



# Ludin's *Kopftuch* (headdress): A problem of religious freedom in German schools

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## Abstract

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*Fereshta Ludin is a German citizen and devout "Muslimin". She has been denied leave to wear her "Kopftuch" in the classroom. She has lost her case in the courtrooms of the states where appeals were lodged to lift the ban. She may consequently not teach at any public school in Germany. We argue that Ludin is entitled to wear the "Kopftuch" on grounds of her right to religious freedom and that the attempt to deny her this entitlement constitutes a breach of individual rights. Following the South African philosopher, Denise Meyerson, we maintain that the domain of religion constitutes an area of intractable dispute, and that the state is not entitled to limit liberty in this domain because it cannot justify limitations in a neutrally acceptable way. Meyerson's arguments rest on the acceptability of Rawls's notion of public reason. We test Ludin's case against Jeremy Waldron's objections to the use of deliberative discipline of public reason in cultural disputes and against his alternative to the politics of identity. Meyerson's approach offers protection of religious dissent in a way Waldron's cannot. One significant reason for this is Waldron's insistence on the elimination of identity claims from the conversation between cultures seeking accommodation with one another in the liberal pluralist state. However, bracketing identity claims eliminates what is peculiar about Ludin's case. This we bring out by drawing on views of Sawitri Sahorsa and Melissa Williams. We argue that Ludin's dilemma is twofold: her status as "metic" – as a member of a minority at the margins of mainstream German culture, and her status as "Muslimin" – as one believed to be suffering sexual discrimination in her own culture, hang together in a way that challenges the integration policies of the German state and embarrasses German feminism.*

## Opsomming

Ludin se kopdoek: die probleem van godsdiensvryheid in Duitsland

*Fereshta Ludin, 'n onderwyseres, is 'n Duitse burger en 'n toegewyde Moslemvrou. Sy is toestemming geweier om haar kopdoek in die klaskamer te mag dra. Sy het haar saak om die verbod op te hef, verloor in die howe van die Duitse state waar sy appél aangeteken het. Sy mag gevolglik nie aan enige staatskool in Duitsland onderrig gee nie. Ons voer in dié artikel aan dat Ludin daarop geregtig is om haar kopdoek te dra op grond van haar reg op godsdiensvryheid en dat die poging om haar dit te verbied, afbreuk doen aan haar individuele regte. In navolging van die Suid-Afrikaanse filosoof, Denise Meyerson, voer ons aan dat die gebied van godsdiens 'n gebied van weerspannige (onoplosbare) dispuut behels, en dat die staat nie daarop geregtig is om vryheid op hierdie gebied te beperk nie, omdat die staat nie beperkings op 'n neutraal aanvaarbare wyse kan regverdig nie. Meyerson se argumente berus op die aanvaarbaarheid van Rawls se idee van openbare rede ("public reason"). Ons toets Ludin se geval ook aan Jeremy Waldron se besware teen die gebruik van die doelbewuste dissipline van openbare rede in kulturele dispuut, asook aan Waldron se alternatief tot die politiek van identiteit. Meyerson se benadering beskerm godsdienstige andersdenkendes op 'n wyse wat Waldron se benadering nie kan doen nie. Een belangrike rede hiervoor is Waldron se klem op die uitskakeling van identiteitsaansprake uit die gesprek tussen kulture wat poog om met mekaar saam te leef in 'n liberale plurale staat. Om die identiteitsaansprake tussen hakies te plaas elimineer egter die besondere kenmerke van Ludin se geval. Ons benadruk dit met die hulp van idees van Sawitri Sahorsa en Melissa Williams. Ons voer aan dat Ludin se dilemma tweevoudig is. Haar status as metoikos ("metic") – lid van 'n gemarginaliseerde minderheidsgroep in die Duitse kultuur – en haar status as Moslemvrou – iemand van wie geglo word dat sy aan seksuele diskriminasie in haar eie kultuur onderwerp word - hang saam op 'n wyse wat die integrasiebeleid van die Duitse staat uitdaag, en 'n verleentheid is vir Duitse feministe.*

## 1. Overview

Fereshta Ludin, a *Muslimin* teaching at a German public school, was reprimanded for wearing her headdress to school; she was accused of making a religious statement; she was (so to speak) silently professing her religion in what ought to be an a-religious context. She, however, refused to remove her *Kopftuch*. Eventually, after a lengthy legal struggle, the high court (Karlsruhe) overruled her and she was discharged – we think wrongly so. This is only one of many similar cases. We focus on Ludin's case because it is the most widely publicised case in Germany and the European Union.

Ludin's dilemma demonstrates something many people suspected. The liberal state in Germany faces two crises, one over an issue of religious freedom and another over the access of minorities to the public realm. As a liberal state Germany shares with other states of the European Union a commitment both to the equal moral worth of persons and to the tolerance of diverse points of view on how lives should be lived. The issue before the German state concerns the problem of how diverse religious views (Protestant and Catholic Christianity as well as Islam) can co-exist in one state without compromising the equality constraints of liberalism. Tolerance for competing versions of what a good life entails distinguishes liberals from fundamentalists (both Christian and Islamic). The states in Germany attempt to cope with the pressures generated by the demands of tolerance by defending a policy of state neutrality, which they interpret as requiring that public agents bear no religious symbols, as an addition to the standard interpretation. Dworkin (1990:13) describes the standard position thus:

Liberalism commands tolerance; it commands, for example, that political decisions about what citizens should be forced to do or prevented from doing must be made on grounds that are neutral among the competing convictions about good and bad lives that different members of the community might hold.

The state has no business resolving the competition or favouring one conviction over another. It can, at any rate, not do so without taking sides, thereby ignoring the requirements of both equality and tolerance. But tolerance has limits. There are things the state should not tolerate, for example, sexual discrimination which makes women unequal partners in marriage and unequal participants in the public/political realm of the state. Liberalism's commitment to the idea of equality rules sexual discrimination (as well as racial and cultural discrimination) out of court. We maintain that the state should not tolerate any illiberal consensus among its minorities because they falsely deny the equal moral worth of persons, and as such they are unreasonable comprehensive ethical doctrines. Rawls (1993:60-61) puts the matter as follows:

Reasonable persons will think it unreasonable to use political power, should they possess it, to repress comprehensive views that are not unreasonable, though different from their own. This is because, given the fact of reasonable pluralism, a public and shared basis of justification that applies to comprehensive doctrines is lacking in the public culture of a democratic society.

Muslim minorities in Germany, however, do practise sexual discrimination and so qualify as illiberal minorities. But the states in

Germany are themselves not consistently liberal. They frequently practise forms of cultural discrimination, which often enough look like racial discrimination. The most important indications of this tendency comes from popular representations in the media of the Other as raced, ethnic (in dress and custom), and non-Christian, from the public statements of elected state representatives (particularly in the Catholic-governed *Christlich Demokratische Union/Christlich-Soziale Union* states), and from a general and prevalent *Ausländerfeindlichkeit* among conservative sectors of the population. These factors render Ludin's struggle over her *Kopftuch* very problematical, making it at once an issue of religious and political freedom.

The fate of Muslim minorities in Europe are tied up with the history of guest worker policies of the states of the European Union. Guest workers initially were regarded as long-term residents without claims to citizenship. This understanding of their status has changed slowly over the years, but these groups still exist at the margins of society without a real prospect of being admitted as equal members of the European Community. The American philosopher, Michael Walzer (1983), calls these people "metics" (cited in Kymlicka & Norman, 2000:21). Ludin's current position, in spite of the fact that she is a citizen, is that of a historical "metic". She is what we shall call a "metic-Muslimin", one who stands at the margins of mainstream culture without the normal rights of participation in the public realm, and one who suffers, or who is believed to be suffering, paternalistic sexual discrimination in her own culture. This double yoke is the key to understanding Ludin's problem.

Ten years ago the South African philosopher, Denise Meyerson, published a book – *Rights Limited* (1994) – in which she defends a limitation clause in the South African constitution. The clause lays down the conditions under which a right protected by the constitution may permissibly be limited. Religious freedom is such a right. For such a right to be limited, the justification of the limitation must be compatible with the democratic values of dignity, equality and freedom (Meyerson, 1994:4). Meyerson's approach, which runs on her use of Rawls's notion of public reason, offers protection of both religious and moral dissenters. This limitation clause is not available to German legislators, but we see no harm in testing the controversy over the *Kopftuch* against the values it contains, for they are democratic values shared by many European states including Germany.

In section 2 we present our interpretation of the controversy over the *Kopftuch*. In section 3 we argue, following Denise Meyerson, that

since the domain of religion constitutes an area of intractable dispute, and since the state cannot justify any limitation of religious freedom in a neutrally acceptable way, it has no business interfering in this realm. In section 4 we take issue with Jeremy Waldron's objections to the use of the deliberative discipline of public reason and with his objections to the employment of the politics of identity in multicultural disputes. We argue that Waldron's alternatives do not help Ludin. In section 5 we examine the failure to understand Ludin's case in the light of an alternative theory presented by Melissa Williams. Williams's "sensitivity-to-reasons" approach also gets a grip on Ludin's case. In section 5 we also take up the failure of feminists in Germany to defend Ludin. In section 6 we draw a few lines together and discuss conditions which must be fulfilled for a programme of religious and cultural integration to succeed.

