FROM ABORTION TO ISLAM: THE CHANGING FUNCTION OF LAW IN EUROPE'S CULTURAL DEBATES

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INTRODUCTION

Is the legal process a feasible venue for defusing Europe's Islam-based tensions? Legal actions have become a hard-to-miss component in the intense political debates over the place of Islam in the European public sphere, often denying the public manifestations of Islamic identity. This Article rethinks the role of the legal process in these debates by drawing upon the cultural controversies over abortion reform, which engulfed Western Europe from the late 1960s to the late 1980s. Legal measures regulating abortion ultimately pacified these controversies, driving the abortion issue off into the peripheries of Western European politics.

Pairing these salient culture-based debates may seem unconventional at first as abortion reforms primarily challenged

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the place of Europe's dominant religion. However, a comparison of the two issues invites an opportunity to infer relations between the usage of the legal process in cultural conflicts and law's impact on the outcome of such conflicts. Moreover, several broad commonalities seem to characterize the political and legal dimensions of the regulation of abortion and Islamic practices across Western Europe. First, using Stokes's classification, both have been passionately and acrimoniously debated as positional (rather than valence) issues, with little inclination for compromise.[1] Second, both issues involved the regulation of personal choices, with gender-based concerns at their centers. Third, each of these debates has been connected to broader socio-political processes engaging questions about European identity and the place of religion in the modern, secular state. Finally, since the geographical location and the legal mechanisms are held constant across the two case studies, their comparison can test whether the intensity of the present-day conflicts involving abortion and Islam could be explained in light of the diverging social role of the legal process in each debate.

Voluminous century-spanning literature emphasized two principal functions of the legal process: (i) *Integrative*, classifying law as a mechanism of governance that manages conflict and facilitates social order, and (ii) *Transformative*, perceiving law to be a vehicle to express values and advance social and political change.[2] This Article argues that law has been acting as a

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1. Donald Stokes, *Spatial Models of Party Competition*, 57 AM. POL. SCI. REV. 368, 368–77 (1963), *reprinted in* ANGUS CAMPBELL ET AL., UNIV. OF MICH. SURVEY RESEARCH CTR., ELECTION AND THE POLITICAL ORDER 161–79 (1966).

2. In the nineteenth century, the formative sociological works of Maine, Durkheim and Weber, which traced the evolution of society from pre-modern state to its industrialized form, identified law's functions as providing rules, institutions and processes to facilitate social interaction and achieve social goals. *See* EMILE DURKHEIM, ON THE DIVISIONS OF LABOUR IN SOCIETY (1893); HENRY SUMNER MAINE, ANCIENT LAW: THE EARLY HISTORY OF INSTITUTIONS (1888); MAX WEBER, ECONOMY AND SOCIETY (1914). In the twentieth century, sociological jurisprudence including HUNTINGTON CAIRNS, THE THEORY OF LEGAL SCIENCE 55–56 (1941) and ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 64–65 (1942), legal realism of Karl N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1373 (1940), and the functionalist theory of Talcott Parsons, *The Law and Social Control*, *in* LAW AND SOCIOLOGY: EXPLORATORY ESSAYS 56, 58 (William M. Evan ed., 1962) and NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 164 (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004) have also emphasized law's facilitative and engineering functions.

transformative device in current Islam-based conflicts engaging Western-European countries with substantial Islamic population, compared with law's integrative role in past political debates in these countries over abortion reform. Using examples from Germany, Italy, France, Belgium, Britain, the Netherlands, and Switzerland, this Article seeks to demonstrate that legal actions concerning rights of Muslim minorities typically focused on generating *social and cultural change.* In prescribing legal norms pertaining to Islamic practices, courts and legislatures have been pursuing by-and-large political goals of assimilation and secularization, thus foreclosing the likelihood of political compromise. In contrast, when these nations debated abortion reform, legal processes acted as a mechanism of *social and cultural order.* Courts and legislatures framed debates beyond the clash of rights or worldviews, generating legal arrangements that incorporated additional social and public policy concerns for the purpose of generating compromises. This process had a calming effect on abortion politics.

Drawing upon these comparative findings, this Article argues that the legal process, and in particular the distinct Western-European model of constitutional review, suggests an opportunity to act differently in present debates over Islam. In short, Europe's predominant political emphasis on reforming Islam by way of legal means should make way for the utilization of law's conflict-management capabilities, by institutionalizing dialogue and compromise-building measures in regulating the role of Islam in the European public sphere. This Article proceeds in three parts. Part I analyzes the evolution of legal arrangements pertaining to Islamic practices across Western Europe, followed by a comparable exploration in Part II of the legal evolution in the context of abortion. In Part III, the Article discerns the diverging role that law has come to play in each of these cultural debates, and concludes with a proposed compromise-oriented path for legal deliberations over Islam's public place in Western Europe.

See also STEVEN VAGO, LAW AND SOCIETY 18–21 (7th ed. 2003) (discussing the functions of law and especially the social engineering function).

I. *REGULATION OF ISLAM-BASED PRACTICES*

The Muslim population in Western Europe originated from different parts of the globe, primarily as labor migration or asylum seekers during the second part of the twentieth century.[3] Expanding to become Europe's largest cultural minority, this community has been facing an uphill integration process complicated by institutional opportunities for discrimination, socio-economic barriers, and a growing negative public perception of Islam.[4] This Part will not attempt a comprehensive depiction of Islam's legal status across Western Europe. Rather, in an endeavor to decipher the relationship between an intense Muslim integration debate and the usage of the legal process, this Part surveys a selection of legal arrangements emerging from recurring Islam-based controversies. As will be shown, in the processes of regulating Islamic dress, halal slaughtering, Muslim immigration, and the building of Islamic worship places,

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3. MUSLIMS IN 21ST CENTURY EUROPE: STRUCTURAL AND CULTURAL PERSPECTIVES 13 (Anna Triandafyllidou ed., 2010).

4. *See* José Casanova, *Religion, European Secular Identities, and European Integration, in* RELIGION IN AN EXPANDING EUROPE 65, 78–80, (Timothy A. Byrnes & Peter J. Katzenstein eds., 2006); Burak Erdenir, *Islamophobia Qua Racial Discrimination: Muslimophobia, in* MUSLIMS IN 21ST CENTURY EUROPE: STRUCTURAL AND CULTURAL PERSPECTIVES, *supra* note 3, at 27, 27; EUROPEAN ISLAM: CHALLENGES FOR PUBLIC POLICY AND SOCIETY 3 (Samir Amghar et al. eds., 2007); Silvio Ferrari, *Islam in Europe: An Introduction to Legal Problems and Perspectives, in* THE LEGAL TREATMENT OF ISLAMIC MINORITIES IN EUROPE 1, 1–10 (Roberta Aluffi Beck-Peccoz & Giovanna Zincone eds., 2004); Nikola Tietze, *Muslims' Collective Self-Description as Reflected in the Institutional Recognition of Islam: The Islamic Charta of the Central Council of Muslims in Germany and Case Law in German Courts, in* ISLAM AND MUSLIMS IN GERMANY 215, 230–32 (Ala Al-Hamarneh & Jörn Thielmann eds., 2008); Sami Zemi, *Islam, European Identity and the Limits of Multiculturalism, in* RELIGIOUS FREEDOM AND THE NEUTRALITY OF THE STATE: THE POSITION OF ISLAM IN THE EUROPEAN UNION 158, 158–72 (Wasif A. R. Shadid & P. S. Van Koningsveld eds., 2002); U.S. DEP'T OF STATE, 2011 INTERNATIONAL RELIGIOUS FREEDOM REPORT: ITALY, *available at* http://www.state.gov/documents/organization/171701.pdf [hereinafter ITALY REPORT]; András Sajó, *Preliminaries to a Concept of Constitutional Secularism*, 6 INT'L J. CONST. L. 605, 614–16 (2008); Willy Fautré, *Full Veil, Burqa, Niqab, Hijab . . . A Challenge to 'European' Values?*, RELIGIOUS FREEDOM: NEW EUROPE SPECIAL EDITION, http://neurope.eu/religiousfreedom/full-veil-burqa-niqab-hijab...-a-challenge-to-'european'-values (last visited Sept. 10, 2012). In the German context, see Gerdien Jonker, *From 'Foreign Workers' to 'Sleepers': The Churches, the State and Germany's 'Discovery' of Its Muslim Population, in* EUROPEAN MUSLIMS AND THE SECULAR STATE 113, 113–23 (Jocelyne Cesari & Seán McLoughlin eds., 2005).

