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Cees Maris

Laïcité in the Low Countries?
On Headscarves in a Neutral State

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***Laïcité* in the Low Countries?
On Headscarves in a Neutral State**

Cees Maris¹
c.w.maris@uva.nl
University of Amsterdam

Abstract

The paper compares French and Dutch legal approaches in regulating the use of headscarves in public institutions as examples of divergent liberal legal cultures and national policies towards immigrant minorities. It shows that in France the principle of *laïcité* or state secularity resulted in a legal prohibition of Islamic headscarves in public schools and other public institutions. In contrast the Dutch legal culture is based on strong notions of tolerance and equality. Muslim women are allowed to a larger degree to wear headscarves in the public sphere, the only exception being a member of the judiciary. The paper advocates an approach of balancing the principles of state neutrality, equality and liberty and to measure a prohibition by using the principles of proportionality and subsidiarity. It proposes a *laicity*- scale (L-scale) that ranges from the extremes of the private sphere at one end to the judiciary at the other. Such a scale allows differentiation between the case of a female Muslim judge required to abandon her headscarf because her judicial function requires neutrality and the case of a female Muslim teacher in a public school acquainting pupils with cultural and religious diversity by wearing the headscarf as a religious symbol.

¹ Professor of Legal Philosophy and Legal Sociology at the University of Amsterdam. This essay owes much to animated discussions with Mitchel Lasser, Stephen Macedo, Luna Pierre, David Richards, Julio Antonio Rios-Figuera, Ralf Rogowski, Jeremy Waldron and Joseph Weiler during my stay as a Senior Global Research Fellow at New York University School of Law in the second half of 2006.

France vs. the Netherlands

At present the countries of the European Union are tending to a common liberal constitution, even though a draft *Constitution for Europe* has recently been rejected by referendum in France and the Netherlands.² According to article 1.2 of the draft, the Union is founded on the values of human dignity, freedom, democracy, equality, the rule of law, as well as on respect for human rights, including the rights of members of minority groups. Although the European member states already have accepted these liberal constitutional values, traditionally they have given shape to them in divergent ways.³ These differences in legal culture may evoke sharp mutual criticism. Thus, French authorities are in the habit of sneering at Dutch tolerance that they view as excessive in such domains as euthanasia and drugs policy. From their part, many Batavians cannot help smiling when French presidents pose with a theatrical majesty that far surpasses the rather bourgeois ways of the Dutch royal family.

Recently, the French Stasi Commission has added policy towards minorities as a new topic to this list of cultural contrasts. According to the Commission, the Dutch policy of forbearance has taken disastrous effects on the integration of ethno-cultural minorities in the Netherlands.⁴ As an attractive alternative the Commission recommends the typically French principle of *laïcité* that centers on a strong secular state. Indeed, the French variant of liberal constitutionalism is presented as a superior model that other European countries would be wise to adopt.

This criticism raises the question of what is the best approach in public policy toward minorities, French *laïcité* or Dutch tolerance? Or, is it possible to construe a rational third way that bridges these differences in European legal cultures? I focus on the proposal to ban Muslim headscarves in public institutes, one of the main issues in the Stasi Report.

² Part II of the draft, *The Charter of Fundamental Rights of the Union*, has already been accepted in 2000 in a separate solemn proclamation by the [European Parliament](#), the [Council of the European Union](#), and the [European Commission](#). The Preamble declares: 'The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice'.

³ As authorized by the Preamble of *The Charter of Fundamental Rights of the Union*: 'The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels'.

⁴ Commission de réflexion sur l'application du principe de laïcité dans le République, *Rapport au Président de la République*, 11 décembre 2003, § 4.2.2.1 (www.ladocumentationfrancaise.fr/brp/).

Tribalizing the Netherlands

What, in French eyes, has gone wrong with Dutch policy towards minorities?⁵ According to the Stasi Report, Dutch politics is guilty of a destructive form of multiculturalism. The typically Dutch *pillar* tradition has encouraged self-organization of immigrant groups in closed cultural communities.

Since the sixties, the Netherlands have been sliding down to communitarianism.⁶ (...) Academics like Herman Philipse even speak of a *tribalization of the Netherlands*. (p. 32) Jacqueline Costa, a member of the delegation of the Stasi Commission that has investigated the Dutch situation on the spot, maintains that, as a matter of courtesy, the Report has been phrased mildly. In her view, it would have been more accurate to say that integration in the Netherlands has ended in complete failure! Traditional Dutch tolerance has turned against itself, offering fundamentalists a safe haven which serves them as a base of operation for blowing up the liberal state from within. The Stasi Report was strongly influenced by the negative findings in the Netherlands, says Costa. Considering the Low Countries as a deterrent example, the Commission determined that the Dutch way should be avoided at all costs.⁷

The Stasi Report observes an alarming ‘communitarianization of urbanism’ in the Netherlands. Immigrant communities are huddling together in particular urban districts, marriages are arranged within the group, the children attend ‘black schools’ that give inadequate training in Dutch language. The second and third generations of immigrants from Muslim countries are attracted by Islamism.

This situation feeds racial and religious tensions, revives anti-Semitism, and intensifies the temptation of extremism, as the phenomenon of Pim Fortuyn has brought to the light. (p. 33) The good news is that the Dutch government has learned from its mistakes. With approval the Stasi Report observes new legislation that demands that newcomers accept the basic values of Dutch society, as part of a general legal duty to integrate.

⁵ The one million Muslims living in the Netherlands, mostly of Moroccan and Turkish descent, make up 6 percent of the population.

⁶ The Commission uses ‘communautarisme’ as a sociological notion referring to a way of life that takes place in closed communities. The term does not have the philosophical meaning that man is a social being rather than an autonomous person.

⁷ *NRC Handelsblad*, February 2, 2004.

French *laïcité*

What is the alternative the Stasi Report advocates? In accordance with its official name, *Commission de réflexion sur l'application du principe de laïcité dans la République*, the Commission concentrates on the principle of 'laicity', or secularity. It presents laicity as a typically French principle, constituting the very foundation of the Republic. Born with the French Revolution and the Declaration of the Rights of Man and Citizen of 1789, in the course of the nineteenth century, *laïcité* evolved into a struggle between the Republic and the Catholic Church. The former gained victory with the legal separation of state and church in 1905.

Although other European states also bear a secular character, they have not carried through *laïcité* in its full sense.⁸ The German constitution, for instance, refers to God; the Anglican archbishop is appointed by the British queen; Greece recognizes Greek-Orthodox religion as its state church. The Netherlands have separated church and state as early as 1795-1798 (the Commission forgets to mention that this happened after military annexation by France). In Holland, however, the laical state has been transformed into the typically Dutch 'pillar system' that rests on sections of the community self-organizing on the basis of religion and class. Thus, diverse European nations have given different shapes to the liberal ideal of the neutral state. On the grounds of comparative research the Stasi Commission concludes that French *laïcité*, as a superior constitutional principle, offers the best way to integrate immigrants from the Islamic world in European countries.

As the Commission indicates, the French laicity principle is based upon three values, freedom of thought, legal equality of all beliefs, and state neutrality. *Freedom of thought* supplies every individual with the right to develop his own ideal of the good life. The state should guard

⁸ According to the Stasi Commission, the international European arrangements are secular in character as well. National states may give further shape to them according to their diverse national traditions. The European Union, for instance, rests on a neutral foundation, although it lacks an explicit principle separating political power and religious authority. The Union recognizes the European Convention of Human Rights, including the freedom of religion in article 9; a member state may restrict this freedom only by way of democratic legislation that is required to protect public safety, health, morals, and the rights and freedoms of others. In the interpretation of the European Court of Human Rights, within this framework each state may determine its relation to the church in accordance with its own traditions. States may restrict the freedom of religion in order to protect other liberal principles, for instance in cases where religious manifestations threaten democracy or gender equality. The Stasi Commission refers to judgments of the European Court that allowed Switzerland, Turkey and Greece to legally prohibit religious symbols such as headscarves in public schools. Thus, the Court has judged that Switzerland may prohibit a teacher in a primary public school to wear a headscarf; in the case of very young children, national governments have a margin of appreciation in determining whether the freedom of religion should be restricted to protect the secular character of public schools (ECHR 15.2.2001 Dahlab v. Switzerland, nr 00042393/98).

this negative liberty, not only in its own vertical relations with its citizens, but also in the citizens' horizontal relations. *Equality before the law* of all beliefs implies that the government should not discriminate between different views of life, or favour any particular outlook. Finally, the ideal of the *neutral state* demands that as an impartial instance and as a safeguard of the two other values, the state itself should not show any particular view of life. In this way, the laical constitution combines unity in the public domain with diversity in the private sphere. This arrangement enables peaceful cooperation of people with conflicting worldviews, an essential requirement in modern plural societies.

