International Journal of Law in Context, 14,3 pp. 374–395 (2018) © Cambridge University Press 2017
doi:10.1017/S1744552317000210

Overcoming essentialisation: a comparative study of 'living-together' conceptions

Emma Patrignani*

Abstract

This paper compares two judgments of constitutional courts (French and German) assessing the constitutionality of statutes concerning veil-wearing and focuses on the underlying conceptions of 'living together'. This means that what is actually compared is the self-understanding of the respective majority in the two societies as stated in the decisions. This is done by disassembling the concept of 'living together' into three elements: the notion of the individual, the meaning of belonging to the national community and the space accorded to religion in public. Each section of this paper examines one of these elements as they are entailed in the judgments and positions them critically within the respective legal cultural and historical contexts. The main aim of this paper is methodological in nature and is namely to show how comparative legal cultural studies can avoid essentialisation and rather highlight the complexity of every cultural context.

I. Introduction

The challenges of multiculturalism are becoming more pressing every day: this can be seen both in the daily news and in the ways law handles the cultural and religious dishomogeneity of society. This paper compares the judgments of two constitutional courts assessing the constitutionality of statutes concerning the presence of a fairly new practice in European society, namely veil-wearing, and focuses on the underlying conceptions of 'living together'. One of these judgments is the French Decision n. 2010–613 DC rendered on 7 October 2010 by the Constitutional Council, and the other is the German order in the cases 1 BvR 471/10 and 1 BvR 1181/10 that was rendered on 27 January 2015 by the First Senate of the Federal Constitutional Court.

Living together is indeed a timely issue. Definable as a modus vivendi (Dupont, 2011, p. 81), the concept refers to human interactions in a given territory and to basic shared values. In nineteenth-century Western European nation-states, those basic shared values were determined by a relatively homogeneous majority in a dominant situation and enforced on everyone else. Conversely, twenty-first-century states are characterised by diversity. Nowadays, living together needs to be renegotiated in a situation of plurality of cultural lifestyles. Taken-for-granted social norms, cultural forms of expression and of social conversance are confronted with alternatives whose alterity can fascinate, but also perturb. This creates challenges also for law: as it is such a topical matter, the comparative study of living together is important for understanding the influence of cultural heritage and for appreciating the novelty of the circumstances.

The study of European living-together conceptions in connection with reactions to Islamic veiling appears to be full of prejudices. The idea to write about this was sparked by the European Court of Human Rights' decision in the case of *S.A.S. v. France* of 1 July 2014. As a matter of fact, the Court declared that the French Act no. 2010–1192 prohibiting full-face veils in all public places is compliant with the European Convention on Human Rights. The only argument that made this point is the French living-together conception, which is considered to be a legitimate

* PhD Candidate, Faculty of Law, University of Lapland E-mail: emma.patrignani@ulapland.fi.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

ground to restrict the rights to respect for private life and to manifest one's beliefs, as foreseen by the second paragraphs of the Articles 8 and 9 ECHR respectively (§142 decision *S.A.S. v. France*).[1] In a nutshell, the living together recognised by the Court entails, as an indispensable element, the possibility of open interpersonal relationships, which in turn are considered to be fundamentally jeopardised by the concealment of one's face. Moreover, living together is used to protect the majority of the population (§122). In effect, by stating that the full-face veil undermines the dignity of others who share the same public space, it is implied that in France people do not wear veils and also that they have to be protected from being confronted with such an unusual sight. The Act no. 2010–1192 defends a certain image of the social landscape, which should be preserved somehow as 'French': a kind of Frenchness that is certainly not Muslim.[2] This much disputed judgment aroused my interest in the French legislative procedure, which led to the promulgation of Act no. 2010–1192; one step of this was the decision of the Constitutional Council assessing the conformity of the Bill to the Constitution. This decision thus became the *comparandum*. Only a few months earlier, the First Senate of the German Federal Constitutional Court had decided that, due to possible bias, the two constitutional complaints regarding the ban on headscarves in North Rhine-Westphalian schools had to be decided without the involvement of Vice-President Ferdinand Kirchhof, as he could be regarded as the author of the legal concept to be considered.[3] I decided to wait for the decision on the merits of the constitutional complaints and that this would become the *comparatum*.

Both courts' decisions will be analysed here against their background, and it will be highlighted how they fit their context. Nevertheless, this does not need to lead to deterministic understandings of history nor to simplistic and reductive 'cultural' justifications. David Nelken warns that '[c]ulture as a term easily lends itself to misuse both by social actors and scholars. It can be interpreted in a way that is "essentialist", over-determined, over-bounded and xenophobic' (Nelken, 2010, p. 6). Vicki Jackson has a similar concern in relation to 'contextually oriented scholarship' within comparative constitutional law, which might 'assume a fixed national identity' (Jackson, 2012, p. 67). In the context of this paper, an example of this would be a causal explanation of the content of the judgments that rhetorically construct the French and the German conceptions of living together as uniform, immovable and stereotypical. In contrast, understanding law in context can rather be an occasion to highlight how every cultural context is 'complex and multi-stranded, and may shift over time' (p. 67). This is what this paper purports to do. The presupposition is that law exists in a social matrix that is actually constituted of a vast diversity of overlapping and potentially competing elements (Nelken, 2010, p. 17).

The essentialisation to be overcome (to which the title of this paper refers) is not the essentialisation of the 'other' veil-wearing woman,[4] but in this case the French and German

1 The Court dismissed all other adduced justifications for the ban: public safety (§139), gender equality (§119) and protection of the human dignity of the veil wearers (§120). It only retained the protection of the 'French conception of living together' as a *legitimate aim* (§121), as well as the measure *proportionate* (§157), so that the ban would fall within the acceptable limitations of the right to respect for private life and of the right to freedom of thought, conscience and religion.

2 Ilias Trispiotis (2016) has argued that the conception of living together as recognised in this judgment is problematic and that an alternative understanding would be advisable.

3 German Federal Constitutional Court's Press Release No. 22/2014 of 13 March 2014, available at: <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-022.html> (accessed 14 March 2017).

4 A discursive practice that indeed exists and is deeply problematic. The fact that this paper does not focus on it does not mean that it is irrelevant and not worth studying; this has masterfully been done by others (Frankenberg, 2014, pp. 246–258). Rather, the focus here is on the European 'self' in order to unveil that its identity is also rhetorically constructed (Dietze, 2009, p. 48), and to possibly contribute to a non-essentialising portrayal of it.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

attitudes towards diversity in society. As will be presented next, the two constitutional controversies concern different types of religious garments and different places where they are forbidden. In France the – upheld – statute forbids the wearing of the full-face veil (*burqa* and *niqab*) in public places, while in Germany the – censured through restrictive interpretation – statute targets the headscarf (*hijab*) worn by public school teachers. Since the comparison carried out in this paper focuses on the non-wearers and on the general vision of society entailed in the judgments, this difference is not a hindrance. In both cases, there is a constitutional court reacting to increasing religious heterogeneity.[5] As with any reaction to otherness, it actually tells much about the self (Amir-Moazami, 2007, p. 17). The headscarf is taken here as a 'mirror of identity' that forces Western societies 'to see who they are and to rethink the kind of societies and public institutions they want to have' (Joppke, 2009, p. X). Therefore, the two decisions offer a wonderful opportunity to understand how courts from different historical, political and legal contexts address challenges posed by diversity in society.

The text will be structured as follows: after a general presentation in Section II of the two decisions, Sections III–V focus on the conception of living together. The concept is broken down into three elements: the notion of the individual (Section III), the meaning of belonging to the national community (Section IV) and the space accorded to religion in public (Section V). Each section will minutely examine one of these elements as they are entailed in the judgments and will position them critically within the respective histories. Finally, the conclusion resets the findings in a more general matrix.

II. Presentation of the two compared decisions

The two compared decisions, if considered as *texts*, are very different: one is two pages long, the other thirty-nine. One was deliberated on by the whole Council as a single organ composed of ten members; the other was decided by the First Senate of the Court as a result of the work of six members, two of which expressed a dissenting opinion.[6] This section will focus on the legal reasoning of the courts, which are also rather different.

The French Decision n. 2010–613 DC rendered on 7 October 2010 by the Constitutional Council declares the Bill prohibiting the concealment of one's face in public places to be compliant with the Constitution. It was taken before it was enacted, according to the second paragraph of Article 61 of the Constitution, so it is an instance of an a priori abstract constitutionality challenge. The Bill was voted on in parliament after various preparatory works. The National Assembly created a commission that had the task of gathering information about Islamic full-face veiling practices (recording 1,900 cases

5 Moreover, in both cases, the constitutional courts are evaluating the constitutionality of statutes dealing with the presence of veils in *public* (all public places and public schools), and therefore they are particularly significant for studying the ideas of the respective societies. It is for this reason they were selected, as opposed to decisions taken by Supreme Courts in France and Germany that concern Islamic veiling in *non-public* sites; for example, the *Arrêt* n° 612 of 25 June 2014 (13–28.369) rendered by the French Court of Cassation in its Plenary Assembly, which confirmed the dismissal of a headscarf-wearing worker from the *Baby-Loup* childcare centre, or the *Urteil* of the German Federal Labour Court rendered on 24 September 2014, n. 5 AZR 611/12, which confirmed the possibility to prohibit headscarves for nurses in evangelical hospitals. As this paper was undergoing review, also the Court of Justice of the European Union has pronounced for the first time the possibility for firms to prohibit workers from wearing religious symbols through the judgments in cases C-157/15 *Achbita, Centrum voor Gelijkheid van kanses en voor racismebestrijding v. G4S Secure Solutions*, and C-188/15 *Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole Univers.*

6 A deeper text-structure, stylistic and linguistic comparison of the judgments will not be carried out, but indeed they do display interesting features of the respective legal culture they stem from. Notwithstanding the relevance of those aspects for a judicial style comparison, they cannot be explored further, as the focus of this paper is on the substantive and implicit content of the texts.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

on French national territory). It submitted its report in January 2010.[7] The Council of State produced a study on the legal feasibility of a ban, presented in March 2010, that actually advised against it.[8] In addition, the National Assembly unanimously voted for a resolution in May 2010 upholding republican values and condemning integral veiling as being in contrast to them.[9] As for the Bill, it was originally deliberated by the government, then adopted by the National Assembly and the Senate, and subsequently deferred to the Constitutional Council by the Presidents of both Houses.

