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## NEUTRALITY AS A TWOFOLD CONCEPT<sup>1</sup>

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### ABSTRACT

Under the circumstances of pluralism people often claim that the state ought to be neutral towards its citizens' conceptions of the good life. However, what it means for the state to be neutral is often unclear. This is partly because there are different conceptions of neutrality and partly because what neutrality entails depends largely on the context in which neutrality is demanded. This paper discusses three different conceptions of neutrality – neutrality of impact, neutrality as equality of opportunity and justificatory neutrality – and analyses the strengths and weaknesses of the different conceptions in different contexts. It suggests that there are two common elements of neutrality in all its exemplifications: a) an element of “hands-off” and b) an element of equal treatment. It therefore argues that while justificatory neutrality is necessary for the state to be neutral it is not sufficient and claims that while conceptions of the good must not enter the *justification* of state regulations, they must be taken into consideration when deliberating the *implementation* of these regulations.

### RÉSUMÉ

Il n'est pas rare, dans des sociétés pluralistes, que les citoyens exigent de leur État qu'il reste neutre eu égard à leurs conceptions de la vie bonne. Il est cependant rare que la notion de neutralité de l'État soit clairement délimitée. Ce manque de clarté s'explique de deux façons : d'une part, pour la raison qu'il existe plusieurs conceptions de la neutralité et, d'autre part, parce que la neutralité dépend essentiellement du contexte dans lequel celle-ci est requise. Cet article examine trois conceptions différentes de la neutralité - neutralité de l'impact, neutralité comme égalité des opportunités et neutralité de la justification - et analyse les forces et les faiblesses de chacune dans des contextes différents. Cette analyse suggère qu'il existe deux éléments constitutifs de la neutralité, communs à toutes ses différentes illustrations: a) un élément de non-intervention et b) un élément de traitement égal. Ainsi, cet article soutient que même si la neutralité de la justification demeure nécessaire pour assurer la neutralité de l'État, elle n'est pourtant pas suffisante, ce qui permet de soutenir que même si les conceptions de la vie bonne ne doivent pas interférer dans le processus de *justification* des réglementations étatiques, elles doivent néanmoins être prises en considération lors des délibérations de la *mise en œuvre* de ces réglementations.

Both in real life politics and in political theorizing the emergence of cultural and individual pluralism led to the claim that the state ought to be neutral. However, what it means to be neutral is controversial. As Rawls puts it “the term *neutrality* is unfortunate: some of its connotations are highly misleading, others suggest altogether impracticable principles.”<sup>2</sup>

A recent case before the German Constitutional Court and the new legislation which followed it emphasises the importance of neutrality as well as the indeterminateness of the term.<sup>3</sup> A young Muslim woman applied for appointment to the teaching profession in Baden-Württemberg after finishing her training, which is the normal procedure for anyone aiming to become a teacher at a public school. Her application was denied: her insistence on wearing a headscarf while teaching was understood to show a lack of aptitude for the position of a civil servant. The argument of the school authorities was broadly neutrality based. It considered the headscarf to be not only a religious but also a political symbol signalling the intention *not* to integrate into secular German society. For both reasons it was said to be incompatible with state neutrality. Furthermore, the school authorities claimed that students have a right not to be subjected to an inescapable authority figure (actively *or* passively) advocating a particular interpretation of Islam. The teacher-to-be appealed against this decision, claiming that

1. her personal freedom of religion was infringed by prohibiting her to wear a headscarf,
2. the decision was discriminatory against Muslims as opposed to other religions with more mainstream dress codes,<sup>4</sup> and
3. usually, neutrality in Germany is understood in an inclusive rather than laicist fashion, that is, as balancing the claims of different religions (well, mostly Protestants and Catholics) rather than banning them from the public sphere.<sup>5</sup>

The case went through several levels of appeal before ending at the German Federal Constitutional Court. The Constitutional Court ruled that the current legislation does not allow taking the intention to wear a headscarf as a sign of lacking respect for the neutrality of the state since there currently is no authoritative understanding of what neutrality entails. The rejection of the teacher’s application was therefore considered unlawful. However, the court also stated that the conditions of pluralism require a clearer definition of neutrality and legislation concerning religious symbols displayed by

teachers. Since this verdict most German states have issued legislation to deal with the issue. There are three general strategies:

1. banning all religious symbols for teachers,
2. allowing all symbols and dress-requirements, and
3. banning “political”, “sexist” or “fundamentalist” symbols while allowing symbols standing for organizations or ideologies considered compatible with adherence to the norms of a free democratic state.

However, all three strategies for achieving neutrality at school are themselves criticised with reference to neutrality. Banning all expression of religious commitment in the appearance of teachers is seen as discriminating against religious candidates and thus as non-neutral between religious and non-religious teachers. Allowing all symbols is seen as problematic because of the danger that teachers would promote controversial values in class-rooms, like suggesting that girls not wearing a headscarf are bad Muslims.<sup>6</sup> Neutrality is breached by allowing state officials to take a stand between controversial considerations of the good life in front of suggestible children. Distinguishing between different kinds of symbols is not unproblematic either, because it is feared that it is inevitable that unfamiliar symbols will be discriminated against. Opponents of the legislation thus claim that too often the notion of what is neutral tracks what is generally socially acceptable (normal) rather than any independent idea and so lacks normative justification. This is particular true for the German case where some states allow nuns wearing habits to teach in public schools while prohibiting Muslim headscarves.<sup>7</sup> Furthermore, there is the question of whose interpretation of any given symbol is to be considered authoritative.

The question of neutrality is thus politically significant. Not only in Germany but also in other Western democracies, legislators struggle to define fair requirements of neutrality.<sup>8</sup> On the one hand, the need for neutral institutions and standards for neutrality increases in view of increasingly pluralist societies;<sup>9</sup> on the other hand minorities increasingly demand official affirmation of their distinct identity.<sup>10</sup>

In this paper I analyse the literature on neutrality and show that the conceptions of neutrality currently discussed are unsuitable to do justice to the full breadth of the concept in its different areas of application. I therefore suggest that neutrality is better understood as a twofold concept consisting of an element of “hands-off” and an element of equality. The “hands-off” element traces the intuition that

there are matters the state has no business to get involved in. The equality element refers to the idea that the state ought to treat citizens holding different conceptions of the good life equally.

## 1. IN WHICH SITUATIONS IS NEUTRALITY APPROPRIATE?

### 1.1 *Neutrality vs. Toleration*

Generally, neutrality requires a situation where two or more parties disagree and the party, which is requested to be neutral, is a) not itself part of the conflict but b) nonetheless in a position to influence it.<sup>11</sup> This general description covers the role the state plays vis-à-vis the conceptions of the good life of its citizens as well as the context of warfare, in which the term first appeared in political thinking.<sup>12</sup> It also shows why neutrality is different from toleration, even though it is in some senses its historical successor.<sup>13</sup> In the case of toleration the second condition is fulfilled: the third party is in a position to influence the conflict by supporting or hindering one of the parties involved.<sup>14</sup> However, the first condition is not fulfilled; toleration, unlike neutrality, does not require not taking part in the conflict and refraining from having (and expressing) a position. Toleration means saying “I think you are wrong, but I will not hinder you from going on in your wrong ways.”<sup>15</sup>

This feature of the idea is at the focus of the most fundamental critiques of neutrality. Perfectionists like Joseph Raz and George Sher say that while there are good reasons for the state to tolerate different conceptions of the good and even to refrain from voicing opinions in many cases, there are lifestyles which are obviously so bad that it would be wrong if the state refrained from condemning them as problematic (whether or not it actually interferes with people living in that way).<sup>16</sup> They argue that the reasons neutralists give for a moral duty of the state to refrain from a) committing to obviously reasonable conceptions of the good and b) condemning plainly unreasonable ones, are not conclusive. As liberals they agree that in most cases there are good reasons to refrain from *coercing* people to live in a particular way, but they argue that where such reasons exist what is required is *toleration* rather than neutrality. They believe that there are undisputedly good elements of people’s lives and that supporting them by means of state power results in circumstances that are better for everyone.

