Politics of Religious Diversity: toleration, religious freedom, and visibility of religion in public space

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This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

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Summary

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Mariëtta D.C. van der Tol

In France, Germany and the Netherlands, a mix of secularisation, privatisation of religion, and immigration concerns have increased social and political anxiety about the visibility of religion and religious diversity in public space. Visibility in public space is a measure of sociability: expressions of identity in public space attest to a public recognition as well as integration of this identity into cultural transcendences. This visibility is historically intertwined with genealogies of early modern toleration (ca 1500-1789). This thesis compares trajectories in the development of toleration and religious freedom in France, Germany, and the Netherlands, arguing that common frames of reference to toleration – truth, outward unity, public order, economic benefit and trust – have transformed into substrata of constitutionalism. Is it possible to fully disentangle toleration from the structures of constitutional law?

Toleration emerged in conjugation with the political imaginary of the *corpus christianum,* which relegated minorities primarily to private spaces, based on the assumption that one could separate spaces and personae. This thesis contends that the political imaginary of the nation replaced the imaginary of the *corpus christianum,* and that constitutionalisation was part of a new political order which constructed a different yet similar oneness of territory, people, and teleology. This nexus creates new categories of othering inside and outside the nation based on religion, race, and origin, or combinations of those.

These new categories of othering obscure that belonging is about more than integration and outward conformity alone, and that immigrants still face structural racism, even when they have fully "integrated". Moreover, the identification of common space with a shared political identity renders minorities vulnerable to political interpretations of public order in the context of the law. Parliamentary documentation and court cases on the full face veil, the burkini, and the hijab, demonstrate this vulnerability, in particular where religious otherness intersects with race and gender.

To my dear "beppe" Door

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1. Introduction

What does it mean to tolerate religious diversity in a post-Christian and post-secular state? In many European countries, political conflicts over religious diversity concentrate on the visibility of religion in public space. Sometimes these conflicts revolve around legacies of Christendom in public space, but more often, these concern the relationship between Muslim identities and the nation state. This thesis addresses the urgent need in the field of political and constitutional theory to better understand the complex relationship between toleration, constitutionalism, and concepts of belonging in the nation state. This thesis contends that the concept of toleration is incompatible with the project of the nation state; yet that sensibilities of toleration form substrata of constitutional law, and that therefore, constitutional law can be vulnerable to political intolerance.

The concept of toleration is primarily located in the early modern period (ca 1500-1789), when social, religious, and political disintegration challenged the political imaginary of the one body of Christ, the *corpus christianum.* The political imaginary of the *corpus christianum* symbolized a sacred interconnectedness of territory, people, and teleology, or, the interconnectedness of political, social, and religious life in the body of Christ. Toleration emerged as a political concept and as a governmental technique that authorities employed to mediate burgeoning tensions between a political imaginary of oneness and its fracturing appearance, and almost exclusively dealt with expressions of otherness within a political community. Visibility of otherness in shared or public space became an indicator of higher levels of toleration, whereas restrictions of this public visibility marked waves of intolerance. These histories of toleration are extremely complex and defy narratives of progression. This thesis identifies *common frames of reference to toleration* and examines them in the context of constitutionalism. A better understanding of the complex relationship between toleration and constitutionalism is pertinent to political and constitutional theory, because visibility

of religious otherness in public space is again contested today under the influences of secularisation, privatisation of religion, and anxiety over non-Western immigration.

The analysis and arguments of this thesis primarily concern France, Germany, and the Netherlands. The juxtaposition of these states is appropriate because of their varying social, political, and constitutional structures which have emerged in the era of constitutionalisation and their formation as nation states. Their processes of constitutionalisation are intertwined with revolutionary concerns over liberty, equality, as well as legal certainty. Yet they are also interwoven with long histories of toleration and disentangling of the social and political implications of the *corpus christianum*. Germany, for example, is often understood as relatively open to cooperation between the state and religious institutions and accommodative of individual religious commitments,[1] whereas *laïcité* in France would intrinsically discourage institutional cooperation, yet vigorously defends freedom of religion in the private space as well as in the context of public worship.[2] The Netherlands exhibits a spirit of relative openness to religious diversity – and although some public funds are available for Catholic, Protestant, Islamic, Jewish, and other institutions, the manifestation of religion in public space is not habitual. For example, the law explicitly regulated Roman Catholic processions until 1983 and, similar to France, expressions

[1] See Christian Roßkopf, 'Staat und Kirche des 19. Und 20. Jahrhunderts im Spiegel verfassungsrechtlichter Zeugnisse', in: Wolfgang Eger, *Kirche und Staat im 19. Und 20. Jahrhundert*, Neustadt an der Aisch: Verlag Degener and Co 1968; Reinhold Zippelius and Thomas Würtemberger, *Deutsches Staatsrecht*, 32e edition, München: Beck 2008; Reinhold Zippelius, *Staat und Kirche. Eine Geschichte von der Antike bis zur Gegenwart*, München: Beck 1997.

[2] Henry Peña-Ruiz, *Qu'est-ce que la laïcité ?*, Paris: Gallimard 2003; Jean Baubérot, *La laïcité 1905-2005 entre passion et raison*, Paris: Seuil 1990; Claude Langlois, 'La révolution française: un processus de laïcisation?', in Hubert Bost (ed.), *Genèse et enjeux de la laïcité*, Montpellier: Labor et fides 1990; Jean Baubérot, *Histoire de la laïcité en France*, Paris: Presses Universitaires de France 2000; Louis Châtellier, Claude Langlois & Jean-Paul Willaime (eds.), *Lumières, Religions et Laïcité*, Paris: Riveneuve 2009; Erik Sengers and Thijl Sunier (eds.), *Religious newcomers and the nation state. Political culture and organised religion in France and the Netherlands*, Delft: Eburon 2010.

of Muslim identity in public space figure prominently in debates over immigration and integration.[3]

This thesis examines the transformation of the political imaginary of oneness as well as the common frames of reference to toleration in the context of constitutionalisation in order to explain and critique expressions of toleration in political debates about religious diversity today. Through a comparison of these three different contexts, this thesis complicates the narrative that post-Enlightenment constitutionalisation reckoned with the divisions and inequalities of early modernity, and, contributes to a more historically informed theorization of the relationship between religious diversity, nationhood, and the meaning of public space.[4] This thesis critiques narratives of progression and illustrates recent lapses into sensibilities of toleration with regards to expressions of religious symbols, and especially Islamic attire, in public space. Such lapses are not only about political rhetoric, they find expression in constitutional law, especially through the mediation of the concept of public order. A better understanding of how toleration is implicated in law could strengthen critiques of uses of public order from the perspective of political and constitutional theory.

1.1 Early modern toleration and its common frames of reference

The early modern concept of *toleration* concerns state action or inaction with regard to religious "others" within a political community.[5] Toleration is distinct from tolerance, which pertains to popular attitudes to religious otherness and which might be a virtue of any religious, or indeed non-religious, individual or community. Toleration is part

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[3] Hannah van Ooijen, *Religious Symbols in Public Functions*, Cambridge: Intersentia 2012.

[4] Claudia E. Haupt, *Religion-State relations in the United States and Germany*, Oxford: Oxford University Press 2012, pp. 28-30.

[5] István P. Bejczy, 'Tolerantia: a medieval concept', *Journal of the History of Ideas* (1997), Vol. 91, No. 4, pp. 365-384, pp. 368-369; William H. Huseman, 'The expression of the idea of toleration in French during the sixteenth century', *The sixteenth century journal* (1984), Vol. 15, No. 3, pp. 293-310, pp. 294, 298.

of a family of words which signify permission, forbearing, longsuffering, licensing, and impunity.[6] In early modern Dutch and German, toleration was expressed in the language of 'verdragen' and 'dulden'.[7] It could be understood as a disposition or *une direction de la volonté,* a direction of the will.[8] The theological concept of toleration is rooted in the Augustinian hermeneutic of the parable of the wheat and the chaff, which is found in Matthew 13.

A crucial aspect to this toleration is the relative acceptance of otherness within the framework of unity. Augustine applied this primarily to the unity of the church, arguing that the church should be tolerant of minor errors in order to maintain its unity and peace, and only exert intolerance to the obstinate (meaning, the Donatists).[9] Medieval canonists extended this narrative to the political imaginary of the *corpus christianum,* in which state and church had different yet complementary vocations in protecting public order and peace and promoting the common good. In canonical law, the possibility of toleration is indicated through phrases like *tolerare potest,* which signals a discretionary restraint of state coercion.[10] This restraint of coercion is

[6] Huseman, 'The expression of the idea of toleration in French during the sixteenth century', pp. 299-301.

[7] Jesse Sponholz, *The Tactics of Toleration. A Refugee Community in the Age of Religious Wars,* Newark: University of Delaware Press 2010, p. 13.

[8] François Olivier-Martin, *Le regime des cultes en France du Concordat de 1516 au Concordat de 1801,* Paris: Loysel Editions 1988, p. 401.

[9] Edward L. Smither, 'Persuasion or coercion: Augustine on the state's role in dealing with other religions and heresies' (2006), Faculty Publications and Presentations. Paper 14, online available http://digitalcommons.liberty.edu/lts_fac_pubs/14 (consulted 31 October 2017), pp. 25, 34; Adam Ployd, *Augustine, the Trinity, and the Church. A reading of the anti-Donatist sermons*, Oxford: Oxford University Press 2015, p. 53.

[10] María J. Roca, 'El concepto de tolerancia en el derecho canónico', *Ius Canonicum* (2001), Vol. 41, No. 82, pp. 455-473, pp. 460, 465, 472-473; R. Scott Appleby cites David Little in *The Ambivalence of the Sacred: religion, violence, and reconciliation*, New York: Rowman & Littlefield 2000, p. 14; Comp.

mirrored by the phrase *dissimulare poteris.* Dissimulation is a concealing of actual identity and might occur both as a result of state pressure or a personal sense of unsafety; for example, offensive and defensive dissimulation.[11]

Chapter Two develops common frames of reference to toleration which inform practical decisions about the restraint of force. This chapter identifies five particular dimensions: 1) the role of truth in discerning goods and evil, as well as the proximity and transience of perceived evils; 2) the notion of the common good; 3) outward unity in relation to public order and peace; 4) economic considerations; and 5) trust, mediated through the categories of loyalty and trustworthiness. This analysis integrates perspectives on medieval toleration from István Bejczy's 'Tolerantia: a medieval concept', Enzo Solari's 'Contornos de la tolerancia medieval', and Maria J. Roca's 'El concepto de tolerancia en el derecho canónico', and Julia Costa Lopez' 'Beyond Eurocentrism and Orientalism: revisiting the othering of Jews and Muslims through medieval canon law'.[12] These perspectives shape my understanding of the early modern period, particularly through Benjamin Kaplan's magisterial work *Divided by Faith; Religious Conflict and the Practice of Toleration in Early Modern Europe,* which describes practices of toleration as negotiations of visibility.[13]

Elizabeth Shakman Hurd discussing David Scott in 'The political authority of secularism in International Relations', (2004), *European Journal of International Relations*, Vol. 10, No. 2, pp. 235-262.

[11] Stefania Tutino, 'Between Nicodemism and "honest" dissimulation: the Society of Jesus in England', (2006), *Historical Research*, Vol. 79, No. 206, pp. 534-553, p. 535; Alexandra Walsham, *Charitable Hatred: tolerance and intolerance in England 1500-1700,* Manchester: Manchester University Press 2006.

[12] Bejczy, 'Tolerantia: A Medieval Concept'; Enzo Solari, 'Contornos de la tolerancia medieval', (2013). *Ideas y Valores,* Vol. 72, No. 153, pp. 73-97; María J. Roca, 'El concepto de tolerancia en el derecho canónico'; Julia Costa Lopez, 'Beyond Eurocentrism and Orientalism: Revisiting the Othering of Jews and Muslims through medieval canon law', (2016), *Review of International Studies,* Vol. 42, No. 3, pp. 450-470.

[13] Benjamin J. Kaplan, *Divided by faith. Religious conflict and the practice of toleration in early modern Europe*, London: Belknap Press 2007.

In the context of toleration, the distinction between public and private comes to signify a distinction between accepted and unaccepted religion, whilst the visibility of the othered religion in public space becomes the litmus test of toleration. These distinctions imply a that one religion normatively determines the identity of a political community and that only this religion is, in principle, professed publicly. This chapter illustrates the significance of toleration in the early modern context through three famous "toleration treaties": for the Low Countries, the Union of Utrecht (1579); for France, the Edict of Nantes (1598); and for the Holy Roman Empire, the Westphalian Treaties (1648). The capstone of this illustration is the specific referral to the notion of *unum corpus* in the original Latin text of the Westphalian Treaty of Osnabrück, which conceptually bridges the notion of the *corpus christianum* with the modern state.

Chapter Three engages formations of toleration and religious freedom in classical (and lesser known) early modern philosophy in order to illustrate that these philosophies largely operated with the common frames of reference to toleration as identified in Chapter Two. Chapter Three refers to early modern philosophy in an attempt to circumvent the classical dichotomy of pre- and post-Enlightenment philosophy, understanding philosophical formations of toleration and religious freedom as a continuum. This chapter can of course not address early modern philosophies on toleration comprehensively. Rather, it identifies particular themes that are relevant to the notion of the *corpus christianum* and the common frames of reference to toleration: the articulation of a new political imaginary in the face of the ailing *corpus christianum;* critiques of the relationship between outward unity and the notion of public order; vigorous disagreement about epistemology and the function of truth in toleration; and lastly, emerging conceptual distinctions between covenant and contract. This chapter concludes that the change from toleration to constitutional religious freedom is begrudgingly located in philosophy and that this change ultimately depended on law and state action.

1.2 Constitutionalism and the formation of religious freedom

Constitutionalisation is crucial to the formation of religious freedom because it anchors religious freedom in the sovereignty of a political community as a whole. This anchoring rests in a narrative of "the people" that conceptually contained religious, social and political fragmentation. This meant that those who were previously only "tolerated", or indeed cast out on account of their heresy, non-Christian religion, or atheist inclinations, would be assured of their membership of the political community. This inclusion implied a severing of political normativity from specific religious or ecclesiastical normativity, and as such is an iteration of secularisation.[14] The constitutionalisation of religious freedom is therefore more than an extension of a privilege, it co-constitutes the inclusive nature of the political community as both a prerequisite and a normatively necessary consequence. For this reason, discrimination of religious (and non-religious) minorities is not only a denial of this inclusive narrative of the people, it also normatively others them.

This constitutionalisation of religious freedom is embodied in the French and Dutch constitutions, as well as the German Basic Law, which include the right to religious freedom, the manifestation of religion in public, as well as several related rights pertaining to the freedom of association, the freedom of conscience, and the protection of family life and freedom of education. These states have also committed themselves to various European and international human rights documents as well as declarations, such as the Declaration on the elimination of all forms of intolerance and of discrimination based on religion or belief.[15] These legal iterations of religious freedom norm state action insofar as they intervene with religious freedom. A state must justify an intervention by: a) justifying a specific societal need, such as public health or public order, and explaining how its action meets this need; b) justifying that action is necessary and that no other methods are available which have a lesser impact

[14] Comp. Shakman Hurd, 'The political authority of secularism in International Relations', p. 238.

[15] Artt 18, 21, 22 International Covenant on Civil and Political Rights; Artt. 18-20 Universal Declaration of Human Rights; Artt 9-11 European Convention of Human Rights and Fundamental Freedoms.

its action serves (this is the principle of subsidiarity); and c) motivating that the proposed action balances the interests of all who are affected (this is the principle of proportionality). This legal theoretical framework contrasts sharply with toleration, which assumes that the state grants the othered a "privilege" rather than a "right", and instead makes the state responsible for the equal protection of rights of all members of the political community.

Chapter Four complicates the relationship between constitutionalism and the protection of religious minorities during the formation of nation states in the nineteenth century. This chapter argues that processes of constitutionalisation were incredibly complex and entangled in discourses over belonging and outward unity, as well as the relationship between public order and shared social norms. Napoleonic Concordats with the churches and its Decrees about Jewish members of the community show more signs of toleration (and anticlericalism) than of religious freedom, and remain a far cry from constitutionalism. The dominance of a particular church in social and political life did not necessarily abate in the Netherlands or in the German lands, whilst these states also navigated a narrative of the people with regards to relatively pronounced regional and local differentiations. Not only did toleration resurface in the constitutional order, the rise of the imaginary of the nation appropriated the interconnection of territory, people, and teleology that had until then characterized the *corpus christianum.*

This re-incarnation of the *corpus christianum* implied a priority of nationhood over religious affiliation. Whilst states needed to engineer a sense of belonging, religious communities faced all kinds of state regulations that intervened with their freedom of worship and their freedom to manifest their religion in public space. This is especially demonstrated by conflicts over Roman Catholic processions, the use of churches and the use of burial space, which all but affirmed the unity of the nation. Over time, France, the Netherlands, and Germany developed distinct approaches to religion in public space, with varying levels of inclusivity to regional as well as religious otherness. Their approaches were not only the result of constitutionalisation,

but were also shaped by cultural responses, such as religious revival, the organisation of public manifestations, and the rise of religious political activism in the nineteenth century.

Hence, the inclusion of religious freedom in constitutions did not guarantee religious freedom or even peaceful coexistence. In practice, the attitude of those who acted on behalf of the state, such as Prime Ministers, Members of Parliament, and local majors, determined the actual protection provided to the members of the political community. This is not to suggest that political attitudes outweighed the constitution; rather, that constitutions left space structurally for the expression of intolerant attitudes in law. The legal language intersected with social and political conflicts over the character of national identity. This chapter therefore raises the following questions: did common frames of toleration become substrata of constitutional law? And does this vary between France, Germany, and the Netherlands? What are the implications of this relationship between toleration and religious freedom for contemporary tensions about religion in politics and law?

Integral to the concept of religious freedom is a contrast between two schools of thought regarding the relationship between religion, state, and society: one that emphasises that the law should distinguish some basic complexities of religion that warrant protection through different legal categories, and one that emphasizes the connection between legal protection of religious freedom in relation to religious life as a whole. For example, on the one hand, Cécile Laborde suggests to disaggregate the notion of religion and distinguish between religion as a conception of the good, a conscientious obligation, a key feature of identity, and a mode of human association.[16] On the other hand, Paul Bou-Habib argues that religion needs to be understood as a matter of integrity and that the law should facilitate an 'equal opportunity for wellbeing' by respecting the importance of religious duty to some members of the

[16] Cécile Laborde, 'Religion in the law: the disaggregation approach', (2015), *Law and Philosophy*, Vol. 34, No. 6, pp. 581-600, pp. 593-599.

political community.[17] This thesis does not attempt to define religion as an aggregated or disaggregated concept, but questions the legitimacy of the state in defining what expressions of religious identity are, constructing their significance in public space, and, in issuing generalised restrictions on the expressions of religious identity in public space.

1.3 Oneness, unity, and the visibility of religion in public space

Chapter Five turns to political and social theory in order to examine legacies of toleration with specific reference to a political imaginary of the nation and the expression of its oneness in public space. In the context of religious diversity, this is about the classical dialectic of commonality and particularity; but it is about much more than that. Considering that the concept of naturalisation stems from the idea that the nation is "natural" and that others enter this natural body, religious intolerance must also be understood against the background of race and origin. Engaging with the work of Wael Hallaq, José Casanova, Patrick Weil, and Ayelet Shachar, this chapter suggests that the category of the nation creates new forms of othering along the lines of territory, people, and teleology. This othering may depend on religion, but often intersects with other issues, such as racism and racialisation, concerns over immigration and integration, presumed loyalty to a foreign religious or political authority, as well as the presumption of conflicting values. This chapter understands othering on a continuum and asserts that the othering of Catholic, Protestants, Jews, and Muslims cannot be understood as identical iterations of othering. Not every minority is equally or similarly vulnerable on this continuum. This continuum implies that integration – as in outward conformity to shared values and dissimulation of religious identity – does not facilitate belonging insofar as the idea of the nation is structurally racist and xenophobic.

[17] Paul Bou-Habib, 'A theory of religious accommodation', (2006), *Journal of Applied Philosophy*, Vol. 23, No. 1, pp. 109-126, pp. 122-124.

The chapter then theorises how this continuum in othering relates to political conflict over the visibility of religious otherness in public space, with reference to the scholarship of Luckmann, Modood, Wilson, Shakman Hurd, Asad, and Taylor on secularisation and the classical public-private divide. This chapter argues that secularisation and privatisation of religion are incompatible with the idea that there is a right to be free from involuntary encounter with material or immaterial religion in public space.[18] Instead, it contends that dimensions of religion which are visible and tangible in the public domain touch upon the heart of coexistence.[19] Amiraux and Jonker write that 'Public space was, first of all, the space in which social actors played a public role and presented themselves to others', and this 'sensorial, perceptive dimension of public space (…) gives all participants the opportunity to consider otherness and confront it in physical space'. This physical space, they argue, is simultaneously a non-material space where actors negotiate common values.[20] However, as Queré and Goffman put it, copresence, as in physical participation in public space is not *per se* conducive to peaceful living in diversity. They rightly point out that copresence might also increase tensions among citizens and may even lead to alienation.[21] The question is, however, when do such tensions amount to a concrete

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[18] Comp. Kim Knott, 'Iconic religion in urban space', (2012), *Material Religion* , Vol. 12, No. 2, pp. 123-136, pp. 132-134; Comp. Irene Becci, Marian Burchardt & Mariachiara Giorda, 'Religious super-diversity and spatial strategies in two European cities', (2017) *Current sociology*, Vol. 65, No. 1, pp. 73-91, p. 74; Nederlandse Bisschoppenconferentie, De Rooms-Katholieke Kerk in Nederland aan het begin van een nieuw millenium. Rapport ten dienste van het Ad-Liminabezoek van Nederlandse bisschoppen van 7-13 maart 2004, Utrecht, 27 January 2004, §1.2.1-1.2.3.

[19] Comp. Becci, Burchardt & Giorda, 'Religious super-diversity and spatial strategies in two European cities', p. 74.

[20] Valérie Amiraux & Gerdien Jonker, 'Introduction: talking about visibility- actors, politics, forms of engagement' in Amiraux & Jonker (eds.) *Politics of visibility: young Muslims in European public spaces,* Bielefeld: Transcript 2006, pp. 13-14; Comp. Armando Salvatore, *The Public Sphere. Liberal Modernity, Catholicism, Islam*, New York: Palgrave Macmillan 2007, p. 49.

[21] Louis Quéré, 'l'Espace public: de la théorie politique à la métathéorie sociologique', (1992), *Quaderni,* Vol. 18, pp. 75-92.

problem in the context of public order? And when can the state legitimately intervene with religious freedom?

While the visibility of religion could be treated as an aspect to the public manifestation of religion, it is a normative assumption to say that religious dimensions can be severed from one's public identity.[22] This normative assumption is inherent to the early modern conceptual dichotomy of public and private spaces, which favoured one group over the other, but which also facilitated an "oppositional process" in which groups created narratives of identity and built secure boundaries around those identities.[23] Luria writes: 'To question such distinctions puts their identities and sense of self to risk'.[24] This chapter argues that the identification of common space with a shared political identity subverts the purpose of religious freedom, and fundamentally is a misappropriation of the sovereignty of a political community. This misappropriation renders religious minorities vulnerable to normative iterations of Luckmann's understanding of secularisation as privatisation of religion.[25]

Furthermore, this dichotomy defies regional identities as well as processes of internationalisation, and is blind to different levels of social and political association.[26] One way to acknowledge the complexity of public space is Jürgen Habermas'

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[22] Erin Wilson, *After Secularism. Rethinking Religion in Global Politics*, New York: Palgrave Macmillan 2012.

[23] Keith P. Luria, *Sacred Boundaries. Religious Coexistence and Conflict in Early-Modern France,* Washington D.C.: The Catholic University of America Press 2005, p. xxiv.

[24] Ibidem, p. xxiv.

[25] Thomas Luckmann, *The Invisible Religion: the problem of religion in modern society,* New York: Macmillan 1967; Wilson, *After Secularism*, p. 111.

[26] Will Kymlicka, 'The Internationalisation of Minority Rights', (2007), *International Journal of Constitutional Law*, Vol. 6, No. 1, pp. 1-32, Conclusion; Will Kymlicka, 'Universal minority rights?', (2001), *Ethnicities*, Vol. 1, No. 1, pp. 21-23; Noé Cornago, *Plural Diplomacies. Normative predicatments and functional imperatives*, Leiden: Martinus Nijhoff 2013.

distinction between the public sphere and the political public sphere.[27] While he argues for a particular type of political language within this political public sphere, he also insists that, in the context of the political public sphere, the institutional separation of church and state should not engender a demand of citizens to adhere to "neutral" arguments.[28] Rawls, on the other hand, pondered extending the scope of the institutional separation of church and state to a demarcation of religion and the political order. He suggested ordering the political process through his notion of public reason, which refers to certain procedural norms which form the basis of public debate as well as rational consensus.[29] This thesis aligns neither with Rawls nor with Habermas; instead, it calls for the protection of individual integrity through the recognition of complex spaces and formations of intersecting individual and communal identities.

1.4 Public order, state neutrality, and striving after the common good

Chapter Six reflects on the meaning of public order and its relationship with social norms, state neutrality, and the concept of the common good. Based on a discussion of the scholarship of Jan Brouwer, János Weiss and Marie-Caroline Vincent-Legoux, this chapter argues that the legal concept of public order necessitates three distinctions for the protection of religious minorities within the liberal constitutional state: 1) the distinction between legal norms and social norms; 2) structural and individual dimensions to public order; and 3) legitimate and illegitimate appeals to public order. These distinctions are important because of the weight that the notion of public order carries in the legal structures surrounding religious freedom. One might even say that

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[27] Jürgen Habermas, *Between Facts and Norms*, Cambridge MA: MIT Press 1998; Jürgen Habermas, *Strukturwandel der Öffentlichkeit*, München: Luchterhand Verlag 1962.

[28] Jürgen Habermas, 'Religion in the public sphere', (2006), *European Journal of Philosophy*, Vol. 14, No. 3, pp. 1-25.

[29] John Rawls, *A Theory of Justice*, Cambridge Mass: Harvard University Press 1971; John Rawls, *Political Liberalism*, New York: Columbia University Press 1993; John Rawls, 'The Idea of Public Reason Revisited', (1997), *The University of Chicago Law Review*, Vol. 64, No. 3, pp. 765–807.

the meaning of religious freedom depends on the meaning of public order. This chapter also engages the theoretical tension between a political reliance on social norms and the imperative of state neutrality. The notion of neutrality is relatively young and is perhaps most clearly articulated by Ronald Dworkin, who said that 'government must be neutral on what might be called the question of the good life'.[30] This chapter argues that the question of neutrality hinges on two principles; neutrality regarding truth claims and impartiality between competing interests.

The question of neutrality is intrinsically connected to the question of public morality or normativity. Ernst-Wolfgang Böckenförde rightly points out that the state itself is void of such normativity yet gains ethical content through political mediation of ethics in the constitution, as well as in legislation, and state action.[31] Similarly, Rawls argued that neutrality does not consist in the absence of morality but that a community needs to substantiate its political morality in order to attribute ethical content to the state.[32] H.L.A. Hart believed that such properties of morality must be laid down in positive law, arguing that morality is only relevant to the state insofar as properties of morality are legally recognised.[33] Dworkin criticized Hart for his view on the initial moral indifference of law, stressing the role of principles to nourish a certain morality in law, following the German tradition of suspicion of a morally emptied state.[34] Legal philosopher Lon Fuller, in his turn, distinguished between a morality of duty and a

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[30] Andrew M.M. Koppelman, 'Ronald Dworkin, Religion, and Neutrality', (2014), *Boston University Law Review*, Vol. 94, No. 4, pp. 1241-1253, p. 1241.

[31] Ernst-Wolfgang Böckenförde, *State, society, and liberty: Studies in political theory and constitutional law*, Oxford: Berg Publishers 1991.

[32] Ibidem.

[33] Herbert L.A. Hart, *The Concept of Law*, Oxford: Oxford University Press 1961; Herbert L.A. Hart, *Law, Liberty and Morality*, Oxford: Oxford University Press 1963.

[34] Ronald Dworkin, *Taking Rights Seriously*, Cambridge MA: Harvard University Press 1977; Ronald Dworkin, *A Matter of Principle*, Cambridge MA: Harvard University Press 1985; Ronald Dworkin, *Law's Empire*, Cambridge MA: Harvard University Press 1986; Ronald Dworkin, *Religion without God*, Cambridge MA: Harvard University Press 2013.

morality of aspiration, which have different justifications, but are not necessarily separate. He notes that the bottom line for the functioning of law entails a procedural and institutional variety of natural law, thus presupposing a morality that pre-exists positive law.[35]

These different positions result from the question of whether there is an ante-institutional morality and whether there are timeless principles of natural law. Though this question about natural morality was urgent in a post-war context, this question was not so different from early modern philosophical debates over truth, as shown in Chapter Three. Early modern Christianity relied on the knowledge of truths that could be known, with certainty, to articulate a morality to which everyone in the *corpus* would submit. Deconstruction of truth thus provoked unsettling questions about the status of morality; its source, its legitimacy, its content, and even its possibility. These questions did not fade away in the context of the modern state. Likewise, Wendy Brown notes that tolerance is always coupled with a level of normativity and that this is no different in modern debates over equality today.[36] The idea that secularity can satisfy the requirements of neutrality is therefore inherent to the othering of religion in the context of the state and the idea that religious partisanship can somehow be overcome through secularity.

Recognising the importance that the law should not disadvantage religious minorities, Lorenzo Zucca suggests a religion-friendly moderation of secularity. He suggests that a "tolerant" secularity could be based on a political morality which would not moralise minorities and would distance itself from the question of truth.[37] This idea of a toleration secularity acknowledges the complex relationship between the notion of truth and political morality, yet inherently minoritizes parts of the

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[35] Lon Fuller, *The Morality of Law*, New Haven: Yale University Press 1964.

[36] Wendy Brown, *Regulating Aversion. Tolerance in the age of identity and empire*, Princeton: Princeton University Press 2006, p. 14.

[37] Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape*, Oxford: Oxford University Press 2012, Chapter 10.

people. Even so, Zucca treats the question of truth in the context of ideas and does not necessarily include the role of social-legal practice, placing his contribution in the realm of neutrality to truth claims, rather than impartiality to competing interests. Gavin d'Costa would take issue with this narrower approach to secularity, arguing that one always has a 'tradition-specific starting point' and, with Wendy Brown, suggests that the content of neutrality is subject to power-dynamics.[38]

Considering these power-dynamics, Habermas later acknowledged that neutrality does not guarantee equality to minorities who depend on the political benevolence of the majority with whom they live.[39] Similarly, Jocelyn Maclure and Charles Taylor associate the notion of modern tolerance and neutrality with marginalisation, even as they regard the protection of the freedom of conscience and religion as central to secularism.[40] They are concerned about the conflation of political and social secularity, e.g. public morality and social norms, warning that unequal burdens may be placed on citizens.[41] Talal Asad looks at this same issue through the lens of conformity, arguing that procedural neutrality demands that religion conform to an imposed national standard if it wants to participate in the public sphere.[42] Will Kymlicka argued, by means of his theory of "benign neglect", that it is 'near-impossible' to separate religion and politics completely and called instead for restraint of political interference with religious minorities.[43] He calls for a reconsideration of

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[38] Gavin d'Costa, 'Whose objectivity, which neutrality? The doomed quest for a neutral vantage point from which to judge religions', (1993), *Religious Studies*, Vol. 29, No. 11, pp. 79-95; Brown, *Regulating Aversion*, p. 178.

[39] Habermas, 'Religion in the public sphere'.

[40] Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience*, Cambridge: Harvard University Press 2011, pp. 4-5.

[41] Ibidem, pp. 16, 21.

[42] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity*, Stanford: Stanford University Press 2003.

[43] Geoffrey Levey, 'Secularism and religion in a multicultural age', in Levey & Modood (eds.), *Secularism, Religion and Multicultural Citizenship*, p. 8.

how liberalism promotes the 'liberalisation of societal cultures', which is akin to Ran Hirschl's concern about the secularising role of liberal constitutional law.[44] Some are even more outspoken. According to sociologist Armando Salvatore, liberalism creates new inequalities, particularly with reference to Catholicism and Islam.[45]

The connection between secularism and neutrality thus seems notoriously suspect within several disciplines. This thesis understands liberal secularism as a normative philosophical framework which undergirds social norms which may have gained political and constitutional traction in liberal democratic contexts, and as such may disadvantage (religious) minorities. This thesis shares the concern over the effective protection of minorities against the universalising character of secularism, as in the work of Henry Peña-Ruiz, Casanova, Wendy Brown, and Shakman Hurd.[46] However, this thesis does not align with the idea that liberal secularity is an orthodoxy, as Jean Baubérot, Martha Nussbaum, and Olivier Roy have suggested, because orthodoxy entails more than a philosophical framework.[47] This distinction between a normative philosophical framework and an orthodoxy acknowledges that none of the three states – France, Germany, or the Netherlands – have actually adopted secularism. The idea that liberal secularity in and of itself functions as an established religion is

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[44] Will Kymlicka, *Multicultural Citizenship: a liberal theory of minority rights*, Oxford: Oxford University Press 1995, p. 172; Ran Hirschl, *Constitutional Theocracy,* Cambridge MA: Harvard University Press 2010.

[45] Salvatore, *The Public Sphere*, pp. 2, 258.

[46] Maclure & Taylor, *Secularism and Freedom of Conscience*, p. 25; José Casanova, 'Immigration and the new religious pluralism: a European Union-United States comparison', in: Geoffrey Levey and Tariq Modood (eds.), *Secularism, Religion and Multicultural Citizenship*, Cambridge: Cambridge University Press 2009, p. 147; Brown, *Regulating Aversion*, Chapter 7. Shakman Hurd, 'The Political Authority of Secularism in International Relations', p. 237.

[47] Steven D. Smith, 'Religious freedom in America: three stories', in: Stephen M. Feldman, *Law and Religion. A critical anthology*, New York: New York University Press 2000; Olivier Roy, *Secularism confronts Islam*, New York: Columbia University Press 2009; Martha C. Nussbaum, *The new religious intolerance: overcoming the politics of fear in an anxious age*, Cambridge MA: Belknap 2012; Jean Baubérot, *La laïcité falsifiée*, Paris: La Découverte 2012.

unhelpful for the purposes of this thesis. Rather, where liberal secularity encompasses social norms for the purposes of law, such uses must be critiqued where they disadvantage religious and other minorities.

Chapter Six closes with the observation that the concept of state neutrality not only relies on a normativity that it seeks to avoid, it also depends on a separation of spaces and personae that is inherent to the logic of toleration. This is contrary to the protection of individual members of society which lies at the heart of constitutionalism, or, the concept of state neutrality may actually hinder the effective protection of minorities. This chapter contends that the notion of the common good as well as the notion of public space need to accommodate social complexity beyond their narrative of oneness. This is perhaps a conceptual equivalent to Van Bijsterveld's observation that tensions between 'functional' and 'integrated' policy-making, micro- and macro-justice, and centralised and decentralised ethics contribute to a decentralisation of the common good.[48] She argues that the notion of the common good exists in a vacuum and that 'the natural orientation towards the common good has lost both its obviousness and its visibility'.[49] This thesis suggests that this may be a necessary consequence of an ethicised notion of the common good, and, that the development of a more complex notion of the common good needs to be inherently relational.

1.5 Law, politics, and religious symbols in public space

Chapter Seven illustrates the relevance of toleration in contemporary political and legal conflicts over the visibility of religion in public space, drawing on case law and parliamentary documents from France, Germany and the Netherlands in the 2010s. This chapter discusses three particular expressions of Muslim identity: 1) prohibitions

[48] Sophie van Bijsterveld, *The Empty Throne. Democracy and the rule of law in transition,* Utrecht: Lemma 2002, pp. 326-329.

[49] Van Bijsterveld, *The Empty Throne,* p. 352.

of the full-face veil in France and the Netherlands, as well as a partial prohibition on the full face veil in Germany; 2) the conflicts about the jilbab or "burkini" in French cities and towns in 2016;[50] and 3) the adjudication of the hijab and other religious symbols in French, German, Dutch, and European courts. These cases demonstrate that the law has become a significant mediator of religious diversity, and, the motivations for political decisions do not always satisfy the legal requirements of the substantiation of a legitimate aim, much less so the concepts of subsidiarity and proportionality.

These issues could be considered to be technical shortcomings, but the reason these cases are included in this thesis is that the misalignment between political motivations and legal requirements illustrates the conceptual arguments in this thesis. Namely, that the operationalisation of the concept of public order tends to rest on a combination of unwritten norms and insufficiently substantiated security arguments (Chapter Six); that the othering of Muslims correlates with the exclusionary character of nationhood, and, speaks to origin as well as racial and religious otherness that the concept of the nation implies (Chapter Five); that this othering on account of nationhood mirrors the othering nature of the *corpus christianum* and the common frames of reference to toleration (Chapter Four); and therefore, that histories of toleration are crucial to an understanding of contemporary conflicts about religious diversity in law (Chapter Two, Three). However, none of these cases show the conceptual trajectory that this thesis advances, it is only through comparison that the complex relationships between toleration, constitutionalism, and narratives of belonging in the nation state emerge.

In closing, I hope that this uncovering of the layering of toleration in contemporary political and legal debates will not only make an analytical contribution to the field of political and constitutional theory, but also, that it will raise awareness

[50] A case study based on these materials has been published, Mariëtta D.C. van der Tol, 'Intolerance unveiled: Burkini bans across France', (2018), *Revue du droit des religions,* No. 6, pp. 139-149.

among practitioners of the impact that common frames of reference to toleration have on political decisions that affect religious minorities.

2. Early modern formations of the theological-political concept of toleration

It is perhaps hard to imagine that religious freedom evolved from the vacillating sensibilities of early modern toleration (ca 1500-1789). For many scholars, these notions represent incommensurable visions of reality that are separated by exigent memories of intolerance and religious aggression. As Europe's house divided, many a room featured memories of a martyr's faith, whose remembrance almost inevitably loaded its indicted others with suspicion. Toleration had much to do with a sense of righteousness, grounded in a disposition of religious superiority, and sanctioned by the Divine. Toleration was a discretionary grace to be extended to deemed wrongs of sorts and sizes that could coexist with the vision of a common identity; whereas issues of greater gravity could warrant dissimulation, exile, or punishment by death.[1] Toleration was the practical consequence of a social, political, and religious imaginary shaped by the body of Christ, one and indivisible in the *saeculum* and in the *saecula saeculorum*. While this unity would not imply absolute uniformity, toleration and dissimulation determined the outward appearance of the body of Christ and thus provided an important conceptual frame of identity and belonging.[2]

The era of Reformations brought about a marring of the body of Christ, known as the *corpus christianum,* which represented a oneness of space, people, and common

[1] Julia Costa Lopez, 'Beyond Eurocentrism and Orientalism: Revisiting the Othering of Jews and Muslims through medieval canon law', (2016), *Review of International Studies,* Vol. 42, No. 3, pp. 450-470.

[2] Keith P. Luria, *Sacred Boundaries. Religious Coexistence and Conflict in Early-Modern France,* Washington D.C.: The Catholic University of America Press 2005, p. xv.

destiny.[3] Inspired by humanist reformations, driven forward by new modes of communication, and shared through popular hymnody, the body of Christ became the concern of every man, fragmented into small and vulnerable communities of faith. Diarmaid MacCulloch diagnoses the problem of intolerance as one of Latin Christianity, whose record on coexistence would 'kindly be termed unimpressive'.[4] A political notion of toleration first emerged in late medieval Scholasticism, even if this toleration was largely theoretical.[5] István Bejczy, María Roca, and Enzo Solari emphasise the centrality of (in)visibility of difference to coexistence; effected through practices of toleration and dissimulation. Contention of the meaning of communal space as well as the subject of visibility make a compelling reappearance in *Divided by Faith* by Benjamin Kaplan who describes different levels of visibility in conjunction with levels of early modern toleration.

This chapter discusses the kinship between concepts of toleration and dissimulation in medieval canonical law in relationship to early modern practices of toleration in the Low Countries, France, and the Holy Roman Empire. This chapter contends that the principle of toleration emerged as a governmental technique for engaging with a begrudged diversity, and that certain conceptual frames of reference to toleration informed the fate of marginalised religious minorities. These include a firm commitment to: *truth;* a unified idea of the *common good*; *outward unity in relation to public peace and order*; *economic benefit*; and *loyalty*. These conceptual frames of reference emerge from the comparison of literature in the history of ideas in conversation with three pivotal treaties of toleration from the Low Countries, France, and the Holy Roman Empire: the *Union of Utrecht* (1579); the *Edict of Nantes* (1598); and

[3] Compare the double ordering in late medieval theological and political thought, see Walter Ullmann, *Law and Politics in the Middle Ages. An introduction to the sources of medieval political ideas,* Ithaca N.Y.: Cornell University Press 1975, p. 271.

[4] Diarmaid MacCulloch, *Reformation. Europe's House Divided 1490-1700,* London: Penguin 2004, p. 676.

[5] Ibidem, 676.

the *Westphalian Treaties* (1648).[6] These conceptual frames of reference do not provide a blueprint of early modern toleration; rather, they attest to a conceptual and practical logic to toleration which finds specific and complex expressions in practice.

2.1 Toleration as a theological-political concept

Toleration presupposes a level of diversity or non-conformity that challenges the normative foundation of society. This normative foundation rests in the figure of Christ and biblical truths as revealed in divine law and the prophets. The relationship between normativity and metaphysical truths was not a mere matter of faith, for the church maintained that faith and reason operated on the basis of non-contradiction.[7] Theological perspectives on justice held together righteousness and sinfulness in the postlapsarian condition of creation (after the Fall of Adam and Eve), whilst maintaining a sense of oneness.[8] Pursuing and defending truth was therefore no lofty affair; it touched on the capacity of a community and individual believer to grow in righteousness and to shrug off the curse of sin in the saeculum. While the church could regard minor offences as temporary lapses, the questioning of fundamental truths or

[6] Union of Utrecht (1579), https://www.law.kuleuven.be/personal/mstorme/unievanutrecht.html, (consulted 7 April 2017); l'Édit de Nantes en faveur de ceux de la religion prétendu reformée of 13 April 1598, electronic edition by N. Dufounaud, 30 July 2003, http://classiques.uqac.ca/classiques/henri_iv/Edit_de_nantes_1598/edit_de_nantes.html, (consulted 20 September 2017); Die Westfälischen Friendensverträge vom 24 October 1648. Texte und Übersetzungen, (Acta Pacis Westphaliae, Supplementa Electronica 1), http://www.pax-westphalica.de, (consulted 5 May 2017).

[7] Enzo Solari, 'Contornos de la tolerancia medieval', *Ideas y Valores* (2013), Vol. 72, No. 153, pp. 73-97, p. 80.

[8] Compare St Augustine's exegesis of Matthew 13 on the parable of the wheat and the chaff, Edward L. Smither, 'Persuasion or coercion: Augustine on the state's role in dealing with other religions and heresies', (2006), *Faculty Publications and Presentations.* Paper 14, online available http://digitalcommons.liberty.edu/lts_fac_pubs/14 (consulted 31 October 2017), pp. 25, 34; Adam Ployd, *Augustine, the Trinity, and the Church. A reading of the anti-Donatist sermons*, Oxford: Oxford University Press 2015, p. 53.

the expression of less than godly behaviour undermined not only the peace and unity in the church, but threatened the very order of being: these wrongs embodied evils and a direct opposition to righteousness, truth, and justice.

