide, as a matter of Union law, because he is in doubt about what Union law requires, and because he believes that he is unable (or because he is unwilling) to resolve the dispute on the basis of national law alone. If the ECJ finds no violation of Union law, chances are therefore low, in practice, that the referring court will subsequently find a violation of religious rights as protected under national law. For if the referring court had been able and willing to find a violation of national law, it would have had little reason to delay proceedings by making a reference for a preliminary ruling in the first place. This implies that, if the ECJ does not find a violation of religious rights as enshrined in Union law, leaving a wide margin of appreciation to the Member States and its courts, it is not very likely that the referring court would subsequently decide that the applicant's religious rights as guaranteed by national law have been violated.<sup>97</sup>

<sup>97</sup>Although the final decision of the referring court in *OP v Commune d'Ans* is still awaited at the time of writing, this is a general observation on the basis of what often occurs in practice (e.g. Belgian Const. Court, 30 September 2021, No. 117/2021, delivered after ECJ (GC) 17 December 2020, Case C-336/19, *Centraal Israëlitisch Consistorie van België a.o.*, ECLI:EU:C:2020:1031; Ghent Labour Court of Appeal 12 October 2020, No. 2019/AG/55, [www.unia.be/files/2020\\_10\\_12\\_Arbh.\\_Gent.pdf](http://www.unia.be/files/2020_10_12_Arbh._Gent.pdf), visited 20 December 2024, delivered after *Achbita v G4S Secure Solutions*, *supra* n. 3. On the *Achbita* ruling of the Ghent Labour Court of Appeal, see M. Spinoy and J. Vrielink, 'The Achbita Case: an Update from Belgium', *OxHRH Blog*, May 2021, [ohrh.law.ox.ac.uk/the-achbita-case-an-update-from-belgium](http://ohrh.law.ox.ac.uk/the-achbita-case-an-update-from-belgium), visited 20 December 2024. The wording used by the Ghent Court in *Achbita* speaks volumes. See e.g. (our own translation from Dutch): 'It is very curious that Ms Achbita continues to suggest ... that until 29 May 2016, the date of inclusion of a new provision in the employment regulations, "no internal rule" existed that implied such a neutrality policy. Surely, it is quite clear that in doing so, she is sawing off the branch she is sitting on ...'; 'Ms Achbita and the [Belgian equality body] do not define the disadvantaged group as the group of persons who adhere to the Islamic religion: according to them, it consists of the group of persons whose religious beliefs compel them to respect certain dress codes or for whom this is at least an important element ... (that is to say: those [Muslims] of the female sex – one could talk endlessly about that if it were relevant to what follows, quod non)'; 'The Labour Court of Appeal points out that in the present case the legitimacy of the neutrality policy of the employer is at issue in so far as it applies to the employees in contact with the customers .... Without doubt, there is also a great deal to be said in favour of a neutrality policy that applies to all employees .... It is with pleasure that the Court notes that at least the [Belgian equality body] no longer seems to dispute the need to abandon its "active pluralism" where the so-called external neutrality of employees is concerned', and 'Finally, the CJEU judgment of 14 March 2017 contains the following consideration [quoting para. 43 of that judgment]. The Labour Court of Appeal finds this consideration somewhat surprising.'

A second crucial difference between the two supranational courts is that the ECtHR's rulings concern an individual State and take into account the particular national context of the relationship between that State and religions. Thus, in cases involving France, Turkey and Switzerland, where secularism is recognised as a constitutional principle of foundational importance – a principle which the ECtHR does not assess as such<sup>98</sup> – the Court has allowed this principle, and the resultant principle of State neutrality, to justify restrictions on the wearing of religious symbols in the sphere of public service and education. At least in theory, this case law does not in any way prevent courts in States with a *different* constitutional tradition from deciding that a ban on the wearing of religious symbols for public sector employees does violate the freedom of religion as protected in Article 9 of the ECHR. On the contrary, they might even be found to have *overstepped* their State's margin of appreciation in deciding otherwise, given their State's particular national context.

