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The Impossibility of Neutrality? How Courts Engage with the Neutrality Argument

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The principle of state neutrality vis-à-vis religion and belief is contested and illusive. Some scholars even label it an impossible principle. Nevertheless, the meanings and functions assigned to neutrality are often determinative of, among others, the scope of the right to manifest one's religion in public institutions. Focusing on recent developments in Europe, this paper makes two claims: one conceptual, the other doctrinal. The conceptual claim is that neutrality can be deployed either as a shield to protect freedom of religion and belief or as a sword to strike religious claims down. Given that lawmakers and policymakers are increasingly relying on the second function of neutrality, the paper goes on to evaluate how the courts have responded. The doctrinal claim of the paper is that courts can engage – and have engaged – with the neutrality argument in three ways: (1) through deference to other interpreters of neutrality; (2) through substantive interpretation of the neutrality principle; and (3) through circumvention of the neutrality argument. The paper suggests that the third approach may well be preferable.

The constitutional principle of state neutrality vis-à-vis religion and belief (henceforth: neutrality principle) is contested and illusive. Neutrality even has all the markings of an essentially contested concept, as attested to by the persistent and fundamental disagreement over its interpretation.[1] As Anna Su puts it, there is "never-ending debate on what neutrality means";[2] and, one can safely add, on what it requires. Given the uncertainty surrounding the neutrality principle, it should come as no surprise that scholars of law and religion often point towards the sheer impossibility of state neutrality on matters of religion and belief. Benjamin Berger, for instance, argues that

> the cogency of a duty of state neutrality floats on a naïve confidence in the divisibility of "matters involving" religion and those of a civic nature. […] [But the] state's inescapable adoption of positions on [matters of public policy] will [inevitably] involve position-taking on matters of deep religious interest.[3]

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[1] See Walter Bryce Gallie's definition of essentially contested concepts as those that "inevitably involve endless disputes about their proper uses on the part of their users". Walter Bryce Gallie, as cited in David Collier et al, 'Essentially Contested Concepts: Debates and Applications' (2006) 11 *Journal of Political Ideologies* 211, 214.

[2] Anna Su, 'Transformative State Neutrality' (2019) *Supreme Court Law Review*.

[3] Benjamin L Berger, 'Freedom of Religion' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds) *The Oxford Handbook of the Canadian Constitution* (OUP 2017) 755, 751.

Despite this alleged impossibility of neutrality, the concept is often determinative – in both constitutional theory and practice – of the room for freedom of religion and belief in constitutional democracies. This is reflected in a series of developments that prompted the writing of this paper.

First, in 2017 a Belgian politician from a mainstream political party floated a proposal, in the media, for a general ban on the wearing of "bigger and visible" religious symbols in the entire public sphere in Europe. The envisaged ban would, however, only apply to religions that represent more than 5% of the population (read: the ban would apply to Muslims in Belgium, but not to Jews or Sikhs).[4] Although the proposal was swiftly repudiated by his own party, the fact that it was floated in the first place – and not by a member of an extreme or fringe party – is indicative of the overall context in which the neutrality debate takes place. This is a climate that is either latently or openly hostile to certain religious minorities.

Second, in 2019 the coalition agreement of the Flemish government for the legislative period of 2019-2024 repeatedly referenced the need for legislation to ban, in the name of neutrality, the wearing of religious and philosophical symbols in public schools – for teachers and pupils – as well as for all civil servants who are in contact with the public.[5] The legislative intention of the Flemish government is reminiscent of existing legislation in France and in Berlin.[6] When lawmakers enact such legislation, they deploy neutrality as a sword to limit freedom of religion, whereas the principle's primary function is arguably that of a shield to protect religion and belief. In the Belgian case, the need for legislation was ultimately shelved in the wake of government-friendly rulings by the courts on headscarf bans in public schools. This indicates that the courts, as well, can play a central role in steering the neutrality debate.

Third, in a well-known series of judgments, both the Court of Justice of the EU (CJEU) and the European Court of Human Right (ECtHR) have exercised restraint in key freedom of religion cases, in response to arguments from neutrality. Particularly striking in these cases, which are discussed below, is the (relative) deference shown by supranational courts to national or even private understandings of the neutrality principle. The supranational cases thus illustrate how powerful arguments from neutrality can be, when invoked before the courts.

Fourth, and final, in 2020 the Belgian Constitutional Court delivered its eagerly awaited judgment on what is in essence a headscarf ban – although neutrally worded – in a higher education institution in Brussels. In its judgment, the Constitutional Court concludes that the ban does not violate students' freedom of religion, nor their right to education. A central

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[4] Simon Andries, 'Bogaert (CD&V) pleit voor algemeen hoofddoekenverbod' *De Standaard* (18 December 2017), available at https://www.standaard.be/cnt/dmf20171218_03249614 (last consulted 29 August 2022).

[5] Coalition agreement of the Flemish government (2019-2024), available at https://publicaties.vlaanderen.be/view-file/31741 (last consulted 29 August 2022).

[6] Loi No. 2004-228 encadrant, en application du principe de laïcité, le port de signes ou tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (15 March 2004); Gesetz zu Artikel 29 der Verfassung von Berlin (27 January 2005), commonly known as the Berlin Neutrality Law. For discussion, see respectively [reference omitted for review purposes]; Armin Langer, 'The Protestant Spirit of the Berlin Neutrality Law: An Old-New Kulturkampf against Religious Minorities in the Public Sphere' (2022) 45 *German Studies Review* 283-305.

component of the Court's reasoning is its deferral to the understanding of the neutrality principle adopted by the legislature and, more immediately, by the college itself. This judgment signals how national courts can also be reluctant to engage with the neutrality argument, up to the point where a constitutional court surrenders its power to provide an authoritative interpretation of a constitutional principle to other actors; and effectively rubberstamps a 'headscarf ban' for adult students.

To understand how these developments have come about, and what they tell us about the role of the neutrality principle in delineating the scope for the right to manifest one's religious freedom in public institutions, we need to think deeply about the functions and meanings of neutrality. This paper aims to contribute to this ongoing debate, not by discussing or critiquing the neutrality principle as such, but by identifying how neutrality can be discursively deployed by state actors and by evaluating how the neutrality argument is approached by the courts.

Throughout the paper, two main claims are made: one conceptual, the other doctrinal. The conceptual claim is that neutrality can be deployed in one of two ways: either as a shield to protect freedom of religion and belief or as a sword to strike religious claims down. In light of increased reliance by lawmakers and policymakers in Europe on the second function of neutrality, it is imperative to also evaluate how the courts have responded. The doctrinal claim of the paper thus relates to how courts have engaged with the neutrality argument; that is, the argument that certain limitations on freedom of religion are necessary to safeguard neutrality. Confronted with this argument from neutrality, courts have responded in three ways: (1) through deference to other interpreters of neutrality; (2) through substantive interpretation of the neutrality principle; and (3) through circumvention of the neutrality argument. These doctrinal approaches are unpacked and discussed throughout the paper.

The structure of the paper is as follows. Section I positions neutrality as an essentially contested concept, the upshot being that neutrality can be assigned multiple functions and meanings. Depending on the function chosen and the meaning emphasized, neutrality can serve to either protect freedom of religion and belief or to limit it. This dual function of neutrality – as a shield or as a sword – is unpacked in Section I as well. Section II builds on the conceptual argument by analysing three doctrinal approaches, adopted by different courts, to instances in which neutrality is deployed as a sword to strike religious claims down. The focus of the analysis is on the case law of the ECtHR, the CJEU, the German Constitutional Court, the Belgian Constitutional Court and the Belgian Council of State, always in relation to the right to manifest one's religion in public institutions (and in private corporations for the CJEU). Section III concludes by suggesting which doctrinal approach might be best.

I. THE MULTIPLE FUNCTIONS OF NEUTRALITY

I.A. Neutrality as an Essentially Contested Concept

In both constitutional theory and practice, there is normative "contestation at the core" about the content and implications of neutrality.[7] As Anna Su puts it, pointing towards the existence of conceptual indeterminacy, there is "never-ending debate on what neutrality means".[8] Yet the debate is not confined to the conceptual. It extends to the normative, in the sense that disputes about the meaning of neutrality are inherently linked to normative disagreement about its implications. The debate cannot, in other words, be reduced to mere conceptual confusion.[9] Instead, there is profound contestation over what neutrality means **and** requires.[10]

Neutrality, in other words, is an essentially contested concept. As Jeremy Waldron explains, a key characteristic of an essentially contested concept is "people advancing and defending (and criticizing and modifying) rival conceptions of the concept".[11] Seemingly irresolvable disagreements arise, Waldron argues, from "a sense that somewhere in the midst of this contestation there is an important ideal that social and political systems should aspire to".[12] Those engaged in contestation are thus attempting to advance the best account of what an ideal requires.

This is precisely what occurs in ongoing debates over neutrality in many liberal democracies in Europe. Participants in these debates agree that neutrality has some role to play in identifying the proper relationship between state and religion. But they disagree on what that role is; or should be. The disagreement arises precisely because the meanings and functions of neutrality are contested and illusive. This does not mean, however, that the debate is stuck in a loop. As Walter Bryce Gallie anticipated when he first introduced the notion of "essentially contested concept", one benefit of contestation could be "a marked raising of the level of quality of arguments in the disputes of the contestant parties".[13]

We can arguably observe this beneficial impact of contestation in political theory, more so than in constitutional law.[14] In political theory, not only have rival conceptions of neutrality been put forward, but also – and importantly – some of these have been rejected in favour of more feasible or defensible conceptions, as a direct result of contestation about the proper meaning and function of neutrality. Neutrality of outcome (or impact), in particular, is now

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[7] Jeremy Waldron, 'Is the Rule of Law and Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137, 149-150.