## 2. Interpretation of the controversy

### 2.1 The first opposing position: the stance of strict neutrality

In this section we interpret the controversy concerning the display of religious symbols by teachers in public schools, by outlining and discussing two positions in support of a ban, i.e. two positions in opposition to the position we want to defend. There are two positions which derive from the freedom the states in Germany have to legislate on matters of education. We shall employ the phrase "the state" to mean the elected governments in the numerous *Länder* and not the central government. At present there is no uniform policy on the problem of religious symbols and no central policy.

- **State neutrality**

Agents in their public roles may bear no religious symbols. This is part of the state's policy of neutrality with respect to religion. The state does not interfere in matters relating to the private/social domain except to prevent interference by one agent or group in the religious life of any other agent or group. This is its proper function. Indeed it has become known in literature (for instance Bird, 1999: 186) as "the service conception of agency" – the state services, rights to liberty thereby creating conditions appropriate to the flourishing of liberty.

- **Bearers of religious symbols infringe the Harm principle**

The critical claims are that agents in their public roles are representatives of the state, and that public agents who display

religious symbols harm the public interest by exerting religious influence in certain non-permissible ways. Specifically, the *Kopftuch* is a symbol of fundamentalist suppression of women; it has an *appellativen Charakter*, a certain *Glaubensinhalt* (Müller, 2003a, reporting on the Karlsruhe judgement) which carries with it a certain worldview, one that damages the equality constraints governing relations between the sexes<sup>1</sup> – (“With this a worldview is put across which probably does not enhance equality between the sexes very much”) (Editorial staff, 2003, quoting Rechtsprofessor Ferdinand Kirchhof). This is the heart of the state’s claim that Ludin’s *Kopftuch* is a symbol of political dissent masquerading as religious dissent. (We return to the charge of political dissent towards the end of this article.)

By appearing before impressionable children the bearer creates the misleading impression that the state sanctions this fundamentalist suppression as part of its public morality. Additionally, the bearer of the *Kopftuch* harms the religious freedom of her pupils (seemingly) by exerting influence on their religious orientation, which influence arises from (unconscious) desires to emulate the person of the bearer. The *Kopftuch*, additionally, may be a cause of religious unrest in the schools. Ludin would be bringing religious conflict from outside into the school – “Konflikte von aussen in die Schule hineinragen” (Editorial staff, 2003, quoting Kiel psychologist Thomas Bliesener).

In all cases in which the Harm principle is infringed, the neutrality obligations of teachers and other public agents take precedence over their religious freedom. In effect, the right not to be harmed is in these cases always prior, even when Ludin’s right to equality of access and opportunity is affected in the form of a *Berufsverbot* (occupational prohibition). According to the Harm principle, someone is harmed when she has been rendered unable, by coercion, manipulation or any other means, to exercise choice in some central part of her life. One important qualification, however, obtains: The constitution does not contain a limitation clause which limits religious freedom.<sup>2</sup> (“Freedom of belief, of conscience and the freedom of confession with respect to religious and worldview confessions, are

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1 “Damit werde eine Weltanschauung transportiert, die sicher nicht sehr die Gleichberechtigung fördert”.

2 “Die Freiheit des Glaubens, des Gewissens und die Freiheit des religiösen und weltanschaulichen Bekenntnisses sind unverletzlich”.

inviolable”) (Müller, 2003b, quoting the Constitution). But this does not exclude pragmatic tampering with religious freedom. “As distinct from other basic rights, there is no basis in the law that enables the state to limit religious freedom. The freedom of religion finds its limits only in comparable values which are named in the law”<sup>3</sup>) (Müller, 2003b, reporting on the decision of the *Zweite Senat des Bundesverfassungsgerichts*). The Harm principle is the one important justificatory consideration, though the limitations it prescribes are subject to considerations of equality.

- **Equal limitation of the freedom of religion**

Liberty is legitimately restricted when the restrictions apply to all moral agents irrespective of their religious orientation. An equal limitation of liberty is justified when it issues in greater liberty. An equal limitation is further justified when it satisfies the Harm principle (i.e. it prevents harms to individuals, such as a loss of liberty due to interference by other agents). This is the standard defence of limitations on liberty. No person may be disadvantaged in respect of her liberty because of her religious beliefs. But the public interest warrants a limited suppression of the freedom of religion on grounds that the *Kopftuch* is a vicious symbol of the kind indicated. The limited loss of religious freedom for one group or religion is then justified when other groups or religions are equally affected by the limitation. If the *Kopftuch* is not permitted, then also no crucifix. Neutrality, then, protects the freedoms of all groups or religions. The need to equalise the effect of the limitation, limits freedom for everyone.

The position may schematically be presented thus:

- Religious freedom is sacrosanct and non-overriddable except in cases where the Harm principle is infringed.
- A limitation of religious freedom is legitimate only when the limitation is borne equally by all in the interests of greater freedom for all.
- The *Kopftuch* causes harm in the sense required by the Harm principle.

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3 “Anders als bei anderen Grundrechten fehlt es an einem Gesetzvorbehalt, der dem Gesetzgeber Einschränkungen ermöglicht. Die Religionsfreiheit findet ihre Grenzen demnach nur in anderen Werten von Verfassungsrang”.

- Forbidding it for public agents who are representatives of state is legitimate, provided that all other religious symbols are also forbidden for the agents concerned.
- The legitimate order is one of neutrality. Ludin offends against this order by wearing the *Kopftuch*, and she must then bear responsibility herself for the fact that she does not have equal access to opportunity and position (*Berufsverbot*).

## 2.2 The second opposing position: the prior importance of the established Christian communities

The state is neutral (in the same sense as the first opposing position), but may limit the religious freedom of alien religions in order to protect the religious freedom of the established Christian communities. Christian symbols are permitted in public schools, but must be removed in the event of complaint. (Nuns are permitted to teach wearing the Habit.) The Muslim symbols (particularly the *Kopftuch*) are explicitly forbidden. ("We cannot put the clothing of our mature Christian culture on equal footing with the insignia of provocative, fundamentalistic, alien cultures"<sup>4</sup>) (quoting Kultusminister Hans Zehetmair; see Anon. (2003)).

The above position may schematically be represented thus:

- Religious freedom is sacrosanct and non-overridable except in cases where the Harm principle is infringed.
- The state must maintain neutrality except when it must act to prevent harm to the established Christian character of the community.
- The *Kopftuch* causes harm in the sense required by the Harm principle.
- Forbidding it for public agents who are representatives of state is legitimate on grounds that the (greater) freedom of the Christian communities are under threat.

The Christian order is the established order. Ludin's *Kopftuch* harms this order. She herself must then bear responsibility for the con-

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4 "Wir können doch die Kleidung unserer gewachsenen christlichen Kultur nicht gleichstellen mit den Insignien provokanter, fundamentalistischer fremder Kulturen" (Anon., 2003).



sequence that she does not have equal access to opportunity and position (*Berufsverbot*).

### 3. In defence of the *Kopftuch*

#### 3.1 Distinguishing kinds of harms

We shall argue below that the *Kopftuch* is a harm of a certain kind, but not a harm in the sense required by the Harm principle. The appropriate sense invokes the idea that *someone is harmed when she has been rendered unable, by coercion, manipulation or any other means, to exercise choice in some central part of her life.*

The opposing positions invoke the Harm principle. Ludin's freedom to practise and to manifest her religion, it is argued, harms others in various ways, and this harm is allegedly sufficient justification to limit, not the practice but rather the manifest of her religion, and only in her public roles. This viewpoint appears to constitute a limited intrusion, yet from the perspective of her belief it may be much more extensive. How much limitation on manifest might practice sustain? Ludin's public utterances, as reported by her lawyers, suggest that the limitation on manifest, albeit only in her role as representative of state, effectively undercuts practice. Indeed, the harm to her position is harm to religious conscience. ("The headdress is a part of her personality and a part of her religious practice as Muslim woman"<sup>5</sup>) (Editorial staff, 2001, citing Ludin). ("Ludin's lawyer, Hansjörg Melchinger, emphasised that his client would experience the removal of her headdress as stripping and that she would be ashamed"<sup>6</sup>) (Editorial staff, 2003, quoting Ludin's lawyer Hansjörg Melchinger).

#### 3.2 Neutral and non-neutral harms

Following Meyerson (1994:1-43) we distinguish between neutral and non-neutral harms. A non-neutral harm is one that emerges from an "intractably disputed belief" (Meyerson, 1994:16 ff.), a belief that cannot be judged by the canons of ordinary public reason and has no chance of being accepted "by all reasonable people" (Meyerson, 1994:10). Religious beliefs are intractable in this sense. The belief

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5 "Das Kopftuch sei Teil ihrer Persönlichkeit und teil ihrer Glaubenspraxis als Muslimin."

6 "Ludins Anwalt Hansjörg Melchinger betonte, seine Mandantin würde das Ablegen des Kopftuches als Entblößung empfinden und sich schämen."

that a woman is naked before the world without her *Kopftuch*, and in a condition of immorality offensive to the Prophet, is exactly of this kind. The belief and its manifest count as a non-neutral harm. We use the terminology of harm here to underline the idea that a "majority can be harmed by protected religious activity" (Meyerson, 1994:23). The state, however, has no business preventing these harms from occurring because the state cannot justify intervention by public reason.