A second difference between toleration and neutrality refers to the fact that both individual persons and the state could potentially be obliged to be tolerant, while neutrality concerning conceptions of the

good life only makes sense as a requirement for the state (and its representatives within their official capacities). It is not the individual who is under any obligation to refrain from forming and expressing an opinion on how neighbours, friends, or strangers live, it is the state (and the office holder.)

Neutrality also differs from the traditional understanding of toleration with regard to content. Neutralists claim that the traditional object of toleration is too narrow and that the sphere where the state should not coerce or influence people should be extended to all conceptions of what makes life worth living. Toleration first addresses religion but also extends to non-religious convictions which however share characteristics of religious belief in concerning matters of conscience, that is fundamental convictions. The object of neutrality, by contrast, is often described by the term “conceptions of the good life” or abbreviated “conceptions of the good.” The term refers to the individual answers each person gives to the question how life should be lived and does not necessarily imply that these conceptions are held with the same sincerity as matters of conscience. As Ronald Dworkin explains:

Each person follows a more-or-less articulate conception of what gives value to life. The scholar who values a life of contemplation has such a conception; so does the television-watching, beer-drinking citizen who is fond of saying “That is the life,” though he has thought less about the issue and is less able to describe or defend his conception.<sup>17</sup>

However, no one argues that the state ought to be neutral in all questions relating to people’s lives. Neutralists distinguish between matters of the right which are the legitimate concern of the state and matters of the good in which the state ought to be neutral.

### 1.2 *The Right vs. the good*

The distinction between the right and the good is central to the idea of liberal neutrality. For neutrality to make sense at all there needs to be a class of values the state must not be neutral towards. For example, the state must not be neutral towards the claim that it should be neutral, or fair, or democratic. Neither is the state allowed to be neutral towards ways of lives that deny and infringe the rights of others. As mentioned above, the class of matters the state must be neutral towards is described as “conceptions of the good life.” By contrast, the class of matters the state must not be neutral towards is called “the right” or “principles of justice.”

In philosophical literature the distinction between the right and the good is usually drawn with regard to the kind of moral claim they make. The right tells you what you ought to do, the good tells you what would be good to do or achieve. Ross' classic definition describes the good as what is desirable and the right as what is obligatory.<sup>18</sup> For the purpose of deciding in which matters the state ought to be neutral and in which matters it must not be, this understanding of the right and the good is not helpful. As Peter Jones points out "The right and the good as used in this context may be sharply separated by the standing given to each but they are not therefore sharply separate in content."<sup>19</sup> The teacher who insisted on wearing her headscarf in school claimed that her religion *obliged* her to wear it – not that wearing a headscarf was something good in general.

The most promising approach to distinguish matters of the good from matters of the right (which set the limits for permissible conceptions of the good) is to draw the distinction with reference to what citizens owe each other. That is, the distinction is normative rather than ontological or epistemic. Rawls identifies the right with reasonable political conceptions of justice (and thus as concerning the fair terms of cooperation between free and equal citizens) and the good with comprehensive religious, philosophical, or moral doctrines (and thus as concerning the question what makes a particular life of a particular person under particular circumstances worth living).<sup>20</sup> The claim is then that ensuring and maintaining fair terms of cooperation is prior to, and sets the limits of, what people may do to make their individual lives worth living.<sup>21</sup>

However, drawing the distinction between the right and the good like this is not unproblematic: achieving fair cooperation is seen as taking priority over personal values and personal religious convictions. Determining what fair terms of cooperation require, however, seems impossible without reference to what is good for people. Most conceptions of neutrality presuppose a liberal account of what is good for people giving much emphasis to autonomy, respect and equality. Liberal values are thus privileged by default. Given that liberal values are not universally shared, this raises the question whether neutrality is self-contradictory by posing a requirement it cannot fulfil in its own foundations. Neutralists are aware of this criticism and there are different strategies for showing that neutrality does not rely on the same kind of conceptions that it aims to rule out in political decision making. The general idea is that there is something like a thin theory of the good underlying the principles of justice which determine the legitimate sphere for pursuing comprehensive – thick – theories of the good.

The distinction between the right and the good thus emphasises that neutrality itself is a moral concept. The claim that the state ought to be neutral is based on a set of values and it therefore excludes conceptions denying its foundational values.

## 2. WHAT DOES IT MEAN FOR THE STATE TO BE NEUTRAL?

Neutrality as established so far requires that the state ought to be neutral between its citizens' permissible conceptions of the good life, but what it actually means *to be* neutral between these conceptions is still unclear. In this part I present the three basic types of neutrality most prominently discussed in the literature:

1. neutrality of impact,
2. neutrality as equality of opportunity, and
3. justificatory neutrality.<sup>22</sup>

The first two conceptions feature mostly as straw-men in criticisms of neutrality and I will show why they are considered problematic. The third, justificatory neutrality, is the conception usually defended by neutralists and it is often taken to be not just a way to realise neutrality but a definition of the concept. I will argue that while justificatory neutrality is necessary for a state to be neutral it is not sufficient.

### 2.1 Neutrality of Impact

According to the first understanding neutrality means ensuring that the third party's action (or inaction) has equal *impact* on the disputants. This view is expressed by Alan Montefiore: "to be neutral in any conflict is to do one's best to help or to hinder the various parties concerned in an equal degree." Montefiore developed this view in the context of political commitment at university. He claims that university teachers "have a duty to remain professionally disinterested and neutral in conflicts which do not touch on their university functions."<sup>23</sup> Teachers are not required to be neutral in all conflicts. They are not to be neutral with regard to scientific disputes in their area of expertise. Nor are they to "help and hinder to an equal degree" students who know the answer to a question or students who do not, or those who abide by university regulations and those who do not. However, in questions which do not touch their position as teachers – like most political or religious questions – they are to aim at having neutral impact on the disputing parties.

While there are significant differences between university and school, it seems clear that school teachers would face the same requirement if that was what neutrality required. However, it seems

unclear what equal impact means in the example of the question of whether teachers in a neutral state should be allowed to wear a Muslim headscarf. Wearing a headscarf can be seen as supporting the position that women *should* wear a headscarf. Not wearing a headscarf can be seen as promoting the idea that women *should not* wear a headscarf. Helping and hindering the different parties equally might then mean something ridiculous like putting the headscarf on and taking it off every other day.

Not only perfectionists but also most neutralists condemn this view as seriously flawed. There are two main problems:

1. in many circumstances it is impossible to help and hinder different parties to an equal degree,
2. it is an open question which is the relevant baseline in reference to which impact is to be equalized.

Montefiore is aware that applying this conception of neutrality – helping and hindering the parties concerned to an equal degree – can in some situations favour one party more than the other. If a father is neutral in a fight between his kids the weaker kid will lose. For Montefiore this is not a problem for neutrality, but rather raises the question if there is a neutral solution in all cases. He explains that unequal success is not problematic as such: if a referee applies the rules of the game neutrally the better team is more likely to win and that is exactly what a neutral referee aims at.<sup>24</sup> That is, even if, the same help and hindrance should have different consequences for the two parties, Montefiore does not consider this a general objection to his conception. What matters is a neutral attitude, that is, the intention to help and hinder parties to an equal degree. Furthermore, in some circumstances it might be possible to compensate the party disadvantaged by a particular option and thus to re-install equal impact. However, as Raz, who calls this conception “narrow political neutrality,”<sup>25</sup> points out, compensation is often costly and seems inappropriate in many cases: How should we compensate motor-sport enthusiasts for the inconvenience of speed limits? Why should, for example, extra hours of Formula 1 on television be a requirement for treating citizens fairly?<sup>26</sup>

The second problem addresses the question of the base lines to which impact is to be equalised. Is the default position wearing a headscarf or not wearing a headscarf? And why? If there is no independent justification why the current situation is morally relevant, neutrality understood as equality of impact protects an arbitrary status-quo.<sup>27</sup> In the case of the referee, equally helping and hindering the different parties (in applying the rules) makes sense because it is

assumed that the better team deserves to win. In the example of the father being neutral between his children it depends on the kind of the conflict whether neutrality as equal impact is fair. If they are testing who is stronger, there is a good reason to be neutral in this sense. If they are deciding who is to have a particular toy, neutrality as equal impact in a fist-fight between two unequally strong kids seems inappropriate.