legal actions have increasingly been used as corrective devices utilized to adjust, contain, and engineer Islam-based practices.[5]

Cultural tensions over the growing presence of Islam crystallized the controversies surrounding the female attire. Islamic dress has not been uniformly regulated, and some European countries refrained altogether from imposing legal restrictions in this context. Among countries regulating this practice, the range of policies depended on the type of attire (headscarf, *jilbab*, burqa, etc.), the public space (public sector institutions, educational arenas, streets, etc.) and the person in question (teachers, students, civil servants and so forth). Yet, a conspicuous number of legal limitations on Islamic female attire arose in recent decades rationalized as protecting fundamental liberal values or as safeguards to an imagined, homogeneous Christian-European identity.[6]

One such prominent example is the 2004 French law banning ostensible religious symbols or clothing in public schools,[7] whose primary aim was the outlawing of Islamic headscarves.[8] Legal deliberations began fifteen years earlier with

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5. For a discussion of the German context, see Peter Frank, *Welcoming Muslims into the Nation: Tolerance, Politics and Integration in Germany*, *in* MUSLIMS IN THE WEST AFTER 9/11: RELIGION, POLITICS, AND LAW 119, 122–26 (Jocelyne Cesari ed., 2009).

6. *See* Valérie Amiraux, *The Headscarf Question: What is Really the Issue?*, *in* EUROPEAN ISLAM: CHALLENGES FOR SOCIETY AND PUBLIC POLICY, *supra* note 4, at 124, 139–43 (Samir Amghar et al. eds., 2007); Hans Michael Heinig, *The Headscarf of a Muslim Teacher in German Public Schools*, *in* RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW 181, 186–87 (Winfried Brugger & Michael Karayanni eds., 2007); JOAN WALLACH SCOTT, THE POLITICS OF THE VEIL 125–27 (2007); Oliver Gerstenberg, *Germany: Freedom of Conscience in Public Schools*, 3 INT'L J. CONST. L. 94, 96–97 (2005); Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 CARDOZO L. REV. 2629, 2643–44 (2009).

7. Loi 2004–228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004–228 of March 15, 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190. The law was approved in the National Assembly by a vote of 494 to 36, in the Senate by a vote of 276 to 20, and received the approval of the President and the Prime Minister. *See* T. Jeremy Gunn, *Religion and Law in France: Secularism, Separation and State Intervention*, 57 DRAKE L. REV. 949, 961 n.76 (2009).

8. JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES 1 (2007) ("Although worded in a religion-neutral way, everyone understood the law to be aimed at keeping Muslim girls from wearing headscarves in school."); SCOTT, *supra* note 6, at

a governmental request to France's highest administrative tribunal to advise on the legal compatibility of wearing religious symbols and the principle of *laïcité* (secularism) in public education following the expulsion of veiled Muslim girls from public school.[9] In its decision, the *Conseil d'État* laid out a vague balancing formula on the permissibility of religious symbols in public schools:[10]

> [P]upils wearing signs in schools by which they manifest their affiliation to a particular religion is not in itself incompatible with the principle of secularism in so far as it constitutes the exercise of the freedom of expression and manifestation of religious beliefs, but that this freedom should not allow pupils to display signs of religious affiliation, which, inherently, in the circumstances in which they are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytism or propaganda, undermine the dignity or freedom of the pupil or other members of the educational community, compromise their health or safety, disrupt the conduct of teaching activities and the educational role of the teachers, or, lastly, interfere with order in the school or the normal functioning of the public service.[11]

It left the implementation of this formula to ministerial circulars and school authorities, which resulted in a two-fold impact.[12] First, its prescription of a case-by-case approach invited

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1–2 ("The law . . . was aimed primarily at Muslim girls wearing headscarves . . . . The other groups were included to undercut the charge of discrimination against Muslims and to comply with a requirement that such laws apply universally.").

9. PUBLIC LAW 434–35 (Sweet & Maxwell, eds., 1990) ("The Minister of National Education decided to ask three questions of the *Conseil d'État*: '(a) In view of constitutional and statutory principles and the rules relating to public schools, is the wearing of religious insignia compatible with the principle of secularity (*laïcité*)? (b) If so, what conditions may be applied to it by ministerial instruction, school rules and decisions of heads of schools? (c) If the wearing of such insignia is banned, or if conditions applied to it are not fulfilled, what steps are available . . . and subject to what sort of procedures and safeguards?'").

10. *See generally* NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW (5th ed. 1998) (describing the courts' functions in France).

11. *See* Dogru v. France, 49 Eur. H.R. Rep. 179 (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90039 (quoting the Conseil d'Etat, Case No. 346.893, of Nov. 27, 1989).

12. *See* Kathryn Boustead, *The French Headscarf Law before the European Court of Human Rights*, 16 J. TRANSNAT'L. L. & POL'Y 167, 188 (2007).

the continuation of the headscarf controversy.[13] Second, it steered political debate toward a legalistic course that ultimately yielded a legislative ban.[14] Conflicts over the Islamic headscarf in schools continued in the following years, with the *Conseil d'État* periodically called upon to arbiter exclusions of veiled Muslims students in different localities.[15] Applying its initial advisory formula, the *Conseil d'État* invalidated the vast majority of expulsions, finding schools' policies too general or excessive.[16] Expulsions were upheld in situations where the headscarf was deemed disruptive to educational activities or perilous to student's safety (*e.g.*, during physical education classes), which were justified on grounds of disturbance to public order.[17]

Yet, against this rights-centered jurisprudence, a political consensus emerged connecting the Islamic headscarf to France's contemporary social and political problems.[18] Public discourse

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13. *See* PIERRE BIRNBAUM, THE IDEA OF FRANCE 231–33 (M. B. Debevoise trans., 2001) (characterizing the decision as an "unsatisfactory state of affairs . . . since it is a matter of opinion whether a symbol of religious conviction has an 'ostentatious character.'"); *see also* DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE 70 (2006); Elisa T. Beller, *The Headscarf Affair: The Conseil d'État on the Role of Religion and Culture in French Society*, 39 TEXAS INT'L L.J. 581, 614–15, 618; Boustead, *supra* note 12, at 188–89; Mohammad Mazher Idriss, *Laïcité and the Banning of the "Hijab" in France*, 25 LEGAL STUD. 260, 273 (2005); Sebastian Poulter, *Muslims Headscarves in School: Contrasting Legal Approaches in England and France*, 17 OXFORD J. LEGAL STUD. 44, 59 (1997); Elaine R. Thomas, *Competing Visions of Citizenship and Integration in France's Headscarf Affair* 8(2) J. EUR. AREA STUD. 167, 167 (2000).