Neutral harms are independent of intractably disputed beliefs and must be prevented by state action. Paternalism of the kind involving the suppression of women in society, specifically the kind that relegates women to positions of inequality with respect to men, whether backed by religious sanction or not, is a neutral harm, one that all people situated as equals would reasonably accord some degree of assent irrespective of their own particular intractable beliefs. Neutral harms have a pernicious character. They strike at the very root of the society disturbing the terms of social co-operation which the citizens have agreed to abide by. In essence, neutral harms are coercions; they coercively negate rights.

The defence of the neutral/non-neutral distinction reaches deeply into the heart of egalitarianism and libertarianism. Meyerson (1994:1 ff.) notes that the South African Constitution contains a limitation clause which deals with the state's right to limit religious freedom in certain kinds of cases. The state is justified in limiting religious freedom when it is able to supply "public reasons" (Meyerson, 1994:15), reasons which "respect the values of dignity, equality and freedom" (Meyerson, 1994:4) and so would be reasons which "all reasonable people would, if asked, accord some degree of force" (Meyerson, 1994:12). The requirement that the state's reasons respect our dignity is a measure protecting moral agents from being used as instruments of the state's power. If the reasons do not carry weight with all reasonable people, the state may rightfully be accused of treating its citizens as a mere means to its ends (in the Kantian sense), thus failing to respect their dignity (Meyerson, 1994:13). If the reasons do not carry weight with all reasonable people, the state might rightfully be accused of advancing the interests of some at the expense of the interests of others, and thus as failing to treat its citizens equally, which is a failure to respect "the inherent moral status" (in the Kantian and Lockean senses) (Meyerson, 1994:14) of some of them. The idea that humans have inherent moral status is meant to counterbalance Hobbesian interpretations of the terms of co-operation between reasonable persons under which it is rational for essentially self-interested persons to co-

operate with others for mutual advantage. The problem with Hobbes is that the terms of co-operation are in effect structured by the balance of power between the strong and the weak (Meyerson, 1994:12), which means that the strong “stand to lose, not gain, from justice” (Meyerson, 1994:13). The strong, then, are unfairly burdened with respect to the compliance constraints of justice. Finally, the inclusion of the word “freedom” in the limitation clause brings out the idea that without respect for dignity and equality, no one can be said to be truly free, not even in the purely negative sense in which we are said to be free if we are free of interference by others.

If any agent discounts the dignity of any other moral agent, or fail to treat her as having inherent moral status, her freedom is harmed. This counts as a neutral harm, because the harm is *a negation of choice in a central part of someone’s life*. The state, in its role as servicer of rights, has a duty to protect its citizens against neutral harms, and may, of course, itself not inflict such harms on its citizens. Non-neutral harms do not denigrate the status of any agent in any way. Non-neutral harms can and do cause offence, but offence is rarely a neutral harm. Meyerson (1994:24-26) explains as follows: When people are offended by an intractable belief, or its manifest, they have not suffered a neutral harm; they have not been rendered unable to exercise choice in any central part of their lives, and so there is no legitimate reason to limit (religious) freedom, which means that there is no public reason to suppress the *Kopftuch*. But offence can be construed as neutrally harming when the offender intrudes on someone’s privacy, when, say, the *Kopftuch* “is imposed on them in circumstances which they cannot reasonably avoid” (Meyerson, 1994:25). If an invasion of privacy is the objection, then neutral harm occurs, though not of the damaging kind associated with these harms.

But what should we say about the objection that the *Kopftuch* is a vicious symbol of the suppression of women? Does the bearer inflict a harm of this dimension on others? If true (and allowing for the moment that it might be true), such harm would count as a neutral harm requiring urgent state action; a retreat to neutrality (in the questionable sense offered by the state) would not be sufficient protection. Indeed, the state would have to suppress not just the *Kopftuch* but also the *Glaubensinhalt* which accompanies it. And that would require decisive interference in the private/social domain, and specifically in schools, to promote a (strongly prescriptive) ethical value about the wrongfulness of gender discrimination. The state would then be taking an ethical stance, which goes beyond its neutral role as servicer of rights, and making judgements about the

(intrinsic) worth of competing religions. State judgements of that kind, carrying with it the stature of legislation, easily converts the non-neutral harm of offence into the bogey neutral harm of gender inequality. Decisive state interference, however, would not escape a deep irony: the wrongfulness of gender discrimination is a strong value in German culture to which appeal can be made without trespassing on sacrosanct religious freedoms (a point we owe to Meyerson 1994:23) thereby raising thorny issues about the over-riddability of individual rights when in conflict with common goals or purposes. The possibility of such an appeal is a good reason not to limit religious freedom. Why, then, does the state choose to limit freedom?

### 3.3 Paternalism and voluntariness

One likely answer concerns the problem of paternalism correctly perceived to be prevalent in minority Islamic cultures. The state judges, so we surmise, that paternalism is the real threat. So we must ask how strongly paternalistic is the *Kopftuch*? Ludin's endorsement of the *Kopftuch* and its *Glaubensinhalte* is a fully voluntary choice (as confirmed by her lawyers). Fully voluntary choices are those that conform to Feinberg's "ideal of perfectly voluntary choices" (Feinberg cited in Arneson, 1989:424). Ideally the chooser should be competent. Her choice should be made in absence of coercion or duress, not because of (subtle) manipulation, not because of ignorance or mistaken beliefs about the circumstances in which she acts or the likely consequences of the various alternatives open to her, and should not be made in circumstances that are temporarily distorting. Let us call this, following Dworkin (1990:50), the "endorsement constraint". Dworkin (1990:50), citing Locke (1991), requires an affirmation of the "endorsement constraint". "A person's endorsement of a conception of the good is necessary for it to be a good for her" (Kernohan, 1998:30). But endorsement, in Dworkin's sense, is only necessary for the ascription of value; it does not entail that decisions are incorrigible. An agent may still be mistaken in the sense in which Sisyphus was mistaken. To avoid this Dworkin (1989:486) requires the "authenticity constraint", which, in addition to making the agent authoritative over her conception of the good, also guards against deception, so that her endorsement is truly constitutive of who she believes herself to be, after due consideration of the merit of the good in a critical, reflective way (Dworkin, 1989:486). The authenticity constraint presupposes, as Kernohan (1998:33) makes clear, a "knowledge constraint": Her "highest-order interest is in coming to know what is

best for her and then being able to implement it". In an important sense, knowing what is best for her is having true beliefs about her good – beliefs she can justify to others (Kernohan, 1998:34-35). The sense at issue concerns the need for revisability: Her good must be revisable in the sense of being responsive to justifying reasons. To protect her from harm to her highest-order interest in leading the best life possible, we have to protect her highest-order interest in knowing what is best for her (Kernohan, 1998:36).

Does Ludin have true beliefs about her good? Ludin has identified her good with her religious faith, in terms of her status as *Muslimin* and the *Glaubensinhalte* of the worldview associated with it. Yet, it may be objected, she may have false beliefs about her good. She may be the victim of cultural oppression of the kind women in the Western democracies associated with religious fundamentalism. Cultural oppression is a form of power (Kernohan, 1998:14). Kernohan (1998:15), quoting Galbraith (1983:25-26), sees the problem in the concept of implicit conditioned power.

Only a part of the subordination of women was achieved by explicit instruction – explicit conditioning. Much and almost certainly more was (and is) achieved by the simple acceptance of what the community and culture have long thought right and virtuous ... This is implicit conditioning, a powerful force.

Young (1992:180) calls the implicit conditioning power of a culture "structural or systemic" oppression which Kernohan (1998:17) compares to Foucault's (1982:781) notion of "a form of power which makes individual subjects". Foucault recognises "two meanings of the word 'subject': Subject to someone else by control and dependence, and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to". Kernohan, like Galbraith and Young, is concerned with the latter. In the relevant Foucauldian sense tying people "to the conception of the good which form their own identities ... subjects ... them to their culture" (Kernohan, 1998: 17). Subjugation in this sense, however, is not harmful. Subjugation is harmful if, for any individual, it interferes with "the very process of forming a conception of the good" (Kernohan, 1998:26), in knowing her good or in implementing her conception of the good. This would be a neutral harm. If she is coerced "into leading a life that is less good than she could have led without the intervention, then ... coercion will have harmed her highest order interest [in leading as good a life as possible]" (Kernohan, 1998:30), and such coercion the Harm principle forbids.

A "form of power which makes individual subjects", where the word "subject" means "tied to her own identity by a conscience or self-knowledge", need not harm the subject. In the sense of "power" at issue here, the making of the subject is the process by which ascribed identities are produced. The African-American philosopher, Kwame Anthony Appiah, offers an account of the idea of ascribed identity. Appiah's arguments are cast in terms of the formation of race identities, but what he has to say is relevant also for the shaping of religious identities of the kind Ludin projects.

