On Liberty and Face Veils

Questioning the legitimacy of the Dutch law on face coverings

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Abstract

The Netherlands has followed eight other countries in the European Union (EU) in passing legislation that somehow regulates the wearing of face coverings. The new Dutch law will come into effect on August 1st, 2019. Legislations on religious garments have been topic of academic debate in Europe because they seem to target Muslim women's religious dress. This thesis is concerned with questioning the legitimacy of this Dutch law. It features an utilitarian understanding of the concept of legitimacy, building on the work of John Stuart Mill. The arguments of advocates and adversaries of the law are examined in order to establish whether or not the law is legitimate. These arguments touch upon colonialism, racism, communication, oppression, safety, symbolic value, liberalism, isolation, emancipation, fundamental rights and symbolic value of legislation, among other things. Through the exploration of the arguments in public debate and the weighing of the utility provided by the law, it becomes clear that the law fails to meet the conditions for its legitimacy.

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Introduction

The Netherlands has followed eight other countries in the European Union (EU) in passing legislation that somehow regulates the wearing of face coverings (Open Society Justice Initiative, 2018, 80). The new Dutch law will come into effect on August 1st, 2019. From that day, it will be prohibited to cover your face in public transportation, government buildings and their adjoining grounds, educational institutions and their adjoining grounds and non-residential healthcare facilities and their adjoining grounds. The law defines covering your face as wearing anything that either completely covers your face, leaves only your eyes uncovered or makes individuals unrecognizable in another way. The law exempts face coverings that are essential to your health, occupation or in playing sports and exempts face coverings worn in the context of festivities and cultural activities (Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 2018).

This Dutch law, (which I will from here on refer to as the law on face coverings,) has been topic of public and academic debate. The law on face coverings is controversial because it includes the burqa and the niqab, (garments typically worn by Muslim women as a form of religious expression,) even though other face coverings are also covered by the law. The notoriety of the law is captured in its Dutch nickname: “het boerkaverbod” which translates to “the burqa ban.”

Legislation on religious garments has been topic of academic debate in Europe before it was a topic of public debate in the Netherlands, because other EU countries have preceded the Netherlands in passing laws that limit the liberty to wear religious garments. These laws have received much attention within the fields of anthropology, law and philosophy. While anthropologists and legal experts can criticize such laws because of its consequences to people or on legal grounds, they have to take government’s power to make laws for granted. Philosophy is unique in that it can question the legitimacy of a government’s power to restrict liberties. This is the approach I will take in contributing to the academic debate about laws that regulate the wearing of face veils (and other face coverings). Therefore the main question of this thesis is: Is the Dutch law on face coverings legitimate?

Methodological considerations

There are two paradigmatic philosophers that provide an account of legitimacy for the use of governmental power in democracies; John Stuart Mill and John Rawls. In this thesis I build on the framework provided by Mill in *On Liberty* (1859). I will do this for two reasons. First, I understand the law on face coverings to be restricting liberties, while the legitimate interference on liberties is the main concern of *On Liberty*.

Second, I consider the Rawlsian framework less suitable to discuss the law on face coverings, since the Rawlsian account of political legitimacy depends on a notion of reasonable citizens and reasonable plurality (Wenar, 2017), while the debate on the law on face coverings in many ways questions who reasonable citizens are and what reasonable plurality is. For example, it might be argued that face veils do not "belong" in Dutch society, because they are taken to be radical and fundamentalist expressions of faith. Some citizens might argue that such expressions should not be tolerated, but others might argue that radical and fundamental religious views are permissible if they do not result in terrorism.

The Rawlsian account then requires an examination of what it means for citizens to be reasonable. Every argument in the debate would then be analysed through that notion of reasonability, which would then judge some arguments to be valid according to a set standard of reasonability, and others invalid. The result of such an analysis would be a picture of what arguments matter if society would be entirely reasonable according to that particular standard and would fail to do justice to the different positions held by actual citizens. I expect the utilitarian account of Mill, one that allows us to understand legitimacy in terms of harm and utility, to provide a more practical framework to discuss the law on face coverings.

My focus on the Dutch context is mainly due to the different considerations at play in the international context. In France, for example, the concept of "laïcité" was an important factor in reaching a decision about the law, while this concept is missing in other countries. Discussing all considerations of the different countries would not only exceed the scope of this thesis, but it would also fail to do justice to the coherency of reasons within the separate nations. The Dutch setting may nevertheless overlap with other countries that have also passed, or plan to pass laws on face coverings.

As the Dutch law concerns all garments that cover one's face, I will use the term face coverings when I mean all garments covered by Dutch legislation. In some contexts, however, I will specifically focus on face coverings insofar they are worn by Muslim women for religious reasons, the burqa and niqaab. For brevity I will refers to these garments as face veils, being a subcategory of face coverings. I will also refer to women who wear face veils as veiled women, which should be understood as a category that does not include women who wear a chador, or hijab (more commonly known in the Netherlands as headscarves).

In what follows I will first provide a theoretical background against which the reader can make sense of the arguments in the debate on the law on face coverings. The main purpose of the first chapter is to answer the question when a democratic government may legitimately pass legislation that infringes upon the liberty of (some) individuals. The second chapter discusses arguments in favour of the law on face coverings. Within the Dutch context these arguments revolve around the themes of homogeneity, communication, oppression, safety and symbolic legislation. The third chapter discusses arguments against the law on face coverings. These arguments may be clustered in the following themes: the voices of veiled women, inaccessibility and isolation, emancipation, fundamental rights and symbolic legislation.

In reconstructing the arguments in favour and against the law on face coverings, I will mostly use the terms advocates and adversaries. This may lead readers to believe Dutch politics may be divided into two camps. In reality, Dutch parliament consists of different political parties, the views of which may be divided among a spectrum. Since my main question is about the legitimacy of the law on face coverings, my focus is on the for- and against of the arguments, and should not be understood as representing a political reality.

In the final chapter I will attempt to weigh the arguments of the advocates and adversaries against one another and answer the research question. The conclusion features a reflection on the answer this thesis provides and considers what questions it gives rise to.

Chapter 1: Theoretical Background

The purpose of this first chapter is to provide the reader with a theoretical background against which he or she can make sense of the debate surrounding face coverings. There are many ways in which this can be done. A historical approach, for example, could help to make sense as to why face coverings are a topic of debate now. As it is the aim of this thesis to examine the moral legitimacy of the law on face coverings, and this law effectively puts a limit on the liberties of individual citizens, this chapter will focus on the question when a government may legitimately pass legislation that infringes upon the liberty of citizens.

In this chapter, I will therefore first examine what Mill has written about legitimate use of governmental power. As will become apparent from an article about the harm principle written by Nils Holtug, an understanding of the concept of harm is crucial to Mill's understanding of legitimacy. However, it has also turned out to be a troublesome concept in contemporary philosophy and I will argue, using the account of Piers Norris Turner, that it cannot provide the conditions for the legitimacy of a law on its own.

The legitimate exercise of governmental power

John Stuart Mill is a paradigmatic writer on the subject of liberty in democracies. Mill is most famous for his essay *On Liberty* (1859). As the focus in this chapter is on infringement of liberty and not on a discussion of democracy, I will not pause to discuss the many features of democracy. Instead, I will highlight two aspects of democracy important to Mill (1859, 2-4) and important to the theoretical background this chapter provides:

1. Governors exercise the will of the people (that is, the most numerous or most active part of the people);
2. Governors are limited in exercising governing power by the limit of legitimate interference of collective opinion on individual independence.

These aspects of democracy require some clarifications. First, what is meant by "the people?" We will here understand the people to be all citizens eligible to vote. Mill himself excluded children and individuals that "have to be taken care of" (Mill, 1859, 8).

It might be argued that some individuals might be wrongfully included or excluded, but I will assume that a sufficiently representative group of individuals with an interest in the law on face coverings is included in "the people." If this assumption is correct, a sufficiently representative group has been involved in the democratic process which led to the establishment of the law.

Second, Mill understands the will of the people to mean the will of the most numerous or most active part of the people. This raises worries about the possibility of a tyranny of the majority, which may result in the oppression of minorities. Mill was very much aware of this risk (1859, 3-4), which is why he tried to diminish this risk by limiting government power.

That leads to the final clarification needed, about the limits of government power. The legitimate use of government power is limited to exercising the will of the people, but this will can only legitimately be exercised if it respects the limits of collective interference on individual independence. Mill considers individuals independent insofar as their conduct has no effect on other people: "The only part of the conduct of any one, for which he is amendable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute." (Mill, 1859, 8)

There is not much behaviour, however, which does not concern other people. Mill gives the example of drunkenness. Being drunk in itself is not something for which you are amendable for society, but your drunken behaviour is. Being drunk regularly might even cause grief to people close to you. If so, Mill considers you are amendable for it (Mill, 1859, 68-69).

That almost all behaviour is up for discussion does not mean that the same behaviour is subject to legitimate government interference, according to Mill. The view conveyed in the above quote does help legitimize the view that almost any kind of behaviour may be publicly debated. As such, it also legitimizes the debate on face coverings, and face veils especially, insofar as they affect others. However, any legitimate exercise of governmental power is, according to Mill, limited by the harm principle: "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." (Mill, 1859, 8) Collective interference on the liberties of the individual through the exercise of governmental power (laws) is only acceptable when it prevents harm to others. So the difference

between being amendable to society and being subject to government interference lies in causing harm to others. What then, counts as harm?

What counts as harm?

This is a question asked by many academic philosophers before me. Nils Holtug (2002) discusses seven approaches often used: theories of welfare, quantities of welfare, varieties of harm, qualities of welfare, a moralized conception of harm, an autonomy based justification and a utilitarian justification. Considering these seven accounts will help to determine what could be a plausible role of the harm principle in limiting government interference. To Holtug, defining harm in the harm principle is about solving the problem of scope, since the definition of harm determines against what range of issues the harm principle may be invoked. In solving the problem of scope, he explicitly assumes “that it should be solved in such a way that the Harm Principle’s implications are at least roughly compatible with the sort of judgements liberals have traditionally used this principle to justify.” (Holtug, 2002, 364) Most liberals would try to explain harm in such a way that the harm principle allows for government interference in cases of severe breaches in someone else’s liberties, but not in cases that only constitute offense. For example, government may imprison someone for physically abusing another individual, but not fine displays of homosexual behaviour on the ground that it might be offensive to other individuals.

Theories of welfare (like that of Stewart, 2010) fail to solve the problem of scope, Holtug argues, because such theories usually define harm as a reduction of welfare, whereby welfare exists in pleasurable mental states or desire satisfaction. Any frustration of desire or any unpleasant mental state would be considered a harm. This is problematic because then government interference would be legitimate for any liberty as long as someone has negative feelings about the exercise of that liberty (Holtug, 2002, 364-365).

