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Separate and Unequal: Judicial Culture, Employment Qualifications and Muslim Headscarf Debates

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Received: 7 August 2013; in revised form: 6 September 2013 / Accepted: 9 September 2013 /

Published: 13 September 2013

Abstract: Few European lawmakers have analyzed the implications of Muslim headscarf bans for equal employment opportunity. EU anti-discrimination directives suggest that contradictory member-state approaches will eventually invoke a judicial Community response at national expense. Drawing on the *bona fide occupational qualification* (BFOQ) standard, this study compares the “judicial cultures” of the U.S. Supreme Court, the German Constitutional Court, the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ). It argues that while the ECJ initially invoked Roman law precepts shared by a majority of its member-states through the 1980s, it has come to embrace Anglo-American norms stressing individual freedoms over state interests. Given their strong support for equal treatment and social inclusion, EU justices will be more likely than member-state or ECHR judges to overturn existing bans on *hejab* at the workplace, once such a case makes its way onto the ECJ docket.

Keywords: Muslim headscarves; equal treatment; European Court of Justice; bona fide occupational qualification; European Court of Human Rights; German Constitutional Court

1. Introduction

Post 9/11 prohibitions on Muslim headscarf use offer a powerful illustration of the tendency to conflate religious identity with political expression, rendering religious attire a litmus test of state efforts to combat Islamic fundamentalism. European debates over *hejab* have little to do with the aspirations of the women who wear them, and lots to do with social-policy failures dating back to the 1970s [1–3]. Responses nonetheless vary across borders, due to historically negotiated church-state relations embedded in national constitutions under divergent framing concepts like *laïcité*, *pillarization*

and *secularity*. The Netherlands and the United Kingdom display significant tolerance for “veiling”, while France and Germany insist on their constitutional obligation to preserve *laïcité* and *neutrality* vis-à-vis would-be proselytizers. These principles were actually introduced to end violent conflict between Catholics, Protestants and anti-clericals that occurred long after Jews and Muslims were driven out of “Europe” as of 1492.

Today the European Union is home to roughly 25 million Muslims; yet scholars rarely analyze the barriers to occupational mobility encountered by female “migrants” (actually second and third generation descendants) grounded in religion. Prior to 2000, Article 8 of the Maastricht Treaty ordained that only persons holding member-state citizenship were entitled to EU-national privileges, like the right to participate in local and European Parliament elections. Minority women who lack national citizenship are thus denied rights to labor mobility accorded indigenous women, even though a majority have been born and/or educated in EU member states. For migrant offspring in Germany, for example, this amounts to double discrimination: vis-à-vis native women, and vis-à-vis Muslims in other EU states who can naturalize within five years of resettlement¹.

Most case studies describe regulatory models ranging from outright prohibition to multicultural tolerance, rooted primarily in historical-institutional factors. Contributors to the impressive VEIL project (*Values Equality and Differences in Liberal Democracies*), for instance, compared citizenship and migration systems, formal church-state relations, legal mechanisms for recognizing faith communities, anti-discrimination policies and gender regimes [4]. Despite the obvious fact that all *hejab* cases involve women, German courts, especially, frame their verdicts in terms of the “negative” rights of unnamed parents and children (*i.e.*, their right NOT to be influenced by a teacher’s beliefs) rather than in terms of positive, economic rights tied to gender and equal opportunity. A judge in Nordrhein-Westfalen, for example, denied a teacher the right to cover her hair with a beret, insisting that others *might perceive it* as being worn for religious purposes [5].

Equally problematic for this study, German federalism requires that educational decisions involving neutrality fall to the Länder, producing sixteen possible outcomes, and thus *unequal protection* of women’s “fundamental rights” under the Basic Law. Eight states have banned headscarf use by public school teachers; the rest have not. A higher administrative court confirmed in January 2009 that Baden-Württemberg could bar a Muslim convert from covering her hair at school but exempted Catholic nuns, insisting that the former signals religious proselytizing while the latter reflects the country’s “cultural” heritage and values. A 2009 Human Rights Watch Report deemed such prohibitions discriminatory, suggesting that an appeal lies ahead [6]. That appeal, I argue, is most likely to occur at the EU level.

The European Court of Human Rights offers one appeal venue, but Muslimas are unlikely to secure their rights there. In *Dahlab v. Switzerland* (2001) and *Leyla Sahin v. Turkey* (2005), the ECHR allowed state preferences to supersede religious freedom enshrined in the 1950 Human Rights

¹ Germany still relies essentially on the principle of *jus sanguinis* (parental lineage), although it did introduce the *jus soli* (birthplace) “option” as part of the citizenship reforms enacted in 2000. Children born in Germany after 1991 are entitled to German citizenship if at least one parent is a permanent legal resident; between the ages of 18 and 23, however, they must undergo a complex process allowing them to keep one or the other. The Turks constitute the overwhelming majority of those born in Germany who are denied dual nationality.

Convention, upholding secularism to preclude threats to “the public order” [7,8]. While few analysts foresee a *Europeanization* of religious freedom (exceptions: Riley, Yavasi, Baer and Wiese), I contend that this process will render national bans moot, sooner rather than later [9–11]. The reasoning here is that while the ECJ initially invoked Roman law precepts (shared by most Community members through the 1980s), it has increasingly embraced an Anglo-American approach stressing *individual freedoms over state interests* still used by some national courts and the ECHR to uphold headscarf bans. As argued below, German and French restrictions on individual religious freedom are not only missing the “fundamentalist” target; they are also quite sexist, and thus doomed to fail should Muslimas appeal to the ECJ over the next decade.

Rather than drawing on national church-state paradigms, I develop a European alternative based on the *bona-fide occupational qualification* (BFOQ) standard, a template found in the 1964 U.S. Civil Rights Act. I contend that anti-discrimination provisions incorporated into the Amsterdam Treaty, EU employment directives, the Lisbon Treaty and the Charter on Fundamental Freedoms will essentially invalidate constitutional qua “states’ rights” arguments advanced by Germany and France, *inter alia*. As this analysis shows, the ECJ is not only intent on deepening and enlarging its own constitutional reach; it also possesses a strong record of securing individual and gender equality rights at the expense of member-state governments.

Efforts to deconstruct the religious freedom conundrum require an analysis of headscarf verdicts at two levels, one centered on the institutional-cultural context, the other on specifics of the case. The first part of my argument holds that each of the two national and two European court “models” explored below responds to the beat of a different normative drum, based on what I call *judicial culture*. Each type pursues its own understanding of “balance” between: (a) individual *versus* collective rights; (b) citizen *versus* state rights; and (c) religious *versus* other freedoms. The United Kingdom and the United States share a similar legal-philosophical foundation that directs their reasoning and interpretation of any law relating to religious and employment discrimination. We can label this the *classical liberalism/individual rights* approach, rooted in the premise, “the less state intervention the better” when it comes to religion and employment. Indeed, both countries have fewer laws trying to mandate religious matters than countries falling into the second category. That type, found in Germany, Turkey and Switzerland, for example, utilizes what I call the *collective identity/state interest* approach. Somewhat paradoxically, these polities make it harder for individuals to manifest their religious affiliations in public places (especially when they are not part of the dominant culture) in the name of neutrality and secularism.

The next component of the institutional-culture argument is that as border-transcending judiciaries, the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) likewise draw on diverging legal-philosophical paradigms. While the ECJ has increasingly come to prioritize individual rights, the ECHR is more likely to uphold state interests based on its doctrine of “national appreciation.” It is not necessary for countries to have “the same laws” in order for us to classify them as sharing a judicial culture. However, the United States and the European Union have begun to overlap considerably in terms of their conceptualizations of *direct* and *indirect discrimination*, as well as in their understanding of what constitutes *bona fide occupational qualification* (BFOQ).