Medieval canonists developed toleration as an ecclesiastical and, later, a political principle on which decisions about minor and major offences were grounded, demarcated through the phrases *tolerare potest* and *dissimulare poteris.*[9] The phrasing *potest* indicates a discretionary competence which is at once a norm of discernment and of action.[10] Roca emphasises that neither toleration nor dissimulation implied normative endorsement, but instead were the outcome of prudential decision-making.[11] Toleration involved restraint and godly moderation of the use of the sword.[12] Importantly, toleration also implied a measure of visibility, and thus contrasts with the concept of dissimulation. Dissimulation was equally condemned by Purists as a manifestation of insincerity. Where toleration is established, dissimulation ceased to be as important. Bejczy argues that toleration existed at differing degrees, varying from the restraint of interference to the active fostering of a particular evil.[13] Roca and Tagliaferry identify dissimulation as a provisional practice concerning the concealment of real beliefs through outward conformity; regarded by some as feigning or lying and by others as culturally imposed conformity or expressions of invisible dissent.[14]

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[9] María J. Roca, 'El concepto de tolerancia en el derecho canónico', *Ius Canonicum* (2001), Vol. 41, No. 82, pp. 455-473, pp, 460, 465.

[10] Klaus Schreiner, 'Toleranz', in *Geschichtliche Grundbegriffe,* Band 6, pp. 524-605, p. 596; Roca, 'El concepto de tolerancia en el derecho canónico', p. 459.

[11] Roca, 'El concepto de tolerancia en el derecho canónico', 458.

[12] Ibidem, 472-473.

[13] István P. Bejczy, 'Tolerantia: a medieval concept', *Journal of the History of Ideas* (1997), Vol. 91, No. 4, pp. 365-384, p. 375.

[14] Roca, 'El concepto de tolerancia en el derecho canónico', p. 466. Filomena Viviana Tagliaferri, *Tolerance re-shaped in the early-modern Mediterranean borderlands. Travellers, missionaries and proto-journalists (1683-1724),* New York: Routledge 2018, Introduction; Stefania Tutino, 'Between

Toleration and dissimulation presupposed that the implied evils were redeemable, judged by the measures of gravity, proximity, and transience. On the contrary, irredeemable evils such as denial of the Trinity or the divinity of Christ, as well as behaviour such as prostitution and homosexuality, were theoretically ineligible for either toleration or dissimulation.[15] These latter issues pertained to divine values; by contrast, confessional and conscientious values could be subject to rational debate, thus pre-empting early modern philosophical debates on fundamental and indifferent matters *(adiaphora)*.[16] Bejczy argues that the classification of evils further depended on proximity and transience: a closer proximity to the body of Christ, including Judaism, rendered non-conformity more problematic compared to non-Christian otherness,[17] since the latter might freely convert upon peaceful encounter with the truth.[18] The matter of proximity was intertwined with transience, since brief lapses and temporary shortfalls in behaviour were more likely to be tolerated because of the expectation that faith and reason would eventually restrain it. Thus, travelling merchants with non-Christian convictions attracted less interest than permanent members of a community who abandoned their faith or cultivated heresy.[19] The latter's sustained dissidence endangered peace and unity, and therefore attracted fiercer persecution.[20]

Nicodemism and "honest" dissimulation: the Society of Jesus in England', (2006), *Historical Research*, Vol. 79, No. 206, pp. 534-553.

[15] Bejczy, 'Tolerantia: a medieval concept', p. 375, Solari, 'Contornos de la tolerancia medieval', p. 87.

[16] Roca, 'El concepto de tolerancia en el derecho canónico', pp. 455-456; Solari, 'Contornos de la tolerancia medieval', p. 94.

[17] Bejczy, 'Tolerantia: a medieval concept', 375; Julia Costa Lopez, 'Beyond Eurocentrism and Orientalism: Revisiting the Othering of Jews and Muslims through medieval canon law', *Review of International Studies* (2016), Vol. 42, No. 3, pp. 450-470, p. 462.

[18] Bejczy, 'Tolerantia: a medieval concept', p. 369, 375.

[19] Costa Lopez, 'Beyond Eurocentrism and Orientalism: Revisiting the Othering of Jews and Muslims through medieval canon law', p. 455; Solari, 'Contornos de la tolerancia medieval', p. 81.

[20] Solari, 'Contornos de la tolerancia medieval', p. 81.

Balancing of evils could involve both religious and mundane concerns, such as public order and economic benefits.[21] Toleration was usually dependent on the condition of non-disturbance of public order.[22] Simultaneously, repression needed to be proportionate in its administration, since violent repression could itself become a problem of public order.[23] Economic benefits could outweigh the imperative of unity as an instance of the common good.[24] For example, Christian regions which were economically dependent on amicable commercial relationships with Muslims fostered a greater toleration towards Muslims.[25] Similarly, the Dutch East India Company and West India Company, though led by Reformed merchants, was more lenient to Jewish merchants for commercial interests. In the late seventeenth century, the French King issued letters of naturalisation to some non-Catholic merchant foreigners whilst maintaining an overall narrative, perhaps even a fiction, of Catholicity.[26] Through naturalisation, the King removed 'the "vice" of their alien birth'.[27] It shows that territoriality and faith already co-conditioned belonging and, even though Catholicity was not a formal condition, many applicants included stories about their converstion

[21] Bejczy, 'Tolerantia: a medieval concept', p. 369; Costa Lopez, 'Beyond Eurocentrism and Orientalism: Revisiting the Othering of Jews and Muslims through medieval canon law', p. 470.

[22] Bejczy, 'Tolerantia: a medieval concept', 369.

[23] Ibidem, 368.

[24] Jeffrey R. Collins, 'Redeeming the Enlightenment: New Histories of Religious Toleration', (2009), *The Journal of Modern History,* Vol. 81, No. 3, pp. 607-636, p. 613; Cary J. Nederman, *Worlds of Difference: European Discourses of Toleration c. 1100- c. 1550,* State College: Pennsylvania University Press 2000. Costa Lopez, 'Beyond Eurocentrism and Orientalism: Revisiting the Othering of Jews and Muslims through medieval canon law', p. 464.

[25] Costa Lopez, 'Beyond Eurocentrism and Orientalism', p. 469.

[26] Peter Sahlins, 'Fictions of Catholic France: the Naturalisation of foreigners, 1685-1787', (1994) *Representations,* Vol 47, Special Issue: National cultures before nationalism, pp. 85-110, pp. 90-95.

[27] Ibidem, p. 103.

to the truth of Catholicism.[28] However, Jews remained ineligible for naturalisation into the eighteenth century and remained reliant on the King's incidental protection.[29]

Thus, toleration instructed authorities to forbear that which it explicitly or implicitly regarded as false or evil, yet which did not fundamentally threaten the order of being in Christ. Practices of toleration entailed a spectrum of rejection and incorporation through marginalisation.[30] Only when intermediated by dissimulation could intolerance spiral into violent elimination. Canonical law made careful distinctions between others of kinds on the basis of their potential to be implanted in the *corpus,* whilst discipline might cause the errant to admit their mistake and return into good standing. In this way, the prudent balancing of wrongs as well as their proximity and transience gave rise to different levels of the visibility of otherness within the one body of Christ. That the narrative of oneness was hardly ever meticulously or strictly enforced signals a relative bandwidth of difference within the narrative of oneness. This prudent balancing included economic stability and public order, through which Muslims and Jews could also be tolerated, even if out of self-interest.

2.2 Early modern diversity, political toleration, visibility of the other

This late medieval tradition of toleration became particularly relevant when European Christendom disintegrated rapidly under the influences of early modernity. Despite the emergence of a new order, which challenged the fundaments of the *corpus christianum,* smaller communities embraced its imaginary, each claiming to restore 'original Christianity'.[31] They seem to function as *corpora christiana:* the appropriation of oneness and its emphasis on unity and outward conformity as the elements of

[28] Ibidem, p. 103.

[29] Ibidem, pp. 95-98.

[30] Bejczy, 'Tolerantia: a medieval concept', p. 375.

[31] See for example, François Olivier-Martin, *Le regime des cultes en France du Concordat de 1516 au Concordat de 1801,* Paris: Loysel Editions 1988, p. 390.

belonging to the Christian order in smaller political entities. Often these different bodies of Christ only gradually adopted different conceptions of truth and the common good, and they stand in the shadow of much greater diversity that would arise in the next half millennium.[32] Nevertheless, early modern communities faced an unprecedented, if not traumatic, level of religious, social, and political disintegration.

In response to these transformations, numerous pockets of uniformity emerged across Europe while patchy and volatile regimes of toleration waxed and waned.[33] Interestingly, where early modern authorities tried to engineer uniformity, this uniformity tended to be stronger than in the imaginary of the *corpus christianum* in its medieval contexts.[34] Salvatore writes that the medieval church never established 'uniformity of practice; on the contrary, its authoritative discourse was always concerned to specify differences, gradations, exceptions'.[35] Moreover, medieval Catholicism represented only one 'trajectory' that emerged from early Christianity.[36] Nicholas Terpstra understands early modern upsurge in religious violence as a social dimension of the late medieval Misericordia devotion, in which the image of the Virgin provided an image for protection. Terpstra notes that in the fifteenth century, this devotion acquired social connotation, leading to a focus 'purgation of the body social'.[37] What is so interesting about his observation is that purity is not simply an

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[32] Comp. MacCullough, *Reformation. Europe's house divided 1490-1700*.

[33] Wayne P. Te Brake, *Religious War and Religious Peace in Early Modern Europe,* Cambridge: Cambridge University Press 2017, p. 52; Benjamin J. Kaplan, *Divided by faith. Religious conflict and the practice of toleration in early modern Europe*, London: Belknap Press 2007, pp. 45, 56.

[34] Ibidem, p. 43; Nicholas Terpstra, 'Civic Religion' in John H. Arnold (ed.), *The Oxford Handbook of Medieval Christianity,* Oxford: Oxford University Press 2014, pp. 148-165, p. 162. Cary J. Nederman, *Worlds of Difference: European Discourses of Toleration c. 1100- c. 1550*, p. 4.

[35] Armando Salvatore quotes Talal Asad in *The Public Sphere. Liberal modernity, Catholicism, Islam,* New York: Palgrave Macmillan 2007, p. 85.

[36] James D.G. Dunn, *Unity and Diversity in the New Testament. An inquiry into the character of earliest Christianity,* third edition, London: SCM Press 1990, pp. 396-400.

[37] Terpstra, 'Civic Religion', pp. 160-164.

outcome of religious doctrine, but is also a witness to the sense of danger and insecurity that beset late medieval Christianity.

It is in this context that existing, emerging, and exacerbating religious differences comes to signify danger and ill-health in the *corpus christianum.* The nature of toleration changed accordingly. Kaplan interprets early modern toleration as practices of peaceful coexistence of those living in 'religiously mixed communities', where peace entailed not the absence of conflict, but rather the ability of a community to contain conflict.[38] This conceptual shift from absence of irregularity to containment of fundamental conflict makes early modern re-appropriations of toleration an invaluable resource for understanding its values and weaknesses. Perhaps unsurprisingly, persisting diversity challenged the unity of spatialities and temporalities. Jeffrey Collins notes Nederman's argument that toleration was a negotiation over the visibility or 'manifestation of difference', and was not about the incongruity of specific beliefs itself.[39] Moreover, while awaiting the much anticipated return of Christ, and thus final judgment over evil, the matter of otherness (e.g. unholiness in space and time) became more pertinent in early modern contexts than in the medieval period.

Truth, outward unity, public peace and order, and economic security shaped toleration profoundly. 'Truth and falsehood, good and evil' remained sharply demarcated in the early modern period and breeds of otherness multiplied along the lines of heresy and infidelity.[40] The notion of truth was no less absolute, even though the distinction between fundamental and adiaphoral matters stretched the realm of opinion and thus, potentially, of toleration. This process was in large part driven by intellectuals, whose careful deconstruction of truth into confessional minimalism underpinned toleration with new philosophical foundations (see Chapter Three).

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[38] Kaplan, *Divided by Faith,* pp. 8-9.

[39] Jeffrey R. Collins, 'Redeeming the Enlightenment: New Histories of Religious Toleration', p. 613; Nederman, *Worlds of Difference: European Discourses of Toleration c. 1100- c. 1550*.

[40] Kaplan, *Divided by faith*, p. 34.

Interestingly, rivalry among Christian communities made the issue of heresy once again central to the dynamics of belonging and othering. The dangers of heresy outweighed those of unbelief and its punishment was an instrument of defence.[41] Much of this had to do with the ever imminent threat of Catholic invasions or Protestant revolts, which raised the question of loyalty and trustworthiness. Hans Guggisberg writes that the question of whether a subject with a different religious could be a loyal subject was a typically sixteenth century question.[42]

It seems that severe threats to unity arose from rivalry among Christian communities rather than from Jewish and Muslim minorities.[43] Perhaps closer theological as well as geographical proximity explains this, as the triumph of one over the other could lead to permanent social and political change. For example, Muslim mercantile presence was believed to be temporary or transient; therefore, its threat to the Christian community was perceived as minimal. Similarly, the existence of beneficial trade relationships made the travelling Muslim and ghettoised Jew more or less acceptable within the Christian framework of unity. These economic considerations stand in contrast with the persecution of Spanish Arabs, Hungarians, and Normans who, on grounds of their foreign status, were labelled as traitors.[44] Demarcation of space and belonging thus reinforced the imaginary of oneness. For Jews and others, dissimulation, such as crypto-Judaism and Nicodemism were other

[41] Ibidem, p. 70.

[42] Hans R. Guggisberg, 'Wandel der Argumente für religiöse toleranz und glaubensfreiheit im 16. und 17. Jahrhundert', in: Heinrich Lutz (ed.), *Zur Geschichte der Toleranz und Religionsfreiheit,* Darmstadt: Wissenschaftlichte Buchgesellschaft 1977, p. 465.

[43] Kaplan, *Divided by faith*, pp. 12, 26, 71.

[44] François Olivier-Martin, *Le regime des cultes en France du Concordat de 1516 au Concordat de 1801*, p. 415.

strategies to survive.[45] However, countless Jewish communities faced forced segregation, sudden expulsion, and violent persecution. Jews often did not have legal standing and their position frequently depended on the strength of the (financial) relationship with a politically powerful protector.[46] Lastly, atheists "forfeited" the privilege of toleration altogether because of their rejection of God, and by implication, their rejection of natural justice and morality.[47] However, despite local and regional attempts at establishing a relative unity, most communities settled for some form of toleration in order to deal with lasting internal differences.

Kaplan and Luria convincingly demonstrate that toleration was intrinsically connected with the concept of visibility and uses of space. Their studies, which carefully contextualise experiences of local toleration, show that concerns over unity and purity fundamentally framed renegotiations of identity, belonging, and visibility. Luria also shows that this concern over purity occupied majority and minority religions alike.[48] Evenhuis writes that seventeenth century Amsterdam was a Reformed city in appearance only: a large group of others resided there, including 'Jews, Roman-Catholics, Anabaptists, Lutherans, Brownists, and various "heretics" (…)' who initially even 'formed a great majority'.[49] This shows that minority status was not necessarily grounded numerically, but based on power-dynamics in the city council. Outward manifestation of otherness, ranging from deemed proselytization to

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[45] Comp. Miriam Eliav-Feldon and Tamar Herzig (eds.), *Dissimulation and deceit in early modern Europe,* New York: Palgrave Macmillan 2015; Peter Zagorin, *Ways of Lying: Dissimulation, Persecution and Conformity in Early Modern Europe,* Cambridge MA: Harvard University Press 1990.

[46] Olivier-Martin, *Le regime des cultes en France du Concordat de 1516 au Concordat de 1801,* pp. 416-419.

[47] David Sorkin, *The Religious Enlightenment. Protestants, Jews, and Catholics from London to Vienna*, Princeton: Princeton University Press 2008, p. 15; Ethan H. Shagan, *The Rule of Moderation: Violence, Religion and the Politics of Restraint in Early Modern England*, Cambridge: Cambridge University Press 2011, pp. 147-148.

[48] Luria, *Sacred Boundaries*, p. xv.

[49] R.B. Evenhuis, *Ook dat was Amsterdam. Deel II. De kerk der hervorming in de gouden eeuw,* Amsterdam: Ten Have 1967, p. 167.

publicly disturbing behaviour, might threaten public order.[50] However, the relationship between the visibility of otherness and outward conformity existed on a spectrum: greater levels of visibility concurred with less outward conformity and vice versa.

Kaplan distinguishes four modes of toleration, each representing a layer of (increasing) visibility: comprehension, private religion, *Auslauf,* and parity. These are all instances of toleration on the level of theoretically more or less separated communities that acquire visible presence in shared space. First, minor differences could be accommodated through *comprehension* within the ambit of one church; Kaplan calls these "ecumenical experiments".[51] He argues that comprehension was a viable middle way, or *modus vivendi*, in the mid-sixteenth century, particularly since non-conformists had not yet crystallised and confessionalised dogmatic differences as crucial to 'true Christianity'.[52] Comprehension demanded a level of conformity on behalf of the tolerated, but also maintained the possibility of Christian unity in the longer run. Historian Ethan Shagan argues that English toleration was dressed in the cultural value of moderation, but that this moderation also warranted violence.[53] It is not unthinkable that comprehension may have been practised alongside dissimulation, allowing for the possibility of compartmentalisation of dissent. Because of the condition of outward conformity, the locus of control was outward behaviour, which could be held together with dissenting beliefs as well as practices in the context of the home.

Kaplan identifies *Auslauf,* or walking out, as the second mode of toleration, which allowed dissenters to worship in neighbouring towns. Groups of dissenters made their way through the streets and through the city gate: walking out was of

[50] Kaplan, *Divided by faith*, pp. 78-79.

[51] Ibidem, p. 132.

[52] Ibidem, p. 133.

[53] Shagan, *The Rule of Moderation*, Chapter 3.

course quite visible, and the larger the group grew, the more problematic an "exodus" would be. Moreover, journeying out of town and returning made visible to all which families or individuals dissented. This means that a basic sense of personal safety must have accompanied the occurrence of *Auslauf.* This mode of toleration occurred in areas where adjacent towns adhered to different confessions. This policy largely maintained the narrative of unity of public worship within one town, although inter-town mobility was obviously visible.[54] Specifically, where the visibility of inter-town mobility became significant, a third mode of toleration was developed: hidden presence.[55]

This third mode of toleration allowed dissenters to worship in relatively hidden places in town. Examples are synagogues and churches that were built in houses, attics, and barns, or within a surrounding band of houses.[56] This worship could be tolerated because of the lesser visibility of dissent compared to *Auslauf* and the maintenance of a degree of outward unity. Remonstrants, Catholics, and Sephardic Jews maintained places such as these in Amsterdam during the seventeenth century and, in times of internal conflict, even appealed to the city council.[57] Conflict could arise over similar hours of worship, which forced people to pass each other on the way to different churches, as well as the display of religious books, the visibility of home shrines from the street, and interestingly, the audibility of prayer, congregational song, and organ playing from the hidden places of worship.[58] Such complaints were not unique to Amsterdam and graphically underwrite the that encounter with the othered was a social and political problem. Such complaints about the encounter of otherness might be claims of "freedom from religion" *avant la garde,* yet on behalf of the privileged religion.

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[54] Kaplan, *Divided by faith*, pp. 144-171.

[55] Ibidem, pp. 172-197.

[56] Ibidem, p. 181.

[57] Evenhuis, *Ook dat was Amsterdam. Deel II,* pp. 168-169, 181-183.

[58] Ibidem, 182-183.

The fourth, and perhaps the most open practice of toleration, was parity. This latter policy allowed the presence of one or more different sub-communities which had its proper institutions, sometimes used the same church building (*simultaneum*), and which sometimes shared a measure of power within a town.[59] Sharing space came with a measure of mutual non-interference.[60] A crucial dimension of this parity is a more or less equal citizenship and the use of an oath which was not denomination-specific. An example of this fourth type of toleration is the one commercial law that applied to all merchants, again in Amsterdam, which included Jewish merchants.[61] The mercantile inclinations of the city council of Amsterdam tended to inspire more leniency than Reformed clergy were prepared to consider; this led to significant protest from Amsterdam and beyond. Similarly, Jews and Christian others lived with greater privileges in the Dutch colonies, which were governed by the West Indies Company and, by geographical implication, were removed from immediate control by the Reformed Church.[62] Though the clergy had *de facto* lost a measure of its grip on the city governance, Amsterdam hardly represented an altruistic or principled form of

[59] Kaplan, *Divided by faith*, pp. 198-234; Te Brake, *Religious War and Religious Peace in Early Modern Europe,* pp. 70-73.

[60] Luria, *Sacred Boundaries,* pp. xxviii-xxx.

[61] Marianne E.H.N. Mout, 'Limits and Debates. A comparative view of Dutch toleration in the sixteenth and early seventeenth century', in Christanne Berkvens-Stevelinck, Jonathan I. Israel, & Guillaume H.M. Posthumus Meyes (eds.), *The emergence of tolerance in the Dutch Republic,* Leiden: Brill 1997, p. 46; Wayne te Brake, 'Religious identities and the boundaries of citizenship in the Dutch Republic', in James E. Bradley & Dale K. Van Kley (eds.), *Religion and politics in Enlightenment Europe*, Notre Dame: University of Notre Dame Press 2001.

[62] Jonathan Israel, 'Religious toleration in Dutch Brazil (1624-1654)', in: Jonathan Israel & Stuart B. Schwartz, *The Expansion of Tolerance. Religion in Dutch Brazil (1624-1654),* Amsterdam: Amsterdam University Press 2007, p. 30.

toleration. Its toleration appears to revolve around utility, even as its policies appeared relatively more open than elsewhere around the North Sea.[63]

From a conceptual perspective, the relationship between toleration and visibility is significant: coexistence went hand in hand with the embodiment of difference in shared space. Conversely, less tolerant inclinations accompanied complaints about visibility and other confrontations with otherness – even when this encounter was more indirect, such as seeing an icon through a window or hearing congregational song from a hidden church. The locus of toleration appears to be the common space. However, Kaplan also highlights the importance of friendship and intermarriage to co-existence.[64] His argument about intermarriage appears to be particularly compelling because intermarriage implies a union of differences that may arise from origin, race, as well as religion. "Mixed" progeny makes this union irreversible and thus challenges relative homogeneity. Jesse Sponholz makes a similar observation in his study of the city of Wesel, arguing that individual choices could lead to *de facto* accommodation of 'confessional difference and Christian unity'.[65]

2.3 Toleration treaties: a norm for discernment in action

The concept of toleration found explicit expression in toleration-treaties, which are an invaluable source for the theorisation of toleration, precisely because they embodied the outcome of negotiations, as well as providing the starting point for inevitably variable practices. The next few sections investigate the notion of toleration in three key treaties: the *Union of Utrecht* (1579), the *Edict of Nantes* (1598), and the *Westphalian treaties* (1648). These treaties emerged from cycles of violent repression and war in the Low Countries, France, and the Holy Roman Empire, respectively, as well their allies

[63] Mout, 'Limits and Debates. A comparative view of Dutch toleration in the sixteenth and early seventeenth century', p. 46; Te Brake, 'Religious identities and the boundaries of citizenship in the Dutch Republic'.

[64] Ibidem, chapter 9 and 10.

[65] Sponholz, *The Tactics of Toleration,* p. 229.

and enemies. It appears that each of the treaties strikes different tones of toleration, weighing the dimensions to toleration of truth, public peace and order, economic benefit, loyalty, and outward unity in ways that are not always predictable. It serves as a reminder that toleration cannot be interpreted as a monolithic idea. Rather, the concept of toleration gives rise to quite different outcomes, based on these dimensions to toleration.

2.3.1 The Low Countries: The Union of Utrecht

The *Union of Utrecht* (1579) was undoubtedly formative for the Low Countries and the later Republic and Kingdom of the Netherlands. This charter of cooperation and mutual support was signed by the seven northern provinces and a number of cities in the South of the Low Countries in an attempt to create a stronger opposition to the military aggression by the Catholic King Philip II of Spain. The Union entailed a confederation in which the states remained independent yet supported each other against foreign threats. The treaty plainly addressed trade, tolls, security, prosperity and, only secondarily, toleration. It stipulated procedures and practical aspects of the union such as free movement, trade, and monetary exchange. It exempted the two richest provinces, Holland and Zeeland from the obligation to tolerate Catholics. In the years leading up to the treaty, the anticipated leader of the confederation, William of Orange, expressed his frustration about the "hateful" attitude of these two provinces to foreigners in general, and to Catholics in particular.[66] It was no secret that he favoured greater toleration of Roman-Catholics and that he aspired to unify northern and southern provinces on the basis of religious peace.[67] His autograph

[66] Holland and Zeeland 'portent une grane haine auz étrangers joinct la fermeté et résolution au fait de la religion', *De Pacificatie van Gent* (1576) in Michel E. Baelde & Paul P. van Peteghem, *Opstand en pacificatie in the Lage Landen. Bijdrage tot de studie van de Pacificatie van Ghent,* Ghent: Ghent University 1976, p. 14.

[67] Ibidem, p. 14, 'tant a regard de la liberté politicque pour le faict de la conscience'.

remained notoriously absent from the *Union of Utrecht:* he never formally signed it, although he begrudgingly declared his acceptance sometime later that year.[68]

A host of other interests jostled the matter of toleration, unapologetically pertaining to elite influence, trade, and security. Only after a list of mundane interests did Article 13 address religion. Article 13 obliged the states to regulate dissenting religion in accordance with the *Pacification of Gent* (1576), meaning that states must grant a measure of toleration for reasons of public order and economic security.[69] The *Union of Utrecht* explicitly recalled this settlement in the interests of peace, prosperity, the safety of property and legal certainty.[70] The *Union of Utrecht* required freedom of

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[68] Luc Panhuysen, 'De Unie van Utrecht: Visie, Improvisatie en Grootspraak', (2012), *Historisch Nieuwblad*, Vol. 7, https://www.historischnieuwsblad.nl/nl/artikel/29185/de-unie-van-utrecht.html, (consulted 7 April 2017); Koenraad W. Swart, *Willem van Oranje en de Nederlandse Opstand 1572-1584*, Den Haag: SDU 1994, pp. 161-162; P.J. Blok, 'Brief van den Utrechtsen burgemeester Aernt Dircxsz van Leijden over zijne zending naar den prins van Oranje', (1920), *BMHG*, Vol. 41, pp. 232-246, p. 244.

[69] Traité et Confédération dite *la Pacification de Gand* entre les Etats des Pays-Bas d'une part et les prince d'Orange avec les Etats de Hollande, Zelande, etc d'autre, Faite à Gand, le 8 novembre 1576, http://mjp.univ-perp.fr/constit/nl1576.htm, (consulted 7 April 2017), Articles 2, 4, 5; Baelde & Van Peteghem, 'De Pacificatie van Gent (1576)', p. 26; '(…)ende drandre Provincien van dese Unie sullen hem moegen reguleren near inhoudt van de Religionsvrede by den Eertshertoge Mathias, Gouverneur ende Cappiteyn Generael van dese landen met die van sinen Rayde by advis van de Generael Staten alrede geconcipieert (…)', original text of Article 13 Union of Utrecht (1579), https://www.law.kuleuven.be/personal/mstorme/unievanutrecht.html, (consulted 7 April 2017). The Pacification of Gent was signed in 1576 by seventeen provinces in the northern and southern Low Countries. The southern provinces, who were predominantly Catholic, signed the Union of Arras in early January 1579, while the norther provinces cooperated in a confederation under the Union of Utrecht of late January 1579. Through the Act of Abjuration of 1581, the northern Provinces seceded and became the Republic of the Seven United Provinces, also known as the Dutch Republic.

[70] '(…) ofte daerinne generalick oft particulierlick alsukcke ordre stellen als si tot rust ende welvaert van de Provincien, Steden, ende particulier leden van dyen, ende conservatie van een ygelick, gheestelick ende weerlick, sijn goet ende gerechticheyt doennelick vynden sullen, sonder dat hem hierinne bij enyge andere Provincien enich hynder ofte belet gedaen sal moegen worden (…)', original text of Article 13 Union of Utrecht.

private worship and prohibited personal interrogation or investigation for religious reasons.[71] Article 17 further stipulated that law and justice be administered equally for citizens and foreigners, which indicates a major shift towards administrative toleration. The two most powerful states, Holland and Zeeland, retained the right to deal with religion at their own discretion.[72] Their elites were officially Calvinistic and sought to limit the influence of Catholicism. Though the *Union of Utrecht* would improve the situation of dissenters across the country, it failed to provide the same security to Catholics in Holland and Zeeland.

The *Union of Utrecht* must be understood against the backdrop of the eighty-years' war with Spain (1568-1648). During the *Alteratie* in 1578, the Catholic city board of Amsterdam had been ousted in favour of Protestant elites. The liquidation of Willem of Orange in 1584 caused a setback to Catholic worship and Amsterdam prohibited Catholic worship altogether. The city expelled many Catholics until 1600, though some could ward off their punishments through bribery.[73] The *Union of Utrecht* thus captures a significant moment in the history of the Low Countries, intending to improve toleration of Catholics, even if only on a private level. Economic security clearly overshadowed the matter of toleration and the war with the Catholic Philip II did not alleviate the pressure on a large proportion of Catholics.

2.3.2 France: The Edict of Nantes

The *Edict of Nantes* (1598) was signed by King Henry IV (1553-1610) and intended to end a spiral of chaos and destruction in France as a result of Catholic-Huguenot conflict. Though numerous local communities coexisted relatively peacefully, and

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[71] '(…) mits dat een yder particulier in sijn Religie vrij sal moegen blijven, ende dat men nyemant ter cause van de Religie sal moegen achterhaelen ofte ondersoucken (…)', original text of Article 13 Union of Utrecht.

[72] 'Ende soe veel tpoinct van der Religie aengaet sullen hem die van Hollant ende Zelant draegen naar haerluyden goetduncken (…), Original text of Article 13 Union of Utrecht.

[73] Evenhuis, *Ook dat was Amsterdam. Deel II,* pp. 184-199.

according to Luria 'found grounds on which to cooperate and negotiate local reconciliation', upsurges of violence made the restoration of public order the determining consideration in this settlement.[74] The Edict was the result of long negotiations and aimed at the restoration of public order and peace, as well as the restoration of Catholic worship.[75] It legally acknowledged that Catholic worship might not be universally restored and it arranged for limited toleration of reformed worship where this would serve the interest of public order and peace.[76] For similar reasons, it also granted a level of influence to reformed nobility, some of whom could even advise the King. For this reason, the Edict was perhaps more of a *modus vivendi* which represented a begrudging compromise for both Catholics and Reformed citizens.

The Edict enshrined the dominant position of the Catholic Church and recalled its standing in the tradition of the church fathers, thus claiming exclusive historical legitimacy. The Edict labels the religious factions *la religion catholique, apostolique et romaine* versus *la religion prétendue réformée.*[77] The religions were certainly not treated equally, although it granted some freedoms to Reformed minorities. The Edict entailed a traditional toleration in the sense that the state conceded to forbear that which it

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[74] Luria, *Sacred Boundaries,* pp. xvii-xviii.

[75] Article 3 l'Édit de Nantes en faveur de ceux de la religion prétendu reformée of 13 April 1598, electronic edition by N. Dufounaud, 30 July 2003, http://classiques.uqac.ca/classiques/henri_iv/Edit_de_nantes_1598/edit_de_nantes.html, (consulted 20 September 2017), 'Ordonnons que la religion catholique, apostolique et romaine sera remise et rétablie en tous les lieux et endroits de cestui notre royaume et pays de notre obéissance où l'exercice d'icelle a été intermis pour y être paisiblement et librement exercé sans aucun trouble ou empêchement'.

[76] From the Preambule of the Edict of Nantes: 'Entre les grâces infinies qu'il a plu à Dieu nous départir, celle est bien des plus insignes et remarquables de nous avoir donné la vertu et la force de ne céder aux effroyables troubles, confusions et désordres qui se trouvèrent à notre avènement à ce royaume', 'nous parviendrons à l'établissement d'une bonne paix et tranquille repos', 'que nous avons reçues de plusieurs de nos provinces et villes catholiques de ce que l'exercice de la religion catholique n'était pas universellement rétabli comme il est porté par les édits ci-devant faits pour la pacification des troubles à l'occasion de la religion'.

[77] Article 3 Edict of Nantes.

explicitly designated to be "false". The desire for outward unity is articulated in several provisions that substantiate a limited toleration. Several provisions make distinctions between public and private bodies and places.[78] Generally, Reformed worship needed to be exercised in private or outside the towns that were the powerful Catholic Lords lived. Liberty of public worship was only allowed in specific places: a secret second brevet licensed about 150 cities and villages as *places de sûreté*, which could even have proper armies under the King's authority to protect themselves.[79] According to historian Nicola Sutherland, this evidences some ambivalence between the strong condemnations and local practices of accommodation.[80]

For reasons of public order and peace, public speech against the established faith was prohibited, as was printing or selling of reformed literature.[81] The edict ordered everyone to respect Catholic holidays and no one was permitted to make noise, to work, or to advertise products on the streets on those days.[82] Nevertheless, individual citizens gained some privileges. Similarly to the *Union of Utrecht*, the Edict proclaimed individual citizens equal before the law.[83] Intervention with the freedom of conscience was prohibited in order to prevent further unrest.[84] Interestingly, the

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[78] Articles 1, 5 and 11 Edict of Nantes

[79] Edict of Nantes, Second Brevet; Nicholas Must, *Preaching Dual Identity. Huguenots Sermons and the Shaping of Confessional Identity 1629-1685,* Leiden: Brill 2017, p. 107.

[80] N.M. Sutherland, 'The Crown, the Huguenots, and the Edict of Nantes', in R.M. Golden (ed.), *The Huguenot Connection: the Edict of Nantes, its Revocation, and Early French Migration to South Carolina,* Dordrecht: Martinus Nijhoff 1988, pp. 34-35.

[81] Articles 17 and 21 Edict of Nantes.

[82] Article 20 Edict of Nantes.

[83] Articles 22, 27 Edict of Nantes.

[84] Article 6: 'Et pour ne laisser aucune occasion de troubles et différends entre nos sujets, avons permis et permettons à ceux de ladite religion prétendue réformée vivre et demeurer par toutes les villes et lieux de cestui notre royaume et pays de notre obéissance, sans être enquis, vexés, molestés ni astreints à faire chose pour le fait de la religion contre leur conscience, ni pour raison d'icelle être

Edict forbade the abduction of Reformed children in order to be catholicised, yet the monopoly of the Catholic Church on legal marriage left Reformed children vulnerable in terms of citizenship and inheritance.[85]

These specific provisions of the *Edict of Nantes* show the importance of outward unity, public order and peace, and the common good in shaping the nature of toleration. This settlement is considerably more religiously inclined than the *Union of Utrecht*. The Edict is explicit about its support for the Catholic Church and its sole and unquestionable assertion of truth. This different emphasis might be explained by the French theology of the monarchical authority and a stronger inclination to unity resembling the idea of the *corpus christianum* in its search for religious and political oneness. However, the Edict shows that realities of diversity and religious violence necessitated concessions of these loftier ideals. In other words, the need to accommodate non-conformity for the sake of public peace and order outweighed the imperative of absolute religious unity. In this context it is worth mentioning the great impact of upsurges of violence for the perception of religious conflict, foremost in the massacres of Michelade (1567) and St. Bartholomew's Day (1572). Violence indeed returned following the revocation of the Edict of Nantes in the Edict of Fontainebleau in 1685.

2.3.3 The Holy Roman Empire: The Peace Treaties of Westphalia

The Peace of Westphalia is another landmark in the history of toleration. The Peace of Westphalia consisted of three treaties: the Treaty of Osnabrück (IPO) between the Holy Roman Empire and Sweden (24 October 1648); the Treaty of Münster (IPM) between France and the Holy Roman Empire, as well as their allies (24 October 1648); and another Treaty of Münster between the United Provinces of the Netherlands and Spain

recherchés dans les maisons et lieux où ils voudront habiter, en se comportant au reste selon qu'il est contenu en notre présent Édit'.

[85] Articles 18 and 23 Edict of Nantes.

(30 January 1648).[86] The IPO and IPM treaties feature toleration on the basis of several dimensions of toleration: truth in relation to the recognised religion; public unity with regard to public worship; the common good and public peace regarding the peace and tranquility of the Empire; and pragmatic economic provisions regarding property, toll, and commerce. The two treaties re-established the Peace of Augsburg of 1555, which had been rescinded by Emperor Ferdinand II in the Edict of Restitution in 1629.[87]

The Peace of Augsburg had previously introduced the famous *cuius regio eius religio* principle, which allowed Catholic and Lutheran princes to alter the religion of their land whilst offering basic security to others.[88] Wayne Te Brake writes that the text of the Peace of Augsburg 'offers eloquent testimony to the sense of weariness and resignation' with which religious difference was accepted by German princes as the 'necessary foundation for their political future'.[89] The IPO and IPM extended this principle to Reformed princes and minorities, with the exception of the Habsburg hereditary lands.[90] Somewhat speculatively, this later inclusion of the Reformed confession might speak to the importance of the potential to share space to the feasibility of toleration, particularly considering the divergent attitudes to sacred

[86] The texts and article numbering are derived from Die Westfälischen Friendensverträge vom 24 October 1648. Texte und Übersetzungen, (Acta Pacis Westphaliae, Supplementa Electronica 1), http://www.pax-westphalica.de, (consulted 5 May 2017).

[87] Article 5.1 IPO, Article 47 IPM.

[88] Territories which had affirmed he Augsburg Confession of 1530, the main Lutheran doctrinal statement; Articles 15 and 16 Peace of Augsburg.

[89] Te Brake, *Religious War and Religious Peace in Early Modern Europe,* p. 58.

[90] Article 47 IPM**:** **'**Cum etiam ad maiorem Imperii tranquillitatem stabiliendam de controversiis circa bonaecclesiastica et libertatem exercitii religionis his ipsis de pace universali congressibus certaquaedam compositio inter Caesarem, electores, principes et status Imperii inita atque instrumento pacis cum plenipotentiariis reginae et coronae Sueciae erecto inserta fuerit, placuit eandem compositionem ut et illam, de qua inter eosdem ratione eorum, qui reformati vocantur, convenit, praesenti quoque tractatu firmare et stabilire eo plane modo, ac si de verbo ad verbum huic inserta legeretur instrumento'.

space.[91] Between these three confessions, no hierarchy was assumed; however, other religions or sects were not to be tolerated in the Holy Roman Empire at all.[92] The Augsburg settlement established parity in the free Imperial Cities in the interest of merchandise and international trade.[93] The treaty also ordered non-interference on behalf of other territories, including a provision for the non-protection of foreign subjects (§23 PA).

The treaties facilitate three levels of religious toleration related to the principle of visibility. The motivation provided for the new order of toleration pertained to liberty of conscience, the prohibition of the abuse of power, and peace and tranquillity in the Empire. The first level of toleration is that the recognised church had a right to public worship within a delineated territory, including the right to build churches in the public space. This being the rule, the treaties made an additional provision for those who enjoyed toleration in the year 1624: they retained their rights to practise their religion publicly in churches, but only at set hours.[94] They also fell under the regime of freedom to private worship, which comprised the second level of toleration. This right to private worship was conferred to all recognised minorities, regardless their status in 1624, and allowed them to meet in small groups in homes.[95] Depending

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[91] See David M. Luebke, *Hometown Religion. Regimes of Coexistence in Early Modern Westphalia,* Charlottesville: University of Virginia Press 2016, pp. 130-131.

[92] Article 7.2 IPO, Article 47 IPM.

[93] Article 27 Peace of Augsburg.

[94] The treaties take the situation of the year 1624 as the standard year and order restitution where possible.

[95] Article 27 IPM: 'Augustanae confessionis consortibus, qui in possessione templorum fuerant, interque eos civibus et incolis Oppenheimensibus, servetur status ecclesiasticus anni 1624, caeterisque id desideraturis Augustanae confessionis exercitium tam publice in templis ad statas horas quam privatim in aedibus propriis aut alienis ei rei destinatis per suos aut vicinos verbi divini ministros peragere liberum esto'. Vgl. Article 4.19 IPO: 'Augustanae confessionis consortibus, qui in possessione templorum fuerant, interque eos civibus et incolis Oppenheimensibus, servetur status ecclesiasticus anni millesimi sexcentesimi vigesimi quarti [1624], caeterisque id desideraturis Augustanae confessionis exercitium tam publice in templis ad statas horas quam privatim in aedibus propriis aut

on the territory, such minorities could be given freedom to occasional public worship. The third level of toleration concerned domestic worship, such as private instruction and private prayer.[96] Men from minorities could send their children to foreign schools for religious education or have them instructed privately. Such freedoms were, however, conditional upon behaviour that caused no disturbance of public order. Interference with private and domestic worship was strictly forbidden.

Those who changed their religion after the settlement had lesser rights. Mirroring the Peace of Augsburg, the Treaty of Osnabrück prescribes a right to migrate, which is known as the *ius emigrandi.* This right allowed men to leave with their wives and children upon payment of the customary recompense for granting freedom from servility.[97] The term for transition was longer. The treaty prescribes a minimum of five years for those who remain adherents of a minority religion and three years for those who change their religion after 1648. Thereafter, they would be dependent on the benevolence of princes. The settlement also restricted multiple changes of a region's religion. After the Westphalian settlement, no right remained for a prince to alter the religion of his territory again, unless a community explicitly demanded it.[98] If the nobility would again change their confession, they simply had a right to migrate themselves whilst maintaining free entry rights in the interest of curating their property, or alternatively, they could decide to stay under the condition that they would only worship in private.[99]

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alienis ei rei destinatis per suos aut vicinos verbi divini ministros peragere liberum esto'; Article 5.28 IPO.

[96] In practice, their likely has been a fourth layer of clandestine worship of the religions that were technically ruled out from the settlement.

[97] Article 24 Peace of Augsburg.

[98] Article 7 IPO.

[99] Article 5.30 IPO.

The latter freedom was conditional upon the requirement not to 'disturb the public peace and tranquillity'.[100] These provisions are significant insofar as the authorities usually set the boundaries for toleration; some of them become subjects of toleration themselves. The levels of toleration speak to the importance of the notion of outward unity. The treaties established different layers of toleration for specific minorities depending on the circumstances in a given territory, but other religious groups were completely excluded from toleration. The layers of toleration resonate with Kaplan's levels of visibility, from almost invisible private and domestic worship, to the *ius emigrandi*. Unrecognised churches remained less visible, especially as domestic meetings were allowed in small groups only and migration was offered as a long term solution. The concern over unity is perhaps most strikingly expressed in Article 5.43 IPO, which calls for parity in those rare communities which could not be considered *unum corpus,* or 'one body'.[101]

This language is of utmost significance, for it presupposes that the treaty understood all other communities as instances of 'one body'. This is an explicit reference to the notion of the *corpus christianum* and its allusions to unity of space and time. The 'one body' language can be understood as a legal affirmation of the division of the *corpus christianum* in multiple *corpora christiana.* Moreover, it shows that the concept of toleration had not yet crystallised a new understanding of shared space or indeed of minority "privilege" in the treaty which has been heralded as the foundation of the modern state. Hence, where Daniel Philpott understands the significance of Westphalia in the affirmation of a system of 'sovereign states', I would be inclined to understand this significance in the legitimacy that the treaties conferred upon political communities as interdependent yet independent *corpora christiana.*[102]

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[100] Article 5.30 IPO.

[101] Article 5.43 IPO.

[102] Daniel Philpott, *Revolutions in sovereignty. How ideas shaped modern international relations,* Princeton: Princeton University Press 2001, pp. 82-84.

2.4 Conclusion

These narratives of toleration provide windows into the common conceptual frames of reference to toleration: truth (secondarily informed by proximity and transience of evil), public peace and order, outward unity, economic benefit, and loyalty. These dimensions appear in the analysis of canonical toleration and they also feature explicitly in the *Union of Utrecht,* the *Edict of Nantes,* and the *Westphalian treaties,* which, for better or for worse, are known as toleration-treaties. This chapter identified common conceptual frames of reference to toleration, but is equally careful to not present these as a template of toleration. With Alexandra Walsham, I am careful to avoid connotations of progress, because histories of toleration are fraught with intolerances.[103] Rather, these frames of reference to toleration evidence that early modern toleration was underpinned by conceptual and practical logic. This logic finds specific and complex expressions in practice through local applications, variations, or less methodical deviation. The three treaties show that common conceptual frames of reference to toleration may function like a conceptual kaleidoscope: producing different, adaptable outcomes depending on differing contexts of times and spaces. This flexibility extends to local and regional contexts as well.