Second, there is the quantities of welfare approach (like Diekema, 2004). This approach tries to solve the problems of the theories of welfare by introducing a threshold: only if enough welfare is threatened, government interference is justified. The main problem of this approach is setting the threshold, which is often related to the proportionality of the intervention (Holtug, 2002, 365-367). Approaches relying on

quantities of welfare assume that if there exists a consensus that the threshold has been reached and the intervention is proportional, then government interference is legitimate. The obvious difficulty of this approach is reaching consensus.

The third approach is the varieties of harm approach (for example, Feinberg, 1984). It assumes that we do not only want to prevent an increase of negative welfare, but also a decrease in positive welfare. Negative welfare is, for example, having physical pain. An example of positive welfare is having multiple options to choose from in terms of education.

The varieties of harm approach relies on a baseline from which welfare is measured. Holtug argues that a counterfactual baseline would be most effective. It measures welfare with reference to an individual's situation had the harmful event not taken place. A worrisome implication of the counterfactual baseline is that you can always describe an increase in positive welfare as a prevention of loss in negative welfare. For example, by gifting someone a holiday, you increase their positive welfare. With the counterfactual baseline in mind, however, you also prevent a situation in which that person would have had less welfare because he or she did not go on that holiday. Not many liberals would argue that a legitimate use of government power is to coerce all citizens to prevent diminutions of welfare, since it would effectively coerce citizens to promote welfare beyond what may reasonably be expected of them. Therefore, Holtug considers this approach a failure as well (Holtug, 2002, 368-373).

Fourth, there is the qualities of welfare approach, which proposes that only damage to certain qualities of welfare constitute harm. For example, feeling offended does not constitute harm according to this approach, but being ill does. However, such an approach cannot, in any plausible way, employ the harm principle to defend core liberties such as the freedom of press. Some books may frustrate basic desires central to people with religious convictions. This would lead proponents of the harm principle to weigh freedom of press against freedom of religion, or any other core liberty in a certain society. This leads to the suspicion that liberals are less principled than they are said to be. The harm principle does nothing more in this case, than other principles that do tell us how to weigh interests (Holtug, 2002, 373-377).

Fifth are attempts to define harm in moral terms (like Saunders, 2016). Central to such attempts is the question: in virtue of what do acts wrong others? Holtug states that

within the liberal tradition, a person is most often understood to wrong another when that person violates the rights of another person. This means that any attempt to define harm would require an account of what rights are. This, in turn, requires a fully-fledged moral theory, which should also be compatible with the harm principle (Holtug, 2002, 377-380). Utilitarianism is the obvious candidate because Mill was a utilitarian. The utilitarian option will be discussed below.

However, we will first discuss the autonomy based justification of the harm principle (for example, Raz, 1986). Autonomy based justifications argue that it is valuable for a person to live life according to his or her own values. Therefore other people or the government should not interfere with that individual's life, except when an individual violates the autonomy of another. Such an account of the harm principle would be unattractive to many liberals, Holtug argues, because it implies that the minimal state is the only state that can ever be justified. This justification of harm would mean, for example, that the state cannot coerce the rich to pay to taxes so that the poor may have access to healthcare.

Yet if you would argue that the poor not having access to healthcare would violate their autonomy and therefore the state should provide this access, you need a moral theory to provide reasons of justice to coerce people into paying taxes. In applying a theory that provides reasons of justice, we might not need the harm principle anymore (Holtug, 2002, 382-386).

Seventh and final, then, is Holtug's discussion of a utilitarian justification of the harm principle. Holtug construes the utilitarian justification of the harm principle to be about rights, presumably to avoid problems encountered in the first four approaches. He writes: "The state may intervene in the life of an individual against his will only if by doing so it will prevent (or reduce the probability of) a violation of the rights others would have in an optimal decision procedure." (Holtug, 2002, 381)

Holtug supposes that utilitarianism is our criterion of rightness. This means that we do not take utilitarianism as a decision procedure, because utility is in the long run best promoted by adopting a different procedure. A common belief is that a successful decision procedure appeals to rights. Violating such rights is what harm consists in. However, the harm principle cannot be a criterion of rightness, because utility will not always be promoted by adhering to it. For example, the harm principle, if understood in

this way, rules out state paternalism, in situations in which utility might require it. So, Holtug concludes, the harm principle might be part of the decision procedure, but only insofar as it promotes utility (Holtug, 2002, 380-382).

I am reluctant to admit to this conclusion, because it effectively renders the harm principle useless. If the harm principle is only admitted as long as it promotes happiness or utility, then why not leave the harm principle out and solely focus on Mill's greatest happiness principle. "The Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness: wrong as they tend to produce the reverse of happiness." (Mill, 1864, 9-10) After all, this principle alone suffices if want we want to say is that rights should be safeguarded only insofar as they promote happiness.

A less liberal account of harm

Another utilitarian justification of the harm principle, one that does not depend on a definition of rights, is that of Piers Norris Turner (2014). His account is more successful, I believe, because he largely omits a specification of harm. Turner starts out by criticizing traditional liberal approaches to the harm principle, for expecting too much of Mill's defence of liberty. This resulted in the many different interpretations of harm, and their accompanying difficulties, Turner argues (Turner, 2014, 300).

Instead, he argues for an expansive view of harm, allowing harm to be a general term for bad consequences. He agrees that *On Liberty* was meant to protect liberty against interference, but views the harm principle as part of a broader defence. The function of harm principle in that broader defence is as a measure against paternalism (Turner, 2014, 301).

Contrary to Holtug's account of the utilitarian approach, Turner explicitly rejects any approach defining harm as a violation of someone else's rights. He rejects this view because too much is being read into the harm principle. Mill's defence of individual liberties at least has to answer two questions, Turner argues. First, what are the necessary and sufficient conditions for society having jurisdiction over some individual's conduct? Second, when society has jurisdiction, what considerations would succeed in justifying interference? The programmatic problem with the rights violation view, Turner says, is that it answers the second question by assuming that rights violations can justify social interference, and takes this as an answer to the first question (Turner,

2014, 302-309). I believe this is essentially what causes conceptual issues with accounting for the harm principle.

Turner instead offers an expansive account of harm. This account understands as harm any negative consequence, including emotional distress (Turner, 2014, 319). In order to maintain this understanding of the harm principle, Turner has to explain how unfavourable judgement differs from harm in Mill's work. Turner argues that even on the expansive conception of harm, having an unfavourable opinion, to have criticism, is not diminishing well-being. He offers the example of judging Lichtenstein to be a bad painter. Having to look at Lichtenstein's paintings a lot might then diminish one's quality of life, but the negative judgement in itself does not. The freedom from interference as long as we do not harm another should then be understood as an anti-paternalistic measure: no individual should be forced to behave differently simply because people judge that behaviour to be in poor taste. Mill's generally liberal conclusions should not be attributed to a nuanced view on harm, but to the idea that emotional distress is a relatively insignificant harm, usually swamped in the interference calculation by other values (Turner, 2014, 311-313).

The emphasis in the harm principle, Turner argues, should therefore be less on the "harm" and more on the "to others," admitting society's jurisdiction when an individual's conduct has some negative impact on another. He notes that his account of the harm principle might make it seem rather toothless, but reminds us that the harm principle is only part of Mill's defence of liberties. Once paternalistic reasons are disqualified in any social deliberation, two things follow. First, as already noted, mere offense is generally a weak consideration. Second, important social considerations are to be recommended to well-organized, public spirited social authorities (Turner, 2014, 320-321).

To give strength to these two claims, Turner mentions several reasons why emotional distress usually is not enough to warrant government interference. Firstly, values such as the value of free discussion and individual expression weigh more than the harm of being offended. A second example is that government interference is only legitimate if it actually diminishes the emotional distress through that interference. (Turner, 2014, 322). This is of course no exhaustive rendering of considerations.

How does the expansive account hold up against the objections made by Holtug to other accounts? The issue with the theories of welfare account was that the harm principle would allow too much government interference for most liberals. The expansive account, instead does not rely on the harm principle to account for Mill's liberal views, but on the greatest happiness principle. The harm principle does allow much to fall within the domain of social debate, but legitimacy of government interference depends on that second principle. If Mill's liberal views are accounted for by the application of the greatest happiness principle, then this supposes that, in general, having more liberties allows us individuals to be happier. This view can indeed be encountered in Mill's work, for example in chapter II of *On Liberty*, in which Mill defends the value of freedom of speech against, among other things, the harm of being offended (1859, 13-45).

Second, the expansive account evades the threshold for legitimate government interference that the quantities of welfare account has to deal with, because government interference does not depend solely on the definition of harm. Instead, the threshold may be determined by an adequately applied utilitarian calculus: if government interference promotes more happiness than it does harm, then it is legitimate (provided that the harm principle is respected).

Third, the expansive view solves the problems with the counterfactual baseline that the varieties of harm approach has, because it holds that the harm principle admits that the prevention of diminutions in welfare fall under society's jurisdiction and therefore are up for debate. However, the legitimacy of government interference depends on the outcome of the utilitarian calculus. I will here make the assumption that the utilitarian calculus will show that coercing individuals to prevent as much diminutions of welfare as possible results in less utility than not coercing individuals in such a way. If this assumption is correct, the counterfactual baseline is not an issue for the expansive account.

Fourth, the objection against the qualities of welfare approach was that the harm principle is less principled than we would like to believe and that it does not tell us how to weigh different values. The expansive account cannot defend itself against these objections, precisely because it argues that it is not the function of the harm principle to

weigh different values. Instead, that weighing needs to be done because of the greatest happiness principle.

Fifth, moral accounts of harm relied on a moral theory to provide in reasoning as to what rights are. As Turner shows why such a reading of the harm principle cannot be maintained, and since he has offered an alternative, I consider the expansive account more successful to this fifth account as well.

Sixth, the objection against the autonomy based justifications of the harm principle was two pronged. First, it would only understand a minimum state as just because laws beyond the bare minimum are likely to violate the autonomy of at least some citizens within a state. Second, if the minimum state is assumed to be unjust because it would violate the autonomy of other individuals by not providing the minimum circumstances to be autonomous, then we need a moral theory providing in reasons of justice. The expansive account does not have to face either of these objections because its definition of harm does not depend on autonomy. The arrangement of the state depends on whatever utility requires.

Seventh, the utilitarian approach as proposed by Holtug depended on a definition of rights and rendered the harm principle useless. According to the expansive account the harm principle might do less than usually is defended, but it still serves a clear function. Yet Holtug was right in assuming that the harm principle has its function in a mixed decision procedure.

This elaborate attempt to define harm had its function in understanding the role of the harm principle, which is a necessary, but not a sufficient condition for legitimate exercise of government power. In addition, the greatest happiness principle causes us to believe governments are good insofar as they promote the greatest possible utility. For any issue then, government interference is acceptable if it promotes more utility than it does harm. Of course, the best government would promote the most utility. For a government to be good enough, however, the utility of government interference has to outweigh harm done by that interference.

Concluding

From the above we can conclude that the law on face coverings is legitimate if, and only if passing the law does not violate the harm principle and passing the law promotes

more utility than it does harm. The harm principle is violated when either one of the following three conditions is applicable:

1. The law is instated because of unfavourable opinions concerning face coverings or a subset thereof.
2. The law is instated, but face coverings cause no harm. That is, face coverings do not even cause a negative consequence as bad as emotional distress.
3. The law does not prevent the harms done by face coverings.