The third dimension of the argument infers that a judicial culture emphasizing individual rights affords women better opportunities for the simultaneous realization of religious freedom and

employment rights than one favoring state interests; indeed, the latter often forces women to choose between the exercise of these rights in ways that do not apply to men. Sampling major verdicts, I then raise specific questions involving gender relations: In what ways does national political culture shape the legal debate regarding “religious freedom” as applied to *hejab*? Under what conditions should the *explicit positive rights* of female teachers—given their disproportionate presence in elementary and secondary education—outweigh *implicit negative freedoms* accorded parents and children? Assuming that women otherwise meet basic professional requirements, does their attire constitute an “essential” qualification for employment? Are women denied the *simultaneous* exercise of religious and economic freedom in ways that men are not, violating EU *equal treatment* precepts? Last but not least, do employment rights receive stricter scrutiny from some courts than others, due to more complex “balancing” obligations?

The final stage of the argument involves the evolving role of the ECJ in securing a “supranational” balance that fosters the equal treatment of women and men regarding fundamental freedoms. Because EU anti-discrimination mandates (Directives 2000/43/EC and 2000/78/EC) are fairly new, no test case is currently under Court of Justice review, although gender equality cases trigger many *preliminary ruling* submissions. Still, the ECJ will be more likely to uphold Muslima rights for two reasons. First, the EU Court is ensconced in a more diverse, dynamic legal culture than national courts (projecting traditional mono-cultural identities) or the ECHR (drawing on a single Convention that takes national constitutions as a given). Secondly, like the US Supreme Court (USSC), the ECJ must consider the employment dimensions inherent in all gender-relevant cases. To show what legal reasoning might prevail in an ECJ ruling, I move beyond verdicts pitting individual rights against state neutrality, adding employment rights to the mix. The combined effect of EU *mutual recognition*, *social inclusion*, and *equal treatment* goals, I argue, will render headscarf bans actionable as *gender discrimination in employment* before the European Court of Justice, undermining state rights stressed by German and French jurists.

Part one outlines differences in two core “legal philosophies”—Anglo- *versus* Roman law (known as common and civil law, respectively)—that have played leading roles in the headscarf drama, stressing the constitutional priorities pursued by each. The ECJ and the USSC evince striking parallels regarding *equal opportunity/gender* cases, despite their historical and structural differences, although space constraints precluded a direct comparison here [12,13]. The second part describes BFOQ criteria, as well as their significance for sex, national origin and religious discrimination. Next I explore *judicial culture* and case law in different contexts, emphasizing paradoxes inherent in the religious framing of this issue. Though uncomfortable with the neutrality defense, German judges have yet to accord exclusive priority to personal religious, educational or occupational rights, in stark contrast to their US counterparts [14]. Although they focus on teachers, German and Swiss arguments are typical of those presented in other countries that have banned *hejab* in public schools, notably, France and Turkey (where cases have focused on students). I then compare two verdicts issued by the “international” European Court of Human Rights, ostensibly supporting “state interest” legal reasoning. The final section suggests arguments that could be made by sex-discrimination lawyers operating within EU borders, based on “supranational” judicial imperatives. Despite national professional socialization, all ECJ justices are obliged to transcend the conflicting practices of 28 member-states in forging a single interpretation of Community law. To assess the changing nature of

judicial culture at the EU level, we first need to examine core differences between competing schools of legal thought now “sharing the bench” in Luxembourg, based on a few national systems serving as “ideal types.”

2. Individuals vs. the State under the Anglo-American Model

As noted above, the UK and the USA share a similar jurisprudential foundation—referred to as the Anglo-American system—that conditions their interpretation of laws involving religious and/or employment discrimination. Although its adherence to classical liberalism/individual rights is quite clear, the United Kingdom’s lack of a written constitution meant that it was also devoid of a real constitutional court until 2009, when a Supreme Court was created under the *Constitutional Reform Act 2005*. Until then it had relied on occasional referrals to a (class-biased) House of Lords a body without binding powers of judicial review. UK citizens could nonetheless address final appeals to two European courts evincing diverging “judicial cultures,” the ECJ and the ECHR. All EU residents can take their cases directly to the ECJ without exhausting national judicial options, as long as the question derives from EU treaties or the *acquis communautaire*. Appealing a case to the ECHR, however, first requires an individual to show proof of an unfavorable verdict from the highest court in her own land. The many factors adding up to “British exceptionalism” make it harder to draw clear systemic lines, much less to trace a consistent case-law path; for heuristic purposes, I therefore draw on the Supreme Court to present the Anglo-American “ideal type” with respect to judicial culture.

Jurists following the classical-liberal model construe rights as essentially anti-governmental, often siding with individuals “in constitutional cases in which a citizen’s negative right is being trampled upon by the state” ([13], pp. 632–33). Once formal barriers to *equal opportunity* have been eliminated, the state sees itself as a neutral arbiter among randomly conflicting interests; it upholds rights already enjoyed by “average” citizens but does not actively promote the conditions under which material rights might be realized by others. Rooted in common law, this type of jurisprudence relies heavily on precedence, incrementalism and individualism. Verdicts depend heavily on the specifics of whatever case has worked its way up a ladder of unspecialized, territorially situated court proceedings. Only questions that can be weighed against the larger constitutional picture are eligible for national deliberation.

U.S. legal proceedings involve real persons and a concrete violation of rights, rendering law suits more adversarial than principled. Interest groups search for cases to advance their own causes, often in an effort to subvert earlier majority rulings and frequently resting on those exceptional or sensational enough that lawyers are willing to pursue them. The Supreme Court consists of nine justices who are appointed “for life”; in the USA, this occurs following nomination by the President and approval by the Senate—if one is lucky enough to survive a grueling set of highly politicized “litmus test” hearings. Applying a “dialogical, conversational, analogical and argumentative style” ([13], p. 635), USSC tries to persuade a diverse citizenry that its majority verdicts are correct, even when the vote is 5–4. “Losers” find some vindication in dissenting opinions that can serve as a launching pad for future challenges as societal conditions change.

Subject to political appointment, federal judges are not obliged to seek *the truth, the whole truth and nothing but the truth*. Unable to solicit additional evidence to ensure deliberation of all “facts of the case,” they depend on the evidence that lawyers from either side choose to present (indeed, the

latter often try to exclude detrimental materials). High Court justices exercise discretion in deciding which contextual factors apply, and which earlier “precedents” take precedence, so to speak, in framing majority and minority opinions. Findings under the Anglo-Saxon paradigm are thus essentially *inductive*, going from a specific case to a universally binding verdict². Majorities can be cobbled together from diverging, penumbral points of reasoning.

The stress on adversarial proceedings can lead judges to rely on “false dichotomies,” pitting *sameness* against *difference* in ways that ignore the cumulative impact of gender + race + class. The historical dilemma facing marginalized groups is that they must appeal to courts that eschew interference, “seek bright lines,” and ignore the “market processes” that define cumulative disadvantages, especially for women and minorities ([15], p. 26; [16]). In cases involving race and religion, women and men are more likely to be on equal footing under the individual rights framework; most USSC verdicts involving gender and race focus on access to employment, affirming the “free market” as the primary channel for achieving equal opportunity.