Alas, the Commission observes that as a consequence of massive immigration from Islamic countries in the last decades laicity has come under pressure. Many newcomers reject the liberal constitutional principles, such as the separation of church and state, individual freedom, and equality of the sexes. In reaction, they tend to seclude themselves in separate communities. In the view of the Commission, the French government has given too much leeway in a 'communitarian' direction, opening space to claims of illiberal communities to preserve their collective identities.⁹

Therefore, the Republic's foundation needs to be reconfirmed. The Commission recommends the enactment of a *Charter of Laicity* that clearly defines each citizen's rights and duties. Civil servants should show strict neutrality in their actions as well as in their outward appearance. Separation of the sexes in the public domain should be prohibited; closed communities should not be subsidized. Simultaneously, French government should take action to improve the situation of immigrants, by countering discrimination, by inserting the history of colonization and slavery into public education, and by recognizing non-Christian holidays.

The Commission pays special attention to public education. Courses on laicity and on the related issue of gender equality should be introduced in the curriculum of public schools. Instruction in languages of the countries of origin should be replaced by lessons in French language. And above all, in public schools pupils should be forbidden to wear headscarves or any other religious symbols.

⁹ For an overview of the French debate on what is preferable, an 'Islam in France' or an 'Islam of France', see John R. Bowen, 'Does French Islam Have Borders? Dilemmas of Domestication in a Global Religious Field', *American Anthropologist*, Vol. 106, No. 1, March 2004, p. 43-55.

Prohibiting headscarves

The Stasi Commission strongly emphasizes public education because it is at school that young people get their training in citizenship. This institution helps them develop their capacity for independent judgment, gain insight in the diversity of world views in modern society, and acquire professional skills. Considerate of the vulnerability of the young pupils' minds, the Commission stresses that public schools should educate them in a tranquil climate, remote from the vehement controversies of the adult world. Therefore, laicity requires that public schools maintain strict neutrality of world view.

In order to protect the serene educational atmosphere against ideological controversies, the Stasi Commission proposes a bill that bans all religious symbols from public schools:

While respecting the freedom of conscience and the particular character of private schools, in public primary and secondary schools it is prohibited to wear clothing or symbols expressing a religious or political persuasion (...). The bill is particularly directed at striking symbols, such as large Catholic crosses, Islamic scarves, or Jewish caps.

The Commission focuses its concerns on the headscarves of Muslim girls. Whereas the secularity of public life has since long been recognized in the religious traditions of Europe, in the Commission's view Islamic scarves express a tendency towards religious isolation. Moreover, as symbols of the traditional subordination of women in the Islamic world, they impede the development of girls into autonomous persons. The command to wear headscarves in public ensues from the traditional Muslim ideal of female chastity that puts women under lifelong control of men. The Commission recognizes that some Muslim girls may voluntarily put on scarves, and that this headgear may incite her social environment to widen her freedom of movement. On the other hand, a large group is wearing scarves under threat of force and violence, as has been convincingly demonstrated by public hearings. According to the Commission, this corresponds with other Islamic violations of women's rights, such as arranged marriages, polygyny, repudiation, and clitoridectomy.

The Commission concludes that the presence of religious symbols in public schools poses a threat to public order. Therefore, in this domain the pupils' religious freedom should give way to state neutrality. In other words, the negative liberties that constitute the first component of the principle of *laïcité*, are overruled by its third component, the demand of laical state neutrality. Meanwhile, the French legislator has converted this bill into formal law.

The Dutch pillar model

Should the Netherlands follow the French example? Or, should the Dutch constitutional variant be preferred to French *laïcité*, as many Dutch citizens will maintain? This raises the preliminary question of whether the Stasi Report has given an adequate analysis of Dutch legal culture.

As the Report rightly indicates, the Dutch approach to immigrant minorities may be seen as a result of the ‘pillarization’ that has determined the Dutch social edifice in the first half of the twentieth century. In an effort to pacify social conflicts, in that period Dutch government has supported major sections of the population in organizing themselves around their particular religion or class.¹⁰ Consequently, Catholics and Protestants used to live in closed ideological communities or ‘pillars’. A Catholic would only read Catholic newspapers, listen to the Catholic broadcasting service, vote for the Catholic political party, be a member of a Catholic trade union, buy his food at Catholic stores, marry a Catholic partner, and send his children to a Catholic school. At the top of this social architecture the elites of the pillars met to run national affairs, while carefully respecting the relative autonomy of each pillar by refraining from controversial ideological issues.

Since the cultural revolution of the sixties a radical process of individual emancipation from the pillarized communities has occurred. Nevertheless, the pillar tradition is still palpable in present-day Dutch society. For instance, the older political parties and the public broadcasting system are organized along the traditional pillar lines. As the Dutch Constitution prescribes, private schools are state-subsidized on equal footing with public schools. Socio-economic

¹⁰ Under pressure of the Russian Revolution, in the Netherlands the ruling *haute bourgeoisie* allowed for universal suffrage in 1917-1919. Although since then all citizens had an individual right to vote, this was canalized into collective structures by instituting particular political parties for Catholics, Protestants, socialist workers, and liberal bourgeoisie. Simultaneously, these ideological groups created parallel organizations in all social and cultural fields. This cultural *apartheid* was compensated for by integration on governmental level, where the elites closely cooperated to settle national affairs, such as legislation, administration, jurisdiction, police, taxes, defense, public order, and public transport.

In his renowned analysis of the system, Lijphart mentions seven conditions for this arrangement of pacifying ideological dissensus. (1) The Dutch leaders were pragmatic businessmen rather than ideological fundamentalists. (2) They were tolerant to deviating views, and tended to involve minorities in public decision making. (3) Crises were solved by top conferences of the leaders of all pillars. (4) Distribution of scarce goods over the pillars was based on the principle of even-handedness and proportionality. (5) Controversial decisions were bypassed. (6) Deliberations were held in secret, only the outcomes were made public. (7) Government had primacy over parliament and judiciary. See A. Lijphart, *The Politics of Accommodation. Pluralism and Democracy in the Netherlands*. Berkeley, University of California Press, 1968.

decisions are often made by consensual deliberation between the ‘social partners’, employers’ organizations and trade unions.¹¹

In comparison with France, the role of the central state is less dominant in the Netherlands. Further back in history, this corresponds with the tradition of decentralized, federative government of the Dutch Republic of Seven Provinces in the seventeenth and eighteenth century; at the time an exception to the centralization processes in other European states, headed by French absolute monarchy. As a consequence, Dutch legal culture puts much weight on freedom and equality, while in France laical state neutrality dominates the two other elements of *laïcité*.

The Dutch Law on Equal Treatment and headscarves

This stress on equal treatment also affects Dutch policy toward minorities, as is shown by the influential, though non-binding judgements of the Commission of Equal Treatment.¹² This Commission was established to assess violations of the *General Law on Equal Treatment* that, among others, forbids discrimination on the grounds of religion or world view in educational institutions and labour relations.¹³ In most cases the Commission rejects prohibitions of headscarves.

As to pupils of public schools, the Commission only allows for a prohibition of the *niqaab*, a veil that almost completely covers the face. The only opening it leaves to the outside world is a cleft for the eyes. By way of exception this prohibition is permitted as it is based on the purely functional ground that a *niqaab* obstructs the communication which is essential at schools.¹⁴

¹¹ Well-known as the Dutch ‘polder model’, that may have its historical grounds in the necessity of close cooperation in a common struggle against the water in the Low Countries.