The ECJ, by contrast, is called upon to interpret a legislative act of the Union, i.e. the Employment Equality Directive, regardless of the particular Member State or plaintiff involved. Absent any express statement by the EU legislature to the contrary, the ECJ in principle regards statutory terms as autonomous concepts of Union law, which must be interpreted in a uniform manner throughout the territory of the Union.<sup>99</sup> It is true that Article 8(1) of the Employment Equality Directive expressly permits the Member States to maintain or adopt a higher standard of protection against religious discrimination at work, the Directive only containing minimum requirements. In *WABE and Müller*, the ECJ clarified that this provision allows Member States, for instance, to make the justification of a difference of treatment indirectly based on religion or belief subject to *higher* requirements as those set out in Article 2(2)(b)(i) of the Directive, as interpreted by the ECJ.<sup>100</sup> In support of that conclusion, the ECJ recalled that the Directive 'establishes a general framework for equal treatment in employment and occupation, which leaves a margin of discretion to the Member States, taking into account the diversity of their approaches as regards the place accorded to religion and beliefs within their respective systems'. This implies that it is for the Member States and their courts to achieve the necessary reconciliation between the different rights and interests concerned, taking account of their specific national context.<sup>101</sup> What the Court does in the instant case, however, is turn this margin

<sup>98</sup>ECtHR 26 November 2015, No. 64846/11, *Ebrahimian v France*, para. 68.

<sup>99</sup>See for example ECJ 18 October 2011, Case C-34/10, *Brüstle*, ECLI:EU:C:2011:669, paras. 26-29; ECJ 5 June 2018, Case C-673/16, *Coman a.o.*, ECLI:EU:C:2018:385, paras. 35-40.

<sup>100</sup>*WABE and MH Müller Handel*, *supra* n. 3, paras. 89-90. See also *SCRL (Religious clothing)*, *supra* n. 3, paras. 47 and 52.

<sup>101</sup>*WABE and MH Müller Handel*, *supra* n. 3, paras. 86-88. See also *SCRL (Religious clothing)*, *supra* n. 3, paras. 48-50. For a critical discussion, see for example Howard, *supra* n. 63, p. 259-261.

of discretion rhetoric, from an argument for allowing Member States to go *beyond* the minimum requirements of the Directive, into an argument for *lowering* the Directive's minimum requirements themselves, down to the level of protection offered by the ECHR.<sup>102</sup> In fact the ECJ refrains from developing a meaningful doctrine for the application of the Article 2(2)(b)(i) of the Directive to the public sector, leaving it entirely to the Member States (and even to every single infra-state body) to achieve the rights balance they deem fair, under the supervision of the national courts. In other words, the ECJ adjudicates as if the EU legislature had not legislated in this field at all.

In so deciding, the ECJ might prompt national decision-makers and courts throughout Europe to reduce the protection their State affords against religious discrimination in the public service. With radical political parties currently breathing down their necks, it may indeed be hard for political decision-makers to resist the lure of adopting a prohibition on the wearing of religious signs in the public sector if they run out of overriding legal arguments against such a measure.<sup>103</sup> As already noted, the same holds for national judges, who may face the blame of judicial activism (or less gentle reproaches) if they uphold a Muslim woman's right against religious discrimination without Union law obliging them to do so.<sup>104</sup> Consequently, in the long run, the ECJ's leaving such a wide 'margin of discretion' to the Member States, including their infra-state bodies, with regard to religious signs in the public service may well result in a race to the bottom. This would be exactly the opposite of what the EU legislature intended to achieve, Article 8(2) of the Directive stating explicitly that the implementation of this

<sup>102</sup> See also Ringelheim, *supra* n. 69.

<sup>103</sup> For instance, it was announced in 2019 that the Flemish Government would adopt a ban on the wearing of visible religious signs for employees of Flemish public authorities: *Vlaamse Regeerakkoord 2019-2024*, p. 16, [www.vlaanderen.be/publicaties/regeerakkoord-van-de-vlaamse-regering-2019-2024](http://www.vlaanderen.be/publicaties/regeerakkoord-van-de-vlaamse-regering-2019-2024), visited 20 December 2024. By the end of the parliamentary term, no such ban had been introduced. When asked in Parliament why the measure had not been adopted, members of Government relied mainly on *legal* arguments, including arguments stemming from Union law, against such a ban. See for example the declarations made by a Flemish minister in the Flemish Parliament on 2 May 2023 ([www.vlaamsparlament.be/nl/parlementair-werk/commissies/commissie-vergaderingen/1725013/verslag/1732053](http://www.vlaamsparlament.be/nl/parlementair-werk/commissies/commissie-vergaderingen/1725013/verslag/1732053), visited 20 December 2024) and 3 October 2023 ([www.vlaamsparlament.be/nl/parlementair-werk/commissies/commissievergaderingen/1761987/verslag/1766281](http://www.vlaamsparlament.be/nl/parlementair-werk/commissies/commissievergaderingen/1761987/verslag/1766281), visited 20 December 2024).