## 2.2 Neutrality as Equality of Opportunity

Neutrality as equality of opportunity avoids the problem of arbitrary baselines by equalizing the *chances* to pursue one’s conception of the good life rather than the impact of actions or regulations. Raz describes this conception, which he calls “comprehensive political neutrality,”<sup>28</sup> in the following way:

One of the main goals of governmental authority, which is lexically prior to any other, is to ensure for all persons an equal ability to pursue in their lives and promote in their societies any ideal of the good of their choosing.<sup>29</sup>

With regards to the religious dress of teachers it is unclear what equal chances to live according to one’s conception of the good means. In one reading it is simple: everyone should have the same chance to become a teacher independent of their religious beliefs. This would favour allowing headscarves. On a different reading – if the conflict which requires neutrality is not the one between different teachers but between different pupils and parents wishing teachers to be particular role-models – it is much more difficult. There could be practical solutions to provide the same opportunity to be influenced by teachers being examples of religious and secular lifestyles – e.g. an equal number of teachers dressing according to different religious and non-religious conceptions of the good. However, such solutions seem silly and do not address the right problem. Opponents of headscarves in schools do not oppose the idea that children are *more* influenced by particular Muslim conceptions of the good than by other conceptions. They generally object to the idea that children are subjected to a teacher advertising a religious conception of life which they associate with the subjection of women. This objection is voiced on the general level too: liberals certainly do not want rapists and gardeners to enjoy equal opportunities to live the way they want.<sup>30</sup> However, the objection does not hold simpliciter: all sensible conceptions of neutralism presuppose the above discussed



distinction between the right (concerning matters of justice which the state ought to protect and enforce) and the good (concerning what makes individual lives worth living). Supporters of neutralism emphasise that the state ought to be neutral only between *permissible* conceptions of the good but not towards conceptions which themselves violate the rights of others.

The question, then, is whether wearing a headscarf while teaching is *unjust*. Opponents of headscarves often argue it is. They claim that the headscarf symbolises the subjection of women and is thus incompatible with the ideals of gender equality and equal citizenship.<sup>31</sup> If this is the case, then it can be argued that the state should not be neutral – according to any conception of neutrality – towards headscarves in any context. The state might have reason to *tolerate* headscarves in some contexts but no reason to be neutral, that is, no reason not to condemn and prohibit headscarves at least in some contexts. If the case is more complicated – as I believe it is – and wearing a headscarf by itself does not suggest the subjection of women the question remains, what it means to be neutral in this context.<sup>32</sup>

Understanding neutrality as equality of opportunity to live according to one's conception of the good is unhelpful to decide the question of teachers' headscarves because it is unclear what equal opportunity means from the point of view of pupils. If it meant that one ought to have an equal chance to have a teacher who is a role-model for the conception of the good one happens to follow, this seems to be a claim requiring much more justification than the reference to avoiding religious indoctrination which is usually seen as underlying this claim to neutrality.

Apart from this indication that neutrality understood as equality of opportunity sets high demands for any justification of neutrality, there are some fundamental problems with the conception. As Will Kymlicka argues, this understanding poses problems for both of the two liberal core values liberty and equality.<sup>33</sup>

Kymlicka argues that granting basic liberties necessarily means that some conceptions will have better and others worse chances to flourish. Individual liberties make it not only harder to pursue illiberal conceptions, but also are challenges for permissible conceptions which require the cooperation of others. Given the commitment to individual liberty it is easier to pursue the life of a hermit than it is to live according to a socialist conception of the good which requires a collective sharing the same ideas. Liberal freedoms are often understood to protect a marketplace of ideas where people are free to express, try-out, pursue and change different conceptions of the good

and where the success of any conception depends solely on what it offers to possible adherents. Equalising the opportunities to pursue any permissible conception of the good is incompatible with such a marketplace of ideas.

Furthermore, there is the problem of “expensive tastes” – equalising opportunities to pursue different conceptions of the good life might require subsidies for champagne lovers which are counter-intuitive. Neutrality on this understanding is thus not compatible with the core liberal concern that any distribution of goods by the state should either aim at an equal distribution or a distribution that advantages those who are otherwise bad or even worst off in society.<sup>34</sup>

Another objection raised against neutrality as equality of opportunity (as well as against other forms of egalitarianism) is the levelling down objection. If all that mattered were equal opportunities then it would be unproblematic to impose obstacles on conceptions of the good life easier to pursue to ensure that adherents of these conceptions do not have an advantage over people with more demanding conceptions of the good.

Most neutralists take these objections relating to freedom, equality and efficiency to be very serious and therefore do not think that this approach to neutrality is promising. They argue that the basic intuition of neutrality is

the view that the state should not reward or penalize particular conceptions of the good life, but, rather, should provide a neutral framework within which different and potentially conflicting conceptions of the good can be pursued.<sup>35</sup>

This intuition is less demanding than neutrality as equality of opportunity. It furthermore underwrites – rather than challenges – the general liberal concerns for the greatest extent of individual liberty and the equal distribution of essential goods. Raz attributes the conception of neutrality as equality of opportunity to Rawls and sees it expressed in his *A Theory of Justice*, where the principles of justice aim to counter morally arbitrary differences in the chances people have to live according to their preferred way of life.<sup>36</sup> However, it is clear that Rawls never intended it to be a general model of neutrality, let alone a principle to direct individual policy decisions. His principle about equal opportunity applies only to the basic structure of society. The distribution of primary goods, freedoms and rights ought to be such that it does not arbitrarily prevent some citizens from pursuing their permissible ways of life.

### 2.3 Justificatory Neutrality

Most neutralists consider neutrality not to entail a principle of equalizing (underlying the last two conceptions presented) but rather a principle of *equal treatment*. They object to conceptions of neutrality focusing on outcome but rather consider it to be a principle of procedural justice.<sup>37</sup> Adherents of justificatory neutrality argue that all outcome-directed conceptions – whether they are equalizing chances or impact – run into problems of feasibility, liberty, expensive tastes and arbitrary base-lines.<sup>38</sup> They argue furthermore that neutrality can only be defended conclusively as a principle of procedure rather than outcome. More precisely, they claim that neutrality relates to the motives of political action. The usual reading is that neutrality prohibits reference to particular conceptions of the good in the justification of political action. Bruce Ackerman's classic formulation of this conception states:

No reason is a good reason if it requires the power holder to assert:  
(a) that his conception of the good is better than that asserted by any of his fellow citizens, *or*  
(b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens.<sup>39</sup>

Since citizens in free democratic societies hold different conceptions of the good and since there is no neutral way to compare them, all considerations of the good are excluded from being reasons for political action. The state thus ought to limit its reasoning to the question what it means to treat each other fairly and release the question of what makes life worth living into the private domain.

Justificatory neutrality provides constraints on the way legislation concerning headscarves in schools is justified. However, in itself it gives no indication whether teachers should be allowed to wear them. Justificatory neutrality clearly prohibits legislation permitting Muslim headscarves in schools on the grounds that Allah commands it, or that women not wearing them are of easy virtue. It also prohibits legislation banning Muslim headscarves on the grounds that Islam is not the true faith, or that immigrant cultures do not deserve respect. Justificatory neutrality is, however, compatible with claiming that headscarves ought to be permitted for reasons of freedom of religion. And it is also compatible with arguing that headscarves ought to be banned because teachers as civil servants represent the secular state and thus should not promote in their appearance any particular religion.

The problem seems to be that there can be right-based reasons both for banning and for allowing the Muslim headscarf for teachers. However, I do not think this is the most serious problem of justificatory neutrality. In most contexts there are different legitimate reasons which need to be weighed against each other. To me, the main problem with justificatory neutrality is that there seems to be more to neutrality than justificatory neutrality. While justificatory neutrality is a necessary requirement for a neutral state, I do not believe it is sufficient. Neutrally justified regulations sometimes are not neutral enough. That is, while the reasoning behind a particular regulation does not refer to anything but principles of justice, its implementation might still show more or less concern for different people's interests.

