Women, the state, and religious dissent in the European Union: an evaluation of the aftermath of Fereshta Ludin's Karlsruhe verdict.[i]

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Abstract

This paper considers a particular instance in which a liberal state – Germany - makes a claim for the limitation of tolerance of religious expression on the grounds of harm. I examine this claim with reference to three basic positions: Firstly, I examine Denise Meyerson's argument 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. I 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. Meyerson's arguments rest on the acceptability of Rawls's idea of public reason. I therefore, secondly, examine Jeremy Waldron's objections to the use of the deliberative discipline of public reason in cultural disputes as well as his objections to the use of the politics of identity which, he claims, distort our ability to engage in reasoned public debate. I argue that bracketing identity claims eliminates what is peculiar about Ludin's case. This I bring out, thirdly, by drawing on the views of Melissa Williams, who advances the idea of sensitivity to others' reasons as reasons, which defines a position midway between Meyerson and Waldron. It is apparent that Ludin's dilemma is twofold: her status as 'metic'- as 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, form a double-bind of oppression. They are connected in a way that challenges the integration policies of the German state.

1. Statement of the problem

Fereshta Ludin, a ''Muslimin'' (*Muslima*) teaching at a German public school, was reprimanded for wearing her head-dress to school. Ludin was accused of making a religious statement; she was (so to speak) silently professing her religion in what ought to be non-religious context. She refused to remove her *Kopftuch*. Eventually, after a lengthy legal struggle, the German Constitutional Court in Karlsruhe decided (on 30 September 2003) that wearing the *Kopftuch* in the classroom does express Ludin's commitment to the ''Muslim

Community of Faith'' (Benhabib, 2004:199), but that this does not disqualify her as a teacher. The court maintained that disqualifying Ludin would be in conflict with her right to freedom of conscience and that her right to freedom of access to public office may not be curtailed. Nevertheless, the court rejected her plea and referred the matter back to the democratic legislatures of the states (*Länder*) for the final decision. In Baden-Württemberg Ludin was overruled and discharged – I think wrongly so. In what follows I shall use the phrase 'the state' to mean the numerous *Länder* which either passed or planned to pass legislation banning the *Kopftuch* from public office.

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. As I judge, the problem amounts to a question about interference: Should the state interfere in the internal affairs of a minority in order to protect women from the harm ensuing from gender discrimination, or should it respect the religious and ethical views of a minority and tolerate unequal treatment of individuals within its ranks?

Tolerance for competing versions of the good life 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 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 as follows: ''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''.

But tolerance has limits. There are things the state should not tolerate, for example, sexual discrimination, which makes women unequal partners in marriage. Liberalism's commitment to the idea of equality rules sexual discrimination out of court. 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. The liberal state is constitutionally bound to protect reasonable comprehensive ethical doctrines. That is one of its most important functions. 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.’’

For a long time the fate of the Muslim minorities in Europe were tied up with the history of the guest worker policies of the states of the European Union. Guest workers were regarded as long term residents without claims to citizenship. This understanding of their status changed slowly over the years, but some of these groups still exist at the margins of society because they do not wish to be integrated as equal members of the European Community. The American philosopher Michael Walzer (1983) calls these people ‘metics’ (cited in Kymlicka and Norman, 2000:21). Ludin’s current position, in spite of the fact that she is a German citizen, is that of the historical ‘metic’. She is what I 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.

2. Interpretation of the controversy

2.1 One opposing position: the stance of strict neutrality

In this section I interpret the controversy surrounding the display of religious symbols by teachers in public schools, by outlining and discussing one position in support of a ban, i.e. a position in opposition to the position I want to defend.[ii]

- **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 an agent or group in the religious life of some other agent or group. This is its proper function. Indeed it has become known in the

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 violate the Harm principle**

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* (Meyerson, 1994:24-26). In what follows I shall have this principle in mind whenever I refer to harm.

