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Reframing the Issues: Mediating the conflict between fundamental rights and ideological values

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Norm multiplicity, political vision singularity: identifiable segments bound by one 'orangeskin'

Like a number of other Western European 'host' countries – *host* to economic and political immigrants facing a range of [quality-of-] life-threatening difficulties in their home societies and *home* to an increasingly individualized indigenous population, Holland has over the past 35 years gradually developed from a substantially mono-ethnic society comprised of familiar and settled (if not actually 'nestled') cultural and religious variations on a theme (Western European-style Christianity) to a society jostling a plurality of cultures, core religious beliefs, philosophical ideologies, lifestyles and value systems.
These often widely-varying personal driving forces inevitably create a clash in claims on the exercise of fundamental rights – including the right to self-determination on the basis of a personally-acceptable value system.

This is not a new phenomenon; Holland is not new to the adjustments of a pluralistic society, having earlier been confronted by and eventually learning to adjust to competing views on many subjects and a variety of different social norms. Its embedded cultures have differed in attitudes towards dress, food, religious beliefs and morals, and over time substantially accommodated those differences under a large, overreaching democratic constitutional umbrella. This shared political functionality has provided the common basis – democratic processes via judicial institutions – to peaceably resolve conflicts that arise as a result of daily interaction. The cohesive bond of the constitutional state enables citizens to relate to each other on the basis of its underlying values and reciprocally to judge norms and conduct by its measure. By the recent evaluation of the Dutch Cabinet, respect for the ideological philosophy embodied in the Constitution creates "a situation of freedom within solidarity."[1] Trusting in the pervasiveness of this political core, a national community has gradually been constructed of three respectively supportive elevations: 1) citizens generally are able to presume the existence of an adequate level of fairness, reasonableness and rectitude in the conduct of their fellows; more progressively,

[1] "Kabinetsreactie: WRR-rapport 'Waarden, normen en de last van het gedrag'," 5 March 2004.

2) these presumptions have encouraged a mutual recognition amongst citizens as persons capable of and entitled to make their own choices; and more progressively still, 3) *beyond mere tolerance* – positive mutual recognition generates proactive participation in the society, manifested in a willingness to create a legally-protected, social space for others to live a life of their own choosing.[2] This policy of rights-respecting non-interference paired with responsibilities to government and to fellow citizens has become a recognizable characteristic of Dutch society and has nourished the existence of a spectrum of personal norms variation.

Apples with oranges

However, as Alvaro Gil-Robles, European Commissioner for Human Rights, pointed out, "There is a difference, however, between cultural norms at variance with each other, and cultural norms that are at odds with the requirements of human rights."[3] This 'at-odds' position is the way in which the hot issue of the culturally-bound practice known as 'honor killing' (Dutch, '*eerwraak*') has been translated in the course of current debates on the compatibility of immigrant cultures with Dutch society. Honor killing is believed to have originated in close-knit, Islamic tribal societies of Arabia, Asia and Africa. The ritualized practice consists of one or more [usually] male relatives killing a female family member if it is proven by the voice of a prescribed number of 'witnesses' that she represents a stain on the family's honor. The 'stain' is adduced by the occurrence of one or more acts prohibited by the restrictive code of the Islam-influenced, honor-focused, paternal culture, namely: consensual pre-marital sex, being a victim of rape, instigating and/or obtaining a divorce and selection of an unapproved marriage partner.[4] At first glance and further, the desirability of combating this practice - and, by extension, the religious, social and cultural perceptions related to gender roles, the nature of the family unit and community ties which engender it – is apparent. However, since that point of view has been thoroughly represented (and continues to be so) in social, political and academic circles, I will not here elaborate its position. Yet, the sheer weight of attention devoted to that widely supported side of the conflict, paired with the persistence of incidences of its practice,

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[2] Minister De Graaf (Dutch Minister for Government Reform and Kingdom Relations), Speech - Conference
on Fundamental Rights in a Pluralistic Society, 20 November 2003.

[3] Alvaro Gil-Robles (European Commissioner for Human Rights) - Speech at the conference on Fundamental Rights in a Pluralistic Society, 20 November 2003.

[4] "Whose Honor? Muslim Women and Crimes of Honor," Azza Basarudin. [Website: http://www.iifhr.com/womens%20website/ppaperhonor_killing.html]

and of the mindset and culture (albeit that of an entrenched minority) which give rise to it, beg the question of whether this stark cultural conflict can be approached, examined and resolved in a different way – one which furthers societal cohesion, sows mutual respect and perhaps even works to close the gap between the sets of norms espoused by advocates from each side of the issue. After all, a methodology which delves beyond the contested visible end-product – non-state regulated violence against women – for a resolution, has a greater chance at long-term success, where that 'success' is defined as an effective appreciation for the fundamental rights and freedoms guaranteed by the Constitution. A cognitive approach which exercises the elasticity of the implicated concepts and the tensile strength of the values underlying them serves as a conceptual stretch, admittedly exaggerated beyond the actually necessary measure, in order to: a) ascertain the 'breaking point' of those concepts and values under scrutiny (i.e., the extent of their validity and their coincidence with the long-term goals of the society); and b) discover just how much of a flexing and adjusting of the snugly comfortable, familiar societal band, is required to accommodate an acceptable re-fit. An initial, paper-bound model can engender flexibility of anticipation in shaping a viable socially-enacted solution – predictably a very different endpoint.

In this respect, a lesson can be learned from the failures of British administration of the Neuer people of Southern Sahara (referred to by Mansell in A Critical Introduction to Law), where "an imposed settlement" of conflicts by application of rigid law did not "effectively finally resolve anything" because "the legal method of translating a problem and decontextualising it did not work because the context remained and had to be lived with." On the one side, honor killing is a cultural, quasi-religious phenomenon which does not stand alone, but is the product of an extensive community and ideological context which is neither eradicated nor compromised by the exercise of post-event, judicial sanctions; on the other side, a bottom-line, legal judgment of the practice does not enhance multicultural arbitration (i.e., a bringing together of value sets) or true societal cohesion. One lesson that can be learned from a keynote in Mansell's anthropological comparisons of the maintenance of 'order' across societies where law was not the primary instrument – nor the individual the primary element – is that the group has its own 'common sense' and reality, and that societal interest is its own legitimizing ideology. This is no less true in Dutch society where, although individual rights and freedoms are guaranteed, the clash of immigrant-versus-native sets of norms is – first of all, intuitively – a clash of group cultures: foreign vs. indigenous; Christian vs. Muslim; community identification vs. individual primacy. Therefore, if a resolution to this problem is to be found and to take root across both sets of cultures, it

must speak with a legitimacy that is recognized and absorbed by both cultures.

As a shared basis of political agreement, the natural sources of legitimization for standardized norms (in a liberal, constitutional democracy) are the national Constitution and various international human rights treaties of which Holland is a signatory. In concert with the respective judiciaries, among their missions is the creation of conditions that enable people to use their recognized and guaranteed freedoms in a proper way by creating a balance between basic rights. Amongst those cherished fundamental rights and freedoms are: the right to equality of treatment; the right to life; the right to personal dignity; the right to a distinctive cultural and/or ethnic identity; the freedom to worship or to live one's life according to a one's own religion or ideology; freedom of expression; freedom of association, meeting and public demonstration; respect for the personal domain; and respect for the inviolability of one's person. Protection and enforcement of these rights actually ensure the possibility of a co-existing plurality of values that respects both individuality and the democratic society. In other words, it is theoretically possible for all citizens to maintain their own cultural identity and honor home-grown ideologies within the context of current Dutch law: a 'double identity' is not only possible but, in keeping with the liberal political ideal of citizens as free and equal persons, expected. As Rawls expounded in "Justice as Fairness: Political not Metaphysical,"

> "liberalism assumes that in a constitutional democratic state under modern conditions there are bound to exist conflicting and incommensurable conceptions of the good. (…) [P]ersons can accept this conception of themselves [*i.e., 'a political conception', ed.*] without being committed in other parts of their life to comprehensive moral ideals often associated with liberalism, for example, the ideals of autonomy and individuality. The absence of commitment to these ideals, and indeed to any particular comprehensive ideal, is essential to liberalism as a political doctrine. The reason is that any such ideal, when pursued as a comprehensive ideal, is incompatible with other conceptions of the good, with forms of personal, moral, and religious life consistent with justice and which, therefore, have a proper place in a democratic society. As comprehensive moral ideals, autonomy and individuality are unsuited for a political perception of justice."[5]

[5] "Justice as Fairness: Political not Metaphysical," Collected Papers, John Rawls, ed. Samuel Freeman. (Harvard University Press, 1999).