Identification is "the process through which an individual intentionally shapes her projects – including her plans for her own life and her conception of the good – by reference to available labels, available identities" (Appiah & Gutman, 1998:78). Religious identities are such labels and they have a powerful grip on identity formation because they embrace normative expectations, for instance, of what being a woman in the Muslim world commits women to. And they have this force because identification is a process tied up with the self and its becoming a person. Identification is not voluntary in the sense that, say, males choose to be males, or females choose to be females, but being male or female shapes a person's life plans in the sense that it is an ascribed identity males and females cannot escape. My identity is a matter of what I make up in an interactive context, from the "tool kit made available by our culture and society" (Appiah, 1994:155). I cannot "make up any self I choose" (Appiah, 1994:155) because we are not free to reject all forms of ascribed identity.

Escape from ascribed identities is almost impossible because of the way the process of identification works: It is in part based on "intentional identification" (Appiah & Gutman, 1998:79), of acting "under descriptions" (Appiah & Gutman, 1998:78) in Anscombe's sense, i.e. in conformity to "the script for that identity" (Appiah & Gutman, 1998:79) and in conformity to having the "antecedent properties [male, female, black skin, white skin etc.] that are consequences of the label's properly applying to ... [one]" (Appiah & Gutman, 1998:79), where the script and possessing the relevant properties "shape" one's action (Appiah & Gutman, 1998:78). One acts, then, in "intentional conformity" (Appiah & Gutman, 1998:79) to the expectations contained in the script, in conformity, that is, to what constitutes the proper way of being a *Muslimin*. There are many scripts, some very oppressive, written (mostly) by men for women, and some very liberatory, written (mostly) by women for women.

The experience of too tightly scripted expectations, of a claustrophobia brought on by the parameters of the script, is proof that there is a gap between what one ascriptively is or aspire to be and the (racial/religious) identity one performs. This gap “makes passing possible” (Appiah & Gutman, 1998:79), i.e. in that space one is free to set aside one script in favour of another. Identification, then, is the process by which the label shapes the intentional acts of the agent (Appiah & Gutman, 1998:80), and though a choice between labels is possible, identification itself is not voluntary (Appiah & Gutman, 1998:80). One chooses some label and one rejects others, and one may be fortunate enough to have a sense of “identity options” (Appiah & Gutman, 1998:80), a sense one acquires in a culture which encourages their growth.

If Appiah is right, I make choices about my identity, but I do not determine the options among which I choose (Appiah, 1994:155). And among inescapable options there are, in Ludin’s world, religious identities which, given their constructed natures in non-secular societies, contain “scripts” (Appiah & Gutman, 1998:97) about what constitutes the proper way of being a man or a woman. Yet, though ascribed identities cannot be escaped, they can be deconstructed: “I *can* choose how central my identification with it will be – choose, that is, how much I will organize my life around that identity” (Appiah & Gutman, 1998:80 – Appiah’s emphasis). Thus a religious identity needs not be a centrally important feature in Ludin’s identity. A religious identity needs not be centrally urgent in her choice among her identity options in the way she supposes, or anyone else supposes, nor in any other way, except, of course, if Ludin freely chose (in the appropriate sense of “freely”) to make it thus.

We argued above that the *Kopftuch* is not a neutral harm; it does not infringe the Harm principle in the required sense. The justification of its suppression would not be possible in terms of public reason because suppression itself infringes the values of dignity, equality and freedom. We are now in a position to make another point. Ludin has acquired an ascripted religious identity. The process by which this has happened is affected by the paternalism inherent in her culture, and this is true irrespective of the degree of voluntariness which attends her final choice. Is paternalism so very bad in her case? Arneson (1989:423, quoting Feinberg) defines weak paternalism as restrictive of action “proceeding from choice that is substantially non-voluntary”, and as such does not count as violation of an agent’s autonomy. Strong paternalism affects the voluntary choices of individuals. Arneson (1989:429 quoting Feinberg) says, “A substantially non-voluntary choice ... is one that is not ‘voluntary

enough", where being voluntary enough is a function of the degree that the choice falls short of perfect voluntariness". A strong and a weak version may, following Van de Veer (1980:200), be distinguished. The claims are as follows:

- Strong paternalism: The paternalistic state is justified in protecting a person, against her will, from the harmful consequences of her fully voluntary choices.
- Weak paternalism: The paternalistic state is justified in protecting her from her non-voluntary choices.

We present the case schematically.

- A cultural milieu is needed for agents to acquire their identities (since it supplies both a context of choice and identity).
- Public intervention shapes the cultural milieu in decisive ways.
- Intervention prevents the expression in action of some choices.
- Intervention therefore restricts freedom as choice.
- Intervention is therefore paternalistic; some freely chosen conceptions of the good life cannot be realised.

We need merely add another point to show the difference between the weak and the strong versions.

- The fact that some choices cannot be expressed in action is a consequence of *non-voluntary choice*. Intervention is therefore paternalistic, but only on the weak reading of paternalism.

Ludin's unconscious subjugation to her cultural context is non-voluntary, and so qualifies as weakly paternalistic. But her fully voluntary endorsement of the influences of her context as a good, and, indeed, her highest good, sheds a different light on the matter. The charge of strong paternalism thereby drops away and her religious identity becomes less a matter of ascription and more a matter of informed choice. We return to the issue of paternalism below.

### 3.4 Generalising Meyerson's distinction

Based on our preliminary analysis, the controversy over the *Kopftuch* is seen as a conflict between conceptions of the good, the highest good of a particular individual, identified as a *religious good*, and a *collective good*, identified as a secular good prevalent in German culture – the equality between the sexes. Following



Meyerson (1994:58), we generalise the distinction between neutral and non-neutral harms over the whole of moral life, to include conceptions of a good life. This means that rival conceptions of what good entails must be recognised as causing intractable moral divisions in the private/social domain. It follows from the analysis above that conflict between conceptions of a good life are intractably disputed in exactly the way that religious beliefs are. It follows further that the state has no business arbitrating the relative merits of conceptions of the good life, because it cannot do so in neutral terms, that is, without taking sides, thereby causing neutral harm. And neutral harm means that at least one party suffers injustice.

It has already been stated that religious identity “needs not” be centrally significant in Ludin’s life, but this strictly has no force when placed against her freely chosen options. What is at stake is Ludin’s freedom to choose, her right<sup>7</sup> to decide what constitutes her own greatest good. Dworkin captures the appropriate idea of having a right: A right exists when there is a good moral reason for protecting some interest or good. Dworkin (quoted in Hartney, 1995:212) puts this line of thought as follows:

Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.

Is the alleged harm of gender inequality sufficient justification for the suppression of the *Kopftuch*? Our answer is implicit in what has gone before. The state and ordinary citizens have access to the moral belief about the wrongfulness of gender discrimination independently of their religious beliefs (a point we owe to Meyerson, 1994:23). It is not necessary to suppress the *Kopftuch*, thereby damaging religious freedom, in order to protect this value. Christians may continue to believe in it; its alleged negation in the symbol of the *Kopftuch* does not deny them this freedom, and so they do not suffer a neutral harm (as distinct from offence). The collective goal in

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7 It is very important not to misconstrue our emphasis on “her right”. Following Meyerson (1994:46) the emphasis is not intended as a defence of subjectivism. The claim is not that “there is no right or wrong in religious matters” (Meyerson, 1994:45-46). Rather, the claim is that “if there are truths about religious matters, they are not truths that can be publicly demonstrated (i.e. by the use of common standards of reason) (Meyerson, 1994:18).

question thus is not a sufficient justification for suppressing the *Kopftuch* and this means that Ludin's right is unjustifiably denied.

The allegation that the state is perceived to sanction fundamentalism, and specifically the suppression of women, whenever Ludin wears her *Kopftuch* in the classroom, is simply unfounded. There is no public reason to deny state representatives the freedom to bear religious symbols. And this means that the state's stance of neutrality, in the sense outlined in the first position above, is not justified policy. Other senses of its neutrality are in order, particularly the sense in which the state maintains its position as servicer of rights in not taking sides when conceptions of the good are in conflict, but rather protecting the freedom to choose those conceptions and to live in accordance with them. The second position above is simply sectarian. It is untenable without qualification.

Ludin's exclusion from the public realm is unjustified unequal treatment of a citizen. The association with the historical "metic" (cf. p. 278) is thereby unequivocally confirmed. Meyerson (1994:62) puts the matter very strongly:

A society that respects everyone's equal status is based on principles which all citizens can reasonably be expected to endorse. But reasonable people are not obliged to unite in endorsing one or other conception of the good. Therefore to permit the contractors to be mindful of their conception of the good – thereby allowing basic institutions to be tailored to serve the dominant conception of the good – would be to allow the distribution of fundamental rights and liberties to be determined by a factor inconsistent with the fact of everyone's equal status. Basic institutions which respect the values of dignity, equality and freedom respond to intractable disagreements about the good life not by favouring one conception of the good over any other but by constituting a framework within which everyone has the same chance to define their own values and ends, provided that in the process they do not infringe on the similar chance of others.

#### 4. Why the *Kopftuch* fares so badly with Waldron

##### 4.1 Waldron and public reason

Jeremy Waldron has objected to the Rawlsian notion of public reason on grounds that it suppresses the conversation between cultures in areas where conversation should continue. Waldron (2000:162) writes:

I think it is a serious mistake to approach the problem of intercultural deliberation *first* with the idea of deliberative discipline and the exclusion of certain lines of argument on the basis of some Rawlsian idea of public reason.