3. Direct Discrimination, Disparate Effect and the BFOQ

Like Article 13 of the EU’s Amsterdam Treaty, the *bona fide occupational qualification* outlaws employment discrimination based on race, sex, religion and national origin—rooted in the mother of all U.S. equal treatment law, the 1964 Civil Rights Act (Title VII). The EU moreover includes protection based on sexual orientation. Employer discretion falls along four axes, two of which are relevant here. Regarding *the essence of work*, the only acceptable qualifications/restrictions are those applying directly to a worker’s ability to perform the designated job. This excludes arguments “protecting” women from jobs that are dirty, dangerous, or strenuous but also highly paid. Individual qualifications and a right to work almost always supersede “customer preference.” The second, *group disqualification*, reflects a refusal to hire an individual on the assumption that few members of a given class could effectively execute fundamental job responsibilities. American courts feel a deeper obligation to individual employment choices, given the lack of an alternative economic-support system, *i.e.*, a cradle-to-grave welfare state. A woman cannot be forced to choose between adhering to a religion and holding a job, especially if the impact on “other people” is merely presumed by the employer.

US high courts apply three types of proof to discrimination cases, beginning with actual *intent* to discriminate; the EU equivalent is *direct discrimination*. Here the *burden of proof* falls to the ostensible victim, who must meet high evidentiary standards by supplying documents or sworn testimony, showing the employer’s refusal to hire, promote, or provide benefits or equal pay based on the applicant’s race, sex, religion or national origin. A second type, *disparate treatment*, requires the plaintiff to qualify as a member of a protected category; if denied a position despite possessing requisite qualifications, s/he must prove that non-protected others with similar qualifications have been hired. The employer has to supply legitimate, non-discriminatory grounds for the rejection, while the applicant must persuade the judge that the reason supplied (business necessity, customer or co-worker preference) is invalid, or part of a cover-up. Finally, *disparate effect* bars employers from utilizing

² Here the UK and US differ, in that judgments passed down by the House of Lords were not binding; yet Parliament has not chosen to legislate conditions that would “decide” the religious attire issue once and for all.

“neutral” hiring criteria that consistently negate the job prospects of protected-category members, like height; the plaintiff must show that alternative, less discriminatory criteria would not result in hiring workers unable to perform designated tasks. The second and third types are increasingly reflected in EU definitions of *indirect discrimination* [17].

Headscarf use has only recently surfaced in the United States as an educational or employment issue³. In *USA Intervenor v. Muskogee Public School District CA* (2004), for example, the High Court applied *strict scrutiny*, invoking the equal protection and free speech rights of school children. In January 2010, the EEOC circumvented a Supreme Court case with a \$43,000 settlement against Ivy Hall Assisted Living in Atlanta (Case No.: 1:08-CV-3067-BBM-SSC), which denied Khadija Ahdaoui the right to wear *hejab* while housekeeping. In 2012 Imane Boudlal filed a case (pending) against Walt Disney, Inc. for her alleged firing after she refused to remove her (non-corporate approved) headscarf during Ramadan at the Grand Californian Hotel and Spa’s Storyteller’s Café.

The most frequently cited U.K. verdict to date involved thirteen year-old Shabina Begum, sent home from the Denbigh High School (Luton) in 2002 for wearing *jilbab*, covering all but her face and hands; she was defended by Cheri Booth, wife of Tony Blair. While Appeal Court judges initially supported Begum’s claim, five members of the House of Lords (acting as the Supreme Court) reversed the decision in 2006, upholding the school dress code [18]. Despite two negative rulings, British officials prefer “fact-sensitive,” case-by-case accommodation; the acceptability of certain types of religious attire in schools “is not a question that a court could or should be asked to resolve ([18], p. 447; [19,20]). Another UK case involving apparel, *R (on the application of Watkins-Singh) v. Governing Body of Aberdare Girls’ High School* [2008] EWHC 1865 (Admin), found that the school had not adequately accommodated a student’s right to an exemption for a religious armband (known as a *Kara*). Most UK cases have been resolved at the school level, however, since House of Lords verdicts are not binding.

4. Group Rights, State Interests and the Roman Law Model

Consisting of two chambers (Senates), the German Constitutional Court enlists eight judges, four of whom are elected by Bundestag and Bundesrat, respectively, based on a two-thirds majority vote; although most serve twelve-year terms, the judges *must retire* when they reach 68 years of age. German judges adhere to a Roman or civil law framework, positing that there is a “correct legal answer” for virtually every legal question, based on a detailed reading of the law. The *Bundesverfassungsgericht* (GCC) construes the proper relationship between citizens and the state in more organic terms, imagining the nation as a holistic community (*jus sanguinis*) in which officials

³ In May 2004, Oklahoma school officials were required to pay one girl an undisclosed sum, after twice suspending her for *hejab*. The Muskogee Public School District alleged that eleven year-old Nashala Hearn had violated a dress code requiring students to submit written applications to wear “head coverings of any sort” in class. Converting to Islam in 2002, Nashala had worn her scarf without incident for a year but was suddenly suspended for three, then five days, after authorities expressed concern about “gang symbols.” Proof that district rules were not “religion-neutral” rested with the fact that the ban was first issued on September 11, 2003, the day her teacher and the school principle noticed Hearn’s attire while discussing the second anniversary of the terrorist attacks in the hall. See [41]. Ok to delete

uphold the “sanctity” of specific groups, e.g., the family, while maintaining a balance among potentially conflicting parties.

The Constitutional Court’s ability to pre-empt social conflicts is rooted in its *abstract control of norms*: cases need not be tied to real human beings; each decision thus amounts to a permanent, binding interpretation unlikely to be overturned due to changes in societal consciousness. The only way to reverse a previous ruling is to amend the Basic Law. The system rests on functionally specialized courts (administrative, labor, finance, *etc.*), requiring substantive expertise on the part of the judges. Expected to engage in “truth-finding,” they are free to commission experts on specific points. Dissenting votes were first made public following a major abortion ruling in 1975 [21].

German verdicts are *deductive*, moving from general conditions to a specific finding; they are thus more closely tied to the rule rather than the exception; judgments often mirror cross-cutting legislative and administrative imperatives incomprehensible to normal mortals. Bureaucratic actors are frequent parties to such suits. Although the system does not permit class action suits, cases making it to the top are representative of broader social groups. Efforts to balance group rights are moderated by judicial reliance on the norms of *proportionality, equal treatment, merit/contribution* and *need*, coupled with “strict proceduralism.” Continental justices recognize the righteousness of group claims but grant legislators wide latitude in the pursuit of other obligations, like ensuring economic stability.

The simplest way to illustrate core differences between the “Anglo” individual-rights model and the “Roman” or statist abstract-norm orientation is to note the way in which significant cases become part of the public record. Equality advocates in the US study *Frontiero v. Richardson* (1973) and *Harris v. McRae* (1980), while German experts consider the *Decision on the Protection of an Existential Minimum in the Income Taxation Law of 1990* [BverfG 82,60 (104); 87, 153 (170f); 91, 93 (108ff, 111)]. Plaintiffs usually remain anonymous until decisions have filtered down through a chain of law journals, acquiring a moniker more suitable for citizen consumption, e.g., the *Rubble Women’s Verdict*. The ECJ’s practice of utilizing the real names of people in discrimination suits, e.g., *Defrenne* or *Kalanke* [22], suggests that it is ever more intent on protecting individuals’ material needs vis-à-vis abstract state rights.