In the decision, the Council respectively refers to Articles 4, 5 and 10 of the 1789 Declaration of the rights of man and of citizen (DDHC) in defining freedom as the possibility to do anything not explicitly forbidden, limiting the law's possibility to restrict action only to activities that are harmful for society and protecting the freedom of opinion. Further, it refers to the third paragraph of the Preamble of the 1946 Constitution, which guarantees equality of women and men, and it mentions the protection public order – an objective with constitutional value. It then moves on to consider the legislator's intentions and performs a minimum control of not manifest disproportionality of the conciliation operated by the legislator between the protection of public order and the guarantee of constitutionally protected rights. It formulates a reserve of interpretation: the public places where the wearing of the full-face veil is prohibited should not encompass the places of worship open to the public – which otherwise would have been included in the 'public spaces' as referred to in Article 2, para. 2 of the considered Bill. Besides this interpretative restriction, the Council declares the Bill to be compliant with the Constitution. The Act no. 2010–1192 was thus promulgated on 11 October 2010 and entered into force on 12 April 2011.

More generally, it has to be added that, in France, the wearing of religious garbs is prohibited at school. In regard to teachers, the rules concerning public agents apply. The duty of strict neutrality was first enunciated by the Council of State[10] in general and then explicitly applied to the wearing of religious symbols.[11] The legal basis for the same prohibition but in regard to pupils is to be found in the Act no. 2004–228 of 15 March 2004 on laicity at school. After various '*affaires du voile*', starting with the 1989 Opinion of the Council of State, which actually considered the wearing of headscarves by pupils not to be incompatible with the principle of laicity at school,[12] the legislators concluded the heated debate with a strong positioning (Joppke, 2009, pp. 44–45). Thus, the decision analysed here can be seen as belonging to an ongoing French discussion on the presence of (mainly Muslim) religious clothing in public places (Dieu, 2010; Champeil-Desplats, 2012).

The German order in the cases 1 BvR 471/10 and 1 BvR 1181/10, rendered on 27 January 2015 by the First Senate of the Federal Constitutional Court, is the response to two constitutional complaints (Article 93, para. 1, sentence 4a, Basic Law, in the following referred to as GG) that were advanced by

7 Assemblée nationale, XIIIe législature, rapport n. 2262. From here on, this report will be referred to as 'Rapport d'Information Raoult' from the name of the reporting deputy, Éric Raoult, available at: ‹http://www.assemblee-nationale.fr/13/rap-info/i2262.asp› (accessed 12 March 2017).

8 *Study of Possible Legal Grounds for Banning the Full Veil*, Conseil d'Etat – Reports and Studies Section, available in English at: ‹http://www.conseil-etat.fr/content/download/1910/5758/version/1/file/etude_voile_integral_anglais.pdf› (accessed 12 March 2017).

9 Assemblée nationale, XIIIe législature, TA n. 459, 11 mai 2010, available at: ‹http://www.assemblee-nationale.fr/13/ta/ta0459.asp› (accessed 12 March 2017).

10 CE, 8 December 1948, *Demoiselle Pasteau*, no. 91.406; and CE, 3 May 1950, *Demoiselle Jamet*, no. 98.284.

11 CE avis, 3 May 2000, *Demoiselle J. X.*, no. 217017. More recently, the duty of strict neutrality has been restated also in the government document Charter of Secularity in Public Services, which was distributed with the *Circulaire* n° 5209/SG on 13 April 2007, available at: ‹https://www.dgdr.cnrs.fr/bo/2007/07-07/521-bo0707-cir5209.htm› (accessed 19 March 2017) and in the Charter of Secularity at School, which was distributed with the *Circulaire* n° 2013–144 on 6 September 2013, available at: ‹http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=73659› (accessed 19 March 2017).

12 CE avis, 27 November 1898, no. 346.893.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

two Muslim women of German nationality. Both had been teaching in public schools and had been requested to remove their headscarves. One substituted the garment with a woollen hat and a polo-neck pullover to cover her hair and neck, but she still received a warning from school authorities. Her lawsuits were unsuccessful at all levels of jurisdiction of the labour courts. The second claimant refused to remove the headscarf and was dismissed. Similarly, her lawsuits in the labour courts were unsuccessful. The claimants alleged that their constitutional rights had been violated by the school authorities' sanctions, as confirmed by the labour courts, and indirectly they also challenged the constitutionality of §57, s. 4, and §58, sentence 2 of the Education Act of North Rhine-Westphalia (NRW SchulG) in the version of 13 June 2006 on which those decisions were based.

The reasoning of the Senate consists in a balancing of constitutionally guaranteed fundamental rights. On the one side, there is the freedom of faith and conscience (Article 4 GG) of the complainants, which is considered in connection with the free development of personality (Article 2, para. 1 GG) and human dignity (Article 1, para. 1 GG), in addition to the right to freely choose one's profession (Article 12, para. 1 GG). Moreover, the Senate refers to Article 3, para. 2 GG on the equality between men and women.[13] On the other side, weighted against those rights, the Senate takes into consideration the negative religious freedom of the pupils (Article 4, para. 1 GG), the educational mandate of the state (Article 7, para. 1 GG) that has to be carried out guaranteeing neutrality of worldview and the parental right to children's upbringing (Article 6, para. 2 GG). The result of this reasoning is a relative prevalence of the rights of the complainants, as opposed to the negative rights of third parties.

The Senate decided that sentences 1 and 2 of §57 s. 4 NRW SchulG have to be interpreted restrictively: the prohibition of the expression of religious beliefs by outer appearance or conduct cannot be justified by mere abstract danger. A sufficiently specific danger of disrupting the peace at school or the state's duty of neutrality has to exist in order for a ban to be constitutionally acceptable. This applies both to teachers and to other educational staff, including socio-educational staff employed by the Land. Moreover, §57 s. 4 sentence 3 of the same statute, which gave privilege to representing Christian and occidental educational and cultural values or traditions, has been declared to be discriminatory on grounds of faith and religious beliefs and hence is unconstitutional and void.

In contrast to France, no full-face veil ban exists in Germany.[14] The legal confrontations on headscarves ('*Kopftuch-Streite*') are mostly in reference to public school teachers. In particular, the Second Senate of the Federal Constitutional Court had decided the *Ludin* case[15] in 2003. At that time, there was no state legislation concerning teachers and headscarves, and therefore the decision of the board of education of the Land Baden Württemberg that prohibited Fereshta Ludin from taking a post as an English and German teacher because of her insistence on wearing a headscarf was annulled. The Second Senate declared that the statutory basis at that time was not

13 Interestingly, both courts refer to the principle of equality between men and women, but the French court does it in order to state that the full-face *veil* places women in a situation of exclusion and inferiority that is incompatible with the principle, while the German one in order to verify that the headscarf *ban* affects disproportionally (only) women.

14 Even though full-face veil-wearing women do encounter difficulties in everyday life, available at: ‹http://www.spiegel.de/international/germany/germany-debates-a-ban-on-burqas-and-other-muslim-veils-a-1108562.html› (accessed 23 August 2016). Federal Chancellor Angela Merkel, in a speech on 14 September 2016, declared full veiling to be 'a big obstacle to integration. . . . When the face remains covered, the possibilities to get to know and to appreciate one's personality are heavily reduced. It hinders communication, which does not consist only in words'. Concerning the possibility of a ban, she envisages it as consisting of 'precise provisions for those sectors where full-face veiling is not appropriate – for example in the public sector or in front of a Court'. Full text available at: ‹https://www.bundeskanzlerin.de/Content/DE/Rede/2016/09/2016-09-14-merkel-parlamentarierkonferenz.html› (accessed 15 March 2017).

15 BVerfG, 24.09.2003–2 BvR 1436/02.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

sufficiently definite for a prohibition on teachers wearing a headscarf, and it expressly advised the Land legislatures to redefine the admissible degree of religious references permitted at school. In doing so, it did not give precise guidance as to the content of the legislation. As a result, the Länder governed by the Christian-Democratic Party (CDU/CSU) passed anti-headscarf legislation that more or less explicitly exempted 'Christian-occidentals' symbols from its reach.[16] But the most evident example of the dependence of the passing of anti-headscarf laws on the colour of the governing party is provided by the Land North Rhine-Westphalia. As long as it was ruled by the Social Democratic Party (SPD), no such legislation was passed (Robbers, 2001, p. 648) but, as soon as a CDU government came into power in 2006, a selectively exclusive headscarf law was enacted (Joppke, 2009, p. 72). Perhaps it is not a coincidence that exactly this statute ended up being contested in front of the Constitutional Court. The First Senate decided as expounded above, which has led to discussion among constitutional law scholars as to whether the case should have been deferred to the Plenary according to §16 of the Federal Constitutional Court Act, as some interpreted this decision to deviate from the previous one (Rusteberg, 2015, pp. 638–639; Sacksofsky, 2015, pp. 806–807; Klein, 2015, pp. 464–466).[17]

The 2010 French Constitutional Council decision and the 2015 judgment by the First Senate of the German Federal Constitutional Court illustrate two very different approaches to veiling in public, to the point that they reach opposite conclusions in their balancing of fundamental rights. However, the following sections of this paper do not spotlight the legal reasoning, but rather the roots of these different judicial approaches and specifically the ideas about French and German societies as depicted in the texts. Indeed, the image of a society inferable from its black-letter law is not necessarily the same as the one that would emerge from empirical research. In addition, these two texts are not taken to represent 'the' French and 'the' German legal answer to the veil, and neither do they contain the ultimate definitions of the courts of 'what it means to live together' in each society. They are steps in the 'iterations' (Benhabib, 2010, p. 466), the processes in which meanings are negotiated, within the French and German legal evolution. These two texts are cultural products of their respective society: as such, they are the result of the 'massaging' (Glenn, 2010, p. 16) of the particular legal tradition they belong to and therefore constitute possible starting points for analysis. The two decisions are here considered as documents in which the deciding organs at least implicitly state something about the French and German ways of living together.