Every effort has to be made to continue the conversation with others “on their own terms” as they attempt to converse with us “on ours” (Waldron, 2000:163 – Waldron’s emphasis), the point being to understand as much as possible about one another’s reasons. The discovery of reasons is the road to understanding social norms and practices; they exist “in a context of reasons and reasoning” (Waldron, 2000:170) inside “the story internal to the norm” (Waldron, 2000:170).

The identity politics so prevalent in multicultural societies, however, distort our understanding of the reasons. We hear too often that a reason for following a norm is that it is our norm: “It seems very odd to regard the fact that this is ‘our’ norm – that this is what we Irishmen or we French or we Maori do – as part of the reason, if not the central reason, for having the norm and for sustaining and following it” (Waldron, 2000:169), and not that we follow them because they lead to virtue, or happiness or justice or liberty. As soon as people start demanding respect for a norm associated with a culture “as part of the respect they demand for their identity” (Waldron, 2000:166), the conversation breaks down and the identity claims become an obstacle to their responsible participation in civic life (Waldron, 2000:168).

Once we bracket the Rawlsian impulse for a deliberative discipline which excludes some norms or practices from the conversation, thus getting to their place “in a context of reasons and reasoning” (Waldron, 2000:170), and remove identity claims as potential non-negotiable claims, we need not feel that we fail to respect someone when we criticise her norms, or fail to treat her practices as rights claims. We might then, as an alternative to identity politics, treat her norms as standards which have a point, which “does work” (Waldron, 2000:174) in her culture – work which “might, in principle or as a matter of at least logical possibility, have been performed by *other* norms, *alternative* standards, and which therefore cannot be understood except in terms of its association with an array of reasons explaining why it is in fact *this* norm rather than *that* norm ... which is the standard we uphold” (Waldron, 2000:174 – Waldron’s emphasis). Then the stage is set for deliberation about the form legal and constitutional arrangements might take to accommodate our differences.

But there is an important rider: Waldron has no great faith in democratic majorities to settle rights claims fairly. He says: "On the whole real-world majorities have tended to act unjustly in the business" (Waldron, 2000:172. Waldron's emphasis). On the other hand, not every rights claim is acceptable: "It simply cannot be the case that someone is wronged every time an opinion about rights is rejected in politics" (Waldron, 2000:166). Disagreements, according to Waldron (2000:166), must be handled with careful attention to a vital distinction "between the individual or minority interests which are the subject of the disagreement, and the opinions held by an individual or a minority about their interests". It is this distinction which gets overlooked whenever an individual or a minority puts forward their rights claims as identity claims.

#### 4.2 Ludin's identity claims

We now have before us the business of trying to decide what is opinion and what is a real interest. First the identity claims should, however, be removed. On Waldron's analysis Ludin could be read as making an identity claim, as saying: "I dress this way or I speak this language or I follow these marriage customs because they are the ways of my people" (Waldron, 2000:169). So out with the claim that the *Kopftuch* "sei Teil ihrer Glaubenspraxis als Muslimin". This, though, needs qualification. Should the idea of a *Glaubenspraxis* also be rejected? We believe that not to be possible. We propose to retain it. Ludin can defend herself on the basis of Waldron's alternative to identity politics provided only that her interlocutors do not defend their position as *Christians* or as *Germans*. If this be granted, the playing field is levelled, and the charge of gender inequality may be examined in its context of "reasons and reasoning".

There are, however, two other claims. "Das Kopftuch sei Teil ihrer Glaubenspraxis", and, as reported by her lawyers, Ludin experiences the removal of her *Kopftuch* as an act of undressing in public, as *Entblößung*, an occasion for shame – *sich schämen*. This means that the *Kopftuch* "sei Teil ihrer Persönlichkeit". Are these claims matters of opinion or are they real interests? Ludin's *Glaubenspraxis* is a real interest. That she suffers *Entblößung* without her *Kopftuch* can be read as an opinion (how undressed is undressed?), though not the fact that this brings on a condition of shame.

The American philosopher, Robert Solomon (1995:825), declares that shame is an emotion serving as *the* focal point of ethics in many

non-Western philosophies. Shame is a social emotion, in contrast with guilt, which is an individualistic emotion. As a social emotion shame has to do with the violation of a common trust, the feel of which we capture by saying (in the appropriate context) “I have let the others down”. Shame is self-accusatory (like guilt), but it is so through the eyes of others, members of a congregation of faith *and* those outside the group, strangers. The experience of shame naturally extends to these others though their eyes do not project shame. The capacity to feel shame is a pre-condition of virtue. An Ethiopian proverb captures the appropriate sense: “Where there is no shame, there is no honour”. The very meaning of shame is proof that its experience is not a matter of opinion, or dependent on someone’s perspective. We hold that *Entblößung* and shame are inseparable. And shame is, in appropriate contexts involving *Entblößung*, a part of Ludin’s personality. The social context in which this connection is established is significant for our understanding of why the autonomy at issue in Ludin’s choice concerns *moral* choice. Is it tenable to require that this claim be bracketed?

We have above arrived at the conclusion that the soft paternalism affecting Ludin’s case is not seriously incapacitating. Fundamentalism is less of a problem than what meets the eye. But in Waldron’s context we need to take this matter a step further simply because identity claims must be bracketed.

### 4.3 Asian women and autonomy

Is it reasonable to expect Ludin to bracket her moral beliefs, her personality and her status as woman? Waldron says: “The identity claims that are worrying us are not claims their proponents need to make in order to vindicate their cultural identities” (Waldron, 2000: 168). And he adds, citing Hobbes’s fifth law of Nature, that “if one can do without the assertion of a rights claim or an identity claim that is going to pose a compossibility (see footnote 8) problem, then one has a duty to try and do without it” (Waldron, 2000:167). How does Ludin “do without it”? Might she unlearn one set of moral responses and the influence they have on her personality, and substitute another (presumably from her German context)? Or does she simply not put forward her beliefs as *her’s*? The former could be difficult. To show what is involved here we draw on ideas of Sawitri Saharso.

Sawitri Saharso (2000) explains why women from Asian cultures seldom attain the degree of autonomy which liberal theory in the West ascribes to Western women. Drawing on psychoanalytic understandings of the Asian self (Saharso, 2000:231), she maintains

that women from Asian cultures do not develop the individuality and inclination for autonomy *qua* women that is needed to act against their cultural expectations. Citing Laplanche and Potalis (1973), she calls to attention how the idea of autonomy is captured in "the twin lemmas of 'ego' and 'identification'" (Sahorso, 2000:233). The ego is the outcome of a process of identification, "the process whereby the subject assimilates an aspect, property or attribute of the other and is transformed, wholly or partially, after the model the other provides. It is by means of a series of identifications that the personality is constituted and specified" (Sahorso, 2000:233 quoting Laplanche & Potalis, 1973:205). The inclination to act autonomously is developed out of this process of identification as soon as the subject separates herself from her models and develops the ability to individuate. The outcome is a fully autonomous agent, defined by Sahorso (2000: 233) as one who has "firm ego boundaries who experiences himself as a differentiated, but organized, unity, who exists independent of and differentiated from his environment".

But the universality of this process is disputed by Sudhir Kakar (1978), Katherine Ewing (1991), and Alan Roland (1996). The Asian personality is characterised "by more permeable ego boundaries that make for a more relational and less individualistic self" (Sahorso, 2000:233). This is so because in extended and close-knit families differentiation from parental models occurs later and is structurally weaker than in the West (Sahorso, 2000:233), and because family relations are characterised by intense ties of affection, mutual caring, reciprocity, and a "highly emphatic, non-verbal sensitivity to one another's feelings and needs without the other having to verbalize them" (Sahorso, 2000:234 quoting Roland, 1996:32). Add to this hierarchically structured gender relations which make women unequal marriage partners, and it is not difficult to see that these cultural norms leave women in particular little recognised scope for autonomy.

How little or how much scope should there be? Sahorso (2000:237) argues that the psychological dispositions created by internalised cultural norms, which render women less inclined to act autonomously, can be modified. This is possible in a way that respects the highly valued relational qualities that are needed for close emotional interaction between family members, which renders a totally new enculturation process for minority groups unnecessary. The goal would be to create a cultural space for people who are not encouraged to have a conscious understanding of themselves as individuals (in the liberal Western sense) to develop (some) individuality (in that sense) (Sahorso, 2000:232). So here too there

is a way out, *pace* Appiah, of treating some ascribed/acquired identity as centrally significant, if the parameters are uncomfortable or disabling in the appropriate sense.

However, women who have suffered this kind of paternalistic moulding have to be identified; we have to say that they, *qua Asian women*, have to receive certain kinds of treatment which will enable them to become participatory members of the public realm. *Contra* Waldron, an identity claim is needed to do justice to them. And this applies to Ludin as well. Ludin's case is peculiar. She stands at the margins of society without the normal rights of access to the public realm, a position reminiscent of the guest workers in the states of the European Union, people Walzer (1983) calls "metics". She is also a *Muslimin* and is believed to be suffering paternalistic sexual discrimination within her own culture. In her case there are two identity claims and each tells a story about an injustice. How do we do justice to Ludin without them?