The concept of toleration is historically and conceptually intertwined with the imaginary of oneness of a *corpus*, yet provides tools to contain religious, social, and political disintegration. Although princes, city councils and kings went to great lengths to maintain some level of unity in common space, it seems that an increase in toleration translated into visibility and tangibility of this very space. With reference to discussions about the visibility of religion in public space in chapter five and six, two matters stand out. Firstly, though private freedom of religion technically falls within

[103] Alexandra Walsham, *Charitable Hatred: tolerance and intolerance in England 1500-1700,* Manchester: Manchester University Press 2006; Alexandra Walsham, 'Culture of coexistence in early modern England: history, literature, and religious toleration', (2013), *The Seventeenth Century,* Vol. 28, no. 2, pp. 115-137, p. 118. Comp. to Te Brake, *Religious War and Religious Peace in Early Modern Europe,* p. 352.

the scope of toleration, it represents the least permissive expression of toleration. Secondly, dissimulation went hand-in-hand with lower levels of toleration. Gaining standing in public space relieved some minorities from the duty to conform and the social necessity to hide their real identity from others. On a personal level, one must have had some confidence that toleration would endure before one would lay off the veil of dissimulation. Thus, however begrudging and tainted, early modern toleration joined the canonical tradition of toleration with a concern over visibility and common space. While many hoped that the body of Christ would yet reunite in the saeculum, the violent eruptions of intolerance perhaps engraved diversity in a manner that would become both inescapable and permanent.

Toleration and public space are concepts that are shaped by the conceptual frames of reference to toleration; the use of these dimensions by authorities depends on the conception of shared space as well as an imaginary of a common identity. In the face of particular issues and controversies about the visibility of religion in shared space, every decision by the state presents as a possibility to commit, not only to the protection of peaceful coexistence, but also to a positive understanding of diversity.

3. From covenant to contract: philosophical critiques and reimagination of political order

Recent deconstructions of toleration as an "Enlightenment"-virtue have complicated the picture of toleration and religious freedom.[1] Yet if religious freedom cannot be unequivocally located in the Enlightenment, where does toleration end and where does religious freedom begin? The previous chapter has shown that practices of toleration did not unreservedly engender religious freedom, and, as this chapter contends, neither did many early modern philosophers. Preoccupation with truth, knowledge, and delineations of permissible and impermissible errors fills page after page. The imaginary of the body of Christ as the basis for social and political order persisted, even though the religious, social, and political disintegration of the *corpus christianum* necessitated the reimagination of the foundation of social and political life. As Gary Remer puts it, many philosophers 'refused to recognize the permanent fragmentation of Christian unity'.[2] This was an urgent problem; Walter Ullman writes that 'there was above all an intellectual restlessness which was clearly prompted by the crumbling of the foundations upon which European society was built. And the new landmarks were not yet discernible'.[3]

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[1] Some scholars prefer to refer to 'Enlightenments' rather than 'the Enlightenment'. I will refer to the Enlightenment as inclusive of Catholic, Protestant, and Jewish Enlightenments, see further: James E. Bradley & Dale K. Van Kley, *Religion and politics in Enlightenment Europe,* Notre Dame: University of Notre Dame Press 2001, p. 2; Jonathan I. Israel, 'Enlightenment! Which Enlightenment?', (2006), *Journal of the History of Ideas*, Vol. 67, No. 3, pp. 523-545, p. 528.

[2] Gary Remer, *Humanism and the Rhetoric of Toleration,* State College: The Pennsylvania State University Press 1996, p. 7.

[3] Walter Ullmann, *Law and Politics in the Middle Ages. An introduction to the sources of medieval political ideas,* Ithaca N.Y.: Cornell University Press 1975, p. 301.

This chapter explores the common frames of reference to toleration – truth, common good, outward unity and public peace, economic interest, and loyalty – in early modern philosophical discourses (ca. 1500-1789). Drawing on writings on toleration by philosophers from the Low Countries, France, and the Holy Roman Empire who represent different political priorities, as well as secondary literature in the history of ideas, this chapter marks four particular aspects of philosophical discourses on toleration: First, that epistemic reformations facilitated a greater latitude regarding certainty about truth; second, that the relationship between outward unity and conformity hinged on the interest of public order; third, that ongoing religious and political fragmentation gave rise to the distinction between religious and political unity; fourth, that religious freedom did not necessarily emerge from the advancement of social contract over divine covenant. The scope of this chapter is limited to the discussion of toleration as initiated in chapter two. This chapter cannot address the philosophical history of toleration comprehensively, nor suggest a particular canon on the development of religious freedom. Instead, based on the primary and secondary materials, it argues that philosophical discourse about toleration may not in and of itself account for a development from toleration to religious freedom.

Rather, this chapter concludes with the suggestion that the change from toleration to religious freedom needed to reside where toleration had been located: in law and in state action. Legacies of the *corpus christianum* could perhaps only be contained by a *legal* re-orientation from divine covenant to social contract. This is perhaps where philosophical contributions to a reimagination of belonging lasted beyond specific iterations of toleration: the articulation of law as an expression of a social contract diminishes the language of the *corpus christianum* and its reliance on toleration. For example, the recognition of human beings as being born "free" implies that law does not operate on the basis of permissions or licenses. Instead, it is the state that now has to justify interventions with natural freedoms. This paradigmatic shift did not, however, necessarily bury the body of Christ in early modern history. Rather, as the next chapters will show, legacies of the *corpus christianum* extended into

nineteenth-century constitutionalism, and as this thesis argues, still form substrata of contemporary political discourses on diversity, pluralism, and religious freedom.

3.1 Epistemological reformation, truth and toleration

Most early modern philosophers, including those associated with the Enlightenment, operated within religious frameworks and assumed their world to be Christian. They generally aspired to contribute to a greater maturity of religious and political life and, in doing so, attempted to reconcile the many social contradictions resulting from religious as well as social-political disintegration.[4] This context of disintegration cannot be overlooked, and in particular, specific arguments about toleration must be understood in relation to personal theological convictions as well as ecclesiastical (dis)loyalties. Engagement with churches' understandings of truth and theological-philosophical deconstruction of itemised core beliefs warranted a compartmentalised toleration: sufferance of perceived falsehood or evil in society 'for prudential reasons' and accommodation of certain heresies *within* the church.[5] Many philosophers believed that toleration could strengthen ecclesiastical and social unity in the longer term, so that the idea of the Christian community would continue to undergird social and political order.[6]

Distinctions between fundamental and less fundamental beliefs were perhaps anticipated in canonical law, the distinguishing of specific core and *adiaphoral* beliefs burgeoned as a result of epistemic and methodological reformations associated with Renaissance humanism. In the wake of the Renaissance, Acontius (1492-1566) and Erasmus (1466-1536) were among the first who used a division between core knowledge and *adiaphoral* conviction. Core knowledge entailed knowledge that was fundamental, certain, and necessary for salvation; by contrast, 'adiaphoral' knowledge

[4] Erin Wilson, *After Secularism,* New York: Palgrave Macmillan, 2012, p. 50.

[5] Remer, *Humanism and the Rhetoric of Toleration,* p. 5.

[6] François Olivier-Martin, *Le regime des cultes en France du Concordat de 1516 au Concordat de 1801,* p. 414.

was either inferred to be inessential to salvation or which was not sufficiently objectifiable. What philosophers like Acontius and Erasmus questioned was perhaps not so much the idea of absolute ontological truth, but rather the degree to which humans could grasp unto it: the sinful dispositions of humans rendered their understanding of divine revelation in Scripture fallible. Thorough occupation with the nature of knowledge, sources of knowledge, and the reconfiguration of methodological perspectives allowed scrutinization of widely held truths. The potential consequences of this severing of knowledge could be dramatic: it would emphasise the distance between creation and its Creator, despite the presumed participation of the body of Christ in the divine. It also provoked questions about the nature of church and society and particularly obscured moral frames of action. It is against this background that Spanish philosophers developed what is known as 'early modern probabilism', as Stefania Tutino has impressively documented.[7]

Hence, the stakes of truth concerned no less than the sustainability of Christian unity and the protection of the social and public order. Various cities, regions and princedoms upheld religion and ecclesiastical association as a condition to citizenship and oathtaking. Consolidation of religious dissent was reflected in social and economic structures and thus put practical pressure on restrictive approaches to toleration. However, growing diversity within (Latin) Christianity did not necessarily prompt philosophers to sunder the notion of the *corpus christianum* itself. They often assumed a Christian truth, even if increasingly narrowly defined, to be the basis of social and political order. Yet they sought to civically accommodate diversity within Christianity. Toleration hardly ever covered all grounds of dissent and excluded atheists and sometimes Christian factions on the basis of public order. As long as dissent was understood to be outside the remit of order, these minorities could be subject to (violent) repression and expulsion, even unto death.

[7] See Stefania Tutino, *Uncertainty in Post-Reformation Catholicism. A History of Probabilism*, Oxford: Oxford University Press 2018, pp. ix, 26-27.

The precise content of the *adiaphora* was highly controversial in both nature and scope among early modern philosophers. Perhaps unsurprisingly, the vigour of the debate on *adiaphora* equalled the debate on core aspects of faith. The stakes were high: whichever element of knowledge was no longer understood to entail uncontested, undoubtable truth, it would thereby lose its spiritual normativity for common life. Erasmus and Acontius, as mentioned above, took the meaning of *adiaphora* in different political directions, the first to emphasise concord or harmony, the latter to downplay differences between factions. Both espoused several specific concerns, such as the need for greater latitude to accommodate disagreement and debate, the necessity of debate in pursuit of greater knowledge of truth, and a separation of ecclesiastical and political functions to maintain peace in church and society. Perhaps because of their strong emphasis on the knowledge of truth, their theories of toleration might not appear fully-fledged.[8]

Erasmus, a Dutch Catholic theologian and philosopher, distinguished between core and *adiaphora* regarding beliefs, as well as religious practices stemming from these beliefs, and he argued for open philosophical debate and voluntary worship.[9] Erasmus certainly was no unbridled sceptic; he was committed to the doctrine of divine revelation in the Scriptures and believed that all adiaphoral matters could be debated on the basis of inclusivity and probability.[10] Erasmus never envisioned such debates to undermine the Christian truth, but rather imagined such deliberation to lead

[8] István P. Bejczy, 'Tolerantia: a medieval concept', *Journal of the History of Ideas* (1997), Vol. 91, No. 4, pp. 365-384, p. 376, Comp. Rainer Forst, *Toleration in Conflict*, Cambridge: Cambridge University Press 2013, p. 107; Gregory D. Dodds, '"Betwixt Heaven and Hell": Religious Toleration and the reception of Erasmus in England', in Karl A.E. Enenkel, *The reception of Erasmus in the early modern period,* Leiden: Brill 2013.

[9] Gary Remer, *Humanism and the Rhetoric of Toleration,* pp. 48-50.

[10] Erika Rummel, 'Desiderius Erasmus', in *Concise Routledge Encyclopedia of Philosophy,* London: Routledge 2000, p. 252.

inevitably towards truth, and only on that condition was worship voluntary.[11] Similarly to canonical philosophy, Erasmus regarded error as a *transient* or temporary flaw which needed temporary accommodation in church and society. He believed error to be somewhat conducive to the pursuit of truth, yet its acceptability depended on a (prudential) balance of greater and lesser evils.[12] Only error stemming from religious immaturity or as a product of a fallible - yet free - will would be considered eligible for toleration. And while the church could choose to excommunicate someone who persisted in error, only the secular authority would be competent to legitimately execute a heretic, should their heresy indeed threaten public order.[13]

This legitimation of violence renders his language of 'flexibility and charity' and 'Christian necessity of peace and concord', and *'concordia'* rather than *'tolerantia'*, somewhat ambivalent. He did not give up the notion of the 'single body of Christ' and his emphasis on concord supposes that harmony is dependent on eventual agreement.[14] Erasmian coexistence thus occupied itself the ideal of Christian unity: one that was somewhat flexible as well as aimed at conversion.[15] Erasmus seemed to have been more interested in the future of the church than in immediate conflicts,; and he understood the role of secular authority as more or less auxiliary to this future reconcilliation. This shows from Erasmus' perspective on other religions such as Judaism and Islam, none of whom recognised the authority of Christ: both secular and religious authorities must treat them with love (even as he expressed himself dismissively about them), so that the unbeliever and the errant might convert and be

[11] Remer, *Humanism and the Rhetoric of Toleration,* pp. 48-50.

[12] Bejczy, 'Tolerantia: a medieval concept', p. 376.

[13] Remer, *Humanism and the Rhetoric of Toleration*, pp. 80, 81-85; Dodds, 'Betwixt Heaven and Hell', pp. 110, 119.

[14] Dodds, 'Betwixt Heaven and Hell', pp. 110, 119.

[15] Gregory D. Dodds, *Exploiting Erasmus. The Erasmian legacy and religious change in early modern England,* Toronto: University of Toronto Press 2009, Chapter 7, Conclusion; comp. Dodds, 'Betwixt Heaven and Hell'.

united to the Christian community.[16] Erasmus was still inclined to exclude a range of marginalised sects, further limiting the exact scope of toleration on account of public order, all of which concerns were informed by a fairly specific Christian morality.[17]

The matters of unity, trust, and the fate of the kingdom of Christ were also invoked by the more radical Acontius, who was an Italian expatriate in London. Rather unconventionally, he suggested excluding the Eucharist and the doctrine of predestination from the core beliefs. The Eucharist and predestination embody visible signs of the spiritual demarcation of the body of Christ.[18] Roman-Catholic, Lutheran, and Reformed communities fiercely contested these doctrines.[19] This move speaks volumes about his concern over Christian unity. It might show that Acontius took the fallible nature of human knowledge seriously, to the extent that he thought even core beliefs could be misguided in spite of divine revelation; yet, his leniency to scepticism regarding fundamental or essential knowledge still upheld an uncompromising sense of truth.[20] He thought that scepticism would resolve into truth through the guidance of the Holy Spirit – an expectation he shared with Erasmus.[21]

The idea of Christian truth remained no less central in Acontius compared with Erasmus, even as Acontius appeared more lenient. Acontius' concern about reconciliation and unity are characterised by explicit eschatological concerns. He regarded Christian unity and peace and unity as instrumental to the destruction of Satan's power and the advancement of God's kingdom, which he considered the

[16] Forst, *Toleration in Conflict*, pp. 107-108; Dodds, 'Betwixt Heaven and Hell', p. 109.

[17] Remer, *Humanism and the Rhetoric of Toleration*, pp. 81-85.

[18] Gerrit Voogt, *Constraint on trial. Dirk Volckertsz Coornhert and religious freedom,* Kirksville: Truman State University Press 2000, p. 63.

[19] David M. Luebke, *Hometown Religion. Regimes of Coexistence in Early Modern Westphalia,* Charlottesville: University of Virginia Press 2016, p. 76.

[20] Remer, *Humanism and the Rhetoric of Toleration*, p. 118-120.

[21] Ibidem, pp. 120-121.

supreme common good over other temporal concerns.[22] Similarly to Erasmus, he perceived theological error to be an ecclesiastical affair and accorded secular authorities competence to punish apostates only in rare circumstances; for example, in the interest of public order.[23] He advocated toleration of the errant in adiaphoral matters, called for temporary toleration of those denying the fundamentals of knowledge, and only demanded 'excommunication and avoidance' of those persisting in their error.[24] Though more lenient within Christianity, he was more restrictive towards Christianity's others. Excluded from toleration was anyone who rejected trinitarian theology, denied Jesus as the Son of God, or dismissed the principles of *Sola Scriptura* and *Sola Fide*.[25]

These two examples show that truth was intrinsically connected to toleration and that even more radical philosophers like Acontius did not suggest alternative foundations for toleration – and thereby maintained the binary of the one Christian body and the others. Christian truth remained the foundation of social and political order, even when it was impossible to ignore the presence of others, like Jews and Muslims. Truth did not hinge, therefore, on the more general aspects of the Christian faith, but specifically on the notion of the body of Christ, the person of Christ, and the Kingdom of Christ in this world and the world to come. It shows that, indeed, these philosophers could not make peace with the permanent fragmentation of the *corpus christianum*, as Remer points out. Dissidence thus remained a matter of non-conformity to Christianity whose chief concern *in the saeculum* was outward unity and public order. The question remains to what extent should one's behaviour be coerced into conformity, or which levels of disturbance warrant which gradations of violence, particularly in the face of wars that are apparently inspired by religion.

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[22] Voogt, *Constraint on trial*, p. 64.

[23] Remer, *Humanism and the Rhetoric of Toleration*, pp. 134-136; Voogt, *Constraint on Trial*, p. 63.

[24] Remer, *Humanism and the Rhetoric of Toleration*, Ibidem, pp. 121, 135.

[25] Voogt, *Constraint on Trial*, p. 63; John Marshall, *John Locke, Toleration and Early Enlightenment Culture*, Cambridge: Cambridge University Press 2006, p. 324.

3.2 Outward unity, conformity and the emerging dominance of the public order argument

In places where differences erupted into egregious violence, the dimension of public peace and order became increasingly important. Not so much because division itself would automatically generate disorder, but because Christian truth, as well as religious and political unity, had undergirded social order and morality. These presuppositions rendered dissent and non-conformity dangerous, not division in and of itself. Dissent was not merely a matter of disagreement that could be civically resolved, but was a matter that put enormous pressure on the political imagination of theologically divided communities. This section features philosophers and theologians whom engaged the public order particularly in relation to toleration, including Jean Bodin (1530-1596), Hugo Grotius (1583-1645), Johannes Althusius (1563-1638), and Baruch de Spinoza (1632-1677). Despite the fact that they all took the dimension of public order very seriously, their conclusions pointed into completely different directions. This perhaps demonstrates the potential of relative volatility within the concept of public order. Moreover, these examples show how difficult it was to disentangle truth and unity from public order and that, eventually, the ideal of Christian unity as the basis for order became untenable.

French philosopher and jurist Bodin, who is usually known from his theory on sovereignty, showed a particular interest in truth and unity in the context of toleration. Of particular interest is his openness to non-Christian religions in the conversation in this common journey to truth – he called for conversation and toleration of non-Christians.[26] Perhaps tangentially, practices of Muslim-Christian dialogue had occurred in Baghdad as early as in the Abbasid era (8th-13th century) and similarly

[26] Otto Busch, *Toleranz und Grundgesetz. Ein Beitraf zur Geschichte des Toleranzdenkens,* Bonn: H. Bouvier und Co Verlag 1967, p. 19; Remer, *Humanism and the Rhetoric of Toleration,* p. 11.

served the search for truth yet within the understanding of superiority of Islam.[27] Despite Bodin's commitment to the superiority of Christian truth, he thought that all religions embodied 'parts of more complex truth' as an expression of the grace of God.[28] It is in this context that he was confident that a measure of justified error within and outside the church could be allowed, even if that meant that worship itself should not be coerced.[29]

He did not advise open-ended dialogue and conversation and he considered that conversational openness could potentially be dangerous for public peace.[30] His *Six livres de la République* (1576) and his later work *Politiques* take stability and public order to be guiding principles to toleration or, indeed, the refusal of toleration.[31] Such decisions fell to secular authorities, which would tolerate or persecute sects for prudential reasons only. However, he intended his ideas for communities which had already become more diverse. In places where religious unity existed, he was comfortable with coercion of uniformity on behalf of secular authority. This might seem to contradict the principle of non-coercion, but it shows that toleration conceptually severed belief and action, and that action could be coerced. Where difference existed, he recommended fostering dialogue and conversation towards the protection of harmony and peace, again assuming that universal natural religion as represented in the Decalogue upheld political order.[32] Harmony and peace amidst disagreement could make a community '*seem* to be one' (italics added).[33] What is

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[27] See Mun'im A. Sirry, (2005), 'Early Muslim-Christian dialogue: a closer look at major themes of theological encounter', *Islam and Christian–Muslim Relations,* Vol. 16, No. 4, pp. 361-376, p. 373.

[28] Remer, *Humanism and the Rhetoric of Toleration,* p. 11.

[29] Busch, *Toleranz und Grundgesetz. Ein Beitrag zur Geschichte des Toleranzdenkens*, pp. 16-17, 20.

[30] Remer, *Humanism and the Rhetoric of Toleration,* p. 10.

[31] Busch, *Toleranz und Grundgesetz. Ein Beitrag zur Geschichte des Toleranzdenkens*, pp. 20-22.

[32] Marion Leathers Kuntz, 'Toleration in Bodin's *Colloquium Heptaplomeres',* in J.C. Laursen & C.J. Nederman, *Beyond the Persecuting Society: Religious Toleration before the Enlightenment,* Philadelphia: University of Pennsylvania Press 1998, pp. 135-137.

[33] Leathers Kuntz, 'Toleration in Bodin's *Colloquium Heptaplomeres',* p. 133.

particularly striking is that this appearance of unity as a mediator of the existent and the imagined; this of course entails an explicit reference to the *corpus christianum.*

Dutch jurist and Arminian theologian Grotius is of course famous for his writings on natural law. He poses the universal and common character of natural law as a foundation for public order and peace in the absence of theological consensus.[34] This focus on a shared framework of natural law seems capable of nuancing the binary between the church and the world, as well as strengthening the premise of the universality of a narrowed conceptualisation of the Christian truth. He certainly affirmed the idea of Christian unity and peace as a divine command, but he believed that this needed stewarding in practice through good ecclesiastical leadership, and it could only secondarily be reinforced through secular leadership.[35] Recognising the reality of difference and, perhaps as a dissenter himself (from the Dutch Gomarian-leaning authorities), he argued that religion pertained to free will and conviction.[36] Unlike many others, he pleaded to tolerate heretics as well as Jews in the Low Countries, though like Bodin and others, he thought that toleration would eventually lead to acknowledgement of error, and thus, conversion to the Christian faith.[37]

In a somewhat similar spirit, German Calvinist political philosopher Althusius developed a predominantly rational framework of toleration in his work *Politica Methodice Digesta, Atque Exemplis Sacris et Profanis Illustrata* (1614). Given the fragmentation in the Holy Roman Empire, it perhaps is not a surprise that he regarded

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[34] Quentin Skinner & Martin van Gelderen (eds.), *Freedom and the Construction of Europe,* Vol. 1, Cambridge: Cambridge University Press 2013, p. 32.

[35] Dorit Wolf-Schwarz (ed.), *Wege zur Toleranz. Geschichte einer europäischen Idee in Quellen,* Darmstadt: Wissenschaftliche Buchgesellschaft 2002, pp. 205-209; Skinner & van Gelderen, *Freedom and the Construction of Europe,* p. 32.

[36] The Arminian-Gomarian controversy pertained to questions of free will and predestination (among other things), and informed a political rift between supporters of a prince and supporters of a republic, leading up to the Synod of Dort 1618-1619.

[37] Wolf-Schwarz, *Wege zur Toleranz. Geschichte einer europäischen Idee in Quellen*, p. 211.

religious unity and uniformity as unrealistic. He condemned religious violence and persecution as a means towards unity quite strongly.[38] As a proponent of the free conscience, he argued that violence and coercion were not only ineffective but could possibly cause a greater disruption of public order than the indicted behaviour: 'lest the entire realm (…) be overthrown'.[39] He considered that the regulation of interpersonal contact among church members with infidels, atheists, impious men, and others was a matter for theologians and not a matter to be governed by secular authorities.[40] Nevertheless, he seemed sympathetic to the idea that the state supported one religion as well as defended this religion from 'enemies, persecutors, and disturbers'.[41]

Such defence would primarily aim at external forces, but also carried imperatives for the magistrate towards internal affairs. Heretics erring in minor things should be tolerated as long as their persuasion remained on the horizon. Gerhard Besier underscores this distinction between minor and major errors as resting in the severity of the threat they pose to the very basis of faith.[42] Despite guarantees for their physical safety, heretics would not actually be free to worship and engage in public debate on their own initiative. He proposed that heretical books should not be imported nor be allowed to be sold, and that heretics and atheists should be barred from offices in the context of church and school.[43] Interestingly, and remarkable for his time, he argued that Catholics who were born in the state as well as Jews should be able to remain and have a level of economic freedom – though he did support the

[38] Johannes Althusius, *Politica Methodice Digesta, Atque Exemplis Sacris et Profanis Illustrata* (1614), edited and translated by Frederick S. Carney, Indianapolis: Liberty Fund 1995, pp. 163-164.

[39] Ibidem, p. 164.

[40] Ibidem, p. 162.

[41] John Witte, *Die Reformation der Rechte. Recht, Religion und Menschenrechte im frühen Calvinismus,* Göttingen: Vandenhoeck & Ruprecht 2015, p. 207; Althusius, *Politica,* pp 156, 160, 162.

[42] Gerhard Besier, 'Toleranz', in *Geschichtliche Grundbegriffe,* Band 6, pp. 445-523, p. 492.

[43] Althusius, *Politica*, p. 165.

ghettoization of Jews.[44] Additionally neither Catholics nor Jews would acquire the privilege of worshipping in public.[45] Thus, although opening the possibility of toleration for the errant and some significant "second class others", such as Catholics and Jews, this toleration would not extend far into the common space. He also based the limits of toleration on the dimension of public order. The magistrates punish heretics in the interest of 'public peace and tranquillity'.[46] Furthermore the 'obstinate and incurable' should be expelled, imprisoned, or put to death (e.g. atheists, 'impious' and those who erred fundamentally and manifestly).[47] Such punishments were not to be undertaken lightly and Althusius insisted that the status of the "hopeless" implored orderly and evidence-based adjudication.[48]

The argument of public peace and order features perhaps the least restrictively in the toleration proposed by the Jewish philosopher Spinoza. Acknowledging the enduring realities of religious difference, Spinoza moved away from the *corpus christianum* as the basis of political unity. As a naturalistic pantheist and sceptic, and an outsider to both Jewish and Christian scholars, he advanced a more radical freedom of belief, judgment, and philosophical speculation based on common reason and the principle of persuasion.[49] He thought that coercion of outward conformity would cause 'disharmony' and dishonest dissimulation.[50] Implicit in his toleration is that difference is 'inevitable' and therefore intolerant attitudes in society might need

[44] Ibidem, p. 162.

[45] Ibidem, p. 162.

[46] Ibidem, pp. 115, 164.

[47] Ibidem, pp. 162-163.

[48] Ibidem, p. 163.

[49] Geoffrey A. Gorham, 'Spinoza, Locke, and the Limits of Dutch Toleration', (2011), *Macalester International*, Vol 27, Article 12, pp. 104-118, pp. 109-110; Michael A. Rosenthal, 'Tolerance as a virtue in Spinoza's *Ethics*', (2001), *Journal of the History of Philosophy*, Vol. 39, No. 4, pp. 535-557, p. 550.

[50] Justin Steinberg, 'Spinoza's curious defence of toleration', in Yitzhak Y. Melamed and Michael A. Rosenthal, *Spinoza's Theological-Political Treatise. A critical guide,* Cambridge: Cambridge University Press 2011, pp. 223-224.

governmental restraint – in particular, of adamant clergy.[51] He believed that intolerance was caused by ambition to force a perception of the good on others.[52] According to Justin Steinberg's account of Spinoza's suspicion about moral legislation, 'outlawing certain expressions of belief will only further alienate offenders and deepen existing schisms'.[53] Rather, a public order that would be stripped of truth claims would allow for stability and peace, although dissenters who posed a threat to public order or 'the core function of the state' should be met with intolerance.[54]

3.3 Distinctions of religious and political unity

Even though most of the above philosophers proposed a greater intellectual openness and suggested some initial functional separations of church and state, they eventually envisioned toleration as the means towards conversion and restoration of religious and political unity. Yet because of the radical religious and political fragmentation, it became more difficult to define the contents of a shared natural law to which everyone could agree. Moreover, a structure of political and religious unity as somehow based on divine covenant became increasingly problematic. Fragmentation led later philosophers to generate new ideas beyond the *corpus christianum.* As they articulated a non-denominational basis for political order, sectarian theological concerns lost their immediate significance for the understanding of political order. Philosophers who contributed to this change include Pierre Bayle (1647-1706), Samuel von Pufendorff (1632-1694), John Locke (1632-1704), Voltaire (1694-1778), Jean-Jacques Rousseau (1712-1778), and Immanuel Kant (1724-1804). The next sections discuss different ways

[51] Ibidem, pp. 219-220; Rosenthal, 'Tolerance as a virtue in Spinoza's *Ethics*', p. 551.

[52] Rosenthal, 'Tolerance as a virtue in Spinoza's *Ethics*', pp. 545-546.

[53] Steinberg, 'Spinoza's curious defence of toleration', p. 223.

[54] Rosenthal, 'Tolerance as a virtue in Spinoza's *Ethics*', p. 536; Steinberg, 'Spinoza's curious defence of toleration', pp. 219, 226, 230; Gorham, 'Spinoza, Locke, and the Limits of Dutch Toleration', pp. 110-112.

in which these philosophers articulated the basis of political order as distinct from religious unity and divine covenant.

French reformed theologian and philosopher Bayle, for example, relinquished any aspiration to a 'single-faith' and rejected the 'irenic vision of "comprehension"' in favour of a greater toleration in his anonymous work *Commentaire philosophique* (1686).[55] He framed religious dissension as primarily an ecclesiastical problem, in particular clerical hypocrisy, and called for political toleration. He did not think unity could be restored through coercion nor persuasion.[56] Political toleration could be justified with epistemological uncertainty as well as the affirmation of the freedom of conscience, which he believed to be guided by the 'voice and law of God'.[57] He believed that toleration would generate peace, while intolerance would engender confusion and conflict, and would hinder the search for truth.[58] Restriction of political toleration would be based on political arguments: a threat of secession and war, the argument of peace and respect for the fundamental laws of the state.[59] Within this framework, even atheists would be tolerated and treated 'justly' as a civilian; however, Catholics remained excluded as potentially disloyal.[60]

A most remarkable dismissal of religious uniformity or indeed unity was articulated by the German jurist, historian, and philosopher Von Pufendorff.[61] Based on a fairly detailed exegesis of Old and New Testament themes on kingship and

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[55] Sally L. Jenkinson, 'Two concepts of tolerance: or why Bayle is not Locke', (1996), *The Journal of Political Philosophy*, Vol. 4, Nol. 4, pp. 302-321, p. 320.

[56] Perez Zagorin, *How the Idea of Religious Toleration came to the West*, Princeton: Princeton University Press 2003, p. 274.

[57] Ibidem, pp. 276-277.

[58] Ibidem, p. 277; Jenkinson, 'Two concepts of tolerance: or why Bayle is not Locke', p. 321.

[59] Rainer Forst, 'Pierre Bayle's reflexive theory of toleration', (2008), *Nomos,* Vol. 48, pp. 78-113, pp. 103-104.

[60] Ibidem, p. 103; Jenkinson, 'Two concepts of tolerance: or why Bayle is not Locke', p. 319.

[61] Von Pufendorff, *On the nature and qualification of religion in reference to civil society* (1687), translated by Jodocus Crull, edited by Simone Zurbruchen, Indianapolis: Liberty Fund 2002, pp. 19-25.

nationhood, he rejected Christian appropriations of covenantal exclusivity and purity in the context of the state.[62] This entailed an explicit dismissal of the language of the *corpus christianum.* Perhaps he sought to counter papal aspirations to religious unity, but the political implications of his argument were more radical than that. The New Testament stated no need for the kingdom of Christ to be associated with any temporal sovereign or state.[63] The church might function in the context of a state and under governmental authority, but it did not need the state, nor any coerced uniformity.[64] Von Pufendorff insisted on a functional separation of ecclesiastical and governmental offices, in addition to a measure of religious freedom – even before Locke published his major works on toleration. Following Augustine's exegesis of the parable of the weeds (Matthew 13), Von Pufendorff affirmed difference as a potential positive and reckoned the individual responsible for their conscience and search for truth.[65] Similarly to Althusius, Von Pufendorff argued that dissention never justified unruly behaviour and that intolerance could be justified on the basis of public order.[66] That he still understood his world to be essentially Christian flows from his exclusion of atheists to toleration, as would Locke, though both seemed to have been less lenient than Bayle.

Locke, an English philosopher and physician, famously argued for a separation of ecclesiastical and political functions. Locke still perceived his context as inherently Christian, which is perhaps why the toleration of atheists remained out of the question. Though the substance of this Christianity remained relatively narrow, his work *The Reasonableness of Christianity as Delivered in the Scriptures* (1695) breathes radical creedal minimalism on the basis of epistemic humility. Man could know the necessary matters

[62] Ibidem, p. 68.

[63] Ibidem, pp. 55-77, 34-35.

[64] Ibidem, p. 64.

[65] Ibidem, pp. 91-93.

[66] Ibidem, p. 91.

of religion through revelation and reason.[67] Yet he did not only distinguish between necessary and indifferent matters, he also argued that it would be *heretical* for a church to teach any adiaphoral matter as part of the necessary religious dogmas.[68] One simply needed to suspend definite judgement on adiaphoral matters as he regarded God as the sole judge of truth – as he famously observed: 'every Church is Orthodox to itself; to others Erroneous or Heretical'.[69] No church would be obligated to tolerate obstinate deviance, but he proposed political toleration on the basis of creedal minimalism, as well as freedom regarding the *adiaphora*.

Locke was not impressed with the practice of moderation and comprehension in his home country as a way to engineer unity. He believed that these had failed to provide stability and peace. He did not just call for religious liberty and voluntary church membership, nor even for public morality to be based on reason rather than confession, he departed from the *corpus christianum* in two particular ways.[70] He rejected the religious and political unity in the state and, like Von Pufendorff, he believed that political order was not grounded in any divine covenant. First, Locke framed churches as free and voluntary associations *within* a political context – this entailed a radical departure from prevailing ecclesiology.[71] Second, he understood political citizenship as a matter of individual freedom and consent, and as John Simmons points out, Locke grounded this freedom normatively rather than

[67] Manfred Svensson, 'Philipp van Limborch y John Locke. La influencia arminiana sobre la teología y noción de tolerancia de Locke', (2009), *Pensiamento,* Vol. 65, No. 244, pp. 261-277, p. 276.

[68] Ibidem, p. 276.

[69] John Locke, *A Letter Concerning Toleration,* London: Black Swan, 1689, edited by James H. Tully, Indianapolis: Hackett Publishing 1983, p. 32.

[70] Ibidem, pp. 26-28, 31-33, 39.

[71] Svensson, 'Philipp van Limborch y John Locke. La influencia arminiana sobre la teología y noción de tolerancia de Locke', p. 274.

historically.[72] This functional separation could facilitate peace as long as the state focused on temporal concerns over common good and public peace.[73] However, the social make up was understood to be Christian, and rejection of a narrow creed still put atheists beyond the bounds of toleration. Similarly to Bayle, and other philosophers operating in non-Catholic majoritarian contexts, Locke distrusted Roman Catholics because their loyalty to the Pope allegedly threatened the very basis of independent character of the state.

Someone who was more impressed with English toleration than Locke is the French historian and philosopher François-Marie Arouet, more often known as Voltaire, who thought of England as an example of toleration for France.[74] Voltaire believed it should be possible to provide a level of safety and certainty concerning the law, marriage, children, inheritance, and even public worship, and thought society should peacefully develop towards more liberty.[75] He grounded toleration in a need to imitate Christ's mildness and patience and the need to live in accordance with God's care for the nations (as in the book of Malachi).[76] Furthermore, as a deist and rationalist, he thought that religion should not be coerced, but that the individual should follow the dictates of reason.[77] More practically, he thought that intolerance provoked dishonest dissimulation and rebellion, and that neither was conducive to sincere faith, peace, and public order.[78]

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[72] A. John Simmons, 'Locke on the Social Contract', in Matthew Stuart (ed.), *A companion to Locke,* Oxford: Blackwell 2016, p. 417.

[73] Locke, *A Letter Concerning Toleration*, pp. 26, 39.

[74] Stan Maes, *Van de Verlichting tot religieus terrorisme. Een psycho-educatieve visie,* Antwerp: Garant 2017, p. 31.

[75] François-Marie Arouet, *Traité sur la tolérance,* 1763, online available through Project Gutenberg, http://www.gutenberg.org/files/42131/42131-h/42131-h.htm (consulted 1 November 2017), p. 37; Maes, *Van de Verlichting tot religious terrorisme. Een psycho-educatieve visie,* p. 32.

[76] Arouet, *Traité sur la tolérance*, pp. 111, 128, 133.

[77] Ibidem, p. 80; Maes, *Van de Verlichting tot religious terrorisme. Een psycho-educatieve visie,* p. 32.

[78] Arouet, *Traité sur la tolérance*, p. 81.

Considering the culture of moderation in England, it might be less surprising that Voltaire proposed a moderated toleration that is limited in its provision for an array of religious "fanatics". Yet, despite his call for an appreciation for some diversity in France, he believed that intolerance would be lawful in specific circumstances.[79] For error was not to warrant crime or to cause any risk to public order: this rationale would justify intolerance to a long list of Jesuits, Franciscans, Lutherans, Calvinists, some Danish sects, and Jews.[80] Voltaire objected to Catholic violence towards the Jews; however, he seemed uninterested in the future of the Jews in France.[81] Intolerance, however, would not be the right of the magistrate, and Voltaire argued that arguments concerning public order should be based on rational considerations only. He was uncomfortable with reliance on untrue or disputable legends, such as in the case of wrongly accused Calvinist Jean Calas, which was the immediate cause towards his argument for toleration.[82]

Rousseau, a contemporary of Voltaire's and a protestant exile to Geneva, is often regarded as a totalitarian thinker with regard to the state. Yet his thought on toleration was more nuanced than is often thought as he advanced toleration as a political strategy. Similarly to Voltaire, Rousseau believed that political unity could be 'compatible with a good measure of confessional disagreement'.[83] This unity would be based on creedal minimalism, which included belief in a benevolent deity, life after death, a state of rewards and punishments, as well as due respect for law and the

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[79] Ibidem, pp. 38, 46-47.

[80] Ibidem, pp. 146-148.

[81] Nemon M. Goldfarb, *Weg uit het getto. Drie eeuwen emancipatie van de Joden in Europa,* translated by Willem van Paasen, Amsterdam: Meulenhoff 2011, Ch. 1; Chris Quispel, *Anti-Joodse beeldvorming en Jodenhaat: De geschiedenis van het antisemitisme in West-Europa,* Hilversum: Verloren 2015, p. 114.

[82] Arouet, *Traité sur la tolérance,* p. 42, Chapter 1, Chapter 10.

[83] Christopher Bertram, 'Toleration and pluralism in Rousseau's civil religion', in Ourida Mostefai and John T. Scott (eds.), *Rousseau and l'Infâme. Religion, Toleration and Fanaticism in the Age of Enlightenment,* New York: Rodopi 2009, pp. 137, 139, 140.

rejection of intolerance.[84] This narrow creed, also known as his basis for 'civil religion', should no longer revolve around many truths and falsehoods, but rather practically serve to uphold order in society.[85] Many religious minorities, including Jews, could benefit from this toleration though atheists would remain ineligible to toleration, as well as any sect that would threaten public order because of their own intolerance.[86] He believed that private belief always was beyond the power of the civil authority; however, the civil authority could punish any distortion of public order as a breach of the social contract.[87] Toleration - and the restriction thereof - thus functioned instrumentally towards the social contract, and its aspirations to truth would thus lose their immediate bearing on social and political order.[88]

Although philosophical discourses distinguished between church membership and political citizenship, this distinction was quite sharply pronounced by Immanuel Kant, Prussian pietist and professor at the University of Königsberg. In his work *Die Religion innerhalb der Grenzen der bloßen Vernunft* (1793), he argued that no one should be held liable civically for theological errors that stemmed from the free will of man, because such was one's freedom.[89] Religious belief could not - and therefore should not - be coerced or prescribed by the magistrate. Instead, Kant suggested that a prince or the state should affirm complete freedom of religion and, advantageously, free deliberation would bring man closer to the truth.[90] He thus transformed somewhat

[84] Ibidem, p. 145.

[85] Ibidem, p. 144.

[86] Quispel, *Anti-Joodse beeldvorming en Jodenhaat*, p. 115; Bertram, 'Toleration and pluralism in Rousseau's civil religion', p. 143.

[87] Ibidem, pp. 143-144.

[88] Bertram, 'Toleration and pluralism in Rousseau's civil religion', pp. 140, 150.

[89] Immanuel Kant, *Religion within the limits of reason alone* (1793), translated by Theodore M. Greene, New York: Harper Torchbooks 1960, p. 40.

[90] Immanuel Kant, *Beantwortung der Frage: Was ist Aufklärung?*, 1784, Stuttgart: Klett 2010.

current principles of restraint into a negative freedom in the realm of the state.[91] Crucially, Kant regarded toleration as opposed to true freedom and his language of freedom is intentionally different from toleration.[92] Furthermore, he dismissed such governmental techniques as 'presumptuous' *(hochmütig).* This dismissal notwithstanding, freedom would, in practice, be limited by Kant's notion of shared moral duty.[93] This language of freedom and shared morality still is curiously informed by notions of truth and self-restraint, which are not unrelated to toleration.

The limits in Kant's suggestion of toleration are based on the notion of a shared moral duty, which is a version of moral unity within the reality of religious disagreement. Political scientist Juan Pablo Dominguez classifies this moral unity as 'moral uniformity', recognising some universalising tendencies.[94] Kant did not compromise in his belief in ontological truth, even as he was epistemically agnostic.[95] Indeed Kant believed that '*one* (true) *religion*' (sic!) found moral expression in multiple Christian and non-Christian faiths, which loosely resembles Spinoza's understanding of common morality.[96] Crucially for Kant's argument, ethical content that was sufficient for the purposes of coexistence would stem from this ontological truth.[97] Knowledge of this ethical content could be attained through both religion and reason. Kant argued that state should rely on non-faith-specific resources in the articulation of this morality.[98] This appears as a version of common grace, and it nevertheless

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[91] David Heyd, 'Is Toleration a Political Virtue?', in Melissa S. Williams and Jeremy Waldron (eds.), *Toleration and its limits,* New York: New York University Press 2008, p. 181.

[92] Juan P. Dominguez, 'Introduction: Religious toleration in the Age of Enlightenment', (2017), *History of European Ideas,* No. 43, No. 4, pp. 273-287, p. 284.

[93] Kant, *Beantwortung der Frage: Was ist Aufklärung?.*

[94] Dominguez, 'Introduction: Religious toleration in the Age of Enlightenment', p. 285.

[95] Kant, *Religion within the limits of reason alone*, p. 100.

[96] Ibidem, p. 98.

[97] Ibidem, pp. 91-93; Heyd, 'Is Toleration a Political Virtue?', p. 181.

[98] Heyd, 'Is Toleration a Political Virtue?', p 190.

understands the world from the perspective of a predominantly Christian environment. As Kant considered this duty natural and not exclusively inherently religious, no one could argue for exemption from these duties. He would demand 'absolute obedience' of citizens regarding their actions in office and also in general; failure to comply would make any citizen unacceptable.[99]

Kant's radical distinction of religious and political unity perhaps epitomises earlier rejections of the *corpus christianum* and represents a new teleology of the state as the protector of peace and stability as well as indifference over denomination-specific claims to truth. However, the notion of a shared morality as derived from truth harbours a semblance of the language of toleration. For this shared morality appears to be morally heavily laden, as well as absolute, because of its natural character and normativity. If this shared morality is employed as political truth, even if just functionally, in what way is it structurally different from toleration? Furthermore, how do the dynamics in the discovery of ethical content account for political stability? Additionally, how realistic and practical is this understanding of shared morality beyond an already relatively homogenous community? What is the freedom granted to those to act and behave in accordance with perhaps deviant thoughts and beliefs, particularly in a context of continuing religious fragmentation? Or to put it more provocatively, might his philosophy not be liable to appear as a limited and strictly political appropriation of toleration that we know from the *corpus christianum?* Chapter Five will return to some of these questions.

