

# The Neutrality of the State

## 1. Conceptual distinctions

# The Neutrality of the state

- First conceptual distinction
  - **Political secularism**: this is the principle of the separation of the state from any religious commitment ('no established religion')
    - Thus the state must be 'neutral' towards all beliefs, be they religious or not
  - **Philosophical secularism**: a commitment to a conception of the world and the 'good life' that does not rely on any transcendent actor or authority. We could see it as a form of 'immanentist' morals and metaphysics.
    - Agnosticism: *we do not believe there is something like God*
    - Atheism: *we positively believe there is NOTHING like a God.*

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- Implications of the first distinction: possibilities of « crossed positions »
  - **At the individual level** all positions are possible :
    - Most religious clerics are neither political nor philosophical secularists
    - Religious believers may be political secularists or not
    - Agnosticists will generally be political secularists
    - Atheists may be political secularists or not (e.g. ex-communist states. What about France and Turkey?)
  - **At the level of the state:** commitment to *political* secularism and to *philosophical* secularism are incompatible.
    - Again cf. the example of former 'communist' countries
    - But a caveat:
      - To be 'neutral' towards any belief implies (at least at first sight) an unavoidable commitment to some kind of 'agnosticism'

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- The importance of political secularism
  - It is a device to enforce **freedom of consciousness**
    - All citizens are free to adopt any religious beliefs or 'philosophical' convictions
    - All citizens are free to express their convictions, within the limits marked by the equal rights of other citizens.
  - It is a device to enforce **equality** among citizens
    - No citizen can be treated differently by the state according to his/her religious or non-religious beliefs.
  - Some consider it is a device to enforce **social cohesion**
    - In that case (strong republicanism) the obligation of neutrality is extended in some way to the citizens themselves

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- The second conceptual distinction
  - Orthodox (classical) secularism ('laïcisme')
    - Adhesion to the goals of political secularism
    - With a bias against religious beliefs that can be expressed in different ways:
      - Religious beliefs are seen as an obstacle to '**freedom of thought**': they limit our access to a full exercise of reason
      - So it is part of the state's task to **emancipate** individuals – especially pupils – from religious alienation
      - The '**public sphere**' must be to some extent 'cleared' from religious symbols that are seen as divisive or contrary to social cohesion.

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- **Tolerant or 'open' secularism**
  - The two main goals of freedom of consciousness and equality are seen to be of uttermost importance
  - There is nothing wrong in **religion as such** (which may well be completely compatible with a full exercise of reason – this of course has to be discussed)
  - The right to **express one's conviction in public** is a fundamental liberty that must be enforced as long as no offence or crime is committed as an effect of this expression
  - Political secularism implies neutrality for the state, **not for its citizens.**

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- The consequences of the two secularisms.
  - **Indirect discriminations**
    - Both conceptions view differently the management of socio-cultural diversity and the problem of indirect discrimination.
  - **Neutrality of civil servants :**
    - Both conceptions draw different conclusions according to the extent of neutrality obligations for civil servants
  - **Neutrality of citizens**
    - Orthodox secularism always seeks (in a great variety of ways) to impose some kind of neutrality to citizens while open secularism strongly rejects this idea
  - **Neutrality at school**
    - Orthodox secularism wants to impose some kind of neutrality on pupils while open secularism points mainly to the contradictions between that position and its own premises.

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2. Indirect  
discrimination and  
'reasonable  
compromises'

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- What is equal treatment? The problem of indirect discrimination
  - Indirect discrimination is the fact that a rule seemingly equal to all imposes an unfair burden on some categories (example: the disabled)
  - In that case, **equal treatment** may differ from **fair treatment**: the task of the state is to promote a compromise to alleviate the burden of the most disadvantaged
  - Those compromises must follow some rules
    - Not to contradict existing legislation
    - Not to restrict unduly the rights of other citizens
    - Not to impose a disproportionate burden on the organization that is obliged to compromise

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- Is religious belief an acceptable candidate for indirect discrimination?
  - **Orthodox secularism :**
    - Demands on the basis of religious beliefs contradict the principle of equal treatment
    - They weaken the possibility of social cohesion (the argument of communitarism)
    - They are never-ending: this is the argument of the 'slippery slope'.

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- **Open secularism**
  - If freedom of consciousness is to be guaranteed, then religious beliefs are an acceptable candidate for the argument of indirect discrimination
  - The ‘communitarism’ argument is basically flawed: it may easily be reversed to charge orthodox secularism of ‘majoritarian communitarism’
  - The argument of the ‘slippery slope’ has no empirical solid ground and can be met by fixing the appropriate ‘no trespassing’ line.