[8] Su (n 2).

[9] See John Gray, 'On Liberty, Liberalism and Essential Contestability' (1978) 8 *British Journal of Political Science* 385, 395 ("what makes a concept essentially contested […] is that disputes about its proper applications cannot be resolved by an appeal to the canons of logic or by recourse to stipulative or lexical definition.").

[10] Collier et al (n 1) 212 ("Beyond this question of conceptual confusion, another issue must be addressed, i.e. conceptual contestation. The strong normative valence associated with some concepts, often combined with other considerations, motivates users to strongly prefer a particular meaning."; emphasis in original removed).

[11] Waldron (n 7) 150 (emphasis in original removed).

[12] Ibid 150-151.

[13] Gallie, as cited in Collier et al (n 1) 220.

[14] The discussion in the text is inevitably cursory.

generally regarded as an impossible standard to achieve, given that liberal states inevitably adopt policies and legislation that impact on citizens' ability to follow their conception of the good (or to see their conception of the good followed by others). Laws on abortion, euthanasia and same-sex marriage are obvious examples. Given the impossibility of neutrality of outcome, most liberal political theorists favour neutrality as justification. In essence, justificatory neutrality entails that the liberal state cannot rely on reasons derived from a comprehensive conception of the good in justifying the adoption of policies and legislation. The liberal state ought to be neutral, in the sense that its policies and legislation should be based on public reason (per John Rawls) or reasons that respect citizens' ethical independence (per Ronald Dworkin), not on reasons that imply the superiority of one comprehensive conception of the good over others (for instance 'militant secularism' or Christian theology).[15]

The debate in liberal political theory is continuously refined by the introduction of new conceptions of neutrality.[16] All prominent conceptions of neutrality moreover remain subject to intense critique, both internal and external.[17] One such critic, Cécile Laborde, has recently suggested that, to the extent that religion and non-religion are not rival goods,[18] "neutrality becomes evanescent the closer we get to hard cases of religious recognition and accommodation".[19] With these hard cases, we enter the domain of the law. Legal scholars, just as political theorists, have proposed different conceptions (or typologies) of neutrality.[20] They have done so primarily to explain or critique how courts adjudicate cases concerning the relationship between religion and state.[21] Depending on how a typology is deployed, this can lead to claims of incoherence or the opposite: findings of coherence. Julie Ringelheim, for instance, has argued that the European Court of Human Rights makes incoherent use of three different conceptions of neutrality in its case law on religious freedom: 'neutrality as absence of coercion', 'neutrality as absence of preference', and 'neutrality as exclusion of religion from

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[15] John Rawls, *Political Liberalism* (Columbia University Press 2005); Cécile Laborde, 'Liberal Neutrality, Religion, and the Good' in Jean L Cohen and Cécile Laborde (eds), *Religion, Secularism, and Constitutional Democracy* (Columbia University Press 2016) 249-272 (discussing Ronald Dworkin's *Religion Without God*).

[16] See for instance Alan Patten's "neutrality of treatment". For discussion, see Cécile Laborde, 'The Evanescence of Neutrality' (2018) 46 *Political Theory* 99, 99 (explaining that on Patten's conception of neutrality as neutrality of treatment, "[t]he state maintains neutrality between rival conceptions when, relative to an appropriate baseline, its policies are equally accommodating of those conceptions"). The upshot is that Patten's theory allegedly improves upon justificatory neutrality, in that it "can explain why some intuitively non-neutral policy, such as religious establishment, is wrong even though it can be justified neutrally" (ibid).

[17] See, for instance, Laborde (n 15) (for an internal critique of Dworkin's version of justificatory neutrality); Laborde (n 16) (for an external critique of Patten's neutrality of treatment).

[18] Laborde (n 16) 104.

[19] Ibid 99. Laborde argues that "[s]ubstantive liberal ideals such as rights to health care, gender equality, fairness in the distribution of costs, and freedom of religion do all the work", not neutrality. See ibid 104.

[20] See also, apart from the typologies discussed in the text, the typology proposed by Sébastien Van Drooghenbroeck, 'Les transformations du concept de neutralité de l'Etat: Quelques réflections provocatrices' in Julie Ringelheim (ed), *Le droit et la diversité culturelle* (Bruylant 2011) 75-120.

[21] Additionally, they tend to express a preference for a specific conception. See Julie Ringelheim, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' (2017) 6 *Oxford Journal of Law and Religion* 46-47 (expressing a preference for neutrality as absence of preference "as this approach best protects the rights and principles of the [European] Convention [on Human Rights]").

the public sphere'.[22] Anna Su has subsequently added a fourth conception to Ringelheim's typology: 'transformative neutrality'.[23] Su argues that adding this conception to the mix can assist us in understanding how seemingly inconsistent court rulings in United States and Canadian constitutional law are, in fact, part of a coherent approach to the relationship between religion and state.[24]

These enterprises – of constructing typologies of neutrality in constitutional and human rights law – are certainly valuable. Similar to what occurs in political theory, they can raise the quality of the debate in law. At the very least, they equip us with a more refined conceptual framework to work with in identifying the implications of diverging understandings of neutrality for, among others, the right to manifest one's religion or belief.

In this paper, I aim to contribute to gaining an even deeper understanding of the role of neutrality in resolving hard cases on the place of religion in liberal democracies. I will do so, not by introducing another typology of different conceptions of neutrality to what is already a colourful mix, but by identifying two – different and seemingly opposing – functions of neutrality to afterwards analyse how courts engage with the neutrality argument in hard cases on religious dress (or what should have been hard cases).[25]

I.B. Neutrality: Shield or Sword?

In constitutional law, as well as in law and religion, the primary function of the neutrality principle is generally understood to be that of a shield, in that it aims to ensure equal protection of all religious and non-religious beliefs that co-exist in a pluralistic democracy. Neutrality performs this shielding function by requiring that the state "neither favours nor hinders any particular religious belief, that is, […] shows respect for all postures towards religion, including that of having no religious beliefs".[26] As a shield, the neutrality principle aims to protect *other* constitutional ends, such as freedom and equality, by blocking certain state actions, for instance the granting of preferential treatment to one religion over all others and over non-religion.

As Richard Moon explains, neutrality protects these other constitutional ends in two senses. On the one hand, "[t]he requirement that the state remain neutral in religious matters precludes [it] from favouring or supporting a religious practice", thereby shielding non-

[22] Ibid.
[23] Su (n 2) 10.
[24] Ibid 10-11.
[25] The analysis focuses on religious symbols, since the concept of neutrality is particularly prominent in the legal (and political) debate thereon.
[26] Supreme Court of Canada, *S.L. and D.J. v Commission scolaire des Chênes* 2012 SCC 7, para. 32. See similarly Constitutional Court of Germany, 1 BvR 1087/91, 16 May 1995 (holding that the Basic Law imposes a duty of religious and ideological neutrality upon the state, "bar[ring] the introduction of legal forms of establishment of religion and forbid[ing] the privileging of particular confessions or the exclusion of those of other beliefs"); Constitutional Court of Belgium 15 March 2011, no 40/2011, para B.9.5 (finding that, in the context of education, "[t]he neutrality the government must strive for at the philosophical, ideological and religious level […] forbids it from disadvantaging, advantaging or imposing philosophical, ideological or religious conceptions." (my translation).

adherents from coercion, discrimination or expressive harm.[27] On the other hand, neutrality "also precludes the state from restricting religious practices in the absence of a compelling public interest".[28] An important question, however, then emerges: what happens to the second sense in which neutrality acts as a shield when the principle of neutrality **itself** is invoked by governments as the compelling public interest to justify restrictions on freedom of religion?

In Belgium, to take just one European state that follows this pattern, neutrality is increasingly invoked in precisely this manner: to justify restrictions on the freedom to manifest one's religion, in particular for religious minorities. Consider bans on covering the face in public, which target the niqab and burqa; bans on religious and philosophical dress for civil servants in public institutions, which primarily target the hijab; bans on religious and philosophical dress for pupils and teachers in public schools, which also primarily target the hijab; and bans on full-body swimming gear, which primarily – and sometimes explicitly – target the 'burkini'. In relation to several (though not all) of these bans, the neutrality principle is actively deployed not to *restrict* state action, but to *justify* it.

In such contexts, which are increasingly common across Europe, the shielding function of neutrality arguably breaks down. When neutrality is routinely invoked as the justification for bans on religious dress, it no longer acts as a shield to protect religious freedom. Instead, it becomes the sword that is used to strike religious claims down. In conceptual terms, neutrality can thus perform two different – and seemingly opposite – functions: that of a shield and that of a sword. This duality creates challenges for courts, especially when judges are called upon to adjudicate cases in which state actors invoke the neutrality argument **against** freedom of religion and belief. As will become clear in the next section, courts can respond – and have responded – in three different ways to this argument from neutrality.