The Basic Law explicitly guarantees human dignity (Art. 1 GG); free personality development (Art. 2 GG); sexual equality (Art. 3 GG); freedom of faith, conscience, creed (Art. 4 GG); free expression, association, movement (Articles 5, 9, 11 GG); educational and occupation choice (Articles 6, 12 GG). Neither Article 6 nor Article 7 explicitly mandates *state neutrality*. Instead of treating neutrality as a means to an end, warranting that that no single religion prevails at the expense of others, headscarf (*Kopftuch*) opponents define it as a collective good, superseding individual rights. Since courts ascribe greater weight to the first articles, the formula “Art. 1 + Art. 4 + Art. 12” would suggest a heavier constitutional-protection burden than the penumbral Art. 6 rights of parents choosing NOT to expose their children to different faiths. These rights are reinforced for those pursuing careers as civil servants: Article 33 accords equal eligibility for “any public office” based on aptitude, qualifications, and professional achievements. No rights “acquired in the public service” can be challenged “by reason of adherence... to a particular religious denomination.” Public school teachers at all levels are civil servants, as are police, judges and other members of the justice system. The Länder develop and enforce their own civil service regulations, but they are still bound by federal supremacy.

As noted earlier, the power to define educational practices (teacher training, hiring, firing, curricular development) falls to the sixteen Länder. Most require public schools to offer *denominational* religious instruction for two hours per week, and regulate its contents (although 40% of the pupils opt out). Brandenburg and Berlin, by contrast, require all students to take courses in Life Training and Ethics, offering faith-specific courses on a voluntary basis [23]. While Hessen banned Baghwan cloaks, monks' frocks and nuns' habits in the 1960s, Bavaria still finances schools employing nuns in habits (full religious garb). State-level proscriptions thus deny *hejab* wearers *equal protection before the law*, beginning with but not limited to their place of residence.

Conflating religious with political expression allows judges to ignore the permanent economic consequences that should factor into proportionality. The question here is whether headscarves render *some* women unsuitable for well-paid civil service careers, a domain that used to insist on “maleness” as a primary *bona fide occupational qualification* through the 1970s. The answer is clearly yes. In 2003 the GCC declared that a teacher's religiously motivated headscarf “can indeed have an especially intense effect,” insofar as “pupils are confronted by a teacher who stands at the center of instructional activity for the entire period of their school attendance, from which they cannot deflect their attention.” German PISA results (Program for International Student Assessment) indicate that there has been a serious decline in “intensive learning” with regard to reading, writing, arithmetic and science—so why would pupils be more attuned to a teacher's religious beliefs?

A blanket exclusion of headscarf-wearers from schools moreover amounts to a *life-long* employment ban, hardly proportionate to the hypothetical harm a child might incur during a year of classroom exposure. Indeed, one could argue that the state has a material duty to promote youth development through cultural pluralism, preparing them for life in a global society. Länder headscarf bans mark the second major violation of women's constitutional rights to religious freedom⁴. There are no laws, however, categorically denying or superseding only male constitutional rights on behalf of a “national” interest.

5. Religious Freedom and Employment: German Case Law

German rulings against private employers suggest that religious rights can occasionally trump abstract interests, customer preferences and third-party risks. Three earlier cases addressing religious and occupational freedom set the parameters for headscarf rulings [14]. A 1995 verdict banned the display of crucifixes in all public classrooms in Bavaria, despite its contention that “the crucifix is ‘value-neutral’ and the Muslim headscarf is ‘religious proselytizing’ because the former is part of the value heritage of occidental nations and the latter is not...” ([24], p. 178)⁵. In 2002 the Federal Labor

⁴ Declaring abortion “illegal but unpunishable” in 1993, the GCC explicitly *suspended* a woman's Art. 4 GG rights (freedom of belief, conscience) for the duration of her pregnancy. Although the legal content is quite different, the result is the same: women can be stripped of their constitutional rights, either temporarily or permanently, in ways that would never be applied to men.

⁵ The High Court declared in May 1995 (BVerfG 93,1) that state placement of crucifixes in the classrooms of obligatory, non-denominational schools violates Art 4 GG, rendering this Bavarian school law unconstitutional. US law (church-state separation) would distinguish between a government agency that buys and places demonstrative religious articles in a classroom—as representative of state values—and a teacher's personal choice to manifest a religious

Court rejected an employer's claim that customers *might* object to a veiled woman at a department store perfume counter. The woman's concrete religious rights outweighed an unsubstantiated claim that her attire could "hurt sales" (BVerfG, 1BvR 792/03)⁶.

Of special significance here is the case of Fereshta Ludin, daughter of an Afghani diplomat who had lived in Saudi Arabia, then moved to Baden-Württemberg, acquiring citizenship in 1987 [25]. She studied German, English and Social Studies to qualify for a teaching career. The State Education Minister allowed her to complete her training, but school officials refused to hire her in 1998. Ludin filed multiple lawsuits, claiming her exclusion violated *state neutrality*. The High Court voted (5:3) in 2003 that Ludin could not be denied school employment, since no state law specifically prohibited headscarves (BVerfG 93,1; BVerfG, 2, BvR 1436/02). Immediately thereafter, Baden-Württemberg, Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia and the Saarland outlawed *hejab* in civil service domains [26,27].

The rule of law mandates that individuals are presumed innocent until proven guilty, but *majority perceptions* often trump *minority protections* in headscarf cases [28]. Baden-Württemberg's law declares that "any conduct or demeanour... is impermissible which *might* give pupils or parents *the impression* [my emphasis] that a member of the teaching staff stands in opposition to human dignity, opposes equality as defined in Article 3 of the Basic Law, or rejects the basic right to liberty and the country's free-democratic constitution." Headscarf bans automatically exclude women while allowing devout Muslim men to teach with no *a priori* restraints; some Islamic communities require devout Muslim men to wear beards, for example—but no government is likely to ban beards for all men⁷. It thus declares a select group of women, but only women, "guilty" of fundamentalist inculcation without a trial. This reverses both national and EU *burden of proof* standards used in most sex discrimination cases [29].

While Germany's top court now permits disclosure of dissenting opinions, French courts (also grounded in "civil law") do not, to preserve the chimera of national unity. The *Conseil Constitutionnel* is overshadowed by a powerful executive, with the President appointing three of its nine judges. Its lack of power under de Gaulle rendered it "little more than a political joke" ([30], p. 125). Correspondingly, French courts hardly played a role in the *foulard* debate. Ignoring most of the 2003 Stasi Commission recommendations, President Chirac pushed through a national ban on "ostentatious religious symbols" in schools without awaiting a high court verdict.

Where gender and employment are concerned, the European Court of Justice often goes where national courts fear to tread. In 1998, the ECJ nullified a Basic Law provision barring women from combat service in *Tanja Kreil v. Bundesrepublik Deutschland* (C-285/98), proving that Community justices are not easily cowed by national arguments even when it comes to traditional "security" or public order concerns. This strongly suggests that Germany and its federally fragmented headscarf

conviction. The UK would differ somewhat from the US in that it possesses an official "state Church," nominally headed by the Queen.

⁶ A regional court did decree that a woman who covered herself completely was ineligible for Social Assistance, because her *burqa* rendered her unavailable for paid employment; a similar verdict was recently issued in Belgium.

⁷ Fundamentalist "denominations" also oblige men to wear specific garments, although hard-core Islamicists will sooner be found teaching—with impunity—in radicalized mosques than in public schools.

bans are destined for yet another collision with the Euro-Court involving the EU Recast Directive (2002/73/EG), the Race Directive (2000/43/EC), and the Framework Directive on Employment (2000/78/EC) addressing gender, religious and ethnic discrimination.