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## 3. The neutrality of civil servants.

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- The principle
  - As civil servants represent ‘the state’, it seems logical to transfer the obligation of neutrality to Civil Servants. But there are first two requisites of ‘neutrality’.
- Neutrality of service and neutrality of appearance
  - The first criterion is that a civil servant must treat all citizens in a fair and equal way without any consideration for their religious or philosophical beliefs. This seems straightforward but poses the question of what equal treatment is.
  - The second criterion is that he/she must be ‘neutral in appearance’ so that he/she cannot be suspected of partiality. This seems more disputable.

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- Who is the state ?
  - The German Federal Constitutional Court assumes that, when the state authorizes a teacher to wear the headscarf, it does not itself endorse the religious signification of it (Joppke, p.68).
  - British Sikh policemen go on wearing their ‘turban’ within the frame of religious freedom in UK, and the state does not feel involved.
  - Some Belgian politicians have mistakenly supposed that a Member of Parliament could be obliged to respect religious neutrality of appearance. But does this not contradict directly the very meaning of a representative who must enjoy the broadest freedom of expression? And what about ‘Christian Democratic’ parties that exhibit their religious inspiration in their name?

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- Who is the State? (continued)
  - On the other hand, if a civil servant whose job is cleaning the rooms in an administration building wears a headscarf, do we consider that the neutrality of the state is in danger?
  - Many people working in the context of the public services are in fact hired by a private firm. In what sense do those workers 'represent' the state that must be neutral?
  - And what about, for instance, public transportation and communications, which are delivered by semi-private firms of which the status is ambiguous? In what sense are we here in the presence of 'the state'?

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- What is a neutral appearance?
  - Should only religion be at stake? What about **social appearances** for instance ?
    - Can we consider that a Prime Minister who wears a 10.000 € watch appears as 'neutral'?
    - What about the tie? Can it not be considered as the recognition symbol among the globalized elite (outside academics...)?
  - Is 'neutral appearance' not simply confused with the traditional outfit of the majoritarian group in society ?
    - Has the 'Catholic headscarf' – which was very common in our society half a century ago – ever been discussed?

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- What is a neutral appearance ?
  - The case of banning the hijab in France : *‘It is obvious that the criterion of ‘ostentation’ was designed specifically to target Muslim signs and that it relied on a highly contestable notion of unacceptable visibility in the public space. Few official republicans paused to consider whether it is legitimate for a neutral, laïque state to discriminate between discrete and ostentatious social practices, given that such judgments are inevitably made against the backdrop of specific, non-neutral cultural contexts’.*
  - Quotation from Cecile Laborde : ‘Critical Republicanism’, Oxford University Press (2008), p. 63.

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- Conclusion: a case for freedom of expression
  - The principle of neutrality of appearance cannot be simply discarded for civil servants.
  - But it must be applied with caution because it may not restrict too heavily the principle of freedom of expression
    - We must discard it whenever the state is not **actually** at stake
    - We must restrict the application of neutrality of appearance to those functions where the necessity of ‘visible impartiality’ clearly overrules the principle of freedom of expression.
    - The best criterion is probably a version of the criterion of the **authority exercised** on citizens (example: a judge, maybe policemen...).

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4. Maximum freedom  
for the citizens.

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- The principles.
  - In the conception of **open secularism, the burden of neutrality is entirely on the state.**
    - It is a central device of democratic states to protect freedom and equality among citizens (see supra).
    - Any attempt to extend the obligation of neutrality to the citizens themselves may be suspected of leading to some kind of destruction of the public sphere itself, the function of which is to foster confrontation and debate among citizens around the notion of common good.

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- The principles (continued)
  - The freedom to express one's religious beliefs **in public** is at the core of the freedom of consciousness
    - Because the right to hold 'hidden' beliefs is of course no right at all.
    - Because many religions require public rituals.
    - Because there is no reason to treat religious opinions, *prima facie*, in other way than other kinds of opinions.
    - This being said, open secularism recognizes of course that no freedom of expression is absolute.