Thus, the concept of a philosophical 'split' between a shared, political, public morality and a non-consequential personal morality is not foreign to the political liberal ideology that, in general terms, informs the current Dutch democracy.

Does this dichotomy trivialize the implied moral development lying behind constitutional norms that protect human rights and democratically acquired freedoms? Does the evident compartmentalization of ideological/moral drives speak condescendingly to subset groups with regard to their values? If one applies Lawrence Kohlberg's understanding of moral development and its manifestations as a template for this issue, one finds that each element 'naturally' occupies its own expected place: the esteem for human rights and individual validity in the context of a cooperative society, which is enshrined in the Constitution and in various international agreements, represents an ideological feat of strength in that these prescriptive documents espouse moral values of a relatively high developmental stage[6] and package them as a *plan of action* toward which the community of peoples *must strive*. These prescriptions do not assume that all – or even most – members of the given society concurrently stand together on that same stage at a given moment in time; an intimate examination of the lives of even those entrusted to execute those norms on behalf of society is likely to show that the struggle lives on. What is key, however, is that societies acceding to the legitimacy of these prescriptions – like the individual human experiencing cognitive and personal development – are able to understand and value a system of moral judgment that is a stage beyond their own present level.[7] The formation and implementation of the constitutional code indicate that the community of peoples [in general] believes that the code represents a more adequate, comprehensive, and integrated system than that which perhaps the several individuals of the community would apply in its absence.[8] The Constitution and principally related normative agreements embody a level of moral organization that has been *materialized* into an achievable, feasible course of action; namely, an 'ideology'.

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[6] "The Cognitive-Developmental Approach to Moral Development," L. Kohlberg. *Phi Delta Kappan* 56, no. 10, p. 671 (1975).

[7] "Patterns of Preference and Comprehension in Moral Judgment," *Journal of Personality* 41, pp. 86-109 (1973).

[8] This is not to say that each individual in the society has actually reached the directly preceding developmental stage (nor that none have reached or exceeded the target stage). The general tone of the society, however, reflects the referred point of development.

One might speculate that if, at some point, all members of the society were actually at the same stage of moral development (i.e., that prescribed by the Constitution), the need would eventually arise for a new type of code to represent the society's further aspirations.

Therefore, the tension actually indicates a balance in the developmental health and trajectory of the society. More, later, on the outer limits of that tension vis-à-vis the integration non-organically integrated members of the society (i.e., recent immigrants of dissimilar ideological origins).
In spite of the democratic, liberal national foundation, the reality is that each of the cultures in question (the majority indigenous, secularized-Christian, Dutch culture and the immigrant, traditional, community-based, Muslim culture) perceives a public-private encroachment of values and norms and, hence, an infringement of constitutionally guaranteed, fundamental rights. "On one side is a fear of the new, that Islam is 'muslimizing' the Dutch society. On the other side, Muslims fear that something as personal as religion is repudiated by Dutch society."[9] The pull exerted by these mutual fears is equally weighty on both sides of the issue: on the one side is the strength of government institutions as power-equipped instruments of the law, supported by majority angst; on the other side is cultural and religious self-identification of a 'community' wedded to historically-rooted traditions. The more-or-less equal weight of the parties translates into a conflict that is not easily quashed. Minister de Graaf addressed the significance of this conflict in his speech to the Conference on Fundamental Rights in a Pluralistic Society, "Many agree that individual freedom and personal development must not be at the expense of other people's liberties, but it is becoming increasingly difficult to establish the boundaries (…). There is the question of conflicting constitutional rights. (…) Questions are arising in many plural societies with regard to the significance and meaning of 'freedom of religion' and the basic principal of the division between church and state…. The significance of religion itself has increased in some countries, precisely because the newcomers practice and promote their religion in a more prominent and public fashion than has been customary…. [The] point of departure is that a government has to warrant or even strengthen the diversity within society by promoting and guaranteeing the core values of democracy."[10]

[9] "Islam uit het publieke domein?" Debate reported by *de Thermometer*. 11, April 2004.
[10] De Graaf.

As minority immigrants, living a firmlyembraced life's philosophy, present an 'in-your-face' demonstration of religious and cultural practices that are utterly foreign to indigenous perceptions over an acceptable 'comprehensive morality', the issue is spoken of either in terms 'failed integration' – *"Should people be encouraged to hold onto their own culture, or should they be obliged to adopt that of their new country?"*[11] – or, in terms of respect for the law of the land – *"We want individuals to have their rights and freedoms fulfilled, but we do not want the rights of others to be denied. (…) [S]pecific differences of religion, social practices and customs… should be viewed in the context of the rights and freedoms of everyone in relation to notions such as human dignity, self-expression, practice of religion and free speech. They should not interfere with the human rights of others or be incompatible with the values of a democratic society."*[12] By another approach, however, issues of noncompliant cultural and ideological practices may not have to be framed in questions of either criminal behavior or of 'how much cultural relativism is permissible'; instead, as Minister de Graaf seemed marginally to acknowledge, "The dominant cultures, political concepts and traditions of law are tested for '*consistency*', as various minority groups come forward to exercise their constitutional rights. (…) causes us to stop and question some of our basic assumptions regarding the position of other groups…." (*italics mine*).
Questioning the internal consistency in the application of existing rights and freedoms can offer a fresh perspective on the norms conflict which, in re-framing the issue within the context of compatibility with the political ideological norms at the core of Dutch society, *may* offer more effective solutions.

Paring and dissecting: what is the essence of an Orange?
As earlier stated, there is no question but that freedom of religion, conscience, association and gathering, and respect for the minority cultures[13] and the private domain are (non-exclusively) protected, such that the Dutch authorities and citizens are obligated to extend the same room for expression to practitioners of divergent beliefs as to practitioners of widely-shared beliefs. Yet, there exists a palpable unease over the dimensions of this protected space.

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[11] De Graaf.

[12] Justice Wilhelmina Thomassen (European Court of Human Rights), "Living together with differences." Speech - Conference on Fundamental Rights in a Pluralistic Society, 20 November 2003.

[13] Article 27, *International Treaty on Civil Rights and Political Rights*, United Nations, 1966.

Dissatisfaction exists "over the way in which various groups in this society use their fundamental rights and over the judicial assessment of that usage. Insecurity [exists] over the boundaries of constitutionally guaranteed freedoms and the relationship between various rights."[14] Naturally, the exercise of constitutionally protected, fundamental rights is not absolute but is subject to necessary restrictions that are also embodied in a democratic society. The same is true of treatybased rights, such as those afforded protection under the European Convention on Human Rights.

> *[T]he human rights safeguarded by the Convention are closely interwoven with* the "democratic society" they serve, which means that they are not absolute but subject to restrictions in the interests of that same democracy. (…) [T]he freedom of thought, conscience and religion (Articles 9[4]) and the freedom of expression (Article 10[5]), are to be considered in the context of democratic society and may therefore be interfered with by a public authority for the benefit of other social interests. (…) Articles 8, 9, 10 and 11 of the Convention contain a qualifying clause whereby the State may restrict the rights enunciated in order to protect the rights of others and the democratic values of society. (…) The only type of necessity capable of justifying an interference with any of the guaranteed rights is, therefore, one which can claim to flow from a 'democratic society'."

Is a prohibition on subset-community, quasi-religious, cultural practices by self-identified, adult believers thusly justified in a democratic society? In general terms, the answer is "no." The Dutch cabinet considered and answered this question in its response to the report of the Wetenschappelijke Raad voor het Regeringsbeleid (WWR), entitled "Waarden, normen en de last van het gedrag":

> "[T]he cabinet sought the WWR's advice on the importance of common values for the effective functioning of a society. (…)also request to research the potential of values which are not generally shared or even conflicting, in relation to the question of whether and to what extent the divergence of specific values must be considered as socially problematic. (...) The constitutional democracy offers the framework within which not only different values can co-exist, but wherein contemporaneous unavoidable value conflicts can peaceably be resolved. (…)That does not mean that people are expected to hold the same beliefs over the desired arrangement of their life and the society. Freedom of thought is, after all, an unconditional right.