Sahorso, in effect, recommends a soft paternalistic modification of the cultural context to which members of minority groups are unconsciously subjugated. But the state, in keeping with liberal practice, refrained from paternalistic interference in the private/social domain. It seems that a hard choice was before the state: Either it places individual autonomy first, thereby sanctioning paternalistic interference (on the strong reading) in the cultural life of a minority in order to change it, i.e. liberalise its members to the extent that women are permitted to abandon the *Kopftuch* without fear of moral condemnation and ostracisation – thus demanding an exit option for the dissenting members of that group, in the way Green (1995:264) recommends – or it places the group's autonomy first and does not interfere even when individual autonomy is curtailed within the group. The Catholic (*Christlich-Soziale Union/Christlich Demokratische Union*) governed states opted for the latter, banishing the *Kopftuch* in public roles in keeping with their vision of what constitutes an infringement of the Harm principle, thereby making it difficult, and even impossible, for devout members of the Islamic minority to participate in civic affairs as equal participants. The Protestant (*Sozialdemokratische Partei Deutschlands*) governed states opted for the former, in the belief that the stance of neutrality would bring about a soft paternalistic modification of Ludin's cultural context, albeit coercively. Could the suggested modification of Ludin's cultural context – which amounts to an intrusion in the private/social sphere – be the way forward? And if so, how is it morally justified?

We think it is clear enough that what is at stake in Ludin's claim that the *Kopftuch* "sei Teil ihrer Persönlichkeit" is, *contra* Waldron, an interest and not merely an identity claim. As such it has a claim to be considered. Yet the conversation about the equal recognition of a cultural process by which individuals and their inclinations are shaped might run into difficulties of accommodation if the Islamic minorities reject the suggested modification of their practices and the demand for an exit option as unequal treatment. Waldron has doubts about the practicality of unmodified accommodation in the liberal state. He puts it like this:

... may properly be demanded', and '... can compossibly<sup>8</sup> be accorded' are *independent* constraints on liberal theories about the special treatment due to certain individual interests. We are not (as liberals) entitled to modify the former simply for the sake of the latter" (Waldron, 2000:159 – Waldron's emphasis).

Waldron (2000:162) further states that a system of mutual accommodations would be no solution at all if the disagreement is about what people are permitted to do. But this is at least part of what is here at issue. So how do we handle this claim?

Compossibility is a problem. When faced with compossibility problems the liberal had best follow Hobbes, opines Waldron (2000:167). Hobbes, in contrast with other liberal theorists, proceeds from the assumption that we are always likely to find ourselves "alongside others who disagree with us about justice" (Waldron, 2000:171). From our side-by-side engagement with strangers we have to construct a framework for community. So, then, following Waldron and Hobbes, the state holds forward its ideal of gender equality, and simply that. And Ludin sticks with her *Kopftuch* as symbol of the virtuous women, and only that. Roots and identities stay out of the picture.

In this truncated context there is nothing which prevents the state from using the weapons in its liberal armoury, of requiring a liberalising response from the Islamic minorities of the kind Sahorso recommends, as a condition of accommodation. This is at least possible given the state's emphasis on the struggle for women's equality – *Gleichberechtigung* (Editorial staff, 2003, quoting Rechts-

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8 "Compossibility' is a technical term, which originates, I believe, with Leibniz. The idea is that two things, each of which is possible, may not be *compossible*, i.e. possible together: the existence of one may preclude the existence of the other or even presuppose that the other does not exist" (Waldron, 2000:159).



professor Ferdinand Kirchhof, defining the first opposing position). Indeed, the stance of neutrality characteristic of the first opposing position requires that some liberalising response be made. Yet, if that is the demand the state is making, matching norm against norm (and just that), it sets itself the task of justifying to the minorities why their norm is unacceptable. It cannot be unacceptable because it comes from a “provokanter, ... fremder Kultur” (Kultusminister Hans Zehetmair [see Anon., 2003] defining the second opposing position), for it may reasonably be objected that this is tantamount to declaring a rival norm unworthy just because it is not home-grown i.e. un-German. No, the unacceptability of the (alien) norm cannot be grounded in such an un-Waldronian way. Might it be unacceptable because it (supposedly) degrades women? Is the problem that the German (or European) norm (supposedly) defines the universal horizon for humanity, all others being less worthy of respect? Such questions may provoke a minority call for the constraints of public reason as a protection of their position as intrinsically worthy. It may also provoke a call for group-specific rights protecting minority religious practices in the way Kymlicka (1989) recommends.

Waldron (2000:172) says:

Some of what the majority may think is fair is revealed by ... (his) analysis to be unfair – such as the a priori imposition of constraints of ‘public reason’. And much of what majorities are accused of doing unfairly – such as contradicting and debating minority practices – is revealed by ... (his) analysis to be not after all inappropriate.

Why does Waldron think that the majority has reason to invoke the constraints of public reason? And why would that be unfair? In Ludin’s case the state stands to lose by such a move for were it to invoke the discipline of public reason it has to move to protect Ludin’s religious conscience. Indeed, its right to intervene in the matter, in a role other than servicer of rights, falls away; then it will have no other lever besides its power to persuade the minority to a liberalising response. We think Waldron’s approach, matching norm against norm and just that, does not take the issue to a point of reasonable resolution, and that means that it leaves the question of accommodation where it was.

## 5. "Metic" – *Musliminnen*: The problem of the double-bind

### 5.1 Understanding one another's reasons

Another approach, also opposed to theories of deliberative discipline, advanced by Melissa Williams, advocates sensitivity to other's reasons as *reasons*. This approach is extremely sensitive to the peculiarities of people, their situations and status. It offers a different solution to the problem than Meyerson's approach.

Williams (2000:125) claims that the theory of deliberative democracy does not adequately address the problems of how structural biases in deliberative processes disadvantage minority groups. Williams (2000:134) argues for a position midway between Meyerson and Waldron. She says:

Models of deliberative democracy call upon participants to speak in their capacity as citizens, articulating their arguments in terms of shared or general interests, rather than as bearers of particular identities and interests. Yet it is only by focussing on the *divergent* interests of privileged and marginalized groups that the latter's contribution to deliberation can contribute to the end of justice towards those groups.

Social difference, defined along the lines of race, gender, class, sexuality, ethnicity and other categories of difference, tends to undermine the notions of reasonableness and reason-giving upon which the legitimacy of state policies like neutrality rest, the central problem being a failure of legitimacy which is due to the failure to recognise the minority's reasons as *reasons*. Such recognition, when offered, usually turns out to be a socioculturally contingent matter. Williams (2000:137) cites as example the debate in the U.S. Senate on a design patent on the emblem of the Daughters of the Confederacy which included an image of the Confederate flag. The patent was initially approved by a wide margin, but after a long and serious debate, initiated by the African-American Senator Carol Mosley-Braun, who pointed out the close association between the history of slavery and the Confederate flag, the patent was rejected by a wide margin. The Senator is cited as saying that the patent was "an outrage. It is an insult. It is absolutely unacceptable to me and to millions of Americans, black and white, that we would put the imprimatur of the United States Senate on a symbol of this kind of idea" (Mosley-Braun quoted in Williams, 2000:137).

*Contra* Waldron, roots and identity matter in public debate. Translated to Ludin this means that the unacceptability of reasons must be qualified by asking “for whom?”, or “Who is speaking?” The *Kopftuch* is a vicious symbol for most Christian Germans; it is a symbol of virtue for most German *Musliminnen*. How do we disentangle virtue and vice in one and the same symbol? Williams (2000:138) argues that the dispute over the Confederate flag revolves around the “social meanings” of the symbol. For black Americans the Confederate flag is an emblem of slavery. For white Americans from the south the flag is a remembrance of sacrifices made for their homeland. Why should the social meaning of the flag to black Americans count as a reason for white Southerners when they do not endorse the content of that meaning? Does Mosley-Braun’s interpretation of the meaning of the Confederate flag constitute a reasonable or unreasonable source of disagreement? And how does Ludin fare when we apply this question *mutatis mutandis* to her?

Williams (2000:138) thinks that the status of reasons *as reasons* becomes particularly problematic when the subject of disagreement concerns the social meanings of existing practices which reinforce current unjust structures of social privilege. For in such circumstances the reasons of marginalised groups do not function as reasons for privileged groups. In Germany the minority Turkish and other ethnic groups from the Muslim world are still associated with the idea of “guest workers” in Walzer’s (1983) sense – “metics”, immigrants without the rights of citizenship, though like Ludin many have attained that status. Kymlicka and Norman (2000:21), remarking on Walzer, describes the plight of “metics” as follows:

They face enormous obstacles to integration – legal, political, economic, social, and psychological – and so tend to exist at the margins of the larger society. Where such marginalized communities exist, the danger arises of the creation of a permanently disenfranchised, alienated, and racially defined underclass.

This somewhat negative picture of how welcome immigrants and guest workers are in Germany is emphasised by Francis Nyamnjoh (2003:8) from the University of Botswana. “It doesn’t matter if you’ve read Goethe, wear *Lederhosen*, and do a Bavarian dance, they’ll still treat you as an immigrant.”