<sup>104</sup> See for example the abovementioned decision of the Brussels Labour Court of Appeal regarding the terms of employment of the city of Brussels. The fact that neither the federal State nor the autonomous region of Brussels (of which the city is part) have adopted an exclusive conception of neutrality was discarded as irrelevant by the Court of Appeal, referring to the ECJ's proposition that not only the Member States, but also their infra-state bodies must be afforded a margin of discretion in designing the neutrality policy they see fit: *Cour du travail de Bruxelles*, 15 February 2024, No. 2023/AB/24 and No. 2023/AB/755, *supra* n. 81.

Directive 'shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive'. The Court's approach is, moreover, inconsistent with its reasoning in other sensitive cases involving conflicts between rights enshrined in Union law, on the one hand, and national policy objectives which touch upon constitutional values and even national identity, on the other. Thus, concerning national language policies, the ECJ has reiterated that, while Member States enjoy:

broad discretion in their choice of measures capable of achieving the objectives of their policy of protecting the official language, since such a policy constitutes a manifestation of national identity for the purposes of Article 4(2) TEU . . . , the fact remains that that discretion cannot justify a serious undermining of the rights which individuals derive from the provisions of the Treaties enshrining their fundamental freedoms.<sup>105</sup>

We therefore find it hard to resist the conclusion that the ECJ has assimilated itself to the ECtHR here, abdicating its proper role and responsibility as the supreme court in the European legal order. Against this, one might argue that the EU legislature itself intended to leave *such a wide* margin of appreciation to the Member States and that the ECJ simply abided by this intention. Indeed, this is what the judgment suggests, where it says that 'Directive 2000/78 establishes only a general framework for equal treatment in employment and occupation, which leaves a margin of discretion to the Member States and, as the case may be, to their infra-State bodies . . .'.<sup>106</sup> Yet for three reasons, this argument is not convincing.

First, the phrase for which the Employment Equality Directive provides a 'general framework' for equal treatment in employment and occupation is to be found in the title and in Article 1 of the Directive. Never before has the ECJ derived from these two words the conclusion that the Member States, let alone their 'infra-state bodies', are entirely free to strike the balance they see fit between the prohibition of discrimination laid down by the Directive and competing interests. More importantly, the ECJ has referred to this 'general framework' in other judgments for exactly opposite purposes. As already mentioned, in *WABE and Müller*, the 'general framework' rhetoric was used as a reason for granting leeway to the Member States to adopt or maintain a *higher* standard of protection

<sup>105</sup>ECJ (GC) 7 September 2022, Case C-391/20, *Cilevičs a.o.*, ECLI:EU:C:2022:638, para. 83. See also, in a similar vein, ECJ (GC) 16 April 2013, Case C-202/11, *Las*, ECLI:EU:C:2013:239, paras. 26-27, 29 and 33.

<sup>106</sup>*OP v Commune d'Ans*, *supra* n. 1, para. 34.



of the principle of equal treatment than the one laid down in the Directive.<sup>107</sup> In other cases, the Court has used the phrase as a reason for giving an autonomous and uniform interpretation, which is moreover often extensive, to a concept of the Directive,<sup>108</sup> or for concluding that the Directive constitutes a specific expression of a general principle of Union law, now enshrined in Article 21 of the Charter (and therefore applied to private relations even before the period for the transposition of the Directive had expired).<sup>109</sup>

Second, the proposition that the EU legislature intended to leave *such a wide* margin of discretion to the Member States in reconciling the prohibition of religious discrimination with State neutrality sits uneasily with other provisions of the Employment Equality Directive. Article 4(2) of the Directive contains an exemption, subject to strict conditions, from the prohibition of religious discrimination for ‘churches and other public or private organizations the ethos of which is based on religion or belief’. There is no specific exemption for public-sector employers, however. On the contrary, Article 3(1) of the Directive states that the Directive applies ‘to all persons, as regards both the public and private sectors, including public bodies’. Given the clear wording of the Directive, it is paradoxical to see that the ECJ has interpreted the conditions under which the religious exemption of Article 4(2) applies in a very stringent way,<sup>110</sup> thus significantly restricting religious organisations’ margin for taking into account (candidate-)employees’ convictions, while at the same time granting public

<sup>107</sup> *WABE and MH Müller Handel*, *supra* n. 3, paras. 86–90. See also *SCRL (Religious clothing)*, *supra* n. 3, paras. 47–50.