An example might help to illustrate this point: let us assume that in a particular situation there are reasons for a school uniform which satisfy the requirements of justificatory neutrality. That is, they do not refer to aesthetic considerations but to the ideals of non-discrimination and equal standing in the class room which – under the given circumstances – cannot be promoted otherwise. The background could be, for example, a mixed group of very rich and very poor children. Let us assume furthermore that any kind of school uniform would solve the problem. Any kind of school uniform would thus be deemed neutral in the sense of being justified on neutral reasons. Now let us say that some of the children for some reason really hate the colour red. My claim is that deciding on a red school uniform would in some sense be non-neutral if a different colour could have been chosen had the school board bothered to ask whether anyone had any strong preferences rather than going with the favourite colour of the principal.

This seems trivial. Every school uniform will upset some children - a universally liked school uniform is pretty much impossible - and some of the kids will just have to bear wearing something they do not like. More generally, since justificatory neutrality refers to and protects the equal fundamental rights and liberties of all citizens, no neutrally justified regulation can be unjust to anyone. It can be inconvenient but since most regulations will be inconvenient to someone this seems regrettable but unproblematic. I argue that some inconveniences under some circumstances are morally relevant: inconveniences are morally problematic if

1. the inconvenience is avoidable (there are plenty of other colours and no other colour triggers such a strong aversion),

2. one group of citizens is significantly more often affected by inconveniences than others (the red-haters were already on the losing side when the colour of classroom decorations, gym balls and flower-beds was decided), and
3. those being inconvenienced by the particular implementation of a neutrally justified regulation did not have a fair chance to make their case and argue for a different implementation.

This is to say that what is non-neutral in my example is not that the children have to wear red (and be miserable) but that this disadvantage could easily have been avoided if their interests had been taken into consideration. That is, the regulation enforcing a red school uniform is non-neutral because it disadvantages a group of children for no good reason.

This section suggested that the conceptions of neutrality discussed in the literature all face some serious problems. Most neutralists do not attempt to defend the first two –outcome directed – conceptions but are only concerned with justificatory neutrality. I think that this step gives up too much of the intuitions underlying neutrality and that there is more to neutrality than justificatory neutrality. To illustrate this point further, I will show in the following section that some of the concerns expressed by neutrality of impact and neutrality as equality of opportunity are quite plausible in some limited circumstances. I will also claim that justificatory neutrality in the context of everyday decision making and especially in the context of the behaviour and appearance of state officials is insufficient to account for the intuitions underlying neutrality.

### 3. WHICH CONCEPTION OF NEUTRALITY IS APPROPRIATE IN WHICH CONTEXT?

A second question relating to the issue of what it means for the state to be neutral is the scope of the claim. This dimension is often neglected in discussions of neutrality, but the relevant context does make a big difference to the plausibility of different conceptions of neutrality. Is it enough for the state to be neutral between its citizens’ conceptions of the good on the level of the basic set-up of society? Should the state be neutral in small scale everyday decisions? How should the representatives of a neutral state handle their own opinions? Is there one conception of neutrality appropriate for all these areas of application or are there different understandings appropriate for different contexts? If so, what unites these different understandings?

In the following I would like to draw attention to the fact that neutrality in all circumstances entails an element of hands-off and an element of equality. However, how these elements are understood and weighed in each particular case does depend on the context. Generally, the “hands-off” element traces the intuition that there are some matters where the state has no business to get involved. The equality element refers to the idea that the state should show equal concern for people holding different conceptions of the good life. This concern for equality is the main motivation of the outcome focused conceptions of neutrality rejected above, while the ‘hands-off’ elements relates to justificatory neutrality. One of the flaws of the conceptions discussed above is that they aim to capture what the notion of neutrality encompasses while focusing exclusively on the one or the other element.

#### 3.1 Neutrality in Constitutional Essentials

The most uncontroversial application of the claim that the state ought to be neutral concerns the basic set-up of society, that is, constitutional essentials. As Rawls states liberal legitimacy requires that the principles guiding the basic structure of society are such that “all citizens as free and equal may reasonably be expected to endorse [them] in the light of principles and ideals acceptable to their common human reason.”<sup>40</sup> Justificatory neutrality spells out the preconditions of such acceptability: in justifying constitutional essentials the state must

1. not refer directly to any conception of the good life, and
2. not evaluate the relative moral value of different permissible competing conceptions of the good life.

That is, in determining and distributing basic goods the state must first of all refrain from relying on comprehensive conceptions of the good but is limited to considerations of the right. Rawls identifies the right with reasonable political conceptions of justice and thus as concerning fair terms of cooperation between free and equal citizens.<sup>41</sup> He claims that ensuring and maintaining fair terms of cooperation is prior to, and sets the limits of, what people may do to make their individual lives worth living.<sup>42</sup>

Secondly, even if some conceptions of the good are more successful in securing and promoting principles of the right, the state ought not give them special praise, encouragement or support at the level of constitutional essentials. Assuming that the duty of the state is to

ensure fair terms of cooperation between free and equal citizens, the constitution laying out the basic rights and liberties shaping these conditions is the wrong place for promoting attractive conceptions of the good life. As we will see in the next part, whether the state ought to refrain from such recommendations on all levels of political action is a more controversial matter.

Justificatory neutrality understood as a) banning comprehensive conceptions of the good as justifications for constitutional principles (element of hands-off) and b) not giving some conceptions of the good advantages over others (element of equality) seems to be the appropriate understanding of neutrality on this level.

However, neutrality as equality of opportunity too might be attractive on this level. Rawls introduces the claim that people should have equal opportunities to pursue their conception of the good life on the level of constitutional essentials. The basic structure of society should be set up in a way to ensure a) that people have “a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all,”<sup>43</sup> and b) that the possibility to live according to one’s conception of the good is not compromised by arbitrary factors like social standing.<sup>44</sup>

Both of these requirements of justice contain an element of equality as well as an element of “hands-off.” Basic liberties ensure an area of non-interference against both the state and other citizens and they are to be distributed equally. The second is concerned with a different form of “hands-off” or rather detachment. Detachment in this case is not a passive principle but rather an active one. It requires conscious effort to exclude irrelevant factors from influencing people’s ability to live the way they want. It thus aims at achieving some equal standing for all citizens.

While justificatory neutrality is mainly focused on setting requirements on how constitutional essentials are to be decided on, neutrality as equality of opportunity provides suggestions concerning the content of these basic principles. Discussing whether justificatory neutrality or neutrality as equal opportunity is a more convincing conception of neutrality might therefore be an unhelpful exercise because these conceptions have different areas of application and do not directly compete with each other but might rather complement each other (as they do in Rawls’ work).

### 3.2 *Neutrality in Everyday Political Decision-making*

Most neutralists do not distinguish between constitutional essentials and ordinary legislation. The requirements of liberal legitimacy apply on

the constitutional structure as well as on the level of “particular statutes and laws enacted in accordance with that structure”<sup>45</sup> and provide a good reason to implement justificatory neutrality on this level too.