If Walzer is right, a common life exists only if people share in shaping that life. If values are not (fully) shared, or are imposed by domination, then a *common* life is not possible. According to Downing and Thigpen (1986:457), Walzer argues “that a common

life may deserve *more or less* respect and that the appropriate degree of respect should be determined by inquiry into the origin of social meanings" (our emphasis). For a genuine common life to exist, members of a community must share in creating the social meanings. The communality of a given social order depends on its inclusiveness. Membership is for Walzer the first condition of participation in the creation of the commonality, and it must therefore be distributed equally. Downing and Thigpen (1986:417) formulate the critical edge that this gives to social criticism as follows:

The concept of the common life ... becomes a standard when a criterion justifying respect for shared understandings is introduced. This standard of judgement can be applied ... by citizens who have assumed that they share a common life. Their discovery of forms of domination that exclude them from the common life should lead them (without resort to an external vantage point) to criticize their society<sup>9</sup>.

The problem seems to be that the countries of the European Union are really concerned with protecting themselves *from* migrants rather than with the protection *of* those groups (Nyamnjoh, 2003:8 citing Thomas & Lee, 1998). Privileged groups, says Williams (2000: 139), are motivated to withhold recognition of the Other's reasons to protect their own entrenched interests. The protection of entrenched interests in circumstances of unequal power means that minority interests are likely to be discounted. Discounting is a problem, a sign of unequal treatment. When reasons are discounted they are given less weight in deliberation than what their proponents give them. Mosley-Braun faced this problem at the first round of the vote. There was little to prevent the U.S. Senate from responding to her in the way that the *Plessy* court responded to arguments concerning the stigma of segregation in the U.S.A.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation between the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but *solely because the colored race chooses to put that construction upon it* (Williams, 2000:139 quoting *Plessy v. Ferguson*. 163 U.S. 537 (1896) – Williams's emphasis).

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9 Walzer's arguments apply properly only to the USA, but Downing and Thigpen have argued that in so far as Walzer's (1983) arguments rely on comprehensive theory, some of the basics of his case in the USA apply also elsewhere. In this we follow Downing and Thigpen (1986).

Yet the Senate granted Mosley-Braun her standing at the second vote. And that means that the association of the Confederate flag with the history of slavery was confirmed as a possible interpretation, and a rival to the interpretation initially favoured. Mosley-Braun's interpretation of the symbol, offered on behalf of African-Americans, was then not an unreasonable source of disagreement. There is surely more to the Confederate flag than its association with the history of slavery, as there is more to the *Kopftuch* than its association with the history of the suppression of women. This "more" is evidence that rival interpretations of the meanings of the symbols at issue do not in themselves constitute unreasonable sources of disagreement.

## 5.2 Feminism, womanism and the double-bind

We take it, then, that it is not unreasonable to interpret the *Kopftuch* as a symbol of virtue. This interpretation, though, is hardly visible in public life. The state's demand that neutrality be maintained does not help to communicate the interpretation which the Muslim minorities endorse. What, then, should we make of the stance of neutrality? In the Catholic states the neutrality requirement is not seriously enforced. The crucifix is permitted in the classroom and must be taken down only when a protest is registered. But this still is selective permission of religious symbols. Muslim symbols are explicitly forbidden. Knapp (2003: 28-29), in summing up a response from Bavaria's *Kultusministerin*, Monika Hohlmeier (*Christlich-Soziale Union*), said the following:

The reasons for this differentiation, or more precisely unequal treatment, she has already given. The Christian churches endorse the principle of the equality of the sexes as enshrined in the constitution. The Islamic faith does not. However, it is at least still arguable whether the Catholic church does in fact unqualifiedly accept the idea of equality between men and women.<sup>10</sup>

In the Protestant states the neutrality requirement is taken seriously, and here it seems like a very reasonable solution to the problem of rival symbols of loyalty within the same state. But the reasonableness of this solution soon evaporates as soon as we realise that

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10 "Eine Begründung für diese Differenzierung, genauer gesagt Ungleichbehandlung, hat sie bereits gegeben. Die christlichen Kirchen anerkennen ihrer Ansicht nach vorbehaltlos das Grundgesetz. Für den Islam gelte das nicht, jedenfalls nicht insgesamt. Nun könnte man trefflich darüber streiten, ob die katholische Kirche tatsächlich die Gleichberechtigung von Männern und Frauen vorbehaltlos akzeptiert."

banning the *Kopftuch* and the crucifix from the public arena changes nothing in the secular state where the strict separation of state and church disallows the crucifix anyway. The state demands that a signifier of difference first be removed before talks can begin. But once removed, neutrality for public agents in the required sense is asserted. The reason for dialogue is thereby obviated. Nothing is granted yet the case is lost.

As we judge it the state's stance of neutrality is actually a form of "status quo neutrality" (a phrase we borrow from Williams, 2000:141), found generally throughout the states of the European Union, particularly in states which have a large percentage of Muslim religionists, e.g. France. "Status quo neutrality" just is what the words suggest, an attempt to deal with restless minorities without actually granting their demands. Williams (2000:142), quoting Sunstein (1993:3), argues that the liberal state "defines neutrality by taking, as a given and as the baseline for decision, the *status quo*, or what various people and groups now have... A departure from the *status quo* signals partisanship; respect for the *status quo* signals neutrality".

To the extent that the state marginalises the Muslim minority, i.e. treats them as the historical "metics" – it fails to live up to its liberal constitution. *Status quo* neutrality is the symptom of this malady. The state's demand for a liberalising response from the minorities as a precondition of dialogue is in conflict with its professed liberalism. In effect, the state demands a winning hand before the game begins! Just how seriously do we treat the state's demand for a liberalising response when it itself oversteps the boundaries of cultural-religious (or is it ethno-religious?) equality?

The Harm principle, of course, hangs closely together with the stance of neutrality. Unequal treatment is a harm, a setback to someone's interests. *Status quo* neutrality is a harm to *Musliminnen*. Is this harm – in the appropriate sense in which the social pressures generated by state-generated pressure to remove the *Kopftuch* is a harm – comparable to the harm women suffer and have suffered historically in circumstances of unequal power? It follows from our argument in Section 3 that the coercive constraints of the stance of neutrality infringes the Harm principle and issues in a neutral harm – the marginalisation of religious minorities. The state is not entitled to inflict harms of this kind on its citizens. The state claims that the harm women have suffered as a consequence of sexual discrimination is the harm *Musliminnen* suffer and have suffered as long as they refuse *Entblößung*. Let us grant the state's claim. We

then ask whether this alleged suffering is comparable to the suffering of the historical “metics”? This is a reasonable question considering that to refuse *Entblößung* is to be reduced to the status of the “metic” (as Ludin’s present status demonstrates). Now, we maintain that the suffering of *Musliminnen* as “metics” is an additional burden for German *Musliminnen*. They shoulder a double load; they suffer as women in unequal partnerships with men, and they suffer as “metics”, as strangers in a country that bids them “Not welcome!”

For liberals Ludin’s status as religious dissenter is less significant than the denial of her status as full and equal member of the democracy of which she is a citizen. As we judge, the stigma of the “metic” colours her religious dissent and blocks resolution of the latter solely as a question of religious freedom. How these two things hang together – cultural imperialism (“metic”) and sexual imperialism (*Muslimin*) – is the true meaning of the state’s claim that Ludin’s *Kopftuch* is a symbol of political dissent masquerading as religious dissent.

If this is political dissent, we must ask to what extent the interpretation of the *Kopftuch* as a vicious symbol of the suppression of women throughout history is a construction imposed on Ludin in circumstances coloured by the stigma of the “metic”? We must also ask whether that is the reason why her reason fails to count as a *reason*? Let us put the argument of the previous section on its head and ask whether the *Kopftuch* as a symbol of the religiously virtuous woman reads as a construction for Christian women in Germany in their circumstances of legal equality with men? Do German women see the religiosity of the symbol? Do they see its stigmatic association with the historical “metic”? Do they see the moral content? Or do they see only their long struggle for liberation? And then rush to liberate Ludin? Should Ludin be liberated from the *Kopftuch*, or simply from the stigma of the “metic”? And if we liberate her from the latter, would the *Kopftuch* then be acceptable?

For Ludin the double-bind, “metic” – and – *Muslimin*, is the critical factor. The status of “metic” seems most often to be only a cultural-religious category. But at times it seems also to be an ethnic, i.e. a racial category. Does race play a role here? In a recent publication, *Race in 21st Century America*, Hu-Dehart (2001:83) argues that in nineteenth-century America non-whites (including Chinese and native Americans) were “usually subsumed under the black category”. The understanding of race beyond the simple black-white divide, by which all non-European (read “non-white”) people are

included under the black category, has a long history. In contemporary America race discourse follows the same logic; "blackness" serves as the extreme of all non-Europeans (i.e. non-whites). If this is a live category in Germany, the "metic" is also a racial category.

Do German women know that overcoming the barrier that separates women from women entails confronting the reality of both cultural (as place-holder for racial?) and sexual imperialism? Does cultural (racial?) imperialism overshadow bonding between German women on the basis of sex? Do German women preferentially bond with German men against the Other? If so, "metic" is a category of blackness. If so, German women and men maintain only a white egalitarianism and not a non-racial one. It follows that Ludin is not protected by white-on-white moral constraints, and that she can be denied rights without moral guilt. Out of this no-one can build a multicultural state.