<sup>108</sup> See for example, regarding the concept of ‘disability’, ECJ (GC) 11 July 2006, Case C-13/05, *Chacón Navas*, ECLI:EU:C:2006:456, paras. 41–42; ECJ (GC) 17 July 2008, Case C-303/06, *Coleman*, ECLI:EU:C:2008:415, paras. 46–47; ECJ 11 April 2013, Joined Cases C-335/11 and C-337/11, *HK Danmark*, ECLI:EU:C:2013:222, para. 35 ff; ECJ (GC) 26 January 2021, Case C-16/19, *Szpital*, ECLI:EU:C:2021:64, para. 32 ff. See also, regarding the concept of ‘pay’, e.g. ECJ 26 September 2013, Case C-546/11, *Dansk Jurist- og Økonomforbund*, ECLI:EU:C:2013:603, paras. 23–30; ECJ 2 June 2016, Case C-122/15, *C*, ECLI:EU:C:2016:391, paras. 19–23, and regarding the concept of ‘conditions for access to employment ... or to occupation’, ECJ (GC) 23 April 2020, Case C-507/18, *Associazione Avvocatura per i diritti LGBTI*, ECLI:EU:C:2020:289, para. 36 ff; ECJ 12 January 2023, Case C-356/21, *TP (Audiovisual editor for public television)*, ECLI:EU:C:2023:9, paras. 41–58.

<sup>109</sup> It is therefore the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination, setting aside any provision of national law which may conflict with Union law. See ECJ (GC) 22 November 2005, Case C-144/04, *Mangold*, ECLI:EU:C:2005:709, paras. 74–78; ECJ (GC) 19 January 2010, Case C-555/07, *Küçükdeveci*, ECLI:EU:C:2010:21, paras. 20–27. See also ECJ (GC) 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257, paras. 47 and 75–77; ECJ (GC) 11 September 2018, Case C-68/17, *IR*, ECLI:EU:C:2018:696, paras. 67–70; *Szpital*, *supra* n. 108, para. 33; *Associazione Avvocatura per i diritti LGBTI*, *supra* n. 108, para. 38.

<sup>110</sup> *Egenberger*, *supra* n. 109, paras. 61–69; *IR*, *supra* n. 109, paras. 49–61.



authorities great flexibility as regards the employment of people belonging to religious minorities.

Third, the purpose of the Equal Employment Directive, as it transpires from its Preamble, is clearly to guarantee equal employment opportunities for all. In particular, Recital 9 of that Directive underlines the importance of employment and occupation for ‘the full participation of citizens in economic, cultural and social life and to realising their potential’. Recital 11 of the Directive states, furthermore, that discrimination based, *inter alia*, on religion or belief ‘may undermine the achievement of the objectives of the TFEU, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons’. The ECJ has not hesitated to recall these precepts in judgments involving discrimination on the basis of other protected grounds,<sup>111</sup> inferring from them the true purpose of the Directive:

[it] seeks to eliminate, on grounds relating to social and public interest, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided.<sup>112</sup>

Unfortunately, not a single trace of these statements about the social importance of equal access to work is left in *OP v Commune d’Ans*.

To be sure, the above is not to be read as an argument *against* a margin of discretion for the member states when adopting measures in order to guarantee the neutrality of the public service. Our comments concern, rather, the *extensiveness* of the margin of discretion, and the *reasons* the Court gives for according it. As described above, the margin of discretion the Court leaves is too wide to provide any meaningful protection for religious minority workers and jobseekers against hostile majority prejudice. Presenting such a wide margin of discretion as if it were flowing naturally from the text of the Employment Equality Directive is, moreover, untruthful. There are valuable reasons for granting a wider margin of discretion in public-sector cases, which can be found, for instance, in Article 4(2) TEU and Article 53 of the Charter. Yet the text and purpose of the Directive are not amongst them. In addition, this legalistic, non-dialectical style of adjudication, though characteristic for the ECJ, is ill-suited to the adjudication of delicate fundamental rights disputes like these. When a court, any court,

<sup>111</sup>*Associazione Avvocatura per i diritti LGBTI*, *supra* n. 108, para. 37; *TP (Audiovisual editor for public television)*, *supra* n. 108, para. 42.