II. DIFFERENT JUDICIAL APPROACHES TO THE NEUTRALITY ARGUMENT

When courts are confronted with the argument from neutrality, invoked by legislators or other state actors to justify restrictions of religious freedom, they can adopt one of three different approaches. Courts can engage in their own substantive interpretation of the neutrality principle. They can defer to the understanding of neutrality by the (domestic) legislator or even a private corporation. Or they can circumvent the neutrality argument altogether and decide the case on other grounds. These doctrinal approaches – of substantive interpretation, deference and circumvention – are discussed in the remainder of the paper, albeit in a slightly different order. It should be noted that the analysis that follows is not intended to be comparative in nature. Rather, its aim is to illustrate different judicial approaches to the neutrality argument. The focus is on cases related to religious dress and particular attention is paid to recent prominent cases.

[27] Richard Moon, 'Freedom of Religion under the Charter of Rights: The Limits of State Neutrality' (2012) 45 *UBC Law Review* 497, 524.
[28] Ibid.

II.A. Deference to National Authorities at Europe's Highest Courts

Deference entails a refusal to provide a substantive interpretation of the neutrality principle in the adjudicating of cases that revolve around the requirements and implications of neutrality in a constitutional democracy. Instead, the interpretation of the principle is left to other actors. Deference is the favoured doctrinal approach to neutrality of Europe's highest courts: the ECtHR and CJEU. Both courts defer, to different degrees, to state actors (ECtHR) or to private corporations (CJEU) in the determination of what neutrality means and requires.

In relation to religious dress, this has given rise to two prominent – and at first glance difficult to reconcile – phenomena. On the one hand, the ECtHR has given states the liberty to retain religious displays in public buildings, provided that no indoctrination occurs.[29] On the other hand, the ECtHR and CJEU have granted broad leeway not only to states but also to private corporations to restrict the wearing of religious dress, even in the absence of indoctrination.[30] I return to this seeming contradiction below.

Let us first consider the case law of the ECtHR in more detail. Although it is common ground that all states in Europe are under a duty of "ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs",[31] the European Convention on Human Rights does not contain anything resembling an Establishment Clause. There are, moreover, important institutional differences between, say, the Supreme Court of the United States and the ECtHR. As a constitutional court, the former has the power (or responsibility) to interpret and develop constitutional norms and principles, including the First Amendment to the United States Constitution. As a regional court supervising the implementation of a treaty, by contrast, the ECtHR lacks a similar constitutional mandate, instead taking on a subsidiary role in the protection of human rights.[32]

The Court's subsidiary role[33] in the ECHR system follows from the fact that the primary duty to respect and protect the Convention's human rights pertains to the 46 Contracting States.[34] In fulfilling their human rights duties, these states often have leeway, the size of which

[29] *Lautsi v Italy* [2011] ECHR 2412.

[30] *Leyla Şahin v Turkey* [2005] ECHR 819; *Dahlab v Switzerland* (adm.) [2001] ECHR 899; *Ebrahimian v France* [2015] ECHR 104; Case C-157/15 *Achbita v G4S Secure Solutions* [2017] EUECJ C-157/15.

[31] See, for instance, *Lautsi* (n 29), para 60.

[32] See Malcolm Evans and Peter Petkoff, 'Marginal Neutrality - Neutrality and the Margin of Appreciation in the Jurisprudence of the European Court of Human Rights' in Jeroen Temperman et al (eds), *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Brill 2019) 128, 144.

[33] See, for instance, *Hamidović v Bosnia and Herzegovina* [2017] ECHR 1101, para 38 ("It is important to emphasise the fundamentally subsidiary role of the Convention mechanism."). On subsidiarity in the context of the ECHR, as applied to religious freedom, see Eva Brems and Jogchum Vrielink, 'Floors or Ceilings: European Supranational Courts and their Authority in Human Rights Matters' in Koen Lemmens, Stephan Parmentier and Louise Reyntjens, *Human Rights with a Human Touch: Liber amicorum Paul Lemmens* (Intersentia 2019) 271-302; Stephanie E Berry, 'Avoiding Scrutiny? The Margin of Appreciation and Religious Freedom' in Jeroen Temperman et al (eds), *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Brill 2019) 103-127.

[34] See article 1 of Protocol 15 to the ECHR: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this

depends on the breadth of the margin of appreciation granted by the Court in relation to a particular matter.[35] Concomitant to the breadth of the margin of appreciation, the supervision exercised by the ECtHR is either more deferential or more stringent.

On issues pertaining to the separation of religion and state, including the interpretation of the neutrality principle,[36] the Court generally grants states a wide margin of appreciation.[37] This goes hand in hand with deferential review in Strasbourg. A primary reason as to why the ECtHR adopts a deferential stance, instead of developing its own interpretation of the meaning and implications of neutrality within the Convention system, relates to the lack of consensus in Europe on the relationship between religion and state.[38] Given this lack of a European consensus, the Court ordinarily leaves the interpretation of the neutrality principles as well as the determination of its implications, to the states.

As is well known, when a unanimous Chamber of the ECtHR deviated from this pattern to impose a uniform rule on the display of crucifixes in public schools in Europe, it was met with political backlash. In the (in)famous *Lautsi* case, the Chamber had ruled that display of the crucifix, "a powerful external symbol",[39] was "incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education."[40] *Lautsi* was subsequently referred to the Grand Chamber of the Court, where no fewer than ten States intervened on behalf of Italy. Eight of those States lamented that "the Chamber's reasoning had been based on a misunderstanding of the concept of 'neutrality', which the Chamber had

Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

[35] On the margin of appreciation, see Petr Agha (ed), *Human Rights between Law and Politics: The Margin of Appreciation in Post-National Contexts* (Hart 2017). The Court for instance narrows the margin of appreciation in cases of political speech and discrimination on the basis of nationality or race (among other factors). It for instance grants a wide margin of appreciation in cases pertaining to economic policy and clashes of rights.

[36] For discussion of the role of the margin of appreciation in other areas of the Court's religious freedom case law, see Berry (n 33).

[37] See, for instance, *Şahin* (n 30), para 109 ("Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance [...] This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially [...] in view of the diversity of the approaches taken by national authorities on the issue.").

[38] Ibid. See also Ringelheim (n 21) 25; Andrea Pin, '(European) Stars or (American) Stripes: Are the European Court of Human Rights' Neutrality and the Supreme Court's Wall of Separation One and the Same?' (2011) 85 *St. John's Law Review* 627, 639-640. For a critique on the use of consensus reasoning in this area, see Berry (n 32) 107-119.

[39] *Lautsi v Italy* [2009] ECHR 1901, para 54.

[40] Ibid, para 57. See also ibid, para 56 ("The Court cannot see how the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism which is essential for the preservation of 'democratic society'").

confused with 'secularism'".[41] In other words, the Chamber was accused of having imposed a sectarian view of the relationship between religion and state on the whole of Europe.[42]

Responsive to the criticism of the Chamber judgment, the Grand Chamber switched to a doctrinal mode of deference. It held that "the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State".[43] The Grand Chamber acknowledged that displaying crucifixes in public schools confer "preponderant visibility" to the majority religion.[44] Although this would have generated an establishment concern in other contexts, the Grand Chamber did not consider it problematic in terms of the Convention's human rights,[45] given that Italy did not pursue an aim of indoctrination.[46]

Well before the *Lautsi* saga unfolded, however, the ECtHR had already adopted a similar deferential approach to restrictions, imposed in the name of secularism and neutrality, on the right of individuals to wear religious dress in public institutions (the Islamic headscarf, in particular).[47] Over the past couple of decades, the Court has consistently deferred to governments in evaluating bans on the wearing of religious dress, whenever the government has relied on an argument from neutrality. The ECtHR has upheld bans for pupils and teachers in public schools,[48] for students and professors at universities,[49] and for employees in the public sector in general.[50] In all cases, the government's invocation of secularism and neutrality

[41] *Lautsi* (n 29), para 47.

[42] See also concurring opinion of Judge Bonello in ibid ("The Convention has given this Court the remit to enforce freedom of religion and of conscience, but has not empowered it to bully States into secularism or to coerce countries into schemes of religious neutrality.").

[43] *Lautsi* (n 29), para 70 (adding that "the fact that there is no European consensus on the question of the presence of religious symbols in State schools [...] speaks in favour of that approach").

[44] Ibid, para 71

[45] See Dominic McGoldrick, 'Religious Rights and the Margin of Appreciation' in Petr Agha (ed) *Human Rights between Law and Politics: The Margin of Appreciation in Post-National Contexts* (Hart 2017) 145, 150 ("Many [...] approaches [to the relationship between religion and state in Europe] could reasonably be described as endorsement or preference for religion, but, short of being coercive, they can survive a Convention challenge.").

[46] *Lautsi* (n 29), para 62 (holding that indoctrination is "the limit that the States must not exceed").

[47] For in depth discussion of these cases, see among others Ringelheim (n 21), Dominic McGoldrick, 'Religious Symbols and State Regulation: Assessing the Strategic Role of the European Court of Human Rights' in Jeroen Temperman et al (eds) *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years Since Kokkinakis* (Brill 2019) 335-366 (both with further references).

[48] *Dahlab* (n 30); *Aktas v France* App no 43563/08 (ECtHR 30 June 2009); ECtHR, *Kose and 93 Others v Turkey* [2006] ECHR 1175.

[49] *Şahin* (n 30); *Kurtulmuş v Turkey* [2006] ECHR 1169.