14. Claire de Galembert, *L'affaire du foulard in the Shadow of the Strasbourg Court: Article 9 and the Public Career of the Veil in France*, *in* LEGAL PRACTICE AND CULTURAL DIVERSITY 237, 237, 254–57 (Ralph Grillo et al. eds., 2009).

15. *See* BOWEN, *supra* note 8, at 92; AHMET T. KURU, SECULARIAM AND STATE POLICIES TOWARD RELIGION: THE UNITED STATES, FRANCE, AND TURKEY 103–04 (2009); SCOTT, *supra* note 6, at 24–29; BRONWYN WINTER & SUSAN HAWTHORNE, HIJAB AND THE REPUBLIC: UNCOVERING THE FRENCH HEADSCARF 163–267 (2008).

16. *See* Jeremy Gunn, *Religious Freedom and Laicité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 457 (noting a ratio of forty-one decisions out of forty-nine reversing expulsions of veiled schoolgirls).

17. *See id.*; *see also* Beller, *supra* note 13, at 584; Idriss, *supra* note 13, at 273–75 (discussing the disparities in the Conseil's case law); MCGOLDRICK, *supra* note 13, at 70–73.

18. *See generally* BOWEN, *supra* note 8; OLIVER ROY, SECULARISM CONFRONTS ISLAM (2007); SCOTT, *supra* note 6; Eva Brems, *Above Children's Heads: The Headscarf Controversy in European Schools from the Perspective of Children's Rights*, 14 INT'L J. CHILD. RTS. 119, 120 (2006); T. Jeremy Gunn, *Under God But Not the Scarf: The Founding Myths of Religious Freedom in the United States and laïcité in France*, 46 J. CHURCH & ST. 7, 10–11 (2004). *See also* Elizabeth Sebian, *Islam in France*, EURO-ISLAM.INFO, http://www.euro-

increasingly ignored the religious freedom dimension of the veil, stressing instead its threat to fundamental French values like gender equality, secularism, and national unity.[19] Finally, a commissioned governmental inquiry examined the application of *laïcité* in the Republic, finding the headscarf no longer "a question of freedom of conscience, but of public order."[20] The enactment of the ban on ostensible religious symbols then followed as the implementation of (one of) the commission's recommendations.[21]

Islamic attire in state schools came under legal consideration in Germany as well. Controversy erupted in relation to a teacher's headscarf when Fereshta Ludin, a public school teacher, was denied employment for wearing the Islamic headscarf.[22] The Federal Constitutional Court (*Bundesverfassungsgericht*) approached the case as a constitutional clash between (i) a civil servant's religious freedom and (ii) the state's duty to provide and the right of parents and students to receive education in a religiously neutral

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islam.info/country-profiles/france (last visited Oct. 11, 2012) (discussing developments in the headscarf controversy, including integration challenges, socio-economic segregation and gender-based concerns).

19. *See* BOWEN, *supra* note 8 at 102, 105–06 (discussing then-Prime Minister Raffarin declaring in April 2003 that schools are the "premier space of the Republic" and should be protected from "ostentatious signs of communalism," and then-Interior Minister Nicolas Sarkozy's speech in April 2003 against identity card photos with Islamic veils in line with "Republican law"); CHRISTIAN JOPPKE, VEIL: MIRROR OF IDENTITY 46 (2009) (discussing then-Interior Minister Sarkozy's April 2003 declaration); ROBERT O'BRIEN, THE STASI REPORT: THE REPORT OF THE COMMITTEE OF REFLECTION ON THE APPLICATION OF THE PRINCIPLE OF SECULARITY IN THE REPUBLIC 1 (2005) (translating then-Minister of Education François Bayrou's circulaire no. 1649 du Septembre 1994 in connection with the headscarf instructing schools to ban "the presence and the multiplication of symbols so ostentatious that their significance is precisely to separate certain children from the rules of common life in the school"); Elaine Sciolino, *Chirac Backs Law to Keep Signs of Faith out of Schools*, N.Y. TIMES, Dec. 18, 2003, at A17 (discussing then-President Jaques Chirac's speech from the Elysée Palace, Dec. 17, 2003, calling for a legislative ban on religious symbols in the interest of diversity in schools).

20. O'BRIEN, *supra* note 19, at 52–54.

21. JOPPKE, *supra* note 19, at 50 (noting 494 *députés* in favor, 36 against, and 31 abstentions).

22. Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] Sept. 24, 2003, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3581, 2004 (Ger.), *available at* http://www.bundesverfassungsgericht.de/entscheidungen/rs20030924_2bvr143602en.html.

environment.[23] The Court observed that a religiously motivated dress by a teacher carries "abstract dangers" to the school's neutral environment, opening up "the possibility of influence on the pupils and of conflicts with parents that . . . may endanger the carrying out of the school's duty to provide education."[24] The Court, however, also emphasized the lack of confirmed knowledge about the negative effects a teacher's Islamic headscarf had on students.[25] Absent sufficient statutory basis in the Baden-Württemberg's Civil Service Act under consideration, the majority opinion (reflecting five of eight judges) refrained from restricting headscarves in schools. At the same time, the Court stipulated that each *länder* is at liberty to decide on such statutory restrictions according to its own particularities and religious compositions.[26] In stark departure from its mediating role in the context of abortion,[27] the German Court not only invited a "permissive" trajectory for legislative bans,[28] but effectively crafted it by creating a "legal vacuum" on religious symbols that necessitated an immediate legislative response.[29] This legislative response soon followed in the form of eight (of sixteen) *länder* bans on headscarves. Of these eight, two applied the ban to all civil servants and seven exempted Christian and Jewish symbols.[30]

The first decade of the new millennium closed with growing tensions throughout Europe over the more traditional

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23. *Id.* ¶¶ 45–47.

24. *Id.* ¶ 49. For an analysis of the case, see Christine Langenfeld & Sarah Mohsen, *Germany: The Teacher Headscarf Case*, 3 INT'L J. CONST. L. 86, 86–90 (2005) and Gerstenberg, *supra* note 6, at 94–97.

25. NJW 3581 (Ger.), ¶ 56.

26. *Id.* ¶¶ 47, 62.

27. *See infra* Part III.

28. MCGOLDRICK, *supra* note 13, at 118.

29. JOPPKE, *supra* note 19, at 70; *see also* Axel Frhr von Campenhausen, *The German Headscarf Debate*, 2004 BYU L. REV. 665, 682 (2004).

30. *See* Heinig, *supra* note 6, at 194. Legal restrictions on headscarves have been imposed by the following states: Baden-Württemberg, Bavaria, Bremen, Lower Saxony, North-Rhine Westphalia, and Saarland enacted headscarf bans for teachers in public schools, while Berlin and Hesse enacted headscarf bans for all civil servants. *See* BUREAU OF DEMOCRACY, U.S. DEP'T OF STATE, 2009 INTERNATIONAL RELIGIOUS FREEDOM REPORT: GERMANY (2009), *available at* http://www.state.gov/j/drl/rls/irf/2009/127312.htm. With the exception of Berlin, all bans included exemptions for Christian and Jewish symbols. JOPPKE, *supra* note 19, at 71–78. For an analysis of the specific laws, see David W. Hendon & Jeremiah Russell, *Notes on Church-State Affairs*, 47 J. CHURCH & STATE 189, 191 (2005).