The state's claims are that agents in their public roles are representatives of the state *(Beamten)*, 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 viewed as a symbol of fundamentalist suppression of women; it has an *appelativen 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: ''Damit werde eine Weltanschauung transportiert, die sicher nicht sehr die Gleichberectigung fördert'' (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.

By appearing before impressionable children the bearer creates the misleading impression that the state sanctions this fundamentalist suppression as part of its public morality, an impression which harms the state i.e. all *Beamten*. 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 harm in other ways, for instance, by causing religious unrest in the schools. Ludin would be bringing religious conflict from outside into the school – "Konflikte von aussen in die Schule hineintragen" (Editorial staff, 2003, quoting Kiel psychologist Thomas Bliesener).

In all cases in which the Harm principle is violated, the neutrality obligations of teachers and other public agents take precedence over their rights to religious freedom. In effect, the right not to be harmed in these cases is always prior, even when Ludin's right to equality of access and opportunity is affected in the form of a *Berufsverbot*.

One important qualification, however, obtains: The constitution does not contain a limitation clause which limits religious freedom. ''Die Freiheit des Glaubens, des Gewissens und die Freiheit des religiösen und weltanschaulichen Bekenntnisses sind unverletzlich'' (Müller,

2003b, quoting the Constitution). This excludes pragmatic tampering with religious freedom. ‘’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’’ (Müller, 2003b, reporting on the decision of the *Zweite Senat des Bundesverfassungsgerichts*). Serious harm is a justification for intervention by the state to limit religious freedom, but the possible limitations are subject to the constraints 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). The constraints of equality are paramount in any defence of limitations of 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 the crucifix is also out of bounds. 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.
- Forbidding it for public agents who are representatives of the 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*).

3. In defence of the *Kopftuch*

3.1 Distinguishing kinds of harms

I shall argue below that the *Kopftuch* is a harm of a certain kind, but not harm in the sense required by the Harm principle. In this argument I follow Denise Meyerson in her use of Rawls's idea of public reason. Public reason is simply a normative canon. It is primarily a norm of moral and political debate which structures public conversations aimed at establishing consensus. According to Rawls's idea, 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 opposing position examined above invokes 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 Ludin's 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. ''Das Kopftuch sei Teil ihrer Persönlichkeit und Teil ihrer Glaubenspraxis als Muslimin''(Editorial staff, 2001, citing Ludin). ''Ludin's Anwalt Hansjörg Melchinger betonte, seine Mandantin würde das Ablegen des Kopftuches als Entblößung empfinden und sich schämen''(Editorial staff, 2003, quoting Ludin's lawyer Hansjörg Melchinger).

3.2 Neutral and non-neutral harms

Following Meyerson (1994:1-43) I 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 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. I 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, and 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.

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 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) and must enjoy some degree of assent of all concerned parties (Meyerson, 1994:12) (cf. p.4). 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, 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 Kantian and Lockean senses) (Meyerson, 1994:14) of some of them. 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 from interference by others.

If any agent discounts the dignity of any other moral agent, or fails 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 must, 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? 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 I owe to Meyerson 1994:23) thereby raising thorny issues about whether individual rights can be overridden 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 perceived to be prevalent in minority Islamic cultures. The state judges, so I surmise, that paternalism is the real threat. So I 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. Following Dworkin (1990:50), let us call this 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 granting the agent authority 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 revision: 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 associate 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 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.

I 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. I am now in a position to make another point. Ludin has acquired a scripted 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.

I 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.

I 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.

3.4 Generalising Meyerson's distinction

Based on my 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), I 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, i.e. without taking sides, thereby causing neutral harm. And neutral harm means that at least one party suffers injustice.

What is at stake is Ludin's freedom to choose, her right 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*? My 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 I 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 question is thus 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 opposing position above, is not justified policy. Ludin's exclusion from the public realm is unjustified unequal treatment of a citizen. The association with the historical "metic" (cf. p.1) 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.''

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

4.1 Waldron and the politics of identity

Jeremy Waldron has objected to Rawls's notion of public reason on grounds that it suppresses the conversation between cultures in areas where conversation should continue. Waldron (2000:162 – his emphasis) 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.