3.4 From toleration to religious freedom?

It might be tempting to understand philosophical discourse on toleration and religious freedom as a somewhat linear development towards triumph of freedom over toleration. This, however, would not do justice to the context of changing epistemology, ecclesiology, as well as the specific historical contingencies in the Low Countries, France, and the Holy Roman Empire. The intellectual restlessness of the

[99] Ibidem, p. 181, Kant, *Religion within the limits of reason alone*, pp. 91-93.

avowed fathers of toleration gives the impression that the permanent fragmentation of religious and political unity was a profoundly distressing process. Discourses of toleration were deeply entangled in both theological and political frameworks of reference, which makes it impossible to separate secular and religious political thought. Depending on context, religious conviction, and ecclesiastical and political loyalties, many of the above intellectuals argued to stretch or limit toleration based on their estimations of the weight of truth, unity, public order, expediency, and trust.

It cannot be underestimated how strongly epistemic reformations impacted on understandings of the kingdom of God in this world. One could not force onto another that which is improbable or uncertain. Much of the *corpus christianum* hinged on a level of conformity that was demanded from strangers within the kingdom of God on earth. The demise of relative religious unity, therefore, gave rise to a reconsideration of the foundations of society, as much as theological reflections of the Old Testament and of the New Testament church were questioned. Some, like Von Pufendorff and Locke, believed that the state could not possibly reflect or be in a direct covenant relationship with God. Others, like Erasmus and Althusius, held on to the idea that the kingdom of God had territorial dimensions into which strangers to the church ought to fit eventually. Revisiting the foundation of political order was therefore crucial to the question of toleration: who belongs within your gates and who is the stranger? Separation of ecclesiastical and political functions could technically fit with both conceptualisations. Separation of church and state, therefore, does not only facilitate freedom: for example, many churches maintained, even in their confession, that political authority was called to be the church's auxiliary even though its function was distinct. This is why the very foundations of political order needed to be reframed.

The previous chapter argued that the division of the *corpus christianum* entailed an endurance of many of its political and religious principles within *corpora christiana.* Demand of conformity and language of purity became stronger in these smaller communities when compared with medieval structures of toleration. This chapter shows that the conceptual frames of reference to toleration did not simply echo into

early modern philosophy, but also, that philosophy did not necessarily clear the way for religious freedom. It seems that the question of where the change from toleration to freedom resides is almost impossible to answer. Kaleidoscopes of practical and philosophical toleration did not just develop towards freedom. Cycles of progression and regression, both in practice as well as in philosophy, show how difficult it was to achieve a new balance of order. Religious freedom, in contrast to toleration, needed to be enshrined in a new understanding of political order.

3.5 The constitution: covenant without God?

This new understanding of political order is first embodied in the law and particularly in the moment of constitutionalisation as a 'form of social power'.[100] Insofar as a constitution embodies a social contract, it offers a tangible alternative for the old order and for toleration, which were founded on the idea of a divine covenant. Despite the fact that many constitutions invoke religious language, a constitution embodies a recognition that the peace and order are not self-evident, and that parties with different convictions and interests need to coexist within impartial frameworks of accountability. This constitutional framework of coexistence does not, of course, replace the normative connotation of a divine covenant. The constitution is perhaps part of a functional as well as a normative double order. Functionally, a constitution is an heir to the divine covenant, yet provides the foundation of a new political order. Normatively, the constitution is an expression of an immanent covenant that constitutes one political body which binds its members yet which may coexist in tension with certain religious or non-religious commitments. This functional and normative double order means that tensions between constitutional and religious commitments need to be moderated with due respect to both public order and personal interests. The moment of constitutionalisation thus offered an opportunity to

[100] Daniel Philpott, *Revolutions in sovereignty. How ideas shaped modern international relations,* Princeton: Princeton University Press 2001, pp. 48-49.

facilitate religious freedom, without religious freedom being the necessary consequence of constitutionalisation.

Given that religious diversity and the foundation of political order were deeply connected in the question of toleration, constitutionalisation of religious freedom and protection of minorities was vital to the project of the modern state. However, the state did not yet own an imaginary that provided a sufficient conceptual basis for religious freedom other than the budding yet contested idea of nationhood. Thus, the position of religious minorities remained dependent on law more than on a specific sense of identity – this is further illustrated in the next chapter. From the perspective of constitutional theory, constitutionalisation of religious freedom brought about a theoretical diametric change in the institutionalisation of toleration, particularly through the language of religious freedom. This change of language is crucial from the perspective of political theory: the dissenter is no longer responsible to justify their deviancy (as in toleration), but that the state is required to justify regulation that intervenes with the freedom of its citizens (as in constitutional freedom). In a constitutional framework, this question is not only about the subject "being free unless" or "not being free unless". The protection of individual freedom legitimises the very nature and purpose of the state. Although religious freedom is of course not unlimited, any limitation must be rationally and constitutionally justified.

Constitutionalised religious freedom adds a positive layer to the language of restraint.[101] While the negative freedom is often understood as the meaning of 'freedom from' and governmental restraint from interference with formally recognised freedoms, its positive aspect entails an obligation to protect and nurture the freedom of citizens to develop their religious commitments within the context of the political community that the state represents. Neither are absolute, and religious freedom may still be legitimately restricted under specific conditions. Legal safeguards against unjustified intervention, however, aim to protect the interests of minorities.

[101] Comp. Isaiah Berlin, *Four essays on liberty,* Oxford: Oxford University Press 1969.

Constitutions and international human rights treaties typically require that a restriction is laid down in law, serves a particular set of legitimate aims, and meets the demands of subsidiarity and proportionality. Contrary to toleration as a begrudging incorporation of categories of others (not necessarily implying visibility in the public space), religious freedom in a constitutional democracy knows no *prima facie* outsiders on the basis of (religious) conviction. All citizens are part of the *one and same political body*.

Realising that toleration has historically been bound up with levels of visibility of non-conformity in public space, restrictions to the manifestation of belief in public space cannot be proclaimed lightly within a constitutional framework. Visibility in the public space, which perhaps is the logical *locus* of encounter, remains crucial in the context of constitutional religious freedom. Moreover, the nature of public space was intrinsically connected to the consolidation of the modern state as well as the idea of nationhood, and contention about the meaning of this public space would shape the position of religious communities within the framework of the nation state. The next chapter illustrates how ongoing tensions and sensitivities around religious or non-religious diversity and visibility in public space led to new cycles of dissimulation and discrimination. Even as the moment of constitutionalisation provided a locus for a change in political order as well as the constitutional instatement of religious freedom, peaceful coexistence still remained a trajectory above and beyond the law.

4. Engineering belonging: substrata of early modern toleration in emerging constitutionalism

The turn from early modern toleration towards the constitutional protection of religious freedom is legally and conceptually located in the era of constitutionalism and the rise of nation states; the late eighteenth century in France, and the nineteenth and twentieth century in the Netherlands and Germany. The idea that a liberal constitution may protect the people against arbitrary power, whether or not this power is located in a monarchy, runs deeply through French, Dutch, and German constitutionalism. This common thread only veils the fact that each of their histories of constitutionalisation have their own integrity. The dissolution of the French monarchy and the maxim *liberté, égalité, fraternité* swept far beyond France, yet its resolute breaking with the ancient regime was in many ways unique and specific to France.[1] Its concerns about the protection of life and goods, civil and political rights, and legal certainty might have been shared more widely; France reacted strongly against absolutism.[2] Once the revolutionary winds subsided, each of the states developed a constitutionalism of their own in which they sought to reckon with the social, political, and religious contentions of the past.

The idea that the state mediated social and political oneness featured strongly in French and Dutch revolutionary documents, invoking the oneness previously ascribed to the *corpus christianum.* The French constitution of 1793 declared the French Republic 'one and indivisible'.[3] The exact same phrase appears repeatedly in the

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[1] Marina Valensise, 'The French Constitution in Pre-Revolutionary Debate', (1988), *The Journal of Modern History,* Vol. 60, Supplement: Rethinking French Politics in 1788, pp. 22-57, p. 22.

[2] Ibidem, p. 34.

[3] Full text of the French Constitution of the twenty-fourth of June, 1793 is available at https://oll.libertyfund.org/pages/1793-french-republic-constitution-of-1793, (consulted 31 January 2019).

constitution *(Staatsregeling)* of the Batavian Republic of 1798 (now the Netherlands).[4] Resembling the language of one people of the French *Déclaration des Droits de l'Homme,* these documents vested Rousseauian sovereignty in the nation, the people, and declared the law to be the expression of the will of 'the whole civil Body'.[5] In Germany, on the other hand, the idea of one nation did not really feature save in the context of national-socialism and, for most of its history, the idea of the German nation assumed regional differentiation. After World War II, it took almost half a century before the idea of the nation became normalised.[6] Nevertheless, Germany, France and the Netherlands have in common that they negotiated the religious fragmentation from the past thought the language and imaginary of the nation; reaffirming a connection between territory, people, and common destiny. This imaginary of the nation came with significant strains of racism, anti-Semitism, as well as religious intolerances. Neither inclusion in the nation nor the enjoyment of rights was self-evident for Jews, Arabs, and travellers, besides non-whites, women, and children, whilst young nation states also struggled to affirm religious diversity. These lingering flaws actually obstructed the effectiveness with which the idea of nationhood could provide an overarching narrative.

Dutch historians Knippenberg and De Pater argue that the association of state and nation only grew in the course of the nineteenth century as a result of the

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[4] The preamble and several articles of this constitution declare the Batavian people to be a 'one and indivisible State'. *Staatsregeling van het Bataafse volk,* 1798, Preambule, Artt. 1 and 9, 'Algemene beginselen' and Titel 1, art. 1, in W.J.C. Van Hasselt (ed.), *Verzameling van Staatsregelingen en grondwetten,* Alphen a/d Rijn: Samsom 1964, pp. 17-19, 27.

[5] Ibidem, p. 18, *'De Wet is de wil van het geheele maatschappijlijk Lichaam (…)',* Article 5 Staatsregeling; Article 3 *Déclaration des Droits de l'Homme et du Citoyen,* 1789, https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789, (consulted 8 August 2019).

[6] Willfried Spohn, 'The (fragile) normalisation of German identity within Europe' in Willfried Spohn, Matthias König & Wolfgang Knöbl (eds.), *Religion and national identities in an enlarged Europe,* New York: Macmillan 2015, pp. 17-37, p. 37.

increasing 'mutual permeation of state and society'.[7] This mutual permeation is what lays the foundation for the various connections between territory, people, and common destiny that were peculiar to the *corpus christianum*, especially where it starts mimicking concerns about relative unity and purity. Churches, which for centuries operated either on the margins or in association with secular power, needed to adapt to the new political order, and navigated vigorous debates both in and outside the Church about the potential and desirability of the idea of the "Christian nation".[8] Conflicts over religion transformed within emerging constitutional frameworks and reinvigorated questions over identity and the cultural future of local, regional, and national communities. Historian Wolfram Kaiser argues that these questions touched upon concerns about European identity and perhaps even the future of Christianity in Europe.[9]

This chapter analyses constitutions and laws that fundamentally transformed the position of religious minorities during the early formation of France, the Netherlands and Germany as nation states. This chapter compares constitutional and legal texts, parliamentary discourse, as well as secondary interpretations of either in order to demonstrate how problematic the idea of religious diversity remained in the context of these nation states. This chapter contends that common frames of reference reappeared in the context of constitutionalism, even to the extent that some of its dimensions became substrata of constitutionalism. This reappearance is intertwined with the understanding of religious diversity within the concept of the nation, as well as contention over the visibility of religious identity in public space. Issues of contention included restrictions on "political" Catholic processions in public space,

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[7] Hans Knippenberg & Ben de Pater, *De eenwording van Nederland,* Nijmegen: Sun 1988, pp. 13-14.

[8] Comp. Mariëtta D.C. van der Tol, 'For the soul of the nation: Christian nationhood in Catholic and Protestant political-theological discourses', unpublished conference paper, 2019.

[9] Wolfram Kaiser, '"Clericalism – that's our enemy!": European anticlericalism and the culture wars', in Christopher Clark & Wolfram Kaiser, *Culture wars. Secular-Catholic Conflict in Nineteenth Century Europe,* Cambridge: Cambridge University Press 2003, pp. 47-76, pp. 75-76.

divisions of burial ground, the use of places of worship, and not least, the nature of primary public education.

4.1 Towards laïcité: France

The emergence of the French constitutional state was complicated by post-revolutionary political and regional differentiation, while rapidly changing governments approached the question of religion in society differently. The French Revolution – rather than a collective turn towards a rearticulated common good perhaps expressed in *liberté, égalité, fraternité* – was profoundly divisive.[10] Even though some may associate revolution with guillotines, terror, and extreme secularity,[11] no clear principle of secularity actually consolidated throughout the nineteenth century. France perhaps witnessed the most virulent cycles of animosity between radical republicans and 'ultramontane' Catholics in the hundred years following the Revolution.[12] The forging of identity intertwined with the moderation of religious identity, particularly in public space, invigorated significant shifts in understandings of publicness. Structural approaches to religion and society started to take root in the Third Republic through policies of 'frenchification' and the juridification of the notion of *laïcité* in the 1905 Separation Act.[13]

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[10] James McMillan, '"Priest hits girl": on the front line in the "war of the two Frances"', in Clark & Kaiser, *Culture Wars,* p. 79.

[11] Jonathan Sperber, *Revolutionary Europe 1780-1850,* New York: Routledge 2017, p. 92.

[12] Numerous moderate movements operated in between, such as liberal and conservative protestants, as well as liberal Catholic and Jewish movements, see McMillan, '"Priest hits girl"', p. 79.

[13] Phyllis Cohen-Albert, 'Israelite and Jew: how did nineteenth-century French Jews understand assimilation?', in Jonathan Frankel & Steven J. Zipperstein, *Assimilation and Community: The Jews in nineteenth-century Europe,* Cambridge: Cambridge University Press 1992, p. 89; *Loi du 9 Décembre 1905 concernant la Séparation des Églises et de l'État,* https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000508749, (consulted 6 August 2019).

It was really Napoleon Bonaparte who would configure the place of religion in nineteenth century France. Napoleon deliberately sourced local religion towards public morality, yet firmly in submission to the state and embedded in policies of cultural centralisation.[14] The main documents on Christianity in France are the 1801 *Concordat* (Catholics) and the 1801 *Les articles organiques* (Catholic, Lutheran, Reformed) as affirmed in the *Loi relative à l'organisation des Cultes* of 1802.[15] Although this entailed a restoration of religion and religious freedom to a limited extent, it also weakened ecclesiastical autonomy. Extensive regulations provided a qualified religious freedom, determined by political interpretations of *public order* and *peace*. Moreover, the regulations showed a deep concern over frenchness. The laws centralised power over religious identities in order to govern divisions within France as well as to limit foreign influence within all denominations.

Napoleon's Concordat of 1801 with Pope Pius VII regulated the position of the Catholic hierarchy in France and remained in place until the Separation Act of 1905. The Concordat recognised in the Preambule that the Catholic religion is 'the religion of the great majority of the French citizens'. Article 1 stated that Catholic worship was free, although all rights and privileges were conditional upon considerations of public order and peace. The state monitored ecclesiastical hierarchy and formal teachings, while it subsidised bishops and curates.[16] For example, the First Consul nominated all bishops, the government approved appointments of lower ecclesiastical hierarchy, and it imposed on all clergy an oath of loyalty to the state.[17] Further, it prescribed one liturgy and one catechism for all French churches, which shaped the liturgy and

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[14] Eli Sagan, *Citizens & Cannibals. The French Revolution, the Struggle for Modernity, and the Origins of Ideological Terror,* Lanham: Rowman & Littlefield 2001, p. 302.

[15] *Loi du 8 Avril 1802 relative à l'organisation des Cultes,* with subsections on Catholic and Protestant organic laws, see http://www.legirel.cnrs.fr/spip.php?article527&lang=fr, (consulted 6 August 2019).

[16] Article 14 Concordat, Articles 64-74 Catholic organic laws.

[17] Articles 2, 5, 6, 10 Concordat.

culture of the French faithful.[18] Napoleon's unilateral *Articles Organiques* towards the Catholic church further prohibited the declaration of new festive holidays and the publication of new confessional or educational documents without governmental pre-authorisation, and restricted foreign influence.[19]

Napoleon issued similar *Articles Organiques* towards Reformed churches and the churches of the 'Augsburg confession'.[20] These also focus on frenchness through the prescribed organisation of French churches and the limitation of foreign influence. For example, foreigners could not exercise liturgical functions and relationships with foreign authorities were prohibited.[21] These laws imposed sizable limitations on these churches, particularly in view of close relationships with Swiss and German churches and seminaries. The laws stipulated that ministers of the Augsburg confession must have studied in France and reformed ministers must have studied in Geneva.[22] Similarly to the Catholic church, confessional and educational documents needed governmental pre-authorisation.[23] Lastly, the churches of the Augsburg confession were inspected annually, perhaps because of their geographical situation and relationships with churches in the German lands.[24]

The Concordat and *Articles Organiques* moderated the public visibility of worship, even if ambivalently. Its designation of Catholic worship as public (Article 1) referred to the performance of the liturgy within church buildings, which were typically owned by the state and put at the disposal of bishops.[25] Religious buildings

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[18] Article 39 Catholic organic laws.

[19] Articles 39, 40, 50, 63 Catholic organic laws.

[20] The Reformed churches are not counted among those of the Augsburg Confession because of a difference in confessional commitment. Similarly, the Reformed communities were only treated as equal to those of the Augsburg Confession from the Westphalian Treaties of 1648.

[21] Articles 1-2 Protestant organic laws.

[22] Articles 12, 13 Protestant organic laws.

[23] Article 4 Protestant organic laws.

[24] Articles 35 ff Protestant organic laws.

[25] Article 12, Concordat, Article 75 Catholic organic laws.

were the centre of public worship and could facilitate 'one religion'.[26] The Concordat recognised the public character of limited outside worship, such as processions. According to historian Paul d'Hollander, publicness involved both the space inside and outside a church building and designated the street as a 'temporary place of worship' to allow for some festive processions.[27] The law scripted the precise number of processions and allowed further restrictions on the basis of public order and the mere presence of another denomination in a town.[28] Outside space could have more than one designation and was explicitly engineered by the state, while the meaning of outside public space was contingent on social unity. In other words: existing diversity would warrant lesser public visibility.

The designation of space for religious practice and the prescribed separation of spaces explicitly departs from toleration practices of parity as described by Kaplan. Parity included the use of one building by rivalling confessions, making the space of a church flexible and less dependent on denomination. Napoleon's focus on unity of space extended even over the dead, setting French society up for conflict over funeral practices long into the nineteenth century.[29] Historian Thomas Kselman describes the building of separate cemeteries in diverse local communities, or if impossible, division of space with clear demarcations and separate entrances.[30] This division of space also occurred in early modern France in towns where confessional differences were more

[26] Article 46 Catholic organic laws.

[27] Paul d'Hollander, 'The Church in the street in nineteenth-century France', translated by Carol E. Harrison, (2004) *Journal of the Western Society for French History*, Vol. 32, pp. 171-194, pp. 180-183.

[28] Ibidem, pp. 180-183; Article 1 Concordat, Article 45 Catholic organic laws; Note the similar rhetoric to the Edict of Nantes.

[29] Thomas Kselman, 'Funeral conflicts in nineteenth-century France', (1988), *Comparative Studies in Society and History,* Vol. 30, No. 2, pp. 312-332, p. 313; Imperial Decree on burials, 23 Prairial, 1804.

[30] For vivid examples, see Kselman, 'Funeral conflicts in nineteenth-century France', p. 314.

pronounced; however, strict separation of the dead was practised almost nowhere.[31] Funerals therefore became a trigger of ecclesiastical-political conflict, fuelling existing unease over religious symbolism, rituals, space, and the division of labour and authority between clergy and civil authorities.[32] It is rather poignant that individual and deeply personal interests were deeply compromised in this institution-based conflict.[33]

In 1808, Napoleon issued three Decrees concerning Jewish communities, following consultation with an Assembly of Jewish Notables and the Great Sanhedrin.[34] Modelled after the *Articles Organiques,* it set Jewish communities back in comparison with the citizenship and civil equality granted in 1791, restricting their religious, social, and economic freedoms.[35] A wider interpretation of the decrees allowed Jewish elites limited power to govern Jewish communities in matters of education, poverty relief, and discipline.[36] Underlying concerns pertained to acculturation and assimilation of Jews, which inherently aimed at the relaxation of a transnational Jewish narrative and consolidation in France.[37] Echoing Stanislas Clermont-Tonnerre's words from 1789, Napoleon famously denounced collective Jewish identity as a 'nation within a nation'.[38] However, it does not seem to be the case

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[31] Keith P. Luria, *Sacred Boundaries. Religious Coexistence and Conflict in Early-Modern France,* Washington D.C.: The Catholic University of America Press 2005, Chapter 3.

[32] Ibidem, p. 314, 320.

[33] Such as mayors forcing their way into churches, individuals breaking into churches, parodies on Catholic ritual and blasphemy at the cemetery, scoffing of clergy, see ibidem.

[34] *Le régelement organique du culte mosaïque*, 17 March 1808.

[35] Decrét du 27 September 1791.

[36] Michael R. Shurkin, 'Consistories and Contradictions: From the Old to the New Regime', (2006), *Historical Reflections*, Vol 32, No. 1, pp. 65-82, pp. 69-70.

[37] Jonathan Frankel, 'Assimilation and the Jews in nineteenth-century Europe: towards a new historiography?', in Frankel & Zipperstein, *Assimilation and Community: The Jews in nineteenth-century Europe*, p. 12.

[38] Joshua Schreier, 'Napoléon's Long Shadow: Morality, Civilization, and the Jews in France and Algeria, 1808-1870', (2007), *French Historical Studies,* Vol. 30, No. 1, pp. 77-103, pp. 78, 81. The

that Napoleon sought to fully integrate Jews as being French. Napoleon's dealings with Jews on the margins of French identity show a concern over a 'pure' kind of Frenchness and belonging, expressed through interference with Jewish cultural identity, regulation of marriage and family, and allegations of economic immorality.[39]

Even further outside those margins were the French Arabs of the early nineteenth century. Essentially ghettoised in Marseille, a group of Egyptian refugees who had associated with Napoleon jostled issues of belonging and compatibility of Arab and French identity.[40] After Napoleon's defeat, a backlash resulted in massacre and burning of their dwellings in Marseille.[41] The state employed no rhetoric of belonging whatsoever to Arabs and they did not gain collective religious or political rights.[42] A considerable group of Arabs remained visibly different, navigating stereotypes of being 'foreigners', along with refugees from Spain and Italy, as well as being 'coloured', along with slaves and Arab Muslims.[43] Schreier notes the difficulties of connotations of Arabs and Muslims with 'intolerance' and 'despotism' in the context of French political discourse.[44] Coller argues that Egyptian presence remained contested, pointing out the tragedy of delocalisation and deterritorialization: they could neither return nor belong.[45] After 1830, Arab life was pushed almost entirely underground.[46] Coller frames the invisibility of Arab France as an expression of both

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Assembly of Jewish Notables, renamed the Grand Sanhedrin focussed on legal harmonisation in the period leading up to the 1808 decrees, p. 78; Frankel, 'Assimilation and the Jews in nineteenth-century Europe: towards a new historiography?', p. 11.

[39] Schreier, 'Napoléon's Long Shadow', pp. 80-82, 102-103.

[40] Ian Coller, *Arab France. Islam ant the Making of Modern Europe 1798-1831,* Berkeley: University of California Press 2011, Introduction, pp. 33-34, 52.

[41] Ibidem, p. 121.

[42] Ibidem, p. 214.

[43] Ibidem, pp. 51-52, 56, 65, 69, 215.

[44] Schreier, 'Napoléon's Long Shadow', pp. 86, 103.

[45] Coller, *Arab France*, pp. 52, 212-214.

[46] Ibidem, p. 217.

the inability and unwillingness of France 'to negotiate the realities of diversity and difference on its soil'.[47]

Programmatic and comprehensive Frenchification occurred in the Third Republic (1870-1940). Decades of flaring controversy between the 1880's and the 1905 Separation Act represent another crucial phase in negotiating identity in connection with the moderation of the public visibility of religion.[48] Over this period public debates over public visibility and platform intensified, while the government promoted more general cultural 'conformity' to 'democratic values' as a source of public morality over against ecclesiastical voices.[49] Borutta labels Catholicism as "modernity's other", referring to 'symbolic exclusion of Catholicism from the hegemonial version of national culture'.[50] French authorities started to lean toward laicisation in a context of deep social polarisation and antagonism, perhaps because of interests of political and social stability. This turn was not linear and still lacked a clear direction on behalf of the state. Moreover, authorities showed little interest in the radical separation of church and state for ideological reasons, for which only a small minority of radical freethinkers campaigned.[51]

Policies of cultural convergence were expressed in the secularisation of a range of key functions in society, such as the institution of civil marriage, mandatory secular education, and the removal of clergy from social public functions from 1881.[52] Such changes appeared in other European countries about the same time. Distinctive to France, however, was the revision of the governmental understanding of "public" in an attempt to reframe the position of religion. In 1880, the Ministry of Interior Affairs

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[47] Ibidem, Preface, p. vii.

[48] McMillan, '"Priest hits girl"', p. 87.

[49] Ibidem, pp. 87-88.

[50] Manual Borutta, 'Enemies at the gate: the Moabit Klostersturm and the kulturkampf: Germany', in Clark and Kaiser, *Culture Wars*, pp. 227-228.

[51] McMillan, '"Priest hits girl"', p. 87. Kaiser, '"Clericalism – that's our enemy!"', p. 54.

[52] Patrick J. Harrigan, 'Church, state, and education in France from the Falloux to the Ferry laws: a reassessment', (2001), *Canadian Journal of History*, Vol 36, No. 1, pp. 51-84.

declared that "public" simply referred to the public accessibility of church buildings, thus stripping worship itself from any material public significance.[53] By implication, outside space was no longer understood as a 'temporary space of worship'. Furthermore, the government interpreted the 1801 Concordat as a special act of "*toleration*" and simultaneously as a (monetary) "*privilege*" which had no constitutional justification nor substantiation.[54] Though toleration and privilege usually do not go hand in hand, the observation that Napoleon's arrangements were in tension with constitutionalism is itself accurate. However, polarised politics around diversity complicated the articulation of what it meant to coexist in a constitutional framework.

Sociologist Émile Poulat located a shift in social attitudes from positive to negative laicity in this context of conflict and radicalisation; that is, an evolution from a separation of church and state with an inclusive public space to one that restricts the level of public inclusivity.[55] In response, the Catholic church used clergy-led processions to increase its 'visibility in the urban setting' to underline and increase its public relevance and tangibility.[56] These embodied bold claims of public space as temporary spaces of worship. On grounds varying from protection of equality of religion in the streets to unapologetic anti-clericalism, some mayors banned processions or imposed restrictions relating to the number and length of processions, their location, and the presence of clergy.[57] Legal reasons included public nuisance of a procession, the threat to public order because of popular violence, its disguise as a political demonstration, or the idea that visibility of religion in public space was an imposition on all.[58] Parallel parades mocking Catholic processions potentially

[53] d'Hollander, 'The Church in the street in nineteenth-century France', p. 186.

[54] Ibidem, p. 186.

[55] d'Hollander quotes Émile Poulat in ibidem, p. 190.

[56] Ibidem, pp. 171-172.

[57] Ibidem, pp. 183-184.

[58] Ibidem, p. 180.

reinforced a process of 'gradual radicalisation'.[59] Instead of bolstering the public argument against Catholic presence, however, many mayors simply regulated both, recognising equal rights to the street.[60]

Absolute separation of church and state was never intended nor enforced in the nineteenth century. Rather, French politicians concerned themselves with equal access to public space. Interests in limiting the role of the Catholic church in society, particularly in education, were shared among agnostics and atheists, as well as Jews and Protestants, whose political and societal consciousness gradually grew.[61] Protestants ended up participating actively in the legislative process establishing *laïcité* in 1905. Perhaps they validated *laïcité* as a means to greater religious freedom as well as a means to moderate Catholic influence on education.[62] The eventual legislative process unfolded under the leadership of a parliamentary committee which represented an interesting mix of ideological and religious backgrounds and interests.[63] Legal *laïcité* primarily pertained to a strict institutional separation, grounded in the liberty of religion and conscience, which was intended to function in conjunction with principles of equality, neutrality, and the political and civil liberties proclaimed in the Human Rights Declaration of 1789.

Though the Act regarded religious activity as a private matter, it employed an ambivalent distinction between public and private spaces.[64] Churches were supposed

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[59] Kaiser, '"Clericalism – that's our enemy!"', p. 75.

[60] d'Hollander, 'The Church in the street in nineteenth-century France', p. 188.

[61] Frankel, 'Assimilation and the Jews in nineteenth-century Europe: towards a new historiography?', pp. 27-28.

[62] Patrick Cabanel, 'Religion, politique et laïcité: de quelques paradoxes du protestantisme français', (2006), *Sociologie et sociétés*, Vol. 38, No. 1, pp. 55-67, pp. 60-62.

[63] Some notable members of the committee are: Ferdinand Buisson, chair, and a Protestant liberal in favour of *laïcité;* George Clemenceau, a radical liberal and atheist in favour of *laïcité;* Jean Jaurès, socialist and opponent of Clemenceau, advocating neutrality over laicity; Francis the Pressensé, a pastor's son and president of the *Ligue des droits de l'homme;* Aristide Briand, a tolerant atheist.

[64] E.g. Article 2 *Loi du 9 Décembre 1905 concernant la Séparation des Églises et de l'État*.

to operate as private associations and the Act ruled that religious gatherings must be public (e.g. publicly accessible) in order to enable monitoring by the police on behalf of the state in the interest of public order (Article 25). Political gatherings were not to be organised in places of worship (Article 26), which resembled the unity of space from the Napoleonic regulations but also put political and religious gatherings on par. It also distinguished places of worship from other buildings with regards to the permissibility of outward religious symbols (Article 28). The Separation Act thus framed space as mediator of identity. A crucial difference is that *laïcité* now offered an alternative, and essentially negative, approach to space. Practically, it effectively imposed an outward unity beyond religious and ideological diversity, fundamentally marginalising rivalling narratives of identity and belonging.

Though *laïcité* was in many respects anti-Catholic in nature, it acquired a more generalised connotation through Article 1 of the French Constitution in 1958: 'France shall be an indivisible, secular, democratic, and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion. It shall respect all beliefs. (…)'.[65] The prominent position of *laïcité* within the Constitution underlines how this notion had become to social and political order, as it were, moving between the constructive to the reflexive function of the law.[66] But it also remained framed over against religion, while the religious and ideological landscape of French society had dramatically changed since 1905. This chapter argues that the centrality of *laïcité* as a principle of constitutional order has, at least, a potential to marginalise minority religions. Not so much because religious freedom would not be protected, but because belief is made out to be a personal characteristic alongside race and origin. As such, it is not part of the primary legal order, which is based on a centralistic

[65] Article 1 Constitution of 4 October 1958, http://www.assemblee-nationale.fr/connaissance/constitution.asp, (consulted 8 August 2019).

[66] Clifford Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective', in *Local knowledge: further essays in interpretative anthropology*, London: Fonatana Press 1983, pp. 167-234.

oneness of territory, citizens, and a set of French values that order the national interest. *Laïcité* is by no means amounts to constitutional atheism, yet it creates a legal basis for the state to instrumentalise 'republican values' to establish a bandwidth of good and evil to the othering of a range of minorities.[67]

Laïcité has become sharper in response to Islam, specifically as the French state invokes this notion as a constitutional underpinning of dissimulating and othering policies. Historian and sociologist Jean Baubérot discerns different dimensions to *laïcité:* historical, political and democratic *laïcité,* which he sees as the original intent, and a new *laïcité,* which excludes religions from common frames of culture and identity.[68] He warns that this new, more radical type of *laïcité* could be used in opposition to human rights, particularly in opposition to religious freedom. He goes as far as to call this laicity a falsified laicity.[69] This section would provocatively suggest that *laïcité* perhaps has the capacity to function as a constitutionalised instance of toleration. Almost ironically, being invented to protect non-Catholic minorities, it may underwrite otherness with regards to race and religion, mediated through a nexus of land, people, teleology, all encapsulated in the notion of frenchness.

This frenchness embodies an imagination of belonging, yet the flexibility of the concept of *laïcité* in junction with its constitutional status may obscure the intersection of constructive and reflexive functions of the law. Moreover, specific legal regulations concerning religion tend to include references to the legal principle public order. While a focus on public order is perhaps idiosyncratic to French legal and social history, this particular legal lens may unwittingly construct state responses to social conflict over

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[67] Henry Pena-Ruiz, *Qu'est-ce que c'est la laïcité?,* Paris: Gallimard 2003, pp. 32-40; Jean-Marc Piret, 'De verhouding van godsdienst en staat (in het onderwijs): historisch-nationale verschillen en Europese convergentie', in P. de Hert & K. Meerschaut, *Scheiding van kerk en staat of actief pluralisme?*, Oxford: Intersentia 2007, pp. 113-146, p. 131-134.

[68] Jean Baubérot, *La laïcité falsifiée,* Paris: La Découverte 2012, pp. 39-40.

[69] Ibidem, pp. 39.

the bandwidth of belonging.[70] And finally, the question of what happens with the integrity of individual and collective religiosity remains. Constitutional concepts of religion, laicity, and functional separation of church and state that grew from explicit institutional polarisation throughout the nineteenth century, might not by definition provide helpful lenses into the question of diversity in France today – as the next chapter will discuss.

4.2 Accommodation of religious difference in Germany

At the start of the nineteenth century, it seemed unlikely that a notion of one German nation would arise over the poly-ethnic fabric of German states and towns.[71] The idea of one nation – arguably rooted in the medieval period – certainly featured in Enlightenment literature yet found little traction among grassroots communities, not least because of relatively low levels of literacy.[72] Regional differentiation was rooted in the Westphalian treaties, making churches dependent on the support of regional princes *(Herrschaften)*. The notion of the nation would thence engender political integration, for example through the development of a public consciousness *à la* Johann Gottfried von Herder (1744-1803) or through the unity of the will of the people *à la* Emmanuel Joseph Abbé Sieyès (1748-1836).[73] Perhaps the idea of the German

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[70] E.g.: *'pourvu que leur manifestation ne trouble pas l'ordre public établi par la Loi'* (Article 10 Human Rights Declaration*), 'sauf à répondre de l'abus de cette liberté, dans les cas déterminés par la Loi'* (Article 11 Human Rights Declaration), *'sous les seules restrictions édictées si ci-après dans l'intérêt de l'ordre public'* (Article 1 Separation Act), and *'dans l'intérêt de l'ordre public'* (Article 25 Separation Act).

[71] Naika Foroutan, 'Hybride Identitäten. Normalisierung, Konfliktfaktor und Ressource in postmigrantischen Gesellschaften', in Heinz Brinkmann & Haci-Hail Uslucan (eds.) *Dabeisein und Dazugehören. Integration in Deutschland,* Wiesbaden: Springer 2013, pp. 85-102, p. 86.

[72] Spohn, 'The (fragile) normalisation of German identity within Europe', pp. 18-19; Stefan Schneider, *Nation ohne Quellen? Oder Der Anfang vom Anfang einer deutschen Bewegung,* (diss.) 2002, p. 12.

[73] Lothar Gall & Dirk Blasius, 'Einheit', in: Otto Brunner, Werner Conze, & Reinhart Koselleck (eds.), *Geschichtliche Grundbegriffe: historisches Lexicon zur politisch-sozialen Sprache in Deutschland,* Band 2, Stuttgart: E. Klett 1975, pp. 117-152, pp. 125-126, 137. Gall and Blasius observe that his language

nation is primarily grounded in territoriality, rather than primordial ethnic homogeneity.[74] Thus, the relationship between ethnicity, homogeneity, and the idea of the nation in Germany remained in ambivalent tension.[75] According to Tönnies, the formation of nationhood depended on the conceptual transformation of *Gemeinschaft* into *Gesellschaft*, which facilitated the idea of unity in diversity.[76] Indeed, the idea of an ethnic nation would emerge amidst: 1) decreasing the relevance of religious and political differentiation; 2) the transformation of religious cleavages into subcultures of denominational christianities; and 3) the increasing nationalisation of expressions of regional culture.[77]

The Napoleonic invasion of 1806 and the consequent deliberate political engineering generated almost traumatic structural changes in relationships between German states.[78] Napoleon replaced the imperial structure with the mostly military Confederation of the Rhine, re-ordering states and effectively giving three million

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concerning unity was unsuitably used in the context of the Federation and would later develop a more unhealthy connection with nationalism, Ibidem, p. 148; Ernst-Wolfgang Böckenförde, *Recht, Staat, Freiheit,* Frankfurt: Suhrkamp 1991, p. 35.

[74] Anthony Smith, *The ethnic origins of nations,* Oxford: Blackwell 1986, pp. 134-141.

[75] Samuel Salzborn, 'Ethnizität, Homogenität, Nation. Ein Spannungsverhaltnis', in Carlo Masala (ed.), *Zur Lage der Nation. Konzeptuelle Debatten, gesellschaftliche Realitäten, internationale Perspektiven,* Baden-Baden: Nomos 2018, p. 29.

[76] Thomas Schmidt-Lux, 'Labor omnia vincit', in Michael Geyer & Lucian Hölscher, *Die Gegenwart Gottes in der modernen Gesellschaft. Transzendenz und religiöse Vergemeinschaftung in Deutschland,* Göttingen: Wallstein Verlag 2006, pp. 404-430, pp. 406-407; Rudolf Steinberg, *Kopftuch und Burka. Laïzität, Toleranz und religiöse Homogenität in Deutschland und Frankreich,* Baden-Baden: Nomos 2015, p. 203; Smith, *The Ethnic Origins of Nations,* p. 153.

[77] Stefan Schneider, *Nation ohne Quellen,* p. 15; Tobias Dietrich, 'Dorfreligion zwischen Glaube und Heimat' in Geyer & Hölscher, *Die Gegenwart Gottes in der modernen Gesellschaft,* pp. 177-196, pp. 190-191.

[78] Communications during workshop 'Togetherness: theological, social, and political ways of understanding human co-existence in the age of the French revolution', convened by Ruth Jackson and Hannah Weibye, 10 December 2018.

Germans a new identity.[79] Similarly to French churches, Napoleon took control over the church and regulated outward representations of religion in Baden, Bavaria and Würtemberg.[80] According to Laura Achtelstetter, these policies fuelled anti-Napoleonic and anti-revolutionary sentiments, which found expression in religious conservatism, even framing political relationships with France as a struggle between good and evil.[81] The Vienna Congress imposed yet another structure, that of the German Confederation *(Verein).*[82] This confederation was designed as an international association, led by the Prince. Although it explicitly affirmed regional independence, it effectively weakened the political independence of many regions.[83]

Intersecting political and economic changes soon engendered new vigour with regard to local identity and romanticising homeliness. At the heart of *Biedermeier* (1815-1848) was suspicion and concern over state power, economic strategy, citizenship, and the common good.[84] The cultural focus on homeliness symbolised the foundation of 'permanence and stability' and protection of one's proper identity, much to the detriment of nationalist visions.[85] Grassroots responses galvanised regional historical and cultural capital to emphasise regional distinctiveness.[86] This regional

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[79] Ibidem.

[80] Ibidem; Siegfried Weichlein, 'Regionalism, Federalism and Nationalism in the German Empire', in Joost Augusteijn and Eric Storm (eds.), *Region and State in Nineteenth-century Europe. Nation building, regional identities and separatism,* New York: Palgrave Macmillan 2012.

[81] Communications during workshop 'Togetherness: theological, social, and political ways of understanding human co-existence in the age of the French revolution'.

[82] This association was established following the Vienna Congress of 1815 and ratified in the 1820 *Schlussakte der Wiener Ministerkonferenzen* or *Final Act of the Ministerial Conference to Complete and Consolidate the Organization of the Germanic Confederation of 18 June 1815*, http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=234&language=german, (consulted 27 October 2017).

[83] Articles 1-2 *Schlussakte der Wiener Ministerkonferenzen*.

[84] Mack Walker, *German Home Towns,* New York: Cornell University Press 1971, pp. 307-353.

[85] Ibidem, pp. 307-308.

[86] Weichlein, 'Regionalism, Federalism and Nationalism in the German Empire', p. 93, 101.

distinctiveness was multi-layered: historian Siegfried Weichlein argues that some states developed a cooperative federalism in affirmation of regional political structures, while sub-state regionalism sometimes identified with the supra-regional political structure in defence against the regional state.[87] The combination of cultural distinctiveness and political stratification perpetuated a measure of regional autonomy. Political stratification rendered an overarching unity or identity difficult to imagine, other than perhaps represented 'through the person of a prince'.[88] The idea of a nation remained a notion of 'abstract' integration and, although it filled an 'empty space', it remained a mostly imagined and constructed community.[89]

Around the same time, regional princes attempted to exert a greater influence on the churches through the regulation of outward matters of religion, such as processions, and brought some ecclesiastical functions under the curatorship of the regional authorities.[90] The Roman Catholic Church declared itself independent from the state towards 1848 in order to reaffirm ecclesiastical autonomy and transnational unity.[91] In 1849, an elitist parliamentary assembly gathered at the Frankfurter Paulskirche to discuss constitutionalisation civil rights as well as the abolition of state churches.[92] Though its proposed constitution failed, some states pursued de-

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[87] Ibidem, p. 95.

[88] Walker, *German Home Towns,* p. 34; W. Reinhard, *Geschichte der Staatsgewalt,* München: Beck 1999, p. 264; Élisabeth Zoller, *Introduction to Public Law: A Comparative Study,* Leiden: Martinus Nijhoff 2008, p. 79.

[89] Weichlein, 'Regionalism, Federalism and Nationalism in the German Empire', p. 96.

[90] Reinhold Zippelius, *Staat und Kirche: eine Geschichte von der Antike bis zum Gegenwart,* München: Beck 1997, pp. 138-142.

[91] Eszter Cs. Herger, '"*Freie Kirche im freien Staat"*: Die katholische Autonomiebewegung in Ungarn', in Kazimierz Baran, *Constitutional Developments of the Habsburg Empire in the Last Decades before its Fall,* Kraków: Jagiellionian University Press 2007, pp. 34-36.

[92] Christian Roßkopf, 'Staat und Kirche des 19. und 20. Jahrhunderts im Spiegel verfassungsrechtlicher Zeugnisse', in *Kirche und Staat im 19. Und 20. Jahrhundert,* Neustadt: Degener 1968, pp. 58-60; Zippelius, *Staat und Kirche: eine Geschichte von der Antike bis zum Gegenwart*, p. 140; Walker, *German Home Towns,* pp. 366-367.

establishment independently. This de-establishment was grounded in concepts of independence, indifference, equality, impartiality; however, there was not yet any concept of neutrality.[93] The tension between elite conceptions of the nation and the grassroots' orientation on localism and regionalism were of course prevalent in the background. The convention had indeed intended to address 'the needs of a fragmented people' and desired to unite the nation in response to regionalism, localism, and weak moorings of national identity.[94]

A clear understanding of what one German nation would become remained absent. Only a strong German consciousness in reaction to the Franco-Prussian war (1870-1871) would lay stronger foundations for political unification. Under Otto von Bismarck, German states united under King Wilhelm IV as the first 'German Emperor'[95] – not the 'Emperor of Germany' because of its wider-ranging territorial connotations.[96] Amidst political and economic unification, as well as a dramatic rise in national consciousness, regional distinctiveness critically transformed. Weichlein explains that the nation became understood in Old Testament terms, as 'one people' in 'many tribes', while the development of cultural nationhood was particularly supported by Protestants.[97] The idea of many tribes would enable the inclusion of regional identity in a 'specific German morality' and consciousness, and reconcile regional diversity with national identity: 'Germanness could encompass their

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[93] Heinhard Steiger, 'Neutralität', in Otto Brunner, Werner Conze, & Reinhart Koselleck (eds.) *Geschichtliche Grundbegriffe: historisches Lexicon zur politisch-sozialen Sprache in Deutschland,* Band 4, Stuttgart: E. Klett 1978, p. 353.