[50] *Ebrahimian* (n 30) (the applicant, a social worker in a public hospital, was dismissed for wearing a headscarf).

sufficed to justify the ban.[51] Importantly, moreover, in *none* of these cases was there any concrete evidence of indoctrination or other pressures exerted by the claimants.[52]

This pattern of cases has led Judge O'Leary, a current Vice-President of the ECtHR, to express her concerns over the ease with which the Court accepts that the abstract principles of neutrality and secularism justify interference with the right to manifest one's religion.[53] Judge O'Leary has noted, in particular, that

> [w]hen it comes to the Chamber's assessment of proportionality [in *Ebrahimian v France*] the abstract nature of the principles relied on to defeat the right under Article 9 tended also to render abstract this assessment. The risk is therefore that any measure taken in the name of the principle of secularism-neutrality and which does not exceed a State's margin of appreciation – itself very wide because what are in issue are choices of society – will be Convention compatible.

Indeed, the absence of a proper proportionality assessment, prompted by the state's invocation of the argument from neutrality in cases on the manifestation of religion,[54] is characteristic of a deferential approach to neutrality. It leads to a pattern in which courts effectively rubberstamp bans, including at the national level (see II.B. *infra*).

The risk to which Judge O'Leary refers is moreover attended by seeming (though not genuine) contradictions in the case law of the Court. From the Court's case law, it transpires that putting up religious displays only breaches the state's duty of neutrality when indoctrination occurs. At the same time, however, the Court allows that same state to restrict the wearing of religious dress in the name of neutrality, even in the absence of indoctrination. Both propositions may seem difficult to reconcile. When considered from an institutional perspective, however, they are coherent. Because the ECtHR adopts a deferential approach to

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[51] See, for instance, *Aktas* (n 48) para 2 ("Elle [that is, the Court] constate en effet que l'interdiction de tous les signes religieux ostensibles dans les écoles, collèges et lycées publics a été motivée uniquement par la sauvegarde du principe constitutionnel de laïcité [...] compte tenu de la marge d'appréciation qu'il convient de laisser aux Etats dans ce domaine, la Cour conclut que l'ingérence litigieuse était justifiée dans son principe et proportionnée à l'objectif visé"); *Ebrahimian* (n 29) paras 63 and 65 ("The principle of secularism [...] and the resultant principle of neutrality in public services, were the arguments used against the applicant [...] France has reconciled the principle of the neutrality of the public authorities with religious freedom [which falls within its] large margin of appreciation").

[52] See Ringelheim (n 21) 39. The Court acknowledges this explicitly in *Ebrahimian* (n 30) at para 62; and *Dahlab* (n 29) (no paragraph numbers available).

[53] *Ebrahimian* (n 30), partly concurring and partly dissenting opinion of Judge O'Leary.

[54] Contrast *Lachiri v Belgium* [2018] ECHR 727. *Lachiri* is one of the few cases in which the respondent government did not rely on an argument from neutrality to justify the ban on religious dress at issue. Instead, it argued that the ban – which applied in courtrooms, including for parties to proceedings – was necessary to safeguard public order in the courtroom. *Lachiri* is also the only case on the wearing of religious dress in public institutions in which the ECtHR has found a violation of Article 9 ECHR (thus far). The nature of the legitimate aim invoked by the government played a central role in this finding. Crucially, the Court found a violation because the government had failed to show in what sense the applicant had posed a threat to public order in the courtroom. For itself, the Court moreover found no evidence whatsoever in the case file that the applicant would have posed such a threat. Whenever a government invokes the argument from neutrality, by contrast, the Court does *not* require the government to demonstrate that the applicant posed a threat to neutrality. Instead, the threat is (it seems) simply assumed to exist. Contrasting *Lachiri* with other cases thus confirms the strength of the argument from neutrality and how easily it leads to a deferential assessment by the ECtHR.

the question of neutrality, so as to not interfere in constitutional matters on the relationship between religion and state, European states are more or less free to regulate religious displays and religious dress as they see fit.

On this point, the approach of the CJEU under EU law is somewhat different, although the Luxembourg Court has arrived at similar conclusions.[55] Because its purpose differs from that of the ECHR system, EU law does more than provide minimum standards, a floor above which States have leeway (expressed in terms of the margin of appreciation in the ECHR system). Instead, in various domains of EU law, the goal is harmonization: the construction of a uniform ceiling that is binding on all Member States. Nonetheless, the CJEU has also adopted a doctrinal mode of deference in the face of arguments from neutrality in discrimination cases, given that this is not an area in which the EU pursues a goal of full harmonisation.[56]

An important difference between both supranational courts is that whereas the ECtHR defers to states, the CJEU defers to private corporations. As is well-known, in *Achbita v G4S* the CJEU ruled that a corporation's "wish to project an image of neutrality towards customers" as part of its freedom to conduct a business,[57] could justify dismissal of a Muslim employee who wanted to wear a headscarf.[58] The CJEU introduced a double limitation to the effect that, first, the neutrality policy should be "genuinely pursued in a consistent and systematic manner"[59] and, second, should in principle "only [cover] workers who interact with customers".[60] But within these bounds, the Court ultimately defers to a corporation's interpretation of what neutrality means and requires. As commentators have noted, this is not a straightforward ruling to adopt, given that it dramatically expands the reach of neutrality from the sphere of public institutions where it normally resides to that of private businesses.[61]

The reasoning in *Achbita* was confirmed, by and large, in the Court's recent *Wabe and Müller* ruling. In this joint case, the CJEU recalled that non-neutrally worded bans on religious dress constitute direct discrimination on the basis of religion or belief within the meaning of Article 2(2)(a) of Directive 2000/78.[62] This is logical, since such bans themselves breach the neutrality principle, in that they either treat different religions differently or treat religion

[55] For discussion, see Brems and Vrielink (n 33).

[56] See CJEU *IX v Wabe* and *MH Müller Handels GmbH v MJ* [2021] EUECJ C-804/18 and C-341/19, para. 89.

[57] *Achbita* (n 30) para 38. On this point, *Achbita* can be usefully contrasted to the *Eweida* judgment of the ECtHR, in which that Court does not treat British Airways' desire to project a certain corporate image as a fundamental right. See ECtHR, *Eweida v the United Kingdom* [2013] ECHR 37, para 94 ("On one side of the scales was Ms Eweida's desire to manifest her religious belief. As previously noted, this is a fundamental right: [...] On the other side of the scales was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight."). Note, however, that contrary to G4S in *Achbita*, British Airways did not aim to project an image of neutrality. See Elke Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf Bans? *Achbita* and *Bougnaoui*' (2018) 55 *Common Market Law Review* 589, 617.

[58] For in depth discussion of the case, see Cloots (n 57); Zoe Adams and John Adenitire, 'Ideological Neutrality in the Workplace' (2018) 81 *The Modern Law Review* 337-360; Brems and Vrielink (n 32).

[59] *Achbita* (n 30) para 40.

[60] Ibid, para 42.

[61] See Brems and Vrielink (n 33) 295.

[62] *Wabe and Müller* (n 56) para 73.

differently from non-religion. In *Wabe and Müller*, the CJEU further clarified that the more common situation of a neutrally worded ban remains subject to similar – even if somewhat more refined – limitations as those introduced in *Achbita*. In particular, a ban that is applicable to all religious, political and ideological symbols

> may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, provided, first, that that policy meets a genuine need on the part of that employer, which it is for that employer to demonstrate, taking into consideration, inter alia, the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out; secondly, that that difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner; and, thirdly, that the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.[63]

The second requirement – that the neutrality policy be pursued in a consistent and systematic matter – is identical to the analogous requirement originally set out in *Achbita*. The first and third requirement, by contrast, seem to provide further refinements or clarifications of the *Achbita* criteria. First, the CJEU is now clear that it is for the employer to demonstrate that a ban is genuinely necessary, for instance to prevent social conflicts or to present a neutral image of the employer vis-à-vis customers.[64] This clarifies the allocation of the burden of proof in the proportionality test, which could – in theory – render it more difficult for employers to justify a ban.[65]

This difficulty is, however, offset by the second clarification, namely that an employer can demonstrate the need for a ban in relation to a number of interests, including the legitimate wishes of customers or users.[66] This is a striking addition to (or clarification of) the *Achbita*-requirements, since an analogous desire to comply with the wishes of customers – albeit it in a different context – was found to constitute direct discrimination on the basis of race or ethnic origin in *Feryn*.[67] The CJEU however distinguishes that case from *Wabe and Müller* by indicating that the wishes of the customers were illegitimate in *Feryn*, whereas they could be legitimate in relation to bans on religious and other dress (this is for the national judge to determine).[68] Since the legitimate wishes of customers can now be grounds for a ban, it may actually become (even) easier for employers to show the need for a ban, for instance by referring to complaints or mere questions by customers about specific employees.[69]

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[63] Ibid, para 70.

[64] Ibid, para 76.

[65] Erica Howard, 'Headscarves and the CJEU: Protecting Fundamental Rights and Pandering to Prejudice, the CJEU Does Both' (2022) 29 *Maastricht Journal of European and Comparative Law* 245, 255-256.

[66] *Wabe and Müller* (n 56) para 70.

[67] Case C-54/07 *Centrum voor gelijkheid van kansen v Firma Feryn NV* [2008] EUECJ C-54/07.

[68] *Wabe and Müller* (n 56) para 66. For criticism, see Howard (n 64) 256 (doubting whether both situations can genuinely be distinguished from one another).

[69] See also Howard (n 65) 257 (noting that "the CJEU allows employers to pander to the prejudices of these customers").