The next sections will discuss the political and philosophical contexts that inform the decisions and more specifically the origins of the conception of living together as entailed in the judgments, which is a result of (at least) three elements. The first of these is the representation of the singular human being, which will be looked at next. The indented paragraphs contain excerpts of the decisions in their original version (English translation is provided in the footnotes).

III. Images of the individual

In both decisions, the courts are dealing with a statute that is forbidding something. They have to verify whether the restriction of the possibilities of action of the individual is legitimate: this implies that some conception of individual has to be mobilised. Aristotle notably considered the individual to be a *zoon politikón*, her existence given by the community, and her nature and telos to be a member of it (Aristotle, 2009, p. 26). This conception was widespread in Europe in the twelfth and thirteenth centuries and has influenced the philosophy of both law and the state (Böckenförde, 2001, p. 12). In

16 Only Berlin and Bremen, governed by left-leaning parties, passed laws prohibiting all religious symbols, Christian and Jewish included.

17 Cf. also the debate among Hans Michael Heinig, Christoph Möllers and Mathias Hong, available at: ‹www.verfassungsblog.de› (accessed 21 April 2016).

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

opposition to this view, the social contract theorists of the seventeenth and eighteenth centuries developed a representation of the human as singular and free. Relations and connections are not given in advance; they can only be created by the free expression of the will of the individual when she wants to do so in order to satisfy her needs or to develop herself.[18] The image of the individual contained in the French decision, clearly ascribable to this more recent conception, will be analysed first.

3.1 Individual as an autonomous being, forced to be free

The French Constitutional Council in its decision bears on the DDHC of 1789, which considers the human to be a carrier of rights inherent to her person, anterior and superior to the state:

> '3. Considérant qu'aux termes de l'article 4 de la Déclaration des droits de l'homme et du citoyen de 1789: "la liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui : ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la Société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi".'[19]

Thus the Council refers to an individual who is primarily free to exercise her natural rights. This 'French republican theory' individual exists prior to her choice of lifestyle, values and politics; these are but external expressions of an inner self (Scott, 2007, p. 127). The Declaration considers the individual abstractly, not in the particular circumstances of real life. The disregarding of particularistic cultural determinations corresponds to the disregarding of any substate community affiliation, or rejection of 'communalism'. *Communautarisme* refers to 'the closing of ethnically defined communities on themselves, ... and a refusal of integration. Communalism threatens the process of direct communication between the state and citizens that underlies French political philosophy' (Bowen, 2010, p. 156). The condemnation of communalism can be traced back to debates held after the 1789 Revolution and, at the time, it was not directed at religious communities. Intermediate corporate bodies were abolished, as they were accused of separating citizens, giving them illusions of superiority, constraining them and claiming authority independently from the state (Bowen, 2010, p. 161). On the contrary, blindness towards intermediate (between state and citizen) forms of affiliation was melded to the concern to assure equality of treatment between individuals who are naturally diverse and to create a common space among very different men and women (Rosanvallon, 2004, pp. 121–124).

The difficulty with this legal fiction is due to the dissension between its apparent descriptive posture ('this is how the individual is for the law') and its strong normativity ('this is how the individual has to be by law'). So for example, in point 4 of the decision, the Council considers the objectives pursued by the legislator as follows:

> '[le législateur] a également estimé que les femmes dissimulant leur visage, volontairement ou non, se trouvent placées dans une situation d'exclusion et d'infériorité manifestement incompatible avec les principes constitutionnels de liberté et d'égalité.'[20]

18 Such is for example the image of the human as described by Jean-Jacques Rousseau in the 'Discourse on the Origin and Foundations of Inequality Among Mankind' (Rousseau, 2002).

19 'Considering that, according to art.4 of the Declaration of the rights of man and citizen of 1789: "Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights. These borders can be determined only by the law"' (all translations are mine).

20 'The legislator considers that the women covering their face, voluntarily or not, find themselves placed in a situation of exclusion and inferiority which is manifestly incompatible with the constitutional principles of freedom and equality.'

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

One cannot avoid recalling Rousseau's statement: '. . . whoever refuses to obey the general will shall be constrained to do so by the whole body; which means nothing else than that he shall be forced to be free' (Rousseau, 2002, p. 166). So an individual who chooses to cover her face is making a choice against her own liberty and equality and can be forced not to make that choice. Liberty and equality are given here an *objective* meaning. The tension between subjective and objective understanding has been conceptualised with reference to human dignity: according to the subjective understanding, dignity is coextensive with freedom of choice and cannot logically be violated by the individual herself, who instead defines what dignity means to her; the objective version, in contrast, introduces external standards. Both in France[21] and at the European level,[22] the subjective understanding of dignity prevails; therefore it is not applicable to this case (Rapport d'Information Raoult, p. 177; Mathieu, 2010; Dieu, 2010). Nevertheless, with this decision, the Council introduces an objective conception of other fundamental rights, namely liberty and equality. Some commentators discuss the 'rupture' and maybe even 'evolution' (Dieu, 2010) of the French conception of the principle of equality, as this 'paternalistic' (Hunter-Henin, 2012, pp. 624–628) version leads to a negation of personal autonomy and free will.

To summarise, the free and autonomous individual of the 'republican theory' to which the Council refers is, paradoxically, limited in her freedom of choice. Finally, she finds herself to be under the influence of the (state) society. The point of departure was the individual conceived as freed by community fetters but, at the end of the line, we see her actually being restricted by this very image. As will be shown next, defining the conception of the individual is fraught with risks for any legal text, and therefore it is understandable that the German decision attempts to leave such a definition as open as possible.

3.2 Individual as community-determined, whichever community

In the decision under scrutiny here, the First Senate of the Federal Constitutional Court focuses strongly on the individual. For example the judgment recognises, at §96 and §110, that an imperative religious precept of covering in the public space is an issue of personal identity as protected by the right of free development of one's personality (Article 2, para. 1 GG) in connection with human dignity (Article 1, para. 1 GG).[23] Moreover, the centrality of the individual can be inferred from the clear distinction that is made between civil servants and public administration (§104, §107, §112)[24] (Theilen, 2015; Schwabe, 2015). In addition to this, when discussing the freedom of religion (§86), the Court refers explicitly also to the singular person entitled with fundamental rights instead of only to the religious community as it used to do[25] (Rusteberg, 2015, p. 640; Ladeur, 2015, p. 634; Sacksofsky, 2015, p. 803). As a result, in this judgment, the individual is important not only as a fundamental rights bearer (as the obvious

21 Cf. for example the Constitutional Council's decisions in preliminary rulings on constitutionality no. 2010–25 of 16 September 2010, no. 2010–71 of 26 November 2010 and no. 2010–30 of 17 December 2010, which all interpret dignity as opposable by the individual to the institutions. In contrast, in the (isolated) decision of the Council of State CE Ass 27 October 1995, *Commune de Morsang-sur-Orge*, n. 136727, dignity had been used to strike down consensual arrangements.

22 Cf. for example the ECtHR decision *Pretty v. UK*, 2346/02 of 29 April 2002.

23 That religious freedom is related to human dignity as protected in Article1 GG had already been acknowledged in the decision on school prayers BVerfG, 16.10.1979–1 BvR 647/70; 1 BvR 7/74 (§63).

24 This distinction is necessary for argumentative purposes, as the Senate has to distinguish this case from the one on crucifix on classrooms' walls, BVerfG, 16.05.1995–1 BvR 1087/9(Klein, 2015, p. 468).

25 For example, in the *(Aktion) Rumpelkammer* decision BVerfG, 16.10.1968–1 BvR 241/66 at §25 and the previous headscarf decision BVerfG, 24.9.2003–2 BvR 1436/02 at §40.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

focus for a decision on a constitutional complaint), but also as she is explicitly singled out from her work and religious community.

The judgment ventures to define the conception of a human being of the liberal constitutional state and explicitly opts for an open characterisation of the individual: that is to say, one that leaves its content as undefined as possible:

> 'Der freiheitliche Staat des Grundgesetzes ist gekennzeichnet von Offenheit gegenüber der Vielfalt weltanschaulich-religiöser Überzeugungen und gründet dies auf ein Menschenbild, das von der Würde des Menschen und der freien Entfaltung der Persönlichkeit in Selbstbestimmung und Eigenverantwortung geprägt ist (§109).'[26]

So the question about the subjective or objective understanding of human dignity, which in the German context has been formulated by Böckenförde (1987, p. 14), is answered in the subjective sense – that is, the individual is bestowed with the responsibility of choosing for herself how to develop her personality (Klein, 2015, p. 467). If one decides to avoid social contacts and become isolated, this choice is protected by the negative freedom of opinion and the general rights of the personality (Beaucamp & Beaucamp, 2015, p. 182). Such is the conception of the individual as entailed in the text. But where does it originate from?