However, applying justificatory neutrality on the level of small scale political decisions is controversial. This is the level where perfectionists are concerned about promoting obviously good and discouraging obviously bad conceptions of the good. And even if one rejects the idea of state support or discouragement for particular lifestyles and argues that the state should be concerned with justice and nothing else, there are political matters which simply cannot be decided in reference to some general principle of justice. Even when the state is restricted to matters of justice, it is concerned with more than constitutional essentials. It is also concerned with coordination: There are matters which do not themselves concern rights but need to be decided to achieve the comprehensive and non-ambiguous distribution of rights and duties necessary for cooperation. However, there often are different ways in which these matters can be decided. If it is possible to make a rights-based argument for a public weekly day of rest, for example, then it is necessary to decide on one day but there is no justice-based reason for any particular day. It seems wasteful and even inappropriate to throw a dice (or to resort to any other strictly “neutral” procedure) when admitting arguments from conceptions of the good allows people to explain and defend their interests in these matters. Especially, since such a procedure would make many happy (this is assuming that the decision is made by majority vote) and imposes just an inconvenience (being outvoted in a non-fundamental matter) on others. Should really all considerations referring to questions of the good life be disregarded even on the lowest level of everyday politics? Rawls himself suggests that while the requirements of public reasons are essential in fundamental matters these restrictions may not apply with regard to less basic matters or not in the same way or not so strictly.<sup>46</sup> De Marneffe even claims that the justification of neutrality – in his understanding the claim to liberal legitimacy – only warrants neutrality in matters concerning basic interests. Concerning non-basic interests he sees no reason why interests that do not require restrictions of freedom should take priority over interests that do.<sup>47</sup>

It thus seems as if justificatory neutrality is too harsh a criterion for everyday politics. On the other hand it might seem that just referring to justificatory neutrality in these matters is not enough to accommodate the ideals underlying neutrality. Are substantial inconveniences entirely unproblematic just because the measure bringing them

about refers to neutral reasons? In his evaluation of standards and levels of religious freedom, W. Cole Durham Jr. points out:

“Many of the major religious persecutions of the last two centuries have been carried out under the guise of formally general and neutral laws. All that is necessary is to pass laws that prohibit everyone in the population from engaging in conduct that is only of concern to a particular religious group in order to pass a law that will fulfil the rule of law requirement but still encroach on religious liberty. Note that often, this will happen not because of intentional animus against a particular group, but because those passing the law are unaware of its adverse impact on a lesser known religious group.”<sup>48</sup>

This is the context where it becomes clear that there might be more to neutrality than justificatory neutrality. If it is impossible for the state *not* to influence its citizens’ ability to live according to their conceptions of the good life – even by restricting itself to neutral justifications – maybe the state needs to take additional measures to ensure that everyone is treated fairly. One way to account for this intuition are the attempts to equalise either the impact of regulations on different life-styles or the opportunities to pursue one’s conception of the good. However, as discussed above, such outcome focused conceptions of neutrality are beset with problems.<sup>49</sup> In the context of discussions on accommodating cultural minorities there are some recent attempts to develop conceptions of procedural justice which put stronger emphasis on equal attention to different interests than justificatory neutrality does while avoiding the problems of outcome related conceptions of neutrality. I will discuss two such conceptions here and suggest that while they by themselves are not satisfactory either, they point in the direction of an understanding of neutrality that accounts for neutrality’s concern for “hands-off” as well as for its concern for equality.

### 3.2 Neutrality as respectful non-identification

Heiner Bielefeld argues for a conception of neutrality as “respectful non-identification” when discussing how to accommodate Muslim immigrants into the German state, which aims to be secular but is nonetheless shaped by its Christian heritage.<sup>50</sup> In his view neutrality cannot be discussed and implemented independent of freedom of religion and concern for the prerequisites of religious life-styles. He thus claims that to be neutral between different religions the state has to refrain from close institutional links to organised religions and yet be

aware of and respectful towards the different religious interests. This is necessary to avoid unknowingly disadvantaging some religions while unconsciously privileging others or non-religious life-styles. Since his specific concern is to facilitate integration by a reconsidered conception of freedom of religion, he does not expand on this idea in general arguments. He rather suggests that consultations with different religious communities concerning their interests with regard to political decisions are important to ensure that freedom of religion is not a principle of mere toleration but of respect for people’s choices.

However, his argument has a wider application: neutrality as respectful non-identification claims that the state has to be impartial in conflicts regarding the good life and that – in order to be truly impartial – it has to be conscious of the various needs of the different parties and of how its non-essential decisions influence their respective chances to flourish.<sup>51</sup> Unlike in the outcome related conceptions of neutrality this conception does not aim at a particular neutral outcome but rather claims that no outcome can be neutral unless all relevant considerations have entered the debate and have had a fair chance to influence public opinion.<sup>52,53</sup>

#### 3.2.1 Relational Neutrality

Veit Bader develops a conception called “relational neutrality” based on a balancing approach to neutrality. The different parties concerned ought all to be heard and the aim is a set of compromises achieving fairly distributed accommodation.<sup>54</sup>

“Relational neutrality replaced the idea of difference-blindness by difference-sensitivity. Only if we take into account actual differences and inequalities between religious groups and organizations can we hope that institutions and policies will, in the long run, become more neutral in relation to these religions and to non-religious people as well.”<sup>55</sup>

While Bielefeld aims at a fair distribution of unavoidable burdens, Bader aims also at balanced support for the different cultural parties. Relational neutrality is part of his reply to what he regards the most severe flaws in the way current liberal political theory approaches the challenges of pluralism. He claims that the usually invoked understandings of neutrality and public reason are problematic mainly for two reasons: a) because they favor secular lifestyles over religious ones, and b) because seemingly neutral institutions/reasons hide the fact that public culture is predominantly shaped by the majority culture while at the same time preventing minority cultures to even voice their concerns.<sup>56</sup>

Bader's approach emphasises the equality element of neutrality over the "hands-off" element. In fact, the main thrust of his argument is against "hands-off" both in the sense of (complete) separation of institutionalised religion and state and in the sense of excluding religious reasons from public arguments. Instead he proposes "priority for democracy" in the sense of a culture of debate which focuses on (concrete) rights rather than on (abstract) principles justifying them and thus allows everyone to justify the relevant rights within their own religious or secular foundational framework.

I do not think that Bader can dispense with the "hands-off" element of neutrality: to reach fair compromise some issues have to be taken off the agenda. Liberal legitimacy requires that citizens must not be coerced to abide by laws based on principles they cannot reasonably be expected to accept. *What* can be legitimate matters for state action thus ought to be decided with reference only to the requirements of fair terms of cooperation between free and equal citizens in modern constitutional democracies. The conceptions of justice appropriate to define these conditions are concerned with what political freedom, political equality, political fairness and democracy require and entail.

Nonetheless Bielefeld's and Bader's contributions contain an important insight. Not everything can be decided with reference to neutral political conceptions of the right: the question of *how* freedom and equality are to be realised in this society depends on the features of this specific society and thus has to take into account the different cultural interests within this society and balance them fairly against each other. This requires a public debate where those interests are voiced and where the voices of minorities are ensured a fair chance of being heard too. I therefore claim that the *justification* of state regulations ought to fulfil the requirements of justificatory neutrality, but that their *institutionalisation* and realisation needs to take seriously the idea of equal concern for people holding different conceptions of the good. That is, while considerations relating to comprehensive conceptions of the good life must not provide the reason for having a particular regulation, such considerations may inform the way the regulation is implemented without breaching neutrality, providing that all parties concerned had a fair opportunity to make their interests heard.<sup>57</sup>

### 3.2.2 Neutral behaviour of state officials

There is one more area of application for claims about neutrality which is prominent in actual political debate but underrepresented in

the philosophical literature: What does it mean for a representative of the state to represent the neutral state? I started this paper with the example of the debates on whether teachers should be allowed to wear headscarves in schools. I argued that the different conceptions of neutrality mainly discussed in the philosophical literature – neutrality of impact, neutrality as equality of opportunity, and justificatory neutrality – are unhelpful in determining what neutrality requires in this case. Now, I will show that neutrality understood as a twofold concept including an element of "hands-off" as well as a concern for equality provides a better foundation to discuss what neutrality requires with regard to representatives of the neutral state.

One understanding of neutrality is uncontroversial when it comes to discussing requirements for representing the neutral state: when interpreting and implementing the regulations of the state and exercising power, state officials ought to treat all citizens as equals, they ought to be *impartial*. Personal conviction must not influence teachers or policemen or social aid administrators or tax officials in the way they deal with those whom they encounter in their official capacity.<sup>58</sup>

The equality element of neutrality is apparent in this context but the "hands-off" element matters too. In most contexts it is inappropriate for state officials to make recommendations as to how one should live one's life or which religions, ideologies, and cultures are true or morally valuable. That is, administrators of social welfare and those associated with the judicial system ought not only apply the relevant rules impartially but also refrain from expressing their personal judgments on the permissible lifestyle-choices of the citizens before them – even if they consider them blatantly wrong. There are several strategies to defend the claim that state officials ought to refrain from expressing their own conceptions of the good. Some argue that people might be intimidated by the official position and thus unduly influenced. Others claim that it is disrespectful to tell people that they made the wrong choices when one has no claim to superior knowledge.