Third and final, the Court's finding that the ban must be "strictly necessary having regard to the actual scale and severity of the adverse consequences" for the employer,[70] creates more leeway for national judges to genuinely balance the impact of a ban on freedom of religion with the alleged impact of the absence of a ban on the freedom to conduct a business. Whether the affected employees are in contact with customers or other employees is likely to remain an important factor in that assessment, although the CJEU is less clear on this point in *Wabe and Müller* than it was in *Achbita*.[71] At the same time, in a marked improvement over the confusion caused by *Achbita*,[72] the CJEU has clarified in *Wabe and Müller* that it remains open to national law, including constitutional norms, to impose more stringent requirements before a difference of treatment indirectly based on religion or belief could be justified.[73] As will become clear below, the Constitutional Court of Germany imposes precisely such more stringent requirements, albeit in the public rather than the private sector (see II.C. *infra*).

To sum up, both of Europe's highest courts have adopted a doctrinal approach based on deference to the argument from neutrality. The ECtHR and CJEU readily accept neutrality as a justification for 'headscarf bans' in a wide range of public and (semi-)private settings, without putting up too many hurdles (CJEU) or even none at all (ECtHR). This deferential approach benefits the state and (by and large) corporations who wish to introduce bans on religious dress in the name of neutrality.

When it comes to regulating religious dress, it is thus difficult to avoid the conclusion that Europe's highest courts are more than willing to allow states and private corporations to brandish neutrality as a sword against (non-)religious claims,[74] while being unwilling to themselves wield neutrality as a shield to protect religious freedom.[75] As a result, (alleged) victims of rights-restrictions are left with very little or no recourse at the supranational level.[76] This lack of an 'effective remedy' at the supranational level makes doctrinal approaches to neutrality at the national level even more important. As the case law of the Belgian Constitutional Court shows, however, national courts may simply continue the deferential trend.

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[70] *Wabe and Müller* (n 56) para 70.

[71] Contrast ibid, paras 63 and 77 with *Achbita* (n 30), paras 41 and 43.

[72] See, for instance, Jessica Giles, 'Neutrality in the Business Sphere—An Encroachment on Rights Protection and State Sovereignty?' (2018) 7 *Oxford Journal of Law and Religion* 339, 344 (commenting on *Achbita* as follows: "The effect of the uniform application of the judgment is that a business can force compliance with its policy of neutrality in a country which does not necessarily have a laic form of government or constitutional settlement between citizens and the state.")

[73] *Wabe and Müller* (n 56) para 89.

[74] See, for instance, *Ebrahimian* (n 30); *Aktas* (n 48); *Achbita* (n 30).

[75] See *Lautsi* (n 29).

[76] Willem Hutten and Nawal Mustafa, "Contesting Neutrality Dress Codes in Europe" *Open Society Foundations* (March 2022) 5, available at https://www.justiceinitiative.org/publications/contesting-neutrality-dress-codes-in-europe (last consulted 24 August 2022).

II.B. Deference to the legislator by the Belgian Constitutional Court

The Belgian constitutional framework on the relationship between religion and state is not one of establishment, nor is it one of (militant) secularism. The Belgian Council of State is clear on this point: "[i]n the Belgian Constitution, the Belgian State is not defined as a secular (laïque) State", whereby secular is understood in terms of the French model of a strict separation between state and religion.[77] Belgium has instead adopted a flexible approach to the separation of religion and state, in which some constitutional provisions are aimed at separating religion from the state, whereas others presuppose a degree of cooperation between both.[78]

The flexible approach to the separation of religion and state is mirrored by a lack of clarity on the exact meaning of the neutrality principle within the constitutional framework. In the Constitution itself, the concept of neutrality features twice, both times in the provision on the freedom of education (article 24 Const.). This provision entails a general obligation for the subunits of the Belgian federation to organize neutral education. It further specifies that such neutrality implies respect for the philosophical, ideological or religious beliefs of parents and pupils.

The concept of neutrality was originally inserted in article 24 (then article 17) Const. during the constitutional revision of 1988-1989, which transferred (most) powers over education from the federal level to the subunits. Herein also lies the origins of disagreements on the exact meaning of the concept. During the constitutional debates on the revision of article 24 (then article 17) Const., emphasis was placed on the dynamic nature of neutrality. Constitutional delegates predicted that, following the transfer of powers over education to the subunits of the federation, concrete translations may be needed to adapt the requirements of neutrality to the different context in each subunit. This, it was noted, should not be understood as favouring contradictory interpretations of the Constitution, but as giving further content to the concept of neutrality.[79] The Secretary of State for Education, in particular, noted that "the 'national' description of 'neutrality' [...] does not exclude an evolution, for instance in the Flemish Community, in the direction of a 'positive neutrality' and a more contemporary pluralistic positioning".[80]

The upshot of the constitutional debate is that the Belgian constitutional framework does not, as such, support a restrictive interpretation of neutrality. Nevertheless, a distinct evolution towards a strict understanding of neutrality has occurred in practice. Over the course of the past couple of decades, the neutrality principle has served as the legal basis (if not necessarily the

[77] Council of State 21 December 2010, no 210.000, para 6.7.2.

[78] For example, while the Constitution prevents the state from interfering in the appointment of ministers of religion (art. 21 Const.), it simultaneously mandates that the state pay the salaries and pensions of ministers of recognized religions (art. 181 Const.). In the specific context of public education, the Constitution provides that education should be free in order to guarantee freedom of choice between so-called 'official' (non-denominational) and 'free' (often denominational) education (art. 24, §1 Const.). At the same time, the Constitution requires that pupils in public schools have the ability to opt for education in one of the recognized religions or in non-denominational ethics (art. 24, §1 Const.).

[79] Verslag over de herziening van artikel 17 van de Grondwet [...], *Parl.St. Senaat BZ* 1988, nr. 100-1/2 at 64

[80] Ibid at 62.

actual reason) for several bans on the wearing of religious dress in Belgium. Bans are now in place in most public schools (for teachers *and* pupils), in civil service (especially at the municipal level), and in many private corporations (the *Achbita* case at the CJEU for instance originated in Belgium)[81].[82] The reach of these bans, which has been likened to a growing oil spill,[83] indicates that policy and practice have effectively moved Belgium closer to the restrictive side of the neutrality continuum.[84]

Although most of the aforementioned bans have been enacted by local authorities through administrative acts, the Constitutional Court has nevertheless been tasked – through questions for preliminary ruling put to it by the ordinary and administrative courts – to evaluate the extent to which such bans can be justified under the Constitution. Both of the Court's key judgments in this area concern bans on religious dress in the educational sector, respectively for pupils in secondary schools and for students in higher education.[85]

In its 2011 judgment, concerning secondary education, the Court has set out a number of basic principles on the interpretation of the concept neutrality in article 24 Const., when considered in the light of freedom of religion and the right to education.[86] The Court has particularly noted that the neutrality principle is "closely linked to the principle of non-discrimination".[87] From this connection, it has deduced a minimum content of the principle, which cannot be deviated from without violating the Constitution.[88] This minimum content entails two types of obligations for the state.[89] On the one hand, the state is under a negative obligation not to prejudice, favor or impose philosophical, ideological or religious views.[90] On the other hand, it is under a positive obligation to ensure, among other things, the positive

[81] *Achbita* (n 30). See Labour Court of Appeal (Antwerp) 23 December 2011; Court of Cassation (Belgium) 9 March 2015 (referring questions for preliminary ruling to the CJEU). See also Labour Court of Appeal (Ghent) 12 October 2020 (ruling, after the CJEU judgment, that Ms. Achbita had not been discriminated against).

[82] Eva Brems and Stijn Smet, 'Islamitische kledij, neutraliteit en vivre ensemble: een kritische analyse' in Gily Coene and Marc Van den Bossche, *Vrij(heid) van religie* (VUB Press 2015) 203, 203. The wearing of the full-face veil has been prohibited by law in the whole public square (Act of 1 June 2011 Aimed at Prohibiting the Wearing of Any Clothing Hiding totally or principally the Face; own translation). This law, however, has not been justified by the preservation of state neutrality and is therefore not discussed further in this paper.

[83] Ibid 215.

[84] Ibid 206.

[85] Constitutional Court no 40/2011 (n 26); Constitutional Court of Belgium 4 June 2020, no 81/2020.

[86] The underlying case concerned bans for pupils in public schools in the Flemish Community education system, enacted by individual schools following a decision by the governing body of the Flemish Community education system to the effect that pupils within this system should no longer be allowed to wear religious or ideological signs to preserve the neutrality of education. A pupil challenged the decision of the governing body before the Council of State, which referred a question for preliminary ruling to the Constitutional Court concerning the delegation of the power to issue a general and principled ban by the state legislator to the governing body of the Flemish Community education system. In its judgment 40/2011, the Constitutional Court thus had to answer a question of legality under article 24 Const. In the process, it provided an interpretation of the concept of neutrality, as contained in article 24 Const.

[87] Constitutional Court no 40/2011 (n 26), para B.9.5.

[88] Ibid, para B.9.4.

[89] Ibid, para B.9.5.

[90] Ibid.

recognition and appreciation of the diversity of opinions and attitudes in public education.[91] At the same time, however, the Constitutional Court has also confirmed the view, adopted by the constituted power during the constitutional revision of 1988, that neutrality should be understood as a dynamic concept, the meaning of which can evolve over time.[92]

Since the meaning of neutrality remains open to contestation in Belgian constitutional law, the general principles proclaimed by the Constitutional Court in its 2011 judgment cannot settle the question of whether neutrality can justify a ban on religious dress for pupils in public schools.[93] This question was left open by the Court in its 2011 judgment, given that the primary legal questions involved in the case concerned the nature of the challenged act and the competences of the highest administrative court, not the substantive compatibility of a ban with freedom of religion.