¹² Lijphart has explicitly recommended the pillar system as a way of integrating immigrant minorities in the Netherlands. This would require participation of representatives of all important social groups in public decision making (by contrast to a majority model), relative group autonomy, proportional distribution of official posts, subsidies, etc., and restricted veto of minorities in cases concerning their group identity. See A. Lijphart, ‘Self-Determination versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems’, in Will Kymlicka (ed.), *The Rights of Minority Cultures*, Oxford: Oxford University Press 1995, p. 275-287.

¹³ The *General Law on Equal Treatment* was enacted in 1994, as a consequence of article 1 of the Dutch Constitution that guarantees equal treatment of all persons in the Netherlands. The law states that in public life all persons should be treated as equals, regardless of their religion, world view, political color, race, gender, nationality, sexual orientation, or marital status. Simultaneously, a Commission of Equal Treatment (CGB) was established to pass judgments on violations of the law. Although legal enforcement of these judgments requires an additional judicial verdict, they are mostly accepted by the parties involved.

¹⁴ CGB 20.3.2003, 2003-40. In November 2006 Dutch government has announced a contested plan to ban Islamic and other garments that completely cover the body from public places; such garbs would pose a grave threat to public security for they may be used as a disguise by terrorists.

Teachers wearing headscarves may also very well belong in public schools. Or so the Commission of Equal Treatment argued in response to a charge of discrimination on religious grounds. A Muslim intern at a teaching academy had filed a complaint against the management that demanded her to remove her scarf while teaching.¹⁵ As a counter-argument the management maintained that teachers should show an open mind in both behaviour and dress, the more so in that teachers are role models. Moreover, liberal Muslim girls may feel threatened by teachers whose dress displays strict religious views. The Commission held in favour of the intern, finding the school guilty of violating article 1 of the General Law on Equal Treatment that forbids direct discrimination on religious grounds. By barring expressions of Islamic religion, the school would exclude female Muslims from the teaching profession. The fact that Muslims have conflicting opinions on headscarves is irrelevant, for the Commission should abstain from theological interpretations. However, the Commission did not grant teachers unlimited religious freedom. Public schools may require that teachers be open-minded. But a religious scarf does not necessarily clash with an open attitude. Rather than judging the teacher on her appearance, the school should have examined whether she was lacking in mentality.

In the view of the Commission, clerks to a law court may wear headscarves as well.¹⁶ Therefore, the court of Zwolle had been wrong in rejecting a female Muslim applicant who refused to remove her religious headgear. The Commission dismissed the plea of the court that judicial neutrality as symbolized by the judicial robe is incompatible with religious signs.¹⁷ In this case, the Commission did not assess direct discrimination of Muslims, since the judicial dress code forbids all deviations in headgear and more in general all non-neutral appearances. A

¹⁵ CGB 9.2.1999, 1999-18.

¹⁶ CGB 9.2.1999, 1999-18; CGB 22.6.2001, 2001-53.

¹⁷ The veil as prescribed in Sura 24:31 of the Koran is hard to combine with the judicial dress code as prescribed in detail in the articles 2-11 of the Dutch *Decree concerning the Titles and Costumes of Judicial Officials*: 'Judicial officials (...) and deputy clerks are dressed in the costume that is prescribed for their office or function, consisting in jabot and gown and, with due observance of the following articles, a cap [beret]. The gown is a long wide robe with a stand-up collar the height of about 4 centimetres, the collar having an aperture of 8 centimetres halfway the front side. The gown as a whole is made of black textile, hanging down to about 10 centimetres from the floor, in the middle of the back side under the collar, as well as at the upper side of the wide sleeves, folded and taken in, the undersides of the sleeves having cuffs the breadth of about 20 centimetres and at the front side in the middle from top to bottom every 5 centimetres furnished with a not-shining small black button. (...) The jabot consists of two pieces of folded white batiste (...) that are connected to one another at their upper sides (...), both pieces together in folded condition the breadth of 8 centimetres. (...) The cap is circular and has a stand-up brim the height of 5 centimetres and a flat and folded upper part, extending 5 centimetres outside this brim, which is furnished with a flat button in the middle, covered with the same textile the cap is made of (...).'

judge is not allowed to display a Jewish cap or a Catholic cross either. But the Commission did assess indirect religious discrimination of the Muslim applicant, since the official dress code still has the effect of excluding her from the judiciary. However, article 2 of the General Law on Equal Treatment allows for indirect discrimination as long as it can be legitimized in an objective way. Now it is certainly legitimate to strive for neutral jurisdiction. But in the view of the Commission, neither judicial robes nor neutral clerks or judges are necessary means to this end. The state could realize judicial neutrality in less radical ways. According to the Commission, law courts may just as well be composed in reflection of social diversity. In other words, in a multicultural society recognition of plurality does not necessarily imply uniformity. The Commission concluded that the judicial dress code violates the principle of subsidiarity that requires choosing less drastic means if these furnish the same results. Therefore, the Law of Equal Treatment implies that clerks of the court may wear Islamic headscarves, as well as Catholic crosses and Jewish caps.

The Dutch Minister of Justice has overruled the Commission's latter judgement by strict directions ordering the judiciary to avoid any appearance of partiality by wearing obvious symbols. Nevertheless, Dutch legal culture generally puts equal treatment before laical state neutrality.

The Stasi Report, then, is right in ascertaining important differences in the constitutional traditions of France and the Netherlands that may influence their policies towards immigrant minorities. Yet, the legal cultures of France and the Netherlands are sufficiently akin to be mutually translatable and comparable at the conceptual level.¹⁸ The three components of the *laïcité* principle, liberty, equality and state neutrality, are common to all Western constitutions, as well as to liberal political philosophy. The cultural differences are to be found in the particular mix, colour and hierarchy these values assume in the diverging historical contexts of the two countries. In France, they are interpreted from the perspective of the overarching concept of *laïcité* which has its roots in the state centrality and the struggle between state and church that are characteristic of French history. Here the third component, state neutrality, takes the shape of strict secularity and overrides the two other elements, freedom of thought and equality of world views. By contrast, the Dutch history of federalism, deliberation and tolerance leads to an

¹⁸ Presuming that the analysis of the French *laïcité* principle given by the Stasi Commission is adequate.

emphasis on egalitarian liberty, while state neutrality may take the form of even-handed support and representation of diverse religious and cultural groups.

These variations within liberal legal cultures bring us back to the main question; should the Low Countries adopt the model of the Stasi Commission? More in particular, should Muslim headscarves and other religious signs be banned from public institutions? Or, should the Netherlands rather stick to the tolerant tradition of the Republic of the United Netherlands, debunking strict *laïcité* as a residuum of the centralistic absolute French monarchy of pre-revolutionary times? Or else, is there a third way that may bridge these differences in legal cultures by a rational reconstruction of the components of laicity?

Private virtue, public vice

In the French constitutional model, Islamic headscarves raise the problem that the very same female chastity that in the private Muslim domain may pass for a virtue, in the public domain may turn into a vice. This creates an inner tension between the component values of *laïcité*, in particular between religious freedom and equality and state neutrality. The solutions of both France and the Netherlands are unbalanced, each putting a one-sided weight on one of these values, respectively laical state neutrality and tolerant equality. The golden middle is to be found in a balanced synthesis of French absolutist secularity and Dutch tolerance.

The Dutch Commission on Equal Treatment undervalues the importance of state neutrality. As the Stasi Commission rightly emphasizes, in plural societies a neutral public domain is prerequisite to peaceful cooperation. In some public institutions this requires a form of neutrality that is stricter, not only than neutrality as even-handedness, but also than neutrality as secularity.

On the other hand, French absolute secularism wrongly neglects the principles of proportionality and subsidiarity. The *telos* of the principle of laicity is to pacify ideological conflicts by giving the citizens as much freedom as is compatible with social cohesion. The prohibition of headscarves, then, should be proportional, not infringing on religious freedom beyond what is required for that purpose. In addition, the principle of subsidiarity requires that the state should not impose far-reaching restrictions when less drastic means would give the same results.¹⁹ In this light, for instance, it seems illegitimate to forbid all civil servants to wear

¹⁹ In this context, I use *subsidiarity* in a sense that deviates from the draft of the *Treaty establishing a Constitution for Europe*: ‘Under the principle of subsidiarity (...) the Union shall act only if and insofar as the

headscarves. Moreover, in those public institutions that do demand strict neutrality, social peace requires further constraints than the secular separation of state and church of French *laïcité*. A strictly neutral state should abstain from enforcing *any* comprehensive view, including secular ones like those of fascism or metaphysical liberalism.