Thus in the context of school and education – where the aim is not just to provide information but also orientation and guidance – there has to be a clear distinction between the values which ought to be taught according to the syllabus (which values can be part of such a public school syllabus is a different difficult debate) and the personal convictions of the teacher. The requirement for state officials to refrain from voicing their own opinions in their professional capacity is particularly strong for teachers because they are confronted with suggestible children. At the same time it is particularly complex since

teachers cannot always avoid commenting on controversial matters. Blatantly biased and one-sided presentations are obviously inappropriate, but refraining from revealing one's own convictions seems impossible as well as unhelpful. Debates on neutral education often refer to neutral procedures of discussion and argue that teachers ought to admit their bias and present the arguments on which they base their decision on as well as the relevant counterexamples and encourage students to engage in their own evaluation of the reasons involved.<sup>59</sup> This is the context in which Montefiore developed his conception of neutrality of impact: lecturers at universities ought to take measures to restrict their personal bias in presenting controversial debates to ensure that students are not unduly influenced by the opinion of an authority figure but make up their own minds. These procedures are designed for older students; on the elementary school level there is much emphasis on not discussing too controversial and too complicated issues. But many questions on what is an appropriately neutral behaviour for teachers are still unsolved.

In dealing with young pupils – and generally when dealing with people who are easily influenced and find it difficult to distinguish between the individual and its official role – the claim to impartiality is even more demanding than refraining from voicing personal opinions. Even passive statements of loyalty or belonging to a particular religion or ideology in the dress and appearance of state officials can be problematic. The question of whether a head-scarf wearing teacher influences the way pupils conceive Islamic identities is one which ought to be raised even if one is ultimately convinced that children have to learn to cope with a plurality of different life choices.

But not only the appearance of teachers can be seen as problematic. Even the appearance of other state officials (or in the case of Turkish Prime Minister Erdogan and Turkish President Gül, the appearance of their wives) has recently gained much attention. In the case of the headscarf-wearing teachers opponents mostly rely on arguments emphasising the danger that children might be unduly influenced by this non-verbal statement to support one rather than another interpretation of Islam.<sup>60</sup> In the case of politicians and administrators opponents claim that (non-verbally) advertising one's partiality to a particular conception of the good life raises questions of whether the claims of these officials to impartiality are convincing. It is argued that state officials ought to *appear* neutral to reassure citizens that they are indeed treated impartially (in the sense of seeing justice being done.)

However, while the requirements of neutral appearance (verbally and

non-verbally) seem convincing for people holding particular offices or within the administration of the state, they cannot be expected to hold in full for politicians in election campaigns, where they present their views on how the country could be rendered better or more just and on what convictions their ideas are based.

The question what neutrality requires from representatives of the neutral state is thus very complex. Understanding neutrality as a two-fold concept helps to systematise rather than to solve the problems. The “hands-off” intuition – suggesting that there are things the state should not get involved in – suggests that representatives of the state should not actively or passively promote particular lifestyles. The equality intuition – aiming at equal citizenship – implies that the representatives of the state should represent the diversity of lifestyles within the state. No one should be disadvantaged in becoming a representative of the state; therefore different needs, like particular dress-codes, need to be accommodated. The two elements thus seem to work against each other in this context and any solution will fulfil the one on the cost of the other. Which element of neutrality is weightier in a particular situation depends on whether it is a situation that stresses the freedom or the equality of citizens.

#### 4. WHAT UNITES THE DIFFERENT CONCEPTIONS OF NEUTRALITY?

In the last section I differentiated between three different contexts of political neutrality concerning citizen's conceptions of the good life a) constitutional essentials, b) political decisions and regulations, and c) the behaviour of state representatives. I suggested that different understandings of neutrality discussed in the literature – neutrality of impact, neutrality as equality of opportunity and justificatory neutrality – are more or less appropriate in these different contexts and that disregarding the context therefore confuses the debate.

I also suggested that all concerns relating to neutrality are either explained in terms of equality or in terms of some form of detachment and in most cases in terms of both, even though one might be more prominent than the other. The concept of neutrality overarching all the different conceptions thus includes

1. an element of “hands-off” tracing the intuition that there are matters the state has no business to get involved in, and
2. an element of equality suggesting that the state should give equal concern to the interests of its different citizens.

How these two elements are interpreted and weighed against each

other depends on the context of the specific claims to neutrality. In his critique of neutralism Raz distinguishes between two similar elements, which he calls a) the exclusion of ideals, and b) neutral political concern.<sup>61</sup> He claims that – even though most neutralists do not differentiate between them – they are two different (and possibly even conflicting) approaches to anti-perfectionism. By anti-perfectionism he means the principle “that implementation and promotion of ideals of the good life, though worthy in themselves, are not a legitimate matter for government action.”<sup>62</sup> Neutral political concern according to Raz entails treating valid and invalid conceptions of the good equally: the principle “commands the government to make sure that its actions do not help acceptable ideals more than unacceptable ones, to see to it that its actions will not hinder the cause of false ideals more than they do that of true ones.”<sup>63</sup> The exclusion of ideals on the other hand means according to Raz “that the fact that some conception of the good is true or valid or sound or reasonable, etc., should never serve as a reason for any political action. Nor should the fact that a conception of the good is false, invalid, unsound, unreasonable, etc. be allowed to be a reason for a political action.”<sup>64, 65</sup> He discusses and dismisses the two approaches separately.<sup>66</sup>

I agree with Raz that neutral political concern (the equality element) and the exclusion of ideals (the hands-off element) are different criteria. However, I claim that both elements are necessary for a full account of neutrality in any given situation.<sup>67</sup> On the one hand, the equality element only makes sense if some topics are taken off the agenda before starting to equalize. Excluding ideals from entering into political debate, on the other hand, is neither possible in all cases nor always desirable and has to be complemented by a concern for equality in the sense of equal concern for different lifestyles. While the two elements are closely connected, neither of them can be reduced to a concern falling under the other approach. They thus require separate justification.

Unlike Raz I think they can both be defended. This defence requires a different article; for now I can only suggest that Rawls’ conceptions of citizens as free and equal provides a suitable foundation for neutrality as a two-fold concept. Because citizens are understood as free, that is, as persons equipped with the two moral powers to form, revise and pursue a conception of justice as well as a conception of the good the state must not coerce them to adhere to regulations the principles of which they cannot be reasonably be expected to accept. Since the only principles citizens can reasonably be expected to accept relate to principles describing fair terms of cooperation between cit-

izens understood as free and equal persons equipped with two moral powers, the state may only refer to political conceptions of justice but must abstain from relying on comprehensive conceptions of the good life. Because citizens are understood as equal in the sense of possessing the two moral powers as well as the powers of reason to the minimal degree required to be fully cooperating members of society, they are to be treated as equals and shown equal respect and concern for their different life choices.