Now that it is clear under which conditions the law on face coverings can be considered legitimate, the next chapters examine whether or not the law is actually legitimate, by examining how the reasons for and against this law satisfy the conditions for its moral legitimacy.

Chapter 2: Arguments of advocates

The goal of this chapter is to examine the arguments employed by the advocates of the law on face coverings and to examine how they relate to the conditions for the legitimacy of that law. It should be noted that most of the arguments made in the public debate on the law are conflated and logically flawed. This is true for both parliamentary debate and for the discussion of the law in the media. In parliamentary debate, for example, it has been argued that the law is only a codification of an already existing norm, because some institutions have regulations that do not allow face coverings (Tweede Kamer, 2016, 5). Of course, that some institutions have such regulations does not mean that all institutions or citizens view those regulations as a norm. In newspapers many arguments are used simultaneously (for example, El Hammouchi, 2018, and Engelbart, 2018). This is problematic for a systematic discussion of the different arguments. Therefore, in order to adequately discuss the arguments, I will attempt to reconstruct the arguments as convincingly as possible. In doing so, I hope to uncover what the exact claim behind the arguments is, so that that claim may be related to the conditions for the laws legitimacy. The arguments of the advocates of the law on face coverings cover four themes: communication, oppression, safety and homogeneity (Moors, 2009, 394-395 and 401-406).

Homogeneity

I will start by discussing the kind of argument that is almost never the first one mentioned and usually saved as a last resort when discussing the law on face coverings: that face veils simply do not "fit" Dutch society. Perhaps this kind of argument is usually treated as a last resort because of its clear appeal to the exclusion of a certain (religious) practice from society.

I start my discussion of the arguments of the advocates of the law with their "final resort," firstly, because I think it provides one of the strongest arguments in favour of the law. Secondly, I think this argument provides a background against which we can make sense of the other arguments the advocates have. Even though this argument can only tell us something about the legitimacy of the law insofar as it covers face veils, it is central to understanding the urgency of the discussion.

As Annelies Moors (2009, 394-395) argues, attempts to ban the face veil need to be seen within the context of a trend towards the culturalisation of citizenship, both in the Netherlands and in other countries in Europe. Indeed, the Dutch identity was one of the core themes in the parliamentary elections of 2017. The law on face coverings itself was called out as an attempt to establish a juridical sense of Dutch identity (Tweede Kamer, 2016, 20). The alleged Islamization of the Netherlands has been the major issue to campaign against for the Dutch Liberty Party (PVV), which argued in this debate that the presence of Islamic influence on street level should be minimized (Tweede Kamer, 2016, 14).

Whether the argument of the advocate considers the Dutch identity or the "threat" of Islamization, I understand it as expressing the same desire: a desire for homogeneity in Dutch society. If this assessment is correct, the question becomes why face veils would not fit the picture of a homogenous Dutch society? Many academics have wondered the same thing, and the answer they develop in the European context usually points at the racist and colonialist tendencies of the West[1] (see, for example, Ferracioli, 2013 and Zine, 2006).

The very terms "racism" and "colonialism" have extremely negative connotations, however, that almost seem to require the "West" to account for and redeem itself as soon as they are mentioned. Yet, a little elaboration on these tendencies could help explain the position of veiled women in Dutch society, and the way they are viewed by other Dutch citizens.

Colonialism and racism

Meyda Yegenoglu's *Colonial Fantasies* (2009) is an exploration of the discursive dynamics that enable a cultural representation of the West by itself through the representation of the Orient, inspired by the work of Edward Said. For the purposes of this thesis it is enough to understand the Orient as the Western representation of the Islamic world. Yegenoglu argues that the Enlightenment produced the modern idea of

[1] I adhere to Alia Al-Saji's characterisation of the "West" as an inadequate notion when taken to refer to a geographical entity or pre-existing entity, but useful in designating a cultural and discursive construct in formation, constituting itself through representations of others (Al-Saji, 2010, 877-878).

the subject as a thinking and rational being. The subject is understood as knowing, before it is understood as object to be known. (Yegenoglu, 2009, 5).

Central to Yegenoglu's analysis is the Foucauldian notion of power as presented in *Discipline and Punish* (1977): productive through visibility and normalisation. Yegenogly understands the modern subject as one that produces knowledge through observation and classification. The modern subject is itself subject to the productive power, but also subjects others to this power, in this case through the colonial discourse (Yegenoglu, 2009, 40-41).

Within that colonial discourse, natives of "the Orient" are an object of knowledge, and by extension, objects to be controlled. Face veils have a special place in the colonial discourse because they render women invisible, and therefore impossible to be known and controlled, in the eyes of the modern subject. Therefore face veils are immediately noticed by the modern subject as an act of concealment. It is this absolute otherness of veiled women that serves to secure the modern subjects' sense of self-knowledge and truth (Yegenoglu, 2009, 41-46).

What the Orientalist writing of the nineteenth century shows, Yegenogly argues, is that wherever the word "veil" is used in the Oriental context, it serves as a membrane between the West and the Orient, which remains mysterious to us. The Orient thus always remains more and other than what it appears to be, always disguised. Yet precisely because the modern subject understands the essence of the Orient as concealed, the modern subject can never grasp the essence of the Orient. It is through the mediation of the absence of the essence of the Oriental subject that the modern subject constitutes himself as Western subject through misrecognition of the Orient, in Yegenoglu's view. The veil is thus necessary to the Western subject to secure its own identity. What is more, the Western subject construes its own identity as sovereign because of the perceived absence of identity of veiled women. (Yegenoglu, 2009, 51).

Additionally, the representational apparatus of colonial culture criticizes the cultural practices and religious customs of the Orient for their oppression of women. This simultaneously helps to construe the Orient as backward, traditional and oppressive and the West as progressive and free (Yegenoglu, 2009, 95-100).

As said, the representational apparatus of colonialism does not only constitute the image of the native Oriental, but posits the Western image in opposition. Alia Al-Saji

argues that the othering of the colonial discourse is a form of cultural racism, that is inseparably intertwined with gender. She argues that face veils are most visible to the Western eye because the Western vision is already structured by colonialism. The vision of the Western subject does not only make visible, but does so according to sedimented habits of seeing (Al-Saji, 2010, 884). These sedimented habits of seeing are to be understood as seeing oneself as superior, free and progressive, for example, in accordance with the colonial background of the Western countries.

Through sedimented habits, visual qualities are naturalized to a visible body. The racist vision builds on the intentionality and naturalization of all vision, but is less responsive, less open to other ways of being that destabilize our habits of seeing. This result in racialized bodies being seen as naturally inferior, and they cannot be seen otherwise. At the same time, racist vision sustains the mechanism of othering present in it by the representations that motivate that vision, which accounts for the rigidity of its vision. Representations of veiled women as backward, traditional and oppressed are generated by the very vision that wants women's' bodies to be visible. The very representation of face veils as obstacle for this vision is legitimized by the Western desire for visibility. This desire normalizes the availability of women's bodies to the colonial gaze.

This is what explains the paradoxical position of veiled women in Western countries: they are hypervisible as barrier and made invisible as subjects. Finally, the racist vision does not only apply to face veils, but also others Muslim women who do not wear one, Muslim men and finally, Muslim culture. This is because the oppression of Muslim women is, from this point of view, attributed to gender relations within Islam, while simultaneously the complex difference of Muslims gets reduced to one dimension (Al-Saji, 2010, 885-887). The essence of "the Islam" remains hidden because the complex reality cannot entirely be reduced to a "true" essence.

These colonial and racist tendencies have not only had influence on the lives of minorities, but also on the way majorities understand face veils and Muslim minorities. Even if we were to argue that colonialism and racism were tendencies of the past, they have had a profound influence on the way the Western subject, and by extension Dutch citizens without migration background understand themselves.

Insofar as the view that veiled women are fundamentally different from Western subjects is still present in Dutch society, the presence of these women indeed frustrates a desire for homogeneity. The harm caused by this frustration is prevented by the law on face coverings in certain areas, although those that are harmed through the frustration of their desire for homogeneity might desire a law that prevents them from being harmed in all public areas.

It is harder to determine whether or not Muslims who do not wear face veils, but are harmed by the extension of the racist view, are helped in any way by the law. This is because both Yegenoglu and Al-Saji argue that the veil is only an anchor for the colonial or racist view of the Western subject. If that anchor (partially) disappears, it is unclear whether the entire discourse on which it is built collapses. As face veils are not banned from all public areas, however, I will assume the law will not alleviate any harms Muslims suffer as a consequence of the extension of racist view. Nevertheless, the desire for homogeneity provides a reason in favour of the law on face coverings because it prevents harms done to that desire.

Communication

Face coverings are often argued to be an impediment to open communication (see, for example, de Zwaan, 2018). Of course, the statement that face coverings are an impediment to open communication would require some justification in order to constitute an argument.

A common justification is that open communication requires the visibility of facial expressions. Because face coverings make it impossible to see such expressions, they hinder open communication. But still, this justification does nothing to establish that face coverings are bad. Worse, passing a law merely to discourage a way of communication that may or may not have your preference fulfils the first condition for violating the harm principle.

One could, of course, argue that individuals not conforming to a preferred way of communication cause other individuals emotional distress, and therefore cause a harm. The law on face coverings prevents this harm from happening in some areas. The emotional distress prevented provides a reason in favour of the law.

Power

However, there is also a more compelling argument to be made about face coverings in communication. This is the argument that face coverings constitute unequal power relations in communication. Wearers of face coverings are hidden from view, or at least their expressions are, which constitutes a kind of safety and invulnerability in communication, that the other person in the conversation does not have, this argument supposes. The person not wearing a face covering is vulnerable by virtue of him or her showing facial expressions (Vermeulen et.al., 2006, 18).

The appeal to unequal power relations only works, however, if we suppose the inequality to be harmful. Doctor-patient, teacher-student and parent-child relationships are all instances of unequal power relations that are usually understood to be mutually beneficial to both parties. To argue why unequal power relations are bad, then, we need a conception of power. While there are many (such as Weber, 1978, 53, Arendt, 1970, 44 or Allen, 1998), I here adhere to Foucault's notion of power, because I am interested in the power relations between otherwise equal subjects within a modern society. The Foucauldian account explicates the mechanisms through which power functions, rather than supposing that power-over or power-to resides in an individual.

In *Discipline and Punish* (1977) Foucault studies the modern practice of imprisoning criminals, rather than killing them or applying corporal punishment. The elements constitutive of this new kind of punishment are also the ones establishing modern disciplinary power, in his view. Above I have already mentioned these truth-forming mechanisms: visibility and normalisation (or naturalisation). This truth in turn serves as a disciplinary power against which norms are established and individuals are being measured and further disciplined when they diverge from the norms established by some regime of truth (Foucault, 1977, 200-226). For example, children are encouraged to increase their performance when they have below average grades.