Proponents of the discipline of public reason claim that the point of invoking the discipline is to bring disparate types of reasons into some sort of commensurate relation with one another (Waldron, 2000:160), but Waldron thinks they overlook a pernicious side-effect: parties to a conversation withdraw from the ‘’duty of civic participation’’ (Waldron, 2000:155), i.e. from the business, as Waldron (2000: 173) puts it, ‘’of coming to terms responsibly with others’’. In effect, they retreat into identity politics, and present their engagement with their norms and practices as though they were a ‘’brute aspect of … identity’’ (Waldron, 2000:173), much in the way that one’s sex or one’s colour is a brute aspect of one’s identity, and as such has a claim to be non-negotiable.

The duty of civic participation requires that every effort be made to continue the conversation with others on their own terms as they attempt to converse with us on ours (Waldron, 2000:163), the point being to understand as much as possible about one another’s reasons. It is not necessary to treat one’s norms and practices as aspects of one’s identity. We might, as an alternative to identity politics, treat some agent’s norms as standards which have a point, which “do 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. 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 distort our understanding of reasons. We often say that a reason for following a norm is that it is our norm. The fact that some norm is ‘our’ norm – ‘’that this is what we Irishmen or we French or we Maori do’’ – cannot be the reason for having the norm (Waldron, 2000:169). This is odd. Do we not uphold norms because they lead to virtue, or happiness or justice or liberty? As soon as people demand respect for a norm associated with a culture as part of the respect they demand for their identity (Waldron, 2000:166), and make the demand a matter of rights (Waldron,

2000:156), the conversation breaks down and the identity claims become an obstacle to their responsible participation in civic life (Waldron, 2000:168).

Once we remove the identity claims surrounding norms and practices as potential non-negotiable claims, and make an effort to get to their place "in a context of reasons and reasoning" (Waldron, 2000:170), we need not feel that we fail to respect someone when we criticise her norms, or fail to treat her practices as rights claims. It is true that real world majorities have failed to settle rights claims fairly (Waldron, 2000:172). However, it simply is not true that someone is wronged every time an opinion about rights is rejected in politics (Waldron, 2000:166).

We know that the principle of equal dignity implies that everyone's identity is entitled to the same respect (Waldron, 2000:157), but there are interests that do not require a special non-negotiable treatment, and these can be dealt with in a way that does allow negotiation and trade-offs. Liberal democracy is, after all, committed to the expectation that such interests always pass the test of compossibility[iii] (Waldron, 2000: 159), and therefore that the stage can be set for deliberation about the form legal and constitutional arrangements might take to accommodate differences. To be on the safe side, disagreements 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" (Waldron, 2000: 166). It is this distinction that gets overlooked whenever an individual or a minority puts forward their 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 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? I believe that not to be possible. I 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", as Waldron (2000:170) recommends.

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. 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.

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'. 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" (Solomon, 1995:825). Shame is, in appropriate contexts involving *Entblößung*, a part of Ludin's personality; they are inseparable. The social context in which this connection is established is significant for our understanding of why Ludin's choice to stick to her *Kopftuch* is *moral* choice. Is it tenable to require that this claim be bracketed?

Is it reasonable to expect Ludin to bracket her moral beliefs, her personality and her status as woman? Waldron says, 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 endnote 2) 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)? This could be difficult. To show what is involved here I draw on ideas of Sawitri Saharso.

Sawitri Sahorso (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 (Sahorso, 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. The Asian personality is characterised "by more permeable ego boundaries that make for a more relational and less individualistic self" (Sahorso, 2000:233). Add to these 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 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 which are needed for close emotional interaction between family members, thus rendering 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). Sahorso, in effect, recommends a soft paternalistic modification of the cultural context to which members of minority groups are unconsciously subjugated.

I think it is clear enough that what is at stake in Ludin's claim that the *Kopftuch* "sei Teil ihrer Persönlichkeit" is, *contra* Waldron, also an interest and not merely an identity claim. As such it has a claim to be considered. How, then, do we proceed with it?