[14] "Nota Grondrechten in een pluriforme samenleving," Ministerie van Binnenlandse Zaken, 2004.

> The extensive variety of life philosophies and political ideologies that have long peacefully co-existed in this country demonstrate that there is no question of uniformity of thought.
> The question is whether lawmaking and rule-giving and they way in which these are interpreted by the judiciary guarantee a satisfactory balance in the relationship between basic rights in our plural society."[15]

All the same, a peaceful co-existence of ideologies does not assume a coincidence of types of ideologies, as further noted, "On an individual level, actions are not only determined by existing rules but also by a personal interpretation thereof as well as by the values and norms acquired during upbringing. At the same time, as the WWR points out, the degree of abstraction of some values offers the foundation for several, *even contradictory norms*."[16] (*italics added*) What, then, where contradictory norms widely differ from those held by the majority society? In order to vary the perspective from that presumed by the current status of the debate over divergent [quasi-] religious practices, let us pose the question, what can legitimize the authorized permission of non-standard norms and conduct in a democratic society? The *Nota Grondrechten* answers this question unhesitatingly:

> "The importance of the rule of law increases in a society where personal ideologies and lifestyles strongly vary and where the composition of the population becomes more heterogeneous. The values of the rule of law and resulting norms and rules of conduct comprise *the minimum connection* between different groups. Amongst those values are freedom, equality and solidarity and the protecting values contained in constitutional rights and fundamental rights – such as, in particular, human dignity, personal autonomy and the right of each individual to make his own choices. (…) Article 1 of the aforementioned proposed EU Constitution specifies: 'Human dignity is inviolable. It must be respected and protected.' The rule of law acts as a binding agent because it offers a reference point for the reasonable containment of numerous unavoidable conflicts over values and norms and clashes between interpretations and enactments thereof, within bounds. This is effected partly through judicial procedures and the democratic process. (…) People and institutions contribute to the prevention of alienation. (…) An open and positive relationship between parties and presupposes, too, that people bring their identities into the dialogue so that the public arena ideally becomes a safer place." (*emphasis added*)

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[15] "Kabinetsreactie.

[16] "Kabinetsreactie.

Thus, the legitimizing effect of the 'rule of law' works for both of the conflicting groups and can actually effect a bond between the two on the basis of a shared political ideology which recognizes and protects the rights of all individuals to the practice of their personal identity, be it ever so divergent. Naturally, however, it can hardly be a justification of the expression of an ideology that denies enjoyment of the aforementioned rights and freedoms to others in the society that it this is a widespread practice within a given community. Among such expressions of an ideology can be counted the practice of genital mutilation of female minors.[17] As the *Nota Grondrechten* continues, "(…) complex cases arise, especially, in respect of the customs and practices of immigrant communities. (…) [C]ertain social and legal norms are well established and which cannot admit exception for new competing customs…. There can, however, be no objection to the continuing practice of important cultural and religious traditions that do not conflict with the requirements of human rights or certain deeply entrenched social mores. Just as the respect for indigenous values can be expected of immigrant communities, so, equally, must their be own be accommodated within the limits outlined above." Hence to the question at the heart of this discussion: In the context of all of the abovementioned limits and exclusions, can 'honor killing' in any way be accommodated, legitimized in a democratic society?

"Can't we all just get along?" – questioning the desirability of fruit salads and hybrids Note that this attempt at re-framing the debate does not presume the *desirability* of the subject custom; rather, a broader definition of the issue is in attempted in aid of likewise broadening the scope of possible resolutions to the ongoing legal and societal conflicts surrounding it. This exercise honors the 'problem-solving approach' in theories of negotiation, which seeks consensual resolution and a constructive settlement between parties and so better guarantees the approval and cooperation of both parties with the finally agreed resolution.

> *"The notion of creating joint gains is that a co-operative, problem-solving* mode, with pooled information, a flexible and creative approach and an appreciation of one another's interests and concerns, will enable parties to arrive at an outcome which enhances the position of all parties, rather than having one party as a "winner" and another as a "loser". (…) [Lateral thinking:]

[17] [Note aside: It is only due to the long-established, historical (i.e., pre- liberal political), (initially) religious - based prevalence of the custom in Western lands that *male genital mutilation – circumcision of infants* – is not automatically ranked in this category. Thus, a fortuitous contingency that it is not a 'foreign' custom.]

> De Bono believes (…) that a fundamental shift of approach is needed. He believes that this is to be found by changing to a new way of thinking about
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> conflicts. (…) By using lateral thinking and adopting a problem-solving, creative approach to the designing of solutions, [he] encourages and assists with finding ways to generate alternative solutions to issues, large or small."[18]

In fact, the 'competitive' approach (also known as "positional") to the issue is the one currently taken by the legal and judicial authorities – as is the prerogative of the government being, as it is, concerned with the imposition and maintenance of *order* through *law* (both written and unwritten) with the backing of force, as necessary. As predicted by Murray, Rau and Sherman (*Processes of Dispute Resolution: The Role of Lawyers*, Foundation Press Inc., 1989), the strategies undertaken by the competitive approach are "hostile and confrontational," and focus "on manipulation and threat" rather than trying to understand the issues sufficiently to find a mutually acceptable solution.
The result, as borne out by reports in the press and the press statements of concerned private organizations, is that "joint gains cannot be identified, communications are distorted and tension, mistrust, anger and frustration" result. More negatively still, "the competitive approach results in deadlock and a breakdown of negotiations, with consequent delays…." Although the state obviously has the upper hand in the enforcement of societal norms, we learn from Sally F. Moore that "between the state and the individual exist varying smaller, organized social fields to which the individual belongs. These fields have their own customs and rules, as well as means by which to enforce or encourage compliance." It is observed that this situation can make it difficult to exercise effective judicial coercion in some private spheres.[19]

Some may argue that – in the market of ideas – a competitive strategy is not unfit for refining the product and the marketing thereof; the end-consumer (i.e., the citizen) may better benefit from a 'new-and-improved' product as a result of the strife between ideology-merchants to gain the upper hand in shaping society. This might, conceivably, be true where the competition involves 'products' of a similar nature which aim to satisfy the same yearning but differ in the means of accomplishment.

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[18] ADR Principles and Practice, H.J. Brown and A.L. Marriott (Sweet & Maxwell, 1993).

[19] "Recht en maatschappelijke verandering: De rol van het 'semi-autonoom sociaal veld' by de sociale werking van het recht," Sally F. Moore. *Reprinted* in the Syllabus Algemene Rechtsleer, (Amsterdam: Universiteit van Amsterdam Faculteit der Rechtsgeleerdheid, 2003-2004).

However, where the field lies between ideologies which not only fight for the method by which to supply a market demand, but also struggle over whether to either fill demand or to dictate the nature thereof [e.g., Merchant X: 'Do you want fruity refreshment? Try my Superior Seedless grapes!'; Merchant Y: 'Do you want grapes? You ***shall*** accept my eggs!'], the integrity of both the market structure [the historical and intellectual basis for the society's evolved ideology] and the independent-minded consumer [the democratic citizen] are compromised by the friction. The fact-finding phase of the problem-solving method actually incorporates the effort to *recognize* the other party's interests, in the style of Axel Honneth [i.e., acknowledge, understand (in the sense of being informed, not necessarily requiring agreement), accord respect, and mutually discover a 'space' where selfvalidation and self-development can unfold], without necessitating that one 'sell the farm' (i.e., give over the entirety of one's patrimony to the effort) in the process. The selfdevelopment that takes place in the glow of mutual recognition requires self-knowledge: what is one's starting point and what is one's goal? Parties from both sides of the conflict must be willing to relinquish the 'sacred cow' status of their ideological keystones ('the group'/'the individual') if they are ably to conduct an appraisal of their ideological inventories and bring these to the table in the information-swapping, fact-finding phase. A rigidified attitude toward each precept misses the interdependence and interplay of each on and with the other, and does not allow the necessary recognition. It is important to note that the 'kinder, gentler' problem-solving method of resolution – incorporating recognition of the other's human dignity and right to respect and self-determination – is here complementary to Kohlberg's description of the developmental stages of moral development. By his assessment, moral growth (a desirable aspect of self-development) occurs in an unvarying sequence of stages, none of which can be passed over in gaining the next. Therefore, it is neither unreasonable nor without intent that parties to the conflict are expected at least to have passed Stage 1 and in so doing to have sufficient knowledge about self and desire – or even Stage 2 and to recognize their membership in one or more communities – to be able to present a self-identifying picture. Besides enabling mutual recognition, what is the intent? Self-presentation requires self-reflection, and researchers of cognitive development have found that reflecting on questions of moral judgment and the process of seeing moral situations from a variety of viewpoints (e.g., via the exchange of information over one's ideological values) stimulates moral development.[20]

[20] "Educational Psychology, A Developmental Approach," Richard C. Sprinthall and Norman A. Sprinthall, p. 222 (Massachusetts: Addison-Wesley Publishing, 1981).