If we understand power in this way, the mutual visibility of conversation partners in a modern society means that they have equal means to measure each other against the norms of a certain truth regime. When either one of the individuals in conversation covers his or her face, it becomes harder to measure that person against the norms set and it therefore becomes harder to discipline that person. The mask makes the individual who wears it less visible and therefore less knowable. For example, it is

harder for a doctor to tell whether or not a patient is really committed taking his medication when he or she is wearing a mask. Nor might the patient be convinced a doctor really wants the best for his patient when he wears a hygiene mask during a consultation. Similarly, it is hard for a teacher to know whether a student is paying attention if that student wears a balaclava.

When it comes to face veils, the inequality in power relations may be even bigger. As has been argued above, the veiled woman is, to the western subject, characterised by the absence of her essence. She is experienced as fundamentally other because her essence always escapes the western subject. While a masked person is hard to measure against norms, the veiled woman constitutes, by virtue of her otherness, a gap in our regime of truth which reveals our inability to make sense of her, while at the same time she fails to adhere to all norms of that regime.

As becomes apparent from the examples, the mutual visibility in communication can indeed prevent harm from happening. But since we are not required to communicate in all settings, it is not necessary to enforce mutual visibility in all public areas. This is precisely what the law on face coverings does: it prevents unequal power relations in communication in areas where the this inequality might be especially harmful, while not overstepping its boundaries.

So both emotional distress caused by not being able to communicate in a preferred way, and unequal power relations in communications constitute a reason for instating the law on face coverings.

Oppression

Face veils are considered to be oppressive by some (Tweede Kamer, 2016, 1). The prominence of this argument in Dutch debate is somewhat suspicious, because it makes one wonder if the law was actually passed because it covers face veils, despite of also covering other face coverings (as is also implied in Moors, 2009, 406-407). It also means that this argument can only tell us something about the legitimacy of the law on face coverings insofar as it covers face veils, but not other subsets of face coverings.

Coercion

Two reasons for thinking that face veils are oppressive can be distinguished. First, there are those who believe that most wearers of face veils are coerced into wearing them (Zee, 2012, Had ik maar een boerka aangehad, 2011). This belief has been revived in the Netherlands by the equation of all face veils to the Afghan burqa during in the aftermath of 9/11 (Saharso & Lettinga, 2008, 468). Such coercion would surely constitute a harm, since the wearer would have chosen differently and therefore does not get to do what would make her most happy. It is unlikely that the law on face coverings would do much to remedy such coercion, because it criminalizes wearing face coverings, not the coercion of it. So the law on face coverings cannot appeal to the coercion of some wearers. Passing the law on that ground would be a violation of the harm principle, since it does nothing to prevent the harm. If anything, there is a prevalent worry that it would further marginalize the women who are forced into wearing a face veil (Moors, 2014, 32)

Socialization

Second, there is the argument that relies on a feminist conception of oppression. This feminist conception of oppression does not rely on individuals being coerced into anything (Taramundi, 2014, 221). Instead it understands oppression as a structural loss of opportunity or agency-capabilities in a group because of the way that the group (usually women) is socialized compared to another group (usually men). The statement that face veils are oppressive then, should be understood as face veils being oppressive to women, whereas men do not suffer from a similar oppression.

Socialisations that limit the opportunities or autonomy of some socially constructed group, may then indeed be oppressive. Within the context of this thesis I understand autonomy to be the ability to act on motives, reasons and values that are somehow your own. This definition is problematic because of its vagueness, but is deliberately chosen to accommodate the different claims about autonomy in this thesis.

Most feminists regard it as oppressive that women tend to choose to sacrifice their career more often than men do when a heterosexual couple has children, because women are socialized to take on a care-giving role. This harms their autonomy by impairing their ability to question whether or not they would want that role, but instead

imposes it in them. To be clear: the fact that these women do make that choice, does not mean, for these feminists, that these women are not being oppressed. Whether or not women are being oppressed depends on the extent to which they have been subject to oppressive socialisation.

Some feminists might argue that the very fact that veiled women choose to wear a garment that denotes their womanhood, attests to them renouncing sex equality. Such a thing can only be chosen when socialized in such a way that other values are more important than sex equality (Taramundi, 2014, 226[2]). This may in turn lead to questions as to how someone could autonomously make such a decision, since autonomy requires the skill to question inherited beliefs (Laborde, 2012, 402).

If we follow this line of argumentation, however, the advocates of the law encounter a problem: there is no evidence that women are being socialized to wear face veils. In a paper that discusses empirical research into face veils, Erica Howard states that the findings suggests the contrary; women choose to wear face veils autonomously (Howard, 2014, 209). While multiple reports recognize that the fact that the interviewees chose to wear a face veil autonomously, does not mean that there are no women being coerced into wearing face veils (Howard, 2014, 210), there is also evidence that suggests that there are more women who would like to wear a face veil, but do not wear one, because they are worried about the reactions others might have (Howard, 2014, 212).

The empirical evidence admits that there is a possibility that some women are coerced into wearing face veils. Sadly, I already concluded that the law on face coverings does nothing to aid such women. Insofar as the evidence tells us something about the socialisation of women who choose to wear a face veil, there is nothing that points to it being problematic or oppressive. Women refraining from wearing a face veil because of the worry for social responses might instead point out that social pressure not to wear a veil might be problematic. With the ongoing debate in the Netherlands, and the social and physical pressure exercised, (see Martijn de Koning, 2017, from 4:29 onward,) it is highly unlikely that the between 50 and 500 wearers of face veils in the Nederlands

[2] To be clear about the intentions of the writer: Taramundi (2014) argues against uses of women's oppression in European political discourses on face veils and in scientific literature opposing the ban. Nevertheless, the argument was retrieved from her paper and referenced here to for that reason.

(Moors, 2014) have no opportunity to critically reflect on their desire to wear one. It is perhaps more likely that they are frequently forced to do so.

So, arguments used in favour of the ban that rely on oppression actually do not contribute to the legitimization of the law. Firstly, because women who are being coerced into wearing a face veil are not being helped by this law. Passing the law for that reason would therefore be a violation of the harm principle. Second, the argument that face veils are oppressive because they are the result of a harmful socialisation does not hold in the Netherlands, because there is evidence to the contrary. Passing the law based on that argument would thus be a violation of the harm principle, because face coverings do not constitute harm in the sense of oppression. Neither of the arguments could help legitimize the law.

Safety

There was also a more practical concern mentioned in parliamentary debate: safety (Tweede Kamer, 2018, 6). There is no denying that criminals sometimes use face coverings to commit offenses. Such use of face coverings surely constitutes a harm. What is unclear, however, is how a law is going to prevent the use of face coverings in that way? Surely no criminal, about to break one law, will worry too much about breaking another. More importantly, this way of arguing cannot account for the inclusion of healthcare and educational institutions and the exclusion of shopping areas.

If the law cannot be relied on to remedy actual safety concerns caused by face coverings, then perhaps we should understand it as an attempt to reinsure people of their safety, even if there is no actual safety issue. Indeed, some advocates of the law argued that the law would provide a sense of social safety (Tweede Kamer, 2016, 5). This argument, then is not only aimed at face veils, but at face coverings in general, since someone in a balaclava or regulation helmet could be perceived as intimidating as well. In fact, Studio Powned, 2015, from 4:42 onward shows that balaclava's are perceived as a threat in public space. The same video shows, from 6:40 onward, that some people are happy with police interference when someone walks in a park wearing a balaclava and that it provides them with a feeling of safety, even though it is, and will remain, legal.

While the video also shows that there is no similar police response to someone wearing a niqab in the city centre (from 3:20 onward), it has been argued that face veils

have been correlated with terrorism (Barker, 2016, 210). Indeed, from 2005 onwards face veils have been tied to Islamic extremism in the Netherlands, as a result of the religiously motivated murder on Theo van Gogh and international terror attacks (Moors, 2009, 399).

In light of the western inability to make sense of the veiled woman (as has been argued in the section on communication), it is no wonder that this rhetoric has caused Dutch subjects to tie face veils to Islamic extremism. Whether or not this representation adequately reflects the truth about face veils, is not my concern here. What is more important here is that (some) people have these feelings of fear when they encounter face veils. As emotional distress counts as harm, this fear is indeed a harm as well, even though it might be caused by a misinformed correlation.

The law on face coverings may indeed be reliably expected to remedy the harms done by face veils and other face coverings, at least in the areas covered by this law. It may even be argued that the law does not cover enough areas. In covering some, it remedies some of the harms.

A critical reader might object to the conclusion that feelings of fear provide a legitimate reason in favour of the law, when those feelings are partially caused by a certain rhetoric. Surely, if this rhetoric has caused these feelings of fear to arise in the first place, it would be better to put limits on this rhetoric, or at least educate people about its flaws?

To that critical reader I must say that it may indeed be the case that either of those options provides more utility. However, the legitimacy of a law does not depend on whether or not it can create the most utility of all possible options. Instead, the legitimacy depends (partially) on whether or not we can reliably expect it to promote more utility than it would do harm, which the argument about feelings of safety gives us reason to believe.

Symbolic legislation

The final argument that I want to discuss here, although briefly, is the symbolic value of the law. While the term "symbolic legislation" is used more often by the adversaries of the law, the advocates of the law have also appealed to the symbolic value of the

legislation as expressing a sentiment. The sentiment expressed is that face veils are somehow undesirable (Drayer, 2018).

This argument does constitute a reason in favour of the law, through other means than the other arguments above. This argument does not rely on the need to establish that face veils cause a harm and the laws ability to prevent that harm. Instead, this argument relies on the positive effect the law may have through expressing a sentiment. For example, if we take the law to express the sentiment that the oppression of women is not appreciated, then the law may indeed spark joy in some people, even though the law does not alleviate any harm oppressed women might suffer.

Through the expression of a sentiment or several sentiments, the law on face coverings thus promotes utility, from this point of view. The promotion of utility would in itself not be enough for the law to be legitimate, since legitimacy also requires the law to prevent harm. Therefore the symbolic value of the law alone is not enough to legitimize the law, but it can provide an additional argument about its utility.

Concluding

In this chapter we have seen that face coverings may indeed constitute a harm to a desire for homogeneity, in communication and feelings of safety. As the law on face coverings prevents these harms, the law may legitimately be passed for those reasons, in the absence of any reasons against the law. Additionally, the symbolic value of the law provides an argument for its utility. In the next chapter we will see whether or not there are any compelling reasons against the law.

Chapter 3: Arguments of adversaries

Like the previous chapter, this chapter is concerned with the reasons provided in the debate on the law on face coverings and how these reasons relate to the conditions for the law's legitimacy. Unlike the previous chapter, this chapter considers the arguments that oppose the law. These arguments are no less diffuse than the arguments discussed above (see, for example El Hammouchi, 2018), but in this chapter too, I will reconstruct the arguments as clearly and convincingly as possible.

The voices of veiled women

Like I did in the previous chapter, I will start out here with an argument that is generally not the first one mentioned in the debate, but does provide a strong argument. This argument too, can be understood to provide a background against which we can make sense of the other arguments of the adversary. Finally, it parallels the first argument of the first chapter in that it also is an argument focussed on face veils and not face coverings in general.