The substantive question has been answered, in the affirmative, by the Constitutional Court in its 2020 judgment on neutrality and religious dress in higher education.[94] Rather than provide its own interpretation of the neutrality principle, the Court confirms in this ruling that the understanding of neutrality can vary without violating the Constitution:

> Since the concept of 'neutrality' is not understood in a static way by the Constitution, it should be inferred that different conceptions of 'neutrality' can be in line with the [applicable] constitutional provision.[95]

The Court subsequently insists that, since neutrality is a dynamic principle, it is not for the Court "to give priority to one particular conception of 'neutrality' over other possible conceptions'.[96] It instead defers to the interpretation of the neutrality principle by the lawmaker and – more immediately, in practice – by the college itself:

> the legislator of the French Community considered that the authority competent for an educational institution is best placed to assess, in the light of the educational project envisaged or given the concrete circumstances, whether or not the aforementioned prohibition [that is, a neutrally formulated ban on the wearing of religious dress] should be included in the internal rules of the school concerned.[97]

In other words, the Constitutional Court has transferred the power to interpret the constitutional principle of neutrality to the legislator who can, in the educational context, in turn delegate this interpretive power to specific institutions of (higher) education. Such transfer of the power to interpret constitutional essentials to other actors raises a number of interesting questions,

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[91] Ibid.

[92] Ibid, para B.9.3.

[93] In an ambivalent passage in judgment no 40/2011, the Constitutional Court indicates that the introduction of a general ban for pupils signals a reconceptualization of the concept of neutrality by the Flemish Community, but one that is "not by definition" incompatible with it. See ibid, para B.15.

[94] Constitutional Court no 81/2020 (n 85). For more extensive discussion of the judgment, see Stijn Smet and Merel Vrancken, 'Religieuze kentekens, neutraliteit en sociale druk in het hoger onderwijs: Noot bij Grondwettelijk Hof 4 juni 2020, arrest nr. 81/2020' (2020) *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid* 264-271; Xavier Delgrange, 'Interdiction du voile dans l'enseignement supérieur: la Cour constitutionnelle, substitut d'un législateur paralysé' (2021) *Journal des tribunaux*, Issue 2, 2-15.

[95] Constitutional Court no 81/2020 (n 85), para B.24.2.

[96] Ibid.

[97] Ibid.

including on the division of roles between the different branches of government in matters of constitutional interpretation.

As argued by Christian Joppke, the relationship between the different branches of government is particularly delicate when it comes to the interpretation of the neutrality principle. Joppke claims that neutrality is (often) a battleground between the legal and political worlds. According to him, exclusive conceptions of neutrality, under which religion should be excluded from the public sphere as much as possible, dominate in political circles (that is, in executives and legislators). Joppke thus posits that the executive and legislative branches of government are more likely to interpret neutrality in an exclusive or restrictive sense, requiring an absence of religious symbols and religious dress in public institutions. By contrast, the inclusive view of neutrality, under which all religions are (allowed to be) equally visible in the public space, would be predominantly adhered to in legal circles. Consequently, Joppke claims, courts are more likely to interpret neutrality in inclusive terms.[98]

But the battleground sketched by Joppke, on which different branches of government adhere to varying understandings of neutrality, presupposes that (constitutional) courts are prepared to engage in substantive interpretation of the concept of neutrality, even when this interpretation is at odds with the prevailing interpretation adopted by a legislator or executive. Whereas the German Constitutional Court has been prepared to take this step (see II.C. *infra*), the Belgian Constitutional Court is not.

The question that arises is the following: can transfer of the power to interpret a constitutional principle – in this case, neutrality – by a constitutional court be justified, especially when the interpretive authority ultimately falls into the hands of an educational institution (e.g. a school or university college)? From the perspective of constitutional theory, one could argue that transfer is appropriate or even necessary: to the extent that neutrality is an essentially contested concept, constitutional courts should not attempt to assign it an authoritative interpretation. Instead, interpretation of the contested concept of neutrality is best left to the democratic process or to actors that are closer to the situation 'on the ground'. This, at least, seems to be the position of the Belgian Constitutional Court.

The argument from democratic credentials is, however, subject to important limitations. We can appreciate this by engaging with the work of Jeremy Waldron, a leading proponent of weak-form constitutional review, which in ideal democratic circumstances denies judges the power to annul legislation. Importantly, Waldron has acknowledged that his ideal-theoretical argument against strong powers of constitutional review does not hold in contexts characterized by prejudice against, and lack of recognition in the democratic process for, the rights of discrete and insular minorities.[99] Given that the neutrality principle is predominantly deployed to the detriment of Muslim minorities in Belgium, there are good reasons to assume that Waldron's qualification applies *mutatis mutandis* to constitutional interpretation of the neutrality principle

[98] Christian Joppke, 'State neutrality and Islamic headscarf laws in France and Germany' (2007) 36 *Theory and Society* 313-342.

[99] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) *Yale Law Journal* 1346, 1403 (arguing that although strong-form constitutional review should be rejected for democratic reasons, there is a stronger claim for strong-form review in settings in which legislation expresses prejudice against discrete and insular minorities).

in Belgian constitutional law. A strong argument can thus be made that the Constitutional Court should have been more hesitant before deferring to the interpretation of the neutrality principle favoured by a legislator or a specific institution of (higher) learning. The case law of the Constitutional Court of Germany indicates that an alternative approach is possible: substantive interpretation of the neutrality principle.

II.C. Substantive interpretation of neutrality in Germany: Open neutrality as a shield

Although the preamble to the German Basic Law begins with a religious reference – "Conscious of their responsibility before God and man…" – the constitutional framework on religion and state in Germany is similar to the Belgian constitutional framework. It is characterized by a flexible approach to the separation of religion and state, in which separation coexists with elements of cooperation.[100]

Under the Basic Law, there shall be no state church; the freedom to form religious societies is guaranteed; the state is prohibited from interfering in appointments to religious office; and all religious societies can regulate and administer their affairs independently within the limits of the law.[101] Whereas these elements point towards separation of religion and state, other constitutional provisions entail a degree of cooperation between state and religion. The Basic Law for instances provides that recognized religious societies shall be corporations under public law and shall, as such, be entitled to levy taxes on the basis of civil taxation lists.[102] As is well known, these taxes are levied by the state and its tax authorities on behalf of recognized religious communities.[103]

Other central aspects of the relationship between religion and state are regulated by articles 3, 4, 7 and 33 Basic Law. While articles 3 and 4 Basic Law guarantee general constitutional rights, respectively equality before the law and freedom of conscience and religion, articles 7 and 33 contain more specific rules. Article 7 Basic Law is the mirror image of article 24 of the Belgian Constitution, to the extent that it guarantees that parents shall have the right to decide whether their children will receive religious instruction and that it provides that religious instruction shall form part of the regular curriculum in state schools (but with the exception of non-denominational schools).[104] Article 33 Basic Law, finally, ensures that

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[100] Claudia E Haupt, *Religion-State Relations in the United States and Germany: The Quest for Neutrality* (Cambridge University Press 2011) 170; Stefan Korioth and Ino Augsburg, "Religion and the Secular State in Germany" (2010) *German National Reports to the 18th International Congress of Comparative Law* 320, 322.

[101] Article 137 (1), (2) and (3) Weimar Constitution of 11 August 1919, as incorporated through Article 140 Basic Law ("The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be an integral part of this Basic Law."). All provisions are taken from the official English translation, available at https://www.gesetze-im-internet.de/englisch_gg.

[102] Article 137 (5) and (6) Weimar Constitution of 11 August 1919. See also article 141 Weimar Constitution ("To the extent that a need exists for religious services and pastoral work in the army, in hospitals, in prisons or in other public institutions, religious societies shall be permitted to provide them, but without compulsion of any kind.").

[103] Korioth and Augsburg (n 100) 327.

[104] Article 7 Basic Law.

> [n]either the enjoyment of civil and political rights nor eligibility for public office nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.[105]

Stefan Korioth and Ino Augsburg have argued that, central to the flexible system of separation of religion and state reflected in the German constitutional framework, is the principle of state neutrality.[106] Indeed, the Constitutional Court of Germany has interpreted freedom of religion, as safeguarded in article 4(1) Basic Law, to imply a duty of neutrality on the part of the state towards all religions and beliefs.[107] According to the Court, the need for state neutrality also follows from the reality of pluralism in society and from the constitutional value of equality:

> The State, in which adherents of different or even opposing religious and philosophical convictions live together, can guarantee peaceful coexistence only if it itself maintains neutrality in questions of belief […] [The Basic Law bars] the introduction of legal forms of establishment of religion and forbid[s] the privileging of particular confessions or the exclusion of those of other beliefs […] The State must instead ensure treatment of the various religious and philosophical communities on an equal footing.[108]

The Constitutional Court has given its understanding of neutrality, as derived from the constitutional framework, further content under the label of 'open neutrality':[109]

> The religious and ideological neutrality required of the state is not to be understood as a distancing attitude in the sense of a strict separation of state and church, but as an open and comprehensive one, encouraging freedom of faith equally for all beliefs.[110]

The Court moreover construes this as the only sensible understanding of neutrality in German constitutional democracy: "[i]t is through this openness that the free state under the Basic Law preserves its religious and ideological neutrality".[111]

Contrary to its Belgian counterpart, the German Constitutional Court has thus given a more substantive interpretation to the neutrality principle, although the Court also operates in a constitutional context marked by federalism. Instead of leaving the constitutional interpretation of the neutrality principle to the legislature in the individual *Länder*, for instance in recognition of the dynamic nature of the concept of neutrality in a federal state, the Constitutional Court has adopted a relatively fine-grained understanding of the neutrality principle. It has thereby

[105] Article 33 (3) Basic Law.