The challenge, first, to 'know thyself' and, then, to know the ideological context of fellow citizen-communities is the provocation towards a developmental growth spurt to the respective next level.[21]

So, in keeping with the spirit of the democratic ideals of the constitution and ideologicallyaffiliated agreements, what does a broader picture of the questioned legitimacy of 'honor killing' look like? Let us start with this citation from Justice Wilhelmina Thomassen on personal autonomy:

> "[T]he first Article of the Charter of Fundamental Rights of the European Union reads: 'Human dignity is inviolable. It must be respected and protected.' (…) Respect for human dignity and human freedom, which has deep roots in western culture, can be considered as a principle suitable for guiding the choices to be made in striking a balance between conflicting Convention rights. Not as a value which should create new rights, but as an instrument by which to rank existing human rights and freedoms… seems evident that some rights have a prominent role in upholding human dignity. Under this head I have already mentioned Articles 2 and 3 [*the right to life; prohibition of torture and degrading treatment, ed.*]. To them I would add the right to selfdetermination and personal autonomy, as reflecting the notion that human existence is meaningful and therefore worthy of protection ***as long as this corresponds to the will of the individual concerned.*** (…) Human dignity and human freedom have a certain element of absoluteness in the sense that ***disrespect for these values in principle constitutes an interference depriving the right concerned of its essence***…. *Is the right to manifest your religion and to live your family life according to your beliefs a justification for oppressing female family members who have their own distinctive views on the subject?* (…) Although the Convention is intended to uphold and promote the effective functioning of political democracy, it cannot be reduced to a blind respect for the principle of the rule of the majority…. Broadmindedness, tolerance and protection of minorities from oppression as a result of majority rule…. Rights (…) to self-determination and personal autonomy."[22] *(emphasis added)*

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[21] "Notions like human rights, equality and civil liberties did not come from documents. They came from struggles. …Struggles cannot be fought from the outside, they must occur internally. …[C]onflict, diversity, and evolutionary change seem inevitable despite the powerful appeal of a traditional core of norms and values. [Richard Bulliet, "Rhetoric, Discourse and the Future of Hope," Under Siege: Islam and Democracy, (1993).] …[T]he modernization of the West did not begin with democracy, human rights, and free markets. Rather the origins lay n struggle, controversy, and debate." Nader Hashemi, "The relevance of John Locke to social change in the Muslim world: a comparison with Iran." *Journal of Church and State*, 1/1/2004.

[22] Thomassen.

Evidently, once the importance of an ideological clash with the majority or host culture is disposed of, a key to legitimizing a contested religious or cultural practice is the willing participation of all involved. The sense that individuals subscribing to a recognized, documented set of beliefs and practices embrace the utter inevitability of their life's ideology creates a safe space under the democratic umbrella for the personal practice thereof. Obviously, the "will of the individual concerned" both presumes and necessitates that practitioners of any such contested practice have attained the age of majority under law so as to be deemed fully capable of such self-determination. Under this proviso, Justice Thomassen considers that interference in an individual's determination of the values and norms by which to live one's life constitutes substantive disrespect for human dignity and derogates the right to a meaningless shell.

What if the majority society cannot comprehend or appreciate the value of the entirety of the dynamics of another's ideology? What if one's cherished life's philosophy (or religious belief) comprises an exacting structure of family honor, approved partner selection, rules against adultery and fornication – in other words, a set of norms and rules governing a part of the private domain which the national legal order has left to individual and family governance? The existence of a parallel or 'competitive' rule-giving order within the national legal order is not unknown. Practically speaking, the subset rule-giving or legal order sets standards only in areas not addressed by the national order; for example, the balance of Dutch laws with laws of the European Community means exclusive authority for one or the other order in some areas, shared authority in other areas and the permission of stronger-than-required measures in protection of specific national interests in some areas of harmonized regulation. If a subset community exacts more stringent (if not 'higher') standards of itself and its *voluntary* members than does the national community, can this rightly be denied to them? For example, one may severely disagree with and criticize the discriminatory view of women held, upon Christian religious grounds, by a certain Dutch political party and one may even argue that such willful subjection of free and equal members of society to a subordinate status is demeaning and incompatible with the ideals of freedom and equality in this society. Yet, if the adult female members of that party choose also to view themselves as second-class human beings and perceive a 'good' and a 'rightness' in their accorded subordinate status – this demonstrated by continued party membership and continued role fulfillment as submissive wife to a husband within a household led by the ideology – respect for the values of human dignity and freedom demands that neither the state nor society intervene or directly attempt to readjust the participants' voluntarily embraced views of themselves.

This is the case even though the state accords those individuals a higher value than they ascribe to themselves. *Personal freedom and dignity, in such instances, means the freedom to consider oneself as stripped of or devoid of human dignity.* As mentioned earlier, such a conceptualization is not foreign to the political liberal ideal. Rawls considered that as long as a citizen fulfills the duties of public political morality (respect for others, full participation in the obligations of society) one's "personal comprehensive morality" is a matter of private interest – although from an external view one would wish for and provide all the environmental elements (social systems, education, and a rewarding legal and judicial framework) for an eventual "overlapping consensus" between the two moralities in favor of the public political morality.

What if the ideology of a group [of individuals] threatens the integrity of others of their own fundamental rights – such as the right to life, or the right to physical integrity in the sense of access to available instruments for the preservation of health? This hands-off and permissive approach is also taken with respect to another religious group – Jehovah's Witnesses – whose strong belief system values strict adherence to a principled prohibition to blood intake, regardless of material consequences to health or life in situations of medical emergency. It has for some time now [this was not always the case] been decided that a conform interpretation of constitutional laws permits them the freedom to disregard and to refuse to cooperate with their fundamental right to life, in favor of converging rights to bodily integrity and freedom of religious expression.
Likewise, the use of possibly harmful, hallucinogenic drugs has been permitted in cases of recognized and documented historical, religious practices of some subset communities [the use of *peyote* by some Native American Indian tribes (U.S.A.), and the use of *ayahuasca* tea containing dimethyltryptamine (DMT) by members of the Santo Daime Church (Netherlands)] in fulfilment of their religious and spiritual obligations.

These examples of self-conceived 'higher values' of conscience and faith can be counted amongst the 'small virtues' referred to in the Dutch Cabinet's response "that are necessary in order to establish the 'large values of constitutional governance" in the long term. (…) [They are] starting points for the responsible handling of individual freedom."[23]

[23] Kabinetsreactie.