4.3 Accommodating Ludin's claims

How far might groups or persons be expected to adapt? Waldron (2000:159) doubts that an easy fit between the norms of traditional and open societies is possible. From the perspective of the state the real question is whether Ludin (or any other person) can *freely* choose to conform to a religion that systematically encourages gender discrimination. If such a belief system does infringe on the moral rights of agents, and if it does not treat women with dignity and as agents with moral status, it is a neutral harm. What should the state do about it? Gender discrimination negates the rights of persons. Using the same distinction between neutral and non-neutral harms, it follows from my argument that the state should intervene.

But the Islamic minorities might reject the suggested modification of their practices as unequal treatment. From their perspective, the state's case hinged on either (i) the *Kopftuch* representing gender inequality or (ii) on it being a religious statement in an a-religious setting. The first falls apart because the *Kopftuch* is not a symbol of gender inequality to Ludin and the Islamic community. The state has conflated two issues: what it takes to be a symbol of gender inequality and gender inequality within a religion. Banning the *Kopftuch* will not increase gender equality amongst Islamic believers. Indeed, they see the banning of the *Kopftuch* as a means of cultural imperialism and of restriction of the public space available to religious minorities.

Even if we are only talking about a headscarf (and not also about religious freedom), then the forced removal of that scarf would be shameful to Ludin; she would be treated as a person

without dignity, which is a neutral harm itself. Should the state protect Ludin's religious conscience? Should it retreat to neutrality here? Or should it insist on the removal of the harm of gender inequality as a condition of accommodation? Waldron has doubts about the practicality of unmodified accommodation, but that does not imply that Ludin's *Kopftuch* is not owed some respect. Waldron says: ''…'may properly be demanded', and … 'can compossibly 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 – his emphasis). This means that the respect we owe Ludin's *Kopftuch* does not cease to require accommodation (or something less than accommodation) simply because it is not possible to accommodate it.

If we do not invoke the discipline of public reason, how do we hold the balance between ''may properly be demanded'' and ''can compossibly be accorded''? Fact is, the state did not appeal to public reason. In Ludin's case it could not do so for it stood to lose by such a move, because then it would have had to move to protect Ludin's religious conscience. In the absence of a normative rule protecting dissent in particular kinds of cases, the state was at liberty to apply the weapons in its liberal armoury, and accordingly demanded a liberalising response from the Islamic community of the kind Sahorso recommends, as a condition of accommodation. That was the preferred line of action considering its emphasis on the struggle for women's equality – *Gleichberechtigung* (Editorial staff, 2003, quoting Rechtsprofessor Ferdinand Kirchhof). Indeed, the stance of neutrality characteristic of the state's position requires that some liberalising response be made.

In demanding a liberalising response the state set 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]), for it may reasonably be objected that this is tantamount to declaring a rival norm unworthy just because it is not home-grown. No, the unacceptability of the (alien) norm cannot be grounded in such an illiberal way. Might it be unacceptable because it (allegedly) degrades women? Is the problem that the 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 Green (1995) and Kymlicka (1989) recommend.

A deep irony attaches to the failure to invoke the discipline of public reason. An identity struggle ensued, one in which Ludin's roots and identity played *the* decisive role. Seyla Benhabib noted this fact. She writes: ''…it is hard to avoid the impression that the real worry of the court was more the substantive … question, as to whether a woman who ostensibly wore an object representing her belonging to 'the traditions of her community of origin' could carry out the duties and tasks of a functionary of the German state'' (Benhabib, 2004:200). The cultural and religious significance of Ludin's scarf clashed with ''widely held beliefs about the public face of a teacher in Germany'' (Benhabib, 2004:200). This clash is all about identity: The court insisted on a more substantive understanding of citizenship-identity which precludes the scarf, as a prerequisite of the identity of a civil servant of the German state.