[106] Korioth and Augsburg (n 100) 322-323.

[107] Constitutional Court of Germany 1 BvR 1087/91 (16 May 1995); Constitutional Court of Germany 1 BvR 471/10 and 1 BvR 1181/10 (27 January 2015) at 109; Constitutional Court of Germany 2 BvR 1333/17 (14 January 2020) at 87.

[108] Constitutional Court of Germany 1 BvR 1087/91 (16 May 1995). See also Constitutional Court of Germany 1 BvR 471/10 and 1 BvR 1181/10 (27 January 2015) at 109; Constitutional Court of Germany 2 BvR 1333/17 (14 January 2020) at 87 ("The state must ensure that the treatment of the various religious and ideological communities is guided by the principle of equality");

[109] In other constitutional contexts, such as the Belgian one, this is also referred to as 'inclusive neutrality'. See for instance Delgrange (n 94) 10.

[110] Constitutional Court of Germany 1 BvR 471/10 and 1 BvR 1181/10 (27 January 2015) at 110. See also Constitutional Court of Germany 2 BvR 1333/17 (14 January 2020) at 88.

[111] Constitutional Court of Germany 1 BvR 471/10 and 1 BvR 1181/10 (27 January 2015) at 111.

put important limitations on the ability of the *Länder* to regulate the display of religious symbols and the wearing of religious dress in public institution.

In German constitutional law, open neutrality thus continues to act as a shield to safeguard religious freedom, for instance by protecting citizens from state imposition of religious displays. In the 1995 *Crucifix Case*, the German Constitutional Court famously ruled that "[t]he affixing of crosses in classrooms goes beyond the boundary" of state neutrality since "the cross cannot be divested of its specific reference to the beliefs of Christianity".[112] As a result, its presence in public schools is incompatible with the freedom of religion guaranteed by article 4(1) Basic Law.

Of more immediate relevance to this paper, are the implications of open neutrality for the right of citizens to manifest their religion in public institutions. On this point, the political and societal contexts in Germany are analogous to that in Belgium, to the extent that about half of the German *Länder* have enacted some form of regulation to restrict the wearing of religious dress – the Islamic headscarf, in particular – in certain public institutions.[113] Yet, the doctrinal approach of the respective constitutional courts to these bans diverges rather strikingly. Whereas the Belgian Constitutional Court has deferred to the understanding of neutrality favoured by legislators and institutions of (higher) education, its German counterpart has scrutinized bans more carefully and has found some – though not all – wanting in the face of the open neutrality required by the Basic Law.

Unlike the ECtHR, the CJEU and the Belgian Constitutional Court, the German Constitutional Court has not been swayed by abstract invocations of the argument from neutrality to justify bans on religious dress in public places. Instead, the Court has held that open neutrality must prevail, unless there is proof of specific threats to either public order (in the form of peace at school) or of state neutrality.[114] In the educational context, for instance, "the mere visibility, apparent in their outer appearance, of the religious or ideological affiliation of individual members of educational staff [in public schools] is not precluded as such by the neutrality required of the state".[115]

As the Constitutional Court has held in its 2015 *Headscarf Case*, mere reliance on neutrality in the abstract cannot provide a justification for bans on religious dress in public schools – for pupils nor for teachers – in the absence of sufficiently specific threats to either the school peace or state neutrality.[116] Johann Ruben Leiss has noted that, through this shift in the assessment from abstract principles to concrete impact, the Constitutional Court has avoided

[112] Constitutional Court of Germany 1995 1 BvR 1087/91 (16 May 1995).

[113] Constitutional Court of Germany 1 BvR 471/10 and 1 BvR 1181/10 (27 January 2015) at 152.

[114] The Court has indicated that such specific threats may arise "if the visibility of religious convictions and clothing practices were to generate or fuel [a] conflict" surrounding "very controversial positions on the question of correct religious conduct [that are being] promoted and introduced into the school – particularly by older pupils or parents – in a way that seriously interfered with school processes and the fulfilment of the state's educational mandate". See ibid at 113. It is, however, difficult to perceive how the mere wearing of religious dress by pupils or teachers may contribute to generating or fuelling such a conflict.

[115] Ibid 111.

[116] Ibid 80 and 101.

"fruitless debates on the threshold of neutrality and the delimitation of when clothes and symbols overstep this threshold".[117]

Open neutrality does have its limits, however, in that it does not require that the state accommodate external manifestations of religion in all public settings. In the specific context of the justice system, in particular, the Constitutional Court allows for more far-reaching restrictions of freedom of religion. The Court has clarified as much in its 2020 *Headscarf Case*, which concerns a legal trainee who was barred from wearing her headscarf in court during her traineeship in the *Land* of Hesse.[118] Under the applicable regional law, trainee-magistrates were required to conduct themselves neutrally as regards religion while in the courtroom, among others by not wearing religious dress.

In reviewing the constitutionality of the law, the Constitutional Court held that the "state's duty of neutrality necessarily also entails a duty of neutrality for public officials since the state can only act through individuals".[119] Unlike the state, however, public officials can exercise fundamental rights, including religious freedom, and this exercise cannot always be attributed to the state.[120] It follows that whenever actions of civil servants cannot be immediately attributed to the state, the neutrality principle as such does not suffice to justify restrictions on the freedom to manifest one's religion. Since a public school teacher wearing a headscarf cannot be identified with the state, she can wear a headscarf without violating the requirements of state neutrality.[121] In the context of the justice system, by contrast, it can be more difficult for the public to draw a line between a public official acting for the state and the actions of the state itself.[122] The courtroom also differs from a public school, in that the latter is "meant to reflect society's pluralism in religious matters", while the former plays no such role.[123] There are, in short, fewer reasons for the Constitutional Court to insist on open neutrality in courtrooms, where the societal reality of pluralism is less immediately implicated. Simultaneously, in the justice context there are stronger reasons to impose limits on open neutrality, given that administering justice involves exercising "public authority vis-à-vis the individual in the classic hierarchical sense", which "gives rise to more serious impairments" of citizens' rights.[124]

Ultimately, however, the Constitutional Court did not impose direct constitutional limits on open neutrality in its 2020 *Headscarf Case*. The Court did not rule that the Basic Law prohibits trainee-magistrates from displaying their religious affiliation in courtrooms. Nor did it rule in the converse sense. Since it was unable to determine which of the conflicting legal interest outweighs the other "to such an extent that it would be absolutely necessary under

[117] Johann Ruben Leiss, 'One Court, Two Voices: Case Note on the First Senate's Order on the Ban on Headscarves for Teachers from 27 January 2015: Case No. 1 BvR 471/10, 1 BvR 1181/10 910' (2015) 16 *German Law Journal* 901, 910.
[118] Constitutional Court of Germany 2 BvR 1333/17 (14 January 2020).
[119] Ibid 89.
[120] Ibid.
[121] Ibid.
[122] Ibid 90.
[123] Ibid.
[124] Ibid 95.

constitutional law to either prohibit or allow the wearing of religious symbols by the complainant in the courtroom", the Court ended up concluding that "the legislator's decision to establish a duty of neutral conduct for legal trainees with respect to ideological and religious matters must […] be respected".[125]

One could say that the Court thereby deferred to the interpretation of neutrality adopted by the legislator, similar to how its Belgian counterpart has approached bans in public education. But, crucially, the German Court only did so because it was unable to strike a decisive balance itself, not because it believed that it should not be striking the balance at all.[126] Considered in the broader context of German constitutional law, in which the Court ordinarily follows its own substantive interpretation of neutrality as open neutrality, this arguably makes for a balanced decision. On the whole, neutrality also retains its shielding function in German constitutional law. By contrast, when deference becomes the 'default' approach adopted by courts, as is the case at the ECtHR, the CJEU and the Belgian Constitutional Court (see II.A and II.B *supra*), neutrality tends to transform into a sword. A third and final approach, which sidesteps the shield-sword controversy by circumventing the argument from neutrality altogether, can be located in the case law of the Belgian Council of State.

II.D. Judicial circumvention of neutrality: The Belgian Council of State

As noted previously, in Belgium most bans on the wearing of religious dress in public institutions are enacted by municipalities, governing bodies of public schools and other administrative bodies. As such, these bans are subject to review by the Council of State, the highest administrative court.[127] During annulment proceedings, the respondent government (for instance a municipality) or body (for instance a public school) often invokes the neutrality argument to support its claim on the necessity of a ban. This has forced the Council of State to consider the meaning and function of the neutrality principle in adjudicating the relevant cases before it.

[125] Ibid 102.

[126] Ibid 101 ("[i]t falls primarily to the democratic legislator to resolve the normative tensions between the conflicting constitutional interests").