This can be deduced since admission of fixed personal norms to the composition of a stable society is an element of *recognition* that furthers self-actualization and creates a space for the eventual development of an acceptable and practical morality.[24] Reciprocal respect is thereby engendered amongst subset communities individually and between subset communities and a definitive national community as bearers of personal rights, public and personal obligations and possessors of meaningful norms. An individual's personal calls of conscience which exceed the requirements of law can conceivably be accorded respect at all levels of the national order – not only as secured in the Constitution. For example, *Alibi* magazine of November 2002 relates the case of a man from Eemnes who, having been charged with '*voorwaardelijk opzet*' in the stabbing of his estranged wife, might have judged as unaccountable for his actions because of '*verminderde toerekeningsvatbaarheid*' as advocated by his lawyer. Upon hearing the judge consider this possible and *judicious* adjudication, the man exclaimed, "Ik ben er helemaal nog niet aan toe om nu vrij te zijn. Ik wil ook helemaal niet naar huis. Detentie is de enige manier om te overleven. (...) Ik schrik van de vraag om vrijspraak, *want ik verdien straf, ik heb iets gedaan wat niet mag!*" The journalist continues to explain,

> "Dat het verweer van zijn advocaat betekende dat de tenlastegelegde feiten niet konden worden bewezen, omdat het bewijs voor het bestandeel opzet ontbrak en dus niet de hele delictsomschrijving was vervuld, daar had de man geen boodschap aan. Zijn raadsman begreep dat alles ingewikkeld was door het hoge juridische gehalte en zijn cliënt nu eenmaal weinig begreep van het juridische taalgebruik, maar de verdachte smeekte het Hof bijna hem toch echt niet vrij te spreken. Vrijspraak betekende voor hem dat hij het niet gedaan zou hebben en dat had hij tot zijn spijt nu juist wel. Vrijspraak van het tenlastegelegde is 'voor het volk' nu eenmaal hetzelfde als onschuldig. Twee weken later kreeg hij 'zijn zin': (...) werd hij veroordeld tot vier jaar gevangenisstraf wegens poging tot doodslag."[25]

The point of this anecdote is that more demanding personal values of 'honor', 'merit' and 'justice' are not entirely incompatible with the legal exercise of order and the enforcement of those norms.

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[24] "Mutual Recognition as a Key for Universal Ethics," Axel Honneth, [*year?*]

[25] "Het recht is niet voor het volk," Tanja de Vette, *Alibi*, Jaargang 33 Nr. 1, Opinieblad (Juridische Faculteit UvA, November 2002).

As the Dutch cabinet's report concluded, the ranking of fundamental rights is undesirable because it offers no satisfactory solutions in cases of potential conflict. Better to proceed from a concept which strives for the 'maximalization of rights', whereby "the right which prevails in a concrete situation is the one which provides the most far-reaching protections" to the individual. At times, such a determination may depend heavily upon the values that the individual indicates – by self-identification or by declaration – that he or she places on the results of those rights. Thus, what was earlier viewed as a clash of fundamental rights – for example, the right to life versus the right to live by one's own religious or philosophical ideology – may actually be a question of converging rights, where each has its own place in its own time, *by personal determination*. The question of how to proceed with this interpretation is one which is difficult to codify in a legislative or judicial setting. In fact, "(t)hese are not always even questions. Especially not if they touch upon associations, religions or concepts which are foreign to us or about which little is known."[26]

How is society to proceed in addressing these conflicts, paradoxes and ambiguities in accordance with and respect with for constitutionally guaranteed fundamental rights? Clarity for the governed facilitates and encourages active decision-making by individuals; clarity for judges excludes the influence of 'cultural relativistic' arguments in courts. Therefore, any actualization of procedures which either restrict fundamental rights or guarantee them in 'difficult' cases should be set down in "clear, fair rules which are accessible and foreseeable. The decision-making process should meet the standards of a democratic society, which is a material factor in determining the margin of appreciation allowed."[27] Definitive legislation combined with clearly specified and enforced administrative and control structures serves the judiciary in its mission to provide legal security and land-wide conformity to the law, and its serves the affected individuals – both the perpetrators and potential "victims" of the contested practice – by empowering them to take responsibility for their own life, well-being and future. This requires that they participate as full 'citizens' (in the Rawlsian sense) in the self-identification and decisionmaking process, and that they make and are enabled to make clear and informed choices on key social and political issues within the guidelines of a Constitution that is declared to extend to *all* the people. Such is the "lawfulness requirement" of resolving a conflict issue under the rule of law.

[26] Kabinetsreactie.

[27] Thomassen.

The individual proactivity requested by this call to self-knowledge and personal accountability is not lamed by the perceived 'organic character' of such subset communities; such a perception disregards the complexly formulated system of rules governing behavior, status and interactions within the community – not responsively formulated but in advance of specific situations. The group exists along pre-defined lines of conduct and has full-fledged institutional sophistication. While the community may be classified as 'organic' in its genesis, its perpetuation implies decisions individually made – conscious or subconscious – to continue to submit. Particularly when the subset community exists as a transplant in ideologically-foreign soil, each day involves a weighing of options, choices, advantages and disadvantages.[28] It would be a soft condescension to exclude the group from the vigorous critique, dialogue and diplomatic parley (including attempts to create compromise) extended to other instances of selfdetermining communities.

Paring the apple: what lies under the skin?
Why is this precision in understanding the nature of the subject subset culture important to this process? Islamic scholars acknowledge that Islam is far-reaching in its prescriptions – in dictating man's responsibility to God (Allah), its seeks to regulates every aspect of life – including laws for family life, education, crime and punishment, and government.

> "The primary issue of what interpretation of Islamic law will be applied raises legitimate questions. The *Shariah* is a *comprehensive legal, ethical and spiritual guide of conduct* to achieve submission to the will of God."[29] [*emphasis added*]

> "Mohammed professed to derive from Heaven, and has inserted in the Koran, not only religious doctrines, but political maxims, civil and criminal laws, and theories of science."[30]

> "In Islam, Muslims are required to follow a set of constraints and degrees of freedom that have been established in Divine Law. Following Divine Law is at the heart of what being a Muslim means.

[28] The word 'Islam' means ' *submission' [to the will of God]* and entails a decision (individual, not group) to suppress innate human tendencies to self-expression, independence, etc. in favor of obedience to the requirements exacted by the higher power(s) [Allah, family, community].
[29] "Shariah courts in Canada, Myth and Reality," Faisal Kutty and Ahmad Kutty, Webpage: http://muslimcanada.org/kutty.html.
[30] "Islam, democracy and Alexis de Tocqueville," Nader Hashemi, *Queens Quarterly*, 22 March, 2003.

> Muslims are not free, according to their likes and dislikes, to pick and choose what they will and will not do with respect to Divine Law. Divine Law is inherent in, and presupposed by, the practices of the Islamic religious tradition. Muslim personal/family law is an integral part of such Islamic practices. *…[T]he principles, methods, values and safeguards inherent in Islamic family/personal law are every bit as sophisticated as anything in the Canadian legal system*."[31] [*emphasis added*]

> "The pertinence of Islam to the modern world is that issuing from the All Knowing and the absolutely Real and serving as the message of the Heaven, *it takes care of everything* and provides for a balanced life and an equilibrium between spiritual needs." [*emphasis added*] *Quoted from "Muslim Personal Law," Syed Athar Husain. Nadwa Press (Lucknow, India, 1989).*[32]

Many Islamic scholars (both apologists and critics) would say that Islam never supposed itself a co-existing precept but a sovereign one whose sovereignty is not content to wait upon the patient hand of God and a divinely-instituted *next world* to make its primacy manifest, but sees itself as the active tool of God to establish that sovereignty *de facto* in the current world.

> "Finally, Muslim Personal Law is a part of the religious structure of Islam and no non-Muslim government has the right to interfere with it. Muslims living under non-Muslim systems are, as such, required to make every possible effort for the recognition of this principle by their governments." *Quoted from "Islamic Faith and Practice," M. Manzoor Nomani. Islamic Research and Publications (Lucknow, India, 1973).*[33]

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[31] "Oh! Canada -- Whose land, whose dream? Sovereignty, Social Contracts and Participatory Democracy: An Exploration into Constitutional Arrangements," Syed Mumtaz Ali and Anab Whitehouse. (The Canadian Society of Muslims, 1991). Website: http://muslim-canada.org.

[32] "The Review of the Ontario Civil Justice System. The Reconstruction of the Canadian Constitution and The Case for Muslim Personal/Family Law. A Submission to The Ontario Civil Justice Review Task Force," Part II – General Discussion of Certain Fundamental Principles and Basic Issues Underlying the Plea for Recognition and Implementation of Muslim Personal/Family Law. Syed Mumtaz Ali (The Canadian Society of Muslims, 1994). Website: http://muslim-canada.org.

[33] Mumtaz Ali, Part III – Treatment of Minorities: Equality and Tolerance versus Discrimination.