A rational solution requires a more subtle balancing of the component values of *laïcité*. In order to establish the proportionality of a prohibition of headscarves, one should differentiate according to the importance of state neutrality in diverse social domains. To this end, it is helpful to construe a scale spanning the extremes of private and public life. On one end of this *Laicity-scale* a Muslim woman is living her private life, at the other extreme a female Muslim judge is administering justice.

Private domain

In her private life an adult Muslim woman is entitled to full freedom of religion; when she chooses to put on a headscarf, she may do so. Of course, she is not allowed to disproportionately impede on the equal liberties of others by pushing her religious convictions, but wearing a scarf does not violate this principle.

All this presupposes that she is wearing her headgear voluntarily. According to the Stasi Commission, this is not the case with all female Muslims. In quarters inhabited by large concentrations of believers, many women are supposedly forced into the traditional female role, inclusive the obligation of wearing a headscarf. What to make of this objection?

The prescription to cover oneself with a headscarf in public life admittedly has its origin in a religious and cultural tradition that used to distribute rights unequally over men and women. Traditionally, only women were subjected to a strict dress code. The prescription to wear a headscarf is not literally given in the Koran. Sura 24:31 of the Koran indicates which parts of the female body women should hide from all men, with the exception of her husband and other close relatives as well as eunuchs and boys ‘who do not know anything of women’s nudity’:

And speak to the believing women that they refrain their eyes, and observe continence; and that they display not their ornaments, except those which are external; and that they throw

objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’. I use *subsidiarity* in reference to the available means to achieve an objective.

*their veils over their bosoms. (...) And be ye all turned to God, O ye Believers! That it may be well with you.*²⁰

In the view of some Islamic lawyers the command of chastity of Sura 24 implies that the female body should completely disappear under a *niqaab*.²¹ In more moderate interpretations it only requires that women cover their hair with a veil.²² This dress code originates from a patriarchal tradition of family honor that was centered on the chastity of the female siblings.²³ Although men should control their passions too, they are not subjected to dress regulations.²⁴

More in general, when taken literally the Koran teaches a subordination of women that is incompatible with the principles of freedom and equality of Western legal culture:

Men are superior to women on account of the qualities with which God hath gifted the one above the other (...). Virtuous women are obedient (...). But chide those whose refractoriness ye have cause to fear; remove them into beds apart, and scourge them (...). (4:35)

Since traditionally women were supposed to have poor self-control, her male siblings guarded her virginity until she was married off. After marriage she had to be absolutely true and obedient to her husband. For the same reason, women could not move around freely in the outside world.²⁵ This patriarchal culture is still wide-spread in the Muslim world. In most

²⁰ At second sight, perhaps the Islamic dress code can still be combined with the Dutch judicial robe. Sura 24 only commands that women cover their bosom, which corresponds with the articles 3.2 and 10.3 of the *Decree concerning the Titles and Costumes of Judicial Officials* that do not allow for a topless judge: 'The gown is to be worn in a closed fashion'; 'The jabot should be fastened in such a way that what is worn around the neck without being part of the gown is not visible'.

²¹ A Dutch judge wearing a full body garb is more difficult to imagine. The sole opening to the world the *niqaab* or *burqa* leaves is the very eye cleft that should be covered by the blindfold of Justitia.

²² As such, a headscarf can be combined with the gown and jabot of the Dutch judiciary and with some effort even with the judicial cap. To make things easier, article 17 of the *Decree* makes an unintended further accommodation to the freedom of religious headgear: 'Unless the president of the college or the district judge, oldest in rank, decides otherwise in case of ceremonious sessions, the cap may be removed during the session or official activities'. But of course this physical compatibility does not solve the real conflict at the symbolic level between the robe as a marker of judicial neutrality and the headscarf as a sign of Islamic faith.

²³ Sura 33:59 states: '*O Prophet! say to your wives and your daughters and the women of the believers that they let down upon them their over-garments; this will be more proper, that they may be known, and thus they will not be given trouble; and Allah is Forgiving, Merciful*'. This verse can be read as a guideline for free women to dress more decently than female slaves; when wrapped in wide robes, they will not be troubled by young men as if they were available as young female slaves.

²⁴ For the dress code of men, see J. Brugman, *Het raadsel van de multicultuur*, Amsterdam 1999, p. 132-145. In early Islam believers were advised to distinguish themselves from non-believers by their clothing. In the 20th century this took the form of a debate on abandoning Western hats or ties.

²⁵ As to the traditional separation of the male and female worlds of men and women, see Louis Gardet, who maintains that headscarves are not prescribed by the Koran (*De islam*, Utrecht 1967, p. 179-182).

Islamic countries men have much stronger rights than the second sex. Whereas a man may marry several women and repudiate his wives, the reverse is impossible. In court, a man's testimony carries far more weight than that of a female witness.

Identifying the headscarf with this vital tradition, some Muslims reject it as a means of subordination. The Moroccan sociologist Fatima Mernissi states:

The hidjab is like heavenly *manna* to politicians who are involved in a crisis. It is not so much a piece of textile, as well a division of labour. Requiring women to wear the hidjab means sending them back to the kitchen. Every Muslim state could halve its official amount of unemployed by appealing to the *sjaria* in the traditional despotic way of the caliphate.²⁶

In the view of Soumaya Naamane, a Moroccan sociologist, the veil is a symbol of sexual submission. On the basis of interviews with 200 women in Casablanca during the eighties she concludes that under the pressure of tradition, most women do not develop into autonomous persons:

Young women do not ask questions because her family makes her think that she is unable to participate in discussions. This is all traditional and sacrosanct.²⁷

According to Chahdrott Djavann, an Iranian anthropologist, the same applies to Muslims in France:

Although we are living in a Western liberal state, minor daughters are still being obliged to wear a veil by their families. In this way girls are turned into objects of desire; objects, for they are forced to wear the veil, and this reality is part of their identity, their appearance, their social essence.²⁸

Similar voices can be heard in the Netherlands. According to Seçil Arda, chair of the International Network of Women from Turkey, all arguments put forward by Muslim women in favour of their headgear are rationalizations of their submission:

Restrictions such as wearing headscarves are made up by men who are using women as marionettes. Next, women declare that they like to wear a scarf and that they do so out of free will. Thus, they are denying their submission in order to embellish their situation. In their denial they resign themselves to their fate. They maintain that their scarves are a purely voluntary affair, for they do not want to be repudiated by their family and community.²⁹

²⁶ Fatima Mernissi, *Islam and Democracy*, Addison-Wesley/Perseus, 2002, p. 203.

²⁷ Soumaya Naamane, *De schaamte ontsluiert. Vrouwen uit Casablanca over huwelijk, seksualiteit en erotiek*, Amsterdam 1994, p. 12 (Naamane-Guessous, Soumaya, *Au delà de toute pudeur*. Casablanca 1990: Eddif).

²⁸ Chahdrott Djavann, *Weg met de sluier!*, Amsterdam 2004, p. 14. (*Bas les voiles!*, Paris, 2003)

²⁹ *De Volkskrant*, 22 maart 2001.

This lack of autonomy might inspire a plea for a full prohibition of headscarves and other religious impediments to the liberties of women.³⁰ Even liberals like Kymlicka who maintain that minority communities have a right to their own cultural identity, reject *internal restrictions* infringing the fundamental rights of individual members.³¹ Still, the Stasi Commission does not recommend a general prohibition in this radical sense, and rightly so.³²

A liberal state should protect all citizens against force and violence, Muslim women included, for example by establishing refuge-homes. But this does not justify a prohibition of headscarves, for neither the Islam nor headscarves as such necessarily imply the use of force against women. It all depends on the cultural, social and personal context in which the religion is interpreted.³³ Many believers consider Islam to be pre-eminently tolerant. It also allows for interpretations that are friendly to women.³⁴ The maximum of four women the Koran sets to polygynic marriage in Sura 4:3 is a good example; when interpreted literally this prescription seems sexist, but a teleological interpretation puts it in another light. Feminist Muslims argue that in Mohammed's days it was drafted to protect women, for up till then a man could marry an unlimited number of wives.³⁵ Extrapolated to modern times, this text would prescribe monogamous marriage.