The argument I am talking about is one that can initially be encountered as an observation, specifically the observation that veiled women are underrepresented in the debate on the law on face coverings (Moors, 2009, 400) or that little is known about their motivations to wear a face veil (Tweede Kamer, 2016, 7). These observations can be made sense of in two ways. First, they could be understood as objecting to veiled women not being heard in a debate in which they are stakeholders. Second, it they could be understood as arguing that the motivations of veiled women have something valuable to add to the debate.

The underrepresentation of veiled women

The first argument, the one that objects to the underrepresentation of veiled women, is an argument also made by Maleiha Malik. In a paper that examines the distinction between legitimate and illegitimate forms of persecution in liberal democracies through the contemporary debate on face veils (Malik, 2014, 232), she argues that the "political elite" is involved in creating and sustaining false knowledge about the victims (of

persecution). Among the elite are not just politicians, but also the media (Malik, 2014, 237-238).

Although Malik focusses on the French and Belgian contexts, her argument is applicable to the Netherlands as well. She describes how the rhetoric of the political elite in France and Belgium builds on representations of face veils as associated with terrorism, the alleged Islamization of Europe, gender-oppression and pollution of a wider political economy (Malik, 2014, 237-242). As has becomes clear in the previous chapter, these themes are also part and parcel of the rhetoric in Dutch public debate. Ultimately, Malik writes, this rhetoric leads to the creation of “false knowledge:”

> This process of creating false knowledge about Muslim women who wear the full facial veil, and denying them a direct political voice in the lawmaking process, was crucial because it allowed political elites to assert that they already knew about the meaning of the facial veil. (Malik, 2014, 242).

I am hesitant to take over the notion of false knowledge within the Dutch context as confidently as Malik uses it in her analysis of the French and Belgian context, because the discussion of the law on face coverings in the Netherlands was mostly focussed on the way face veils made people feel, rather than on the identity of the women who wear them. Even so, representations in all three countries are similar and it would be fair to say that even in the Dutch context, the way people view veiled women has been coloured by the rhetoric of media outlets and politicians.

In Belgium and France the “creation of false knowledge” has resulted in Muslim women being viewed as suffering from an autonomy deficit (Malik, 2014, 242-245). In the Netherlands we see a similar result, since the view that veiled women are oppressed is not uncommon. However, it has already been established in the previous chapter that this view cannot be maintained, since the empirical evidence points to the contrary (see the section on oppression). So, considering veiled women as stakeholders in this debate may undermine the position of the advocates of the law. If the adversaries of the law want to establish a new argument against the law, veiled women need not only be regarded as stakeholders who’s interests should be protected, but also as citizens that might have something valuable to add to society, from which we are deprived through the instatement of the law.

The liberal argument

That leads up to the second argument, that veiled women may have something to add to the debate. This way of arguing their point seems more coherent with the position of the adversaries, since most of them confess to having difficulties face veils (Tweede Kamer, 2016, 12) while simultaneously objecting to legislation about it. So the argument of the adversaries is that the position of veiled women could be a valid position, which can co-exist with their own position, that prefers women not to wear them.

If so, questioning after the motivations of veiled women should be understood as building on the liberal assumption that different people living different lives is one of the worthwhile features of a liberal society, since the adversaries of the law do not necessarily promote wearing face veils but do object to limiting the freedom to do so. We encounter a similar view in Mill's own work:

> As it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself. (Mill, 1859, 47).

The importance of having as many liberties as unrestricted as possible, for liberals, is to serve the aim of experimenting with different modes of life, which I hereafter call lifestyles. While some lifestyles will not appeal to some individuals, there is value in allowing all different kinds of lifestyles for three reasons. First, individuals in society might learn something from different lifestyles, might "discover new truths" (Mill, 1859, 53-56). Second, it allows citizens to develop a lifestyle suitable to their character (Mill, 1859, 56-57). Third, it allows society to improve itself through the development of individuals that deviate from set standards, which then might prove to be redundant or oppressive (Mill, 1859, 57-61).

This section builds on the first reason Mill gives for the value of having access to different lifestyles. What the adversary of the law then needs to show, is that the wearing of face veils might not only valuable to the women who wear one, but also to

others, even if these people chose not to wear one. If this can be established, the law on face coverings is harmful insofar as it deprives people of access to a valuable lifestyle from which they might learn.

That the law on face coverings is harmful because it deprives people from a chance to learn something from veiled women, is argued by Claudia Ruitenberg. She argues that prohibitions on Muslim's girls and women's dress, including face veils, is a form of censorship that is miseducative (Ruitenberg, 2008, 17). Her focus is on public education, which she understands as creating a public, a democratic polity. Miseducative is "any curricular or pedagogical action that impedes the achievement of important educational goals" (Ruitenberg, 2008, 20).

Building on Judith Butler and Jacques Derrida, Ruitenberg argues that one of the central goals of public education is to provide a structural openness of knowledge and discourse. Education, to her, consists in initiations into knowledge and discourse in ways that both remain open to questioning and critique. Public education, in creating a public, must then involve an introduction into the discursive world, so that students may examine discursive acts that form new iterations of public discourse (Ruitenberg, 2008, 21).

Prohibiting face veils in educational context then hinders a critical examination of discursive processes and effects, Ruitenberg argues. Declaring face veils off-limits, impedes the study of the inherited nature of these acts. By banning some discursive acts, we hinder the study of that act and disguise regulatory codes as natural and self-evident (Ruitenberg, 2008, 22-23).

Another educational goal that thwarted by the law on face coverings is the development of Muslim student's agency, Ruitenberg argues. She understands the development as agency to be part of education. She defines agency as the ability to make choices based on some conception of a good life and to enact those choices. The prohibition takes away the possibility to teach students that they are not just subject to representations, but also can resignify representations. Instead of expanding female Muslim students' agency, the ban assumes these students' incapacity to resignify this discourse and thwarts the development of their agency (Ruitenberg, 2008, 23-24).

While Ruitenberg, focusses on the development of Muslim's students agency, I think that this argument may be extended to other students as well. For example, some

people see face veils as promoting exchange between intellectual equals since it impedes unwelcome male advances (Kim, 2012, 298). While such a view might not be appealing to all, it could be a view from which a lot could be learned, even if it were only what might be harmful about it. Non-Muslim students might also resignify the representation of face veils and veiled women, insofar as they will produce further representations of these women.

Impact

Of course it remains possible for Dutch schools to discuss face veils, but this is different from having the possibility of entering into a discussion with someone who has chosen to wear one. The difference is that in discussing face veils, they might be misrepresented, while this chance is significantly smaller when you discuss the subject with someone who wears a face veil. Nothing is known, however, about how many schools would have invited a veiled woman to speak about her experiences and motivations. Perhaps the number of possible encounters with veiled women within the educational context is the highest in Muslim schools.

What is more, educational institutions are not the only areas in which the face veil will be prohibited. Veiled women will effectively be banned from public transportation, non-residential healthcare facilities and government buildings. That means that in these areas, there is no longer a possibility to interact with them and to learn something from their lifestyle.

However, the harm caused by the law in this respect should not be overestimated. First of all, the amount of encounters that would have happened with veiled women will be limited, as the estimated amount of veiled women is low in the Netherlands. Second of all, the amount of encounters with veiled women that would have actually resulted in a dialogue in which the other person learns something may be expected to be even smaller. Not everyone who encounters a veiled woman would want to enter into a dialogue with an open nature with her. Third of all, the areas in which face veils will be prohibited are not all areas where people would want to enter into a dialogue with a veiled woman in any case. An individual in a hospital might be too preoccupied with his own health to enter into a dialogue about face veils, whereas that same individual might do so in another public area.

What remains of the line or argumentation that asks after the position of veiled women as one that has something to add? Because of the limitation of the areas in which people may appear wearing a face veil, the amount of encounters with veiled women is diminished. This also means that the amount of encounters in which people could learn from her lifestyle choices is diminished. As these encounters are not likely to be frequent, however, the harm done in terms of the possibility that people could learn from that lifestyle is limited. Nevertheless, it is a harm to be taken into account in the next chapter, in which I will attempt to weigh all the arguments that make a point about the utility of the law.

Inaccessibility & isolation

Another concern that has been mentioned in the parliamentary debate on the law on face coverings is that face coverings do not promote integration, but instead further alienate individuals wearing face coverings because services and facilities become inaccessible to people wearing face coverings. Some fear that wearers of face veils will no longer have access to essential services and facilities, such as hospitals and government buildings (Tweede Kamer, 2016, 21). Wearers of face veils are therefore forced to either uncover their face, or to choose not to enter the places were face coverings will be penalized. This means that if they choose not to take of their face veil, they cannot receive healthcare, cannot report something to the police and cannot apply for a passport without committing a criminal offense.

By extension, veiled women will likely become isolated because they cannot participate in society in many respects, for example by pursuing a degree or joining in on parent's evenings in schools (Tweede Kamer, 2016, 21). Indeed, as a result of the law, face coverings seem permitted only in the private domain or in areas so public that other individuals can avoid communicating with someone who wears a face covering. The law will likely cause a form of social isolation that women who wear face veils did not experience before. After the instatement of the law they will have less opportunities to socialize with people with whom they might have something in common, such as an interest in a similar academic topic or being a parent.

The increased social isolation of these women causes several harms. First, it causes harm to the women who experience their isolation as a loss. Second, it might

hinder other people in engaging in meaningful relations with veiled women. Third, there is the already established argument of the previous chapter that the isolation of women who wear a face veil causes a loss in opportunity to learn something meaningful from her.

Isolation and inaccessibility as self-imposed?

The inaccessibility of institutions and facilities can simply be remedied by taking off the covering, the advocate of the law might argue. Wearers of face coverings need not take the radical path, they need not be harmed, if they simply agree to uncover. But taking such a position, Muhammad Velji (2015) argues, fundamentally misunderstands what veiling is about.

He likens this position to that of the luck egalitarian (Velji, 2015, 545) insofar as luck egalitarianism can be understood as making claims about accommodations relating to responsibility. When you choose something that results in a disadvantage to you, you are less entitled to compensation than when bad things happen to you as the result of bad luck, the argument is. He is particularly concerned about the way this argument is used in debates about the accommodation of minority religions (Velji, 2005, 455). For luck egalitarians, wearers of face coverings simply deprive themselves of some services and facilities, since it is their choice to wear face coverings, and the deprivation of accommodation can simply be remedied by taking of the covering.

But, Velji points out, viewing the wearing of face veils as a choice, can only happen if you think about religion from an outsider perspective which interprets the practices of religious devotion as individual duties of conscience. In defining religion as a matter of belief, he argues, it becomes a cognitive framework instead of a practical mode of living which includes techniques for teaching the body and mind to cultivate specific virtues, set in tradition (Velji, 2015, 459). From that outsider perspective veiling seems open to reinterpretation when that practice clashes with other standards of living.