Historically, in the German territories, the collectivist representation of the individual has been more influential (Böckenförde, 2001, p. 8). Later on, in the Basic Law, the image of the individual developed as a sort of hybrid: in its first draft, Article 1, para. 1 declared the state to be 'there for human will, not the human for the State's will'. Hence, it apparently leaned towards a Rousseauian conception of individual – but which could also be understood as a reaction to the just defeated Nazi regime. The final version of Article 1 GG actually refers to human dignity. A definition of the image of the individual has been formulated by the Federal Constitutional Court in a 1954 decision[27]: 'The image of the human contained in the Basic Law does not refer to an isolated individual; rather the Basic Law has solved the tension between individual and society in the sense of the community-relatedness and boundedness of the person, without thereby encroaching his own intrinsic value' (§29).

According to the classic comment by renowned constitutionalist Günther Dürig (2003, p. 24), the Court found a balance between the human being as an autonomous individual and the Aristotelian conception of collective, political humanity.

Overall, in German law, the legal understanding of the human is very heterogeneous, depending on the branch of law considered (Häberle, 2008). Space is given for various developments and concretisations, and this openness is not a fortuity, but a political statement, as the liberal democratic order of the constitutional state entails the normative negation of any prescribed integral human image (p. 63). This openness is found in the decision considered here as well. The Senate puts emphasis on the individual taken singularly, separated from the societal context, and recognises that, through the exercise of her rights and freedoms, the person inevitably manifests her choices connected to societal and religious belonging. In this way, the judgment recognises that the individual is under the ascendancy of the community but does not impose a certain predominant societal conception.

---

26 'The liberal state of the Constitution is characterised by openness towards the multiplicity of convictions concerning worldview and religion, and such an attitude is based on an image of the human being that is shaped by human dignity and the free development of personality in self-determination and -responsibility.' This formulation is to be found already in §42 of the 2003 decision of the *Ludin* case.

27 BVerfG, 20.07.1954–1 BvR 459/52; 1 BvR 484/52; 1 BvR 555/52; 1 BvR 623/52; 1 BvR 651/52; 1 BvR 748/52; 1 BvR 783/52; 1 BvR 801/52; 1 BvR 5/53; 1 BvR 9/53; 1 BvR 96/54; 1 BvR 114/54.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

To sum up, the 'typically French' autonomous individual ends up being constrained by the Constitutional Council more than the '(partially) community determined German' by the Federal Constitutional Court. Such a statement on the extent of the autonomy of the individual recognised in the two texts would remain incomplete if the kind of national bond implied was not put under scrutiny. This leads us to the next chapter: after having pondered on the conception of the individual in the two texts, the following addresses the meaning of societal belonging.

IV. Societal belonging

The two countries offer good material for comparison, as they have been 'constructing, elaborating, and furnishing to other states distinctive, even antagonistic models of nationhood and national self-understanding' (Brubaker, 1992, p. 1). The commonplace representation of the French national community is that of a political community, while the German national community is first and foremost a cultural and ethnical one. So belonging in France would be the result of a rational act of will, while in Germany it would be a pre-political fact (Dumont, 1991, p. 249). These two 'types' of different national cohesion ideals are mirrored also in the degree and form of inclusiveness/exclusiveness in relation to ethnic difference and in the distinction between the French civic territorial (*jus soli*) and German ethnocultural (*jus sanguinis*) basis of criteria for attributing citizenship. The next section will attempt to problematise this conventional narrative.

4.1 Civic nationalism, moralised

The two decisions compared here do not approach the issue directly, but both make reference to life in society and to the presence of foreign practices in public spaces. In this sense, they both reveal something about the conception of 'belonging' in the respective societies, and their assertions are diametrically opposed. Concerning French society, the Constitutional Council acknowledges the legislator's concern that:

> '[P]ratiques … consistant à dissimuler son visage dans l'espace public … méconnaissent les exigences minimales de la vie en société.'[28]

In this manner, it states that the full-face veil is not only against liberty and equality, but also against fraternity, as it casts off the others and contests head on 'our conception of living together' (Rapport d'Information Raoult, p. 87). Also in the explanatory memorandum accompanying the Bill as it was discussed in the French parliament, the wearing of a full-face veil is defined as a 'sectarian manifestation of a rejection of the values of the Republic'[29] that brings with it 'a symbolic and dehumanizing violence, at odds with the social fabric'.[30] In other words, there is a certain social fabric whose texture is defined negatively by placing it in opposition to the Islamic practice.

It has to be added that this decision has introduced an innovative notion of public order (Levade, 2010; Verpeaux, 2010). In the third *considérant*, the Council refers to Articles 5 and 10 DDHC, which enable the legislator to intervene to protect public order. The 'tryptic' of safety, tranquillity and salubrity constitutes the 'material public order' that, according to constitutional jurisprudence,[31]

28 'Practices … consisting in covering one's face in public spaces … are oblivious to the minimal exigencies of life in society.'

29 Projet de loi interdisant la dissimulation du visage dans l'espace public, N° 2520, Assemblée Nationale, p. 3, available at: ‹http://www.assemblee-nationale.fr/13/projets/pl2520.asp› (15 March 2017).

30 *Ibid.*

31 Cf. for example the decisions no. 94–352 of 18 January 1995, no. 2003–467 of 13 March 2003, no. 2010–605 of 12 May 2010.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

has to be reconciled with the constitutionally guaranteed freedoms. But, by referring, in the fourth *considérant*, to the 'exigencies of life in society', the Council is actually extending the meaning of the notion. The simple protection of public order would not be enough to justify a general and absolute ban. Public order acquires a more substantial and positive content consisting of a certain number of social values.[32] What is problematic with this 'social' public order is that it may change over time, it could be filled with even more precise and restrictive social rules, and more generally it is an instance of moralisation of the public space (Dieu, 2010; Fatin-Rouge Stéfanini and Philippe, 2011). Actually, Article 5 DDHC, with its negative phraseology (the legislator is entitled to edict prohibitions only against acts which are harmful to society), was designed to restrict the possibilities of state interference. 'Ironically', it now becomes 'a source of justification for one of the most intrusive pieces of legislation passed in France' (Hunter-Henin, 2012, p. 631). The social public order is very close to the objective understanding of fundamental rights mentioned in the previous section, as in both cases a social norm is identified and imposed on the individuals, and personal autonomy yields to social heteronomy (Dieu, 2010). In this way, the political community that constitutes France is not neutral or value-free. On the contrary, it is becoming filled with normative content in an explicit way.

It has to be acknowledged though that, to a certain extent, this is not a complete novelty in French history. It is true that Ernest Renan, in his famous speech at the Sorbonne in 1882, spoke of a 'daily referendum' (Renan, 1882, p. 27) to characterise the belonging to the French state. He argued that it is not race, language, interests, religion or geography that constitute a nation, but the existence of a common will. However, he also referred to the existence of a common past, of having common ancestors: so, even in Renan's speech, which is usually depicted as foundational for civic nationalism, there are actually elements of ethnicity concealed beneath the surface (Noiriel, 2007, pp. 19–20). Accordingly, the simplistic 'Jacobin' image of France represents only one side of the coin (Birnbaum, 1998; Daly, 2013, p. 373). In the later part of the nineteenth century, a strong conservative current emerged that stressed the cultural and historic unity of France both against internal minorities and Enlightenment ideas and also external pressures (notably the Prussian annexation of Alsace-Lorraine). This conservative current, a sort of Catholic militant vision of Herderian culturalism (Birnbaum, 2004, pp. 262–280), has been described as a 'counter-revolutionary clerical monarchism and militarism' and as a 'populist, anti-semitic and vernacular ethnic movement, seeking to redefine "France" as an ethnic nation' (Smith, 1986, p. 149). As a consequence, French republicanism developed strongly as a reaction to such political opponents (Birnbaum, 2004, pp. 277–280). Historians of racism today argue that the discourse on the nation during the III Republic (1870–1940) actually turned on two axes: the civic and the identitarian one (Reynaud-Paligot, 2015), and indeed the stereotypical representation of France as an instance of pure civic nationalism is a superficial simplification.

It is against this historical background that the recent refurbishment of 'national identity' has to be read. Starting from the electoral campaign in 2007, Nicolas Sarkozy resorted to arguments about the majority's identity as opposed to the presence of Muslims on the national territory (Noiriel, 2007, p. 112; Daly, 2013, p. 378). Moreover, he established the connection between immigration and national identity, as 'immigration politics' would 'determine the identity of France in 30 years' (Noiriel, 2007, pp. 92–99). Such a polarisation of the discourse (French society as opposed to Muslim alien) is to be read also in the logic underlying the decision considered in this paper (Ouald Chaib & Brems, 2013, pp. 16–17).

32 Even if very implicitly, this 'immaterial' public order had already been useful in the reasoning of the Constitutional Council decisions no. 94–343/344 of 27 July 1994, no. 99–419 of 9 November 1999 and no. 93-325 of 13 August 1993 that forbid certain biomedical practices, incest and polygamy, respectively.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

Overall, the kind of 'life in society' envisaged in the Council's decision and the moralised version of public order it advances seem to be rather at odds with the civic conception of belonging. Rather, they are inscribable into a rhetoric of national identity, which, as argued, is not totally absent in the French legal tradition.