Headscarves may also express various meanings that very well fit a liberal state. Under its cover Muslim women can move around without being harassed, a freedom that they can use to

³⁰ The *private sphere* is defined by the harm principle which does not coincide with the domestic domain. State interference is legitimate wheresoever the rights of women are under threat.

³¹ See Will Kymlicka, *Multicultural Citizenship*. Oxford, 1995: Clarendon Press.

³² But Anne Vigerie and Anne Zelensky, two leading French feminists, have argued that *laïcité* implies the far-reaching measure that all places of 'common life' should be made free of religious belief (reported by John T. Bowen in 'Muslims and Citizens. France's headscarf controversy' in *Boston Review*, February/March 2004, p. 33).

³³ See also Annelies Moors, 'Muslim cultural politics'. *What's Islam got to do with it?*, Amsterdam 2004. As a sociologist Moors rejects both the essentialist 'orientalism' of Huntington's *The Clash of Civilisations* that depicts Islam as an all-comprehensive system determining all domains of life, and the 'modernist' view that religion is a private affair that should be separated from the political, economic and social domains. Sociological research shows that at present Islam occupies changing positions in wide cultural developments, showing large overlaps of the private and public domains. This social dynamic is soaked with diverging contrasts between seculars and believers, moderns and conservatives, lower and middle classes, townsmen and countrymen, etc.

³⁴ See for instance Riffat Hassan, 'Gelijk voor God, ongelijk op aarde? Islamitische vrouwen en mensenrechten', in K. Noordam, R. van Oordt en Coskun Cörüz (red.), *Mensen, rechten en islam*, Amsterdam 1998. Also see Nahed Selim, *De Vrouwen van de Profeet* (Amsterdam, 2004), who disputes the thesis that the Koran prescribes headscarves.

³⁵ According to Mutahhari, even now Islamic polygyny renders women an important service, obliging husbands to take permanent care of their wives, whereas modern man finds sexual variation by yearly changing his secretary. See Murtada Mutahhari, *The Rights of Women in Islam*, Theran 1981.

find an outdoor job or to study. Some only wear their headgear to express their religious or cultural identity, which may well include modern views on the rights of women.³⁶ Other women wrap their head with a scarf by way of every-day garment or fashion-statement.³⁷

These motives may still veil conformism, indoctrination, or fear of excommunication. But even so, such suppressive tendencies should not be met with force. Instruction and education promoting awareness of equal rights are more appropriate responses³⁸, since by its very nature autonomy is a disposition that can not be enforced.³⁹

One may *prima facie* assume, then, that most adult Muslim women in the Netherlands wear their headgear voluntarily. A general prohibition of headscarves would be out of proportion because it would also strike all harmless use. Moreover, it would violate the principle of subsidiarity since force and violence can be replaced with more specific measures. Therefore, the fundamental right to private life as granted by article 8 of the European Convention for the Protection of Human Rights and Freedoms implies that female Muslims in private should be free from prohibitions of headscarves.

Neutral jurisdiction

At the other end of the L-scale a female Islamic judge is administering justice. In this domain state neutrality is essential, since social peace requires a public body that settles conflicts between citizens by impartial arbitration. The right of the judge to religious freedom and non-discrimination should therefore yield to the right of justiciables to an independent process, as set

³⁶ Naema Tahir, a lawyer of Dutch-Pakistani descent, depicts the choice of headscarves by Dutch Muslim women as a juvenile pursuit of social influence and freedom of movement in the new Western environment, in a strategic effort to have the cake and eat it. On the one hand they try to please their home front while simultaneously enlarging their freedom of movement; on the other hand they demand the autochthonous population to respect their religious identity by appealing to secular arguments (Naema Tahir, 'Moslimmeid, jij bent geen slachtoffer', *NRC Handelsblad*, 26 november 2004).

³⁷ The Dutch fashion designer Cindy van den Bremen has designed the headscarf-line *Capsters* with sporting models like *Aerobics*, *Tennis*, *Outdoor* and *Skate*. See also Cindy van den Bremen & Mira van Kuijeren ('Baas op eigen hoofd', *Lover* 2004/2, p. 5-7), who present the headscarf as an elegant accessory that used to be worn by movie stars such as Grace Kelly and Audrey Hepburn during the fifties and sixties. According to them, as a Muslim headgear the scarf is a relatively innocent garment that enables Muslim women to participate in Dutch society and to fight sexist interpretations of Islam.

³⁸ Also, government should do all it can to prevent the development of an under-class living in ghettos and seeking refuge in a neo-fundamentalist counter-culture.

³⁹ More in general, many non-Muslim citizens tend to conformist ways of life as well, yet nobody demands that they should be forced to be free. The liberal ideal of individual autonomy does not imply the atomistic view that everybody should arrange his life in complete independency of his social environment.

down by article 6.1 of the European Convention. According to the European Court, this right also implies that judges should avoid any appearance of partiality.

In John Locke's theory of the social contract, this typical judicial function is one of the main reasons for establishing civil society. In absence of central legislation and impartial jurisdiction, conflicts have to be settled by the parties themselves, with all the inconveniences thereof.⁴⁰ Likewise, in Rawls' social contract doctrine the judiciary acts as the mouth of 'public reason'.⁴¹ Since in a modern plural society ideological consensus cannot reasonably be expected, Rawls argues, it would be *unreasonable* to enforce any particular ideology upon all citizens. Therefore, government should limit itself to actions based on *public* reason, i.e., on arguments that are acceptable to all parties. The only constitutional arrangement which may count on a reasonable consensus is a neutral state, confining itself to the provision of 'primary goods' needed by everyone, irrespective of his outlook on life. Amongst these are the classical fundamental rights and freedoms such as freedom of religion and expression, and the socio-economic rights that are needed to make proper use of one's liberties.⁴²

State neutrality, then, requires narrower restrictions than that of French secularity. Public reason not only excludes religious arguments, but secular metaphysics as well: comprehensive worldly views such as metaphysical liberalism, conservatism, fascism or Marxism are not to be allowed in the public debate on constitutional issues.⁴³ Judicial argumentation too should respect

⁴⁰ John Locke, *Two Treatises of Government* [1689], Cambridge 1988, *Second Treatise*, section 125. As human beings tend to partiality as soon as their interests are at stake, taking the law in one's own hand necessarily results in unending conflicts. In this situation, nobody is secured of the peaceful enjoyment of his rights. Therefore, we all have good reasons to recognize the authority of a central legislator who posits clear laws that are acceptable to all, as well of a judiciary that impartially decides conflicts about the just interpretation of the law. In *A Letter Concerning Toleration* (1689) Locke emphasizes that the state should be neutral in religious matters. Tolerance being the best way to keep the peace in the midst of fundamental religious controversies, freedom of religion and separation of state and church are of central importance. The state, then, should confine its concerns to the citizens' general well being, leaving religious affairs to their individual responsibility.

⁴¹ John Rawls, *Political Liberalism*, New York 1996, Columbia University Press, lecture VI, par. 6.

⁴² *Political Liberalism*, lecture IV, par. 6.