The access to religious subjectivity is not simply accessible at will, Velji argues. It requires self-transformation, self-development and modification of existence. He even goes so far as to say that it requires becoming other than yourself (Velji, 2015, 459).

He does not go as far as to say that religious practices are involuntarily in the same sense that sneezing is, and admits that there is an element of choice in them, but

Velji does object to a depicting of religious practices that makes religious practices a matter of either luck or choice. Such an understanding of religion reifies it as monolithic, objective and imposed in his understanding (Velji, 2015, 459-460).

According to this logic, then, wearing a face veil is, for some Muslim women, a means to becoming more pious, and not an end in itself. By not allowing these women to veil (in some areas), the state frustrates their goals of transformation, in which the veil is constitutive of becoming pious. Since piety should not be understood as a finished state but a continuing activity, he writes, "then taking away her veil destroys her ability to concretely become the person she chooses to be through carrying out those actions that express her own purposes and needs." (Velji, 2015, 460)

If Velji is right in his conception of what face veils mean to women who wear them, the harms these women suffer are not simply alleviated by taking off their face veil. Rather, they have to compromise one thing for another, their health or their piety, being involved in their child's education or their religious transformation.

The result of the law on face coverings will not be that some women will live in self-imposed isolation and inaccessibility of certain facilities and services. Instead, the law forces women who wear face veils to compromise her desires. This is something that she did not have to do, were it not for the law that forces her to make that compromise. Effectively, the law on face coverings then does not allow these women to develop a lifestyle suitable to their character, which Mill argued was the second reason for allowing multiple lifestyles in society (see the previous section). The harm that the law on face coverings causes is that it forces women to either suffer the harms deriving from inaccessibility and isolation or suffer the harm of not being or becoming who she wants to be.

Emancipation

A third objection to the law on face coverings is that it does nothing to further emancipation and does not protect women against coercion (Tweede Kamer, 2016, 16). That the law on face coverings does nothing to prevent men from coercing women into wearing the veil has already been established in the previous chapter, in the section on oppression. Therefore I will here concentrate on the first half of the argument; that the instatement of the law does nothing to further emancipation.

However admirable the demand to further emancipation, it cannot provide an argument against the law. As already argued at the end of the previous chapter, the legitimacy of the law does not depend on whether or not it promotes the greatest possible utility. What the adversaries would instead need to argue, is that the instatement of the law harms the emancipation of women.

Indeed, women who continue to wear face veils after the instatement of the law may depend on the willingness of their doctor to pay house visits, or on other people to cast her vote. The harms that result from inaccessibility or isolation when she chooses not to take off her face veil are even more poignant when we consider what it is that veiled women want to achieve. They are trying to gain acceptance, or at the very least tolerance, for their preferred way of living. They want their lifestyle to be accepted, to have all the options other women have, while enjoying a life suitable to them. Their attempt to be accepted could very well be seen as a struggle for emancipation. See, for example the above mentioned video by Martijn de Koning, 2017, from 7:29 onward and De Nieuwe Maan, 2018 from 22:15 onward, in which the spokesperson of a protest group consisting of veiled women clearly states she wants to be accepted, and is even prepared to do something extra to gain acceptance.

Reifications of norms

Schirin Amir-Moazami offers an interesting perspective that helps to explain how the law on face coverings affects these women's attempt to emancipate the wearing of face veils. She builds on the concept of performativity as laid out by Judith Butler in *Gender Trouble* (1990) and *Excitable Speech* (1997). Amir-Moazami explains performativity as alluding to the process of generating meaning through naming and reiteration. She writes:

> The performative can be futural, in that it generates effects by materializing what is 'not yet'. But it also depends on something which has already been said in the past, and its power and authority depend upon how it recalls that which has already been brought into existence. (Amir-Moazami, 2014, 268)

In applying the concept of performativity to face veils, Amir-Moazami focusses on how the naming of the veil in public debate is a practice that is performative in the sense that it leads to the issuing of a law, and that the repetitive rhetoric evokes a set of negative emotions and imagery, which in turn recaptures “the body of the European self” (Amir-Moazami, 2014, 267-269).

I have used the term Western subject in the previous chapter when describing this process of recapturing. The law only further reifies the Western subject through codifying where nonconformist ways of dressing are admissible. By codifying what is undesirable, we also represent a desirable ideal. Indeed, we have already seen that the negative representation of invisibility and being concealed translates itself into the desirability of being observable and knowable in colonial discourses (see the sections on homogeneity and communication).

But, as Al-Saji argues, the abjection of the “veiled woman” permits the “western woman” to be constituted as a desirable ideal. This ideal however only has its meaning within a system of gender relations that builds on colonial and patriarchal discourse (Al-Saji, 2010, 888). Within this system of gender relations the idealized western woman is naturalized and normalized. The reification of this norm then does not only harm veiled women, but also any other feminist project within the western context, since it means that they first have to subvert the idea that western women are fully emancipated. The law on face coverings thus effectively harms the emancipation of women by reifying the idea that only western women are emancipated.

Face veils and performativity

Yet another argument may be made if we focus on how this reification sets back veiled women. It is a missed opportunity for Amir-Moazami, I believe, that she does not apply the concept of performativity to the wearing of face veils itself, especially since her argument is about why veiling, as a transgressive embodied practice, provokes strong reactions (Amir-Moazami, 2014, 264). If anything, applying the concept of performativity to veiling could strengthen her point.

Butler herself applied the concept of performativity to another subversive practice; the art of drag. Butler considers gender to be a corporal style, constituting a performative act (Butler, 1990, 177). Drag mocks gender by revealing the imitative and

contingent structure of gender through its imitation (Butler, 1990, 175). While the act of wearing a face veil is unlike drag in that it is not (assumed to be) an act of mockery, it is like drag in that it reveals the contingency of gender norms and perhaps even norms of communication by not adhering to those norms, while simultaneously posing norms through the performance of wearing a face veil. I would even argue that face veils reveal the contingency of many assumptions about what a good life is, since the performance of wearing one conveys messages undermining many of these assumptions. For example that expressing individuality is not that important. Finally, like drag performers are not always in drag, veiled women do not wear their face veil in all circumstances, but limit their act to audiences they deem appropriate.

Like drag performances have influenced perceptions of gender (Shapiro, 2010, 155-156), wearing a face veil, as discursive performance, may influence our perceptions of many things. Both practices strive for acceptance while simultaneously challenging existing norms. As such, both practices are emancipatory practices. A law that codifies an emancipatory act as undesirable thus posits that act as abnormal, while the very performance of wearing a face veil is an attempt to normalize it.

The inaccessibility of does not only make veiled women more depended on other people, but also limits the areas in which she is allowed to challenge an existing norm through her performance. That the law criminalizes the act of wearing a face veil in government buildings seems especially harmful to me, since government buildings are the site of politics. Insofar as the wearing of a face veil may be seen as a political act, it is now limited to areas in which it can easily be avoided.

The first section of this chapter rendered Mill's third reason for allowing as many lifestyles as possible is the improvement of society. Face veils could potentially do this by challenging gender norms, similar to how drag has done this. So, the law on face coverings harms the emancipation of women who wear the face veil, along with harming other women fighting the reified norm constituted in the ideal of the western woman.

Fundamental rights

Another group of arguments that I want to discuss here are the arguments that somehow appeal to rights. Some of these arguments appeal to internationally recognized human rights (Tweede Kamer, 2016, 2) and others to constitutional rights

(Tweede Kamer, 2016, 18). These arguments have many different versions. They could appeal to the right of women to wear what they want, to the right of religious freedom for Muslim women, or the right to freedom of expression. I will not consider all appeals to rights separately here, but instead understand the argument as making a claim to some fundamental right, whatever the right mentioned in the actual argument may be.

Bottom line

There are two ways to understands these appeals to rights. First, we could understand the adversary of the law to suppose that rights are a bottom line we could not cross. To do so, however, is problematic, since there is virtually no right, or liberty, unlimited in the Netherlands. The right to wear what you want is limited, for example, because it is prohibited to be completely naked in most areas in the Netherlands. Likewise, freedom of speech is restricted in several ways, among which is lese majesty.

So it is clear that rights may be limited by law. Perhaps we should then understand this bottom line approach as a bottom line that may not be violated in the absence of reasons to do so. Yet the previous chapter has shown that there are reasons in favour of limiting the freedom to wear face veils. So understanding rights as a bottom line does not help the adversary of the law in making an argument against the law.

What is more, the bottom line approach for rights has similar issues as the quantities of welfare approach of the harm principle: what is the threshold? We have already seen that this is not an easy question to answer. The threshold set in the first chapter is that government interference provides more utility than it does harm and the harm principle is not violated. Whether or not the threshold is met, is the main question of the next chapter.

If the adversaries of the law cannot appeal to a bottom line approach of rights, he or she might wonder what the function of rights is within the Millian framework, or even whether they do have a function. This is not an argument easily settled, but I understand rights within the Millian context as David Brink (2016) does. He understands rights as considerations that in normal circumstances trump or constrain the pursuit of other goods, but are not absolute. Rights have a function in furthering our interests and in realizing our capacities for self-governance, which Mill considers constitutive of human nature. The adoption of rights by law, in turn, provides utility because it protects our

capacities for self-governance (Brink, 2016, 388-389). Since the capacities for self-governance is what allows human beings to pursue genuine happiness and not mere contentment, rights enable people to pursue happiness (Brink, 2016, 378-380). This is why the liberal values the freedom to pursue different modes of living so much, since rights protect our capacity for self-governance and our pursuit of happiness. This view on rights highlights the arguments made in the sections on emancipation and inaccessibility. The law on face coverings restricts the self-governance of women who wear face veils and their pursuit of happiness.

What this view on rights also does, however, is highlight the arguments of the advocates of the law, since they claim that face veils interfere with the kind of life they would like to live by harming them, for example, by harming their feeling of safety.

This points to an explanation as to why rights are not absolute in the Millian context as I and Brink understand it. The use of a right by one person may harm another, as has become evident in this discussion. The use of rights then, is that they insulate the interests of individuals against inference and may be observed uncritically, until the adherence to them is no longer optimal in the pursuit of utility overall (Brink, 2016, 386-387). Whether or not the inference on the right to wear face coverings in any areas is in the interest of the pursuit of utility overall is a matter for the next chapter.

A slippery slope

But there remains another way of understanding the appeal to rights; as a slippery slope argument. The slippery slope argument is a fallacy that takes an initial point through which one can, by a series of related events, envision an undesirable conclusion. The argument then is that because of the undesirable conclusion, the initial point should be avoided (Hansen, 2015). The most prevalent use of this fallacy is the argument that the law on face coverings forms a stepping stone to other anti-Islam legislations (Tweede Kamer, 2016, 36, Salaheddine, 2017, from 2:01 onward).

However, I already stated that the slippery-slope argument is a fallacy. It is a fallacy because even if the (envisioned) final scenario is unjust, this does not mean that the initial point is also unjust. Therefore you cannot conclude that the initial point should not happen. Purely based on logic then, the appeal to rights through a slippery slope argument cannot help the adversary.