The state's failure to acknowledge that Ludin's identity has a place in the public domain forced it into a false dichotomy. It did not accept that it is possible for Ludin freely to choose to conform to a religion that systematically encourages gender discrimination, and so it saw only two lines of possible action: 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 – thus demanding an exit option for the dissenting members of that group, as 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 first line of action is actually appropriate in cases of dissent within a group. A simple exit option protected by the state, remedies the problem. Ludin, however, was not a dissenting member of a group. The second line is also inappropriate, for it rests on the misconception that Ludin is suffering curtailment of her freedom at the hands of her group.

The problem seems rather that parties to the conflict have misread identity claims, or have constructed false identities, or have found some identities to be irreconcilable with others. *Contra* Waldron there is a place in the conversation for identity claims. I have argued that they cannot summarily be dismissed. I think Waldron's approach, which requires that these claims be bracketed, 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*. 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 – her emphasis) 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.

Confirmation of identity is clearly a prerequisite of justice, and sensitivity to reasons *as reasons* presupposes sensitivity to identity. 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, again by a wide margin (Williams, 2000:137).

Williams (2000:138) argues that the dispute over the Confederate flag revolved 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 an unreasonable source of disagreement? And how does Ludin fare when we apply this question *mutatis mutandis* to her? 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) 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 were associated with the idea of "guest workers" in Walzer's (1983) sense – "metics", immigrants without the rights of citizenship – an association which left a black mark on the state's integration policies.

Kymlicka and Norman (2000:21), citing Walzer, describe 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.

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. 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.

I 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?

As I judge, the state's stance of neutrality is actually a form of "*status quo* neutrality" (a phrase I 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" is just 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".

Does the state still treat the Muslim minority as historical "metics"? To the extent that the history of 'metics' in Germany has had an effect on the state's perception of the merits of Ludin's case, to that extent it has failed to live up to its liberal constitution. *Status quo* neutrality is a symptom of this malady and harm to *Musliminnen*. 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", i.e. as marginalized strangers. The stigma of the "metic" colours Ludin's religious dissent and blocks resolution of the problem solely as a question of religious freedom. How these two things hang together – cultural imperialism ("metic") and sexual imperialism (*Muslimin*) – is perhaps 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 reasons fail to count *as reason*s.

Let us put the argument 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 only see their long struggle for liberation? 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?

The status of "metic" seems most often to be only a cultural-religious category only. But at times it also seems 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, then 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? I.e., 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. If this is true, then Ludin is not protected by white-on-white moral constraints.

To 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: "Frauen wie Fereshta Ludin, die trotz Kopftuch all diese Rechte haben und nutzen [unter anderem, 'freie Berufswahl', und 'ungehinderten Zugang zum öffentlichem Raum'], sind international die absolute Ausnahme – nicht die Regel".

The additions in parenthesis are Husen's words. Katje Husen sees the *Kopftuch* as a threat to the *status quo* because it figures so powerfully in Ludin's assertive assault on the entire fabric of inequality in the public realm. Yet, Ludin is not *visible* (in the sense in which public visibility is meaningful) in this domain: She does not have unobstructed access to this realm, nor does she have 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 norms, 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".

6. The failure of tolerance

Are all citizens able to operate freely as equal participants in the public realm? It follows from my argument that Ludin does not have equal access to the public realm and that she has suffered denial of a right fundamental to liberal democracy. An equal right to the freedom of association has been denied (in one respect) on grounds that it harms the equality constraints governing the relationship between the sexes. I have argued that the claim is spurious. Nevertheless, denying her the right to freedom of association (in the specified respect) damaged her status as an equal in yet another respect – her entitlement to equality of respect, as a woman. It could be argued that subordinating rights to freedom of association (albeit only in the limited sense specified above) to the constraints of equality in cases in which these things conflict, is right, the justification being that it protects equality of respect for women;

but, actually, in the end such an argument makes little sense because we cannot protect this right to respect by damaging it.