6. The “National Appreciation” Model and the European Court of Human Rights

Turning to the *international* level, the European Court of Human Rights was established in 1959 to address complaints filed under the 1950 Convention on Fundamental Human Rights. Experiencing steady growth through the 1980s, its docket became unmanageable owing to new Contracting States. Its annual case-load rose from 119 cases in 1997 to 13,858 applications by 200 [31]. Comprised of forty-six judges, the ECHR is elected by the Council of Europe’s Parliamentary Assembly for six-year terms; each judge is assigned to one of five Sections, purportedly “balanced in terms of geography and gender.” Although the Court is obliged to “take into account” the different legal traditions of Contracting States, its proceedings are “adversarial and public.” Judges may append separate concurring or dissenting opinions.

The ECHR seeks to accommodate diverse legal regimes based on a so-called *margin of national appreciation*, reflecting the belief “that [national authorities] are ‘better placed’ to decide how best to discharge Convention obligations in what is a sensitive area.” Deeming its role subsidiary, it does not aim to impose uniform solutions across the member nations “with regard to establishment of the delicate relations between the Churches and the State...” ([31], p. 43). The ECHR determines whether a particular national law has been enacted and whether it conforms with Convention requirements; it reviews “settled” case-law but grants the state in question the benefit of the doubt in matters of public order.

Judicial outcomes based on Article 9 ECHR, however, have been far from consistent. Section 1 reads: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to.... manifest his [sic] religion or belief, in worship, teaching, practice and observance.” Section 2 holds: “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” The two passages comprising Article 9 amount to a legal paradox: Section 1 grants inalienable religious freedoms to any individual, which Section 2 then restricts or potentially nullifies by allowing the state to advance its own broad, albeit conflicting interests. ECHR justices are forced to choose between one or the other, depending on the way in which common or civil law traditions define the citizen-state relationship in the country at issue.

According greater weight to the individual rights stressed in Section 1, the U.K counts among the more pro-active European states in addressing racial/ethnic diversity and religious tolerance. The ECHR’s tendency to “over-interpret” Section 2 reinforces reluctant-integrationist states like Germany, however. France used the latter to justify a “blanket prohibition” of *foulard*, *yarmulke* and turban wear as essential for the preservation of “safety and the social order”—yet the ban did nothing to prevent youth of migrant descent from rioting in the Parisian suburbs two years later [32,33]. The ECHR has likewise upheld state prerogatives over individual freedoms in Switzerland and Turkey; as non-EU members, neither of the latter is subject to ECJ review.

Analogous to the *Ludin* case, *Dahlab v. Switzerland* affords a prime EHCR example. As a Catholic, Lucia Dahlab had met formal accreditation requirements and secured a permanent job teaching children aged 4–8. Converting to Islam in 1991, she began practicing *hejab* that year, triggering no reaction. She gave birth to her first child in 1992, and returned from a second maternity leave in June 1994. In May 1995 the school inspector reported her to the Geneva Directorate for Primary Education; in June 1996, Dahlab was asked to “unveil.” In August she was ordered not to wear her scarf in undertaking “professional duties,” insofar as it “constituted an obvious means of identification imposed by a teacher on her pupils,” regardless of *her* intention ([7], p. 1).

The ECHR concurred with the Swiss government that *hejab* was “a powerful religious symbol” that could unduly influence children; admitting that there had been no complaints from parents or pupils, the justices nonetheless claimed “that does not mean that none of them have been affected” ([7], p. 2). They referenced German legal reasoning that Muslim head-coverings clash with two key tenets, religious freedom for all and children’s right to a religiously neutral education. Beyond proselytizing, the judges insisted *hejab* was “difficult to reconcile... with the principle of gender equality” (although Dahlab bought her scarves at a local shop where non-Muslims purchase them as fashion accessories). The Swiss government insisted that she could teach at private schools “of which there were many in the Canton,” discounting the fact that private schools run by other faith-groups (mostly Catholic or Protestant) did not hire Muslims. Although the state’s primary school monopoly left her no real options, a court majority invoked the “margin of appreciation,” finding the ban relevant, sufficient and “proportionate to the legitimate aim pursued” ([7], p. 14).

ECHR justices applied similar reasoning in 2005, this time in relation to a university student rather than a teacher. *Leyla Sahin v. Turkey* parallels the Art. 9 (2) interpretation prevailing in France. Proclaiming all individuals “equal before the law,” Article 10 of the Turkish Constitution permits “no distinction based on language, race, color, sex, political opinion, philosophical belief, religion.” Atatürk’s Headgear Act of 1925 nonetheless outlawed religious attire outside places of worship. Headscarves began reappearing after the 1979 Iranian revolution, leading the state to issue new dress regulations for higher educational institutions in mid-1981 after a military coup. The Administrative Court decreed that the 1988 Higher Education Act rendered “modern dress or appearance... compulsory,” although “veils” covering the neck and hair could be worn “out of religious conviction.” Other courts ruled that religious rights did not cover Islamic garb outside the private sphere and could be restricted on “public order” grounds.

Completing four years at Bursa University, where she had consistently worn *hejab*, medical student Leyla Sahin transferred to Istanbul University in 1997. She first encountered problems when the Vice Chancellor declared in 1998 that scarf and beard wearers would not be admitted to lectures or tutorials “by virtue of the Constitution” and in accordance with Supreme Administrative Court and ECHR rulings (the decree followed another military intervention forcing “religious” Prime Minister Ebakan out of office). Instructors were required to report violations to university authorities “as a matter of urgency.” Sahin was denied access to a written oncology exam on March 12, 1998, refused the right to enroll in orthopedic traumatology, denied admission to a neurology lecture and then to a written exam on public health. In July Sahin filed an ECHR application against her home country. By a 16-1 vote, the Court upheld Turkey’s position that *hejab* use at public universities contravened the Constitution, since it “was in the process of becoming a symbol of a vision that was contrary to the freedoms of

women and those fundamental principles” (my emphasis; [8], p. 22). The determination that one woman’s scarf threatens the secularity or neutrality of the state as a whole allowed the government to define what a religious symbol signifies or what it *might* come to signify.

The sole dissenter, Francoise Tulkens (Belgium), invoked the 2003 German *Ludin* ruling, stressing that headscarf use “has no single meaning” ([8], p. 47). The ECHR and the Turkish state took a position on the very “meaning” being contested, however. The abstract control of norms underlying the *margin of appreciation* privileged the perceptions of male national elites. The ECHR required no positive proof that either Dahlab or Sahin associated with fundamentalist groups or mosques. Officials admitted that public order had not been disrupted, and that neither woman rejected sexual equality as a constitutional principle. Yet in both cases, judges accepted government inferences that women’s personal religious choices were equivalent to external pressures from movements constituting a threat to the state⁸.

Tulkens opined further: “It is ironic that young women should be deprived of that education on account of the headscarf. Advocating freedom and equality for women cannot mean depriving them of the chance to decide on their future.” Instead they are being excluded “from exactly the liberated environment where knowledge can be freely pursued without external societal pressures” mirroring “that very fundamentalism these measures are intended to combat.” If *hejab* really posed a concrete threat to secularity and equality, the state would have to ban the practice across *all* occupations, public and private. Limits on fundamental freedoms should be based solely on “undisputable facts and reasons which have legitimacy without doubt, not mere worries or fears...” ([8], p. 50).

The state’s political angst in this case is curious, insofar another ECHR ruling on *freedom of expression* used much stricter evidentiary standards to protect a male Muslim cleric who had openly called for Sharia and referred to children born of civil marriages as “bastards” [34]. Regarding male freedom of expression, the Court has never accepted that interference with individual rights “can be justified by the fact that the ideas or views concerned are not shared by everyone and may even offend some people.” Judge Tulkens wrote further that stressing the *potential* effect a headscarf, “presented as a symbol, may have on those who do not wear it does not appear... to satisfy the requirement of pressing social need.... what is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to” ([8], pp. 46–47). Ironically, the duly elected AKP government of Recep Tayyip Erdoğan revised the constitution and eliminated headscarf bans in late 2010—but instituted a violent crackdown against democratic protesters in Taksim Square in 2013. This suggests that *his* motives had little to do with a “woman’s right to choose” and more to do with his personal goal of reestablishing “Islamic” behaviors in the secular Turkish state—but the same motives cannot automatically be ascribed to individual women themselves.