Islamic veil, even though the number of Muslim females fully covering their face and bodies has been negligible and does not seem to be rapidly growing.[31] This underlies a stark disproportionality between the intensity of public attitudes and the actuality of the problem. France became the first European nation to ban full-face covering in public with an overwhelming approval of both houses of parliament.[32] This prohibition was broader than the earlier ban on headscarves in that it applies to public locations and spaces in general and to all people irrespective of gender, age, or nationality (including visitors).[33] Despite an earlier *Conseil d'État* advisory opinion that a ban stands in violation of France's national and international legal obligations,[34] the law has nevertheless been cleared during the legislative process by the *Conseil Constitutionnel*, France's highest constitutional authority.[35] The *Conseil Constitutionnel* approved the legislature's rationale prohibiting "practices that are dangerous for public safety and security and fail to comply with the minimum requirements of life in society . . . women who conceal their face, voluntarily or otherwise, are placed in a situation of exclusion and inferiority patently incompatible with constitutional principles of liberty and equality."[36] Conveying a

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31. *See Burqa Ban Blights Belgium, Say Critics*, EURONEWS (Apr. 30, 2010), http://www.euronews.net/2010/04/30/burqa-ban-blights-belgium-say-critics; Amanda Knief, *Liberté, Egalité—de Féministes! Revealing the Burqa as a Pro-Choice Issue*, HUMANIST Sept.–Oct. 2010, *available at* http://www.thehumanist.org/september-october-2010/liberte-egalite%E2%80%94de-feministes-revealing-the-burqa-as-a-pro-choice-issue; John Lichfield & Vanessa Mock, *Burqa Banned in Belgium*, NEW ZEALAND HERALD (May 1, 2010), http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10642088.

32. *French Senate Approves Burqa Ban*, CNN (Sept. 14, 2010), http://articles.cnn.com/2010-09-14/world/france.burqa.ban_1_burqa-overt-religious-symbols-ban-last-year?_s=PM:WORLD.

33. Robert E. Snyder, *Liberté Religieuse en Europe: Discussing the French Concealment Act*, 18 HUM. RTS. BRIEF 3, 14, 15 (2011).

34. CONSEIL D'ETAT, STUDY OF POSSIBLE LEGAL GROUNDS FOR BANNING THE FULL VEIL (2010), *available at* http://www.aihja.org/images/users/1/files/fullveil.en.pdf?PHPSESSID=f83dg63dqj61vokoep4kk44fu1.

35. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, Rec. 276 (Fr.), *translation available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010-613DC-en2010_613dc.pdf. The ruling did incorporate one change—exempting "places of worship open to the public" as contravening Article 10 of the Declaration of the Rights of Man and the Citizen of 1789. *Id.* ¶ 5.

36. *Id.* ¶ 4.

reasonable and proportionate balance "between safeguarding public order and guaranteeing constitutionally protected rights," the law was construed constitutional.[37] Accordingly, the public and political "values-based condemnation of practices that some Muslim women undertake on the basis of their religious convictions" became legal justifications.[38]

In Belgium, where *hijab*-based controversies were generally handled on a case-by-case basis,[39] a ban on full-face coverings took effect in July 2011 after it was overwhelmingly approved by the two houses of parliament.[40] Carrying a monetary penalty and the threat of jail time, the law forbade face coverings in public for security reasons.[41] The legislation of a burqa-type ban is currently being deliberated in the Netherlands and Italy, where public order legislation has already been applied against burqa-wearing women in some municipalities.[42]

The traditional version of the Islamic dress came under judicial consideration in the school context by the English House of Lords, which upheld a public school's suspension of its *jilbab*-wearing student, Shabina Begum.[43] The ruling is a telling

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37. *Id.* ¶ 5.

38. John R. Bowen, *How the French State Justifies Controlling Muslim Bodies: From Harm-based to Values-based Reasoning*, 78 SOC. RES. 325, 328 (2011).

39. Hassan Bousetta & Dirk Jacobs, *Multiculturalism, Citizenship and Islam in Problematic Encounters in Belgium*, *in* MULTICULTURALISM, MUSLIMS AND CITIZENSHIP 23, 30–31 (Tariq Modood et al. eds., 2006); Dominic McGoldrick, *Muslim Veiling Controversies in Europe*, *in* 1 YEARBOOK OF MUSLIMS IN EUROPE 427, 454 (Jorgen S. Nielsen et al. eds., 2009).

40. Vanessa Mock, *Burqa Ban Unites a Politically Divided Belgium*, DEUTSCHE WELLE (July 23, 2011), http://www.dw.de/dw/article/0,,15260969,00.html; *Overwhelming Majority in Belgian Parliament Votes Symbolic Burqa Ban*, BBC MONITORING EUROPE, May 2, 2011, *available at* http://www.accessmylibrary.com/article-1G1-255234211/overwhelming-majority-belgian-parliament.html. The ban on the full face Islamic veil has been considered by Austria, the Netherlands, several cantons in Switzerland, and is currently under deliberations in Italy. The cities of Lleida and Barcelona in Spain have also enacted specific bans. Herman Salton, *Fear Factor: Europe Bans the Burqa*, OPEN DEMOCRACY (Nov. 8, 2010), http://www.opendemocracy.net/herman-salton/fear-factor-europe-bans-burqa.

41. Mock, *supra* note 40.

42. Katerina Nikolas, *Netherlands to Ban the Burqa in 2013*, DIGITAL JOURNAL (Jan. 30, 2012), http://www.digitaljournal.com/article/318703.

43. R. (Shabina Begum) v. Headteacher and Governors of Denbigh High School, [2006] UKHL 15, [2006] ALL ER 487, [2006] ELR 273 (H.L.) (appeal taken from Eng.); *see also* Gareth Davis, *The House of Lords and Religious Clothing in* Begum v. Headteacher and Governors of Denbigh High School, 13 EUR. PUB. L. 423, 423–27

example of courts' active roles in constructing limits and expectations of Islamic manifestations in the public sphere. To harmonize its religiously diverse student body, the school designated the *shalwar kameez*, a traditional South and Central-Asian dress, as its dress-code option for Muslim students.[44] The school refused Begum's wish to wear the more traditional *jilbab* out of concern that this would pressure other students and threaten social cohesion.[45] Notwithstanding the incorporation of the European Convention on Human Rights ("ECHR") into English law via the Human Rights Act ("HRA"),[46] the House of Lords unanimously affirmed Begum's exclusion, with three justices finding no interference with Begum's rights and two finding the interference justified.[47] Anxiety over radical Islam manifested by the *jilbab* is evident in the ruling's narrative, depicting sheer praise of the school's inclusive conduct and disapproval toward the confrontational and uncompromising attitudes of the Begums.[48] Lord Scott found it "extraordinary" that the *shalwar kameez* would not be regarded modest enough for Muslim girls.[49] Lord Hoffman, while acknowledging that it would be "irrelevant" to assess how obligatory is the *jilbab* in Islam, still expected "common civility" in religious conduct.[50] Finally, echoing the prevailing French approach, Baroness Hale

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(2007); SAMANTHA KNIGHTS, FREEDOM OF RELIGION, MINORITIES, AND THE LAW 48 (2007).

44. [2006] UKHL 15, ¶ 6 (discussing dress codes at the school).

45. [2006] UKHL 15, ¶ 18 (discussing the threat to social cohesion).

46. European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, [hereinafter ECHR], *available at* http;//www.unhcr.org/refworld/docid/3ae6b3b04.html. Article 9 of the ECHR prescribes: "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others." *Id.* art. 9. The ECHR was incorporated into English Law by the Human Rights Act ("HRA") of 1998. *See* Human Rights Act, 1998, c. 42 (Eng.).