4.2 Ethnocultural belonging and openness to difference

In the meantime, on the other side of the Rhine, the German society depicted in the judgment text studied here appears to be much less homogeneous. In particular, the Federal Constitutional Court reiterates:

> 'Die Einzelnen haben in einer Gesellschaft, die unterschiedlichen Glaubensüberzeugungen Raum gibt, allerdings kein Recht darauf, von der Konfrontation mit ihnen fremden Glaubensbekundungen, kultischen Handlungen und religiösen Symbolen verschont zu bleiben (§104).'[33]

So, in the German society as it is represented in this text, there is no right to be sheltered from the confrontation with foreign manifestations of faith, ritual deeds and religious symbols (§116). More broadly, the decision records the high diffusion of the Islamic veil in German society (§100, §116), which is described as religiously pluralistic (§105). This is reaffirmed also by the dissenting judges (§11, §17), even though they differentiate between societal everyday encounters and repeated influential confrontation at school.

Besides these general statements, in the decision, the Senate searches for practical concordance (balancing among constitutionally protected rights) among freedom of religion and the fundamental rights of third parties and societal values with a constitutional status (Sachs, 2015, p. 572). Without going into the details, the outcome of the court's reasoning is that the rights of the third parties yield to the rights of the one. Hence, fundamentally, the evaluation leads to antithetical results as in the French decision, which considers the rights of third parties to be successfully opposable to the religious freedom of the individual. In other words, the German state–societal bond seems to be less constraining.

This could be justified by referring to the historical disconnection between ethnocultural nation-membership and formal state-membership (Brubaker, 1992, p. 51). The various pre-unitary German principalities were religiously and culturally heterogeneous, and the overarching Empire provided a mythical rather than realistic conception of the German nation (Benz, 2008, p. 32). Also, the Constitution of 1871 was not the achievement of popular sovereignty, but of 'state' sovereignty, where the state – functioning as a negotiation system among executives under the hegemony of Prussia – was conceptually separated from the citizens (p. 48). It is only during the Wilhelmine era (1890–1918) that a more ethnonational politics emerged, and the 1913 German Imperial and State Citizenship Law nationalised and ethnicised citizenship regulation (Brubaker, 1992, p. 114). This was then distorted and radicalised with the ethnoracial restructuring of citizenship undertaken by the Nazis (p. 166).

The catastrophes of World War II mark an important discontinuity in the history of the German national self-understanding (Gerdes & Faist, 2006, p. 319). Still, the citizenship law maintained a certain ethnonational inflection, which was characterised by expansiveness towards ethnic Germans expulsed from Eastern Europe and the Soviet Union and restrictiveness towards

33 'In a society that gives space to different religious beliefs the individuals don't dispose of the right to be spared from confrontation with foreign expressions of faith, cultual practices and religious symbols'. The statement is to be found also in the *Ludin* decision (BVerfG, 24.09.2003–2 BvR 1436/02) at §46, in the crucifix decision (BverfG, 16.5.1995–1 BvR 1087/91) at §34, and more recently it has been reaffirmed by the Federal Administrative Court (BVerwG, 30.11.2011–6 C 20.10) at §30.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

non-German immigrants (Brubaker, 1992, p. 170). This is manifested particularly clearly with the *Gastarbeiter* politic[34]: cultural diversity was necessary, their integration by definition excluded and naturalisation an exception. Germany has for a long time refused to consider itself as a country of immigration, which has led to the lack of a viable assimilationist tradition (p. 176). Rather, it has followed a policy of 'benign differentialism' (p. 178): even though access to citizenship is restricted, everyday encounters with differences are not excluded. This is restated by the Senate in the decision considered here as well.

Albeit, it has to be remembered that the Senate declares unconstitutional the provision that establishes a preference for Christian-occidental values: with the exception of the Berlin and the Bremen Laws, all other Länder statutes favoured the Christian-occidental majority (Baer & Wrase, 2005). Party political discourses in the legislative processes made use of the notion of German national identity in opposition to an invented Islamic threat. Through the headscarf debates, both poles have been constructed around a confrontational dichotomy in order to avoid difficulties in actually defining German national identity and to address inherent inconsistencies and contradictions within approaches to immigration and citizenship law (Sinclair, 2012, p. 29).

To conclude, the founding idea(l)s concerning the population of the state rooted in nineteenth-century history display big differences between France and Germany. Those have to be contrasted with the more recent political developments and the contemporary stress-factor that is immigration: populistic instrumentalisation of immigration is, somewhat ironically, a transnational phenomenon (Gerdes & Faist, 2006, p. 327). This section aims to highlight how, in both countries, belonging to national communities contains both civic and ethnic components. Indeed, these components are present in varying proportions at particular moments in history, which mark the specificity of each national experience (Smith, 1986, p. 149). The cultural and historical contextualisations attempted here expose how the two decisions fit respectively in their tradition, or more precisely, how they fit respectively in a *certain crease* of their tradition. Both traditions contain contradicting elements, and the same principle has received different concretisations at different times, as it is particularly manifest in the case of secularism as well.

V. Religion in the public sphere

After having taken into consideration the conceptions of the individual and of societal belonging, this section focuses on the place accorded to religion in the public space insofar as this is relevant for the living together. Different settings are possible, and each presupposes a certain accommodation of the public and private spheres. The settlement between these two conceptual spaces bounds the living together, as the significance of different religious garments allowed in the public sphere is indeed a determinant of the conditions of coexistence.

5.1 Many laicities

During the legislative procedure in France the principle of *laïcité* had been left aside: prohibiting the burqa could not be justified in the name of *laïcité*, as it was for the 2004 Statute on religious symbols at school (Rapport d'Information Raoult, p. 90). First, this is because the setting in that the integral veil was to be prohibited does not only involve state institutions, but also the entirety of the public places of the French territory. Second, it is because the burqa was declared not to be a religious symbol, but rather a political one and prohibiting it would be based on concerns of public order. Third, the

34 Migrant workers who were recruited mainly from southern Europe from the 1950s onwards were considered to be temporary sojourners, and their presence in Germany was seasonal according to business cycles. But, by the early 1970s, the sex ratio, employment rate and surge in births started to signal settlement (Brubaker, 1992, p. 172).

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

principle was dismissed as ineffective, as it would weigh only on the state and not on private persons (pp. 90–94).

Nonetheless, the Constitutional Council referred to Article 10 DDHC, which protects religious freedom, thus confirming the religious significance of the banned practice (Dieu, 2010). Moreover, the Council introduced a reserve of interpretation:

> '[L]'interdiction de dissimuler son visage dans l'espace public ne saurait, sans porter une atteinte excessive à l'article 10 de la Déclaration de 1789, restreindre l'exercice de la liberté religieuse dans les lieux de culte ouverts au public; . . . sous cette réserve, les articles 1er à 3 de la loi déférée ne sont pas contraires à la Constitution.'[35]

By including this restriction in the ban (it is not applicable in places of worship), the Council revealed the religious object of the law. If the prohibited attire was not religious, there would be no need for an exemption on religious grounds (Joppke & Torpey, 2013, p. 47). The Council's judgment resets the prohibition into the dichotomy mentioned at the outset of this section – to what degree are observant practices accepted in the public sphere. In any case, the official rhetoric had not hindered legal scholars from considering the ban as a (however questionable) application of the principle of laicity (Champeil-Desplats, 2012).

But what does laicity mean? At least two versions of the principle can be differentiated on the basis of the meaning associated to the public/private dichotomy. One requires public and private spheres to be clearly demarcated. Belief (private) and knowledge (public) are rigorously autonomous to one another: religion is limited to a constructed private space and cannot be expressed in the public sphere. Another version of the principle postulates it as personal (in this sense private) belief and religious freedom. This includes the respect of religious practices in private as well as in public life, but it negates the pre-eminence of one specific religion: in particular, the possibility of a state (public) religious institution (Baubérot, 2012, pp. 48–49; Bowen, 2010, pp. 29–31).

In the seventeenth and eighteenth centuries, the dominant conception in France was Gallicanism, an arrangement of close cooperation between the state and the French Catholic Church, which in turn had autonomy from the Vatican. Thus Catholicism enjoyed a sort of monopolistic position (Baubérot, 2012, p. 179). According to Ferdinand Buisson, the philosopher and first theoriser of *laïcité*, the principle was introduced in France with the Revolution and the DDHC through the creation of a State that was independent from the Church, detached from any religion and the recognition of human rights not considered to be given by God (1882, p. 1469). Then Napoléon Bonaparte instituted a complex system of Concordats with the recognised religions, but still the whole of the nineteenth century has been characterised by strong hostilities between two Frances: one deeply Catholic and the other one referring to the values of free thinking (Baubérot, 2013, p. 37).

The oppositions continued also during the III Republic and, even if the 1882 Statute laicises primary education, thus reducing drastically the political and social influence of the Church (Buisson, 1882, pp. 1469–1470), the horizon of an integral laicity is never attained (Baubérot, 2013, p. 72). During the parliamentary debates that led to the 1905 Statute on the Separation of the Churches and the State, opinions have been expressed in favour of a public space freed from all religious symbols and clothing (Baubérot, 2012, pp. 185–188), but the resulting text is actually an

35 'The ban on covering one's face in public spaces shall not limit the exercise of religious freedom in the places of worship open to the public, otherwise it would cause an excessive infringement of the article 10 of the 1789 Declaration; . . . given this limitation, the articles from 1 to 3 of the Bill referred to are not contrary to the Constitution.'