But the slippery slope argument appeals to fear of a future that does not leave room for certain core aspects of life to different individuals, and does not rely on sheer logic. Every step towards that future then confirms the fears that the future might not be as good as the present is. The law then causes emotional distress in people who view this law as moving towards that unpromising future. As emotional distress qualifies as a harm, this harm provides a reason against the law.

Symbolic legislation

The final argument in the discussion on the law on face coverings revisits the argument that the law is a matter of symbolic legislation. There are two different arguments adversaries make with regard to the symbolic value of the law. First, that the law is symbolic legislation that does not solve any problem (Tweede Kamer, 2016, 20, du Pré, 2018). I assume that "real" problems refer to things like actual safety issues caused by face coverings, or the actual oppression of women. The previous chapter has already established that these issues either are not there, or are not solved by the instatement of the law.

Nevertheless, that does not mean that there are no "real" problems. Why would people feeling unsafe not be a real problem? Why would the issues surrounding communication with people wearing face covers not be a real problem? In the above section, I have argued that from a traditional liberal perspective, these problems need to be taken seriously because they convey something about the way some people prefer to live, just as the liberal's own arguments need to be taken seriously. Additionally, the previous chapter established that the symbolic value of the law also provides some utility. Therefore, the "mere" symbolic value cannot provide an argument against the law.

The second argument, then, is that the law, as symbolic legislation, conveys a negative or harmful sentiment (Tweede Kamer, 2016, 19). This argument has also been noted by Cécile Laborde in the French context. She writes:

> State law is uniquely coercive, and its symbolic potency manifest. Drafters of the burqa law hoped that the bill, while legally shakey, would at least convey a powerful message of national mobilization against the threat of Islamism. Yet there are real dangers associated with using the

> coercive apparatus of the law to convey symbolic messages. In this particular case, the harm caused by the perceived victimization and stigmatization of Muslims might well outweigh any of the anticipated benefits of the law. (Laborde, 2012, 410)

There are some who would argue that the drafters of the Dutch bill had a similar intention as the drafters of a similar bill in France (Moors, 2009, 395, Tweede Kamer, 2016, 14). Whether or not this is the case, is not my concern here. What is important in determining whether or not the law is legitimate, is whether the law causes a similar harm in the Netherlands.

While it is hard to substantiate whether or not Muslims indeed feel (more) stigmatized because of this law. Yet, there are some indications that this might be the case. A few newspaper articles report that Muslims feel targeted by the law because it targets a practice often seen as expressing Islamic faith and that Muslim authorities worry about the law increasing antimuslim sentiments (Amghar, 2019, Bouzzit & Taheri, 2018). Both the feelings of Muslims that feel stigmatized by the law on face coverings and the worries about increasing polarisation are harms to be taken into consideration when we consider whether or not the law on face coverings is legitimate.

Concluding

In this chapter several arguments have been discussed that oppose the instatement of the law on face coverings. Considering the position of the women who wear face veils, the inaccessibility and isolation she will encounter as well as her emancipation and the emancipation of women in general all provide arguments against the law. Any appeal to “fundamental” rights fails to provide such an argument, while the symbolic value of the law can provide both an argument in favour of the law (as has been shown in the previous chapter) as an argument against it. The exact arguments will be listed next chapter in an attempt to weigh them against each other.

Chapter 4: Making up the balance

In the previous two chapters I considered the arguments of the advocates and adversaries of the law and how they make a point about the legitimacy of the law on face coverings. The purpose of this chapter is to weigh the arguments against each other so that I can formulate an answer to the research question of this thesis: is the law on face coverings legitimate? Before I do that, however, I want to briefly revisit the conclusion of the first chapter, which stated the conditions for the law's legitimacy. Restating these conditions will help to remember what has to be established in order for the law to be legitimate.

At the end of the first chapter, I concluded that the law on face coverings is legitimate if, and only if, passing the law does not violate the harm principle and passing the law promotes more utility than it does harm. In addition, I posited three conditions that would violate the harm principle. These three conditions will be repeated in the next section, since I examine whether or not the harm principle is violated in that section. In order to answer the research question, it needs to be established whether or not the law on face coverings meets all the conditions for the laws legitimacy.

Do the arguments satisfy the harm principle?

First, I need to establish whether or not the harm principle would be violated by the instatement of the law. If one of three conditions for violating the harm principle is being met, the harm principle is violated, which would render the law illegitimate despite any utility the law could provide. The first condition for violating the harm principle is the instatement of the law because of unfavourable opinions on face coverings or a subset thereof. While I do not doubt that some Dutch citizens have unfavourable judgements about face coverings or a subset thereof, the analysis of the arguments of the advocates of the law shows that their point is not that the law should be instated because of those unfavourable opinions. In fact, all of the arguments of the adversaries depend on the establishment of harm that is at least as bad as emotional distress, except the argument about the symbolic value of the law. However, that argument does not depend on unfavourable opinions, but on utility provided by the expression of a sentiment. Therefore, the first condition for violating the harm principle is not met.

The second condition for violating the harm principle is the instatement of the law even when face coverings do not cause harm. This means that all face coverings have to cause harm, not just a subset of them. If only a subset causes harm, the law can only be legitimate insofar as it covers that subset, but not insofar it covers other face coverings. The sections on communication and safety in chapter 2 establish that all face coverings cause harm. The sections on communication established that face coverings can cause emotional distress and harmful unequal power relations. The sections on safety established that face coverings cause some people to feel unsafe. So, face coverings cause harm and therefore the second condition is not met either.

The third condition for violating the harm principle is that the law has to prevent harms done by face coverings. Since this condition focusses on the prevention of harm of all face coverings, it has to be shown that harm in communication and feelings of safety are prevented, since those where the only arguments that established that all face coverings cause harm.

As said, the section on communication does succeed in making an argument about all face coverings causing harm. While I concluded that the inequality in power relations and emotional distress may be more severe when individuals engage in communicating with someone who wears a face veil, the argument does count for all face coverings. The law prevents these harms in the areas where communication is most likely to be essential.

It may be asked how often a situation will occur in which one individual is emotionally distressed or harmed by an inequality in power relations when engaging in communication with someone who wears a face covering other than a face veil in an educational setting, non-residential healthcare setting, government building or in public transportation. Perhaps in a train during the carnival period one individual might prefer another to remove his or her mask, but then the law does not apply. During that period the mask is appropriate because it is worn within the framework of celebrating a cultural festivity. The instances in which harm will be done by wearing a face coverings that is not a face veils in which the law does apply will perhaps be quite bizarre. Nevertheless, if only one such a bizarre situation is remedied by the law, the law prevents the harm done by all face coverings.

I understand the section on safety to provide a more compelling argument, since it relies on less bizarre circumstances to establish that the law prevents harm. Any appearance of someone wearing a face covering in the areas covered by the law that would have caused some emotional distress is being prevented by the prohibition in these areas. So the law on face coverings does not meet the final condition for violating the harm principle, or any other condition for violating it. Therefore, the law on face coverings respects the harm principle.

Expected utility

If we are to conclude that the law is legitimate, the utility provided by the law must outweigh the harm done by the law. This is a troublesome demand for any law, since the legitimacy of the law depends on its actual consequences and not on its expected consequences. However, a problem in making laws is that legislation first has to be created and enforced if we are to know the actual outcomes of the instatement of the law, if the outcomes can be measured at all.

In general, the principle of utility requires the enforcement of whatever we expect to provide the greatest utility, because striving for utility in general promotes utility. This remark might lead my reader to believe I am a rule-utilitarian, since rule utilitarianism supposes that an act is right insofar as it conforms to a rule which value for overall utility is at least as great as any alternative rule available, whereas act utilitarians suppose that an act is right insofar as its consequences for overall utility are as good as any alternative available (Brink, 2018). However, I do not intend to settle the debate between act- and rule-utilitarians here. I believe a general adherence to rules to be compatible with the act-utilitarian account as well, since an act-utilitarian "does not claim that the individual [or legislator] must always consciously calculate consequences, but only that he should be expected to recognize when a general rule's connection to overall utility clearly is in doubt." (Turner, 2015, 728) So, if we accept the general rule that we should enforce what we expect to promote utility, then it is no longer a problem that we do not yet know the actual outcomes of the law, since the expected outcome is enough to establish whether its instatement is legitimate in the absence of reasons to doubt the expected outcome.

Weighing utility

That, finally, leaves the question if we may expect the law to promote utility. Unfortunately, weighing expected utility is not an exact science. We do not know the exact amount of veiled women, or the exact amount of people who are harmed by encountering them. Neither do we know anything about the intensity of the emotions of both groups, nor about the duration of those emotions. With all that in mind, I think it is still worthwhile to make an assessment based on the little information we do have: the estimated amount of veiled women in the Netherlands. I will try to make this assessment to the best of my abilities, but I do not expect the final word could ever be said about any assessment of expected utility, precisely because it is not an exact science.

Harm prevented and utility provided by the law

The first section of the second chapter concluded that the law prevents harms in terms insofar it prevents frustration of a desire for homogeneity, but only in some areas. The utility provided by that prevention cannot be great, because the amount of times the law will prevent this harm is small. Given that there are between 50 and 500 veiled women in the Netherlands, most people will never encounter a veiled woman.

I believe the most heartfelt frustrations in life are frustrations of our most authentic desires. I understand authentic desires in the Frankfurtian sense. They are desires that we feel represent us, desires that we accept we have and that we view as expressions of ourselves even if we are not the cause of those desires (Frankfurt, 2006, 7-8). Two things cause doubt as to whether the desire for homogeneity, insofar as this desire expresses a desire for the exclusion of face veils from Dutch society, is an authentic one. Firstly, we have already seen in the previous chapters that face veils have been represented in the debate in an almost exclusively negative way, which leads to the question how these representations have influenced the desire for homogeneity. Secondly, the first call for a ban on face veils was made by a politician when there did not yet exist a public demand for such a law. In fact, at the time the first ban was motioned, there was no public debate on face veils (Moors, 2014, 24). This causes doubt as to whether citizens feel that a desire for homogeneity as excluding face veils truly represents who they are as citizens. For some people the desire might be authentic and I believe they suffer a more significant harm if they encounter someone wearing a face

veil. Since that chance is still very small, the amount of harm prevented by the law on face coverings cannot be expected to be high.

The second section of the second chapter was about harms to communication. I argued in this chapter that for face coverings other than face veils to harm someone in communication, the situation has to be quite exceptional. Usually, we could just ask someone to take off a face covering, but face veils are an exception to this rule since they are worn because of a conviction of the wearer. Engaging in communication with veiled women may cause some individuals emotional distress because they cannot communicate in their preferred way. However, this harm can be avoided by not engaging in conversation with a veiled woman. A similar response could be formulated against the argument that face veils constitute a harmful unequal power relation. People can avoid such a relation by not engaging in conversation. This is of course harder for people who are somehow expected to converse with women who wear a face veil, like teachers and doctors. So this law prevents harm to people who would otherwise suffer from either emotional distress or a harmful power relation, and are expected not to walk away from such conversations. As several interbranch organisations have declared not to need legal regulations on face veils (Raad van State, 2015, 3-4) we cannot expect the law on face coverings to prevent many such situations. The utility provided by the law in this respect cannot be great either.