To white feminists in Germany Ludin is an anachronistic rarity. Katja Husen (2003), feminist parliamentarian (Bündnis 90/Die Grünen), describes Ludin as one enjoying the freedoms and rights of the liberal state, yet she clings to her *Kopftuch*, the very thing that makes her invisible in traditional Islamic society, i.e. denies her the rights and freedoms just referred to in Islamic society:

Women like Fereshta Ludin, who in spite of the headdress still have and enjoy all these rights (choice of a career, and unobstructed access to the public domain) are universally the absolute exception, not the rule.<sup>11</sup>

The additions in parenthesis are Husen's words. Ludin is not visible in the public domain. She does not have unobstructed access to this realm, nor does she have the free choice of a career. Ludin's invisibility is in Jeremy Weate's sense, a "construction of the inner eyes" (Weate, 2003:12 quoting from Ellison's *Invisible man*) of those (like Husen) who refuse to see her. Within the framework of feminist normativity Ludin is socially invisible, i.e. she is "being seen as invisible" (Weate, 2003:14 quoting from Ellison's *Invisible man*). Husen refuses to see the "metic". Verily, we say unto you: Ludin is the woman the feminist does not see!

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11 "Frauen wie Fereshta Ludin, die trotz Kopftuch all diese Rechte haben und nutzen [unter andere, 'freie Berufswahl', und 'ungehinderten Zugang des öffentlichen Raumes'], sind international die absolute Ausnahme – nicht die Regel".



Is *status-quo* feminism at all helpful? Marie Pauline Eboh (1998: 335), speaking from an African perspective relevant to Ludin's problem, defines the African women's rejection of feminism in the white world in favour of "womanism" in the black world as follows:

African womanism tends to marry African perturbation with the feminine problem. For the African womanist, the double allegiance to women's emancipation and African liberation are inseparable. This is the philosophy of African womanism.

The African-American, bell hooks<sup>12</sup>, offers some guidance from the USA. hooks (1998:340) claims that privileged white women in the USA organise around their own oppression, thus ignoring the differences between their social status and the status of black women who experience racial discrimination in addition to sexual discrimination. White feminism, therefore, is only the mark of race and class privilege, an image black women cannot identify with because for them there is nothing liberatory in the white-party line analyses of women's oppression. hooks (1998:343) describes her experiences at the hands of feminists as follows:

Our presence in movement activities did not count, as white women were convinced that 'real' blackness meant speaking the patois of poor black people, being uneducated, streetwise, and a variety of other stereotypes. If we dared to criticise the movement or to assume responsibility for reshaping feminists' ideas and introducing new ideas, our voices were tuned out, dismissed, silenced. We could be heard only if our statements echoed the sentiments of the dominant discourse.

German feminists see the *Kopftuch* as a threat to the *status quo* because it figures too powerfully in Ludin's assertive assault on the entire fabric of inequality in the public realm. Their hostility is one of the unintended consequences of Ludin's plea for religious tolerance. For German men such a powerfully assertive woman is likewise invisible *as woman*, assertiveness and power being qualities too masculine for a woman. As punishment Ludin has earned herself the image of political dissenter Number One – the Number One "Other". Her "controlling image" (Collins, 1998:346) is the "metic"-*Muslimin*, comparable to the negative images black women have and have had in America – "mammies, matriarchs, welfare recipients, and hot mommas" (Collins, 1998:346). In Patricia Collins's words (Collins, 1998:346-347), Ludin is frozen in a condition of

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12 This orthography (with small letters) is the preference of bell hooks.

inbetweenness; she is essential for the survival of society simply "because those individuals who stand at the margin of society clarify its boundaries" though they do not belong. By not belonging she "emphasises the significance of belonging".

## 6. The failure of integration

Ludin (2003:30) says: "For me it is interesting to note – particularly in the social discussion which occurred after the judgement (of the German Constitutional Court in Karlsruhe) – who actually makes of the theme a political one, and which basic political changes in our society will be achieved by the discussion".<sup>13</sup>

As we judge there are two consequences of political importance. The first deals with the unwillingness of the German states (and for that matter the rest of the world) to cope with the pressures of multiculturalism. There are two kinds of multiculturalism on the international market at present, a "thick" and a "thin" variety. The South African philosopher W.C van der Merwe (1999:316) distinguishes these as follows:

With thin multiculturalism is meant societies in which the cultural differences which are claimed as rights are embedded in a greater (political) culture, a liberal democratic culture or a culture of universal human rights in which consensus exists about the right to differences as, for example, has been the case in Belgium until recently. Thick multicultural societies refer to societies, like Israel, wherein certain of the cultural differences which are claimed as rights, undermine a general acknowledgement of the right to difference, for example, when what is demanded is the right to a nondemocratic political system, or the prohibition of religious freedom, freedom of speech and so forth.

At present the German states which banned Muslim symbols while keeping Christian ones are behaving like Van der Merwe's thick multicultural societies. The second opposing position is their stance; it is the position of Catholic conservatism in Germany prevalent in the *Christlich Demokratische Union/Christlich-Soziale Union* (libertarian capitalists) governed states. Their stance is strongly sectarian. They are undermining the "general acknowledgement of the right to difference", and out of that no-one can build a multi-

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13 "Für mich bleibt es interessant zu beobachten – vor allem in der nach dem Urteil entstandenen gesellschaftlichen Diskussion – wer hier das Thema eigentlich zu einem Politikum macht und welche grundsätzlichen politischen Veränderungen in unser Gesellschaft damit erreicht werden sollen".

cultural society. The stance of neutrality, the first opposing position, is the stance of the Protestant *Sozialdemokratische Partei Deutschlands* (social democrats) governed states. They behave more like the thin version. But even here there is not much evidence that cultural differences which are claimed as rights are embedded in the greater (political) culture, as Van der Merwe describes this position. These states do not consistently present a liberal face, so the neutrality issue can hardly be interpreted as one of the liberal state demanding a liberalising response from an illiberal minority.<sup>14</sup> Though they exhibit more tolerance than the Catholics, they also fail the liberal test of tolerance. We have chosen to chastise these states for their illiberalism, but that does not mean that Ludin's intolerant, paternalistic co-religionists are let off the hook. Their support of gender inequality is an abomination. In defending the *Kopftuch* we have not defended their intolerance.

There is an important reason why tolerance figures so poorly in Germany generally. Liberal pluralism is here still in a somewhat primitive form. German liberal pluralism assumes only European values and working conditions, and so tends to screen out the diversity of cultural viewpoints in the public realm, allowing only the voices of the dominant culture to be heard. Given this fact we judge state neutrality with respect to political morality to be wrong headed. The state should intervene when values sacrosanct to liberal pluralism are under threat – values like autonomy, equality and tolerance. The relative tolerance of the Protestant states is disappointing considering the long struggle for Protestant recognition in Germany. There is nothing like suffering for one human to recognise the humanity of another. Husen should note this fact. And so should *Verfassungsrichterin* Lübke-Wolff <sup>15</sup> who stood before Ludin in the court – woman to woman – to hand down judgement.

The second consequence of political importance deals with the freedom citizens have to operate freely as equal participants in the public realm. We have argued above that with respect to this freedom Ludin has suffered denial of a right fundamental to democracy. The direct implication of Meyerson's protection of the

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14 Subject-related literature presents extended philosophical thought about how a liberal state should deal with an illiberal minority. See Will Kymlicka, 1989, 1995 and Andrew Kernohan, 1998.

15 The photograph of Ludin standing before *Verfassungsrichterin* Lübke-Wolff earned third prize in a national photographic competition (Anon., 2004).

*Kopftuch* in the private/social realm under Rawls's shield (see John Rawls, 1971), is that it must also be protected in the public/political realm, for the values protected in the former must find expression and confirmation in the latter if they are to be recognised as values of a multicultural commonwealth. Only then can the process of multicultural integration in the public realm begin.

Yet the state denies that Ludin has been denied access to the public/political domain. This claim has been defended by parties sympathetic to the state: "Mrs. Ludin's freedom of religion has not been affected in the public realm, in fact, she can even teach at private schools" (Müller, 2003c, quoting Rechtsprofessor Ferdinand Kirchhof).<sup>16</sup> She can, but that is not the point. Private schools for Muslim children are privately funded. Muslim communities have to pay for the continuity and survival of their cultural context, something the German communities get for free. This point about paying for what others get for free is itself evidence of unequal treatment in the public domain (a point we owe to Kymlicka, 1989). It hangs together with the point about being visible as a participating community in the public realm. German liberal pluralism favours German (ethnic) interests, which fact renders other voices inaudible in public life. The Muslim communities therefore have a more difficult task to make their voices heard in the public domain. The state's denial that Ludin has been disadvantaged underscores its sensitivity to the point that the confirmation of values at the level of the public/political realm is essential to integration. It is clear that thus far the state's integration policies have failed. Something like Meyerson's approach, or Williams's, is needed to do justice to Ludin and Muslim minorities.

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**Key concepts:**

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Muslim women: the problem of double discrimination

religious freedom and legitimate restrictions of religious expression

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godsdienstvryheid

marginalisering van Moslemminderhede

Moslemvroue: die probleem van dubbele diskriminering