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

attempt to negotiate the end of the conflicts between clericalists and anti-clericalists (Baubérot, 2013, p. 83). It establishes a clear institutional separation and privatises the religious institutions in the sense that those have to now be organised as associations and, as such, they can act in the public space. The state does not assume any responsibility for private 'religious needs', but it guarantees the freedom of conscience and of belief without distinguishing among creeds (p. 87).[36]

The Constitutions of 1946 (IV Republic) and 1958 (V Republic) declare France to be laic. *Laïcité* thus becomes a shared heritage, and the division among the 'two Frances' is overcome. The laic self-conception of the political representatives and the intellectuals notwithstanding, rituals and symbolic elements of Christian origin have not disappeared. Moreover, in society, the Catholic Church has a relevant role and is thus publicly visible (Amir-Moazami, 2007, p. 96). Starting from the late 1970s and early 1980s, the public space changes also due to the increasing visibility of migrants. The Muslim population arriving mainly from ex-colonies (Algeria became independent in 1962) begins to settle down (Baubérot, 2013, p. 113), and political fights that were previously thematised as workers' fights are now defined as 'identitarian' by the political discourse (Noiriel, 2007, pp. 60–65).

The contemporary revival of *laïcité* is oriented to questioning the compatibility of immigrants' religion with it. Actually, *laïcité* is today mainly invoked to ostracise ostensible Muslim practices from the landscape of public visibility (Daly, 2013, pp. 379–380). This new laicity is structurally different from the previous one: its historical roots are not the religious wars and the Revolution, but the French colonial past; its geopolitics is not connected with the conflict of the two Frances, but with globalisation and the rejection of a Anglo-American liberal societal model; it is not discussed primarily in parliamentary debates, but it has become extremely mediatised; and from historically being a progressive principle, it is becoming a conservative one (Baubérot, 2013, pp. 119–121).

Overall, even if the courts sometimes still interpret the principle in favour of the rights of the individual (Joppke, 2009, p. 38), the decision studied here is rather in line with the new laicity resulting from the recent shifts in the meaning of the concept (Hunter-Henin, 2012, pp. 617–623).

5.2 Disputed neutrality

Oscillations of meaning are to be recorded also concerning the presence of religion in the public sphere in Germany. The central principles for this aspect in the judgment are freedom of religion, state neutrality and equal treatment, which are all basic principles inscribed in the constitutional structure (Robbers, 2001). As mentioned above, in the balancing between constitutional rights and values carried out by the First Senate, the positive religious freedom of the teacher headscarf-wearer prevails over the negative religious freedom of the pupils (reasoning concludes at §122). This extensive conception of religious freedom is the result of an erstwhile if very slow (Sacksofsky, 2009, p. 22) historical process: the individual would get an initial *beneficium emigrationis* in the 1555 Augsburg peace treaty, and the 1648 Westphalia treaty merely recognised the right of toleration for the private exercise – in the sense of not publicly visible – of a religion different from the state one (Dreier, 2011, pp. 76–77). Positive and negative freedom of religion were established only in 1919 with the Weimar Constitution (WRV). Nowadays, it is recognised as being of primordial importance and extensively interpreted to the point that it may have led to a sort of unintentional (not being the result of firm measures on integration policies) multiculturalism (Gerdes & Faist, 2006, p. 322).

36 Nevertheless, cases exist that show disagreement about the exact content of the principle. For example, the Council of State intervened in 1909 by annulling the decision of the Sens city mayor to prohibit clerks from accompanying a funeral procession in their sacerdotal dress, as it was deemed to be a measure not strictly necessary to the protection of public order, CE, 19 February 1909, *Abbé Olivier*, n° 27355. This decision is interestingly analogous to the one taken last summer by the Council of State, which suspended the decision of the mayor of Villeneuve-Loubet, who wanted to ban clothes that demonstrate an obvious religious affiliation worn by swimmers on public beaches (burkini), CE, 26 August 2016 n. 402742, 402777.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

State neutrality also is the result of a long and conflict-ridden process. The concordat of Worm 1122 is the first document setting forth the division between spiritual and temporal authorities, whose posts and competences become explicitly separated. Nevertheless, in the German territories, *one* Land's religion would still exists until the eighteenth century (Catholic, Evangelical or Reformed). The state stopped identifying itself with any creed with the Prussian Allgemeines Landrecht in 1794 and, even then, only the three Christian cults recognised by the law of the Reich enjoyed the *exercitium religionis publicum* – that is, open public presence (Dreier, 2011, pp. 74–77). In the Frankfurt Constitution of 1848/1849, full religious freedom was recognised and all distinctions between *excercitium publicum* and *privatum* disappeared. These central elements were overtaken also in the Prussian Constitution 1850, which albeit at the same time also codified the Christian impregnation of the state and the ethical co-ordination of both the Church and the state (pp. 78–80). This asset was then overcome with the WRV, which established also the main lines of the contemporary setting.

Nowadays, Article 140 GG, with its reference to Article 137, para. 1 WRV, forbids the existence of a state Church. Besides, the principle of neutrality is not explicitly stated, but is derived from the combination of the individual freedom of religion and conscience (guaranteed in Article 4 GG and in Article 140 GG combined with Article 136, paras. 1 and 4, Article 137, para. 1 WRV) with the principle of equality (as expressed by Article 3, para. 3 and Article 33, para. 3 GG) (Ganz, 2008, p. 41). This leaves space for different concretisations (Heinig, 2009). Among the two possible models of a stricter division vs. a more encompassing cooperative stance, Germany has definitely tended towards the second (Kokott, 2005, p. 346), and a change of direction would require a new interpretation of the principle (Sacksofsky, 2009, p. 33). This was also the position of the Second Senate's majority in the 2003 *Ludin* decision, which, at §43, stated that overall state neutrality has to be understood as open neutrality, but that, in the particular case of schooling, the Land legislatures could find a different 'appropriate compromise' (§47). In so doing, it opened up the possibility for the Länder to opt for a more 'laicist' conception (Baer & Wrase, 2005, p. 244), provided that they would do so by guaranteeing equality of treatment among members of different religious communities (§71). As is known, most Länder passed statutes that forbade headscarves but not Christian symbols, or they introduced a preference for 'Christian-Western' values, which led to serious constitutionality doubts among scholars (Baer & Wrase, 2005, pp. 249–251) and to discordant interpretations.[37]

In regard to the decision considered here, the First Senate restricts the discretion previously accorded to the Länder and re-establishes a more pluralist understanding of neutrality (Traub, 2015, p. 1340). This is defined as follows:

> 'Die dem Staat gebotene weltanschaulich-religiöse Neutralität ist indessen nicht als eine distanzierende im Sinne einer strikten Trennung von Staat und Kirche zu verstehen, sondern als eine offene und übergreifende, die Glaubensfreiheit für alle Bekenntnisse gleichermaßen fördernde Haltung (§110).'[38]

37 On the one hand, the Federal Administrative Court attempted a constitutionally conformed interpretation, which considered 'Christian' values and symbols not to be of a religious nature (despite their religious origin), but a reference to broadly understood cultural values that would underlie the whole constitutional value system (BVerwG, 24.06.2004–2 C 45.03). This path was followed by the Federal Labour Court (BAG, 20.08.2009–2 AZR 499/08, at §24), the Constitutional Courts of Bavaria (VerfGH Bayern, 15.01.2007–11-VII-05) and Hesse (StGH Hessen, 10.12.2007–P.St. 2016). On the other hand, most of the local tribunals have refused to treat religions differently and disapplied the privileging rule by forbidding not only the headscarf, but all and sundry religious symbols (see the whole list of seventeen decisions at Henkes and Kneip, 2010, p. 608). This led to the unplanned result of limiting the space accorded to Christian symbols, thus shifting from a model of open neutrality to a stricter laicism (pp. 608–610).

38 'The ideological-religious neutrality required from the state is however not to be understood as a distancing one, in the sense of a categorical division of state and Church, but rather as an open and cross-cutting posture, fostering equally the freedom of belief for all confessions.' The formulation is identical to the already

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

Moreover, the judgment reiterates that the state cannot identify with any particular religion or acquire any religious or conscience content (§110), and it has to avoid also taking part and intervening in creeds affairs and cannot judge nor determine the content of a religion (§86, §110). In addition to these general statements, the Court concretises them in reference to the school sector and qualifies as '*bekenntnisoffen*' exactly those interdenominational schools that can convey to pupils tolerance towards other religions and worldviews (§111, §115). So the daily confrontation with teachers wearing religious clothing would be balanced by the presence of other teachers wearing different attire: in this way, interdenominational schools mirror the religiously pluralist society (§105, §116).

In this regard, the First Senate clearly puts an end to the partly contradicting local tribunals' interpretations of various statutes forbidding headscarves and privileging Christianity. It rejects policies that would have had certain forms of religious exercise pushed into the private sphere and reasserts neutrality as not meaning state indifference towards religion, but rather that the state can permit religious activities in its sphere and offer them a forum. Clearly, this text entails a new strong (re-)statement of the significance of neutrality in the German context.

To summarise, the French decision seems to assume a stricter (even for French standards) conception of laicity, which tends to erase the religious from public spaces. This, thus, favours negative religious freedom, while the German one reasserts a cooperation model that is more indulgent towards positive freedom of exercise. Nevertheless, the contextualisation of the two texts allows some similarities to emerge: first, the degree of religiosity permitted in the public space has been variating over time. For both countries, it can be said that there is no fixed constitutional understanding of the neutrality principle to be derived from the provisions concerning the division between state and Church (Ganz, 2008, p. 44). Second, the very concepts of *laïcité* and state neutrality have been developed in historical contexts that were radically different from the present one, as the state was facing mainly well-established and already institutionalised Christian creeds (Sacksofsky, 2009, p. 12; Baubérot, 2012, p. 183). Therefore, old understandings of the terms are unfit to deal with contemporary challenges of religious pluralism, especially in a context where religious cases are actually intertwined with migration, integration and other socio-economic issues. This is related more broadly also with the question of national identity: for both countries, the degree of religiosity allowed in the public sphere is discussed in connection with (or against) the development of a religious and cultural pluralistic identity. The third commonality is that, even in a synchronic perspective, different meanings are given to the principle by different institutional actors (Joppke, 2007, p. 315; Henkes and Kneip, 2010, pp. 612–613).