47. [2006] UKHL 15, ¶¶ 25, 41, 55, 72, 94 (noting that Lords Bingham, Hoffman and Scott found no interference in Begum's right to religious freedom, while Lord Nicholls and Baroness Hale found the interference justified).

48. *Id.* ¶¶ 25, 34, 44, 46, 50, 52, 77, 80, 83, 98.

49. *Id.* ¶ 83.

50. *Id.* ¶ 50.

focused on the transformative duties of public education and the protection of gender equality.[51] Hence, Islam can be fitting for the educational public sphere as long as it can find expression under the religiously neutral *shalwar kameez.* Anything more extensive is a slippery slope for social cohesion and endangers the liberal mission of schools.

Established to oversee the implementation of ECHR, the European Court of Human Rights ("ECtHR") systematically deferred to national policies and the expertise of domestic courts in cases concerning the Islamic headscarf.[52] In its leading ruling, *Leyla Sahin v. Turkey*,[53] the ECtHR relied on the margin of appreciation doctrine and endorsed Turkey's position legitimizing the prohibition on the headscarf as a threat to secularism and democratic values.[54] A similar rationale guided the ECtHR in finding "not unreasonable" the expulsions of Muslim French students wearing Islamic headscarves during sports classes in light of domestic criteria on health, safety and assiduity.[55] A veiled-teacher's dismissal was upheld in *Dahlab v. Switzerland.*[56] The ECtHR found the infringement on religious freedom justified since it was "difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."[57]

The educational arena furnished additional assimilationist legal measures against Muslims. Judicial proceedings from Germany and Switzerland exemplified how earlier religion-based exemptions from mandatory physical education classes have increasingly been replaced with denials of such exemptions on the basis of public interests. In Germany, lower courts have

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51. *Id.* ¶¶ 95, 96, 97.

52. *See* Isabelle Rorive, *Religious Symbols in the Public Space: In Search of a European Answer*, 30 CARDOZO L. REV. 2669, 2285–86 (2009) (analyzing European Court of Human Rights ("ECtHR") jurisprudence on the headscarf).

53. Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 117.

54. Id. ¶¶ 39, 114.

55. Dogru v. France, 49 Eur. H.R. Rep. 179 (2009); Kervanci v. France, App. no. 31645/04, ¶ 73, Eur. Ct. H.R. (2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en.

56. Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 430.

57. *Id.* at 463.

been narrowing a 1990s German Federal Administrative ruling,[58] finding physical education to outweigh the potential infringement on religious freedom.[59] In Switzerland, a similar shift has taken place within the jurisprudence of the Federal Supreme Court.[60] Whereas in 1993 the Court exempted a minor female Muslim from mandatory swimming lessons on the basis of her religious faith,[61] the Court overruled its own judgment in 2008 in relation to two minor Muslim males.[62] Framing the latter case "as an issue of immigration, and consequently, of integration of migrants rather than one of religion per se,"[63] the Court construed public interests realized through swimming classes, (*i.e.*, personal safety, equal opportunity and cultural integration) as overriding individual religious freedom.[64]

The treatment of halal slaughtering in Germany further substantiates how a growing popular resistance to the visibility of Islam has been manifested in restrictive legal limitations. European treatment of religious slaughtering does not follow a single model, with most countries traditionally offering a religious exemption from slaughter regulations as several others prohibited altogether slaughter deviating from state rules (*e.g.*, prior electric shock).[65] Executive and judicial resistance toward protecting the Islamic ritual of halal slaughtering has been evident in different *länders* since the 1970s, interlocked with a growing concern for animal rights.[66] The 1986 Federal Animal

58. BverwG 25 Aug. 1993, BverwGE 94, 82 (Ger.) (exempting a twelve year old Muslim school girl from mixed physical education classes).

59. OVG North Rhine-Westphalia 5 Sep. 2007, *Nordrhein-Westfälische Verwaltungsblätter* 22 (2008) (Ger.): 154; VG Dusseldorf 30 May 2005, *Nordrhein-Westfälische Verwaltungsblätter* 20 (Ger.); VG Dusseldorf 18 K 301/08 of 7 May 2008 (Ger.); VG Dusseldorf Au 3 E 08.1613 of 17 Dec. 2008 (Ger.).

60. Johannes Reich, *Switzerland: Freedom of Creed and Conscience, Immigration and Public Schools in the Postsecular State—Compulsory Educational Swimming Instruction Revisited*, 7 INT'L J. CONST. L. 754, 761 (2009).

61. Bundesgericht [BGer] [Federal Supreme Court] June 18, 1993, 119 BGE Ia 178 (Switz.).

62. Budesgericht [BGer] [Federal Supreme Court] Oct. 24, 2008, 135 BGE I 79 (Switz.).

63. Reich, *supra* note 60, at 762.

64. *Id.* at 762–63.

65. *See* Pablo Lerner & Alfredo M. Rabello, *The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities*, 22 J. L. & RELIGION 1, 12–15 (2007).

66. *See* SILVIO FERRARI & ROSSELLA BOTTONI, LEGISLATION REGARDING RELIGIOUS SLAUGHTER IN EU MEMBER, CANDIDATE AND ASSOCIATED COUNTRIES 5–6, 88 (2010),

Protection Act (*Tierschutzgesetz*) prohibited the slaughter of animals without previous stunning in the interest of sparing avoidable pain.[67] Because this prohibition negated methods of religious slaughter, the law granted an "exceptional permission for slaughter without stunning" when "necessary to meet the needs of members of certain religious communities . . . whose mandatory rules required slaughter without stunning."[68]

Yet, between the late 1980s into the mid-1990s, a series of court rulings denied constitutional protection to halal slaughtering on the following grounds:[69] (i) halal slaughtering was distinguished from the protected Jewish practice interpreted as a mandatory ritual only for the Jewish community, (ii) Islam in Germany was construed to be practiced differently than the same religion practiced elsewhere, with halal slaughtering mandated (or not) only by non-German Islam, and (iii) Because Islam has yet to be recognized as a corporation of public law (*Körperschaft des öffentlichen Rechts*) both at the federal and the *länder* level, halal slaughtering was not afforded constitutional protection.

The Federal Constitutional Court reversed these judicial rationales in 2002.[70] Recognizing halal slaughtering as a fundamental right of Muslims, the Court concluded that it surpassed animal protection construed as "a public interest [of]

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available at http://www.issuu.com/florencebergeaud-blackler/docs/report-legislation; Shai Lavi, *Unequal Rites—Jews, Muslims, and the History of Ritual Slaughter in Germany, in* JUDEN AND MUSLIME IN DEUTSCHLAND: RECHT, RELIGION, IDENTITÄT 164, 175 (José Brunner & Shai Lavi eds., 2009).

67. Tierschutzgesetz [Animal Protection Act], Aug. 12, 1986, Bundesgesetzblatt [BGBI.] I S. 1277 at § 4a.1, *translated in* FERRARI & BOTTONI, *supra* note 66, at 88. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 2002, 1 BvR 1783/99 (Ger.), *available at* http://www.bundesverfassungsgericht.de/en/decisions/rs20020115_1bvr178399en.html.

68. Tierschutzgesetz [Animal Protection Act], Aug. 12, 1986, BGBI. I S. 1277, at § 4a.2.

69. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] June 15, 1995, BVerwGE 99, 1; Verwaltungsgericht [VG] [Administrative Trial Court] Koblenz 1993 [AZ: 2 K 1874/92.KG]; Oberverwaltungsgericht [OVG] [Higher Administrative Court] 1993 [Az: 20A 3287/92]; Verwaltungsgericht Gelsenkirchen 1992b [AZ: 7 K 5738/91]. *See also* Lavi, *supra* note 66, at 175–77; MATHIAS ROHE, THE LEGAL TREATMENT OF MUSLIMS IN GERMANY 7 (2003).

70. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 2002, 1 BvR 1783/99 (Ger.).

. . . *high importance* among the population."[71] The ruling generated a speedy legislative backlash in the form of a constitutional amendment "directed against the Muslim ritual," elevating animal protection to a "national objective" in the German Constitution.[72] Bestowed with its invigorated constitutional status, animal welfare now enjoys equal weight when balanced against other fundamental rights including religious freedom, which opened a new legal avenue for reluctant courts and administrative authorities to restrict halal slaughtering in Germany.[73]

With migration emerging as a central component in contemporary European identity politics, immigration laws have also taken a restrictive turn justified as furthering liberal ends.[74] The Netherlands seemed to have experienced the most dramatic policy reorientation.[75] Successive legislation replaced the once celebratory example of multicultural tolerance with a comprehensive mandatory civic integration program designed predominantly for the "non-western" migrant population.[76] This program includes: (i) pre-arrival "civic integration" exam at the country of origin for people seeking residency, (ii) compulsory testing of language proficiency and knowledge of Dutch values,

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71. *Id.* ¶ 41 (emphasis added).

72. *See* Lavi, *supra* note 66, at 178. The *Bundestag* voted overwhelmingly (549 to 19) in 2002 to add "and the animals" ("*und die Tiere*") to Article 20a of the German constitution. Kate M. Nattrass, ". . . *Und die Tiere*": *Constitutional Protection for Germany's Animals*, 10 ANIMAL L. 283, 302 (2004) (discussing the politics preceding the amendment).

73. Case law remains divergent. *Compare* Verwaltungsgericht [VG] [administrative trial court] AU 5 E 03.2198, *with* Oberverwaltungsgericht [OVG] [higher administrative court] 4 M B 4/04. *See also* FERRARI & BOTTONI, *supra* note 66, at 21; Lavi, *supra* note 66, at 178.

74. *See generally* JEF HUYSMANS, THE POLITICS OF INSECURITY: FEAR MIGRATION AND ASYLUM IN THE EU 72–77 (2006); CHRISTIAN JOPPKE, CITIZENSHIP AND IMMIGRATION 31–32 (2010) [hereinafter JOPPKE, CITIZENSHIP]; Thomas Diez & Vicki Squire, *Traditions of Citizenship and the Securitization of Migration in Germany and Britain*, 12 CITIZENSHIP STUD. 565 (2008); Liav Orgad, "*Cultural Defense*" *of Nations: Cultural Citizenship in France, Germany and the Netherlands*, 15(6) EUR. L.J. 719, 723–29 (2009); Allen Stoddard, *Immigration and Islam in Europe*, EURO-ISLAM.INFO, http://www.euro-islam.info/key-issues/immigration (last visited Oct. 27, 2011).

75. Triadafilos Triadafilopoulos, *Illiberal Means to Liberal Ends? Understanding Recent Immigrant Integration Policies in Europe*, 37 J. ETHNIC & MIGRATION STUD. 861, 868 (2011).

76. *See* J. F. I. KLAVER & A. W. M. ODÉ, CIVIC INTEGRATION AND MODERN CITIZENSHIP 59–110 (2009) (discussing the recent changes in the Netherlands' law).

institutions and social norms for new and settled immigrants, (iii) an unpublished naturalization exam; (iv) income level requirements and various fees, and (v) a given time frame and limited number of chances to complete the integration process.[77]

Perhaps the most striking judicial example for this hardening shift toward Muslim immigration was the decision by France's *Conseil d'État* to deny citizenship on the basis of traditionalist Islamic lifestyle.[78] Prior to the existing ban, the *Conseil d'État* upheld in 2008 the denial of citizenship to a *niqab*-wearing Muslim on the grounds of failure to assimilate.[79] Interpreting a 2003 clause in the Civil Code authorizing the refusal of citizenship on the basis of "insufficient assimilation, other than linguistic," the *Conseil d'État* ruled that a Moroccan-born woman who started wearing a *niqab* at the request of her husband after moving to France was insufficiently assimilated.[80] Acknowledging that the woman spoke French, was married to a Frenchman of Moroccan origin, and mothered three French children, the *Conseil d'État* nevertheless concluded that the woman adopted "a radical practice of her religion incompatible with the essential values of the French community, especially the principle of equality of sexes."[81] In recent years, France's immigration laws have also tightened through legislative measures.[82]

Finally, with the growing presence of Islam across Western Europe, the construction of Islamic places of worship has "led to more and more frequents disputes, debates, conflicts and posturing, even in countries where such conflicts were

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77. Vera Marinelli, *Current Immigration Debates in Europe: A Publication of the European Migration Dialogue: The Netherlands* 5–8 (Jan Niessen, Yongmi Schibel, & Cressida Thompson eds., 2005), *available at* http://www.migpolgroup.com/public/docs/141.EMD_Netherlands_2005.pdf; HUM. RTS. WATCH, THE NETHERLANDS: DISCRIMINATION IN THE NAME OF INTEGRATION (2008), *available at* http://www.hrw.org/en/node/82373.

78. Conseil d'Etat [CE] [Council of State], June 27, 2008, MmeFaiza M., req. no. 286798, *available at* http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000019081211.

79. *See id.*

80. *See id.*

81. *See id.*

82. *See* MARTIN SCHAIN, THE POLITICS OF IMMIGRATION IN FRANCE, BRITAIN, AND THE UNITED STATES 57 (2008).

previously unknown and mosques were already present."[83] While disputes have frequently been resolved through municipal negotiations or judicial remedies, examples of bureaucratic denials to building mosques remain a recurrent issue most notably in Italy.[84] Minarets, the *par excellence* symbol of Islam's penetration into the European public sphere, became a central focus of such disputes.[85] Whereas Muslims often perceive the construction of minarets as a "question of nostalgia, of doing things as they would 'at home' . . . for non-Muslim residents, it is often a matter of being invaded, almost as if a foreign body had been forced upon them."[86]

In Switzerland, the legal manifestation of this growing distrust recently played out in the form of direct democracy.[87] A local legal dispute in the municipality of Wangen bei Olten over the construction of a minaret ignited a successful popular initiative resulting in a constitutional amendment incorporating a ban on the construction of minarets.[88] A leading right wing activist behind the successful initiative explained

> [W]e don't want minarets. The minaret is a symbol of political and aggressive Islam . . . . The minute you have minarets in Europe it means Islam will have taken over . . . . Banning minarets would send a clear signal that our European laws, our Swiss laws, have to be accepted. And if you want to live here, you must accept them. If you don't, then go back."[89]

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83. STEFANO ALLIEVI, CONFLICTS OVER MOSQUES IN EUROPE: POLICY ISSUES AND TRENDS 7 (2009).

84. *See* ITALY REPORT, *supra* note 4. These denials "take the form of 'selective enforcement' of rules that already exist but which are only highlighted when dealing with mosques and Muslims." ALLIEVI, *supra* note 83, at 67.

85. ALLIEVI, *supra* note 83, at 45.

86. *Id.* at 46.

87. *See id.* at 47 (noting that anti-minaret legislation was also passed earlier in Austria).

88. *See* Bundesverfassung [BV] [Constituntion] Apr. 18, 1999, art. 72 (Switz.) ("[T]he construction of minarets will be forbidden."); Joanna Pfaff-Czarnecka, *Accommodating Religious Diversity in Switzerland, in* INTERNATIONAL MIGRATION AND THE GOVERNANCE OF RELIGIOUS DIVERSITY 223, 243–44 (Paul Bramadat & Matthias Koenig eds., 2009).