⁴³ In defence of his comprehensive liberal view on jurisdiction, Ronald Dworkin has criticized Rawls' concept of public reason for not having the exclusionary force it claims (Ronald Dworkin, 'Rawls and the Law', *Fordham Law Review*, April 2004, p. 1387-1405). Dworkin agrees that reference to religious revelation is too parochial to be counted as reasonable. But public reason would fail to set limits to non-religious comprehensive moral convictions, since everybody will view his own considered judgments as pre-eminently reasonable. More particularly, it would not exclude Dworkin's comprehensive liberalism, and rightly so. According to Dworkin, the necessary constraints on judicial argument are rather to be found in his *interpretivist* conception of law, that includes his comprehensive liberal anthropology while excluding religious arguments: 'Judges may not appeal to religious convictions or goals in liberal societies because such convictions cannot figure in an overall comprehensive justification of the legal structure of a liberal and tolerant pluralistic community' (p. 1399).

the constraints of neutral public reason, abstaining from comprehensive religious or philosophical considerations.⁴⁴

However, Dworkin's objection rests on a misunderstanding of Rawlsian *public reason*. Rawls defines *public reason* as the reasonableness of equal and free citizens in a constitutional democracy (Rawls 1996, p. 213). Contrary to Dworkin's suggestion, in this context 'reasonableness' does not refer to the epistemological criterion that an argument should be grounded in good reasons. Political liberalism presents it as an ethical concept, based on the reciprocity between citizens that is required for their peaceful and fair cooperation in a plural society: '(...) being reasonable is not an epistemological idea (though it has epistemological elements). Rather, it is part of a political ideal of democratic citizenship that includes the idea of public reason' (Rawls 1966, p. 62). Each citizen is supposed to have the moral capacity to be 'reasonable' in the sense that in the public debate he is willing to restrict his argumentation to reasons that are acceptable to his fellow-citizens. He refrains from referring to the deeper convictions that he holds true, because he acknowledges the 'fact of reasonable pluralism': in an open society one may reasonably disagree about the incompatible truth claims of a plurality of comprehensive doctrines. It would be unreasonable and destabilizing, then, to enforce one of these doctrines on others. The ideal of the autonomous person of comprehensive liberalism, for instance, is too contested to serve as a sound basis of peaceful and fair cooperation. In other words, reasonable citizens agree to disagree. Within these constraints, Rawls accepts Dworkin's *interpretivist* view of judicial reasoning. 'To say that the court is the exemplar of public reason also means that it is the task of the justices to try to develop and express in their reasoned opinions the best interpretation of the constitution they can, using their knowledge of what the constitution and the constitutional precedents require' (Rawls 1996, p. 236; see also note 23 on that page). In this way, Rawls can counter another familiar objection to the constraints of public reason: that it would allow for a plurality of reasonable answers to controversial political questions, so that in the end one cannot help falling back on comprehensive views to formulate the right answer. Reasonable interpretation can fill the gaps that would otherwise leave the decision underdetermined. (For a further discussion of whether public reason is sufficiently complete to deal with difficult political issues, see Samuel Freeman, 'The Idea of Public Reason Revisited: Public Reason and Political Justifications', *Fordham Law Review*, April 2004, p. 2021-2072.)

⁴⁴ *Political Liberalism*, lecture VI, par. 6. The Supreme Court has a special task in guarding the constitutional rights.

This view of the judiciary is contested. Jeremy Waldron has criticized Rawls' model of public reason for being unsuitable to political deliberation and judicial reasoning (Jeremy Waldron, 'Public Reason and "Justification" in the Courtroom' (1 *J. L. Phil. & Culture* 107 (2007))). As to political decision-making, Waldron argues that the constraints of public reason are detrimental to practical rationality because in the process of justifying a decision *all* pros and cons should be weighed in accordance with their relative strength. Arguments grounded on comprehensive religious or philosophical views should not be left out of the picture, for they can carry weight too; the more so since the metaphysical belief in question might be true. As to jurisdiction, public reason plays no role here, since the constraints to judicial arguments are to be found in the formal legal sources such as legislation.

However, Waldron's argument that public reason falls short of justificatory rationality is not convincing, for its constraints can be justified in a meta-ethical argument that is open to revision. As a revisionist, I would not object to granting comprehensive views a supporting role in political deliberation, provided they are not *decisive* in the final decision-making. Waldron rightly supports his plea for including comprehensive arguments by remarking, first, that they might be true, and second that people have a capacity for understanding unfamiliar views. Therefore it can make sense to try one's religious arguments in discussions with non-believers, in the hope that they will find them attractive enough to be converted. But in fundamental controversies this is unlikely to happen on a large scale. As Rawls observes, in a modern open society enduring reasonable pluralism is to be expected. Since up till now no comprehensive religious or philosophical view has been shown true, it would be unreasonable to anticipate an eventual discovery of eternal truth in the future by enforcing one of those views upon dissidents for now. It would, moreover, be inconsistent with the very project of political liberalism of pacifying ideological conflicts. Therefore, it is rational to separate the process of political decision-making from the more inclusive moral debate by giving public reason a decisive role.

Public reason presents an adequate normative model for judicial argumentation too. Obviously, in deciding a case the judge lacks competence to weigh all relevant public reasons, constrained as he is by laws and jurisprudence. But ideally the sources of jurisdiction should in their turn be determined by the liberal theory of

Members of the judiciary, therefore, should rank the value of impartial jurisdiction over their rights to religious freedom and non-discrimination. This leads to the next question; does the requirement of impartiality imply a ban on judicial headscarves? The Dutch Commission of Equal Treatment has denied this implication, holding that it would violate the principle of subsidiarity. In the case of the court clerk, the Commission argued that impartial jurisdiction could just as well be guaranteed in a less drastic way, by a court reflecting social diversity.⁴⁵

However, this alternative is inadequate in the light of its arbitral role. A court mirroring ideological plurality would politicize the judiciary instead of raising it above party. Moreover, after the collapse of the pillar system in the sixties most Dutch citizens have left their traditional homogeneous communities to adopt diffuse and overlapping identities. In modern society it is unclear which characteristics should be mirrored by law courts; sex, or color, or class, or sexual preference, or ideology? In short, in the domain of jurisdiction strict neutrality is preferable to neutrality as even-handedness. Judges should subscribe to the neutral principles of freedom and equality of political liberalism, leaving their deeper convictions behind in their private domain. Whoever is unable to do so, should not be selected for the job.⁴⁶

justice, so that the outcome of the legal process as a whole would still correspond with public reason. The fact that the real world does not live up to this ideal does not imply that judges should abandon the ambition for impartial arbitration as a central aim of the judicial practice. Public reason should at least constrain them in the negative sense that they should not appeal to personal moral, metaphysical or religious views. This specific constraint of public reason is sufficient for my present argument about judges expressing particular religious attitudes.

⁴⁵ This arrangement would be in line with the Dutch pillar tradition. On the theoretical level it corresponds with Carens' concept of 'justice as even-handedness'. Carens advocates a form of state neutrality that does not keep aloof from cultural minorities, but rather actively supports them on the basis of *even-handedness*. This does not imply that each cultural community should be supported in proportion to the number of its members; it only requires taking into account that the preservation of cultural identity is a central human concern. Within the framework of the liberal principles of liberty and equality, then, one should strive for compromises based on proportional balancing. See Joseph H. Carens, *Culture, Citizenship, and Community. A Contextual Exploration of Justice as Evenhandedness*, Oxford: Oxford University Press 2000.

⁴⁶ Pierik argues that in most lawsuits religion is irrelevant, for instance in the case of parking fines or conflicts about rent (Ronald Pierik, 'Onpartijdigheid van rechter niet bedreigd door hoofddoek', *Trouw*, 12 mei 2001). The religion of the judge would only matter in specific cases, for example in the charge of discrimination against Imam Khalil el-Moumi's statements that homosexuality is a disease. Therefore, in Pierik's view the principle of subsidiarity requires a less radical, pragmatic solution based on the possibility of retirement in problematic cases Dutch law offers judges (either voluntarily or on request of a party to the procedure). In short, in the majority of lawsuits scarf-wearing judges pose no special problem, while cases with a religious impact can be left to judges with neutral looks.

Though sympathetic at first sight, this solution is not adequate. It would require a complex casuistry: may a scarf-wearing judge assess young Moroccan criminals, or disputes concerning immigration, or divorce, or same-sex marriage, or parental authority? Moreover, it would result in an uneasy bipartition within the judiciary.