<sup>112</sup>ECJ 2 June 2022, Case C-587/20, *HK/Danmark and HK/Privat*, ECLI:EU:C:2022:419, para. 34; *TP (Audiovisual editor for public television)*, *supra* n. 108, para. 43.

dismisses a fundamental right's claim, it matters a great deal to the plaintiff how that message is communicated.

## CONCLUSION

In *OP v Commune d'Ans*, the ECJ failed to adopt a principled and coherent reading of the Employment Equality Directive by accepting the legitimacy of the aim, advanced by the municipality of Ans, for pursuing a strict neutrality policy within its administration, without any further inquiry into the objective reasons that could undergird such a policy. Although the Belgian Constitution, unlike the French, does not contain a principle of *laïcité*, and the contours of the Belgian concept of State neutrality are internally contested, the ECJ judgment in principle permits every single Belgian municipality, as well as any other administrative body, to adopt a strict neutrality policy. Given the ECJ's complaisant acceptance of a public body's alleged wish to create an entirely neutral administrative environment, it becomes nearly impossible to demonstrate that a ban on the wearing of signs of conviction is not suitable or goes beyond what is necessary to achieve that legitimate aim. The Court's (*ad hoc*) addition of a third branch to the proportionality test is unlikely to fully compensate for the extremely lenient application of the other steps of the test, for the (mainly practical) reasons set out above. This judgment therefore risks opening the door for many more 'neutrality rules' to come, in Belgium and probably in other member states as well. As a consequence, it may seriously affect the employment opportunities – and, hence, the well-being, emancipation and integration – of Muslim women in Europe. This is especially worrying for Belgium, where the employment rates of people with an immigration background are extremely low, despite it being one of the most multicultural countries in the EU.<sup>113</sup> It is, moreover, a mystery how this development could be squared with the EU legislature's firm intention to promote equality in the workplace.

Of course, in reply it could be stated that the ECJ is far from a Hercules operating in an ideal world. In the real world, there is Islamophobia and Euroscepticism. What is more, politicians exploiting anti-Muslim and anti-EU sentiments are often one and the same, and are currently thriving in many Member States. It might be argued that, especially when an issue as delicate as the wearing of the Islamic headscarf by public servants is at stake, the ECJ is right to decline an interpretation of Union law that risks upsetting public opinion and enticing certain national politicians to question the legitimacy of the Court and even of the EU itself. Or it might be thought that, in areas in which no European

<sup>113</sup>S. Vandeleeuw, *Positieve actie. Naar betere tewerkstellingskansen voor personen met een migratieachtergrond* (die Keure 2024) p. 3.

consensus has emerged, it is simply more efficient to let human rights grow bottom-up, rather than imposing a high standard of protection top-down.

The thesis submitted here is that the Court could have paid heed to the diversity of national constitutional traditions regarding the relationship between the State and religion, while at the same time securing a moral and coherent reading of the Employment Equality Directive, and giving due consideration to procedural fairness. Indeed, the Advocate General had proposed an interpretation of the Directive that was able to accommodate legitimate national concerns. The Advocate General had paved the way for a doctrine which would have left a certain margin of discretion to the Member States, but which would also have set the minimum bar high enough to protect Muslim women against administrative neutrality rules inspired by hostile majority prejudice. Furthermore, his approach would have avoided the double standards revealed in this case note. It is therefore regrettable that the judgment is not more in line with the Advocate General's Opinion.

### *Epilogue*

The referring court delivered its final judgment on 3 December 2024. The court found the municipality's neutrality rule indirectly discriminatory on the grounds of religion. According to the court, there are no factual elements which objectively justify the municipality's decision to pursue an exclusive neutrality policy. In so deciding, the court aligned itself with the Opinion of the Advocate General.<sup>114</sup>

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<sup>114</sup>The judgment is available at <https://www.unia.be/fr/legislation-et-jurisprudence/jurisprudence/arbeidsrechtbank-luik-afdeling-luik-3-december-2024>.