89. *Cultural Cleansing?*, 62 EUROPEAN RACE BULLETIN 15 (2008), *available at* http://www.irr.org.uk/pdf/ERB_62.pdf (quoting Oskar Freysinger, Member of Parliament, the Swiss People's Party (SVP)).

Accordingly, direct democracy provided a majority of the Swiss citizenry a legal venue to ban the construction of minarets against the position of the Federal Supreme Court, the Federal Council, and both chambers of parliament, which viewed the proposed ban as violating the Swiss Constitution and Switzerland's international obligations.[90] Four minarets currently exist throughout Switzerland, highlighting the depth of anti-Muslim sentiments shared across Switzerland.[91]

Hence, a contentious political era over Islamic visibility and access to the European public sphere yielded a sizable body of legal measures institutionalizing exclusionary policies disguised in liberal narratives. The compatibility of these developments with liberal policy-making seems questionable considering that the liberal project largely assumed to be fostering "greater inclusion, openness, and pluralism."[92] Moreover, according to liberal constitutionalists, the legal process is a key component in realizing liberal ends, since constitutional structures institutionalize protection for minorities in addressing cultural conflicts.[93] Obviously, no liberal society fully realizes a commitment to neutrality.[94] Yet, the discrepancy between liberal ideals of pluralism and the assimilationist thrust reflected in legal measures pertaining to Islamic practices seem to be

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90. *See The Swiss Referendum on Minarets: Background and Aftermath*, EUROPEAN RACE AUDIT BRIEFING PAPER 1, Feb. 2010, *available at* http://www.irr.org.uk/pdf2/ERA_BriefingPaper1.pdf (noting that 57.5% of the electorate voted in favor in a roughly 54% turn out); Lorenz Langer, *Panacea or Pathetic Fallacy?: The Swiss Ban on Minarets*, 43 VAND. J. TRANSNAT'L. L. 863, 866 (2010). The ban has been challenged in the ECtHR. *See* Whitney Hayes, *Swiss Ban on Minarets Heads to European Court*, THE HUMAN RIGHTS BRIEF (Jan. 28, 2010), http://hrbrief.org/2010/01/swiss-ban-on-minarets-heads-to-european-court-2.

91. *See* U.S. DEP'T. OF STATE, 2010 RELIGIOUS FREEDOM REPORT: SWITZERLAND (Nov. 17, 2010), http://www.state.gov/g/drl/rls/irf/2010/148989.htm (noting that minarets are part of the mosques in Geneva, Zurich, Winterthur, and Wangen).

92. Fiona B. Adamson et al., *The Limits of the Liberal State: Migration, Identity, and Belonging*, 37 J. ETHNIC & MIGRATION STUD. 843, 843 (2011).

93. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 147–49 (1977); WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 6–10 (2007); EDWARD SCHEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN 3–4, 73–75 (2006); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 6–7 (2007).

94. Stephen Holmes, *The Permanent Structure of Antiliberal Thought*, *in* LIBERALISM AND THE MORAL LIFE 227, 230, 245 (Nancy L. Rosenblum ed., 1989).

conspicuously stark, calling for closer scrutiny of these measures as part of Europe's integration debate.[95]

II. *ABORTION REFORMS ACROSS WESTERN EUROPE*

Between the late 1960s to the late 1980s, bitter abortion debates submerged the Western European public sphere. With a growing social recognition of the health risks in clandestine abortions and greater openness toward sexuality and gender equality, Western European countries were compelled to reevaluate their restrictive regulatory regimes on abortion. As demonstrated in what follows, these reforms were preceded by bitter public debates along liberal and conservative lines, which ultimately resulted in uneasy legislative compromises over contested ideas about the rights of women and the unborn. However, these legislative compromises, which intentionally avoided the pro-life and pro-choice dichotomy, proved resilient in disarming European abortion politics.

Abortion debates in Britain emerged in the 1960s largely in connection to public health concerns.[96] Deadly backstreet abortions and the births of many children with disabilities caused by a drug taken during pregnancy (thalidomide) generated public support for reforming the criminalization of abortion induction.[97] Reflecting these health concerns, the Abortion Act 1967 allocated the decision making authority on abortion solely to the medical system.[98] Section 1(1) of the

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95. *See generally* Ofrit Liviatan, *Faith in the Law—The Role of Legal Arrangements in Religion-Based Conflicts Involving Minorities*, 34 B.C. INT'L & COMP. L. REV. 53 (2011) [hereinafter Liviatan, *Faith in the Law*].

96. Stephen Brooke, *Abortion Law Reform: 1929-1968*, *in* THE ABORTION ACT 1967 15, 16 (Michael D. Kandiah & Gillian Staerck eds., 2001); COLIN FRANCOME, ABORTION IN THE USA AND THE UK 53 (2004); EMILY JACKSON, REGULATING REPRODUCTION: LAW, TECHNOLOGY AND AUTONOMY 77 (2001); Madeleine Simms, *Britain*, *in* ABORTION IN THE NEW EUROPE: A COMPARATIVE HANDBOOK, *supra* note 96, at 31, 34.

97. On the process of reforming, see Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, § 58 (U.K.) and Infant Life (Preservation) Act 1929, 19 & 20 Geo 5, c. 34, §. 1(1) (U.K.). *See* BERNARD M. DICKENS, ABORTION AND THE LAW 49–50, 77 (1966); JOHN KEOWN, ABORTION, DOCTORS AND THE LAW 84–109 (1988).

98. [U.K.] Abortion Act, 1967 C. 87. The Act was amended once in 1990 through Section 37 of the Human Fertilization and Embryology Act to reduce legal abortions from twenty-eight to twenty-four week gestation as a result of medical advancements in technology related to pregnancies. *See* Simms, *supra* note 96, at 40; *see also* MELANIE LATHAM, REGULATING REPRODUCTION: A CENTURY OF CONFLICT IN BRITAIN AND FRANCE 89 (2002); Ellie Lee, *Reinventing Abortion as a Social Problem: "Postabortion*

Abortion Act, titled "Medical Termination of Pregnancy," created a series of statutory defenses for medical professionals performing abortions, refraining altogether from rights discourse or the assignment of moral weight either to the women's choice or the fetus's life.[99]

This trajectory proved a decisive determinant in calming British abortion politics and generating parliamentary support for the reform.[100] "Framing the law in '"medicalized'" terms meant that medical authority, rather than moral imperative, becomes decisive . . . [and] marginalize[d] the opinion of those who disagree with the existing abortion law on rights-based grounds."[101] Pro-lifers found solace in the fact that a woman's decision to abort is monitored by the medical profession inherently committed to preserving life.[102] For pro-choicers this legal compromise offered a viable expansion of abortion possibilities, since bestowing doctors with medical discretion has not limited access to abortion in Britain.[103] Moreover, "medicalizing" the procedure also meant that abortion procedures became a standard gynecological service offered in public hospitals rather than private clinics, limiting the

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Syndrome" in the United States and Britain, in HOW CLAIMS SPREAD: CROSS-NATIONAL DIFFUSION OF SOCIAL PROBLEMS 39, 42 (Joel Best ed., 2001).