Still one can argue that headscarves are not necessarily non-neutral signs, and that judges should be selected on their convictions rather than on their headgear. Admittedly, a headscarf may symbolize a fundamentalist attitude that is incompatible with the liberal separation of church and state and with equal rights of women. But headscarves may also express motives that very well fit a liberal constitution, such as solidarity with one's community, concern for one's family, considerations of decency, fashion-consciousness, or vanity. Nevertheless, this multi-interpretability of the headscarf does not take away all grounds for prohibition. Decisive in the context of jurisdiction is the perspective of the judiciable citizen, who is not in a position to know the judge's intentions. Therefore, a judge should also refrain from all signs that have the *appearance* of partiality. Given that it is reasonable to require a judge to leave behind his deepest substantial convictions in his private sphere, why would it be unreasonable to hold on to the lesser requirement of adjusting his outward appearance?⁴⁷

Moreover, non-orthodox motives could also supply sufficient reasons for banning scarf-wearing judges. It may be true that some Muslim women move around more freely under the cover of a headscarf, but this is just freedom within a cage of illiberty and inequality. Other women wear their headscarf to meet the expectations of their social environment; they are disqualified for an arbitral role because they show insufficient independency.

Furthermore, headscarves are the subject of deep political and religious controversies within Muslim circles. While some Muslims favour them as a means to conserve the traditional inequality of the sexes, for that very same reason others reject them as a symbol of suppression. Of the Moroccan youth in the Netherlands one of every two thinks that Muslim girls should wear a headscarf, whereas one of every three rejects this obligation. Some schools are the stage of a battle on headscarves between orthodox and liberal Turkish parents. Neutrality requires that judges keep away from such deeply controversial symbols.⁴⁸

⁴⁷ By definition, neutral jurisdiction excludes religious convictions that are incommensurable with the liberal constitution. As Rawls indicates with his 'paradox of public reason', in public deliberation one has to look away from one's fundamental convictions even though it concerns fundamental problems such as euthanasia or divorce. The liberal constitution requires all citizens to be able to distinguish between the public and the private sphere, a requirement that *a fortiori* applies to judges. Orthodox judges, then, have to take a somewhat schizophrenic attitude. In Western culture, however, there is no real paradox because the liberal constitution rests on an 'overlapping consensus' from the perspectives of the comprehensive religious and philosophical worldviews.

⁴⁸ For a more extensive argument, see C.W. Maris, 'Hoofddoek of blinddoek?', in N.F. van Manen (red.), *De multiculturele samenleving en het recht*, Nijmegen 2002, p. 181-191.

The L-scale

By placing other social positions on a scale in between both extremes, it is possible to differentiate by context. Courtroom clerks are so close to the judicial college that they should accept the same dress code.⁴⁹ The same goes for civil servants in public functions with ideological implications, such as employees of the Immigration Service.

On the contrary, the absolutist French rule that all civil servants should avoid any appearance of partiality is out of proportion. Why would appearance matter in functions that do not involve direct communication with citizens? More in general, why would state neutrality be tainted by the appearance of civil servants in jobs without ideological impact, such as janitors?⁵⁰

What about teachers in public schools; which position on the L-scale is right for them? In certain respects their role may seem akin to judicial arbitration. Teachers not only instruct their pupils, they also judge their performance. Furthermore, pupils are future citizens whose education is of public concern, also because of its ideological impact. Since educational institutes are at the very crossing of public and private life, the state may legitimately ask for open-minded teachers who accept the liberal rule of law.⁵¹

⁴⁹ But, as the British Lord Chief Justice has rightly announced recently, lawyers are allowed to wear an Islamic veil in court, as they have no arbitral function.

⁵⁰ By way of exception, strict state secularism might be legitimate in countries where the separation of church and state is at stake, possibly in Turkey. The ECHR holds that Turkish universities may prohibit headscarves and other religious symbols such as beards. According to the Court, strict secularism may be necessary to defend democracy and other liberal values such as gender equality, particularly in Turkey where the neutral state is threatened by religious fundamentalists. In this Islamic nation the headscarf has a special political impact that inspires fundamentalists to use it as a symbol to put dissidents under pressure (ECHR June 29, 2004, *Leyla Sahin v. Turkey*, nr 00044774/98).

On the other hand, according to a report of the Dutch Scientific Council for Government Policy Turkish Islam is compatible with the constitutional values of the European Union (*De Europese Unie, Turkije en de islam*, Amsterdam 2004). In an additional study, Zürcher and Van der Linden point out that female adherents of the Islamic Welfare Party in Turkey dispute the Turkish ban on headscarves in public places with an appeal to the secular human rights (and that, moreover, 85% of Turkish women who do not cover their head consider themselves as Muslims, whereas only 10% favors re-introducing Islamic family law).

In the Netherlands organized fundamentalist resistance is marginal. For instance, the militant Islamic political party, Arabic-European Liga, only pursues Islamic pillarization within the liberal framework of the Dutch constitution. (For an extensive analysis of the AEL program, see C.W. Maris, *Als God het wil. Is islamitische partijvorming wenselijk?*, in: B. van Leeuwen en R. Tinnevelt (eds.), *De rusteloosheid van de multiculturele samenleving*.) This may seem amazing in the light of Stasi Report that depicts the Dutch situation as alarming; on inquiry however the persons who were surveyed in the Netherlands state that they do not endorse this analysis (see Froukje Santing, 'Verbazing over harde Franse conclusies', *NRC Handelsblad*, 3 februari 2004).

⁵¹ Elsewhere I have argued that the 'requirements of adequacy' set to private schools by the Dutch constitution should imply courses in constitutional principles and civic duties (C.W. Maris, 'Normen en waarden in de multiculturele samenleving', *Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie*, 2002, jaargang 31, nr. 3, p. 215-234).

However, the analogy between teacher and judge falls short. A judge should avoid all appearance of partiality because of his anonymous and impersonal arbitral relation to the justiciables. To teachers, who do have more personal relations with their pupils, impartial looks are less crucial. In the course of a school year pupils get to know their teachers well enough to be able to look through appearances. A teacher, then, does not arrive at the critical point until she is actually expressing a controversial ideology.

Pupils' headscarves

Pupils in public schools take a position on the L-scale that is even further from the judiciary. Unlike judges and teachers, they do not hold public authority over others. In their case, impartiality cannot be the ground for prohibiting headscarves.

On the other hand, they do not belong at the other extreme of the L-scale either. A female Muslim pupil deviates from grown-up Muslim women in private in two respects. Firstly, as a minor she has not yet reached the status of a fully autonomous person; secondly, she is visiting a public school. These differences might justify a prohibition of headscarves. In the view of the Stasi Commission, religious symbols should be banned from schools in order to protect the vulnerable minds of the pupils; scarf-wearing pupils might not only put liberal female Muslims under pressure, they might themselves be victim of a suppressive ideology as well.⁵²

In the light of liberal educational aims, however, a total prohibition of religious signs would violate the principle of proportionality. It would include the symbols of European religions, although the Stasi Commission recognizes that these have since long stopped being major sources of political conflicts. It would also affect Muslim pupils who wear their headscarves

In the same vein Macedo argues that private schools should impart knowledge of the basic civic values, because acquaintance with democratic principles including tolerance is indispensable in a plural society. Macedo maintains that this requirement satisfies the demand of state neutrality, even if its *results* are not neutral since pupils will be exposed to diversity and critical ways of thinking. See Stephen Macedo, 'Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?', *Ethics*, Volume 105, Issue 3 (Apr., 1995), p. 468-496.

In spite of its respect for diversity, even Galston's liberal pluralism implies far-reaching governmental requirements to private schools, among others to supply adequate information about alternative ways of life. See William A. Galston, 'Two Concepts of Liberalism', *Ethics*, Volume 105, Issue 3 (Apr., 1995), p. 516-534.

⁵² The Stasi Commission refers to the testimony of Chahdortt Djavann (2004): 'By allowing the veil or headscarf in schools, teenagers in the suburbs are once more placed under the yoke of Islamic dogmas, hampering their emancipation even stronger. Some are raped or called whores because they refuse wearing a veil or headscarf' (p. 57).

voluntarily and without any externally-directed motive.⁵³ They might form a majority, at least in the Netherlands where most Muslims show little affinity with fundamentalism.