## NOTES

- 1 For helpful comments and criticism I would like to thank Daniel McDermott, G.A. Cohen and the reviewers of *Les Ateliers de l'éthique*. Earlier versions and arguments from this paper were presented at the conferences *Liberal Neutrality - A Re-Evaluation* (Montréal), *the Society for Applied Philosophy Annual Conference 2008* (Manchester), *Values and Diversity - Culture, Religion, and the Law in Contemporary Europe* (Pilsen), and *Rethinking the European Union* (Edinburgh); I am grateful to all participants for the helpful discussions as well as to Keble College and the Department for Politics and International Relations at the University of Oxford to financial support to attend these conferences.
- 2 Rawls, John, *Political Liberalism*, New York: Columbia University Press, 1996, 191.
- 3 BVerfG, 2BvR 1436/02 of 24.09.2003.
- 4 2 BvR 1436/02, 70.
- 5 2 BvR 1436/02, 4.
- 6 This point was discussed in the dissenting opinion of the judges Jentsch, Di Fabio and Mellinshoff, 2 BvR 1436/02, 114f.
- 7 See Goerlich, Helmut, "Distanz Und Neutralität Im Lehrberuf - Zum Kopftuch Und Anderen Religiösen Symbolen," *Neue Juristische Wochenschrift* Heft 40, 1999, Steiger, Heinhard, "Der Streit Um Das Kopftuch - Plädoyer Für Eine Aktive Neutralität," *MenschenRechtsMagazin* 9, no. 2, 2004, and Joppke, Christian, "State Neutrality and Islamic Headscarf Laws in France and Germany," *Theory and Society* 36, no. 4, 2007.
- 8 See in particular the debates in France and Turkey where laicism is attacked as limiting freedom of religion and as being non-neutral between religious and non-religious lifestyles.
- 9 The traditional German understanding of neutrality consisted in balancing the interests of Catholics and Protestants and was very accommodating. The state currently assists in collecting the "membership fees" for established churches and the constitution entails a right for recognized churches to provide religious education in public schools. This German balancing approach to neutrality always neglected minorities like Jews or Atheists. While it could theoretically have been extended to consider minorities too, it is doubtful whether such an enterprise is feasible nowadays – where the sheer number of lifestyles increased radically – unless some issues are taken off the agenda from the very beginning. On this concept of "open neutrality" see Joppke, "State Neutrality and Islamic Headscarf Laws in France and Germany."
- 10 The growing importance of multiculturalist thinking means that minorities demand recognition rather than mere toleration for their specific ways of life.
- 11 See Waldron, Jeremy, "Legislation and Moral Neutrality," in Goodin, Robert E. and Andrew Reeve, eds., *Liberal Neutrality*, London/ New York, Routledge, 1989, p. 63.
- 12 There is one relevant difference between the cases: in the context of international justice all three parties are states, while in the context of neutrality within the state the neutral party is a/the state while the conflicting parties are citizens holding different conceptions of the good life. Nonetheless, both of Waldron's requirements apply.
- 13 There is a historical link between toleration and neutrality. John Locke's *A Letter Concerning Toleration* provides first arguments why there are areas of life where the state must not get involved in. See Locke, John, "A Letter Concerning Toleration," New York: Prometheus Books, 1990. These arguments are limited in scope but the logic developed in them was later used to justify a more extended application consisting not only in limited religious toleration but neutrality concerning questions of the good life more generally.
- 14 This impact used to be rather great in the case of the edicts of toleration in European history where governments granted toleration in the sense of limited freedom of religion from a position of superior power. They could – and often did – also choose religious persecution instead. The impact of non-toleration within the constraints of a liberal constitution is much less severe. Still, state propaganda in favour or in opposition to particular ways of life generally has an impact on whether people chose to live this way rather than that.
- 15 It is also possible to be neutral towards something we neither agree nor disagree with, but toleration requires a distinctive lack of support for whatever is tolerated. We do not tolerate something that we think is likely to be perfectly unproblematic from our point of view. Rather if we say we *tolerate* something we refer to something we actually object to or something we do not think worthy of our attempt to figure out whether or not we agree with it.
- 16 See Raz, Joseph, *The Morality of Freedom*, Oxford, Clarendon Press, 1986 and Sher, George, *Beyond Neutrality*, Cambridge, Cambridge University Press, 1996.
- 17 Dworkin, Ronald, "Liberalism," in Dworkin, Ronald, ed., *A Matter of Principle*, Oxford, Clarendon Press, 1985, p. 191.
- 18 See Larmore, Charles, "Right and Good," in *The Routledge Encyclopedia of Philosophy (online edition)*, ed. Edward Craig, 1998 and Ross, W.D., *The Right and the Good*, new ed., Oxford, Clarendon Press, 2002.
- 19 Jones, Peter, "The Ideal of the Neutral State," in Goodin, Robert E. and Andrew Reeve, eds., *Liberal Neutrality*, London and New York, Routledge, 1989, p. 28.
- 20 See Rawls, *Political Liberalism*, p. 174-176.
- 21 See Rawls, John *A Theory of Justice*, rev. ed., Cambridge MA, Harvard University Press, 1999, p. 27f. and Rawls, *Political Liberalism*, p. 173-176.
- 22 There are different ways to characterise and group different conceptions of neutrality. The distinction is often drawn in view of the focus on outcomes, intention or procedure, but I think this distinction is less clear. As the discussion will show neutrality of impact and equality of opportunity are outcome directed, in the sense of *intending* to bring about a particular kind of equality. Justificatory neutrality, by contrasts, understands is a procedure of equal treatment. Again what matters is not to actually achieve treating the different parties equally but rather the *intention* to do so. I therefore follow Raz in distinguishing the types of neutrality by their understanding of what kind of equality is required. See Raz, *The Morality of Freedom*, p. 114.
- 23 Montefiore, Alan, *Neutrality and Impartiality*, Cambridge: Cambridge University Press, 1975, p. 44.
- 24 *Ibid*, p. 9-10.
- 25 Raz, *The Morality of Freedom*, p. 117.
- 26 Raz' own example of compensating wanna-be-rapists for the inconvenience of prohibiting their choice of pastime is more problematic because this conception