"With respect to the Muslim international law, there are many points on which Muslim law is at variance with the modern, Western international practice. Consequently, it is up to Muslim States to see if their heritage could not be proposed to others with convincing arguments for universal application."[34]

"The ultimate reality, according to the Quran, is spiritual and its life consists in its temporal activity. The spirit finds its opportunities in the natural, the material, the secular. *All that is secular is therefore sacred in the roots of its being*. There is no such thing as the profane world. …The state, according to Islam, is only an effort to realize the spiritual in human organization. …[T]he *authority of 'the King, Lord and Master of this Universe' is not to be partitioned between the conflicting claims of 'Caesar' and 'God'.* You cannot bring partners to share God's authority with him. **That is, for a Muslim, the most unforgivable of all the derelictions of religious duties.** Such is the grave and critical nature of *shirk* in Islam. So all law has to be sanctioned by the Divine Will – including the law – stemming from the human activity, provided it is within the limits prescribed by the Divine." [*emphasis supplied by writer*] *Quoted from A.K. Brohi (Advocate, Supreme Court of Pakistan and former Minister of Law) in the introduction to "Islam Law: Its Scope and Equity," Said Ramadan. (London, U.K.: MacMillan, 1961).*[35]

"God is the real law-giver, and authority of absolute legislation rests in Him. No person, clan or group, not even the entire population of the state as a whole, can lay claim to sovereignty." *Quoted from "Fundamental Teachings of Quran and Hadith," Nisar Ahmed.*[36]

"The Islamic Imperative: …If the governmental authorities and judicial system of a non-Muslim country have in place methods of conflict resolution that are rooted in principles and values that are governed by motives other than the intention to please God or which do not serve the best interests of the Muslim community or which contain less wisdom than do the guidelines which have been given by Allah and His Prophet, then Muslims place their spiritual and social lives in dire peril when they submit to that which is other than what Allah has ordained for those who wish to submit themselves to Him."[37]

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[34] Mumtaz Ali, Part III – Treatment of Minorities: Equality and Tolerance versus Discrimination.

[35] Mumtaz Ali, Part III – Treatment of Minorities: Equality and Tolerance versus Discrimination.

[36] Mumtaz Ali, Part III – Treatment of Minorities: Equality and Tolerance versus Discrimination.

[37] "Mumtaz Ali, Part V – Conclusion.

This is not to say that Islam-as-it-is-practiced in a Western society is inadaptable to a role as a transplant in a democratic order, in the sense of the practical relationship between 'morality' and 'ideology' which was earlier herein proposed.

> *"The discovery of these rules of conduct is attained through fiqh or* jurisprudence. *Fiqh* is composed of the *Usul al Fiqh* and the *Furu al fiqh*. *Usul al fiqh* is the methodology of jurisprudence, including the philosophy of law, sources of rules, and the principles of legislation, interpretation and application of the Quran and traditions of the prophet Mohamed. *Furu al fiqh* are the derivates or the legal rules, *which are subject to interpretation and evolution*."[38] [italics added]
>
> "Hence the dictum of Abu Yusuf (a very highly regarded Muslim jurist): "A Muslim is bound to regulate his conduct according to laws of Islam wherever he may be." It goes without saying that this depends upon the liberty enjoyed in foreign countries. …In spite of the insistence of Muslim jurists on Muslims being bound by their own laws wherever they may find themselves, it cannot be denied that Muslims in foreign territories live there on sufferance and they are subject to twofold restrictions. …Secondly, such Muslims have to accommodate themselves to the laws of the country where they are living. …Muslim minorities share the opportunity and the responsibility to seek the best standard and the best possible quality of life they can acquire by all lawful means available to them. …Depending on how they negotiate with governments of their adopted non-Muslim homelands, Muslims either can live the best kind of lives, or reduce themselves to the worst possible levels of existence."[39]
>
> "Do you want to govern yourself by the personal law of your own religion, or do you prefer to be governed by the secular Canadian family law? …If your choice is in favour of the second option, then you must accept the necessary logical consequence that, in following Islamic principles and precepts, one must obey the law (or follow a course of action for this purpose) with due regard to the latitude and flexibility for adaptation to the changing times and circumstances. And for the survival and establishment of an Islamic way of life, one must, out of sheer necessity, seek ways and means as to how one may be able to cope with new and changing situations." *Paraphrased from Maulana Muhammed Taqi Amini, from the Urdu.*[40]

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[38] Kutty and Kutty.

[39] Mumtaz Ali, Part III – Treatment of Minorities: Equality and Tolerance versus Discrimination.

[40] Mumtaz Ali, Part III – Treatment of Minorities: Equality and Tolerance versus Discrimination.

Observation can testify that, despite the long-standing scripture and traditions, tens of thousands of Muslims currently abide and participate in their democratic surroundings apparently without significant self-perceived damage to their spiritual integrity. Further, they do so in accordance with the laws of their democratic societies. Whether this adaptive stance of Muslims is certified by the recognized 'keepers of the faith' (i.e., the spiritual leaders) is not at point here. It may be that Islam-in-the-scripture and Islam-inaction diverge somewhat according to time, place and circumstance – a phenomenon known to other prominent modes of belief (i.e., Christianity/Christendom, Judaism/Jewish culture, or even secular *law-in-the-books* and *law-in-action*). The question is whether the self-professed in a given society – the Netherlands – will find it valuable to the sustention of their Muslim identity and even the evolution of the practice of their faith to make the further adaptations necessary to have their faith accommodated as one of the many modes of self-expression and self-development which find themselves at home within the ideology of a liberal democracy.

Achieving a balance of ingredients: a political science
Does an expectation of limited normative compliance relative to the larger society trivialize the subset group's norms? However organized, a community (delineated by spoken and unspoken rules of behavior and interaction) is a human construct. By international conceptions, one primary occurrence of a community is the nation-state, a society contained by and limited to its sovereign borders. This fact of existence does not 'trivialize' the characteristics and norms of non-conform groups, but does underscore the relative power relationship and the *de facto* hierarchy traditionally recognized as the prerogative of a sovereign nation. This understanding recognizes a political situation (law as a social fact), not a judgment of culture or norms. The nation organized according to the norms of a liberal democracy offers two options to its citizens in respect to pursuing ideological adaptations to a generally fair rules system: 1) democratic change via persuasion and participation; and 2) an open border, i.e. the freedom to depart the country – if its ideology is so personally intolerable – in search of a more amenable ideological home. Conversely, the disrespectful, trivializing system offers neither the opportunity for individually-instigated internal change, nor the right to expatriation in case of dissent.

It should not be thought that the exercise in seeking a normative resolution is exclusively the responsibility of the subset group. Advocates and supporters of the homegrown democracy tend to take its existence and future for granted and forget that it did not spring full-grown out of their national soil, but that its modern incarnation is the product of millennia of

strife, war, compromise, and intellectual activity. They forget that the living nucleus of a democracy must be opinion, discussion, and education. Those who are born into this society cannot value it sufficiently to perpetuate and grow it save by knowledge of the experiences of past generations and an engendered feeling of responsibility to the future. If the ideology of liberal democracy is under-appreciated by its beneficiaries – such that they take no or insufficient steps to instruct, persuade and gain the support of those who step into such a society without a similar background of organic growth into this ideological phase – they justly risk losing it to an eventual unpersuaded majority and shall need, themselves, to exercise the 'open border' option in search of a homeland which will allow them to live according to *their* norms. Why do so many second- and third- generation Dutch citizens identify more strongly with the land and culture of their immigrant parents than with the Netherlands? Why has that 'minimum connection' – comprised of 'the values of the rule of law, resulting norms and rules of conduct' (from the earlier cited *Nota Grondrechten*) – not been made to effectively link so many Dutch citizens of foreign extraction to the ideology of their adopted home? A breakdown in the formative focus of nationally-organized education is largely at fault. The slack is taken up by extra-territorial ideologies (i.e., ideologies which are, in the long-run, incompatible with the continuance of a liberal democracy) whose proponents embrace their worth and the value of perpetuating them. Ideological formation is not an instance of self-occurring 'natural law' but is competitive and evolutionary. The obvious lesson is that those most dedicated to the task stand a greater chance of ideological survival. As the American educators Richard C. Sprinthall (American International College) and Norman A. Sprinthall (University of Minnesota) noted,

> "[E]ducation by definition is not value-free or neutral. Curriculum materials, teaching procedures, readings, and films all to a greater or lesser degree teach values. Certainly, a free democratic society clearly rests on a very explicit value structure: to be an informed and intelligent democratic citizen means that we value principles of social justice, the consent of the governed, a free press, and equal rights and opportunities – the basic construct of a democratic constitution. A free public-school system, supported by public funds, is, at least ostensibly, designed as an instrument to teach pupils how to function effectively in a democratic society. This process includes both rational and ethical domains, as philosophers would say, the epistemology and the axiology – how we know something and how we value. Thus, in addition to the so-called intellectual domain, or levels of conceptual development, we need to consider the ethical domain."[41]

[41] Sprinthall and Sprinthall, p. 384.