VI. Conclusions

This paper attempts to locate the conceptions of living together entailed in two judgments concerning veiling within the respective context of different legal cultures. This has been done by analysing the conceptions of the individual, of the national societal bond and of religion in public that are inscribed in the texts of the decisions. The differences in context result in different approaches to balancing rights in both increasingly pluralistic societies and also result in different understandings of living together. The main finding concerning the two legal cultures to which the compared decisions belong is that they both are highly inhomogeneous and contain contradicting elements. In other words, the context has been studied highlighting its complexity.

mentioned §43 of the 2003 judgment. All three main quotations used in this paper are reiterations of what had already been stated in 2003: I take this to mean that, even though the object of the two rulings is not the same, the conceptions of individual, of pluralistic society and of open neutrality are shared by the two Senates.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

Trying to recapitulate the three central sections (III, IV and V) of this paper might cause a certain amount of bewilderment. The enlightened autonomous individual can be forced to be free, while the community-determined one can be actually freer to express herself as she pleases. A civic conception of the state is not incompatible with strong 'national identity' claims, while an ethnic-cultural one can develop both into favouring Western-Christian values and into being more pluralistic. Finally, the legal setting concerning the role of religion in public needs to be renegotiated in the present pluralist situation. One might feel the temptation to surrender to this conceptual chaos. Indeed, if one conclusion can be drawn, it is that (legal) meanings are fluctuating and that (legal) traditions are hybrid in nature.

There are at least three levels of understanding the conceptions of 'living together' enshrined in the two decisions. The first one is by relating the court's position to the respective 'stereotypical' image of the legal culture. I hope to have shown how these images do not exist in a coherent form. Communities are imagined and traditions are invented, and one main concern of this paper has been to avoid reifying national stereotypes. If legal cultures, like all cultures, are a product of the contingencies of history and are always undergoing change (Nelken, 2004, p. 5), then a complex outcome should not be considered as a failure. Legal cultures rather manifest an attitude of 'tending towards' one or the other model. In this way, also the decisions considered here are cases, themselves crossed, belonging to inhomogeneous traditions. As a consequence, the living together they envisage is not a fully and coherently instantiated modus vivendi, but a patchwork of different elements.

A second possible reading stresses the political aspects of the different kinds of judicial review that are carried out in the two judgments. The French a priori and abstract constitutionality check was tightly integrated into the legislative procedure. The objective understanding of freedom and equality, as well as the extended conception of public order and the re-delineation of the meaning of public and private when referred to the space religion is allowed to take, can all be inscribed into a coherent political project. Therefore, it may be plausible to read this judgment as part of the political campaign traversing multiple state institutions that led to affirming a certain conception of living together in French law (Ouald Chaib & Brems, 2013, pp. 12–13). This campaign did not focus on stressing the autonomy of the individual, but rather on the 'threat' of communitarianism and reclaimed the authority at the central level to determine the required level of the population's homogeneity. Critical voices indeed exist but are to be found in the literature and in other sources, such as the media, that were not taken into consideration here. In contrast, the German judgment holds a completely different structural position. Here, the control of the constitutionality of the statute was carried out as a response to two constitutional complaints, so the Court had to play a different role: it did so by prioritising the position of the individual and her freedom of religion, rather than pursuing any vision of 'how the German society should be'. German constitutional complaints are meant for defending the individual's rights, and this may explain the Senate's focus on the person, her rights and freedoms. In so doing, it stopped the legislators of the Länder, who were on the whole more focused on affirming the 'Christian and Western' values that had to be transmitted at school. The point here is that different types of judicial review and their timing (a priori or a posteriori) do affect the framing of the issue.

Third, the two texts can be made sense of by highlighting their exceptionality: the French decision has been described as 'a stretch, if not an impossibility, given the prevailing jurisprudence and legal opinion' (Joppke and Torpey, 2013, p. 45). The German decision had two dissenting justices and was going (partly) against a decision taken by the other Senate only twelve years earlier and the Länder legislatures. The two cases entail statements on a crucial topic, which is the conception of living together. They reveal the high level of divergence of views; both judges could have written a text putting forward an opposite vision of their respective society and would have found elements to sustain such a view within their own tradition.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

To conclude, understanding law as an expression of culture does not mean having a romantic or essentialising vision of law. The texts analysed here can be effectively made sense of as a result of the circulation of models and the (temporary) outcome of political debates on topics of immigration and religious symbols. This paper attempts to show how trying to understand legal terms by placing them in their cultural context does not necessarily entail essentialisation, uncritical acceptance or justification. Rather, it means looking for oppositions and contradictions that are inherent in every legal culture and understanding law as being the result of power struggles in their political contingency.

References

AMIR-MOAZAMI, Schirin (2007) *Politisierte Religion: Der Kopftuchstreit in Deutschland und Frankreich* [Politicised Religion: The Headscarf Debate in Germany and France]. Bielefeld: transcript Verlag.

ARISTOTLE, (1912/2009) *The Politics of Aristotle: A Treatise on Government*, trans. W. Ellis. Auckland: The Floating Press.

BAER, Susanne and WRASE, Michael (2005) 'Staatliche Neutralität und Toleranz in der "christlich-abendländischen Wertewelt"' ['State Neutrality and Tolerance in the "Christian and Western Worldview"'], *Die Öffentliche Verwaltung* 6: 243–252.

BAUBÉROT, Jean (2012) *La laïcité falsifiée* [Falsified Laicity]. Paris: Éditions La Découverte.

BAUBÉROT, Jean (2013) *Histoire de la Laïcité en France* [History of Laicity in France], 6th edn. Paris: Presses Universitaires de France.

BEAUCAMP, Guy and BEAUCAMP, Jakob (2015) 'In dubio pro libertate: Überlegungen zur Kopftuch- und Burkaverbotsdebatte' ['In dubio pro libertate: Reflections on the Debate about the Banning of Headscarf and Burqa'], *Die Öffentliche Verwaltung* 5: 174–183.

BENHABIB, Seyla (2010) 'The Return of Political Theology: The Scarf Affair in Comparative Constitutional Perspective in France, Germany and Turkey', *Philosophy & Social Criticism* 36: 451–471.

BENZ, Arthur (2008) *Der moderne Staat: Grundlagen der politologischen Analyse* [The Modern State: Principles of the Politological Analysis]. Munich: Oldenbourg Wissenschaftsverlag.

BIRNBAUM, Pierre (1998) *La France imaginée* [Imagined France]. Paris: Fayard.

BIRNBAUM, Pierre (2004) 'Entre universalisme et multiculturalisme: le modèle français dans la théorie politique contemporaine' ['Between Universalism and Multiculturalism: The French Model in the Contemporary Political Theory'] in Alain Dieckhoff (ed.) *La constellation des appartenances – Nationalisme, libéralisme et pluralisme* [Constellation of Belongings – Nationalism, Liberalism and Pluralism]. Paris: Presses de Sciences Po, 255–280.

BÖCKENFÖRDE, Ernst-Wolfgang (1987) 'Zur Eröffnung' ['Introduction'] in Ernst-Wolfgang Böckenförde and Robert Spaemann (eds.) *Menschenrechte und Menschenwürde: Historische Voraussetzungen, Säkulare Gestalt, Christliches Verständnis* [Human Rights and Human Dignity: Historical Preconditions, Secular Form, Christian Understanding]. Stuttgart: Klett-Cotta.

BÖCKENFÖRDE, Ernst-Wolgang (2001) *Vom Wandel des Menschenbildes im Recht* [About the Changing of the Image of Human Beings in Law]. Münster: Rhema.

BOWEN, John R. (2010) *Why the French Don't Like Headscarves: Islam, the State, and Public Space*. Princeton: Princeton University Press.

BRUBAKER, Rogers (1992) *Citizenship and Nationhood in France and Germany*. Cambridge, MA; London: Harvard University Press.

BUISSON, Ferdinand (1882) *Dictionnaire de pédagogie et d'instruction primaire* [Dictionary of Pedagogy and of Primary Education], vol. 1/2. Paris: Hachette.

CHAMPEIL-DESPLATS, Véronique (2012) 'Laicité et liberté religieuse en France: aux sources de la loi interdisant la dissimulation intégrale du visage dans l'éspace public' ['Laicity and Religious

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

Freedom in France: At the Sources of the Statute Forbidding the Integral Covering of the Face in Public Spaces'], *Revista Derecho del Estado* 20: 51–72.

DALY, Eoin (2013) 'Political Liberalism and French National Identity in the Wake of the Face-Veiling Law', *International Journal of Law in Context* 9(3): 366–385.

DIETZE, Gabriele (2009) 'Okzidentalismuskritik: Möglichkeiten und Grenzen einer Forschungsperspektivierung' ['Occidentalism Critique: Possibilities and Limits of a Research Perspectivation'] in Gabriele Dietze, Claudia Brunner and Edith Wenzel (eds.) *Kritik des Okzidentalismus: Transdisziplinäre Beiträge zu (Neo-)Orientalismus und Geschlecht* [Occidentalism's Critique: Transdisciplinary Contributions to (Neo-)Orientalism and Gender]. Bielefeld: transcript Verlag, 23–54.

DIEU, Frédéric (2010) 'Le droit de dévisager et l'obligation d'etre dévisagé: vers une moralisation de l'espace public?' ['The Right to Unveil and the Obligation to Be Unveiled: Towards a Moralisation of Public Space?'], *La Semaine Juridique Administrations et Collectivités territoriales* 48: 35–42.