On the other hand, Muslims do display a strong tendency to stick to traditional family values, including that of male superiority.⁵⁴ Members of the younger generation tend to identify with new forms of Islamic faith that are stricter than their parents' traditions and that undoubtedly enforce the trend of wearing headscarves. Yet, when such tendencies pose a threat to the tolerant climate of public schools, they should rather be countered with arguments and civic education.⁵⁵

A prohibition of religious signs may even have negative effects on integration, hindering pupils from learning to respect cultural and ideological differences. When students are free to wear what they like, public schools offer them an eminent opportunity to experience diversity. Unlike the court room, then, in the domain of public education neutrality should take the shape of pluriformity rather than of uniformity.⁵⁶

More generally, education is the best way to integration, so that public schools should have maximum accessibility to all parts of the population.⁵⁷ A ban on headscarves may have the opposite effect of excluding Muslim pupils.⁵⁸

⁵³ Nevertheless, public order may require a ban on headscarves when they are proven to transform public schools in daily battlefields of intolerance, force and violence. On the basis of testimonies of teachers, the Stasi Commission comes to the conclusion that the official figures minimize the problems at schools. However, on this point its argumentation is as impressionist as its observations on the Netherlands. In fact, most Dutch Muslims show little affinity with fundamentalism. In these circumstances, depicting their symbols as inherently causing conflicts may have an escalating effect by suggesting that the Islam is aggressive in itself.

⁵⁴ According to *Muslims in Nederland* Muslim immigrants constitute an exception to the *convergence thesis* that processes of modernization and secularization show global uniformity (as a consequence of either universal cultural evolution or cultural diffusion from the West). Dutch Muslims converge in their acceptance of democratic values in the political domain, in line with the traditional separation of secular and spiritual powers in most Islamic countries. However, they diverge by clinging to traditional family values. The 'Islamic exception' may have its cause in the strong orientation of Islam on daily regimens, jurisdiction and administration.

⁵⁵ School should be able to take specific measures against pupils who disturb the order in the classroom, for instance by rejecting the authority of female or homosexual teachers, or by hindering a discussion of the Holocaust.

⁵⁶ Also see G.A. den Hartogh, 'Onderwijs moet niet neutraal zijn', *NRC Handelsblad* 16.3.2004.

⁵⁷ See J. Dagevos, *Perspectief op integratie. Over de sociaal-culturele en structurele integratie van etnische minderheden in Nederland*, Den Haag 2001.

⁵⁸ For the same reason, in order to promote the integration of Muslims the pillars tradition should not be revitalized, for instance, by subsidizing Islamic schools. The reason is not that Islam would be a backward religion, but rather that most Muslims in the Netherlands are in a very weak social-economic position. Their social isolation would be stimulated by a closed community life in a separate Islamic pillar. Moreover, Dutch Muslims do not form a homogeneous cultural or ethnic community. See C.W. Maris, *Als God het wil. Is*

In summary, then, measures against scarf-wearing pupils in public schools conflict with the principles of proportionality and subsidiarity, and may have counter-productive effects. In this domain Dutch tolerance is preferable to French *laïcité*.⁵⁹

Coda: cultural clashes

Conflicts concerning headscarves are generally phrased in religious terms. At second sight, however, class and culture may play a decisive role. Like most religious sources, the Koran contains ambiguous and sometimes mystical texts that lend themselves to countless diverging readings. This does not come as a surprise, since holy books are intended to represent the Infinite with finite means. Inevitably, then, sacred texts will be interpreted by its readers from the perspective of their cultural and social situation. This also applies to the Islamic verses on gender relations.

Most Islamic immigrant communities of Mediterranean descent in Europe have their roots in labor migration. Coming from agricultural regions with high degrees of illiteracy, in European countries they are in danger of collectively falling into an underclass; a tendency that is enforced by xenophobic reactions of the native population. Their patriarchal family traditions are interwoven with an agricultural way of life that involves substantial gender inequalities. In reaction to their poor social opportunities and the low status of their parents, younger generations are attracted by new currents in Islam claiming to represent pure forms of belief of an outspoken illiberal character. In this social context, religious texts on gender relations are often read as strict prescriptions aimed at safeguarding female chastity. In this respect headscarves may be seen as marks of a way of life that restricts the liberty and equality of women, even if the actual motives for wearing them may vary.

This results in clashes with the liberal legal culture of the new European homelands. In Europe, the disasters of religious wars have led to the view that tolerance is the best way of pacifying ideological conflicts. On the national level, the liberal *let's agree to disagree* requires a

islamitische partijvorming wenselijk?, in: B. van Leeuwen en R. Tinnevelt (eds.), *De rusteloosheid van de multiculturele samenleving*.

⁵⁹ In other words, the three components of the French principle of *laïcité* should be interpreted and balanced in a way that deviates from the recommendations of the Stasi Report; in the case of Islamic headscarves in public schools the values of liberty and equality of religion should overrule the value of strict state neutrality.

neutral state governing the public domain, while in private life individual autonomy is guaranteed by liberty rights.

The policies of the European countries towards immigrant minorities vary under the influence of the diverse shapes they have given to the liberal constitution. In line with its tradition of tolerance and equality, Dutch legal culture emphasizes respect for the identity of cultural and religious minorities. In the Netherlands, state neutrality may take the shape of public institutions that reflect the pluriformity of social life and of even-handed support of the diverse religious and cultural groups. In contrast, French *laïcité* primarily requires minorities to respect the secular character of public life. In this laical tradition France has enacted far-reaching legal bans on religious signs that particularly aim at Islamic headscarves.

From the perspective of the liberal tradition of the United States with its emphasis on individual freedom and respect for religion, French laical fundamentalism is hard to understand. The American incomprehension is heightened by other differences in legal culture, especially in the fields of immigration and social security. In comparison to Europe, in the US the integration of Muslims works out less problematic because immigrants are selected on their capacities⁶⁰ and urged to an active attitude by America's more economical system of social security.⁶¹

Such cultural conflicts raise the question of whether there is a rational way to settle them. At the constitutional level political liberalism presents an arrangement designed to pacify cultural clashes in the form of a hypothetical imperative: if one is willing to cooperate on fair terms, then one should agree with the liberal separation of the public and the private domains.⁶²

This leaves the question open of how conflicting liberal principles should be balanced, for instance in the case of civil servants who want to wear Islamic headscarves. The *Laicity-scale*

⁶⁰ Probably, the position of Muslim immigrants in Europe is more akin to that of Mexican immigrants in the US. See Dean, Frank B., Rodolfo de la Garza, et. al. (eds), *At the Crossroads: Mexican and U. S. Immigration Policy*, Rowman and Littlefield Publishers, Lanham, Md., 1997.

⁶¹ In contrast, the more generous social security in Europe stimulates a passive attitude. It also incites large-scale immigration on the basis of family reunion that furthers the growth of closed, ill-adapted communities adhering to illiberal traditions. In the Netherlands, 70% to 80% of the Moroccan and Turkish marriages are arranged with partners from their village of origin.

⁶² Since this political version of liberalism does not rest upon the contested metaphysics of individual autonomy, it may be acceptable to Muslims who are willing to adjust themselves to the plural character of modern Western society. Fundamentalist believers of all creeds who take the *paradox of public reason* seriously and do not accept the self-relativizing approach required, may still claim dominion of the public domain. Doing so they create a state of civil war to which a reaction of self-defense is legitimate.

helps in determining the relative importance and substance that should be attached to the principle of state neutrality in diverse public institutions when weighing it against the principles of freedom and equality. The arbitral function of the judiciary requires the strict neutrality of 'public reason', excluding all reasons based on religious and secular comprehensive views. In other public institutions, such as the public broadcasting system or public schools, neutrality may take the more tolerant form of an even-handed representation or support of groups with diverging views of life. In public domains without much ideological impact individual freedom should have priority. Thus, the L-scale allows for differentiation between the case of a female Muslim judge required to abandon her headscarf because her judicial function requires neutrality in appearance, and the case of a female Muslim teacher in a public school who should only avoid illiberal instruction. Pupils in public schools should be free to wear all kinds of religious signs, for this prepares them for the cultural and religious diversity of modern plural society.