[94] A.E. Dick Howard, 'Willi Paul Adams and American constitutionalism', in Andreas Etges & Ursula Lehmkuhl (eds.), *Atlantic Passages. Constitution, immigration, Internationalization,* Berlin: Lit Verlag 2006, p. 45.

[95] Contrasting with aspirations towards a greater unification which would include Austria.

[96] Otto von Bismarck had supported a smaller Germany, to appease Austrian and Southern princes. See William Dawson, *History of the German Empire 1867-1914,* first published in 1919, republished Plano: Merkaba Press 2017, p. 355.

[97] Weichlein, 'Regionalism, Federalism and Nationalism in the German Empire', pp. 101-102.

diversity'.[98] This did not necessarily include Jewish communities, despite the suggestion of a trans-regional Jewish "tribe".[99] The extreme consequence of this exclusion is found in Karl Marx' work 'On the Jewish Question', in which he suggests that 'the social emancipation of the Jew is the emancipation of society from Judaism'.[100]

Religious differences remained important and indeed became the focal point of contestation in the context of the Kulturkampf of 1871-1878.[101] Southern and Catholic regionalism remained suspicious of Bismarck's liberal and Protestant allegiances and military strategies. Moreover, Bismarck attempted to incorporate important societal functions in the mandate of the state at the cost of the role of religious institutions. Like in France and the Netherlands, such policies were important to processes of nation-building. The civil registration laws conferred the right to the state to register marriage, births and deaths, all of which had belonged to regional ecclesiastical bodies before. Like in the Netherlands, education regulations established state oversight, sparking great controversy, especially since the Christian school had become the medium for the transmission of religious identity.[102]

It would be a mistake to place the churches simply against the state, since their relationship is better described as ambivalent rather than antagonistic. Churches did not simply oppose nationalism, and reversely, religious culture became co-constitutive to nationhood. Some churches worked pragmatically with nationalist and regionalist movements, and functioned between both types of imagined communities without principally being embedded in either of them.[103] At once, the sectarian social structures

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[98] Ibidem, pp. 101, 103.

[99] Ibidem, p. 102.

[100] Karl Marx, *On the Jewish Question*, Braunschweig, 1843, p. 52.

[101] Pieter de Coninck, *Een les uit Pruisen: Nederland en de Kulturkampf 1870-1880,* Hilversum: Verloren 2006, p. 387.

[102] Ibidem, p. 101.

[103] James Bjork, 'Inadvertent allies: Catholicism and Regionalism in a German-Polish borderland', in Augusteijn & Storm, *Region and State in Nineteenth-Century Europe,* London: Palgrave Macmillan 2012, pp. 246-268.

remained so important that even Berliner Atheists organised themselves in the Berlin Free Religious Congregation.[104] However, German society still saw atheists as dissidents, and racial others like Jewry and traveller populations remained on the margins.[105] Yet the Kulturkampf could be seen as a 'symbolic exclusion of Catholicism from the hegemonial version of national culture'.[106] Some secular regulations support this perspective. Borutta documents a prohibition to preach on political matters in such a way that disturbed 'the public peace', residency-restrictions to ultra-montane Jesuits and a prohibition of the appointment of foreign clergy.[107] The state confiscated ecclesiastical estates and imprisoned dissenting members of the clergy. This dimension of the Kulturkampf appears to be an intensification of anticlerical tensions that existed before the Unification as well as beyond the German Empire. One might argue that this anticlericalism was reinvigorated through popular religious revival, ecclesiastical suspicion, Catholic regionalism, topped with the proclamation of papal infallibility in 1870.[108]

In response, the Catholic church tried to develop as a more homogenous minority, perhaps similar to Catholic and Protestant minorities in the Netherlands. Churches sought to raise awareness and rally political resistance through investing in public visibility, which materialised in 'processions, pilgrimages, and outdoor masses'.[109] The state came down on such visible expressions of religion in public space,

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[104] Todd Weir, 'Towards a history of sociology of Atheistic religious community', in Geyer & Hölscher, *Die Gegenwart Gottes in der modernen Gesellschaft,* pp. 197-228, pp. 197-198.

[105] Ibidem, pp. 224-225.

[106] Manuel Borutta, 'Enemies at the gate', pp. 227-228.

[107] Ibidem, p. 249. This was actually quite similar to provisions of the French Concordat.

[108] Lisa Dittrich, *Antiklerikalismus in Europa. Öffentlichkeit und Secularisierung in Frankreich, Spanien und Deutschland (1848-1914),* Göttingen: Vandenhoeck & Ruprecht 2014, p. 122. Some Roman Catholics refused to recognise papal infallibility and created the old-Catholic church in Germany.

[109] Kari Kälin, *Schauplatz Katholischer Frömmigkeit. Wallfahrt nach Einsiedeln von 1864 bis 1914,* Fribourg: Academic Press Fribourg 2005, p. 39; Holger Schmenk, *Xanten im 19. Jahrhundert: eine Rheinische Kleinstadt zwischen Tradition und Moderne,* Cologne: Böhlau 2008, p. 42; Beth Griech-Polelle, 'Bishop

for these expressions embodied rival narratives of identity associated with establishment as well as with the Vatican.[110] Interestingly, Catholics in states with Catholic neighbours reverted to practices of Auslauf and travelled to worship in the church of choice.[111] In the heat of the culture war, some liberals in parliament considered a potential 'exclusion of religion from the public space', coerced if needed, in addition to the institutional separation of church and state.[112] This, if anything, agitated religious consciousness and actually increased religious civic engagement.[113] In the middle of this cultural conflict, religious actors founded the Christian Deutsche Zentrumpartei, which represented interests of religious minorities in Parliament and which would become quite powerful into the twentieth century.[114]

The constitution of Weimar of 1919 conferred independence to the churches in internal matters as well as corporate privileges through series of Concordats between the *länder* and the churches.[115] The Weimar constitution thus departed from the Augburger *Herrschaftsrecht;* Hans Dreier observes that it also and importantly marks the moral independence of political order from the church.[116] However, the cultural underpinnings of the nation remained culturally Christian in nature both with respect to its search for unity and with respect to mechanisms of exclusion. Ambivalently,

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Von Galen and Resistance to Nazism', in Omer Bartov and Phyllis Mack (eds.), *In God's Name: Genocide and Religion in the 20th century,* New York: Berghahn Books 2001, p. 112. In her evaluation of the use of processions as a form of resistance, she recalls the role of these during the Kulturkampf under Von Bismarck.

[110] Richard von Kralik, *Allgemeine Geschichte der neuesten Zeit von 1815 bis zur Gegenwart, Dritter Band 1857-1875,* 1919, republished Paderborn: Salzwasser 2013, p. 874.

[111] Jo Marie Farwick, *Ernste Zeiten für Katholiken. Der Kulturkampf in Preußen,* Munich: GRIN 2002, p. 16.

[112] Borutta, 'Enemies at the gate', p. 248.

[113] Hartmut Lehmann, *Säkularisierung. De europäische Sonderweg in Sachen Religion,* Göttingen: Wallstein Verlag 2004, p. 84.

[114] Borutta, 'Enemies at the gate', p. 230; Lehmann, *Säkularisierung,* p. 84.

[115] Horst Dreier, *Staat ohne Gott. Religion in der säkularen Moderne,* München: Beck 2018, p. 92, Peter Unruh, *Religionsverfassungsrecht,* Baden-Baden: Nomos 2009, p. 190.

[116] Dreier, *Staat ohne Gott*, p. 168.

Christianity theology and culture both provided the foundation for German nationhood as well as criticised its secularisation.[117] At the same time, German identity was multifocally stratified. Certain dimensions of regional identity became more nationalised (e.g. music, choirs, theatre) and cultural christianities slowly became 'neutral phenomena'.[118] Yet regional culture was not fully subsumed in national identity; it rather remained co-constitutive to it.

The secularised nature of cultural Christianity in Germany perhaps created a modular homogeneity that reinforced several exclusions along the lines of non-Christian religion.[119] Such exclusions are, of course, not exclusively religious and are profoundly interlinked with the racialisation of German nationhood in the early twentieth century. The combination of racialisation and sacralisation of German nationhood rendered the social margins extremely thin; the focal point of which is the jarring trauma of Auschwitz.[120] This racialisation was indeed extreme under national-socialism, however, this racialisation does not fall outside the parameters of the nation state as a nexus of territory, people, and teleology. Nandita Sharma rightly understands 'the national form of state power as one that *inherently* organizes human "society" *as a racialized community*, one in which citizenship operates to create a positively

[117] Birgit Rommelspacher, *Wie christlich ist unsere Gesellschaft? Das Christentum im Zeitalter von Säkularität und Multireligiosität,* Bielefeld: Transcript 2017, p. 232.

[118] Dietrich, 'Dorfreligion zwischen Glaube und Heimat', pp. 189-191.

[119] Rommelspacher, *Wie christlich ist unsere Gesellschaft?,* pp. 233, 284-285; Matthias König & Wolfgang Knöbl, 'Religion, nationalism, and European integration: Introduction' in *Religion and national identities in an enlarged Europe*, pp. 1-16, p. 4.

[120] Lehmann, *Säkularisierung,* pp. 84 ff, 102, Hans Joas, 'Sakralisierung und Entsakralisierung. Politische Herrschaft und religiose Interpretation', in Friedrich Graf & Heinrich Meier (eds.), *Politik und Religion. Zur Diagnose der Gegenwart,* München: Beck 2013, pp. 259-286, p. 283; Rommelspacher, *Wie christlich ist unsere Gesellschaft?,* p. 407, Steinberg, *Kopftuch und Burka,* pp. 201-202.

racialized "nation" and a negatively racialized other'.[121] The next chapter will pick up on this idea of inherent racialization of nationhood.

Post-war West-Germany is characterised by a rejection of nationalism, critical self-reflection, constitutionalism, acceptation of secularity and neutrality of the state, as well as cooperation with the churches.[122] East-German communism, however, regarded Nazism as an aspect of fascism and was less inclined to internalise a sense of guilt while the idea of the (secular) German nation remained the reference frame.[123] After the war, the *Grundgesetz* (GG) for the *Bundesrepublik Deutschland* opened with the recognition of human dignity, *Menschenwürde.* From thence, this notion of human dignity entailed the foundational norm of legal order.[124] This idea of human dignity is enshrined both as a concept and as a series of civil and political rights and freedoms. The constitution also includes both the individual freedom of religion (Articles 4:1, 4:2 GG) and the freedom of religious communities, *Religionsgemeinschaften* (Articles 9, 140 GG).[125] This freedom may be further protected through the European Convention of Human Rights.[126] It is relevant that the constitution regards religious communities as

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[121] Nandita Sharma, 'Racism', in Bridget Anderson & Vanessa Hughes (eds.), *Citizenship and its Others. Migration, diasporas and citizenship,* Basingstoke: Palgrave Macmillan 2015, pp. 98-118.

[122] Florian Roth, *Die Idee der nation im politischen Diskurs. Die Bundesrepublik Deutschland zwischen neuer Ostpolitik und Wiedervereinigung (1969-1990),* Baden-Baden: Nomos 1995, pp. 387-388; Unruh, *Religionsverfassungsrecht,* p. 38; Stefan Korioth, 'Wie lassen sich religionspolitische Konflikte rechtlich regeln?', in Andreas Anter & Verena Frick, *Politik, Recht und Religion,* Tübingen: Mohr Siebeck 2019, pp. 11-30, p. 27.

[123] Spohn, 'The (fragile) normalisation of German identity within Europe, p. 22; Unruh, *Religionsverfassungsrecht,* p. 39.

[124] Verena Frick 'Sakralisierung des Rechts. Zum Verhältnis von Politik und Recht in der Theorie des *Global Constitutionalism'*, in Anter & Frick, *Politik, Recht und Religion,* pp. 93-109, p. 93.

[125] Unruh, *Religionsverfassungsrecht,* p. 51.

[126] Article 9 European Convention of Human Rights; Claus Dieter Classen, *Religionsrecht,* Tübingen: Mohr Siebeck 2006, p. 99.

gemeinschaften, which perhaps amounts to an ecclesiastical bias compared to less institutionalised religious communities.[127]

The Reunification of 1990 marks several important dimensions to the relationship between religion, state, and nation. Spohn observes that a greater congruence of state and nation evolved after the unification, yet that this process was highly complex because of the intersection of intra-German normalisation of the idea of the nation with international immigration and European integration.[128] Religious communities had changed too. Ruff writes that the crumbling of religious communal life engendered significant societal effects because of the close relationships to both state and society. And reflexively, the further differentiation of political and religious life perhaps meant that confessional subcultures had ceased to be coherent religious communities.[129] Religion nonetheless remained the constant factor in the imagination of state, nation, and society, not least because of its reflection in law which privileged the participation and visibility of some religious communities over others.

After the Reunification, the *Grundgesetz* and constitutionalism formed the bedrock of German law. Reflecting on Geertz, Reuter suggests that the law itself could be a form of imagining social life.[130] Frick even regards constitutionalism as a "sacralisation" of the law.[131] Tine Stein writes that religion remained a constant factor in the constitutional state, for example through its focus on freedom, responsibility,

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[127] Ulrich Willems, 'Weltanschaulich neutraler Staat, christlich-abendländischer Kultur und Laizismus', in Manfried Walter (ed.), *Religion und Politik,* Baden-Baden: Nomos 2004, pp. 303-322, p. 303; Raida Chbib, 'Einheitliche Repräsentation und muslimische Binnenvielfalt', in Hendrik Meyer & Klaus Schubert (eds.), *Politik und Islam,* Wiesbaden: Springer 2011, pp. 87-93.

[128] Spohn, 'The (fragile) normalisation of German identity within Europe', pp. 23-24, 37.

[129] Mark Ruff, 'A religious vacuum?', in Geyer & Hölscher, *Die Gegenwart Gottes in der modernen Gesellschaft*, pp. 351-379, pp. 355, 376.

[130] Astrid Reuter, *Religion in der verrechtlichten Gesellshaft. Rechtskonflikte und öffentliche Kontroversen im Religion als Grenzarbeiten am religiosen Feld*, Göttingen: Vandenhoeck & Ruprecht 2014, pp. 67-68.

[131] Frick 'Sakralisierung des Rechts. Zum Verhältnis von Politik und Recht in der Theorie des *Global Constitutionalism'*, p. 93.

equality and solidarity, human dignity, and the separation of church and state.[132] At once, the cooperative model of the relationship between church and state carried over after the Reunification. Religious freedom remained grounded in a combination of individual and institutional freedoms as well as the principles of neutrality and human dignity.[133] However, the cooperative model is vulnerable to the criticism that it might not be sufficiently open to diversity and multiculturality.[134] Moreover, as Augsberg notes, the bifurcation of individual and institutional freedoms may not be sufficiently flexible to account for the complexity identity formation.[135] Given the growing role of the law in politics of religious diversity, the nature and goal of neutrality must be monitored, and as Frick argues, the justification of legal arguments as well as the limits of the law need to be precisely described and scrutinised.[136]

4.3 Pragmatic accommodation: the Netherlands

Relative pragmatism characterises much of Dutch constitutional arrangements around the protection of minorities. Its constitutional outlook is in some ways a hybrid of French and German intuitions as it is partly accommodative and segregationist, and partly laicised. Dutch constitutional thought has been heavily influenced by German and French philosophy, though Dutch constitutional philosophy never developed a

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[132] Tine Stein, *Himmlische Quellen und irdissches Recht. Religiöse voraussetzungen des freiheitlichen Verfassungsstaates,* Frankfurt: Campus Verlag 2007, p. 336.

[133] Kathrin Groh, 'Das Verhältnis von Staat und Kirche aus verfassungsrechtlicher Perspektive', in Thomas Bohrmann & Gottfried Küenzlen, *Religion im säkularen Verfassungsstaat,* Münster: Lit verlag 2012, pp. 23-38, pp. 23, 30-35.

[134] Jochen Bohn, 'Religion vs. Rechtsstaat, oder: wenn die Neutralität endet. Ein skeptischer Ausblick', in *Religion im säkularen Verfassungsstaat,* pp. 137-140, p. 139, Kai Hafez, *Freiheit, Gleichheit und Intoleranz: Der Islam in der liberalen Gesellschaft Deutschlands und Europas,* Bielefeld: Transcript 2014, p. 312.

[135] Ino Augsberg, 'Ist religiöse Identität ein Problem für das Recht?', in Anter & Frick, *Politik, Recht und Religion,* pp. 31-45, p. 43.

[136] Andreas Anter & Verena Frick, 'Zur Einführung: Politik, Recht und Religion', in Anter & Frick, *Politik, Recht und Religion,* pp. 3-10, pp. 6-7, Frick 'Sakralisierung des Rechts. Zum Verhältnis von Politik und Recht in der Theorie des *Global Constitutionalism'*, p. 106.

fully-fledged or native concept of the separation of church and state on the basis of which particular issues could be regulated. Instead, particular arrangements emerged from specific historical contingencies. The Netherlands developed as a unitary state from its constitution in 1814-1815, appropriating some of the policies regarding unity and centralism that Napoleon imposed on the Dutch Kingdom from 1804. It consisted of a number of provinces which had historically cooperated while holding on to cultural, linguistic, and religious identities, particularly regarding Protestant and Catholic affinities. For this reason, from 1814 onwards, the future of the United Kingdom of the Netherlands would be shaped by its ability to accommodate a level of decentral autonomy and, in particular, its ability to foster a national identity beyond religious and other cultural differences.

King William I, who reigned from 1813-1840, attempted to overcome sharp religious division by encouraging religious moderation, social and economic convergence, and political centralisation.[137] He employed and supported moderate Protestantism to these very ends, while he restricted the freedom of both orthodox Protestants and Roman-Catholics. His policies led to the short-lived establishment of the Dutch Reformed Church, as well as state departments for Catholic and Reformed worship, which could regulate and investigate into ecclesiastical practices.[138] He prohibited the initiation of new Catholic or confessional Reformed schools, sanctioned through criminal law.[139] Many in religious leadership feared that education would be used towards shaping citizens in support of the state at the expense of confessional education, e.g. religious identity. The King also, and particularly, regulated Catholic

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[137] Knippenberg & De Pater, *De eenwording van Nederland,* p. 13.

[138] Ido de Haan, *Het beginsel van leven en wasdom. De constitutie van der Nederlandse politiek in de negentiende eeuw,* Amsterdam: Wereldbibliotheek 2003, p. 138.

[139] Like Germany, the Netherlands also regulated this imposed convergence of identities partly through criminal law. The law forbade specific religious instruction in schools. Attempts to establish religious schools were met with closure and criminal prosecution of teachers, see T.M. Gilhuis, *Memorietafel van het Christelijke Onderwijs. De geschiedenis van de schoolstrijd,* Kampen: Uitgeverij Kok 1975, pp. 66-72.

processions. Soon after his inauguration, he restricted the number of public processions to two a year.[140] Popular discontent rose and illegal processions were organised throughout the country – both Catholic processions and Protestant protest-processions.[141] In 1821, the King prohibited all processions in the province of North-Brabant, which was predominantly Catholic, and allowed processions to continue in other provinces only if these had continually existed throughout the French occupation.[142] Incongruent with the Dutch reputation of tolerance, these restrictions existed until 1983.

The King's religious and national politics disquieted both Catholic and orthodox Reformed communities in the Netherlands. These large and distinct communities, though theoretically having a similar interest in religious freedom, lacked political clout as a result of limited suffrage as well as profound mutual mistrust. The southern, predominantly Catholic, provinces revolted and founded the Kingdom of Belgium in 1830. This secession was largely popularly led, especially as Catholic leadership had not intended a violent revolt.[143] King William I sent his army in vain and soon the secession was a fact. According to Knippenberg and De Pater, this implied that the Northern Netherlands needed to readjust and limit its ideas about the nation to a smaller contingent of people and territory.[144] In 1834, a major schism also occurred within the Dutch Reformed church, emerging from conservative discontent. The King prohibited worship other than in small groups (up to twenty) and enforced this restriction through criminal law and other repressive measures, such as

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[140] Peter J. Margry, *Teedere quaesties: religieuze rituelen in conflict. Confrontaties tussen Katholieken en Protestanten rond de processiecultuur in 19e-eeuws Nederland,* Hilversum: Verloren 2000, p. 224.

[141] Ibidem, pp. 225-227.

[142] Ibidem, p. 228.

[143] Roberto Dagnino, *Twee leeuwen, één kruis. De rol van Katholieke culturele kringen in de Vlaams-Nederlandse verstandhouding (1830-1900),* Hilversum: Verloren 2015, pp. 64-65.

[144] Knippenberg & De Pater, *De eenwording van Nederland,* p. 21.

billeting.[145] In response, some groups met in attics and farmhouses in the countryside; these practices are strange reminders of practices of dissent worship from the early modern period, such as *Auslauf* and dissimulation of places of worship.[146]

A major constitutional change was initiated by liberal parliamentarians in 1848. Its intention was to loosen the relationship between the state and religion and, consistent with this vision, it facilitated a greater measure of religious freedom. This freedom of religion was based on a fuller separation of church and state, which went further than the separation of church and state in France around the same time.[147] This constitutional move provided Catholic communities within the Netherlands, as well as orthodox reformed communities, the freedom to organise themselves and found new educational institutions, albeit entirely at their own expense. Roman-Catholics and Jews thus gained unprecedented freedom in the Netherlands compared with other countries.[148] This freedom perhaps perpetuated the religious segregations of the time, yet it also marked the beginning of explicit, organised, and mass supported civil engagement of these communities through the establishment of schools, newspapers, associations, and charities.

Expressions of these differences outside church buildings were still regulated and the 1848 Constitution explicitly restricted processions in the Netherlands, obviously targeting Catholic processions. It enshrined an ambivalent attitude towards

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[145] Guillaume Groen van Prinster, a Protestant but himself not an explicit Calvinist, condemned these actions as unconstitutional in work, *De maatregelen tegen de Afgescheidenen aan het Staatsregt getoetst,* Leiden 1837.

[146] G.J. Kok (ed.), 'Afscheiding, Doleantie, en vereniging', https://gereformeerdekerken.info/afscheiding-doleantie-en-vereniging/, (consulted 6 Augustus 2019).

[147] Jan Art, 'Religie en samenleving: de voortdurende beeldenstorm', in D.W. Fokkema & Frans Grijzenhout, *Rekenschap 1650-2000*, Den Haag: Sdu 2001, pp. 95-114, p. 101.

[148] Christopher Clark, 'Kulturkampf und europäische Moderne', in Astrid Reuter and Hans G. Kippenberg (eds.), *Religionskonflikt im Verfassungsstaat,* Göttingen: Vandenhoeck & Ruprecht 2011, p. 28.

public worship, perhaps similar to the one the French Ministry of the Interior adopted in the 1880's.[149] It permitted public worship within 'buildings and closed places', but encapsulated the possibility of regulation in the interest of 'public order and peace'. It also permitted public worship outside those buildings and closed places, but only if these entailed historically standing practices. All other acts of public worship remained outlawed. Clark argues that this prohibition was inspired by Protestant anti-Catholicism rather than by secular voices.[150] However, given that Parliament was liberal in majority, this could have been inspired by a concern over public order as well as general suspicion of Catholic loyalties. Yet Dutch national identity and consciousness was shaped by explicit and deeply rooted anti-Catholic sentiments, which rendered the reconciliation of Catholic and national identity complex matter throughout the nineteenth century.[151]

Another consequence of the freedom to organise religious communities freely was the papal reinstitution of ecclesiastical hierarchy in 1853, somewhat anticipated by a 1827 Concordat between the Dutch King William I and the Pope.[152] Strong anti-Catholic sentiments invigorated mass protests on behalf of orthodox Protestants, or the April-movement.[153] The Catholic minority lived predominantly in the southern parts of the Netherlands. Therefore, this anxiety and mistrust over Catholic intentions appears a matter of what one imagines the nation to be. Although orthodox Protestants also formed a minority, their ideas about Protestant nationalism and the imagination

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[149] Article 167 of the 1848 Constitution, see Van Hasselt, *Verzamelingen van Nederlandse Staatsregelingen en Grondwetten*, pp. 317-318.

[150] Clark, 'Kulturkampf und europäische Moderne', p 28.

[151] Peter Raedts, 'Katholieken op zoek naar een Nederlandse identiteit 1814-1898', (1992), *BMGN,* Vol. 107, No. 4, pp 713-725, p. 714.

[152] Sjoerd T. Buwalda, 'Voor godsdienst, vaderland en Oranje: het verzet van Utrechtse protestanten tegen de liberale staatsinrichting en het herstel van de bisschoppelijke hiërarchie (1840-1853)' *Jaarboek Oud-Utrecht,* 2000, pp. 103-124, pp. 108-109.

[153] Johan van Zuthem, *Heelen en halven. Orthodox-protestantse voormannen en 'politiek' antipapisme in de periode 1872-1925,* Hilversum: Verloren 2001, p. 14.

of the state as historically and teleologically Protestant were quite strong. So strong, in fact, that many of them protested against state-facilitated Catholic emancipation. This might explain why these protests are sometimes understood as an expression of discontent with liberal political domination, who, as an imagined 'they', had enabled this "ultramontane" institution.[154]

The fostering of a shared national identity remained a sensitive matter throughout the second half of the nineteenth century. Social and political divisions became deeper because of the explosive growth of religious and rising socialist mass movements. Social segregation and distrust characterised divisions at the grassroots level, feeding into a climate of polarisation. On an individual level, however, such divisions were not as clear cut; for example, some Christians leaned towards liberal or socialist circles, sometimes at the expense of their reputation in Christian circles, and vice versa. Thus the Netherlands was all but a cultural unity and, while a middle-class gained suffrage, lack of consensus threatened effective political decision-making. Most famous debates arose over the place of religion in schools, particularly as these spaces represented much that a country could hope to be in the future: liberals saw education as a vehicle to mitigate the sharp (religious) divisions, while religious communities generally regarded education as the vehicle to protect, transmit and strengthen communal identity. [155]

Under the leadership of the protestant pastor and politician Abraham Kuyper, poor, Protestant, and largely disenfranchised masses became involved in political decision-making through protests and mass petitions. While building civil institutions to represent the reformed community as a minority-community, Kuyper firmly rejected the imagination of a Protestant or even Christian nation, thus explicitly letting

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[154] Buwalda, 'Voor godsdienst, vaderland en Oranje: het verzet van Utrechtse protestanten tegen de liberale staatsinrichting en het herstel van de bisschoppelijke hiërarchie (1840-1853)', p. 104.

[155] Ph.J. Idenburg, *Schets van het Nederlandse schoolwezen,* Groningen: Wolters 1960, p. 79; A.B. Lam, *Openbaar of bijzonder onderwijs? De visie van mr. J.J.L. van der Brugghen op het school-vraagstuk in Nederland,* 's-Hertogenbosch: Malmberg 1969, p. 15.

go of the ideal of teleological unity.[156] The Catholic priest and politician Herman Schaepman (1844-1903) tried to foster a similar sense of Catholic consciousness by establishing a political party similarly to Kuyper; he too harboured little aspiration to shaping a Catholic national identity.[157] Pilgrimages and processions gradually revived in the 1870's and explicit connections were made with Dutch saints and religiously significant places in order to underline a Catholic as well as Dutch identity.[158] Raedts argues that some of these were intended symbolically, especially since some of the processions were performed in silence so as to not disturb others.[159] Catholic civil society would develop strongly in the early twentieth century and it successfully pursued political ambitions beyond just protecting Catholic identity, actually very similarly to Catholics in Germany.[160]

This sustained political vacuum would eventually lead to mutual constitutional recognition, following from the 1917 Pacification agreement. A constitutional amendment (Article 23) then entitled all schools to equal funding and ordered the state to provide for public education on the basis of subsidiarity. This included Roman-Catholic and Jewish schools and later included Islamic and other types of schools as well. This constitutional change was highly symbolic: it was a legal recognition of wider social, political, and economic religious divisions along lines of religious and ideological identity.[161] But as much as it affirmed division, it also facilitated civil institutionalisation of division, known as "pillarization". This division went beyond

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[156] Mariëtta D.C. van der Tol, 'Raising the Ante', *Comment*, 1 September 2016, https://www.cardus.ca/comment/article/raising-the-ante/, (consulted 6 August 2019).

[157] Herman Schaepman, *Een katholieke partij: proeve van een program*. Utrecht: Van Rossum 1883.

[158] Raedts, 'Katholieken op zoek naar een Nederlandse identiteit 1814-1898', pp. 723-724.

[159] Ibidem, p. 725.

[160] Comp. Staf Hellemans, 'Verzuiling en ontzuiling van Katholieken in België en Nederland. Een historisch-sociologische vergelijking', (1988), *Sociologische Gids,* Vol. 35, No. 1, pp. 43-56, pp. 43-36.

[161] Piet de Rooy , 'Een zoekende tijd. De ongemakkelijke democratie, 1913-1949', in R. Aerts (et al), *Land van kleine gebaren. Een politieke geschiedenis van Nederland 1780-1990,* Nijmegen: SUN 1999, pp. 197-282, p. 199.

religious organisations and institutions of civil society. On a popular level, this was reflected in the choice of business partners, relatively low levels of intermarriage, and the division of political and social associations. It amounted to a compartmentalisation of public space, while the bandwidth of unity was moderated by the reality of difference.

The Netherlands thus developed an idiosyncratic practice of accommodation within the narrative of the separation of church and state or neutrality of the state as the state was mandated to treat religious and non-religious communities and institutions equally. The result is a somewhat modified separation of state and church compared to the 1848 constitution; a modification that seems somewhat akin to the German principle of accommodation. As the constitutional perspective on the separation of church and state changed, the function of the civil realm was changing as well. The intention of liberals was to encourage the development of a more homogenous civil realm, based on constitutional values rather than ideological and religious differentiation. This type of unity was never really achieved and it appears that the function of the civil realm became another force that challenged governmental identity politics. At the same time, however, civil society became the focus of civic engagement, relatively strengthening the democratic capital.

Throughout the twentieth century, religious freedom and neutrality became gradually associated. These two conceptual heritages came from Germany and France, respectively, and their association would have looked unlikely in the early stages of the Dutch nation state. Neutrality tends to be based on Article 1 of the Dutch Constitution, which entails a right to equal treatment and prohibits unjustified discrimination on a set of specific grounds, including religion.[162] Though this phrasing

[162] Article 1 of the Dutch Constitution: 'Allen die zich in Nederland bevinden hebben in gelijke gevallen gelijk behandeld. Discriminatie wegens godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht of op welke grond dan ook, is niet toegestaan.', http://wetten.overheid.nl/BWBR0001840/2008-07-15, (consulted 6 September 2017).

might occur alike in French and German constitutional documents, the context and content of the list of human rights reflects historically relevant concerns. Religious freedom is by no means absolute and it can be limited on the basis of interests of health, traffic, and the prevention and neutralisation of public disorder. However, the rights and freedoms catalogue is understood both qualify the relationship between state and individuals, primarily, and, to some extent, between citizens.[163]

Religious freedom moved between the ends of the spectrum, ranging from serious restriction and intolerance to unprecedented freedom and even financial support. It appears that the focus on human rights and equality has eventually led to a type of accommodation in which minorities receive their share of public funding – which moreover is often perceived as a normative right. This inclusivity has led to high degrees of visibility of religious and ideological difference in the public domain through civil and political representation. This implies an approach to religious minorities that is relatively accommodating, while hands-off with regard to content. It limits the constitutional warrant for the state to legitimately intervene in a reality of social divisions, particularly as its tools for intervention are attached to explicit conflict in public spaces, such as concerns of public order or the protection of the rights of others.

Compared to the negotiation of regional diversity in Germany, the long persisting smaller scale diversity in the Netherlands probed a necessity to incorporate a variety of others in the public domain. However, the extreme parity epitomised in pillarization might be stronger than the parity Kaplan analysed in the context of early modern toleration. To Kaplan, parity was an advanced mode of coexistence within the early modern context. One could look at Dutch pillarization in different ways. On the one hand, extreme pillarization might show a failure to develop a sense of community and social coherence. On the other hand, pillarization could be seen as a mode of peaceful coexistence, the basis of a culture oriented towards compromise, and

[163] C.W. van der Pot & A.M. Donner, *Handboek van het Nederlandse staatsrecht.* 15e druk, D.J. Elzinga & R. de Lange (eds.), Deventer: Kluwer 2006, pp. 284-293.

developing a relatively accommodative variation of the separation of church and state. Everyone had to tolerate a range of others and concede on the matter of funding, even if begrudgingly. That is, almost everyone: as in Germany, Jews and Catholics needed to prove they belonged and, outside the European mainland (e.g. the Dutch population in the Caribbean colonies) there was no constitutional status of Dutch citizen until the mid-twentieth century.[164]

4.4 Conclusion

In each of the three countries that are discussed, the transition from toleration-based coexistence to rights-based coexistence was intertwined with social and political change, e.g. constitutionalisation, the development of national identity, and the articulation of national interests. However, the nation state rested on the political imaginary of the *corpus christianum* insofar as it re-enacted a unity of territory, people, and common destiny. The national scale of the political community changed dynamics of inclusion and exclusion on a regional and local level, however, in its reliance on the idea of the nation, it created new categories of inclusion and exclusion. National exclusivism touched upon origin (territory), race (people), or religiosity (teleology) and thus created a continuum of othering that rendered religious as well as racial minorities vulnerable, albeit for slightly different reasons. Religious communities were not unequivocally optimistic about nationhood, even as many communities adapted themselves to changing social realities. Controversy about the compatibility of religious identity and national identity thus engendered intra-national othering, as liberal elites tended to understand religiously conservative challenges as a threat to the project of the nation.

During these controversies, sensibilities of toleration resurfaced and even transformed in the context of emerging constitutionalism. Crucially, many

[164] See Mariëtta D.C. van der Tol, *De jongste ontwikkelingen van het kiesrecht in het Koninkrijk der Nederlanden in historisch perspectief,* Oisterwijk: Wolf Legal Publishers 2014, pp. 11-19.

controversies over intra-national difference concerned their manifestation and visibility in public space, as they had done in the context of toleration. Restrictions on Catholic processions are quite symbolic of this anxiety over the use of public space as well as the character of the nation. It is telling that communities in Germany and the Netherlands reverted to *Auslauf* and other early modern practices of dissimulation. The contestation of public space necessarily becomes the contestation of national identity, and vice versa, and this obstructs the development of inclusive understandings of diversity. Moreover, the attachment of public space to national identity is perhaps implied in the unitarian character of the nation state, yet is assumed, and one that makes the nation state receptive to sensibilities of toleration. At once, controversy over the meaning of public space and national identity indicates that neither the meaning of public space nor the notion of national identity were on a pre-determined trajectory. Mediated through these controversies, common frames of reference to toleration transformed in the context of emerging constitutionalism. Notions of public order, unity, and loyalty gained particular traction, even if the expressions thereof differed between France, Germany, and the Netherlands. Historical experiences, often contingencies, shaped the transformation of common frames of reference to toleration in constitutionalism, and created a lingering legacy of toleration in the nation state.

5. Lingering legacies of toleration in the nation state: integration, secularisation, and privatisation of religion

Legacies of toleration thrive in contemporary scholarly discourses about integration, secularisation, and privatisation of religion. This chapter analyses these discourses through the lens of the common frames of reference to toleration, and in particular from the perspective of oneness and unity. The political imaginary of the nation implied racism as well as religious intolerance and mediated its limits in public space. Constitutionalisation of the new political order arguably redirected the meaning of oneness and unity in the modern state. This is sometimes referred to in the conceptual distinction between *Gemeinschaft* and *Gesellschaft*: a political community is no longer primarily oriented at its oneness despite its differentiations, but is able to negotiate the character of its oneness on the basis of its inner differentiations.[1] However, constitutionalisation also transformed and exacerbated social tensions about identity and difference. As Hafez puts it, the new political order was based on a series of normative presumptions which hinder the acceptance of multiculturality and diversity.[2] Walter puts it in the words of unity and diversity with the following conundrum: How much cultural divergence might a democratic constitutional state tolerate, and how much convergence should it demand?[3] Forst reiterates the question

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[1] Ferdinand Tönnies quoted in Thomas Schmidt-Lux, 'Labor omnia vincit', in Michael Geyer & Lucian Hölscher, *Die Gegenwart Gottes in der modernen Gesellschaft. Transzendenz und religiöse Vergemeinschaftung in Deutschland,* Göttingen: Wallstein Verlag 2006, pp. 404-430, pp. 406-407.

[2] Kai Hafez, *Freiheit, Gleichheit und Intoleranz: Der Islam in der liberalen Gesellschaft Deutschlands und Europas,* Bielefeld: Transcript 2014, 312.

[3] '*Wieviel kulturelle Divergenz kann ein demokratischer Verfassungsstaat dulden?'* and *'Wieviel Konvergenz (Assimilation) muß er verlangen?'* in Christian Walter, 'Religiöse Toleranz im Verfassungsstaat – Islam und Grundgesetz', in Hartmut Lehmann (ed.), *Koexistenz und Konflikt von Religionen im vereinten Europa,* Göttingen: Wallstein 2004, pp. 77-99, p. 78.

more normatively: Which normative content is necessary for the society to be a unity, and which differences should be recognised for this unity to be justified?[4]

This chapter argues that the connection between national identity (oneness) and the nature of public space (unity) still burdens discourses over identity and belonging. First, the notion of the oneness of the nation charges discourses over immigration, integration, and social norms. Second, this connection between oneness and unity hinders the accommodation of diversity in public space.[5] This connection inhabits a potential to intolerance, and, suggests that processes of cultural formation can be self-contained. Through structural as well as incidental exclusions from public space, for example because of a normative privatisation of religion or because of voluntary dissimulation, religious minorities cannot fully participate in processes of cultural formation. Furthermore, the racialisation of national identity implies that neither integration nor outward conformity actually address the nature of belonging. Thus, the disintegration of post-modern societies under the influences of secularisation, immigration, and privatisation, raises questions about the relationship between national identity and public space, as well as about the structural inequalities that arise from it.

5.1 Oneness and otherness: re-enacting a nexus of territory, people, and teleology

The modern state re-enacts the nexus of territory, people, and teleology in its integration of state, nation, and cultural formation. It is this 'closely knit unity' of 'politics, law, and society', that today allegedly raise questions about the compatibility of Islam with the democratic state.[6] The previous chapter discussed similar contentions

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[4] Rainer Forst quoted in Rudolf Steinberg, *Kopftuch und Burka. Laïzität, Toleranz und religiöse Homogenität in Deutschland und Frankreich,* Baden-Baden: Nomos 2015, p. 217.

[5] See Jürgen Habermas, '"The Political": the rational meaning of a questionable inheritance of political theology', in Eduardo Mendieta & Jonathan Vanantwerpen (eds.), *The Power of Religion in the Public Sphere,* New York: Columbia University Press 2011, p. 16.

[6] Wael B. Hallaq, *The Impossible State. Islam, politics, and modernity's moral predicament,* Columbia University Press 2012, p. 38.

over the compatibility of Catholicism and Protestantism with the project of the modern state. It is only in the course of the nineteenth-century that state and nation associated as a result of the 'mutual permeation of state and society'.[7] However, this development is not only contingent on processes in the nineteenth century. This chapter argues that this mutual permeation is inherent to the genealogy of the modern state, in particular its kinship to the *corpus christianum*.[8] This *corpus* provided a sense of identity which provided legitimacy to the conditioning of the presence of others on the basis of relative outward conformity, loyalty, truth, public order, and the more mundane concern of economic benefit. The Westphalian treaties provided an early imaginary of the modern state.[9] However, the treaties also presumed political communities to operate as 'one body' *(unum corpus)*.

The modern state is, however, not a mere continuation nor an inevitable successor of this *corpus*; instead, the modern state offered a unique opportunity to overcome the binaries of dominance and marginalisation on religious grounds. Indeed, as Gianfranco Poggi analyses, constitutionalisation became part of a longer process of unravelling common identity from religious dominance.[10] Nonetheless, the integration of state, nation, and cultural formation entangles the nation state in a political imaginary of oneness that echoes the imaginary of the *corpus christianum*.[11] Or,

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[7] Hans Knippenberg & Ben de Pater, *De eenwording van Nederland,* Nijmegen: Sun 1988, pp. 13-14.

[8] Benjamin J. Kaplan, *Divided by faith. Religious conflict and the practice of toleration in early modern Europe*, Cambridge MA: Belknap Press 2007; István Bejczy, 'Tolerantia: A Medieval Concept', (1997), *Journal of the History of Ideas*, Vol. 58, No. 3, pp. 365-384; Enzo Solari, 'Contornos de la tolerancia medieval', (2013), *Ideas y Valores,* Vol. 72, No. 153, pp. 73-97; María J. Roca, 'El concepto de tolerancia en el derecho canónico', (2001) *Ius Canonicum,* Vol. 41, No. 82, pp. 455-473.

[9] Daniel Philpott, *Revolutions in sovereignty. How ideas shaped modern international relations,* Princeton: Princeton University Press 2001, pp. 30-36.

[10] Gianfranco Poggi, *Development of the Modern State. A sociological introduction,* Palo Alto: Stanford University Press 1978.

[11] The French constitution of 1793 declared the French Republic 'one and indivisible', full text available at https://oll.libertyfund.org/pages/1793-french-republic-constitution-of-1793, (consulted 31 January

as the French constitution puts this oneness: 'indivisible, laïque, démocratique et sociale'.[12] Not only does the state therein assume a sense of oneness akin to the foundation of the *corpus christianum*, but it must also substantiate this new imaginary of belonging over and against the religious, social, and political fragmentation that it inherited from the old world. The legal notion of the nation emerged in this context and had the exceptional capacity to transcend religious and regional identities.

Membership in the nation in the modern state is primarily determined by birth, and may depend on genealogy or place of birth (*ius sanguinis* and *ius soli*), as well as residency and matrimonial status.[13] Although naturalisation amounts to "adoption" into the natural body of citizens, the understanding of this body of citizens is not exclusively racial.[14] It appears that the *ius soli* gained priority over the *ius sanguinis.* Contemporary terminology of "autochthonous" and "allochthonous" continue to signify the biological and territorial difference, meaning "native to the land" and "other to the land". As Patrick Weil shows convincingly, naturalisation in the modern state functioned as a 'legal technique' to confer rights to certain migrants and to exclude undesired migrants.[15] He also demonstrates that neither Germany nor France can be stereotyped along the principles of the *ius sanguinis* or the *ius soli*, with the exception of the racialised laws of naturalisation in Nazi-Germany and Vichy-France.[16]

2019); The exact same phrase appears repeatedly in the constitution of the Dutch Batavian Republic of 1798 (*Staatsregeling*). Its preamble as well as several articles declare the Batavian people to be a 'one and indivisible State'. *Staatsregeling van het Bataafse volk,* 1798, Preambule, Artt. 1, 9, 'Algemene beginselen' and Titel 1, art. 1, see W.J.C. Van Hasselt, *Verzameling van Staatsregelingen en grondwetten,* Alphen a/d Rijn: Samsom 1964, pp. 17-19, 27.

[12] The French Constitution, https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur, (consulted 31 January 2019).

[13] Patrick Weil, *How to be French. Nationality in the Making since 1789,* translated by Catherine Porter, Durham: Duke University Press 2008, p. 2.

[14] Peter Sahlins, 'Fictions of Catholic France: the Naturalisation of foreigners, 1685-1787', (1994), *Representations,* Vol 47, Special Issue: National cultures before nationalism, pp. 85-110, p. 86.

[15] Weil, *How to be French,* p. 178.

[16] Ibidem, pp. 87ff, 188ff.