Is such an inculcating use of education really an act of cultural judgmentalism? Yes, and no. A requirement that all citizens be, at one time or another (elementary phases of schooling for children; 'citizenship' programs for adult immigrants), instructed in the history and ideology behind the norms of the national society implies the worth and effective utility of this system (and of this nationally-achieved phase of moral development) as a connector of various groups of individuals in respectful, peaceful interaction. Robert Dahl's observation concerning the creation of a democratic culture in a non-democratic society applies as well for the perpetuation of a democratic culture within the changing demographic composition of the local population, namely "…few would seriously contest [that] an important factor in the prospects for a stable democracy in a country is the strength of the *diffuse support for democratic ideas, values, and practices* embedded in the country's culture and *transmitted, in large part, from one generation to the next*."[42] [emphasis added] However, the right to supplemental – even ideologically competing – values instruction on a personally-selected and personally provided basis is not thereby excluded. The efficiency of a comprehensive education as a tool of social engineering has not gone unremarked by activists for a more selfassertive manifestation of subset cultural norms. For example, one of the earlier cited papers presented by The Canadian Society of Muslims rejects the formative influence of Canadian public school education:

> "Becoming a loyal subject of Canada has nothing to do with being assimilated into some sort of pre-fabricated, monolithic, standard set of assumptions, values, beliefs, commitments and practices *which public education is, among other things, intended to promote*. Supposedly, such a monolithic process constitutes an allegedly unifying social and political medium. Yet, one can be taught values such as freedom, rights, democracy, social responsibility, justice and multiculturalism without going to public school and without presupposing that everyone must engage these topics in precisely the same way." (*emphasis added*)[43]

[42] Quoted from "Political Culture and Economic Development," Robert Dahl (1999) by Nader Hashemi in "Islam, democracy and Alexis de Tocqueville." *Queen's Quarterly.* 3/22/2003.

[43] Mumtaz Ali, Part III – Treatment of Minorities: Equality and Tolerance versus Discrimination.

What would the author have in its stead? He offers by way of contrast,

> "On the other hand, public education cannot teach, say, a Muslim child about how to be a good Muslim. In addition, public education cannot actively assist a Muslim child to establish an Islamic identity or to adopt an Islamic way of life. …[N]or do public schools have the capacity to help the individual learn how to put all of this into practice on a day-to-day basis."[44]

This observation begs the question, "Is the Dutch organization of public education helping the individual understand the value of liberal democratic norms and how "to put the them into practice on a day-to-day basis"? This formative step will be crucial as a pre-requisite enabling self-identifying members of the subset community to signal competency in selfdetermination for issues involving freedom of choice in matters of conscience (see below). In fact, a responsible enacting of any constitutionally-compatible strategy for the resolution of competing rights as suggested in this paper must be preceded by a statesponsored, comprehensive education in democratic norms if members of the community are to be afforded a real choice.

Maintaining taste[ful] integrity: a social art
Besides the aforementioned pre-requisites for individual participation, structures for approaching this resolution should include legislative action, public debate among elected public officials, representatives of the judiciary, representatives of the target group (e.g., imans, mullahs, Islamic interests – including Muslim women's interests – organizations) and individuals directly affected by this issue as a matter of the personal exercise of conscience. Binding ground rules should be established by a co-operative of governmental and subset community entities; these in turn should be supplemented by self-regulation within the subset communities, under official oversight.

There is room here for mediation-type administrative and control structures in the cadre of 'cooperative legality' (public-private partnerships) along these lines:

1) <u>Official registration of the subset community and a mandatory, comprehensive declaration of its practices</u>;

[44] Mumtaz Ali, Part III – Treatment of Minorities: Equality and Tolerance versus Discrimination.

2) Jurist- (academic and practicing) and subset community expert- panel appointments whose function it is to ensure that potential registrants to a subset community fully understand the scope of the undertaking (indication of subscription to an official set of norms and their underlying values) – possibly in the context of an interview or counseling. [This can be compared to the preabortion procedure psychological and information counseling supplied to women by some clinics. The goal is to create aware citizen-consumers.] **In accordance with the constitutional democratic values, this subscription and its practical application – *whatever that may be, as defined by statute* – would be restricted to citizens of adult age who are capable of making an informed choice** (see the information/education-proviso above)**.**
Once comprehensive information is given, the consequences of an *individual choice to conform* and to be counted among such practitioners of a stringent and personally demanding ideology – where one readily forfeits one's life or bodily integrity to the counsels of conscience – can be no more reprehensible than the invasive, elective cosmetic surgery opted for by any number of image-conscious individuals in the society.

3) Official and documented registration of subset community members. [An example of this sort of self-declaration is apparent in the cardcarrying/medical tag wearing custom of Jehovah's Witnesses. These chose a form of identification which will ensure observation and respect of their belief system even when they are incapacitated and unable to speak for themselves.]

4) A panel similar to that in step 2 whose function it is to assess, after-the-fact, whether individual cases fall under the pre-defined area of subset community authority for judgment, and a national judicial oversight committee to review subset community judgments. This step entails **strict enforcement** of any relevant national law where the reviewed act is deemed (judged) not to coincide with subset community authority and established regulations, but instead trespasses into the domain of hierarchically superior national law – either by reason of lack of fulfillment with requirements of self-identification or by failure to fulfill established motivational requirements (i.e., manslaughter/murder not incited by religious demands of honor).

5) A national order mediation panel to enable and facilitate ***speedy,***

definitive, publicized, and registered 'exit'-decisions by desirous subset community members, and strict enforcement of any pertinent legal consequences in case of any trespass of that individual's expressed, legally-protected will; plus counseling and support of extracted members in order to realize separation (physical separation, if necessary) from the subset community. [By way of comparison, again, ex-Jehovah's Witnesses or those less assiduous in the practice of their beliefs refuse/neglect/decide not to carry self-identification cards and are therefore entitled to a medical staff's full array of life-saving treatments (including blood transfusions), even if family members insist otherwise, in the absence of independent verification of affiliation with the belief system.]

6) Legally regulated facilities within areas of the subset community, which are required to broadcast and enforce the registered self-extraction decision within the community.

Of what are all of these steps in aid? To reprise the considerations of the Dutch cabinet in relation to other questions of values, norms and the obligations of conduct, but that are superbly applicable here:

> "An important value in our society is shaped by the fact that each individual is deemed capable of making personal choices, including bearing responsibility for his own conduct. (…) An individual in this society cannot, therefore, hide behind the group, as though powerless over his own conduct. The person is a social being. This means that people only come into their rights in relation to others; it is only in relations with others that norms and conduct acquire real meaning. (…) Personal responsibility of citizens and organizations in our society for the fulfillment of norms (both formal and informal) is therefore of prime importance to the cabinet. Even in cases where the government has a role in enforcement, grassroots support for these norms is essential. (…) The fact that that this is a question of personal responsibility does not ignore the fact that there is also a social, even general interest in the question of whether this personal responsibility can actually be realized. (…) In caring for the general interest [the government, ed.] should to the extent possible contribute to the creation of circumstances wherein citizens and organizations are able to accept personal responsibility to the greatest extent possible, as well develop themselves in a free environment. (…) The government also needs to offer sufficient possibilities for peaceful resolution of conflicts. In general the democratic process is, itself, an outstanding means peacefully to handle conflicting views in this society. (…) Although realizing that enforcement of norms can never be the panacea for all trespasses, the cabinet gives high priority to a serious enforcement of law and rules. (…) *In addition to active official law enforcement, an important aspect of opposition to taking*