DREIER, Horst (2011) 'Säkularisierung des Staates am Beispiel der Religionsfreiheit' ['Secularisation of the State Using the Example of Religious Freedom'], *Rechtsgeschichte* 19: 72–86.

DUMONT, Luis (1991) *Homo Aequalis, II – L'idéologie allemande: France-Allemagne et retour* [Homo Aequalis, II – The German Ideology: France-Germany and Back]. Paris: Gallimard.

DUPONT, Luis (2011) 'Cultural Diversity and Modernity: The Conditions of the Vivre Ensemble' in Alain-G. Gagnon, André Lecours and Geneviève Nootens (eds.) *Contemporary Majority Nationalism*. Montreal: MQUP, 80–100.

DÜRIG, Günter (2003) *Grundgesetz Sonderdruck: Kommentierung der Artikel 1 und 2 Grundgesetz* [Basic Law Excerpt: Comment to the Article 1 and 2 of the Basic Law]. Munich: C.H. Beck.

FATIN-ROUGE STÉFANINI, Marthe and PHILIPPE, Xavier (2011) 'Le Conseil Constitutionnel face à la loi anti-burqua: entre garantie des droits fondamentaux, sauvegarde de l'ordre public et stratégie politique' ['The Constitutional Council and the Anti-Burqa Statute: Among Guarantee of Fundamental Rights, Safeguard of Public Order and Political Strategy'], *Revue francaise de droit constitutionnel* 87(3): 548–560.

FRANKENBERG, Günter (2014) 'The Innocence of Method – Unveiled: Comparison as an Ethical and Political Act', *Journal of Comparative Law* 9(2): 222–258.

GANZ, Sarah (2008) *Das Tragen religiöser Symbole und Kleidung in der öffentlichen Schulen in Deutschland, Frankreich und England: Eine rechtsvergleichende Untersuchung unter Berücksichtigung der EMRK* [The Wearing of Religious Symbols and Clothing in Public Schools in Germany, France and England: A Comparative Study Taking Account of the ECHR]. Berlin: Duncker & Humblot.

GERDES, Jürgen and FAIST, Thomas (2006) 'Von ethnischer zu republikanischer Integration: Der Diskurs um die Reform des deutschen Staatsangehörigkeitsrechts' ['From Ethnic to Republican Integration: The Discourse on the Reform of the German Citizenship Law'], *Berliner Journal für Soziologie* 3: 313–335.

GLENN, Patrick (2010) *Legal Traditions of the World, 4th edn.* Oxford: Oxford University Press.

HÄBERLE, Peter (2008) *Das Menschenbild im Verfassungsstaat* [The Image of the Human Being in the Constitutional State], 4th edn. Berlin: Duncker & Humblot.

HEINIG, Hans Michael (2009) 'Die religiös-weltanschauliche Neutralität nach dem Grundgesetz' ['Religious and Value Neutrality According to the Basic Law'], *epd-Dokumentation* 31: 17–23.

HENKES, Christian and KNEIP, Sascha (2010) 'Von offener Neutralität zu (unintendiertem) Laizismus: Das Kopftuch zwischen democratischem Mehrheitswillen und rechtsstaatlichen Schranken' ['From Open Neutrality to (Unintended) Laicism: The Headscarf between Democratic Will of the Majority and Constitutional Limits'], *Leviathan* 38: 589–616.

HUNTER-HENIN, Myriam (2012) 'Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom', *International & Comparative Law Quarterly* 61(3): 613–639.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

JACKSON, Vicki C. (2012) 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and András Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, 54–74.

JOPPKE, Christian (2007) 'State Neutrality and Islamic Headscarf Laws in France and Germany', *Theory and Society* 36(4): 313–342.

JOPPKE, Christian (2009) *Veil: Mirror of Identity*. Cambridge; Malden, MA: Polity Press.

JOPPKE, Christian and TORPEY, John (2013) *Legal Integration of Islam: A Transatlantic Comparison*. Cambridge, MA: Harvard University Press.

KLEIN, Tonio (2015) 'Das Kopftuch im Klassenzimmer: konkrete, abstrakte, gefühlte Gefahr?' ['The Headscarf in the Classroom: Concrete, Abstract, Perceived Danger?'], *Die Öffentliche Verwaltung* 11: 64–470.

KOKOTT, Juliane (2005) 'Laizismus und Religionsfreiheit im öffentlichen Raum' ['Laicism and Religious Freedom in the Public Space'], *Der Staat* 343–365.

LADEUR, Karl-Heinz (2015) 'Das islamische Kopftuch in der christlichen Gemeinschaftsschule' ['Islamic Headscard in Christian Interdenominational School'], *Juristen Zeitung*, 70(13): 633–637.

LEVADE, Anne (2010) 'Épilogue d'un débat juridique: l'interdiction de la dissimulation du visage dans l'espace public validée!' ['Epilogue of a Juridical Debate: Ban on Face Concealement in Public Space Validated!'], *La Semaine juridique Édition générale* 43: 1977–1981.

MATHIEU, Bertrand (2010) 'La validation par le Conseil constitutionnel de la loi sur "le voile intégral": La reconnaissance implicite d'un ordre public "immatériel"' ['The Validation by the Constitutional Council of the Law on "Integral Veiling": The Implicit Recognition of an "Immaterial" Public Order'], *La Semaine Juridique Édition Générale* 42: 1930–1932.

NELKEN, David (2004) 'Using the Concept of Legal Culture', *Australian Journal of Legal Philosophy* 29: 1–26.

NELKEN, David (2010) 'Using Legal Culture: Purposes and Problems', *Journal of Comparative Law* 5(2): 1–39.

NOIRIEL, Gérard (2007) *À quoi sert 'l'identité nationale' [The Use of 'National Identity']*. Marseille: Agone.

OUALD CHAIB, Saïla and BREMS, Eva (2013) 'Doing Minority Justice through Procedural Fairness: Face Veil Bans in Europe', *Journal of Muslims in Europe* 2: 1–26.

RENAN, Ernest (1882) Qu'est-ce qu'une nation? Conférence faite en Sorbonne, le 11 mars 1882 [What Is a Nation? Conference Held at the Sorbonne, 11th March 1882]. Paris: Calmann Lévy Éditeur.

REYNAUD-PALIGOT, Carole (2015) 'Les origines de la notion de race dans la culture française' ['Origins of the Notion of Race in French Culture'] in Emmanuel Laurentin (ed.) *Histoire d'une république fragile* [*History of a Fragile Republic*]. Paris: France Culture and Fayard, 141–148.

ROBBERS, Gerhard (2001) 'Religious Freedom in Germany', *Brigham Young University Law Review* 2: 643–668.

ROSANVALLON, Pierre (2004) *Le modèle politique français* [The French Political Model]. Paris: Éditions du Seuil.

ROUSSEAU, Jean-Jaques (2002a) 'The Second Discourse: Discourse on the Origin and Foundations of Inequality Among Mankind', trans. L. Crocker, in Susan Dunn (ed.) *The Social Contract and the First and Second Discourse*. New Haven; London: Yale University Press, 69–148.

ROUSSEAU, Jean-Jaques (2002b) 'The Social Contract', trans. S. Dunn and H.J. Tozer, in Susan Dunn (ed.) *The Social Contract and The First and Second Discourse*. New Haven; London: Yale University Press, 149–256.

RUSTEBERG, Benjamin (2015) 'Kopftuchverbote als Mittel zur Abwehr nicht existenter Gefahren' ['Headscarf Bans as Defence against a Non-Existing Danger'], *Juristen Zeitung* 70(13): 637–644.

SACHS, Michael (2015) 'Kein allgemeines Kopftuchverbot für Lehrerinnen in der Schule' ['No General Headscarf Ban for Teachers at School'], *Juristische Schulung* 571–574.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press

SACKSOFSKY, Ute (2009) 'Religiöse Freiheit als Gefahr?' ['Religious Freedom as Danger?'], *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 68: 8–46.

SACKSOFSKY, Ute (2015) 'Kopftuch als Gefahr – ein dogmatischer Irrweg' ['Headscarf as Danger – A Dogmatical Wrong Track'], *Deutsches Verwaltungsblatt (DVBl)* 13: 801–808.

SCHWABE, Jürgen (2015) 'Anmerkung' ['Comment'], *Deutsches Verwaltungsblatt* 9: 570–572.

SCOTT, Joan (2007) *The Politics of the Veil*. Princeton; Oxford: Princeton University Press.

SINCLAIR, Stefanie (2012) 'National Identity and the Politics of the "Headscarf Debate" in Germany', *Culture and Religion – An Interdisciplinary Journal* 13(1): 19–39.

SMITH, Anthony (1986) *The Ethnic Origins of Nations*. Oxford: Blackwell.

THEILEN, Jens T. (2015) 'Towards Acceptance of Religious Pluralism: The Federal Constitutional Court's Second Judgement on Muslim Teachers Wearing Headscarves', *German Yearbook of International Law* 58.

TRAUB, Thomas (2015) 'Abstrakte und konkrete Gefahren religiöser Symbole in öffentlichen Schulen' ['Abstract and Concrete Dangers of Religious Symbols in the Public Schools'], *Neue Juristische Wochenschift* 1338–1341.

TRISPIOTIS, Ilias (2016) 'Two Interpretations of "Living Together" in European Human Rights Law', *Cambridge Law Journal* 75(3): 580–607.

VERPEAUX, Michel (2010) 'Dissimulation du visage, la délicate conciliation entre la liberté et un nouvel ordre public' ['Face Covering, the Delicate Conciliation between Freedom and a New Public Order'], *Actualité Juridique – Droit Administratif* 42: 2373–2377.

https://doi.org/10.1017/S1744552317000210 Published online by Cambridge University Press