The state denies that Ludin has been denied access to the public domain. This claim has been defended by parties sympathetic to the state: “Die Religionsfreiheit Frau Ludins werde im öffentlichen Raum nicht angetastet, ja sie könne sogar an Privatschulen unterrichten”. (Müller, 2003c, quoting Rechtsprofessor Ferdinand Kirchhof). 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 I owe to Kymlicka, 1989). It hangs together with the point about being visible and audible as a participating community in the public realm. The direct implication of protecting the *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 recognized as values of a multicultural commonwealth.

The problems of viable integration policies clearly have a leg in the problem of tolerance. Germany qualifies as a ‘thin’ multicultural state,[iv] i.e. it is a society in which the cultural differences which are claimed as rights are embedded in a culture of universal human rights in which consensus exists about the right to difference. But often Germany behaves like a ‘thick’ multicultural society, i.e. one in which the cultural differences which are claimed as rights undermine the generally acknowledged right to difference. Seyla Benhabib (2004:200-201) captures this shift from ‘thin’ to ‘thick’ admirably in her portrayal of Ludin’s identity problem. On one count, she is a citizen in a ‘thin’ multicultural state, one in which her reasons (should) have some degree of force in the public domain. On another, she is a ‘metic’ in a ‘thick’ multicultural state, one in which her face does not conform to the public image of a teacher in Germany.

There is a deep problem in these identity switches. Part of it is concealed in the much debated disjunction of religious and secular language. Jürgen Habermas (2005: 36) has warned against discounting religious language. He says: ‘’Säkularisierte Bürger dürfen, soweit sie in ihrer Rolle als Staatsbürger auftreten, weder religiösen Weltbildern grundsätzlich ein Wahrheitspotential absprechen, noch den gläubigen Mitbürgern das Recht bestreiten, in religiöser Sprache Beiträge zu öffentlichen Diskussionen zu machen.’’ Indeed, citizens

embracing a secular worldview are charged with the task of translating religiously inspired comprehensive doctrines into publicly accessible, secular language. (And, of course, *vice versa*, as a complimentary learning process requires.)

Secular worldviews just are European. Not surprisingly, German liberal pluralism assumes 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. Habermas wants to rectify this imbalance. And this means that the (identity)-claim, ‘’Das Kopftuch sei Teil ihrer Glaubenspraxis als Muslimin,’’ must have its place in the public domain; and so must the (identity)-claim that the *Kopftuch*, as religious symbol, ‘’sei Teil ihrer Persönlichkeit.’’

The personality in question here is one Husen failed to see, and the claims at issue here are ones *Vefassungsrichterin* Lübbe-Wolf understood but failed to protect. There is nothing like suffering for one human to recognize the humanity of another. As a feminist, Husen should note this fact. And so should *Verfassungsrichterin* Lübbe-Wolff who presided in court to hand down judgment – woman to woman.[v]

Endnotes

[i] A different version of this paper was published in South Africa in 2001.

Coetzee, P.H., & Roux, A.P.J., 2004, Ludin’s *Kopftuch* (headdress): A problem of religious freedom in German schools, *Koers – Bulletin for Christian Scholarship* 69(2), 277–316. http://dx.doi.org/10.4102/koers.v69i2.306

[ii] A 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. ‘’Wir können doch die Kleidung unserer gewachsenen christlichen Kultur nicht gleichstellen mit den Insignien provokanter, fundamentalistischer fremder Kulturen’’(quoting Kultusminister Hans Zehetmair; see Anon. (2003)).

The above position may schematically be represented thus:

- Religious freedom is sacrosanct and may not be overridden 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 consequence that she does not have equal access to opportunity and position (*Berufsverbot*).

[iii] '' '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).

[iv] For my insight into the distinction between 'thin' and 'thick' multicultural societies, I am indebted to Van der Merwe, W.C. 1999. Cultural relativism and the recognition of cultural differences. *South African Journal of Philosophy*, 18(3):313-330.

[v] The photograph of Ludin appearing before *Verfassungsrichterin* Lübbe-Wolf earned third prize in a national photographic competition (Anon., 2004).

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