> *the law into one's own hands is the provision of sufficient qualitative and quantitative possibilities for the peaceful resolution of social disagreements.* … In that light, it should be observed that the judicial procedure should most often play a secondary role. Access to the courts is not always the most appropriate manner of conflict resolution. A graduated approach to the administration of justice – whereby the personal responsibility of the individual citizen is appealed to – is vital. The cabinet proposes, therefore, besides a good preparation of the judiciary, the development of alternatives, such as mediation. (…) The integration of minorities has a goal: shared citizenship for immigrant and indigenous peoples. That is loyalty and active participation in the Dutch society. (…) This requires appropriate government policy and measures. (…) The cabinet wants to set up meetings… with representatives from minority organizations to discuss ways of handling different cultural backgrounds."[45]

This broader view of the relevance of fundamental rights and freedoms to a conflict issue brings into focus important issues of participation, mutually enforced respect (between majority and minority communities on the one hand, and between continuing and emancipated members of the subset community on the other hand), and dialogue. The value of beginning with these elementary aspects of social co-existence in a pluralistic society was witnessed to by Deputy Secretary General of the Council of Europe:

> "Integration of minorities in society is a two-way street. It not only requires acceptance by minorities of the rule of law, democratic principles and of human rights, but also a general acceptance by dominant cultures that integration undoubtedly implies that society as a whole is changing. This may reduce the hitherto uncontested place of dominant cultural or religious traditions in a society. (…) …a willingness to question and reconsider certain dominant traditions in society that may unnecessarily impact negatively on minority culture. (…) Reconciling respect for "different" identities with fostering social cohesion can only succeed if it is based on human rights (…) [and a] willingness to meet and understand "the other", to achieve mutual comprehension. (…) [The] Council of Europe also promotes the concept of "education for democratic citizenship". This is an essential safeguard against a cultural relativism which would undermine social cohesion. Democratic citizenship stresses "the ties that bind" all members of society. It stresses citizenship as a necessary common identity of all. (…) [It] includes human rights education as a tool for respecting others: my human rights are your human rights.

[45] Kabinetsreactie.

> It means empowerment of those who are disadvantaged to achieve full and effective equality, socially and economically, but also politically: by enabling and promoting active participation of all in the democratic process and public life in general. A human rights-based approach to questions of integration also means: no tolerance for activities or practices that seek to undermine human rights or limit them excessively. This is reflected in Article 17 of the European Convention on Human Rights as well as in the Framework Convention for the Protection of National Minorities. Finding solutions to tensions between different human rights must always respect the basic tenets of a democratic society based on the rule of law and respect for human rights of all its members. It is only within the framework of universal human rights that one can find solutions that are legitimate, convincing and acceptable for all. (…) That in a human rights-based approach, the starting point is the individual and his or her dignity and rights as a human being. That includes the right freely to express oneself, including one's religious identity, in private and in the public space. Precisely because this is a right, it should be the rule and restrictions of the right should be the exception, only justified where necessary in a democratic society in order to protect other legitimate interests. The legal framework should make allowance for assessing proportionality of measures restricting expressions of identity. It should include judicial and other checks, also against religious discrimination and arbitrariness."[46]

This broader view also appreciates Justice Holmes' consideration of the value of understanding and appraising the psychological aspect of legal and personal decisions; if participants are held to and judged according to their own declared standards, one can reasonably expect to see an eventual evolution – possibly a falling off of divergent norms by virtue of a *conscious choice* for separation. Eventual atrophy of this prescribed practice (honor killing) can be anticipated – much like the prescription of stoning adulterers and homosexuals has atrophied in Jewish belief and culture; although stoning remains a recognized prescription in Jewish holy texts, a modern-day incident of this type would be viewed as an aberration and a strictly personal vendetta – not as an acknowledged or acceptable religious/cultural practice among Dutch Jews.

It is to be expected that such an apparently permissive outlook on the legitimacy of conflicting personal norms under existing Dutch law will meet with opposing suppositions.
I will here briefly anticipate and respond to a few:

[46] Maud de Boer-Buquicchio (Deputy Secretary General of the Council of Europe). Speech at the Conference on Fundamental Rights in a Pluralistic Society, 20 November 2003.

Question: What if the subset community attempts to expand its allotted authority into areas of competitive or conflicting decision-making – e.g., '*sharia*' law and sanctions against theft, [ordinary] murder, slander, and the like? ANSWER: such offenses are crimes already addressed by national legal provisions. The national judiciary should not tolerate infringement of its domain of authority, but should firmly enforce the law. The subset community's authority exists *only* within the context of national authority. This situation is currently known in the case of national regulations that recognize the ritual slaughter of animals along religious guidelines which are at odds with national regulations in respect of animal welfare; however, authority for the procedure has been explicitly granted within boundaries (designated organizations, designated practitioners within those organizations, and registration of practices and practitioners – both Muslim and Jewish).

Question: Some countries do not even allow extradition of suspected criminals to thirdparty lands for crimes where the death penalty may be imposed because it conflicts with the principle of the value of human life adhered to within the first country. How can a government held to the rule of law effectively 'hand over' its citizens to the fatal justice of a non-conformist ideology within its own borders? ANSWER: Neither the first country nor the suspected criminal subscribes to the values (i.e., the validity of the death penalty) of the third-party country, and *should not* be held to its standard, naturally. That punishment represents the unilateral declaration of a sovereign legal order and the first country is well within its own rights as a respectively sovereign country to refuse cooperation. If the suspect, nonetheless, *chooses* to return to and submit to the adjudication of the thirdparty country, the first country has no rational authority to prevent him. The suspect assesses himself and wishes to be assessed by the legal standards of the third-party country. He is within his rights to do so. By comparison, where a potential victim of honor killing – i.e., a female who wilfully identifies with and chooses to participate in a particular subset community – and her potential executioner both explicitly declare adherence to a same set of laws, values and principles, the national order may choose to allow voluntary fulfilment of those specific (if generally repugnant) requirements within pre-determined boundaries.

[47] "Justice as Fairness: Political not Metaphysical," Collected Papers, John Rawls, ed. Samuel Freeman. (Harvard University Press, 1999).

Question: The very permanence of the death penalty in 'honor killing' invalidates the personal freedom of conscience. Rawls, too, posited that citizens are "free to conceive of themselves and of one another as having the moral power to have a conception of the good" that is not inevitably immutable. In fact, "as citizens, they are regarded as capable of revising and changing this conception on reasonable and rational grounds, (…) as independent from and as not identified with any particular conception of the good…."[47]
Since the possibility of change in one's private, 'comprehensive morality' is admissible, isn't the tolerance of an ideology that negates that possibility by destruction of the person essentially illegitimate? ANSWER: Even liberal political governments implicitly acknowledge the relative value of human life, even if the vocalization is otherwise. Under specific circumstances, engagement in wars, the permission of euthanasia, the legality of abortion, the absence of extreme measures to avert potential suicides, the lack of allinclusive measures to absolutely ensure the health and welfare of every single individual within its political borders, the necessity of armed law enforcement agents – all demonstrate the reality that the value of human life is relative to values of competing, convergent or higher orders. This acknowledgement certainly makes room for personal determination in this issue, especially in the framework of conscience and a personal, core morality.

Getting to the core – a messy but fruitful endeavor
As a starting point for strategizing an effective mediation, the concepts presented in this paper demonstrate the utmost respect for the rule of law attribution of formal individual equality before the law. It presumes the ability of individuals to speak for themselves, to make life-determining personal choices and to see themselves as the state (presumably) sees them – as political human beings capable of unknown potential. This is not to say that such is definitely the case. Reality often speaks loudly and otherwise over an individual's deficiencies in distinguishing the self from the environment. That is why any program which attempts even to shadow the resolutions suggested in this paper would need to 'meddle' deeply and comprehensively in the social environment and the affairs of conscience of its affected citizens and exhaust all possibilities for individual decisionmaking if it hopes to justify the results. So, if the goodwill and participation of subset communities are to be expected and maintained throughout such an endeavor, complexly interwoven layers of cooperation will be required from communities and government institutions to address the innate power imbalances, to facilitate information gathering, the development of options, the determination of regulations and to implement the systems.

Not the least of this cooperation would be that required between community representatives and the judiciary as a necessary part of review. Can the one overcome distrust of the intentions of the other enough to instigate a first phase of discussions and negotiations? Can the other overcome the inherent repugnance for any order which, if unchecked, threatens to jostle the legal order off its pole? Well, the argument has here been re-framed; let them have a look at it.

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