⁸ Feminists are divided over whether or not any form of veiling signals male oppression and the subordination of women’s bodies. I have nonetheless chosen comparable cases of teachers who publically proclaimed that they practice hejab based on their own free will, that they do want to participate in the PUBLIC sphere as paid laborers, and that they do accept prevailing constitutional gender equality norms. As a feminist scholar who has read the court transcripts, I must accept their right to self-determination and self-description, based on what these women declare to be their motives. It would be an act of cultural imperialism on my part to impose images/stereotypes advanced by other scholars arguing about “women in Islam,” in general,—even if they have never personally interviewed these individuals.

Tulken's assertions nevertheless get to the heart of the two-level argument presented here. First, in institutional terms, the ECHR failed to meet its own standard of ensuring "geographic and gender balance" (Art. 14), presented as a core element of its official "judicial culture." The presiding Chamber consisted of thirteen men and five women; eight judges hailed from recently "democratized" countries (that is, former "godless-communist" states), evincing little experience in matters of church-state relations⁹. Not one of its five Sections reflects gender parity. Perhaps this explains why the ECHR applies *strict scrutiny* to men's rights of expression (e.g., as Sharia-espousing imams) but employs a much weaker standard, *national appreciation*, in regard to women. Regarding case specifics, the ECHR also neglected to consider proportionality: Unable to finish her medical studies in Turkey, Şahin transferred to the University of Vienna in 1999—although a foreign medical license would make it harder to practice medicine in her home country. Forcing women to choose between advanced education and religious freedom subjects them to a material employment ban unlikely to stand at the EU-level.

7. "Balancing" Constitutional Imperatives: The European Court of Justice

The judicial culture informing the German, Swiss and Turkish cases challenged the religious nature of *hejab*, re-interpreting it as a political symbol; rendered "optional", *hejab* could signify oppression by entrenched patriarchal clerics, OR personal support for fundamentalist groups, OR resistance to the dominant culture that denies opportunity to different ethnic groups, or any combination of the above. All major cases to date have involved adult women insisting that their decisions were personal, not imposed, as asserted by third parties with no ties to the female "on trial". Even if women were to adopt *hejab* as a form of political expression, their free speech is constitutionally guaranteed. So why are only women denied the simultaneous exercise of religious and political freedoms? Why should *their* religious rights preclude occupational choice and equal treatment at the workplace?

The constitutions of EU member-states contain substantive rights not codified in the U.S, such as sexual equality, family protection, social welfare, educational and occupational freedom (the U.K. was compelled to include these in its 1998 Human Rights Act). The Lisbon Treaty's partial incorporation of the Charter of Fundamental Freedoms reinforces such individual rights. Unlike the Supreme Court, however, the ECJ cannot "pick and choose" its cases; it disposes of 600 to 800 decisions per year. For the record: The supranational court has "never explicitly justified an employment policy which disproportionately disadvantages women" ([35], p. 297).

The Court of Justice's early embrace of the Roman law paradigm derives from fact that only the UK and Ireland have Anglo-traditions. By the time those two joined the Community in 1973, the ECJ had accrued 20 years of settled law, including multiple landmark cases on gender equality. Although most justices sit on national benches prior to appointment, the ECJ is a court *sui generis*, mediating not only between the Community and member-states but also between citizens and their own states. Unlike national courts anxious to avoid clashes with executive and parliamentary institutions, the ECJ does not worry about offending the Commission, or the Council or the European Parliament. Rather, it seeks "to 'speak' the law to promote its own and the EU's authoritativeness, as if the latter were a

⁹ The justices came from Switzerland, Greece, France, Slovenia, Turkey, Belgium, Romania, the Czech Republic, the Ukraine, Croatia, Georgia, San Marino, Spain, Sweden, Armenia, the Netherlands and Norway.

stable long-established republic when, in fact, it is an evolving work in progress without a fixed constitutional identity” ([13], pp. 640–41).

Rosenfeld describes the ECJ’s *modus operandi* as the “syllogistic application of a general rule—embodied in a code—to a particular set of facts.” ([13], p. 628). As a judicial hybrid, the ECJ issues unsigned verdicts without dissenting opinions. Since the 1960s, this supranational court has moved beyond the adjudication of existing EU directives and regulations, drawing on *preliminary rulings* to construct a higher legal order superseding national law (*supremacy*), further reflected in its stress on *mutual recognition*, *direct effect* and *best practices*. Preliminary rulings account for more than half of all new cases. Its original civil-law inclinations have been transformed by “dialogical” briefs submitted by eight Advocates-General. The cursory, objective language of the *univocal* Court is supplemented by occasionally “personalized” phrasing among the AGs, who are “open to a broad panoply of plausible arguments that often expose the complexity, contradiction, fragility or near equivalence, in terms of persuasiveness” of alternative conclusions ([13], p. 642). The AG “speaks” to the justices not as part of the institution but as “an individual who sees it all from her uniquely situated position and who advocates, accordingly, what she thinks the ECJ decision should be” ([13], p. 642). While the ECHR defers to national norms, EU member-state courts increasingly defer to the ECJ: through referrals for preliminary rulings they have ceded power, according the Euro-court great legitimacy.

Despite their historical roots in divergent traditions, the USSC and the ECJ overlap in two key respects: both are non-specialized courts of generalized jurisdiction, functioning not only as courts of first instance but also as courts of last appeal. They thus possess a unique capacity for blocking off old paths and charting new ones across many policy domains. Both entities accorded themselves power of judicial review, based on *Marbury v. Madison* (USSC, 1803), *Van Gend en Loos* (ECJ, 1963) and *Costa v. ENEL* (EJC, 1964), respectively. Both can “re-interpret” questions over time in accordance with changing conditions¹⁰. Even without a formal constitution, successive treaties (Maastricht, Amsterdam, Lisbon) have significantly expanded EU norm-shaping powers, creating standing for new groups, based on sex, nationality, religion, sexual orientation and disability, for instance. Compared to Supreme Court reliance on precedent, ECJ use of preliminary rulings allows it to issue hypothetical, thus potentially more progressive judgments, irrespective of national constitutional differences.

8. Equal Treatment, Occupational Qualification and EU Case Law

Under the 1957 Rome Treaty, the Community posited four fundamental freedoms, including free movement linked to one’s profession. Community Directives 89/48/EEC and 92/51/EEC refined guidelines on the *mutual recognition* of occupational competencies, including regulated professions whose exercise is nationally restricted (e.g., law, teaching, physiotherapy). It applies further to “nationals fully qualified to practise a given profession” in one EU country hoping to pursue said occupation in another. *Recognition* is defined in terms of “the diploma, certificate, qualification or set of qualifications awarded in a Member State on completion of comprehensive professional education and training” [36,40]. Diplomas, certificates or qualifications “should be recognized as they stand,” following submission of a formal “application for recognition” to the competent Member State

¹⁰ Under Roman law systems, e.g., in Germany, a High Court verdict can only be reversed by way of constitutional amendment.

authority. The latter determines whether previous formal training differs significantly from host country requirements:

...In the event of differences in the length of training of one year or more, the competent authority in the host Member State may require evidence of professional experience (varying from one to four years). In the event of significant differences between professions or in the content of training, it may require you to undergo an adaptation period or an aptitude test....