- of the good life is not permissible and thus does not deserve neutral concern at all. See *Ibid*, 115f.
- 27 Joseph Raz elaborates this argument in *Ibid*, p. 121f. See also Waldron, "Legislation and Moral Neutrality", p. 67, Jones, "The Ideal of the Neutral State", p. 14-17, Dworkin, Ronald, "What Is Equality? Part 1: Equality of Welfare," *Philosophy and Public Affairs* 10, no. 3, 1981, Ackerman, Bruce, *Social Justice in the Liberal State*, New Haven, Conn., Yale University Press, 1980, p. 45-53, Rawls, John, "Fairness to Goodness," *The Philosophical Review* 84, no. 4, 1975, p. 551-554.
- 28 Raz, *The Morality of Freedom*, p. 117.
- 29 *Ibid*, p. 115.
- 30 Raz refers to a similar example to undermine the plausibility of neutralism. See *Ibid*, p. 115.
- 31 See, for example, Ates, Seyran, *Der Multikulti-Irrtum*, Berlin, Ullstein, 2007, p. 119-138 and Shadid, Wasif and P. Sjoerd van Koningsveld, "Muslim Dress in Europe: Debates on the Headscarf," *Journal of Islamic Studies* 16, no. 1, 2005, p. 45f.
- 32 The religious reasoning for the headscarf seems linked to a specific understanding of the relations between the sexes: "A woman wearing Islamic modest dress is considered to "wear hijab." In Arabic she is a muhajjaba, which denotes that by doing so, she obeys the religious rules of decency and separation between the sexes, especially in the public sphere." (Shadid and van Koningsveld, "Muslim Dress in Europe: Debates on the Headscarf.", p. 36) This conception of modesty is foreign to modern liberalism but does not necessarily translate into a claim about the subordination of women. There also is an increasing number of Muslim women in Western society who do not necessarily share this understanding of modesty but rather wear the headscarf to affirm their religious identity in opposition to the dominant mainstream culture. (Shadid and van Koningsveld, "Muslim Dress in Europe: Debates on the Headscarf.", p. 47f.)
- 33 See Kymlicka, Will "Liberal Individualism and Liberal Neutrality," *Ethics* 99, no. 4, 1989, p. 883-886.
- 34 Neutrality understood as equality of opportunity links neutrality to discussions of egalitarianism. See most prominently how Dworkin's discussion of neutrality interlinks with his conception of luck egalitarianism in Dworkin, "What Is Equality? Part 1: Equality of Welfare.", Dworkin, Ronald, "What Is Equality? Part 2: Equality of Resources," *Philosophy and Public Affairs* 10, no. 4, 1981 and Dworkin, Ronald, "Is There a Right to Pornography?," *Oxford Journal of Legal Studies* 1, 1982.
- 35 Kymlicka, "Liberal Individualism and Liberal Neutrality," p. 886.
- 36 See Raz, *The Morality of Freedom*, p. 117f. and also Rawls, John, *A Theory of Justice*, Cambridge, Mass.: Harvard University Press, 1971, p. 13f. and 62f.
- 37 Richard Arneson, William Galston and Charles Larmore call this conception "neutrality of procedure," Kymlicka calls it "justificatory neutrality." See Arneson, Richard, "Neutrality and Utility," *Canadian Journal of Philosophy* 20, no. 2, 1990, 218f., Galston, William A., *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State*, Cambridge, Cambridge University Press, 1991, p. 100, Larmore, Charles, *Patterns of Moral Complexity*, Cambridge, Cambridge University Press, 1987, p. 44 and Kymlicka, "Liberal Individualism and Liberal Neutrality," p. 884.
- 38 See, for example, Waldron, "Legislation and Moral Neutrality," p. 67. In the case of equal opportunities it is not really a base-line that is disputed but rather different possible levels of equal opportunities. The question is whether an overall worse but equal distribution or an overall better but unequal distribution satisfies the motivations for equality/neutrality better. The literature on egalitarianism considers this question under the heading of "levelling down objection." See, for example, Derek Parfit, "Equality and Priority," *Ratio* 10, 1997.
- 39 Ackerman, *Social Justice in the Liberal State*, p. 11.
- 40 Rawls, *Political Liberalism*, p. 137.
- 41 See *Ibid*, p. 174-176.
- 42 See Rawls, *A Theory of Justice*, p. 27f. and Rawls, *Political Liberalism*, p. 173-176.
- 43 Rawls, *Political Liberalism*, p. 291.
- 44 See *Ibid*, p. 63.
- 45 See Rawls, *Political Liberalism*, p. xlvi.
- 46 See *Ibid*, p. 214f.
- 47 See De Marneffe, Peter, "Liberalism, Liberty, and Neutrality," *Philosophy and Public Affairs* 19, no. 3, 1990, p. 259-262.
- 48 Durham, W. Cole, "Perspectives on Religious Liberty: A Comparative Framework," in Van der Vyver, Johan D. and John Witte, Jr., eds., *Religious Human Rights in Global Perspective*, The Hague/ Boston/ London, Kluwer Law International, 1996, p. 33.
- 49 It is on this level of individual political decisions where the objections against neutrality of outcome and neutrality as equality of opportunity relating to levelling down and arbitrary standards apply with full force.
- 50 See Bielefeldt, Heiner, *Muslims Im Säkularen Rechtsstaat. Integrationschancen Durch Religionsfreiheit*, Bielefeld: transcript Verlag, 2003, p. 16f.
- 51 The desire to get their voices heard and their interests taken into consideration motivates all kinds of life-style associations to demand a "politics of recognition" rather than mere toleration from the state. A prominent example are the gay and lesbian movements who demand that their identity is acknowledged and their interests taken into account when shaping policies. They demand for example that the traditional regulations concerning recognized partnerships/marriage are broadened to accommodate their interests too.
- 52 For similar claims that liberal equality requires "that politics must be organized so that it can be a theatre of moral argument and commitment based in the responsibilities of community rather than only another market for discovering passive revealed preferences" see Dworkin, Ronald, "Foundations of Liberal Equality," *The Tanner Lectures of Human Values* IX, 1989, p. 38 and Dworkin, Ronald, "Liberal Community," *California Law Review* 77, no. 3, 1989.
- 53 For the related claim that neutrality is not the same as indifference but an expression of respect for individual life-choices see Goodin, Robert E. and Andrew Reeve, "Do Neutral Institutions Add up to a Neutral State," in Goodin, Robert E. and Andrew Reeve, eds., *Liberal Neutrality*, London/New York, Routledge, 1998, p. 201f. They argue that neutrality is thus not simply a constraint of gov-

- ernment action but rather a teleological concern aiming at a political system which overall does not favour any conception of the good over another. This is compatible with accounting for interests stemming from conceptions of the good as long as these elements of special concern balance each other out in the overall evaluation. The problem of this conception is, however, that it once again focuses too strongly on outcome rather than procedures.
- 54 In his work on religious exemptions in a society of equals Stuart White proposes a similar approach for dealing with the challenge of achieving a fair distribution of exemptions from general laws and thus to allow some accommodation of particular religious interests without undermining the equal standing of citizens in society. He does not use the language of neutrality, but his approach can be seen as another way to do justice of the concern for equality underlying liberal neutrality. See White, Stuart, "Religious Exemptionism in a Society of Equals," *Ninth Annual Graduate Conference in Political Theory*, University of Warwick, 2007.
- 55 Bader, Veit, "Religious Pluralism: Secularism or Priority for Democracy?," *Political Theory* 27, no. 5, 1999, p. 608.
- 56 Bader lists a total of eight objections to standard liberalism. The two I mention here roughly summarize his objections iv to viii (for a) and i to iii (for b). For more details see Ibid, 598-603. For a similar critique from a multicultural perspective see also Modood, Tariq, "Multiculturalism, Secularism and the State," *Critical Review of International Social and Political Philosophy (CRISPP)* 1, no. 3, 1998.
- 57 Considering conceptions of the good in the way state regulations are implemented does not mean that the resulting implementation is convenient for everyone but only that those who have a stake in the particulars of the implementation had a fair chance to argue for a more convenient solution. This will avoid implementations that needlessly inconvenience some people but since most implementations will necessarily inconvenience some people there will always be a trade-off between the interests of different citizens. Considering conceptions of the good in the implementation of state regulations is a fundamentally different approach to what Brian Barry calls the 'rule and exemption' approach (See Barry, *Culture and Equality*, Oxford, Polity Press, 2001, p. 40). The aim is using discourse referring to conceptions of the good to find universally valid regulations which are more convenient for those affected rather than to exempt particular people from particularly burdensome regulations.
- 58 The requirement of impartiality does not automatically lead to the claim that state officials must not treat citizens with different conceptions of the good differently: it could be state policy to treat Christians different from Muslims. This would obviously be a non-neutral regulation. But the officials still could execute it impartially, that is, without reference to his personal convictions.
- 59 See for example Gardner, Peter, "Neutrality in Education," in Goodin, Robert E. and Andrew Reeve, eds., *Liberal Neutrality*, London/ New York, Routledge, 1998, p. 126.
- 60 While it seems fairly uncontroversial to minimize undue influence on children by banning teachers from wearing party emblems and other symbols advertising particular (controversial) lifestyles, the banning of religiously obligatory clothing encounters opposition from arguments based on free exercise of religion. Even the guarantee of freedom of religion is not unlimited and restricted by principles of justice and especially the harm principle. But while religious preaching clashes with the right to be free from religious indoctrination, which itself is part of freedom of religion, having to see a teacher wearing a headscarf might not amount to a sufficient level of harm to justify the limitation of the teacher's right to live according to her beliefs. Furthermore, similar arguments can also be made based for non-religious ideologies and the status of religious claims might be less special than usually thought. It might therefore be equally problematic to ban teachers from displaying their non-religious loyalties.
- 61 See Raz, *The Morality of Freedom*, p. 107f.
- 62 Ibid, p. 110.
- 63 Ibid, p. 111.
- 64 Ibid, p. 136.
- 65 Raz presumption in both cases is that it is possible to clearly identify some conceptions of the good as true and valid (e.g. being a truly caring and competent nurse), whereas others are objectively bad and mistaken (consuming destructive drugs). He rightly claims that neutralists prevent themselves from supporting Maria Teresa just as well as from stopping alcoholics from ruining their own lives. And he rightly claims that neutralists prevent themselves from basing laws on the true and valuable idea of compassion nor may they outlaw meanness. However, since Raz rejects the distinction between the right and the good neutralists rely on, the consequences of 'neutral political concern' and the 'exclusion of ideas' are more radical and unattractive than the consequences of the concern for 'hands-off' and equality. He discusses, for example, that neutral political concern ought to take the interests of would-be rapists into account. See Raz, *The Morality of Freedom*, p. 115.
- 66 His rejection of neutral political concern is based on the problems associated with egalitarianism mentioned above (expensive tastes, levelling down, arbitrary standards etc.). His argument against the exclusion of ideas is based a) on the problem of distinguishing the right and the good and the question of whether neutrality is a coherent notion and b) on a more general attack on the connection between statehood and coercion underlying the common justifications of neutrality. See Ibid, p.110-162.
- 67 I use the term neutrality for the overarching theme, which Raz calls anti-perfectionism.