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- In practice
  - In a practical way open secularism will often present itself as a ‘negative reasoning’ because it will argue against restrictions of freedom defended by orthodox secularism
  - But the terminology of orthodox secularism is often somewhat flawed, mixing ‘public authority’, ‘public space’, ‘public sphere’, ‘public realm’, and so on.
  - My own line of reasoning will be to try **to draw a straight line between the neutrality of the state and the freedom of its citizens.**

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- Examples.
  - Is a civil servant authorized to oblige a woman to take off her headscarf if she wants to receive a welfare benefit (because she is in a 'public space')?
  - Should we establish the principle that, in hospitals, patients have no word to say about the sex of the doctor? (Verzin, p. 152)
    - How can we reconcile that with the principle of free choice of the doctor ?
    - On what ethical ground may a general obligation of 'cecity' to sex be defended (see the security checks in airports)
  - Is it a fundamental difference between 'tell' and 'show'? To what extent (Nadia Geerts)?
  - Should places of education for adults have the right to ban religious signs?

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## 5. The neutrality of pupils

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- Positioning the problem
  - Both orthodox and open secularism recognize that school is a specific field
    - At the departure point of basic education (primary and most secondary) there is an **obligation** which nobody denies in our society
    - We all accept that pupils are **not yet** fully autonomous persons and that some amount of ‘paternalism’ is required.
    - But open secularism is still mainly opposed to banning the veil at school. What are the arguments?

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- The arguments against the interdiction of the veil.
  - Arguments of principle
    - The interdiction underestimates the rights of children and mainly the right to have their say when they are capable of reasoning
    - The interdiction underestimates the parental authority and the right for parents to transmit their cultural traditions to their children.
    - The interdiction underestimates the suffering of children/parents who see their culture as despised.
    - The interdiction is at its most paternalistic when it recognizes no ability in the children to critically assess their own cultural heritage.

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- Arguments of principle (continued)
  - The interdiction seems *prima facie* to contradict its own purpose because it does not allow the confrontation of various beliefs.
  - The interdiction strongly contradicts its own purpose because the ultimate consequence will be to exclude pupils from the school, and so, to reinforce the alienation it is suppose to fight against.
  - And, mainly, the interdiction relies on a **strongly idealized vision of ‘the state’** that is supposed to act as the ‘true and only’ emancipatory (f)actor.

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## – Practical arguments

- In the Belgian context, education is ‘saturated’ by Catholicism: most than half the pupils are educated in **publicly funded Catholic schools**.
- So the main criticism that can be made of the ban of the hijab is its **evident unfairness**. The hijab will be banned on the claim of ‘neutrality’ in one half of the publicly funded schools and on the basis of the ‘Catholic pedagogical project’ in the other half.
- This is no secularism but a form of ‘**Catho-laïcité**’ as Cecile Laborde puts it (in *Critical Republicanism*).

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- Discussion of the practical argument
  - Orthodox secularists often assume that they want equal treatment for Catholics, Jews, Muslims, ... alike.
  - But this is **obviously out of reach** for the secularists today in Belgium.
  - The case against the ban of the hijab is clearly influenced by the context:
    - Arguments of principle against the ban are strong
    - But practical arguments seem to me in any case **even stronger**.
  - Moreover, given the context, it seems reasonable to charge orthodox secularist of bad faith in that debate.

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Some conclusions



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- Can the state be ‘fully’ neutral?
  - Neutrality is already a non-neutral ethical position
    - The state is committed to some kind of ‘agnosticism’ which may seem to religious people not ‘fair’ to religion as such.
    - But it seems unavoidable if we want to live in a ‘liberal’ society.
  - Neutrality can only be experienced on the basis of some shared values:
    - Human rights and liberties
    - A roughly common sense of fairness
    - A commitment to the equality of women and men
    - A commitment to democratic institutions

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- Do we want the state to be ‘fully’ neutral?
  - What about mandatory education?
    - It is a commitment on the part of the State to a certain definition of the ‘good life’.
    - But we consider it as a basic tenet of our democratic society.
  - Do we want the state to be ‘neutral’ between the rich and the poor?
    - As for me, I do not.
  - Do we want the state to be neutral between active and passive citizenship?
    - I prefer not, but I am obliged to recognize this is a perfectionist stance.

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- What would an 'ideally' neutral state be like?
  - I think there is no abstract definition and the question can only be treated in context.
  - Religion is only one aspect of the matter.
  - A good deal of disagreement between orthodox and tolerant secularism rests on matters of facts: if we agree to the great scheme of '**the clash of civilizations**', then the principles of freedom and equality that are at the core of secularism may appear as 'expensive tastes'. I suspect the revival of orthodox secularism owes something to that feeling.