Aptitude tests are “limited to the professional knowledge of the applicant.” In case of rejection, the host country must supply reasons, according the candidate the right to appeal. Guidelines for teachers seeking to relocate to Germany, France or the Netherlands mention only the “set of qualifications required in order to take up teaching in the Member State from which you come (e.g., university degree and doctorate for university lecturers or, in certain countries, university degree, and teaching diploma for secondary education).” Following formal recognition, the individual may apply for instructional posts under the same conditions as national candidates. Under German federalism, a *hejab*-wearer qualified under Dutch law could teach in Hamburg but would suddenly find herself “disqualified” if she moved to Bavaria. This ostensibly contravenes EU logic that only criteria deemed “reasonably necessary” for normal classroom activities can limit the free exercise of a profession across member-state boundaries: the *bona fide occupational qualifications* of the job candidate.

The EU’s original power to intervene in gender discrimination cases required a direct connection to the paid workplace; Art. 119 EC (*equal pay for equal work*) served as the mother of all Community equality policies. Council Directive 76/207/EEC (ETD), amended by Directive 2002/73/EC, obliges member-states to uphold *equal treatment for men and women* relative to employment, vocational training, promotion, working conditions or terms of dismissal. Equal treatment prohibits *direct* and *indirect discrimination* based on sex, including rules involving marital or family status. Indirect discrimination applies where an ostensibly neutral criterion or practice results in disproportionate disadvantages for one sex, unless it is “objectively justified and the means of achieving it are appropriate and necessary.” Exceptions include occupational activities in “which by reason of their nature, or the context in which they are carried out, the sex of the worker constitutes a determining factor.”

The ETD affords women some special protection or measures ameliorating existing inequalities. It encompasses all situations covered by Art. 141 TU (formerly, Art. 119 Treaties of Rome), Directives 75/117/EEC, 76/207/EEC and 92/85/EEC (pregnancy protection). Once the plaintiff presents “facts from which discrimination may be presumed to exist,” it becomes the employer’s burden “to prove that there has been no contravention of the principle of equality” (Council Directive 97/80/EC, Council Directive 98/52/EC). The ECJ definitively rejects *romantic paternalism* as grounds for excluding women from certain occupations. In 1997, it found France guilty of unequal treatment in prohibiting female night-work, imposing fines of €142,425 per day for five years, until the latter finally complied.

EU equal treatment directives supersede national constitutional precepts, as illustrated by *Tanja Kreil v. Federal Republic of Germany* (2000, Case C-285/98). In 1949, the Basic Law established universal conscription for men over the age of 18, despite specifically mandating sexual equality (Art. 3 GG) and the free choice of profession (Art. 12). Allowed to volunteer for “military-musical units”, women were explicitly prohibited from service involving weapons; they could be required to

work in public health or in stationary military hospitals during a declared “state of defense”, however, without the right to conscientious objection.

Trained in electronics, Tanja Kreil, applied in 1996 to the weapons-electronics maintenance service of the *Bundeswehr* but was denied a position under Art 12a. Warned that a rejection based solely on sex violated the ETD, the Administrative Court referred the case to Luxembourg for a preliminary ruling. Granting that member-states may decide how best to organize their armed forces and ensure their security, the EU judges nonetheless declared that such decisions did not fall completely outside Community equality principles. The ECJ applies “strict scrutiny” to ETD exceptions, permitting the use of sex as a determining factor only for select occupations, e.g., prison wardens or policing posts involving violence¹¹. Having invoked *proportionality* in two earlier cases, it held that denying women the right to bear arms excludes them from virtually all military posts, justified neither by the specific nature nor by the particular context of their duties. Since women undergo basic weapons training for self-defense, Germany “contravened the principle of proportionality” by insisting that all armed Bundeswehr units remain exclusively male. Not even pregnancy or maternity allows women’s exclusion from posts “on the ground that they should be given greater protection than men against risks to which both men and women are equally exposed.”

Space constraints preclude a review of further ECJ verdicts upholding BFOQ tenets; it explicitly rejects a “dumbing down” of national practices involving sex equality, however, and has reversed the burden of proof in such cases. The *Kreil* case suggests that were it called upon to render a judgment on Muslim headscarves, the ECJ would sooner support a material *right to work* over an abstract commitment to *neutrality*, *national interest* or *protection of the weaker sex*. It would also weigh automatic bans in terms of their “proportionality,” e.g., potential harm to a “hypothetical child” *versus* a life-long public school employment ban for those who practice *hejab*¹². Supranationality, by definition, supersedes “the national interest” of any given member-state.

9. Anticipating the Triumph of Employment over Religion

As Norman Doe ([37], p. 141) attests, “law is a place where religion and politics meet.” Some European states apply a “reasonableness test” regarding attire, permitting employers to require fashionable clothing in upscale settings [38], or to bar *hejab* in occupations with identifiable uniforms. Spain permits headscarves in state schools, while France bars “ostentatious displays of religion” among pupils. Finland and Sweden allow veils but not *burqas* in schools, claiming that complete covering inhibits dialogue over sexual equality. The Netherlands rejects *burqas* or veils that might interfere with “safety” but finances religious schools. Some courts have sought to pre-empt complaints by classifying headscarves as an “occupational hazard.” In Denmark, for example, a supermarket chain

¹¹ See *Johnston v. Chief Constable of the Royal Ulster Constabulary* (Case 222/84 1986) and *Angela Maria Sirdar v. Army Board and Secretary of State for Defence* (Case 273/97, 1999).

¹² Previous judicial rulings in Germany have affirmed that Article 6 GG does not accord parents an absolute power over classroom instruction or conditions; fundamentalist Christians would have no right to exclude evolution theory from the curriculum, for example. Nor would parental rights automatically include the ability to protect their offspring from strapless tops, revealing shorts or T-shirts with offensive logos worn to school by other classmates—even if these complaints were religiously motivated. These are conflicts that must be resolved at the school level.

fired a Muslim in 1991, claiming that her headscarf could get caught in the cash register! Danish judges rejected analogous arguments that baseball caps and Santa Claus hats should also be ruled hazardous. It speaks volume that courts have nullified bans for clerical staff relegated to back offices, along with janitorial workers.

EU case law to date, coupled with recent anti-discrimination provisions, will make it extremely hard for any member-state to insist on unique constitutional mandates regarding “freedom from” religion. The limited argument pursued here is that individual countries will not succeed in extending “negative freedom” to hypothetical parents and children in the face of employment consequences for real women insofar as *equal employment opportunity* is the very issue the ECJ has used to expand its own powers of constitutional review. Rosenfeld’s characterization of the ECJ as a “transnational” body does not adequately capture its *supranational* reach in relation to policies tied to the single market. It also underestimates the ECJ’s willingness to address *indirect* as well as *direct* discrimination. In this domain “European law breaks national law,” leading to ever more national reliance on preliminary ECJ rulings.

Returning to the concept of judicial culture, the European Union professes a commitment to eight fundamental principles regarding religion, none with the binding power of its gender equality precepts. Affirming the value of religion in national cultures, it stresses *subsidiarity*, cooperation and dialogue with faith communities; upholds religious freedom and the autonomy of denominational associations; ensures religious equality through non-discrimination; and accords limited special protections and privileges to religion [37]. The Maastricht and Amsterdam Treaties broadened the EU’s potential sphere of judicial action with regard to individual freedoms, however. Although directly tied to “the paid workplace,” *hejab* bans are most likely to face anti-discrimination review under Article 13 AT and three recent directives; the former allows the Council, acting unanimously, to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” As argued earlier, a judicial culture emphasizing individual rights affords women a better chance of simultaneously securing religious freedom and employment rights, while a courtroom culture favoring state interests seems to force women, but not men, to choose one set over the other.