In contrast with Weil, Adrian Hastings argues that the Christian world derived its ideas about nationhood and the status of nations from biblical imaginaries as early as in the post-medieval world, particularly in reference to the Old Testament.[17] He defines the nation as an ethnic community with a dynamic yet strong self-consciousness around a shared culture and liturgical language.[18] Indeed, this relationship between ethnic understandings of the nation and cultural liturgy is found in the work of Samuel Salzborn.[19] This liturgical language also finds a new expression today, both in reference to the nation and in reference to the position of churches in the nation; for example in the *Cultural liturgies* trilogy by James K.A. Smith. Examples of this could be the national anthem, a flag, a national sports team, fortified by a cultural reverence for these symbols that express loyalty and emotional attachment to the nation.[20] Hastings' argument entails a connection between nation and shared values and it is a powerful argument insofar as there is an expectation that one would marry within the group, which is something that Kaplan also alluded to (Chapter Two).[21]

A combination of Weil's and Hasting's understanding of nationhood provides an interesting angle to the relationship between the nation state and the *corpus christianum.* Marriage and reproduction may thus reinforce conceptions about belonging based on a combination of place, genealogy, and culture. If shared culture and birth indeed align in the notion of the nation which otherwise prospered from the nineteenth century onwards, it cuts right into present day conversations about

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[17] Adrian Hastings, *The Construction of Nationhood. Ethnicity, Religion and Nationalism,* Cambridge: Cambridge University Press 1997, p. 186.

[18] Ibidem, pp. 3-4.

[19] Samuel Salzborn, 'Ethnizität, Homogenität, Nation. Ein Spannungsverhaltnis', in Carlo Masala (ed.), *Zur Lage der Nation. Konzeptuelle Debatten, gesellschaftliche Realitäten, internationale Perspektiven,* Baden-Baden: Nomos 2018, pp. 29-44, p. 41.

[20] James K.A. Smith, *Cultural Liturgies,* trilogy, Grand Rapids: Baker Academic 2009.

[21] Hastings, *The Construction of Nationhood,* p. 168.

immigration and integration. Importantly, it indicates that there are several different types of othering possible within the concept of the nation state. For the nation state provides the political mechanism for inclusion and exclusion on account of immigration, genealogy, race, religion, social norms, cultural values, or any combination of these. For example, it frames the assumption that the foreigner would need to assimilate in order to belong, and also that certain foreigners need to work harder than others to satisfy the demands of integration. Perhaps for some it is nearly impossible, for example where it is said that a woman who wears a hijab cannot be German.[22] However, this connection of territory, people, and teleology also has a capacity to turn inward, towards "others" within the nation.

The previous chapter already discussed the fact that nineteenth-century nation building involved a measure of centralisation as well as the encouragement of cultural convergence and diminishing of the political significance of particular religious identities. The developing permeation of state and society thus laid the foundation for the junction of state and nation. This means that the state may struggle to accept the idea that certain citizens might prioritise their religious teleological claims. In the middle of the Dutch culture wars, Dutch Prime Minister Jan Kappeyne van de Copello (1877-1879) compared conservative Christian minorities with a 'fly that spoils the whole ointment', saying they had 'no right of existence in this society'.[23] It stood in stark contrast with the maxim of his opponent Abraham Kuyper: 'there is not a square inch in the whole domain of human existence over which Christ, who is Sovereign of all, does not cry, Mine'.[24] Related to this are the territorial claims of Catholic, Lutheran, and Reformed churches, expressed in the parish system and the 'physical frames of

[22] Recorded by Rudolf Steinberg in 'Toleranz und religiose Pluralität am Beispiel von Kopftuch und Burka', p. 189.

[23] Paul van der Steen, *Ware grootheid, schamele kleinte. Twee eeuwen Nederland,* Amsterdam: Balans 2013, chapter 'Waken voor een offerfeest der beginselen'.

[24] Kuyper's inaugural address at the dedication of the Free University, quoted in James D. Bratt (ed.), *Abraham Kuyper: A Centennial Reader*, Grand Rapids: Eerdmans 1998, p. 488.

reference that church buildings provide.[25] Luttikhuis notes that the perpetuation of the parish system in Protestant circles emerged from a failure to reimagine the meaning of territoriality to the church during the Reformation.[26] This is a quite relevant detail as the churches maintained rivalling nexuses of territory, people, and teleology – in some places epitomised in aspirations for the whole nation to be Christian.[27]

More importantly, not all instances of othering are the same and demands of assimilation do change over time. The plight of Judaism makes this dismally clear: cultural conformity and outward conversion to Christianity would not necessarily lead to acceptance in the nineteenth century. Under national-socialist influence, the Nazi regime actually denaturalised Jewish citizens without any regard to cultural conformity. But national-socialism was not exceptional about the racialisation of nationhood; for racism and religious intolerance are entwined with the concept of the nation. Cycles of anti-Semitism reappeared after WWII and continuing (legal) pressures on certain practices, like *Sjechita* and circumcision, as well as popular intolerance to orthodox Jewish communities, shows that the othering of Jewish identities may be a structural part of the political imaginary of the nation state. This is quite different from othering of Catholics, for example, whose belonging could be engineered by expressions of allegiance to the state, introduction of national aspects to

[25] Vyacheslav Karpov, 'Desecularisation: A Conceptual Framework', (2010) *Journal of Church and State,* Vol. 52, No. 2, pp. 232-270, p. 247.

[26] For examples in various Reformed churches in the Netherlands, see http://kerkrecht.nl/trefwoord/indeling-kerkelijke/territoriaal-beginsel (consulted 31 January 2019). For the relationship between parishes and territorial or geographical divisions, see B.A.M. Luttikhuis, *Een grensgeval; oorsprong en functie van het territoriale beginsel in het gereformeerde kerkrecht*, Gorinchem: Narratio 1992, pp. 264-266.

[27] Geoffrey Levey, 'Secularism and religion in a multicultural age', in Geoffrey Levey and Tariq Modood (eds.), *Secularism, Religion and Multicultural Citizenship*, Cambridge: Cambridge University Press 2009, p. 16.

their spirituality, and limitation of public visibility.[28] As it were, anti-Catholic othering did not concern unalterable characteristics.

Islamophobic othering, which appears most vigorously but not exclusively on the political 'right', is yet different from the othering of Christianity and Judaism. Strømmen and Schmiedel argue that Muslim citizens are often assumed to have been born elsewhere, to belong to another nation, and to be culturally or religiously different.[29] They understand Islamophobia as 'new racism', even as this 'essentialization of the other' might happen along the lines of religion as well as race.[30] However, racial or religious dimensions are not interchangeable on the continuum of othering that the political imaginary of the nation embodies. Islamophobia indicates an othering towards all the constitutive elements of the nation state: territory, people, as well as teleology. Moreover, Islam is made out to be 'opposed to Christianity', as well as loaded with suspicion about political allegiance, insurmountable cultural differences, and foreignness.[31] This presumed opposition implies a gradually different type of othering compared to anti-Semitism, based on this presumed antagonism to Christianity.

Of course neither Islam, Judaism, nor Christianity function as closely knit communities within the nation, particularly since these communities are highly diverse themselves. However, the law sometimes forces religious communities in a paradigm of internal unity, for example through the designation of *Religionsgemeinschaften* or *Kerkgenootschappen*. Whereas this might have been true for many churches about a century ago, today, identity formation is more stratified and

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[28] Comp. José Casanova, 'Immigration and the new religious pluralism: a European Union-United States comparison', in: Geoffrey Levey and Tariq Modood (eds.), *Secularism, Religion and Multicultural Citizenship*, Cambridge: Cambridge University Press 2009, p. 145.

[29] Hannah Strømmen & Ulrich Schmiedel, *The Claim to Christianity. Responding to the Far Right*, London: SCM Press 2020, p. 20.

[30] Ibidem, pp. 20-21.

[31] Ibidem, p. 5; Hallaq, *The Impossible State*, p. 38; Ayelet Shachar, 'Introduction: Citizenship and the "right to have rights"', (2014), *Citizenship Studies*, Vol. 18, No. 2, pp. 114-124, p. 118.

complex. Religious identity could be seen as a network of dispositions, mediated through both individual and collective aspects to identity formation, but not necessarily tied to identifiable groups.[32] This is of course akin to Geertz's and Foroutan's understanding of cultural hybridity, in which local and transnational cultures have an impact on the national identity, an identity which is in fact bound to a certain territory and people.[33] This means that it is difficult to concretise a coherent understanding of culture.[34] Käßmann rightly raises the issue that societies need to find a balance between identities, without dividing society between a *Leitkultur* and its others, facilitating mere multiculturality, or indeed creating the existence of parallel societies.[35] Moreover, an overemphasis on normative othering in processes of identity formation shapes identity primarily negatively.[36]

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[32] Heinrich Schäfer, 'Religiöse Identität – ein Netzwerk von Dispositionen', in Ines-Jacqueline Werkner & Oliver Hidalgo, *Religiöse Identitäten in politischen Konflikten,* Wiesbaden: Springer 2016, pp. 15-17; Sonja Haug, 'Ethnische Gemeinschaften, Religionsgemeinschaften und Aspekte der Intergration', in Heinz Brinkmann & Haci-Hail Uslucan (eds.) *Dabeisein und Dazugehören. Integration in Deutschland,* Wiesbaden: Springer 2013, pp. 249-272, p. 272; Kirstin Bunge, 'Die Krise der säkularen Staatsidee und das Potenzial der Religion zur friedlichen Identitätsbildung. Persönliche Integrität als Scharnier zwischen individuelle rund kollektiver Ethik', in Werkner & Hidalgo, *Religiöse Identitäten in politischen Konflikten*, pp. 58-59; Raida Chbib, 'Einheitliche Repräsentation und muslimische Binnenvielfalt', in Hendrik Meyer & Klaus Schubert (eds.), *Politik und Islam,* Wiesbaden: Springer 2011, p. 102.

[33] Naika Foroutan, 'Hybride Identitäten. Normalisierung, Konfliktfaktor und Ressource in postmigrantischen Gesellschaften', in Brinkmann & Uslucan, *Dabeisein und Dazugehören*, pp. 85-102, pp. 85-86.

[34] Haci-Hail Uslucan & Heinz Brinkmann, 'Die Integrationsdebatte: Ein Lehrstück für die politische Kultur', in Brinkmann & Uslucan, *Dabeisein und Dazugehören,* pp. 11-24, p. 15.

[35] Margot Käßmann, 'Multikulturelle Gesellschaft – Wurzeln, Abwehr und Visionen', in Martin Rothgangel, Ednan Aslan & Martin Jäggle (eds.), *Religion und Gemeinschaft. Die Frage der intergration aus christlicher und muslimische Perspektive,* Göttingen: Vanderhoeck & Ruprecht Press 2013, p. 31.

[36] Christian Danz, 'Religiöse Identität und gesellschaftliche Integration. Zur Funktion von Religion in gesellschaftlichen Inklusions- und Exklusionsprozessen', in *Religion und Gemeinschaft,* pp. 42, 45.

5.2 Oneness and unity

Given the stratification of individual and collective identities, the question arises how ideas regarding the oneness of the nation relate to the outward expression thereof in public space? How are potentially incompatible dimensions of othered identity accommodated in public space; or, how much conformity is demanded from religious and other minorities? Public space matters to the formation of social identity, since this is the space in which many identities meet, interact, and clash. The structures of public space play a tremendous role in the process of socialisation or, as Pierre Bourdieu calls it, a social "habitus", or the embodiment of social identity.[37] Though communication of difference may potentially be very broad, in the context of this dissertation unity concerns those religious behaviours and expressions that are in direct dialogue with oneness, including symbols, actions, speech, and sound.[38] And their inclusion or exclusion in public space condition their participation in the formation of the common "habitus". Reinhold Niebuhr argues that unity is not only functionally maintained but also 'created by the ability of a dominant group to impose its will'.[39] The distinction between oneness and unity is not simply semantic and, its conflation can in fact have disastrous consequences for minorities.

This conformity may not encompass every visibility of religion. Expressions with *political* connotations or expressing rivalling claims of identity receive most political attention, as discussed in chapter four and chapter seven. Designation as "political" was at the heart of burkini bans in France in 2016, as mayors framed burkinis as symbols of terrorism, misogyny, and deviancy from French republican values. French and Dutch lawmakers made similar comments about the full face veil,

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[37] Bourdieu quoted in Dietmar Rothermund, 'Religiöse Praxis und die Artikulation sozialer Identität', in Lehmann (ed.), *Koexistenz und Konflikt von Religionen,* pp. 157-168, pp. 157-159.

[38] E.g., the ringing of church bells or Islamic call to prayer, see Isaac Weiner, *Religion out loud. Religious Sound, Public Space, and American Pluralism,* New York: New York University Press 2014; Levey, 'Secularism and Religion in a multicultural age', p. 2.

[39] Reinhold Niebuhr, *Moral man and immoral society,* New York: Scribner 1934, p. 4.

as an expression of the rejection of culture and a decision to not belong. Germany also issued a limited full face ban, but only for state officials on the ground of open communication, as elaborated upon in chapter seven. However, states makes different choices about religious symbols in public spaces; for example, Scotland and Canada have introduced a formal optional hijab for police uniforms in order to increase the level of representation, whilst such an addition to the uniform remains out of question in France and the Netherlands.[40] The question is, therefore: who has the right to determine which symbols carry which political connotations, what their weight is, and what the right kind of unity entails?

Unity in public space is not only functionally attached to national identity, it is also not a mere expression of this identity; it actively reinforces processes of cultural transcendences that shape this identity.[41] The significance of this transcendence historically derives from the old *unitas christiana* in which unity and oneness were grounded in the transcendental unity of God.[42] Unity is about more than optics of difference, because this unity concerns that which the optics allude to, namely a reality of teleological differentiation. Oneness and unity are in constant dialogue. For example, positive and negative dimensions to unity negotiate a bandwidth of diversity within dynamic narratives of oneness. Unity is more than a set of positive affirmations, it also needs a negative dimension; for example, excluding certain types of otherness in affirmation and defence of narratives of oneness. One could argue that negative

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[40] Scotland police, 'Hijab now an optional part of Police Scotland uniform', 23 August 2016, https://www.scotland.police.uk/whats-happening/news/2016/august/hijab-ratified-as-option-for-police-scotland-uniform, (consulted 8 August 2019).

[41] Harald Wydra, *Politics and the Sacred,* Cambridge: Cambridge University Press 2015, pp. 43-49; Comp. Hubert Knoblauch, 'Europe and Invisible Religion', (2003), *Social compass,* Vol 50, No. 3, pp. 267-274, p. 269.

[42] Lothar Gall & Dirk Blasius, 'Einheit', in: Otto Brunner, Werner Conze, & Reinhart Koselleck (eds.), *Geschichtliche Grundbegriffe: historisches Lexicon zur politisch-sozialen Sprache in Deutschland,* Band 2, Stuttgart: E. Klett 1975, pp. 117-152 pp. 117, 125-126.

unity could be seen as incorporation by marginalisation, as Bejczy observed in the context of toleration. However, the difference is that nation states could not legitimately expel their own citizens and thus needed to balance tensions between different religious communities within their space and territory. Nonetheless several countries did employ persecution, pogroms, as well as economic measures to undermine the presence of minorities, most dramatically in Nazi-Germany as well as Nazi-collaborators in France and the Netherlands in the period 1940-1945.

Historically, states have commonly determined the bandwidth of outward unity, including action or inaction, speech or silence, the manifestation or dissimulation of othered identity. Explicit as well as implicit incentives to behavioural conformity presented by the state may provoke a sense of inequality or even second class citizenship. Several scholars are worried about the conformity that liberal or secular societies demand from their religious minorities: Shachar, Nussbaum, and Shakman Hurd warn against the universalising tendencies of secular liberalism and criticise its demand of unilateral assimilation of "newcomers".[43] Khomyakov openly accuses traditional liberal toleration of silencing difference, 'making it invisible (…) to the exclusion of minority groups from larger society'.[44] He reconsiders the ideal of equal access and representation in public space as he argues that 'silencing and privatisation of the different is not justifiable anymore'.[45] Though visibility of religious minorities is much at the heart of diversity debates, I disagree with Khomyakov's on the characterisation of liberalism. Rather, it is inherited from Christianity and roots in narratives of being the one body of Christ.

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[43] Shachar, 'Introduction: Citizenship and the "right to have rights"', p. 118; Elizabeth Shakman Hurd, 'The political authority of secularism in International Relations', (2004), *European Journal of International Relations*, Vol. 10, No. 2, pp. 235-262, p. 237; Martha C. Nussbaum, *The new religious intolerance: overcoming the politics of fear in an anxious age,* Cambridge MA: Belknap 2012.

[44] Maxim Khomyakov, 'Toleration and respect: historical instances and current problems', (2013) *European Journal of Political Theory,* Vol. 12 No. 3, pp. 223-239, p. 232.

[45] Ibidem, pp. 233-234.

The problematic nature of the connection of national identity and public space underlines Tariq Modood's suggestion that a moderation of secularism might take some pressure off minorities.[46] Similarly, John Inazu argues that recognition of 'deep differences' must lead to 'modest unity'.[47] However, the question is: what forms the basis of unity, even when its remit was more modest? One of the crucial questions is whether unity moderates differences because of discomfort with the public expression of otherness or because of tangible effects in society that require regulation? The requirement of rational decision-making accompanies the very notion of the constitution, since the constitution protects citizens, including religious minorities, from arbitrary interference. The law only allows particular interventions on the basis of a carefully described set of criteria, such as public order, public health, and security. Even when these criteria are fulfilled, an intervention must be in accordance with principles of subsidiarity and proportionality. The next chapter elaborates upon the tension between arguments pertaining to social norms and rational conceptualisations of public order.

5.3 Publicness, public space, and liberal secularism

The idea that a common identity is foundational to political unity perhaps grounds in this conceptual integration of state, nation, and cultural formation.[48] Exclusive perspectives on public-private divides have historically sustained marginalisation of minorities. I would be inclined to go one step further. *Geschichtliche Grundbegriffe* characterises the public-private distinction as a Renaissance reconceptualization of

[46] Tariq Modood, 'Muslims, religious equality and secularism', in Levey & Modood, *Secularism, Religion and Multicultural Citizenship.*

[47] John Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference,* Chicago: University of Chicago Press 2016, p. 7.

[48] Charles Taylor discusses Seyla Benhabib in 'Why we need a radical redefinition of secularism', in Eduardo Mendieta and Jonathan Vanantwerpen (eds.), *The Power of Religion in the Public Sphere,* New York: Columbia University Press 2011, pp. 45-46.

society.[49] Toleration ordered the inclusion and exclusion of those who did not belong to the official church, thus privileging the official church, or what would now perhaps be called a *Leitkultur.* This means that public-private divides are not only imbued with the problem of marginalisation of minorities, but equally with the dominant representation of the official church. Scholars like Salvatore notice a similar issue today around the connection between secularity and public space; this connection is rightly questioned where it again facilitates the exclusion of minorities.[50]

Thomas Luckmann's understanding of secularisation as a process of particularisation and privatisation might suggest a regression of religious freedom: after all, religious minorities end up in carefully curated private spaces.[51] When public space is regarded as a space of free expression and mediation of normative action, Quéré and Taylor rightly anticipate that minorities may simply lose a measure of their standing to the shadow of privatisation.[52] They are also relatively excluded from cultural capital, contribution to a shared identity, and the common good. Catarina Kinnvall writes that such othering is relatively more likely to occur when a society goes through significant, perhaps even 'traumatic' change. Othering – even the demonization of the other – becomes part of 'collective identity formation'.[53] Many minorities have fallen victim to this negative identity formation, including Jews, Muslims, other religious minorities, people of colour, women, sexual minorities.[54] Thus

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[49] Lucian Hölscher, 'Öffentlichkeit', *Geschichtliche Grundbegriffe,* Band 4, pp. 413-467, p. 427.

[50] Armando Salvatore, *The Public Sphere. Liberal Modernity, Catholicism, Islam*, New York: Palgrave Macmillan 2007, pp. 256-258.

[51] David Novak, *In defense of religious liberty,* Wilmington: Intercollegiate studies institute 2009, p. 6; Thomas Luckmann, *The Invisible Religion: the problem of religion in modern society,* New York: Macmillan 1967.

[52] Louis Quéré, 'l'Espace public: de la théorie politique à la métathéorie sociologique', (1992), *Quaderni,* Vol. 18, pp. 75-92, p. 77.

[53] Catarina Kinnvall, Globalisation and religious nationalism: self, identity, and the search for ontological security', (2004), *Political Psychology,* Vol 25, No. 5, pp. 741-767, pp. 753-754.

[54] Ibidem, pp. 758-761.

privatisation of otherness hinders cultural participation and diminishes the potential to inform cultural transcendences. Moreover, the emancipation of the othered was always marked by public recognition and visibility in public space. Hence, the contestation of the visibility of Islam today, which Hallaq understands as a negotiation of Islamic identity in society, is by no means new.[55]

Nonetheless, not every instance of privatisation is by equally problematic. Casanova views privatisation as an expression of secularisation and argues that privatisation becomes problematic once it becomes normative.[56] Louis Quéré and Erving Goffman observe that copresence *(la coprésence corporelle)* does not guarantee genuine interaction but could equally contribute to a process of mutual estrangement *(estrangement réciproque)*.[57] They refer to physical presence of different identities in a shared space at the same time, embodied through either humans or the symbols, sounds, and conversations that express distinct identities. Copresence could occur in many different private and public spaces, but they have in mind the presence of different identities in public space. Estrangement might further be unidirectional. Perhaps genuine interaction and estrangement are not mutually exclusive. It is, however, plausible that encounters in public space could potentially be more difficult the more significant or incompatible those differences are perceived to be. Yet several matters convolute: the ability of a society to handle diversity, the ability of individuals to cope with others that allegedly behave morally objectionably, the inclusion of minorities in normative action, the legitimacy of dissimulation, and the mediation of difference in public space after a period of dissimulation.

A different lens to Luckmann's secularisation as privatisation and Casanova's privatisation as secularisation is privatisation as differentiation. First introduced by

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[55] Hallaq, *The Impossible State,* p. 38.

[56] José Casanova, *Public Religion in the Modern World,* Chicago: University of Chicago Press 1994, p. 38.

[57] Quéré, 'l'Espace public: de la théorie politique à la métathéorie sociologique', p. 83; Comp. Kim Knott, 'Iconic religion in urban space', (2012), *Material Religion,* Vol. 12, No. 2, pp. 123-136.

Karl Marx, this is an important observation from the perspective of toleration: exclusion from shared space of non-Catholic dissent emerged from Catholic cultural hegemony.[58] In the early modern context, toleration in private could only be an instance of secularisation insofar as the home was considered to be part of the *corpus christianum.* This means that privatisation had a double-facing character; perhaps, depending on its context, privatisation meant both secularisation and (private) differentiation. Interestingly, several Protestant traditions developed varying degrees of investment in cultural formation and governmental endorsement. Some minorities, like Anabaptists and Socinians developed little interest in cultural or indeed political influence. Yet it is not easy to discern a general principle: Protestants that gained cultural or political dominance or relied on the notion of the *corpus christianum* have tended to lean towards a positive obligation on behalf of the state. This is reflected in confessional documents, which may understand the state as a potential threat to the church, or indeed as its helper and defender.[59]

Thus, secularisation and privatisation need contextualisation. It appears plausible that, to some extent, secularisation is a taking of 'possession of that which had been associated with the ecclesiastical', as Shakman Hurd says.[60] This is true when it comes to particular societal functions that have historically been carried out by churches, such as rites of passage, education, and charity work. In reality, the picture is more complicated than that, for a host of minority churches and groups have never possessed such societal functions. The matter is thus not one of secularisation from religion in general, but secularisation from a particular ecclesiastical community that historically dominated culture in general. Historically, secularisation as a derivative of *'saeculum'* has emerged from the perspective of the religious, and in distinction from eternal concerns. Yet, post-Christendom secularisation appeared within a framework that still assumed Christian culture and morality (chapter three), in which framework

[58] Karl Marx, 'On the Jewish Question', Braunschweig, 1843, p. 35.

[59] See in particular debates about Article 36 of the Belgic Confession.

[60] Shakman Hurd, 'The political authority of secularism in International Relations', p. 238.

secularisation accommodated differentiation. However, societies and their normative constituencies have fundamentally changed: the profound normative fragmentation, de-confessionalisation, and comparatively lesser social importance of ecclesiastical institutions imply that secularisation and privatisation may not naturally coincide today.

Hurd's observation that 'secularism arrogates itself the right to define the role of religion in politics' may not account for post-Westphalian practices where states already dictated the meaning of religion in public space.[61] However, her criticism that secularism 'operates unaware of the contingency of its assumptions and the consequences of its universalising tendencies' entails a crucial observation. Chapter Four discussed how nineteenth century liberal constitutionalism mirrored several features of toleration, including a sense of the need for cultural convergence, moral supremacy, a universalist outlook, and restrictions of religious rivalry in public space. Under different cultural circumstances, secularisation and privatisation of religions may not have an identical meaning in comparison with the collapse of the *corpus christianum.* Within liberal constitutionalism, a process of secularisation could potentially mean the reverse: making space again for religious communities. In a post-Christendom context, containing religious diversity in private may at best perpetuate an outward appearance of cultural secularity. Reversely, it may deepen divisions, if not polarisation. The question is how societies might find a balance between these diversities while simultaneously containing potential conflicts.

Secularisation certainly has a different ring today. The question is whether individuals actually recognise religious symbolism in physical and mental spaces: several scholars argue that this recognition depends on self-relevance.[62] Others argue that symbols are learned and transmitted culturally, but that their influence depends

[61] Ibidem, p. 237.

[62] Roger Odin, 'Religion and Communication Spaces. A semio-pragmatic approach', (2015), *Journal for Religion,* Vol. 1, No. 1, pp. 23-30, p. 30.

individual validation.[63] Doria Pezzoli-Olgiati argues that religious symbolism is culturally ubiquitous, but that reception of religious symbolism is dependent on a person and a specific recognition of a symbol as religious. As a result, meaning-making becomes a matter of multiplicity.[64] Max Weisbuch-Remington (et al) argue that 'religious symbols can have a substantial and nonconscious influence on coping processes' with regards to motivational performance. They indicated a difference between those who were and were not religious themselves.[65] Similarly, Michal Bilewicz and Jaroslaw Klebaniuk argue that the meaning of symbols largely depend on self-relevance.[66] The idea that meaning-making is stratified and relies on self-relevance is helpful: the ways in which people perceive the nature of national culture and the meaning of religion in public space are incredibly complex and diverse.

5.4 Complex public space and integrity of spaces and personae

Questions about outward unity assume the possibility and acceptance of a separation between what one believes and what one does, as well a separation of spaces in which one ought to conform and where not. In other words: discourses on outward unity are imbued with dichotomisations of space and personae. These dichotomisations can be traced back to early modern discourses on diversity. We have seen in chapter two that some mode of dichotomisation existed within the notion of the *corpus christianum*, allowing a bandwidth of beliefs and practices within the narrative of the one body of

[63] Max Weisbuch-Remington (et al.), 'The nonconscious influence of religious symbols in motivated performance situations', (2005), *Personality and social psychology bulletin,* Vol. 31, No. 9, pp. 1203-1216, pp. 1212-1213; Armando Salvatore quotes Talal Asad in, *The Public Sphere*, p. 41.

[64] Doria Pezzoli-Olgiati, 'Approaching religious symbols in the public space. Contemporary art ant museums as places of negotiation?', (2015), *Journal for Religion,* Vol. 1, No. 1, pp. 95-101, pp. 96, 99, 100.

[65] Weisbuch-Remington (et al.), 'The nonconscious influence of religious symbols in motivated performance situations', pp. 1212.

[66] Michal Bilewicz & Jaroslaw Klebaniuk, 'Pshychological consequences of religious symbols in public space: Crucifix display at a public university', (2013), *Journal of Environmental Psychology*, Vol. 35, pp. 10-17, pp. 14-16.

Christ.[67] Chapters Two and Three have shown that toleration treaties, as well as early modern philosophy, addressed public-private distinctions. I argue this distinction was by no means new, but within the context of the *corpus christianum*, developed a specific meaning: the individual could not find salvation outside this body of Christ. Relegation of difference to private space as well as dissimulation only foreshadowed the imminent judgment and protected the integrity of the one body. In fashion, many early modern philosophers upheld a broad conception of the non-private, or common space. Today, one would say they held a broad conception of publicness.

This conception of publicness benefitted the dominant religion: it was inherent to the social and political order that the two overlapped and that minority religion remained on the margins. This amounts to significant asymmetry: only religious minorities (including atheists) felt the daily constraints of demands of conformity and the consequences of playing different roles between public and private personae in those spaces. Conceptually, outward conformity became a condition for belonging. Conformity and dissimulation could allow individuals, and in some spaces whole communities (e.g. Jewish assimilants), to take on specific economic roles or work in specific spaces, particularly where the overall structure of economic participation and citizenship was defined on the basis of the dominant religion.[68] In other words, there was a relative clarity of expectations. It must be recognised, however, that the public-private divide carries strong white, male, Protestant overtones from a time when home, towns, states looked rather different to the complexities of contemporary societies: gender, class, religious community, and economic associations were to some extent spatialised and demarcated as well.

Today, spaces, roles, and identities have become even more complex. Perhaps it helps to recognise that the public-private dualization grew from spatialised institutions, particularly when observing how this dichotomy impacts individual

[67] Lucian Hölscher, 'Öffentlichkeit', *Geschichtliche Grundbegriffe,* Band 4, pp. 413-467, p. 430.

[68] Armando Salvatore, *The Public Sphere*, p. 259.

integrity.[69] Salvatore points out that 'frequency and intensity of encounters among strangers' renders specific 'role games' attached to specific spaces problematic.[70] Not only does the public-private dichotomy still disadvantage religious minorities in general, it affects women in particular who may not be able to hide religious attire, or in the case of men – Sikhs.[71] Even as public space is in reality of course not unified, nuances within public as well as private spaces (complex spatialization) might create as many problems as they solve.[72] Rapid cultural change under the influence of migration, secularisation, regionalisation, internationalisation, and not least digitalisation, does warrant more complex theorisation of space. Complex spatialization may still not relieve asymmetry of disadvantage as long as public-private distinctions revolve around institutions more than around citizens. This is what John Dunn might mean with 'tolerance' as complex democracy that builds on intersectionality.[73] Perhaps Stephan's recommendation of the protection of 'minimal boundaries of freedom' might perhaps extend into more complex spatialization.[74]

Galeotti argues that individual rights do not suffice and that minorities need public recognition of their group identity.[75] Although the protection of minority interests is a condition of liberal constitutionalism, it also perpetuates the idea, along with democratic majoritarianism, that society is divided between a majority and

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[69] Paul Bou-Habib, 'A theory of religious accommodation', (2006), *Journal of Applied Philosophy*, Vol. 23, no. 1, pp. 109-126, p. 124; Amar Singh, *Religion in Politics. Ghandian perspective on the present context*, New Delhi: Deep and Deep 2003, p. 120.

[70] Salvatore, *The Public Sphere*, p. 226.

[71] Netherlands Institute of Human Rights, *Annual Report 2017*, p. 147.

[72] Salvatore, *The Public Sphere*, p. 258.

[73] John Dunn, 'Postface: The grounds for toleration and the capacity to tolerate', p. 9, https://www.researchgate.net/publication/289173975_Postface_The_Grounds_for_Toleration_and_the_Capacity_to_Tolerate, (consulted 13 February 2020).

[74] Alfred C. Stepan, 'Religion, democracy, the "Twin tolerations"', (2000), *Journal of Democracy*, Vol. 11, No. 4, pp. 37-57, p. 38.

[75] Cited in Khomyakov, 'Toleration and Respect: historical instances and current problems', p. 232.

minorities. For legal purposes, it is quite challenging to articulate definitions and boundaries for every group identity, beyond structures to accommodate cooperation between individual citizens and other legal entities in civil society. Not least, group identities, even when hyphenated, ignore internal nuances and differentiations within world religions like Islam, Christianity, Judaism and others.[76] Moreover, as Wiktorowicz shows in the context of terrorism in name of Islam, public debates tend to gloss over internal differences and disagreements, impacting negatively on moderate Islamic communities.[77]

5.5 Conclusion

What does it mean to be one? And how does outward unity relate to projections of oneness? Who has the right to determine what the right kind of oneness or shared civil identity is?[78] This chapter argued that the nation state re-enacts a nexus of territory, people, and teleology in its unity of state, nation, and social norms. For this reason, the nation state is liable to the exclusionary political mechanisms of the *corpus christianum.* The modern state, however, has been able to shape society so as to foster a sense of national identity beyond the social and religious fragmentation that the state inherited from the early modern period. At the same time migration, secularisation, and individualisation have put pressure on the idea of oneness that the nation state embodies, and bring out new tensions pertaining to social identity. Moreover, conflation of oneness and outward unity puts religious expressions and religious symbols in public space once again at the heart of debates over belonging, integration,

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[76] Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience,* Cambridge MA: Harvard University Press 2011, p. 35; Erin Wilson, *After Secularism. Rethinking Religion in Global Politics,* New York: Palgrave Macmillan 2012, p. 30; Casanova, 'Immigration and the new religious pluralism: a European/United States comparison', p. 145.

[77] Quintan Wiktorowicz, *Radical Islam Rising. Muslim extremism in the West*, Lanham: Rowman & Littlefield 2005, p. 4.

[78] Cynthia V. Ward, 'On difference and equality', (1997) *Legal Theory,* No. 5, pp. 63-99, pp. 98-99.

and secularisation. This chapter argues that the idea of privatisation of religion is deeply problematic from the perspective of the genealogy of toleration and religious freedom. And crucially, where oneness and outward unity are conflated, one overlooks that integration and outward conformity perhaps may never satisfy the demands of belonging.

Whilst some level of othering is inevitable to any articulation of identity, I suggest that the absence of a unified sense of identity perhaps causes a fixation on "others". This political othering is not only damaging to society, it but also tests the reliability of constitutional safeguards vis-à-vis religious as well as racial and ethnic minorities.[79] The constitution theoretically provides protection to minorities through the prohibition of discrimination as well as the freedom of religion.[80] These constitutional protections of (religious) minorities aim to ward off arbitrary interferences on behalf of the state. In this way, the constitution creates space not only for ordinary differences, but also for "deep" or even "deviant" differences, as John Inazu and David Little argue.[81] But does it and will it continue to do so? Admittedly, it is possible that the state can legitimately restrict the public visibility of its religious and other minorities. Such restrictions must be based on rational arguments and satisfy the requirements of public order and neutrality towards denominational truth-claims. Moreover, they must respect the integrity of every individual. The next chapter elaborates on these requirements of public order and neutrality before it circles back to the question of outward unity. Restrictions of expression of (religious) difference in public space may certainly be *outcomes* of incidental policies, general arguments pertaining to the oneness of state, nation, and social norms cannot intrinsically lay down the law concerning co-existence and religious diversity.

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[79] Wydra, *Politics and the Sacred,* p. 45.

[80] Taylor, 'Why we need a radical redefinition of secularism', pp. 45-46.

[81] Cited in R. Scott Appleby, *The Ambivalence of the Sacred. Religion, violence, and reconciliation,* New York: Rowman & Littlefield 2000, p. 14.

6. Public order, state neutrality and striving after the common good

Public order is at the heart of constitutionalism. Early modern authorities instrumentalised the notion of public order against religious minorities, who embodied 'the extraordinary' to the political imaginary of the *corpus christianum* which provided the foundation for public order.[1] This extraordinariness did not place the othered outside the framework of public order, but in the context of toleration, extraordinariness entailed an incorporation through marginalisation.[2] Public order referred to the stability and security of social structures, which would the protection of matrimony, taking oaths, or certain religious practices; and incidental dimensions, like outbursts of popular violence or the occasional refusal to conform. Constitutionalisation of civil and political rights legally extended 'the ordinary' to the previously marginalised, and charged the state to protect public order in the name of the sovereignty of the nation.[3] This public order faces two ways: states have the responsibility to protect public order, and, states have a relative discretion in defining public order as well as a duty to justify its operationalisation. The effectiveness of the notion of public order hinges on the relative independence of public order from social or cultural norms, e.g. Bourdieu's *habitus,* which stem from the relatively privileged contingent of the nation.[4]

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[1] "Extraordinary" as in Harald Wydra, *Politics and the Sacred,* Cambridge: Cambridge University Press 2015, p. 23.

[2] István P. Bejczy, 'Tolerantia: a medieval concept', *Journal of the History of Ideas* (1997), Vol. 91, No. 4, pp. 365-384, p. 375.

[3] Saba Mahmood, 'Secularism, sovereignty, and religious difference: a global genealogy?', (2017), *Environment and Planning D: Society and Space,* Vol. 35, No. 2, pp. 197-209, pp. 198, 202.

[4] Bourdieu quoted in Dietmar Rothermund, 'Religiöse Praxis und die Artikulation sozialer Identität', in Lehmann (ed.), *Koexistenz und Konflikt von Religionen,* pp. 157-168, pp. 157-159.

This chapter engages the relationship between social norms and public order in the specific context of religious diversity. It theorises the relationship between social norms and the legal notion of public order and problematises a reliance on social norms alone to substantiate an appeal to public order. This then proceeds to question how a reliance on social norms affects the imperative of state neutrality. It further examines how the notions of publicness and "secularisation as privatisation" impede the imperative of neutrality as well as render articulations of the common good less inclusive. How does public order account for deep diversity and the complex nature of social roles and spaces? Is it possible to accommodate complex common goods? This chapter contends that a robust notion of a complex common good is crucial to the notion of public order. This complex common good might include intersecting and potentially conflicting interests. A recognition of the complexity of the common good may be part of developing a more positive understanding of diversity and facilitate peaceful coexistence in the face of further social fragmentation.[5]

6.1 Public order

The framing of "public order" in constitutional and human rights documents varies between France, Germany, and the Netherlands. Moreover, European, national, regional and local dimensions to public order further differentiate its meaning and its application. This differentiation notwithstanding, neither the contextual nature of public order nor the absence of one common formula implies the absence of coherent

[5] Realities of diversity eventually broke the narrative of unity and thus challenged social order, even violently in the context of early modernity; see William T. Cavanaugh, '"A fire strong enough to consume the house": wars of religion and the rise of the state', (1995), *Modern Theology*, Vol. 11, No. 4, pp. 397-420; Scott Thomas, 'Rethinking religious violence: towards a mimetic theory approach to violence in international relations', (2015), *Journal of International Political Theory*, Vol. 11, No. 1, pp. 61-79; Andrea Pin, 'Does Europe need neutrality? The old continent in search of identity', (2014), *Brigham Young University Law Review*, Vol. 3, pp. 605-634, p. 628.

meaning.[6] Rather, the fluidity of public order is bound up with the specific legal context and the role that the principle of public order fulfils in that context.[7] This section connects both legal and political perspectives on public order in order to draw distinctions between: 1) legal frameworks and social norms; 2) structural and individual arguments; and 3) legitimate and illegitimate arguments of public order. I problematise the increasing significance of social norms on public order arguments. This is important because constitutional democracy as well as the interest of legal certainty form the bedrock of non-arbitrary decision-making that constitutionalism is believed to underwrite. Legal certainly exists in the clarity and accessibility of the law, as well as in the predictability of its application, and aims at the protection of one's physical, spiritual, and economic security.

Article 9 of the European Convention of Human Rights reads: 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health, or morals, or for the protection of the rights and freedoms of others'.[8] Article 10 of the French declaration of human rights states that the manifestation of religion may not disturb public order: *'pourvu que leur manifestation ne trouble pas l'ordre public établi par la Loi'*.[9] Article 6 and 9 of the Dutch Constitution as well as Article 2 Wet Openbare Manifestaties include a reference to the prevention of disorder outside of religious buildings and private spaces: *'…ter*

[6] Gerhart Husserl, 'Public policy and ordre public', (1938), *Virginia Law Review,* Vol. 25, No. 1, pp. 37-67, pp. 41-43.

[7] Marie-Caroline Vincent-Legoux, L*'Ordre Public. Étude de droit comparé interne,* Thesis Université de Bourgogne, Dijon, 20 December 1996, p. 10.

[8] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, https://www.refworld.org/docid/3ae6b3b04.html (consulted 8 May 2019).

[9] *Déclaration des Droits de l'Homme et du Citoyen*, 1789, https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789, (consulted 8 August 2019).

bescherming van de gezondheid, in het belang van het verkeer en ter bestrijding of voorkoming van wanordelijkheden'.[10] German Basic Law omits a direct reference to public order, but Article 5 Abs. 2 includes references to generally applicable law – including other human rights – as well as the protection of young persons and personal honour: *'Diese Rechte finden ihre Schranken in den Vorschriften der allgemeinen Gesetze, den gesetzlichen Bestimmungen zum Schutze der Jugend und in dem Recht der persönlichen Ehre'*.[11]

The difference between these framings of public order is not merely semantic and partly resides in how the state relates to diversity in society, including religious diversity. These differences stem from divergent trajectories of identity as well as political philosophy that reimagines political order independent from religious ontological claims. Chapter Four concluded that many regional and religious identities coalesced in Germanness, though it rendered the margins of belonging narrower in comparison with France. János Weiss explains in his lengthy work on German constitutional philosophy that the German state is based on a non-hierarchical, conflict neutralising, organisational nature *(Zentralnervensystem*).[12] This organisational nature assumes diversity whilst Weiss rejects a presupposition of ante-institutional unity.[13] In contrast with the federal character of Germany, the nature of the French and Dutch states has been (moderately) unitary: the territorial dimensions to religious diversity conflicted more directly with the notion of the unitary state, whereas a federal state left more space for regional autonomy as well as differentiation. Furthermore, as this

[10] Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815 (Dutch Constitution), https://wetten.overheid.nl/BWBR0001840/2018-12-21, current from 21 December 2018 (consulted 8 May 2019), Wet van 20 april 1988, houdende bepalingen betreffende de uitoefening van de vrijheid van godsdienst en levensovertuiging en van het recht tot vergadering en betoging (Wet openbare manifestaties), https://wetten.overheid.nl/BWBR0004318/2010-10-10 (consulted 22 January 2021).

[11] Grundgesetz für die Bundesrepublik Deutschland, 23 Mai 1949, (German Basic Law), https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/grundgesetz/gg_01-245122, (consulted 8 May 2019).

[12] János Weiss, *Die Konstitution des Staates,* Frankfurt: Peter Lang 2006, pp. 363-397.

[13] Ibidem, p. 384.

organisational nature transcends civil discourses and institutional diversity, it fosters a process of deliberation and seeks to build consensus without assuming the highest authority.[14]

The organisational nature of the German state instructs a first distinction between public order as social norms and public order as the sum of legal arrangements within a jurisdiction *(Vorschriften der allgemeinen Gesetze)*. German constitutional law distinguishes between *öffentliche Ordnung* and *öffentliche Sicherheit*: The former refers to unwritten social norms, whereas the latter entails positive legal arrangements that guarantee civil security.[15] Legal scholar Jan Brouwer explains that the Dutch Supreme Court associated public order with the German concept of *öffentliche Ordnung* in the late twentieth century: though linguistically close, the Court overlooked the difference between *öffentliche Ordnung* and *öffentliche Sicherheit*.[16] Brouwer points out that this mistake has been rectified since, and observes that any inclusion of ethical norms into the concept of public order would have enormous consequences.[17] This could include specific ideas about gender equality; for example, the idea that a headscarf is an expression of gender inequality. Such content weakens the legal certainty of minorities and makes them vulnerable to arbitrary interference on behalf of the state. Brouwer helpfully explains that an alternative exists; namely, that many potential concerns of public order are already protected in particular and more concrete regulations, for example in provisions of criminal law. He argues that these particular provisions must prevail over a more generalised principle of public order, which is part of legal reasoning under the principle of the *lex specialis*.[18] These

[14] Ibidem, pp. 369, 380, 387.

[15] Ibidem, p. 2165.

[16] Jan Brouwer, 'Wat is openbare orde? Bevoegdheden van de burgemeester niet onbegrensd', (2016), *Nederlands Juristenblad*, No. 30, pp. 2162-2169, p. 2164.

[17] Ibidem, p. 2162.