The third section of the second chapter, on oppression, was not successful in establishing an argument in favour of the law. The fourth section, on safety, argued that the value of the law is in providing a feeling of safety in the areas covered by the law. I do believe this argument to provide more utility than the previous arguments, since I assume more people to feel unsafe or intimidated when encountering someone wearing a face covering, than are harmed in communication with someone who wears a face covering. As said before, however, most Dutch citizens will never encounter a person wearing a face veil and even less people can be expected to encounter someone wearing another face covering in the areas covered by the law, since there are no groups of wearers of other face coverings. Therefore, the utility provided by the law in this respect is not a lot either.

The fifth section of the second chapter provided the argument that the law promotes utility because it expresses a sentiment, or some sentiments, that promote

utility. I mentioned the example that people who take the law to signify that oppression of women is not appreciated might be happy with the instatement of the law. Similarly, the law could be taken to express a codified desire for homogeneity, or as symbolic safeguard for a standard of communication. I understand the symbolic value of the law to provide the most utility, since it does not rely on circumstances in which harm is alleviated, but instead relies on people's own associations with the law. However, the added utility of the law as expressing a sentiment should not be overestimated, because it requires people to think about what the law represents to them. I expect the debate on the law to stimulate more reflection on the symbolic meaning of the law than the instatement and enforcement of the law itself, since the small amount of women that are estimated to wear a face veil leads us to believe that not much people will ever notice that the law exist after the debate has settled down, since they will not be affected by it.

Harm caused by the law

I now move on to the harms the law might cause. In the first section of the third chapter, I argued that the law harms citizens by making face veils a less accessible mode of living to learn from, but that this harm should not be overestimated, since the desire to learn from this mode of living in the areas targeted by the law may be expected to be low. The second and third harm that the law constitutes are the isolation veiled women will likely have to suffer and the forced compromise they have to make in their desires. I believe the harm to veiled women to be significant because the previous chapters give cause to believe that they desire to wear a face veil is authentic. As said, I believe harms to such desires to be most heartfelt. I therefore understand women who wear the veil to be harmed significantly by the law.

The third section of the third chapter established that the law causes harm to emancipatory efforts of women in general by reifying the ideal of the western women as emancipated. Additionally, the law harms emancipatory efforts of veiled women. I do not think that the emancipatory efforts of women in general are significantly harmed by the law. While it is true that the law in some sense codifies that is considered ideal, but the impact of the codification of the law on its own is less significant than the reifications of that ideal in the debate on the law. Perhaps the codification is harmful when we

consider all Dutch laws, for example laws on parental leave and last names, but in itself, the law does not do much harm to the emancipatory efforts women in general.

The emancipatory efforts of veiled women, however, are significantly harmed by the limitation of the areas in which the veils may be worn. I have already argued that it is especially harmful that face veils are banned from the political site, since wearing one could be a powerful performative act.

The fourth and the fifth section altogether provided three arguments that I want to discuss at the simultaneously. The first argument was that the law on face coverings harms people insofar as it causes them to worry that this law leads down a slippery slope to more laws that are somehow negatively valued. The second was that the law causes harms to Muslims that feel victimized by the law as they view it as expressing an anti-Muslim sentiment. The third argument was that the law harms people by causing worries about polarisation. Like the argument about the harm to the emancipatory efforts to women in general, the harm in caused by the law in these three respects cannot be considered to be major. Perhaps the harm caused by the law is more significant within the context of other laws or social developments, but if we consider the law on its own, we cannot expect it to cause harm more significant than emotional distress. As the appearance of face veils also causes emotional distress in some individuals, these arguments are to be taken equally serious.

Concluding

Having considered the expected impact of the law on face coverings, I do not expect the law to provide much utility. At the same time, I do not expect it to do much harm either, except to veiled women, whom I understand to be harmed significantly. What is more, the prevention of harm partially depends on the enforcement of the law. As some Dutch mayors have stated that the enforcement of the law does not have priority in their city (van Laarhoven, 2018). While the first statement of the mayor of Amsterdam was taken to be an expression of disregard for the law (Koops, 2018), the statements of other mayors where taken to be more concerned with the deployment of resources. As time and resources for law enforcement are limited, and the Dutch police force is understaffed (Ornstein, 2018), the possibilities to enforce the law on face coverings are limited as well. Some of the harms the law is meant to prevent may then not be

prevented at all. As the Netherlands already has some policies that tolerate practices that are illegal (like selling soft drugs), it is hard to determine the extent to which the law will be enforced and harm will be prevented.

If the law on face coverings is enforced, I believe the harm done by the law and the harm prevented by it would be approximately equal, where it not for the significant harms done to veiled women. The harm done to these women is what makes the law cause more harm than it prevents, since the harm prevented and the harm done to other individuals seems marginal. It need not be the case that policemen target veiled women that violate the law, but if these women risk a fine when entering some areas, they are likely to avoid these areas. This is similar to how Dutch policemen usually do not try to catch cyclists in a pedestrian area, but when they do they fine that individual and because of that, people do not generally cycle in pedestrian areas.

If the law is not enforced at all, and face coverings will be tolerated, the third condition for violating the harm principle is being met, because the law then does not prevent harm done by face coverings.

So, if enforced, I conclude that the law is not legitimate because it does not promote more utility than it does harm. If not enforced, the law on face coverings violates the harm principle and would therefore not be legitimate either.

Conclusion

From August 1st, 2019, the Dutch law on face coverings will come into effect, even though it fails to fulfil the conditions for its legitimacy, as we have seen. The conditions for the legitimacy of the law where established in the first chapter of this thesis, which first examined a plausible conception of the harm principle. Because the different conceptions of harm where all troubling in accounting for the role of the harm principle on its own, I built on the account of Piers Norris Turner. He counts any negative consequence, including emotional distress, as harm. The harm principle only protects against mere unfavourable judgement, like judging something to be of poor quality or judging something to be in poor taste. What safeguards Mill's liberal views, then, is that many things outweigh emotional distress when it comes to the legitimate exercise of government power. In addition, a law has to promote more utility than it does harm in order to be legitimate.

The second and third chapter of this thesis explored which arguments could provide solid reasons in favour and against the law. Since all arguments have been repeated in the previous chapter, I do not repeat them here again. The reasons for and against the law were weighed against each other in the fourth chapter, in which the harms done to veiled women in the Netherlands proved decisive in determining that the law is not legitimate.

Reflections

There is one theme in the third chapter that deserves some reflection. The examination of an appeal to rights lead to the conclusion that such appeals cannot provide an argument against the law on face coverings, since rights are absolute respective to their utility. This view explains why pleas against similar laws in other European countries based on rights have failed to succeed in international courts (Kalantry&Pradhan, 2017). Perhaps the adversaries of these laws that challenge these laws in such courts have something to gain by studying the utility of such laws. If they do so, they might succeed in undermining the value of these laws, which in turn could be used to argue why their rights should be respected. I hope this thesis can contribute to that aim.

In weighing the arguments, what diminished the utility provided by the law by preventing a frustration in the desire for homogeneity, was my doubt whether or not that desire, insofar as it demands the exclusion of face veils, is an authentic one. I would have thought the provided utility to be significant if I would have thought the call for the exclusion of face veils as expressing an authentic desire of the majority of Dutch citizens. Perhaps then the provided utility would be big enough to argue for the laws legitimacy. Similarly, if there were more veiled women in the Netherlands, and the law had been initiated because of a public demand, the utility provided by the law would have been more apparent. This would likely have led to a different assessment and another conclusion.

As has become apparent from the second chapter onwards, the representations of face veils and veiled women are generally negative in the Netherlands. Many of the harms caused by being confronted with a veiled woman are at least partially caused by these negative representations. The accuracy and fairness of these representations should, given their profound influence, be questioned. Not only for the sake of veiled women, but also because they influence other citizens. As has been argued in the first section of chapter three, discussing discursive acts such a wearing a face veil not only allows us to learn from such acts, but also influences the future representations of those acts. Therefore, I do not believe the discussion on the desirability of face veils in the Netherlands should be ended by the instatement of this law. If anything, it only underlines Mill's position that an open public debate is more valuable than government interference. Sadly, open discussion is now hindered by the limitation of the areas in which veiled women may appear. Therefore it seems more important than ever to accommodate veiled women, so that they may be heard as well.

The debate's impact on the utility of the law also points out one of the limits of my research method. By choosing a framework provided by Mill, I committed to a definition of legitimacy that depends on the outcomes of the law. My adherence to Turner's account made this more apparent, but the harm principle itself already supposes it, since respecting the harm principle requires a law to prevent harm to others. This outcome focussed definition of legitimacy leaves no room to consider the fairness of the tendencies that influence those outcomes. It might be argued, for example, that a desire for homogeneity is an unjustifiable desire because it is caused by colonial and racist rhetoric. Some people would not accept it as establishing a valid

argument in favour of the law. Similarly, the harm done to the emancipation of women in general may not be significant through the establishment of this particular law, but the cumulative effect of multiple laws may cause a significant effect. It is a limitation of my method, then, that it threats the law as an isolated case. At the same time, however, it is also the strength of this method, since it allowed for an isolated study of the legitimacy of the law on face coverings.

Another question that arises from this thesis is whether or not democracy, as a modern institute, is capable of dealing with the issues of a multicultural society. I'm thinking of issues like integration and religious practices like ritual slaughter. By understanding democracy as a modern institute I mean understanding it as a form of government that exerts power through observation and normalisation. The democratic process then becomes a process that tries to establish a norm. The divergence from that norm results in some disciplinary measure, which has the ultimate goal of assimilating difference to the established norm.

It is only through the works of thinkers like Foucault, Butler and Yegenoglu, who reflect on or criticize the modern way of thinking, that it becomes clear how power is exercised in modern societies. The argument of Ruitenberg in chapter three, that one of the central goals of education is to provide structural openness of knowledge and discourse and remain open to questioning an critique, should perhaps be extrapolated to the entire political realm. It is this structural openness that allows for the possibility of the resignifications of established traditions and norms. Settling an issue through legislation could be damaging to that openness. What may be required to safeguard that structural openness, and whether or not it is even possible to safeguard structural openness sufficiently in a democracy, are questioned better suited for a different thesis. Nevertheless, the different ways in which this thesis shows the democratic process as posing norms, shows that it is not a non-trivial issue.

Concluding

The utility of debating face veils does not end with the instatement of the law, nor in establishing its illegitimacy. Continuing the debate on face veils and laws about them could influence how both are perceived and how face veils are represented. Sadly, the instatement of an illegitimate law will likely impede further discussions in the

Netherlands. That does not mean the debate has to end, however. Continuing the international debate could result in questions about the moral foundations of laws that regulate the wearing of face veils. Hopefully, this will result in some alleviation of the harm done to veiled women by the illegitimate use of governmental power in the Netherlands.

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