Getting unanimous action from the Council is no easy task. Headscarves, however, involve a high degree of *intersectionality*, that is, discrimination based simultaneously on sex, ethnic origin and religion, which opens it to “employment” treatment. Council Regulation 1612/68 (amended 1976, 1998) maintains: “Any national of a Member State shall, irrespective of his [sic] place of residence, have (sic) the right to seek employment, to join a vocational training course or to take up an activity as an employed person....” European decision-makers inserted Article 1a: “..., all discrimination on the grounds of sex, racial or ethnic origin, religion, belief, disability, age or sexual orientation shall be prohibited.” Art. 6 of the Lisbon Reform Treaty upholds the freedom “to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.” Afforded the same legal value as the Treaties, the Charter of Fundamental Freedoms (Art. 21) holds: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion, belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited” ([37], p. 145).

Council Directive 2000/43/EC (6) extends the equal treatment principle to persons irrespective of racial or ethnic origin, warranting protection against employment discrimination. The rise of a

multi-religious EU triggers a positive responsibility to ensure that economic inclusiveness be extended to different faith groups. Establishing a framework for equal treatment in employment, Council Directive 2000/78/EC asserted for the first time that eliminating religious discrimination—like sex discrimination—comprises a fundamental principle of Community law. Recognizing women as frequent victims of multiple discriminations, it construes employment and occupation as key elements in guaranteeing equal opportunities, since both strongly contribute to individuals' full participation in economic, cultural and social life.

The Framework Directive 2000/78/EC applies to national law deemed necessary for maintaining security, public order, public health, crime prevention and protecting “the freedoms of others.” As shown earlier, German federalism allows states to double the “unequal treatment” facing Muslims whose employment rights vary from Land to Land (Hamburg *versus* Bavaria) and diverge from those in other member-states (The Netherlands, UK). The EU pledges “take into account the different ways in which men and women experience discrimination on grounds of religion” as it seeks a “workable unity in the European approach to the regulation of religion” ([37], p. 152). Having proven that is both willing and able to nullify Basic Law provisions in *Kreil*, the ECJ will hardly feel cowed by eight out of sixteen Lander constitutions regarding headscarves. Recall that Germany's High Court merely declared that Ludin could not be barred from school because no such state laws *existed* as late as 2003.

Ironically, Germany, along with the Netherlands, is the country evincing the most extensive web of state/local “equality agencies,” coupled with top-quality EU lawyers who regularly network with academics and judges regarding transposed equality regulations. Länder activists have a formidable track-record in targeting their own state labor courts for ECJ referrals, to pre-empt conservative Constitutional Court interpretations. Between 1971 and 2003, German judges initiated the greatest number of Article 234 equality references [not included under Art. 119 EEC/141 TEU] for a preliminary ruling, accounting for 42 of 147 judgments. Even more astounding: the ECJ declared German practices inconsistent with EU law in 76 percent of those cases ([39], p. 94).

Comparable reasoning is likely to apply regarding the Framework Directive: derogation justifying discrimination on religious grounds will be limited insofar as employers will have to demonstrate that a woman's religion is a determining factor in her actual ability to discharge job duties (e.g., as a cleric, as opposed to a sales clerk). The ECJ will ultimately permit member-states to engage in “difference of treatment” only if religious affiliation constitutes a genuine, determining occupational requirement, if the broader objective is legitimate, and the requirement is proportionate to the organizational ethos.

10. Conclusion: A Europe of Knowledge and Tolerance

EU anti-discrimination developments over the last decade make it increasingly unlikely that national courts will be able to sustain (anti-)religious reasoning to exclude women from other member-states from the simultaneous exercise of religious freedom and employment rights, much less home-grown teachers in public schools. This study has shown that judicial cultures matter, first, in ranking individual rights over state interests; and secondly, in according priority to concrete employment rights over moral/theological or abstract political concerns for public order and security. The failure of virtually all European high courts to ensure the balanced participation of women and

men in judicial deliberations per se is another factor contributing to their failure to apply “strict scrutiny” when it comes to women’s rights to religious freedom, freedom of expression and paid labor.

Under Europe 2020, the EU has assigned itself the ambitious task of becoming “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.” In 1998, nearly 90% of Germany’s children of migrant descent left school with no occupational certification [23]. It is not headscarves but rather mass unemployment among all youth that has completely “disrupted the social order” by way of riots in Paris (2007), London (2010, 2011), Madrid (2012) and Athens (since 2009). Teachers expressing pride in minority cultures and religions undoubtedly stand the best chance of winning the hearts and minds of alienated youth who might be recruited by political zealots, willing to exploit their troubled searches for belonging.

Like the U.S. Supreme Court, the ECJ is compelled to reconcile the competing needs of a multi-cultural constituency whose 500 million residents differ not only in their understanding of citizen-state relations but also with respect to migration background, languages and religions. It cannot uphold the mono-cultural foundations of individual member-states. The ECJ has shifted “from a style and rhetoric that were thoroughly French to something somewhat closer to the U.S. model” ([13], p. 640). ECJ justices comprise a unitary team intent on defining, preserving and consolidating a community of shared values, institutions and policies; they have become key allies in realizing the Union’s primary goal, “the free movement of people, goods, services, and capital,” social cohesion and anti-discrimination by way of “strategic initiatives.”

The ECJ is a self-made “guardian of the treaties”; rejecting “national appreciation” arguments stressed by the ECHR, it depends on its own case-law heritage in ameliorating gender equality. Even in “sweeping decisions promoting the unity” of EU governance ([13], p. 649), the Euro-judiciary has not only favored Community prerogatives over member-state constitutions but also citizens pitted against their own countries, dating back to *Van Gend en Loos* (1963). It has upheld individual rights even when this meant reigning in the EU’s own “positive action” agenda, e.g., protecting men in *Kalanke* and *Marschall*¹³.

Mindful of Abraham Maslow’s adage, “if you only have a hammer, everything looks like a nail,” I conclude that the European Court of Justice will allow employment consequences to outweigh political-religious constraints on headscarf use, because employment verdicts comprise the largest body of case-law and the strongest supranational tool at its disposal. Judicial culture does “matter” in according primacy to citizen *versus* state rights. Equally important is the degree to which judges are asked to resolve conflicts of a national, transnational or supranational nature. At both levels of analysis examined here, the Court of Justice seems capable of transcending *national politicizations of the constitution* invoked by a post-911, anti-Muslim frenzy, witnessed in France, Germany, and elsewhere. Its best bet for achieving this is to pursue a European *constitutionalization of politics*, that is, “by removing issues and controversies from the give-and-take of the day-to-day political arena and transforming them into constitutional problems to be settled by adjudication” ([13], p. 650). As the

¹³ *Kalanke v. Freie Hansestadt Bremen* [1996] ICR 314, ECJ Case C-450/93; *Marschall v. Land Nordrhein-Westfalen*, Case No. C-409/95. Court of Justice of the European Communities, November 11, 1997. Further, *Summary of the Judgments of the Court of Justice of the European Communities, 1987-1992* (1992).

U.K.'s Lord Justice Denning opined, "No longer is European law an incoming tide flowing up the estuaries It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses...."¹⁴ The legal tide is likely to shift in favor of Muslim women.

Conflicts of Interest

The author reports no conflict of interest with any parties or institutions mentioned in this work.

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