[18] Ibidem, pp. 2165-2167.

specific laws create a boundary between social (or indeed ethical) norms that have found a positive expression in law and those which have not.[19]

Though it might be tempting to interpret this distinction between *öffentliche Ordnung* and *öffentliche Sicherheit* as a German particularity, French law makes a similar distinction regarding the concept of *l'ordre public.* Article 6 of the *Code Civil* distinguishes *l'ordre public* from *les bonnes moeurs.*[20] Jacques Robert notes that the 1789 text of the Declaration referred to public security *(sûreté publique)* and the rights of others.[21] This distinction seems close to the concept of *öffentliche Sicherheit.* Former member and president of the *Conseil Constitutionnel* Pierre Mazeaud argues that the *Conseil Constitutionnel* never defined the concept of public order as such, but the Court follows the instincts of administrative law: in this context, public order refers to order, security, public health, and public tranquility.[22] Mazeaud argues that the *Conseil Constitutionnel* and the European Court of Human Rights both emphasise the security dimension of public order. Also, both require a concrete and real threat to public order for a public order argument to be valid.[23] Vincent-Legoux argues that *les bonnes moeurs* coincide with *moralité publique;* including moral norms that are necessary to public life in a particular jurisdiction.[24] However, she distinguishes both *bonnes moeurs* and public morality from social morality, because a pluralistic society should not privilege one

[19] Ibidem, p. 2163.

[20] Code civil du 15 Mars 1803, https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070721&idArticle=LEGIARTI000006419285, (consulted 31 May 2019).

[21] Jacques Robert, 'La liberté religieuse', (1994), *Revue Internationale de Droit Comparé,* Vol. 46, No. 2, pp. 629-644, p. 635.

[22] Pierre Mazeaud, 'Libertés et ordre public', (2003), https://www.conseil-constitutionnel.fr/les-membres/libertes-et-ordre-public, (consulted 31 May 2019).

[23] Ibidem.

[24] Vincent-Legoux, *l'Ordre Public*, p. 532.

social morality over the other.[25] Though public morality thus becomes part of the public order discourse, according to the *Code Civil,* they are distinct.

The principle of public order is also a principle of action for the state.[26] This means that the state has the authority and the duty to protect public order through retributive as well as preventative coercion.[27] Similarly to the principle of toleration, public order orders the protection of citizens but may also legitimise coercion and even the use of violence against them. The use of force is equally moderated by the principle of public order. Vincent-Legoux argues that French law substantiates this dimension of public order through necessity and proportionality.[28] The principle of necessity is more or less synonymous with subsidiarity in other human rights documents, including the European Convention of Human Rights. This means that legitimate goals and the weight of measures to be taken must be balanced: the law prefers the relatively least restrictive measure (subsidiarity) and requires a fair balancing of interests (proportionality). Failure to apply force on behalf of the state could therefore be a violation of public order itself.

Applicability of criminal law as a *lex specialis* in principle implies a claim of public order; such is the logic of the constitution. Yet criminal law is not the exclusive source to public order: the principle of public order functions also in private and in administrative law.[29] However, more could be said about the relationship between positive legal arrangements and unwritten social norms. This very distinction between positive law and social norms has made legal scholars nervous about the endorsement of the French concept *vivre ensemble* (living together) by the European Court of Human

[25] Ibidem, pp. 566-570.

[26] Ibidem, p. 22.

[27] Ibidem, pp. 35-36.

[28] Ibidem, pp. 132, 452, 468.

[29] Ibidem, p. 2.

Rights when it did not find fault with the French face veil ban in 2014.[30] Legal scholar Illias Trispiotis questions its potential to demanding 'conformity' to majoritarian preferences.[31] Another legal scholar, Myriam Hunter-Henin, evaluates the doctrine as 'unconvincing' and potentially conflicting with the principle of proportionality.[32]

Ethical concerns that have not been codified thus lack the legal basis for direct application, save in exceptional cases. The exclusion of extra-legal ethical norms not only reinforces the principle of legal certainty but their very exclusion undergird the security of ethical diversity within the state. This exclusion limits the potential to arbitrary decision-making in incidental cases and circumscribes the otherwise likely fragmentation of the concept of public order. Jan Brouwer and Jon Schilder already identified several problems to local uses of public order arguments, including terminological inconsistency by mayors and local governments, insufficient definition of theoretical aspects to public order, as well as insufficient specificity of the criteria for application.[33] Such differentiation may be inherent to the logic of decentralised and casuistic decision making in states like the Netherlands and Germany; however, the casuistic nature of the facts of a case and the objectification of criteria for decision-making should not be conflated. Perhaps the question is not *per se* whether the public order concept is applied differently, for it is, but the question is rather at what point fragmentation erodes a coherent meaning and predictable application, and thus, legal certainty.

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[30] Art. 2 of Loi no. 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public; Santions in Code pénal, Article 225-4-10. Similar prohibition applicable in Belgium. ECtHR 1 July 2014, 43835/11 *(S.A.S. v. France)*, in conjunction with ECtHR, 11 July 2017, 4619/12 *(Dakir v. Belgium)*; ECtHR 11 July 2017, 37798/13 *(Belcacemi and Oussar v. Belgium).*

[31] Ilias Trispiotis, 'Two interpretations of "living together" in European human rights law', (2016), *Cambridge Law Journal*, Vol. 75, No. 3, pp. 580-607, pp. 606-607.

[32] Myriam C. Hunter-Henin, 'Living together in an age of religious diversity. Lessons from Baby Loup and SAS', (2015), *Oxford Journal of Law and Religion*, Vol. 4, No. 1, pp. 94-118, p. 118.

[33] J.G. Brouwer & A.E. Schilder, 'Dwalen door het woud van het openbare-orde recht', (2011) *Trema,* No. 5, pp. 168-175, p. 170.

Second, I argue that public order distinguishes between structural and individual dimensions. Areas that historically entailed structural dimensions to public order included family life, rites of passage, and trade conventions. Specifically in the context of toleration, undermining such conventions could be seen as a threat to public order. Not all structural dimensions have become part of positive law. Individual dimensions concern specific issues that the state might try to regulate, like an individual matter, or even restricting the freedom of one specific individual. The law does not permit this. Individual dimensions are different from the above mentioned incidental dimension to public order, since violence and disturbance of public order are regulated through criminal and administrative law. Moreover, structural and individual dimensions may not overlap with positive law and unwritten social norms. However, I argue that an intersection of unwritten social norms and structural arguments in the context of public order might render religious minorities particularly vulnerable. This vulnerability resides in potential compulsion to cultural conformity beyond what is constitutionally required from citizens, akin to what Trispiotis noted in the context of *vivre ensemble*.

The vulnerability of religious minorities, stemming from the potential intersection of structural arguments and unwritten social norms, affirms the importance of law in defining and limiting the scope of public order. It deserves recommendation that structural arguments of public order be established in law, insofar as this is possible, legitimate, and desirable within a constitutional democracy. This works differently for individual arguments. Typically, constitutional law prohibits the use of individual norms to limit constitutional rights, unless its specific particularity warrants an individual norm.[34] This means that the regulation of particular issues may only be grounded in generalisable norms. This rule functions as an important layer of protection against direct discrimination against minorities.

[34] See for example Article 19 German Basic Law; Reinhold Zippelius & Thomas Würtemberger, *Deutsches Staatsrecht*, 32st edition, München: Beck 2008, pp. 216, 458-459.

However, the next chapter will show that national legislatures have fairly conspicuously tweaked argumentation between individual and generalisable norms in attempts to regulate Islamic attire in public spaces.

Third, arguments on public order may entail legitimate and illegitimate dimensions. Not all arguments to public order are legally permissible. First of all, most courts require that public order is based on a tangible rather than a perceived threat. As the next chapter shall demonstrate, courts have generally ruled out feelings of insecurity or discomfort as a sufficient basis for a public order argument. As John Dunn argues, arguments of public order must be rationally grounded, that is, on the basis of a set of defined characteristics and sound epistemology.[35] Historically, unsound appeals to public order have served to compromise the standing of minorities. *Avant-garde fake news*, like popular tales told about Jews, French Protestants, and Dutch Catholics, shed a complex light over histories of toleration. Some tales persisted long into the nineteenth century.[36] Such tales alleged subversive inclinations or moral deficiencies within minority communities, either to take over secular power, to offend God, or to engage with occult practices. And whether or not such tales were grounded in any kind of reality, these have often become guises for intolerance.

The legal and political boundary between permissible and impermissible arguments of public order could be rather thin, particularly with regard to recent waves of terrorism in France and Germany, as the next chapter discusses. Higher courts require evidence of a tangible threat to public order, and typically declare arguments which fail to meet that standard illegal. The number of cases suggests that the boundaries between acceptable and unacceptable arguments are frequently tested. Indeed, contemporary cases on religious freedom may include arguments that are

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[35] Personal communication, 21 August 2017.

[36] Christopher Clark, 'The New Catholicism and the European Culture Wars', in Christopher Clark & Wolfram Kaiser, *Culture wars. Secular-Catholic Conflict in Nineteenth Century Europe*, Cambridge: Cambridge University Press 2003, pp. 11-46, p. 41.

questionable from the perspective of law and rationality. Such border cases are interesting because the public order argument is the only legal and salient connection between early modern practices of toleration and constitutional religious freedom. Chapter Two has shown that early modern arguments of public order were often grounded in tangible disruptions of public order and were not always completely arbitrary. One could therefore question whether rationality and legality are sufficient to understand differences between early modern and contemporary arguments of public order in the context of religious difference – an issue that will be raised again in the next chapter.

Finally, public order may practically interrupt the integrity of individual citizens. A level of differentiation in concepts of public order between national, regional, local, and even institutional contexts might be necessary because of distinct spheres of autonomy as well as the casuistic nature of incidental decision-making. Differentiation could spill over in fragmentation, and therefore in diffusion and unpredictability. Moreover, fragmentation may impact the integrity of individual and communal life. A disproportionate variety in regulations, dress codes, and expectations impede legal certainty: where are religious individuals permitted to display a religious expression and where not, and where may religious and non-religious "others" expect to not be confronted with such religious expression? Matthias König would add thereto that the notion of public order also features in the context of the European Union, which might sever the contextuality of public order that is bound up with national sovereignty and even national identity.[37] He argues that the use of public order in the context of the European Union might, in practice, bolster equality and non-discrimination.

[37] Matthias König, 'Europeanising the governance of religious diversity: an institutionalist account of Muslim struggles for public recognition', (2007), *Journal of ethnic and migration studies,* Vol. 33, No. 6, pp. 911-932, pp. 914, 917, 919, 928.

Realistically, it is not feasible to legislate exhaustively on religious diversity other than, in general, a principle of non-interference applies. This principle of non-interference is grounded in the constitutional protection of religious freedom, on the basis of which the state is not allowed to intervene unless it meets specific requirements of legality, proportionality and subsidiarity. In many instances, coexistence comes down to everyday attitudes of tolerance and intolerance at a grassroots level. It must be recognised that legal fragmentation could also result from fragmented negotiation of such tolerance levels at the grassroots level. Furthermore, while individuals could chose to dissimulate certain religious symbols, for example caps or hats worn over a *kippah* or a cross that may be put behind attire, some religious symbols cannot be dissimulated, for example different types of head covering worn by Catholic, Orthodox Jewish, and Muslim women. The Netherlands Institute for Human Rights has observed that women can be particularly disadvantaged by restrictions on religious symbols.[38]

Thus it is vital to distinguish between legal frameworks and social norms, between structural and individual dimensions, and between legitimate and illegitimate substantiations of public order. This is crucial for the protection of legal certainty and the rights of minority citizens, which is inherent to constitutionalism as an answer to the arbitrariness and lack of protection legislatures associate with the ancient regime. Moreover, there is a need for consistency and mitigation of fragmentation of public order arguments across local, regional, and national levels of government. This is particularly important as decentralised authorities weigh into discussions on diversity and, on the basis of public order, may have significant competencies to restrict religious and other freedoms, such as mayors. Development of consistency, as Brouwer suggests, in central concepts and criteria towards application, may also limit the scope for political tweaking of public order arguments. The clarification of the notion of public order from the perspective of constitutional

[38] Netherlands Institute of Human Rights, *Annual Report 2017*, p. 142.

law is urgent and therefore, national legislatures, who express the national sovereignty in law, should take initiative to this clarification.

6.2 Public order, social norms and neutrality

The notion of neutrality conditions the relationship between public order and social norms and yet is perhaps not as much a key to diversity questions as it might appear to be. The concept of neutrality was not originally part of the nineteenth century constitutional language. Nineteenth century constitutionalists proposed a moderated version of religion, intolerant to fundamentalism and assertion of power on behalf of religious institutions. *Geschichtliche Grundbegriffe* describes how neutrality in early modern language referred to impartiality as well as fair and equal treatment of rivalling parties.[39] Another connotation is independence from partisan communities or churches without implying anticlericalism or anti-religious sentiments.[40] Or, neutrality is absence of judgement or support vis-à-vis religious and non-religious worldviews, both culturally and institutionally.[41] Carl Schmitt argued that neutrality would be an expression of parity and would uphold both the principle of non-intervention and of equal opportunity.[42] What these perspectives have in common is that neutrality prohibits the state from instrumentalising a normative framework to the disadvantage of individuals and communities, particularly regarding social norms. Neutrality is thus in fundamental contrasts with toleration and its grounding in one particular "orthodoxy".

This neutrality is not a neutrality of disposition: neither state nor society are void of normative frameworks; nor can either truly avoid the problem of normative

[39] Michael Schweizer, 'Neutralität', in *Geschichtliche Grundbegriffe,* Band 4, pp. 317-337, p. 321.

[40] Heinhard Steiger, 'Neutralität', in *Geschichtliche Grundbegriffe,* Band 4, pp. 337-370, pp. 353, 359.

[41] Ibidem, p. 369.

[42] Ibidem, p. 367. Neutrality is described as '*ein technisches Mittel'* for the State.

disproval.[43] The paradox between neutrality and the inevitability that states rely on a normative framework is abundantly criticised in literature. Political philosopher John Dunn puts it as a 'beguiling conception of liberals' to equate the undoing of toleration with equal respect of individual autonomy – for this is difficult to combine with vivid disapproval.[44] Gavin d'Costa argues that neutrality in itself is impossible because one always has a 'tradition-specific starting point'.[45] Similarly, Mahmood writes that law is 'encoded with an entire set of cultural and epistemological presuppositions' that are not independent from traditions and adds this is particularly the case with public order.[46] Others, like Lorenzo Zucca, affirm the importance of normativity, even truth, in law.[47] However, not all expressions of neutrality may be equally affected by normative biases. Claudia Haupt maps out five different types of neutrality: non-consideration, positive neutrality (as in minimal interference), equality, separation, and neutrality as an interpretative guide.[48] What these types of neutrality have in common is that they reflect a concern not so much about disposition, but about action.

A distinction between a neutrality of disposition and a neutrality of action might yet not render the question of "orthodoxy", taken as dominant normative narratives within a state, superfluous; the nation state is deeply informed by an

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[43] John Dunn, 'Postface: The grounds for toleration and the capacity to tolerate', p. 1, https://www.researchgate.net/publication/289173975_Postface_The_Grounds_for_Toleration_and_the_Capacity_to_Tolerate, (consulted 13 February 2020); Gavin d'Costa, 'Whose objectivity, which neutrality? The doomed quest for a neutral vantage point from which to judge religions', (1993), *Religious Studies*, Vol. 29, No. 11, pp. 79-95, p. 95.

[44] John Dunn, 'The grounds for toleration and the capacity to tolerate', pp. 1-2.

[45] Gavin d'Costa, Whose objectivity, which neutrality?', pp. 95ff.

[46] Saba Mahmood, 'Religious reason and secular affect: an incommensurable divide?', (2009), *Critical inquiry,* Vol. 35, No. 4, pp. 839-862, pp. 859-860.

[47] Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape,* Oxford: Oxford University Press 2012, Chapter 10.

[48] Claudia E. Haupt, *Religion-state relations in the United States and Germany,* Oxford: Oxford University Press 2012, pp. 171-178, 199.

emphasis on relative homogeneity.[49] This is important to note, because early modern toleration hinged on a connection between orthodoxy and social norms, often at the expense of minorities. Legacies of toleration are not only imbued with a positive substantiation of an "orthodoxy", but also entailed normative otherings. The same is said by Peña-Ruiz and Shakman-Hurd about universalising aspects to secular "orthodoxy".[50] Secularism, rather than secularity, would indeed be problematic when invoked by states at the expense of "other" normative frameworks of minorities.[51] Or when it appears to 'replace the religious foundations for peaceful coexistence with an all-encompassing secular philosophical conception' when its underlying views are not equally shared.[52] As Wendy Brown boldly states, secularism can be as intolerant as religious law.[53]

As accurate as these conceptual arguments might be, these renderings of secularism are perhaps insufficiently flexible to the idea that secularism, like religious normativities, does not represent a coherent system of beliefs and practice. The normative disintegration that France, Germany, and the Netherlands face might mean that "orthodoxy" could, if anything, be based on a potentially large range of

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[49] Gavin d'Costa, Whose objectivity, which neutrality?; Comp. Steven D. Smith, 'Religious freedom in America: three stories', in: Stephen M. Feldman, *Law and Religion. A critical anthology*, New York: New York University Press 2000.

[50] Elizabeth Shakman Hurd, 'The political authority of secularism in International Relations', (2004), *European Journal of International Relations*, Vol. 10, No. 2, pp. 235-262, p. 237; Henry Peña-Ruiz cited in Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience,* Cambridge MA: Harvard University Press 2011, p. 25.

[51] Shakman Hurd, 'The political authority of secularism in International Relations', p. 237; Veit Bader, 'Secularism, public reason or moderately agonistic democracy', in Geoffrey Levey & Tariq Modood, *Secularism, Religion and Multicultural Citizenship,* Cambridge: Cambridge University Press 2009, pp. pp. 110-136, pp. 132-133; Rowan Williams, *Faith in the Public Square,* London: Bloomsbury 2012, p. 3.

[52] Maclure & Taylor, *Secularism and Freedom of Conscience*, p. 15.

[53] Wendy Brown, *Regulating Aversion. Tolerance in the Age of Identity and Empire,* Princeton: Princeton University Press 2006, chapter 7.

intersecting otherings. For example, even if "post-modern" or "post-truth" tendencies in a society would perhaps preclude a positive articulation of truth, normativity can also be found in the form of strong disproval. This is not only relevant from the perspective of neutrality, either as a disposition or a principle of action, but also from the perspective of toleration. Toleration usually concerned behaviours which authorities deemed to be wrong as well as threatening the social order. What is interesting about contemporary iterations of normative disproval is that the connection between social norms and public order has the capacity to render a normative othering to be a threat to public order. In the face of deepening diversity, this possible shift, from a focus on concrete behaviour to normative disagreement, could erode the very foundations of the political protection of religious and other minorities.

The pivotal question therefore is: who has the authority to determine the nature of public order and the scope of its inclusion of social norms? Or, as Gavin d'Costa rhetorically asks, 'whose objectivity, which neutrality?'[54] Orthodoxy in relation to political power is ironically normativity-blind: religious and non-religious frameworks are equally capable of dominating political normativity. Early modern strategies to share political power, to distinguish fundamentals from indifferent matters through epistemic humility, or to narrow the political normative frames to a lower common denominator did not avail against the rapid social, religious, and political disintegration. Some of these strategies have made reappearances, like in Basinger's suggestions to revert again to epistemic humility in contemporary normative debates.[55] Or in scholarly debate on a commonly acceptable political

[54] Gavin d'Costa, 'Whose objectivity, which neutrality?'.

[55] David Basinger, 'How religious diversity can and does foster religious tolerance', in James Kraft & David Basinger (eds.), *Religious Tolerance through Humility,* Aldershot: Ashgate 2008, p. 30; William Hasker 'Thinner theologies, religious diversity and religious tolerance', in Kraft & Basinger (eds.), *Religious Tolerance through Humility,* p. 97; Peter Byrne, 'Quinn on tolerance and diversity', in Kraft & Basinger (eds), *Religious Tolerance through Humility,* p. 109.

procedure, like Rawls and Habermas. However, irrespective of how narrow a common frame of normativity could possibly be, the state has no right to "conversion" or the "conformity" of minorities; rather, it has a duty to protect them.

6.3 Seeking the common good

The notion of the common good is bound up with the notions of public order, social norms, and neutrality. At a first glance, the common good might seem to coincide with the notion of the national interest. But this is not quite the case. As Bruce Douglass notes, the idea of the national interest emerged over and against the interest of the absolutist monarch and is thus distinct from the common good.[56] The idea of the common good would be more positive as well as oriented on the future. The notion of the common good perhaps first refers to the good of a political community as a whole. Conceptually, the notion of the common good does assume a bifurcation of the private and the common. This bifurcation might work inherently against minorities, particularly where secularisation refers to the privatisation of religious or indeed non-religious normativities. However, in order to protect the good of the community, the common good needs to also subsume private interests, however diversified these are. Given the somewhat insecure moorings of the notion of a unified common good today, the question is how the common good could facilitate to the complexity of social and political life.

In *The Empty Throne*, Sophie van Bijsterveld explains that the common good exists in a vacuum as 'the natural orientation towards the common good has lost both its obviousness and its visibility'.[57] She points out that tensions between 'functional' and 'integrated' policy making, micro-and macro-justice, and centralised and

[56] Bruce Douglass, 'The common good and the public interest', (1980), *Political Theory*, Vol. 8, No. 1, pp. 103-117, pp. 106-108.

[57] Sophie van Bijsterveld, *The Empty Throne. Democracy and the rule of law in transition,* Utrecht: Lemma 2002, p. 352.

decentralised ethics contribute to a decentralisation of the common good.[58] This analysis seems appropriate, as it implies that fragmented iterations of the common good might be based on intersecting interests which may be at odds with other such iterations. This fragmentation of the common good then leaves law as a mediator of difference, while the law has no intrinsic capacity to generate order or to provide content on justice, the common good, or indeed belonging.[59] Moreover, the deep fragmentation of society means that even the function of the law diminishes as a mediator of ethical content. In theory, this fragmentation might surrender the law, and thereby the political mechanisms of inclusion and exclusion, into the hands of democratic majorities.

'Government must be neutral on what might be called the question of the good life', Dworkin summarised as the crux to the debate on the relationship between normativity and the common good in the 1980's.[60] However plausible this statement appears, it has also become deeply problematic. Not only is neutrality itself normatively contingent, normative contingency of decision-making which is blind to its own biases can negatively affect equal dignity. In other words, neutrality is not a goal in itself, but is an instrument that serves the protection and affirmation of citizen's dignity and the standing of communities in society. Moreover, when the imperative of neutrality leads to an unwillingness or inability to engage with religious diversity in decision making, it may impair a sense of the common good and reinforce social divides. A report on religious freedom in the United Kingdom called for investment in mutual understanding, politically as well as socially, warning that decision-making

[58] Ibidem, pp. 326-329.

[59] Ernst-Wolfgang Böckenförde, *State, society, and liberty: Studies in political theory and constitutional law*, Oxford: Berg Publishers 1991.

[60] Ronald Dworkin, 'Liberalism', in Ronald Dworkin, *A Matter of Principle*, Cambridge: Harvard University Press 1985, pp. 181-204. p. 191; Andrew Koppelman, 'Ronald Dworkin, Religion, and Neutrality', (2014), *Boston University Law Review*, Vol. 94, No. 4, pp. 1241-1253, p. 1241.

risks being 'insensitive and inadequate', thus harming 'the public good'.[61] It is this insensitivity which is so greatly concerning.

As Taylor and Habermas agree, states cannot avoid normative frameworks altogether, whether these are religious or not.[62] What they perhaps disagree on is the extent to which dominancy of any bandwidth of normativity is problematic. Most scholars would agree, in principle, that commonality exists in a concern for the wellbeing and equal dignity of the members of the political community. Most scholars would also accept basic liberal constitutional values, labelling this as a relatively thinner conception of the good. Even here, however, it seems hard to escape the echoes of universality and exclusivity. In his work *Constitutional theocracy,* Ran Hirschl contended that the universalising tendencies of liberal values, within the framework of constitutionality, resulted into secularising effects within constitutional law.[63] And as Peter Byrne observed that 'soteriological exclusivism' appears to be 'the potential enemy of tolerance', so is the exclusivism that is associated with liberal constitutional values.[64] Yet the problem of universalisation is not intrinsic to constitutional liberalism alone. For a long time, scholars like Rawls and Habermas sought to imagine solutions to normative diversity through focusing on a fair procedure instead.

In *Political Liberalism,* Rawls distinguishes between man's comprehensive view and man's political view, concluding that comprehensive views are related to different

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[61] The Report of the Commission on Religion and Belief in British Public Life, *Living with difference: community, diversity, and the common good,* Cambridge Woolf Institute, 2015, p. 10.

[62] Jürgen Habermas, '"The Political": the rational meaning of a questionable inheritance of political theology', in Eduardo Mendieta & Jonathan Vanantwerpen (eds.), *The Power of Religion in the Public Sphere,* New York: Columbia University Press 2011, p. 25; Charles Taylor, 'Why we need a radical redefinition of secularism', in Mendieta & Vanantwerpen (eds.), *The Power of Religion in the Public Sphere,* p. 46.

[63] Ran Hirschl, *Constitutional Theocracy,* Cambridge MA: Harvard University Press 2010, p. 23.

[64] Byrne, 'Quinn on Tolerance and Diversity', p. 109.

and sometimes incompatible conceptions of the good.[65] He concludes that publicness involves politics foremost; therefore he argues that contributions be limited to the political aspects of man's comprehensive view.[66] In a theoretical experiment, he suggested focussing on political procedure. In theorising diversity, he suggested the idea of reasonable pluralism as a *modus vivendi*, which, in his words, aims at society's 'unity and stability'.[67] He thus disjoins the bond between man's inner convictions about life and man's political convictions, loosening religious metaphysical and epistemological doctrines in particular.[68] This approach resembles the creedal minimalism we encountered in early modern philosophical debates over faith and reason in Chapter Three. Rawls argues that society could benefit from developing an overlapping consensus; a consensus that should be sought based on rational arguments to persuade each other and form political majorities.[69] Interestingly, Rawls does not dismiss other than rational arguments as irrational, but rather classifies these as non-rational, not meaning that these non-rational arguments would necessarily be untrue.[70]

Rawls suggests that political institutions should adhere to procedural rules or guidelines which are not specific to any confession.[71] Rawls explains that this *modus vivendi* is not necessarily sceptical about truth,[72] but still embodies a liberal principle of justice stemming from liberalism. In his theory, he expects members of the political community to accept the principles of a liberal constitution, which is yet another instance of expected conformity. This conformity assumes that liberal principle, as an

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[65] John Rawls, 'The Idea of an Overlapping Consensus', in John Rawls, *Political Liberalism*, New York: Columbia University Press 1993, p. 134.

[66] Ibidem, pp. 134-140.

[67] Ibidem, p. 133.

[68] Ibidem, p. 144.

[69] Ibidem, p. 163.

[70] Ibidem, p. 153.

[71] Ibidem, p. 162.

[72] Ibidem, p. 150.

instance of the public good, is paramount to normative diversity and capable of providing "unity and stability". Habermas, Rawls' contemporary, concludes that this *modus vivendi* does not comprise a claim to truth, but would be considered as exerting neutrality towards conflicting worldviews.[73] Habermas sees the heart of publicness in public debate, communication, as well as public opinion making. Habermas calls for more neutrality and objectification in the political public sphere, arguing for the strength of communicative action based on the language of reason. On a conceptual level, Habermas argues that consensus about the acceptability and rationality of reasons help frame public debates and overcome controversies. This approach implies that certain types of language and arguments could potentially be excluded for the public debate, especially if there would be a majority consensus about it. Although Habermas could be read in this way, discursive inclusivity is still possible when actors already agree on a rational basis would recognize other instances of language and argumentation and engage with it in a meaningful way.

Another important feature of Habermas' theory of communicative action is his understanding of unity in relation to truth. While Habermas assumes a level of unity in the public debate, he is not looking for cultural convergence necessarily.[74] His theory attempts to undergird the protection of individual identity and freedom while also shaping a political public sphere which is effective: a political public sphere which is able to objectify subjective validity claims on the basis of consensus.[75] The search for truth through public debate, like philosophers as Kant and Hegel advocated, is not key for Habermas.[76] He further argues that 'the concept of legal norm itself is positivistic

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[73] Jürgen Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism', (1995), *The Journal of Philosophy*, Vol. 92, no. 3, pp. 109-131, p. 110.

[74] Jürgen Habermas, *The Structural Transformation of the Public Sphere,* (transl. from German publication in 1962), Cambridge, MA: MIT Press 1989, p. 213.

[75] Ibidem, p. 18.

[76] Ibidem, p. 119.

and stripped from the marks of universality and truth'.[77] Nancy Fraser argues that the consensus that may arise from this type of deliberation may express a popular understanding of the 'common good'.[78] However, Rawls' and Habermas' interpretations offer a relatively closed concept of the common good because of the *a priori* restriction of faith-based arguments.

Rawls himself argued that the effectiveness of his approach relied on a degree of unity and cohesion in society and warned that deep conflicts would possibly arise in its absence.[79] Both Rawls and Habermas respond to post-war and post-modern concerns about the question of morality in law, yet the ongoing diversification of society makes it hard to imagine procedural correctness as a long-term solution to the crisis of the common good. Moreover, this approach is so deeply rooted in rationality that it does not seem to allow for the deepening polarisation and decline in mutual trust within society. To be clear, neither Rawls or Habermas seem to have argued for exclusion of religion, but rather an objectification of political procedure. However, the cultural and political processes of developing a sense of the common good rely on basic willingness to dialogue and encounter in order to overcome processes of estrangement and fragmentation.

The past two chapters have alluded to the necessity of again making room for religion in public space. Secularity rightly removed religious dominance from political institutions; however, it would be a philosophical assumption to hold that religion should be removed from public space altogether. Moreover, the idea that religion is a private affair overlooks the social relevance of religious organisations in and beyond places of worship, as well as the interconnectedness and intersection of identities and the making of meaning in society. This is in addition to the idea that secularisation as privatisation limits religions' potential to cultural transcendences roots in a latent

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[77] Ibidem, p. 180.

[78] Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy', (1991), *Social Text*, No. 25/26, pp. 56-80, p. 59.

[79] Rawls, 'The Idea of an Overlapping Consensus', p. 166.

assumption that private religion is not actually part of the common good. This is an intuition that squares with toleration more than with religious freedom, and with *Gemeinschaft* more than with *Gesellschaft*. From a conceptual perspective, making room for religion in public space therefore also means to make room for religion in the common good.

When the common good primarily emerges out of values and ideas, one could look for a conception of the common good which is perhaps less robust or exclusively detailed in its particulars and more robust in including religious as well as non-religious traditions. Perhaps the meaning of the common good erodes when it continues to be based on a lowest common denominator. Perhaps the idea of the common good could hold conflicting philosophical understandings of the good, yet explicitly affirming that such understandings are vital to the meaning of the common good.[80] Yet even when the common good would become more complex in this regard, it might not provide a positive understanding of diversity, but only attempt at containing it. Similarly, creedal minimalism could not contain the diversity that exploded in the early modern period. Rather, the common good might need to recover the idea of relationality, based on being more than on conviction and philosophical or religious exclusivity.

This focus on "being" would base the normativity of the common good primarily on relationships and relationality. This would mean to focus less on social roles that individuals or groups may have, and more on the recognition of the dignity of every individual in relation to their roles and responsibilities in communities, networks, and their membership of the society. This of course does not erode conflict about values, but these conflicts are only secondary to the common good. Normative conflicts might be contained, in that the dignity of the other prohibits the self from ostracising the other on account of normative differences. The recognition of the other

[80] Comp. Alfred C. Stepan, 'Religion, democracy, the "Twin tolerations"', (2000), *Journal of Democracy*, Vol. 11, No. 4, pp. 37-57, p. 37.

has become part of the recognition of the self, like the recognition of a minority is part of what it means to hold something in common. This means that a healthy common good caters to the needs of minorities; not as an afterthought, but as essential property of "the common". When a society loses sight of this relationality, some values might become more equal, and some people might be more equal than others, and this makes a society liable to intolerance.

6.4 Conclusion

Constitutionalisation has transformed the notion of public order. Declaring the unity of the notion of the people, it theoretically erased legal inequalities that stemmed from toleration and included the previously marginalised in its notion of the people. The protection of individual citizens against arbitrary decision-making as well as the principle of legal certainty improved the legal standing of the previously marginalised, however, as chapter four contended, not automatically so. In the constitutional context, public order warrants several distinctions to live up to the legal expectation of individual protection: 1) between social norms and legal norms; 2) between structural and individual arguments; and 3) between legitimate and illegitimate arguments of public order. Public order might legitimise action on behalf of the state, as long as such action meets the requirements of subsidiarity or necessity, as well as proportionality. However, the above distinctions mean that the state ought not to use a socially dominant normativity to the restriction of freedom of its religious minorities. As the next chapter will discuss, conflicts about the protection of public order as well as proportionality make for the bulk of legal discussions about restrictions on the face veil, the burkini, and the headscarf, in addition to other religious symbols in public space.

This chapter also argues that neutrality has become relatively exclusive and that, alongside the notion of secularisation as privatisation, this comes at a cost: the cost that minorities cannot fully participate in cultural as well as political transcendences in order to inform social norms as well as the common good. In the

wake of profound fragmentation under influences of secularisation, immigration, and privatisation of religion, a society might become more liable to the possibility that social norms, be they secular or not, dictate the parameters of publicness in the name of 'living together'.[81] It is therefore crucial to the project of the modern state to develop new techniques of public inclusion, or what Wibren van der Burg calls 'inclusive neutrality'.[82] This implies no priority of distributive publicness over communal publicness. Rather, I contend that commonality can grow through inclusivity to the particular, admitting complexity to space, deliberation, and the common good.

[81] Maclure & Taylor, *Secularism and Freedom of Conscience*, p. 15; Netherlands Institute of Human Rights, *Annual Report 2017*, p. 147.

[82] Netherlands Institute of Human Rights, *Annual Report 2017*, p. 147 cites Wibren van der Burg, *Het ideaal van de neutrale staat. Inclusieve, exclusieve en compenserende visies of godsdienst en cultuur,* Den Haag: Boom 2009, pp. 41 ff; see also R. Scott Appleby, *The Ambivalence of the Sacred. Religion, violence, and reconciliation,* New York: Rowman & Littlefield 2000, p. 13.

7. Regulating conformity: law, politics, and religious symbols in public space

Politicians from left to right stress the importance of integration of Muslim members of the political community, both allochthonous and autochthonous. Despite the fact that many Muslims in France, Germany, and the Netherlands hold formal citizenship or are eligible for citizenship, political decisions about the manifestation of Islamic attire suggests that belonging is primarily a matter of outward conformity. This chapter examines political decisions, motivations, as well as institutional scrutiny thereof, regarding the face veil, such as the niqab and the burqa, the jilbab or "burkini" in France, as well as headscarves, like the hijab in France, Germany, and the Netherlands. These decisions impact on the religious freedom that constitutions, aided by the European Convention of Human Rights (ECHR) and other European and international human rights documents, confer on all citizens. Many provisions on religious freedom include particular requirements that states must meet in order to legitimately intervene with religious freedom. A legal and legitimate interventions is prescribed in law (legal certainty), must serve specific and circumscribed legitimate interests (legitimate aim), must be as least restrictive as possible (subsidiarity), and must be the result of fair balancing of interests (proportionality). This chapter contends that political decisions about religious attire, and their motivations, barely meet the constitutional threshold on account of the requirement to substantiate an appeal to public order.

Constitutions protect the religious freedom of individuals and, occasionally, of minority communities as well. Post-revolutionary elites reimagined order against the whims of absolutism and lacunae in the protection of basic rights of life, liberty, and property. Constitutions put limitations on the possibilities for the state to rely on the law when the state discriminates against its minorities. The concept of public order is central to many constitutional provisions and its legalisation and rationalisation

confine the space for the state to rely on insufficiently substantiated as well as plainly biased arguments of public order. As with toleration, the state negotiates the space between dogmatic ideas about politics and lived practice through laws and regulations. Today, this is done by national legislatures, Ministers, and regional and local political leadership, all of which have the authority to impose restrictive regulations on the basis of public order. This chapter shows that mayors in particular enjoy wide competences to intervene into religious freedom, yet that disparate argumentation of public order is problematic. Although the majority of this chapter discusses the wanderings of public order arguments, the arguments toward the end contend that legality and rationality are insufficient categories for understanding debates over religious symbols in public space.

7.1 Restrictions of the face veil: burqa and niqab

French, German, and Dutch legislatures have issued restrictions on the face veil, known as "burqa bans", yet legislative choices differ. France (as well as Belgium) introduced a full prohibition of the use of face veils in 2011 and, following years of litigation, the European Court of Human Rights (ECtHR) affirmed the laws based on its marginal scrutiny. However, proliferation of burqa bans across Western Europe followed the ECtHR's affirmation in 2014. Germany issued a partial ban in 2017 which addressed only state officials in specific public locations, as a blanket ban would contravene its Basic Law. In 2018, and after years of legal and political procedures, the Dutch Parliament voted in favour of a burqa ban in specific public spaces including court houses, public transport, hospitals, and schools. Despite the fact that various right-wing groups promote such restrictions, none of these laws technically came from amongst their ranks. This section looks at the argumentation that the eventual laws feature in each of the countries. It also discusses structural changes in legislative proposals in the Netherlands, for the reason that the burqa ban went through numerous unsuccessful legislative cycles. These cycles dynamically illustrate that politicians repeatedly tweaked the public order argument to survive scrutiny applied

by the Council of State. This is not simply an archival task; layers of argumentation show how seemingly neutral political and legal language explicitly obscures intolerant attitudes.

France issued burqa restrictions with regard to the general open and public space in (2010-2011). The letter of the law does not mention the burqa, the niqab, or even Islam by name. Article 1 employs seemingly neutral language when it says that no one is allowed to wear clothes that are designed to cover the face in the public space.[1] Article 2 further defines the public space as all spaces that are open to the general public as well as spaces that fulfil specific public functions.[2] The same article acknowledges exceptions for professional purposes, sports gear, and festive garments. Enforcement of the law rests in various provisions of criminal law, including ordinary fines of maximum €150.[3] However, the law sanctions domestic and social pressure to cover one's face on account of their sex with one year imprisonment and a maximum of €30,000 in fines; increased to two years and €60,000 if the subject is a child.[4] The law initially did not exclude places of worship from the concept of public space, and the *Conseil constitutionnel* ordered the law to be amended accordingly.[5]

The motivation of the law explicitly targeted the Islamic face veil and decried it as 'symbolic and dehumanising violence' and a rejection of the values that bind the nation together.[6] It stated that the interest of *vivre ensemble* or 'living together' renders

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[1] Article 1 Loi no. 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public. Santions in Code pénal, Article 225-4-10. Similar prohibitions apply in Belgium, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670&categorieLien=id (consulted 10 March 2020).

[2] Ibidem, Article 2.

[3] Ibidem, Article 3.

[4] Ibidem, Article 4.

[5] Décision No. 2010-613 DC Loi du 7 octobre 2010 interdisant la dissimulation du visage dans l'espace public, consideration no. 5.

[6] See Exposé des Motifs Loi no. 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, 'La dissimulation du visage dans l'espace public est porteuse d'une violence

state inaction unacceptable for reasons of gender equality, protection of republican values, and the social contract. Moreover, the motivation suggests that the notion of public order includes these dimensions: *'La défense de l'ordre public ne se limite pas à la préservation de la tranquillité, de la salubrité ou de la sécurité. Elle permet également de prohiber des comportements qui iraient directement à l'encontre de règles essentielles au contrat social républicain, qui fonde notre société'*.[7] Chapter six discusses the article on public order by former president of the *Conseil constitutionnel* (1998-2007) Pierre Mazeaud who argued that public order refers to order, security, public health, and public tranquillity, in line with the decisions of the ECtHR. The *Conseil constitutionnel*, however, did not refer to this understanding of public order in its decision. Rather, it included an observation that the principle of public order prohibits the use of rights to harm others and that women have equal rights to men.[8] Neither the legislature nor the *Conseil constitutionnel* made much effort to obscure the focus of the law on Muslim women who wear a face veil, despite the fact that the text of the law is religiously neutral and without reference to the female sex.

After several women were fined for transgressing the burqa ban, they brought their case to the attention of the ECtHR, known as the S.A.S. v. France case.[9] It seems that the Court may have struggled with its verdict on the matter. The Court painstakingly argued that a wide Margin of Appreciation applied, which gives space to European countries to pursue their own policies in the absence of sufficient legal convergence or harmonisation. It should be noted that the Margin of Appreciation

symbolique et déshumanisante (…)',
https://www.legifrance.gouv.fr/affichLoiPubliee.do?idDocument=JORFDOLE000022234691&type=expose&legislature=, (consulted 12 August 2019).

[7] Ibidem.

[8] Décision No. 2010-613 DC du 7 octobre 2010 Loi interdisant la dissimulation du visage dans l'espace public, consideration 3.

[9] ECtHR 1 July 2014, 43835/11 *(S.A.S. v. France)*, in conjunction with ECtHR 11 July 2017, 4619/12 *(Dakir v. Belgium)*; ECtHR 11 July 2017, 37798/13 *(Belcacemi and Oussar v. Belgium).*

applies with regard to the European Convention and the European Court, and that it is separate from the requirements that emerge internally from French law. Furthermore, the Court affirmed the notion of 'living together', as advanced by the French legislature. Although this notion of 'living together' appears to be idiosyncratic to the S.A.S. case, it has attracted critical appraisal. Legal scholar Illias Trispiotis questions its fairly wide potential to demanding 'conformity' of minorities to majoritarian preferences.[10] Myriam Hunter-Henin finds the doctrine 'unconvincing' and suggests simply employing the existing proportionality-test, which is part of the formal legal structure.[11] Trispiotis' argument about conformity is particularly interesting from the perspective of toleration; the issue of conformity is further discussed below.

The position of the European Court is particularly interesting because its verdict followed only months after the *Bayerischer Verwaltungsgericht* issued a thorough verdict on the niqab in the context of vocational education.[12] In 2013-2014, a vocational school in Regensburg revoked the admission of a student who refused to remove her niqab in the school, in accordance with the regional law. Her application included a photo in which she wore a hijab; however in the meantime she had begun wearing the niqab. The Court held that the state could prohibit the face veil in the particular context of public education according to Article 7:1 Basic Law.[13] It dismissed the applicant's argument that open communication would not be hindered by the face veil. The Court affirmed the importance of non-verbal communication like mimicry and gestures to open communication.[14] Moreover, the Court noted that, in this case, the student had

[10] Ilias Trispiotis, 'Two interpretations of "living together" in European human rights law', (2016), *Cambridge Law Journal,* Vol. 75, No. 3, pp. 580-607, p 606-607.

[11] Myriam C. Hunter-Henin, 'Living together in an age of religious diversity. Lessons from Baby Lou pand SAS', (2015), *Oxford Journal of Law and Religion,* Vol 4, No.1, pp. 94-118, p. 118.

[12] Bayerischer Verwaltungsgericht, 22 April 2014 – 7 CS 13.2592 (followed by the Verwaltungsgericht Osnabrück, 19 August 2016 – 1 B 81/16).

[13] Ibidem, §18-20.

[14] Ibidem, §21.

alternatives available to her, such as self-study and external exams, concluding she had no duty to attend school anymore.[15] Though this case offers a concrete approach to the importance of open communication, the European Court might have regarded the context as too different from the S.A.S. case, since it did not mention the German case at all. However, the choice to affirm the concept of 'living together' is not obvious, particularly because it leaves ample space to generalise social norms to the effect of public order. The openness of this concept could easily have problematic effects on consecutive cases, as the section on the French burkini cases demonstrates.

In 2018, the Netherlands issued a partial burqa ban with regards to schools, transport, hospitals, town houses, appealing to the importance of transparent communication. To this point, organisations could lay down rules in incidental codes of conduct. After Geert Wilders mentioned a possible general face veil ban in 2005, an advisory committee of legal experts under the leadership of professor Ben Vermeulen advised that a generalised partial ban required a foundation in law; that is, a law enacted through the national Parliament. In absence of this legal foundation, other regulations of face-dissimulating attire could enter into conflict with provisions regarding religious freedom in both the constitution and the European Convention.[16] At face value, the 2018 law provides the mandatory legal foundation for a partial prohibition. A narrow focus on the law as such would obscure alterations made to the formal motivation over a long period of time. Such dynamics are crucial to understanding of this law in its proper context, particularly because the prohibition was first designed as a criminal law.