[127] It should be noted that the Council of State is a *sui generis* institution, composed of two sections with different powers and competences. The section administrative jurisprudence sits as the highest administrative court and has the power to review and annul administrative acts. The section legislation, by contrast, acts as an advisory body during the legislative process. Its advisory opinions are authoritative, but not binding on the executive (which has introduced a bill subject to the advisory process) or the legislature (when debating and voting on the bill in Parliament). Both sections are competent to interpret and apply the Constitution to either the case at hand or the bill at issue. For ease of reference, only the section jurisprudence is discussed in the text, but footnote references can be to both sections.

Similar to the Constitutional Court, the Council of State perceives a direct relationship between state neutrality and the constitutional principle of equality.[128] The Council of State has held, in particular, that

> [i]n a democratic rule of law state, the government must be neutral, because it is the government of and for all citizens; and because it must, in principle, treat everyone equally without engaging in discrimination on the basis of religion, belief or political opinion.[129]

From this conception of neutrality, the Council of State has deduced a number of implications for the right to wear religious symbols for civil servants, in general, and for teachers and pupils in public schools, in particular. Although it has at times deferred to the government's invocation of neutrality, most notably in relation to bans on religious dress for most teachers in public schools,[130] the Council of State generally construes neutrality as a means to other constitutional ends.[131] Analogous to the German Constitutional Court, this approach allows the Council of State to shift its analysis from abstract interpretations of neutrality to evidence-based evaluations of the extent to which bans on religious dress are actually necessary.

For our present purposes, the most important rulings of the Council of State concern bans on religious dress for pupils in public schools. In these cases, the Council of State has noted that the duty of neutrality that applies to teachers in public schools cannot simply be extended to pupils, given that the latter are service users instead of service providers.[132] This has important consequences for how the Council of State reviews bans:

> insofar as pupils are concerned it always needs to be investigated whether the way in which neutrality is conceived – and implemented – fits the objective of protecting public order or the rights and freedoms of others.[133]

In marked contrast to the deferential approach by the Belgian Constitutional Court, mere invocation of neutrality thus does not suffice to justify a general ban for pupils in public schools. Instead, the Council of State evaluates the proportionality of the ban, requiring the respondent government to prove its necessity. We are, in other words, firmly in the territory of 'traditional' proportionality analysis, rather than that of constitutional interpretation of the neutrality principle.

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[128] See, among others, Council of State (section legislation) (General Assembly) 20 May 2008, no. 44.521/AV at 8; Council of State (section administrative jurisprudence), 14 October 2014, n0. 228.752, para 38.2 (both referring to Constitutional Court no 40/2011 (n 26).

[129] See, among others, Council of State (section legislation) (General Assembly) 20 May 2008, no 44.521/AV at 8; Council of State (section administrative jurisprudence) (General Assembly) 21 December 2010, n0. 210.000, para 6.7.2. See also Council of State (section administrative jurisprudence) (General Assembly) 27 March 2013, no. 223.042, para VI.2.6 (using a slightly different formulation).

[130] See, for instance, Council of State (section administrative jurisprudence) 27 March 2013, no. 223.042; Council of State (section administrative jurisprudence) 1 February 2016, no. 233.672.

[131] The focus in this paper is on one particular issue, namely the Council of State's case law on 'headscarf bans' for pupils in public schools. For more detailed analysis of the whole body of case law and advisory practice, see [reference omitted for review purposes].

[132] Council of State (section administrative jurisprudence) 14 October 2014, no. 228.752, para 38.3.

[133] Ibid, para 38.5.

After noting the absence of "hard data and concrete testimonies" in the case file,[134] the Council has concluded in the relevant cases that

> Not a single piece of evidence has been adduced to support the aims for which the earlier, more religion-friendly policy concerning the wearing of religious and philosophical signs by students was abandoned in favour of a general ban that is **also** imposed in schools in which there is no actual need thereto.[135]

Since the respondent government failed to show that the ends pursued by the neutrality of the educational system were threatened,[136] the Council of State has found that the ban violated the pupils' freedom of religion.[137] Rather than attempt – arguably in vein – to establish whether or not neutrality requires or justifies a ban, the Council of State has instead evaluated the evidence on record regarding the alleged threat to public order and the rights of other pupils; and – in the relevant cases – has found it wanting.

In effect, the Council of State has thereby gone one step further than the German Constitutional Court by sidestepping the neutrality question altogether and instead resorting to an evidence-based touchstone against which it can evaluate the necessity of a ban, not in the name of neutrality but to protect public order or the rights of other pupils. Ultimately, this places the emphasis on what should be the central issue in the relevant cases to begin with: to what extent does the wearing of religious dress by an individual – a teacher, a pupil, a student, a trainee-magistrate – effectively endanger or threaten public order or the rights of others?

When courts adopt a purely deferential approach – as the ECtHR, the CJEU and the Belgian Constitutional Court do – this question becomes immaterial. Instead, it is assumed that the abstract principle of neutrality can justify a ban, regardless of the concrete situation 'on the ground'. By contrast, when courts put forward their own substantive understanding of neutrality – as the German Constitutional Court does – the question does become relevant, especially when the baseline assumption is that neutrality allows for a broad right to manifest one's religion in public institutions. In that case, it must be shown that other constitutional requirements justify a ban in the circumstances. The central difference with circumvention of the neutrality argument, the approach adopted by the Belgian Council of State, is that the circumvention approach takes the next logical step by sidestepping the neutrality question altogether to focus on the issue that matters: is public order genuinely threatened or are the rights of others really at risk?

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[134] Ibid, para 52. See also ibid, para 47 ("the defendant [ie. GO!] does not demonstrate, or even claim, that in the schools at issue behaviour occurred that may indicate any concrete disturbances of public order").

[135] Ibid, para 53 [emphasis in original].

[136] Ibid.

[137] Ibid, para 54. See also, decided on the same day, Council of State (section administrative jurisprudence) 14 October 2014, no. 228.748; Council of State (section administrative jurisprudence) 14 October 2014, no. 228.751 (the claimants in both of these cases belonged to the Sikh community; Sikhs effectively suffer 'collateral damage' from bans that, although formulated neutrally, seem to primarily target Muslim pupils).

III. CONCLUSION

Throughout Europe, courts are often expected to solve disputes over the separation of religion and state, including cases on the wearing of religious dress in public institutions. In adjudicating these cases, courts are often required to engage with the neutrality argument: the idea that bans are necessary to uphold the principle of neutrality. When legislators, executives and other decision-makers invoke neutrality as an argument to limit freedom of religion – in other words, when neutrality is used as a sword to strike religious claims down – courts can respond in one of three ways: through deference, through substantive interpretation, or through circumvention.

Deference is the preferred doctrinal approach of Europe's highest courts in the face of the neutrality argument. The ECtHR and CJEU routinely defer to state actors and even private corporations that brandish neutrality as a sword against religious freedom. When courts defer the interpretation of neutrality to state actors or private corporations, they avoid raising charges of 'judicial activism'. At the same time, however, a purely deferential approach is problematic, to the extent that mere invocation of the neutrality argument suffices to justify far-reaching intrusions into religious freedom. When domestic courts follow suit, as the Belgian Constitutional Court does, adherents of minority religions risk being left without effective recourse before the courts. This renders the right to manifest one's religion in public institutions, particularly for religious minorities, virtually meaningless.

Yet, alternative approaches to the neutrality argument are available; alternatives that ensure a fairer balance with the right to freedom of religion. The German Constitutional Court's approach of substantive interpretation, in which it understands neutrality as an open neutrality, allows for more fine-grained analyses of 'headscarf bans' without tilting the balance entirely in the other direction. Whereas open neutrality in principle requires that citizens retain the right to manifest their religion when they enter public institutions, including when acting as civil servant within those institutions, it is not limitless. When the circumstances require it, legislators and other state actors retain room to enact bans to uphold the neutrality of particular institutions. Nonetheless, substantive interpretation of neutrality by courts can be contested, to the extent that it can be perceived as judicial activism, in which a constitutional court 'usurps' the power to provide an authoritative interpretation of the neutrality principle without leaving sufficient room for other actors to pursue alternative conceptions. To the extent that such criticism is valid – or even for pragmatic reasons – judicial circumvention of the neutrality argument could provide a viable alternative.

Exemplified in the case law of the Belgian Council of State on bans for pupils in public schools, judicial circumvention avoids problematic situations in which mere invocation of the neutrality argument suffices to justify (most) bans on the wearing of religious dress in public institutions. At the same time, judicial circumvention also avoids potential charges of 'judicial activism' or 'usurpation' of powers of constitutional interpretation. Instead, under the circumvention approach courts focus their analysis on the examination of the evidence for and against alleged threats to the constitutional ends that neutrality is meant to protect: equality, public order and the rights of others. This analysis logically takes the form of a proportionality test, which not only allows courts to consider the issues that really matter, but also aligns more closely with the role that judges tend to assume when adjudicating rights cases. By examining

the evidence for and against alleged threats to the constitutional ends that neutrality is meant to protect, the circumvention approach enables courts to evaluate whether concrete ends such as the rights of others are actually in peril, rather than be distracted by the abstract – and contested – requirements of neutrality.

These findings do not necessarily mean that neutrality is – or should become – a redundant principle. But they do imply that the neutrality argument should perhaps play a less central role in courts' reasoning in cases on religious dress than it currently does. The counter-cases of the German and Belgian Constitutional Court notwithstanding, there is arguably no reason for courts to either provide their own substantive interpretation of neutrality or to defer entirely to the understanding of other actors, when they can sidestep the neutrality argument altogether and examine the evidence instead.