In 2006-2007, Geert Wilders and Sietse Fritsma *(Partij voor Vrijheid en Democratie)* issued a first proposal to prohibit the burqa and niqab in public space through the

[15] Ibidem, §23.

[16] B.P. Vermeulen, J.P. Loof & B. Wegeling (eds.), 'Overwegingen bij een boerka verbod. Zienswijze van deskundigen inzake een verbod op gezichtsbedekkende kleding', The Hague, 3 November 2006, p. 5.

system of criminal law.[17] As a matter of interpretative technique, they did not qualify the burqa or niqab, nor the public space, other than that both must be interpreted in their broadest sense.[18] The proposal breathes negative sentiments towards Muslims in the *Schilderswijk*, a well-known migrant neighbourhood in The Hague.[19] The formal motivation listed three main reasons for the proposal, as follows: 1) the idea that burqa and niqab are diametrically opposed to modernity, as they express a rejection of Western core values, including equality of men and women; 2) the burqa and niqab hinder emancipation and integration of women in the Dutch society; 3) the allegation of safety risks, such as sentiments of unsafety that citizens might associate with the burqa or niqab and, secondarily, the fear that the use of the burqa in the 2005 London attacks would set a precedent.[20] Secondary arguments included that the law would discourage social pressure to wear a face veil, as well as the assertion that 'the problems' with regard to interpersonal communication would be solved.[21] For these reasons, Wilders and Fritsma asserted that the use of the burqa and niqab is 'completely undesirable'.[22]

The proposal failed, in part because of a unconventionally critical report on behalf of the Netherlands Council of State.[23] The Council of State observed that the assertion of the oppression of women was ill-founded and emphasised that, insofar as concrete problems existed, this law would not be an effective means of addressing these problems. Though the Council agreed on the importance and, to some extent, the legitimacy of open communication and safety requirements, the Council advised that the motivation was insufficient when compared with the fundamental interference with religious freedom that the law would cause. Moreover, the Council

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[17] Kamerstukken II 2006-2007, 31 108, no. 2, The Hague: Sdu 2007

[18] Kamerstukken II 2006-2007, 31 108, no. 3, The Hague, Sdu 2007.

[19] Ibidem.

[20] Ibidem.

[21] Ibidem.

[22] Ibidem, the original wording is 'volstrekt ongewenst'.

[23] Kamerstukken II 2006-2007, 31 108, no. 4, The Hague, Sdu 2007.

emphasised that the definition of public space was too casual.[24] In its reasoning, the Council largely followed the report by Vermeulen et alia from 2006. This report made two key observations: 1) that the limitation of constitutional religious freedom required a formal law (e.g. established through a Parliamentary process) and that delegation to decentralised bodies was only permitted with regard to the legitimate aims of public health, traffic, and public order;[25] 2) that the public order argument needed proper substantiation, including evidence of a concrete problem of public order besides reflections on the principles of proportionality and non-discrimination.[26] The report also judged the association of the burqa and the niqab with the oppression of women 'ill-founded'.[27]

In the following year 2007-2008 Kamp *(Volkspartij voor Vrijheid en Democratie)*, a liberal Member of Parliament, proposed a law similar to the proposal of Wilders and Fritsma, but in this instance regarding public buildings and open spaces.[28] Kamp cleansed the proposal from apparent discriminatory language, nevertheless he came up with essentially the same provision. Based on the *Refah Partisi* case, he argued that the Netherlands would have a wide Margin of Appreciation. He argued that the face veil hindered objective standards of safety, such as identification, surveillance, and facilitated robbery and even terrorism. In the context of criminality, he referred to the 2005 attacks in London and the "native example" of Willem Holleeder, a well-known criminal who allegedly covered his face in certain meetings to avoid identification.[29] Kamp secondarily argued that the principle of the separation of church and state would uphold the face veil, and even mis-cited the above Vermeulen report, alleging

[24] This concern led to an amendment in the proposal, see Kamerstukken II 2007-2008, 31 108, no. 5.

[25] Vermeulen, Loof & Wegeling, 'Overwegingen bij een boerka verbod', pp. 3, 37.

[26] Ibidem, pp. 6, 45, attachment no. IV.

[27] Ibidem, p. 15.

[28] Kamerstukken II 2007-2008, 31 331, no. 3.

[29] Ibidem.

that the face veil amounted to a "great social problem".[30] Its footnote leads to a section in the Vermeulen report saying that the social consternation about the face veil amounted to a 'problem of some size', but that no statistics are available to assess the number of women who veil their faces.[31] The compulsory report of the Council of State in response to Kamp's proposal has never been made public, which is probably indicative of its level of criticism.

In June 2012, demissionary Minister of Interior Affairs, Liesbeth Spies, sent a new legislative proposal to Parliament which the Council of State again met with significant criticism.[32] This new proposal argued that the face veil symbolised inequality.[33] It argued that the face veil prevented full social participation on behalf of women and that the state needed to intervene to protect public order; the actual balancing of interests consisted of weighing open communication against individual freedom.[34] Perhaps inspired by the French burqa ban, the motivation defined public space broadly and was inclusive of ordinary streets as well as specific functions of public life, such as train stations and shopping malls. The Council of State was highly critical of most of these arguments, either because they were insufficiently supported with evidence, a consequence of their conceptual impermissibility, or because they were of limited significance.[35] The Council reiterated that a *generic* prohibition is impermissible and that incidental and specific restrictions should be grounded in legally sound motivations.[36] The then Minister of Interior Affairs, Ronald Plasterk

[30] Ibidem, '… vormt een groot maatschappelijk probleem'.

[31] Vermeulen, Loof & Wegeling, 'Overwegingen bij een boerka verbod', pp. 12-13.

[32] Kamerstukken II 2011-2012, 33 165, no. 2; Kamerstukken II 2011-2012, 33 165, no. 3. Council of State advice in Kamerstukken II 2011-2012, 33 165, no. 4.

[33] Kamerstukken II 2011-2012, 33 165, no. 3.

[34] Ibidem.

[35] Kamerstukken II 2011-2012, 33 165, no. 4.

[36] Ibidem.

(Labour), retracted the proposal in December 2015, but only after issuing a new one in November 2015.[37]

This new proposal made it through both houses of Parliament, with the Senate voting in favour in June 2018.[38] The full opposition on the left voted against, including Plasterk's own Labour party. This new proposal entailed a partial prohibition and referred to particular public functions, such as public traffic, education, and healthcare. The motivation unsurprisingly invoked the argument of open communication. Of more interest is the Minister's tweak of argumentation regarding the notion of 'living together', as per the S.A.S. case. The Minister held that the pluralistic nature of Dutch society could only function if 'everyone' *(iedereen)* would participate and if everyone would share 'the basic principles' *(de basisprincipes)*.[39] The Minister, however, did not substantiate what these 'basic principles' would precisely entail, relying instead on the argument of open communication. The Minister argued that the limited understanding of public space amounted to a fair balancing of interests. Moreover, the proposal would not be discriminatory because of the use of neutral language.[40]

The tweaks did not convince the Council of State. The Council observed that the 'neutral' wording would not obscure the fact that the burqa and the niqab had been the explicit and direct reason to design the legislation.[41] The Council reiterated the absence of evidence of a concrete problem and noted that only few women actually wear the face veil. The Council observed that internal Codes of Conduct by civil institutions already enabled partial regulations so that a general prohibition pertaining to particular public functions would be unnecessary, if not symbolic. The Council dismissed any argument of harmonisation of existing codes, since no problems had been reported with the existing codes. Ironically, the Council included a note on the

[37] Kamerstukken II 2015-2016, 33 165, no. 6; Kamerstukken II 2015-2016, 34 349, no. 2

[38] Kamerstukken II 2015-2016, 34 349, no. 2; Kamerstukken II 2015-2016, 34 349, no. 3.

[39] Kamerstukken II 2015-2016, 34 349, no. 3.

[40] Ibidem.

[41] Kamerstukken II 2015-2016, 34 349, no. 4.

necessity of communication in dealing with diversity, hinting that incidental dialogue and internal Codes of Conduct addressed the matter of the face veil better than a generalised partial prohibition. Finally, the Council reiterated that, even though the European Court would consider the Margin of Appreciation to be wide, national legislation needed to be justified on the basis of national law as well as careful motivation.

The German government *(Bundesregierung)* issued a partial face veil ban in 2017, but only with regard to state officials in particular public spaces, such as national defence, police, and court houses.[42] The law followed only eleven days after the 2016 terrorist attack at the Berlin Christmas market.[43] The proposal appealed to the foundation of a relationship of trust and open communication between state officials and citizens, thus amounting to the proper functioning of the state.[44] The proposal secondarily invoked the imperative of religious and ideological neutrality on behalf of the state, which assumes neutrality would be compromised if an official covered their face.[45] Similar arguments occurred in later documents of the *Bundestag*.[46] In comparison with debates in the Dutch Parliament, it is significant that again parties on the 'left' were not supportive of this law. Opposition from *Die Linke* called the proposal blatant symbolic politics *(reine Symbolpolitik),* in addition to warning for social sentiments against the Muslim population in Germany.[47] The *Bündnis 90*/*Die Grünen* argued that the problem which this restriction targeted did not factually exist. They also accused the Christian democratic *CDU*/*CSU*/*SPD* government of issuing this regulation out of fear for populism.

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[42] Gesetz Jahrgang 2017, Teil I, No. 36, Bonn 14 June 2017.

[43] Bundesrat Gestzentwurf 788/16, 30 December 2016. The terrorist attack in question was carried out on 19 December 2016.

[44] Ibidem, p. 9.

[45] Ibidem, p. 1.

[46] Deutscher Bundestag, 18. Wahlperiode, 18/11180, 15 February 2017; Deutscher Bundestag, 18. Wahlperiode, 18/11813, 30 March 2017.

[47] Deutscher Bundestag, 18. Wahlperiode, 18/11813, 30 March 2017, p. 16.

Indeed, in February 2018, the right-wing populist movement and now political party *Alternative für Deutschland* (AfD) published a proposal for a general prohibition of the face veil in a broadly defined public space.[48] The motivation invoked the freedom of Muslim women and their right of self-determination, an argument that could sway either way. More significantly, the AfD asserted that Islam would be a discriminating ideology, contrary to the principle of *Menschenwürde* and defiant of European culture and its 'enlightened-democratic values'.[49] The motivation frames the burqa and niqab as the 'uniform' of both Salafism and Islamism and completely ignores any nuance of fundamental differences between the two. Similarly to the Dutch and French debates, they imported the idea of living together *(gesellschaftlichen Zusammenlebens),* which is again an explicit reference to the S.A.S. case from 2017. Other reasons include safety concerns, the matter of swift identification, and the effectiveness of video-surveillance, as in the Netherlands. To date, this proposal has not progressed further.

Legislative proposals about the face veil in France, the Netherlands, and Germany show that the national legal systems have an integrity of their own and that internal quality standards must be met. However, the echoes of the living together teleology spread widely, even as politicians and Ministers craft argumentation to fit the requirements of the law. Legislation on the face veil shows that popular sentiments about Muslim presence translate in tangible restrictions that are problematic for a number of reasons. First, because the *state* advances arguments about otherness, incompatibility of values, and gender equality that are poorly - if at all - based on evidence. It should not go unnoticed that clear political value-judgments are made (truth), concerns about visible otherness are expressed (visibility), an outward conformity is demanded (outward unity). Moreover, the thinly substantiated appeals to public order show that constitutional protection of minorities do not always protect

[48] Deutscher Bundestag, 19. Wahlperiode, 19/829, 21 Feburary 2018.

[49] Ibidem.

minorities from state intervention with their freedoms. The wanderings of the Dutch burqa ban show this in particular, because Parliament established the law without satisfying the requirements laid out in a handful of especially critical reports of the Council of State. Lastly, the implications of the othering and discriminatory arguments ring beyond the question of the face veil. Othering rhetoric is not limited to alleged 'extremities' of Islam, such as the burqa and niqab. As we will see below, similar arguments occur to the more mundane matter of headscarves and the so-called burkini.

7.2 Preventing terrorism on the beach: the French burkini cases[50]

In the wake of the Nice attack in the Summer of 2016, over thirty French mayors issued burkini bans with regard to public beaches.[51] Seemingly general and neutral language veiled rather blatant prejudice towards a group of Muslim women wearing modest swimwear known as the "burkini". Mayors have the authority to issue such restrictions on grounds of public order; however, these occur in local settings and perhaps unsurprisingly feature varying motivations. This section uses the Cannes and Villeneuve-Loubet decisions *(arrêtés)* as a starting point, because a group of human rights activists challenged this decision all the way up to the *Conseil d'État*. The mayor of Cannes forbade 'ostentatious religious attire', explicitly using the language of *laïcité* in the middle of the Summer.[52] According to media outlets, he clarified this concerned the burkini and jilbab only as signs of religious extremism, and did not include other

[50] Portions of this section have been published, Mariëtta D.C. van der Tol, 'Intolerance unveiled: Burkini bans across France', (2018), *Revue du droit des religions*, No. 6, pp. 139-149.

[51] The mayors represented a variety of political preferences.

[52] 'Une tenue de plage manifestant de manière ostentatoire une appartenance religieuse', in 'Burkini: le maire de Cannes interdit les vêtements religieux à la plage', *Le Monde*, 11 août 2016: http://www.lemonde.fr/societe/article/2016/08/11/le-maire-de-cannes-interdit-les-vetements-religieux-a-la-plage_4981587_3224.html (consulted 4 June 2018).

religious expressions, such as the kippah or a cross.[53] He further framed the decision in the context of good morality, *laïcité*, hygiene, and security rules.[54] The mayor of Villeneuve-Loubet similarly appealed to the public order principle, further motivating the restriction in the context of 'good morality', *laïcité*, 'hygiene', and 'security'.[55] Other mayors modelled their *arrêtés* in similar vein. Such motivations show the truer side of these regulations, such as tweaking the public order argument and apparently ill-founded appeals to public health and good morality.

Human rights activists unsuccessfully challenged the decisions at the *tribunal administratif* of Nice, and then appealed to the *Conseil d'État*, which actually suspended both decisions.[56] Following the verdict of the *Conseil*, all but one prohibition were suspended.[57] The *Conseil d'État* expressed profound concerns about the motivations behind these restrictions and called the Villeneuve-Loubet decision a grave and clearly illegal attack on fundamental liberties: *'une atteinte grave et manifestement illégale aux*

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[53] 'Le maire de Cannes interdit le port du burkini sur les plages', *Nice matin*, 11 août 2016, http://www.nicematin.com/faits-de-societe/le-maire-de-cannes-interdit-le-port-du-burkini-sur-les-plages-70612 (consulted 4 June 2018). 'Burkini: le maire de Cannes interdit les vêtements religieux à la plage'.

[54] 'L'accès aux plages et à la baignade est interdit […] à toute personne n'ayant pas une tenue correcte, respectueuse des bonnes mœurs et de la laïcité, respectant les règles d'hygiène et de sécurité des baignades adaptées au domaine public maritime', cited in 'Burkini: le maire de Cannes interdit les vêtements religieux à la plage'.

[55] Arrêté du 5 août 2016 du maire de la commune de Villeneuve-Loubet, portant règlement de police, de sécurité et d'exploitation des plages concédées par l'État à la commune de Villeneuve-Loubet, no. 2016-42 annule et remplace no. 2016-41, § 4.3.

[56] Tribunal Administratif de Nice, 13 août 2016, no. 1603470, § 6; Tribunal Administratif de Nice, 22 août 2016, no. 1603508, 1603523, § 8.

[57] The Sisco *arrêté* was issued in response to a riot that had occurred on the beach: Arrêté du 16 août 2016 du maire de la commune de Sisco, 'Considérant que les tenues vestimentaires religieuses ostentatoires peuvent être source de conflit grave […]'. The Tribunal Administratif of Bastia upheld the Sisco ban on the ground of public order, Tribunal Administratif de Bastia, 26 janv. 2017, no. 600976, 1600980, § 5.

libertés fondamentales'.[58] The *Conseil* observed that arguments of public order must be grounded in tangible threats to public order and clarified that mere fear was insufficient to a prohibition that gravely affects the fundamental freedoms of citizens.[59] The *Conseil* dismissed other concerns, such as hygiene and decency, as irrelevant as well as unconnected to the principle of public order.[60] This verdict not only corrected local misapplication of the law, it also reproved the decision of the *tribunal administratif* of Nice, which had affirmed that the burkini was a sign of more than religion alone and that the burkini could pose a risk to public order.[61]

The cases attracted mass media and provoked some high ranking politicians to speak out on the matter. Shortly after the decision of the *Conseil d'État,* Prime Minister Manual Valls posted a long note on his personal Facebook-page.[62] This note exerted many of the arguments that the *Conseil d'État* had just ruled against. Valls argued that the burkini debates encompassed a 'fight' of cultural and political dimensions, maintaining that the burkini would be a political sign. He argued that it represented restrictions that would be imposed on certain Muslim women: *'Il n'y a pas de liberté qui enferme les femmes!'*. Moreover, he called for a modernisation of Islam and a political

[58] Conseil d'État, ordonnance, 26 août 2016, no. 402742, 402777, § 6.

[59] Ibidem, § 6: 'En l'absence de tels risques, l'émotion et les inquiétudes résultant des attentats terroristes, et notamment de celui commis à Nice le 14 juillet dernier, ne sauraient suffire à justifier légalement la mesure d'interdiction contestée', and 'L'arrêté litigieux a ainsi porté une atteinte grave et manifestement illégale aux libertés fondamentales que sont la liberté d'aller et venir, la liberté de conscience et la liberté personnelle'.

[60] Ibidem, § 6: 'Dans ces conditions, le maire ne pouvait, sans excéder ses pouvoirs de police, édicter des dispositions qui interdisent l'accès à la plage et la baignade alors qu'elles ne reposent ni sur des risques avérés de troubles à l'ordre public ni, par ailleurs, sur des motifs d'hygiène ou de décence.

[61] Tribunal Administratif de Nice, 13 août 2016, no. 1603470, § 6; Tribunal Administratif de Nice, 22 août 2016, no. 1603508, 1603523, § 8.

[62] Facebook post by Manual Valls, 26 Aug. 2016: https://www.facebook.com/notes/manuel-valls/assumons-le-d%C3%A9bat-sur-le-burkini/1125932284153781/ (consulted 4 June 2018).

Islam that would be compatible with republican values, in particular with *laïcité*.[63] President Hollande similarly expressed that the burkini was incompatible with French values, although he also warned against provocation and stigmatization of Muslim minorities.[64] Such expressions could be understood as potentially undermining the decision of the *Conseil d'État*. This attitude was indeed mirrored in the desire of a number of local authorities to nevertheless enforce their measure, as well as in new attempts to issue the burkini bans veiled in slightly altered language.

In 2013, before the burkini controversy in France, the highest German court explicitly affirmed use of 'burkinis' in the context of obligatory swimming lessons organised by public schools. The Court affirmed the accommodation of the burkini for reasons of integration and development of group processes.[65] Since catering to minors is fundamentally different in schools, compared with the open space, and is typically adjudicated more strictly, this explicit affirmation is very significant. The European Court took a similar approach in the *Osmanoğlu and Kocabaş v. Switzerland* case in 2017.[66] The Court affirmed the use of the burkini by Muslim schoolgirls and ruled that no exemption from sports classes needed to be granted on the basis of religious freedom. In these cases, the highest German Court and the European Court signalled a somewhat positive evaluation of the burkini; that is, the burkini can contribute to integration in certain settings. These judicial attitudes show that one-dimensional

[63] According to *The Guardian*, A. Chrisafis, 'French PM supports local bans on burkinis', 18 August 2016, https://www.theguardian.com/world/2016/aug/17/french-pm-supports-local-bans-burkinis (consulted 4 June 2018).

[64] According to France24, K. Chhor, 'Both sides of burkini debate cite French commitment to secularism', 3 Sept. 2016, http://www.france24.com/en/20160831-france-commitment-secularism-burkini-ban-debate-laicite (consulted 4 June 2018).

[65] Bundesverfassungsgericht, 11 September 2013 – 6 C 25.12, similar approach to regional court Hessischer Verwaltungshof, 28 September 2012 – 7 A 1590/12.

[66] ECtHR 10 February 2017, 29086/12 *(Osmanoğlu and Kocabaş v. Switzerland)*.

interpretation of the burkini as a symbol of fundamentalism and alleged incompatibility with democratic values is, at least in law, unwarranted.

Akin to the discussion about the burkini is the discussion about sports hijabs. In 2014, the Court of The Hague adjudicated a claim of discrimination after an interconfessional school prohibited the use of sports hijabs in Physical Exercise classes.[67] The school in question had temporarily permitted the use of sports hijabs, but decided to prohibit these for safety-reasons. The school did not, however, base its safety argument on any evidence that the sports hijab was unsafe. Instead, the school argued that it was not in a position to judge the safety and had decided to prohibit all uses of the hijab in Physical Exercise classes. The Court ruled that a general prohibition was unsuitable to guarantee pupils' safety and that the school should have explored alternatives. It is important to notice that the element of religious conviction was not necessarily part of the proceedings, but rather, the mere question of proportionality of aims and means. Several Dutch and German cases actually focus on this question of proportionality in relation to religious freedom; indeed, German and Dutch courts indicate that general prohibitions are difficult to justify and that they will scrutinise proportionality related content in particular.

7.3 Regulating the ordinary: hijabs and other religious attire

A similar logic on proportionality features in labour cases, such as incidental prohibitions of the hijab and other religious attire. In 2017, the *Verwaltungsgericht Frankfurt am Main* adjudicated a case involving a law clerk of the *Landgericht Frankfurt am Main (Rechtsrefendar)* who declined to remove her covering from her hair and neck.[68] Her employer sent her a notice about dress restrictions, which specifically mentioned that a headscarf was not permitted because of the imperative of outward neutrality of the Court. The Court held that a restriction of religious freedom needed to be grounded in a formal law; moreover, it stated that a law clerk is not actually

[67] Rechtbank Den Haag, no. 3498889 – 14-30774, 15 October 2014.

[68] Verwaltungsgericht Frankfurt, 12 April 2017, 9-L 1298/17.F *(Rechtsreferendariat mit Kopftuch)*.

bound by the same abstract requirement of neutrality as judges are. The Court decided that in the absence of tangible problems, the prohibition was not proportionate. In 2015, the *Bezirksamt Neukölln von Berlin* ruled that the conflict of the neutrality principle and personal freedom required case-specific solutions to satisfy the requirement of proportionality.[69] The verdict included the observation that a headscarf could be permitted to a law clerk; in this case, someone who was temporarily detached in the context of judicial training. The Court ruled that the women involved would not carry out any tasks with direct external effect.

A similar case occurred in 2016 in the Netherlands. The Court of Rotterdam and an external law clerk entered into conflict over the permissibility of the headscarf. The Court held that the headscarf itself was not the issue, but that its symbolisation of Islam was: the Court argued that such a 'visible and recognisable sign of personal conviction' was incompatible with clerking.[70] The Court appealed to its neutrality code, as well as to a letter of the Minister of Justice to Parliament. The *College voor de Rechten van de Mens,* the Dutch national Human Rights Committee which issues authoritative, yet non-binding decisions, held that an external law clerk was not actually part of the judicial branch of the state. As a result, the requirement of impartiality and independence applied differently, compared to the role of judges. The *College* advised that the motivation of the decision to prohibit the headscarf was insufficient and that it excluded a large group of scarf-wearing Muslim women from training and working with the Court.

The question of impartiality was at stake in a case over head covering and the Dutch police in 2017. In contrast to Canada and Scotland, where specially designed hijabs were introduced and integrated with the required police uniform, Dutch and French authorities were dismissive of the very idea. In 2017, the *College voor de Rechten van de Mens* dealt with a complaint by a female police officer who wished to wear a

[69] Bezirksamt Neukölln von Berlin, 10 June 2015 *(Muslimin, Refendariat, Kopftuch)*.

[70] College voor de Rechten van de Mens, 26 May 2016, 2016-45.

hijab at work.[71] Her work involved administrative duties without face-to-face contact with external clients. The internal dress code expected police officers to remove all symbols of religious or political conviction in order to guarantee a neutral, impersonal, and uniform appearance of the police. This rule applied to officers both in uniform and in civilian attire. The *College* judged that this dress code amounted to indirect and unjustified discrimination. It found fault with the application of the principle of subsidiarity as well as proportionality, because the woman worked in an administrative capacity, did not issue decisions, and did not encounter external people in her work. The college thus considered risk of a partial appearance minimal.

A slightly more ambiguous case concerned the dress code of an Amsterdam-based transport company in 2009-2010.[72] The company allows the hijab and includes an optional hijab with the uniform. A Christian employee raised a complaint because he wanted to display a cross, resting on his chest, over his uniform. A change in dress code forbade necklaces of any kind over a uniform and the company suggested rings or bracelets instead. The regional court of Amsterdam concluded that this code entailed indirect discrimination, but that the aim of professional appearance was justified. Moreover, the Court held that the company did not need to assess the religious meaning of necklaces. Sometimes courts do require a greater effort on behalf of employers. In 2014 a woman, who received help from the municipality of Roosendaal to find appropriate work, could not take up a particular position because the company dress code demanded trousers.[73] The woman in question always wore skirts for religious reasons (this is fairly common in some regions in the Netherlands) and had done similar work in a skirt before. On allegation of non-cooperation, the municipality lowered her benefits. However, the court faulted the local authorities for not documenting the facts of the case as well as failing to enter into a discussion about the kind of work that would be suitable for this woman.

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[71] College voor de Rechten van de Mens, 20 November 2017, 2017-135.

[72] Gerechtshof Amsterdam, 15 June 2010, BM7410.

[73] Rechtbank Zeeland-West-Brabant, 16 December 2014, AWB 14-4065.

In a 2017, a hospital employee complained about a code that forbade her from wearing long sleeves, which she wanted to do for religious reasons. Though the hospital legitimately seeks to guarantee hygiene standards, the Dutch court judged that the proportionality principle requires the employer to make accommodations.[74] The Court found that the board should investigate in other solutions to accommodate the employee's religious claim. A German case concerning an employee of a confessional hospital fared differently, where a hospital overseen by the *Evangelische Kirche* was allowed to forbid its employees from wearing a headscarf.[75] The difference between these cases is, in part, warranted by the fact that the Dutch hospital technically is part of the civil service, whereas the German hospital concerned a confessional institution.

A decision by the European Court of Justice (ECJ) of 2017 clarified that it would not unreservedly affirm blanket bans on religious attire and that national courts should investigate whether or not a restriction is grounded in a specific professional requirement. The ECJ delivered guidance in the much anticipated ruling *G4S Secure Solutions* and *Bougnauoi* in March 2017. The Court ruled that restrictions of headscarves could potentially be justified, but it prescribed a systematic and contextual approach regarding existing law. Although it dismissed the argument of direct discrimination in this case, it agreed that occupational requirements could discriminate indirectly, particularly regarding Muslim employees.[76] Such indirect discrimination might be justified if answerable to legitimate aims, such as relationships with clients and/or neutrality. Importantly, mere unease of clients was dismissed as a legally permissible argument; moreover, the Court prescribed a case to case review to determine the necessity and proportionality of imposed restrictions.

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[74] Rechtbank Midden-Nederland, 4 September 2017, UTR 17/2796.

[75] Bundesarbeitsgericht 24 September 2014 – 5 AZR 611/12.

[76] European Court of Justice, 14 March 2017, C-157-15 *(G4S Secure Solutions),* C-188/15 *(Bougnaoui and ADDH v. Micropole Univers).*

7.4 Conclusion

Though these cases are different in many respects, some common threads can be discerned. Whereas the normative bias was perhaps not difficult to detect in the case of the niqab, burqa, and burkini, prejudice can sometimes occur in more seemingly neutral ways and can affect the quality with which the various interests are balanced. It would also be a mistake to understand arguments about the niqab, burqa, burkini, or headscarf as idiosyncratic to Islam. The way in which politicians and even governments frame Islam as other, disloyal, threatening to the social order, at least in this chapter, can affect any religion that offers an alternative narrative of the relationship between territory, people, and common destiny. The cases presented here give a strong indication that the question of visibility is pertinent to debates over religious freedom. The closing paragraphs revisit the legal requirements to an intervention with religious freedom and discuss them from the perspective of toleration and constitutionalisation of basic liberties. The main questions are thus: 1) is there a concrete problem? and, if so, does the problem amount to a pressing need to regulate?; 2) if a regulation exists, does it directly or indirectly affect religious freedom?; 3) is there a legitimate aim?; 4) is the proposed solution the only possible or satisfying solution?; and 5) is the proposed regulation proportionate?

First, is there a problem and if so, does this problem amount to a pressing need to regulate? The definition of a problem ought not to be a matter of political tweaking. The cases on the face veil indicate that problems are sometimes 'found' after the suggestion of a regulation has been made and that problems tend to be exaggerated. However, the legal requirement of a tangible problem is foundational to the constitutional and democratic order. It seems that mere unease does not cover the ground of a problem; neither does an 'immaterial dimension' to the notion of a problem. The above cases on the face veil show that bias and reliance on value-judgments shaped the perception of a deemed problem. This is at the least suspicious, if not impermissible from a constitutional perspective. Moreover, it resembles the

dimensions to toleration of truth and common good. For the state, casting others as existing in conflict with the democratic perception the good life, and categorising their values as clearly wrong, is an instance of toleration *pur sang*.

A second question arises as to whether a regulation actually restricts with a religious freedom. Not all allegations of an interference with religious freedom are justified. An example is the recent litigation in the Netherlands about the *Pastafarian* or *Church of the Flying Spaghetti Monster* conviction. Intended as a parody on religion, some of its adherents like to wear a colander on their heads. In 2018, the Dutch Council of State judged that, according to 'the current state of affairs', the request to use a photo with the colander on a national identity card and driver's license fell outside the scope of religious freedom.[77] The Council judged that according to 'the current state of affairs' this was not the case for a lack of seriousness and cohesion. In line with German jurisprudence it quoted in its decision, it pointed out that the freedom of opinion and expression thereof was more appropriate for this case.[78] The decision did not preclude, however, future inclusion of *Pastafarianism.* It is not substantially contested that official evaluation of the scope of the definition of religion has its problematic sides, particularly when the state is both adjudicator of the definition of religion and the regulator of religious freedom at the same time.

Once the threshold of religion is taken, not every expression thereof is automatically covered under the religious freedom provisions of the law. When an expression is indeed covered under the law, courts evaluate whether there is a direct or indirect impact on this freedom. For some, this distinction might appear to be a legal technicality, but it is this very distinction that often hides behind seemingly neutral language. When a state regulation discriminates directly, it explicitly targets a specific religion or expression thereof and this is typically fiercely scrutinised by courts.

[77] Raad van State 15 August 2018, 201707148/1/A3.

[78] Oberlandesgericht Brandenburg, 2 August 2017 – 4 U 84/16; Bunderverfassungsgericht, 11 October 2018 – 1984/17.

Indirect discrimination occurs when a seemingly neutral regulation has an undue impact on a specific minority, which could be a religious community, or groups or individuals within religious communities. This type of discrimination is also strictly scrutinised as it is fundamentally no less problematic. There are many border cases, of which the burkini debate is a good example: the legal documents employ generalised language, whereas state officials declare to explicitly target particular expressions of religion.

Third, the language of toleration is perhaps most likely to appear in justifications of an intervention with religious freedom. The justification is part of a threefold test: legitimate aim, subsidiarity, and proportionality. With regards to a legitimate aim, it is important to stress that these are included in the human rights provisions in national constitutions, as well as European and international human rights documents. These aims are formally scripted, such as public hygiene, safety, and/or traffic, to the exclusion of other aims. Particularly worrying is the influence of the concept 'living together'. This concept is a French legal concept and does not constitute a legitimate aim in Germany, the Netherlands, or many other European countries. The implications of this concept could be significant, particularly since it practically marries social norms into the public order argument. That is not permissible in either Germany or the Netherlands, and question is to what extent shall it uphold French policies towards Muslim minorities in the future. The scrutiny of public order arguments tends to be strict. The above cases give the impression that the French *Conseil d'État,* the Dutch Council of State, and the German and Dutch courts take this scrutiny seriously. The ECtHR earlier affirmed a strict scrutiny of public order arguments, considering a general prohibition of religious symbols illegitimate in the absence of a concrete threat to public order.[79] It is clear that any alleged threat to public order needs to be tangible and concrete.

Fourth is the question of subsidiarity. This principle demands that a regulation is weighed against other alternatives that might have a lesser impact on religious

[79] ECtHR 23 February 2010, 41135/98 *(Ahmet Arslan and others v. Turkey).*

freedom. Reasonable alternatives are sometimes available. The Dutch debate on the partial restriction of the face veil shows that incidental Codes of Conduct could do more justice to the situation at a grassroots level than generic national legislation would. In this case, it appears that national legislation was the result of a particular political strategy, rather than an effective measure against a tangible problem. Another example is the discussion on the hijab and the uniform or the sports hijab. In both cases there is a legitimate interest in a certain appearance, be it appropriate in the police force or in a gymnastics hall. It is interesting that sports hijabs and police hijabs are introduced in some countries, whereas others declare it completely unacceptable. It raises the question of political will more than anything else to accommodate a particular individual need.

Fifth is the principle of proportionality, which requires a considerate balancing of interests involved. To use the example of the police uniform and the hijab: in the case of the Dutch police administrator, the arguments advanced with regards to her function turned out to be mostly irrelevant. Similar questions raised with regards to law clerks show that courts differentiate between the type of impartiality and neutrality demanded from different types of state officials. The latter implies that not one and equal neutrality and impartiality is indeed demanded from state officials *en bloc,* but that regulations must be appropriate within their particular context. This is an important lesson from these cases, particularly because so many debates do not move beyond generalised statements about church and state, or about the role of religion in society. Moreover, the aforementioned cases almost unequivocally state the casuistic nature of restrictions of religious freedom. In most cases, a general restriction based on a conceptual notion of neutrality is dismissed in favour of the protection of the needs of an individual or simply the demands of a specific job description, such as in the G4S case.

In conclusion, the law provides a scripted rationale for the protection of the manifestation of religion in open, public space. This rationale applies not only to retrospective judicial scrutiny, but also to a constructive political substantiation of

motivation for legislation that restricts the visibility of religious symbols in public space. It is encouraging to see that courts take a strict approach to the scrutiny of political motivations to restrictions of religious freedom; however, a wide Margin of Appreciation on behalf of the European Convention incidentally encourages politicians to seize the discretionary freedom towards political opportunism, such as in the case of the Dutch burqa ban. However, the legal protections really offer a bottom-line of protection. Given the gravity of interference with religious freedom in several of the above cases, it is of concern that legislatures struggle to meet those minimum requirements and that criticism of advisory bodies, and sometimes even correction by courts, are not taken seriously enough in the legislative procedure.

8. Conclusion

The visibility of religion in public space is crucial to both toleration and religious freedom. Toleration emerged in conjugation with the political imaginary of the *corpus christianum,* which expressed a oneness of territory, people, and teleology, and which justified the marginalisation of normatively othered religious minorities in a period of rapid social, political, and religious disintegration. The nation state, with its integration of state, nation, and cultural formation, operates as a counterpart of the *corpus christianum.* Its political imaginary rests on the idea of the nation, and transformed religious othering into a continuum of othering with regards to religion, origin, and race. This othering is expressed in contemporary contention over the meaning and use of public space. In France, Germany, and the Netherlands, political and legal conflict over religious diversity, in particular the expression of Muslim identities, concentrates on the visibility of otherness in public space. The instrumentalization of constitutional law in these politics of diversity demonstrates that the law is not immune to othering and intolerance. The notion of public order in particular, which functions as a gatekeeper of religious freedom, is vulnerable to the inclusion of social norms, and may thus obstruct the effective protection of the religious freedom of minorities.

This conclusion reflects on four implications of this study: 1) the relationship between religious diversity and public space; 2) the relationship between public space and the political imaginary of the nation; 3) the vulnerability of the notion of public order to political intolerance; and 4) the imperative and impossibility of neutrality.

8.1 The relationship between religious diversity and public space

The notion of a neutral public space is not natural to French, German, or Dutch formations of toleration and religious freedom. France only developed *laïcité* from the start of the twentieth century. This *laïcité* did not initially refer to neutrality in public

space, but only to impartiality and independence of certain public institutions from the Roman Catholic Church. Processes of constitutionalisation in the Netherlands and Germany do not demonstrate a commitment to a neutral public space either. Instead, they also imposed a range of restrictions on Catholic, Protestant, and Jewish communities, much in the image of toleration. In the Netherlands, restrictions on Catholic processions remained in place until 1983. Several religious communities met these restrictions with spiritual revival, deliberate expression of religion in public space, as well as political activism. Germany and the Netherlands both developed more accommodative political and legal approaches to religious diversity in direct conversation with these social tensions.

From the mid-twentieth century, the idea of secularisation as privatisation gained traction over secularisation as differentiation. This traction was entwined with the secularisation thesis, e.g. the anticipation of the decline of religious in public and personal life. This secularisation as privatisation is colloquially synonymous with the separation of church and state, and in this capacity, it gives rise to the idea that it justifies the mitigation of visibility of religious diversity in public space. This is ironical historically, because visibility in public space expressed toleration, and exclusion from this space signified the most restrictive form of toleration before violent repression. Moreover, common frames of reference to toleration appear in relation to this neutralisation of public space – especially outward unity, public order, and trust. This normative understanding of the privatisation of religion is of course not synonymous to the separation of church and state; moreover, privatisation does not rest on a rational justification, and the separation of church and state primarily refers to the mutual independence of state and ecclesiastcal institutions.

The idea of privatisation of religion with reference to public space is thus historically profoundly problematic. However, this is not only the case with religious diversity. It is no coincidence that the emancipation of women, people of colour, and sexual minorities materialised through participation in public space as well as representation and visibility in key functions of society. Inclusion and visibility of

otherness creates space that is crucial to encounter of differences and to cultural transcendences. Exclusion from the public space, on the other hand, historically symbolises normative othering. Its elimination from cultural transcendences signifies judgment, namely, that this otherness takes no part in the future of the political community, and is only "tolerated" for the purposes of eventual integration. Current political tensions over the visibility of religious diversity might not fully assume these connotations of toleration; however, the relationship between public space and the political imaginary of the nation equally hinges on othering that in the context of nationalism functions normatively.

8.2 The relationship between public space and the political imaginary of the nation

The concept of public space shapes and depends on the political imaginary of the nation. The notion of the nation emerged over against religious as well as social and political fragmentation and symbolised a unity of the political community in early constitutions. However, the integration of state, nation, and culture – foreshadowed in the Peace of Westphalia – transformed religious otherness into a continuum of otherness with reference to religion, race, and origin. This continuum implies differentiation in minoritisation to the extent that the experience of minority Catholics, Jews, and Muslims should not be generalised on account of religion or race only, or even origin. Although citizenship has become dependent on naturalisation and integration, the construction of this otherness for political purposes is much more fluid and adaptable to particular issues. Moreover, where this othering with respect to religion, race, and origin becomes normative, it constructs not only various types of othering, on the flipside, it also constructs various types of superiority.

This continuum of religion, race, and origin implies that a focus on integration and outward conformity ultimately fails to address the question of belonging. Standardisation of language, moderation of religious distinctives, and participation in cultural traditions of the nation may facilitate assimilation of newcomers, it does not alter the relationship of a given minority with respect to origin and race. Nineteenth-

century Arabs went underground, and many Jews dissimulated their identity and adopted Christian practices, which effectuated a measure of outward conformity. However, none of this could actually undo the barrier to belonging that nationhood created. Today, allochthonous religious communities still face this insurmountable othering, especially as this othering is amplified in the context of conservative and right-wing politics. This provokes the question if it is possible to articulate a more inclusive notion of the nation, or "the people", and can this be done without narrowing the fringes of belonging?

8.3 Public order as the mediator of diversity

The integration of state, nation, and cultural formation impacts on the concept of public order and makes it vulnerable to the inclusion of social norms to the disadvantage of religious minorities. The principle of public order is an important mediator of diversity because it protects the religious freedom as well as other constitutional rights of minorities as well as legitimises state intervention with these rights and freedoms. The legal notion of public order is diffuse, however, key aspects include security, safety, legal certainty, and public health. This thesis argues that three distinctions that are vital to the interest of the protection of minorities: the distinction between legal norms and social norms, the distinction between structural and individual dimensions to public order, and the difference between legitimate and illegitimate arguments of public order. The progressive inclusion of social norms into arguments of public order, especially mediated through the notion of "living together" makes constitutional law extremely vulnerable to intolerance, and because of that, forms a potential threat to religious freedom.

The distinction between legal norms and social norms means that not all social norms can legitimately inform the concept of public order. French, German, and Dutch law do make this distinction, however, under the influence on the "living together" doctrine, this distinction has become less pronounced. Further, the distinction between structural and individual dimensions to public order pertains to the generalisability of

the law. Legislation on the expression of Muslim identity in public space violated this principle. Overly-general language that obviously aims at Muslim identity, or, long lists of exceptions to the definition of face covering, testifies to this violation. Lastly, the distinction between legitimate and illegitimate arguments of public order refers to the substantiation of a concrete threat to public order. For example, the relatively low number of Muslim women who wear a face veil in these countries as well as the absence of a concrete threat to public order in its classical understanding, make these legal restrictions extremely problematic. This provokes further questions about the operationalisation of public order as a legal concept. Is this notion inherently obstructing the effective protection of minorities or does it only need a stricter definition?

8.4 The imperative and impossibility of neutrality

Constitutionalism did not engender neutrality. Rather, constitutionalisation recalibrated the legal frameworks in which social, political, and religious fragmentation needed to be contained. Constitutionalisation was not only a break-away from absolutism and denominational dominance, it also preserved a concern over truth and a common good. However, constitutionalism still emerged from within a largely Christian framework and operated under the assumption that it was possible to reunite the Christian factions. Its structures continue to disadvantage non-Christian minorities compared to Christian minorities in the nation state. Constitutionalism technically never aimed at neutrality, but rather relied on a principle of impartiality and assumed that Members of Parliament would speak on behalf of the nation and not on behalf of partisan interests. Impartiality recognises relevant differences, but also assumes a relative measure of oneness which render these differences secondary. Neutrality is primarily ethical, impartiality is by definition relational.

This is important to the concept of neutrality as non-consideration. This type of neutrality verges on secularisation as privatisation, also making religious differences secondary to a unified public cause. Narratives of neutrality that affirm the

privatisation of belief might thus reinforce cultural marginalisation as a result of privatisation, and it defies the importance of relationality. If toleration indeed expressed concern over the inclusion of minorities in public space, cultural formation, common identity, and articulations of the common good; perhaps conflicts over religious freedom ought not to negate those very dimensions of belonging. Today, the most significant threats to this inclusion arise from nationalism and the traction it has gained across the political spectrum. These threats materialise in law and have a real impact on the lives of minorities. Such threats are not incidental, and though legal scrutiny tends to focus on particular issues and cases, it is crucial to understand these against the backdrop of waves of intolerance and the legal and political structures that facilitate intolerance.

Tolerance and intolerance are often hidden in concrete situations, historically and contemporarily, and sometimes they are clothed in constitutionalism. It is in this intersection of intolerance with constitutionalism that political and constitutional theory needs a stronger awareness of legacies of toleration. Political and constitutional theorists need to develop a robust notion of a complex common good which is primarily relational rather than ethical, and which gives an account of the complexity of contemporary society. The notion of public order similarly warrants reflections on the structures in the law that support racism, religious intolerance, gender inequality, and xenophobia; especially as the definition of public order has a direct impact on the possibilities to restrict religious freedom for other than classically permitted reasons. These conversations and reflections are equally not beholden to political and constitutional theorists only; these conversations will be enriched by a structural engagement with sociologists, historians, theologians, anthropologists, and others.

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