99. [U.K.] Abortion Act, 1967 C. 87, § 1 The Article reads: "Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if that practitioner and another registered medical practitioner are of the opinion, formed in good faith . . . that the case in question meets several conditions, including a pregnancy less than twenty-four weeks, and its continuance involves a physical or mental risk for the woman, the fetus or her existing children, greater than if the pregnancy were terminated." *Id.*

100. JACKSON, *supra* note 96, at 110.

101. Lee, *supra* note 98, at 43–44.

102. JACKSON, *supra* note 96, at 83.

103. Ann Furedi & David Nolan, *Fighting a Battle of Ideas–Conflict on Abortion in the UK, in* PLANNED PARENTHOOD IN EUROPE 7–11 (Nov. 1995); Lee, *supra* note 98, at 43; *Parliament, Pressure Groups, Networks and the Women's Movement: The Politics of Abortion Law Reform in Britain (1967–83), in* THE NEW POLITICS OF ABORTION 231–56 (Joni Lovenduski & Joyce Outshoorn eds., 1986); *see also* Joanna N. Erdmann, *Moral Authority in English and American Abortion Law, in* CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW, *supra* note 130, at 107, 122–23; JACKSON, *supra* note 96, at 81; SALLY SHELDON, BEYOND CONTROL: MEDICAL POWER AND ABORTION LAW 163–64 (1997) (providing a feminist critique).

possibility (and mobilizing potential) of protest against abortion clinics.[104]

Since the passage of the Abortion Act, abortion has remained in the margins of British politics. Private bills to amend this legal arrangement on abortion have been introduced over the years but were all defeated, and "many scholars note with relief that abortion in the United Kingdom generates less conflict and controversy than in the United States."[105] Similarly, attempts to challenge the Abortion Act in courts met a reluctant judiciary. Rejecting the claim of a husband seeking to stop his wife from terminating her pregnancy, the British court remarked, "[i]t would be quite impossible for the courts . . . to supervise the operation of the Abortion Act 1967. The great social responsibility is firmly placed by the law on the shoulders of the medical profession . . . [only] a foolish judge . . . would seek to [interfere with the discretion of doctors acting under the 1967 Act]."[106]

The enactment of the HRA presented an opportunity to shift abortion discourse in Britain in the direction of rights-based claims.[107] Yet, this scenario has been unconditionally rebuffed by the judiciary.[108] Dismissing a claim for parental notifications of a minor's abortion on the basis of parental right to family life, the Court forcefully rejected the applicability of American rights-based jurisprudence, stipulating: "in this country . . . the right to an abortion is clearly established in certain prescribed circumstances."[109]

French abortion reform was set in motion in the late 1960s, following decades of staunch pro-natalist governmental stance prompted by dwindling population during the two World Wars.[110] The changing role of women, growing sexual openness,

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104. Furedi & Nolan, *supra* note 103, at 7.

105. Erdmann, *supra* note 103, at 108; JOHN KENYON MASON, THE TROUBLED PREGNANCY: LEGAL WRONGS AND RIGHTS IN REPRODUCTION 14 (2007).

106. Paton v. British Pregnancy Advisory Service Trustees, [1979] Q.B. 276, at 281–82 (Eng.).

107. Human Rights Act, 1998, c. 42 (Eng.). On the impact of the HRA in English law, see Ofrit Liviatan, *The Impact of Alternative Constitutional Regimes on Religious Freedom in Canada and England*, 31 B.C. INT'L & COMP. L. REV. 45, 46–47, 53–54 (2009).

108. R. (Axon) v. Secretary of State for Health, [2006] EWHC 37 (Eng.).

109. *Id.* ¶ 33.

110. Abortion was outlawed in France in Article 317 of the 1810 Napoleonic Penal Code. Bartha Maria Knoppers, Isabel Brault, & Elizabeth Sloss, *Abortion Law in*

over-population growth and life-endangering clandestine abortions, all generated a growing demand for the reevaluation of reproductive legislation with the abortion question at its axis.[111] Amid "sensational and extreme" public debate framed along a feminist-conservative and Catholic divide,[112] the government introduced in 1975 the Voluntary Interruption of Pregnancy Act ("VIP Act"), whose "moral thrust [was] much one of prevention as one of liberalisation."[113] The VIP Act was "pervaded by compassion for the pregnant women, by concern for fetal life, and by expression of the commitment of society as a whole to help minimize occasions for tragic choices between them."[114] Accordingly, abortion remained a criminal act, although one that could be medically authorized until the tenth week of pregnancy were a woman "in a situation of distress."[115] Abortion procedure had to be preceded by mandatory counseling emphasizing family-oriented policies and positive alternatives to pregnancy, as well as a week long waiting period.[116] Eighty-one Gaullist and center *députés* (deputies) of the *Assemblée Nationale* (Lower House of Parliament) opposing the bill immediately referred it to the review of the *Conseil Constitutionnel*, which cleared its enactment.[117] Resting on the

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Francophone Countries, 19 AM. J. COMP. L. 889, 894 (1990). For a discussion of Pronatalist politics, see LATHAM, *supra* note 98, at 82–85. On procreation-enhancing policies following World War II, see Maggie Allison, *The Right to Choose: Abortion in France*, 47 PARLIAMENTARY AFF. 222, 223–24 (1994).

111. Allison, *supra* note 110, at 223–26.

112. DOROTHY MCBRIDE STESTON, WOMEN'S RIGHTS IN FRANCE 65 (1987).

113. Allison, *supra* note 110, at 230. Law No. 75-17 of 18 January 1975. JOURNAL OFFICIEL DE LA RÉPUBLIC FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 18, 1975, p. 739, amended by Law No. 79-1204 of 31 December 1979 JOURNAL OFFICIEL DE LA RÉPUBLIC FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 1, 1980, p. 3. A summary of the law is available in MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 146, 155–57 (1987).

114. GLENDON, *supra* note 113, at 156.

115. *Id.* at 156; Allison, *supra* note 110, at 230 (noting the "source of distress" exception).

116. GLENDON, *supra* note 113 at 156–57; Allison, *supra* note 110, at 230; Jean C. Robinson, *Gendering the Abortion Debate: The French Case*, *in* ABORTION POLITICS, WOMEN'S MOVEMENTS, AND THE DEMOCRATIC STATE 87, 90 (Dorothy McBride ed., 2001). In 2001, the *Conseil Constitutionnel* cleared an extension of the ten-week threshold to twelve. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2001-446DC, July 27, 2001, Rec. 74, *available at* http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1008.

117. Conseil constitutionnel [CC] [Constitutional Court] decision No. 74-54DC, Jan. 15, 1975, Rec. 19, *available at* http://www.conseil-constitutionnel.fr/conseil-

statutory requirement of "reasons of distress," the *Conseil Constitutionnel* concluded that the law is not "inconsistent with any of the fundamental principles recognised by the laws of the Republic [*i.e.*, respect for life], nor with the principle [of] "health care to all children."[118]

The law refrained from providing a definition of "a situation of distress," leaving its determination in the hands of the pregnant woman.[119] Even though this construction was perceived as degrading by pro-choice activists, it effectively made abortion a readily available procedure for French women.[120] The law was enacted on a five year trial basis, reinvigorating the pro-choice/pro-life conflict.[121] Yet, by the time the law was brought for reevaluation, the compromise had already taken hold, and the law was reenacted with minor changes.[122] One such change was the inclusion of a duty on the state to actively promote the principle of respect for life and strengthen family-oriented policies.[123]

Until the 1970s abortion was a punishable crime in Germany.[124] Motivation for reform emerged from the need to provide solutions for dangerous clandestine abortions, yet

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constitutionnel/root/bank_mm/anglais/a7454dc.pdf. The review of a law's constitutionality can be referred to the *Conseil Constitutionnel* by sixty Deputies or sixty Senators. *See* Louis Favoreu, *The Constitutional Council and Parliament in France, in* CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 81, 91–93 (Christine Landfried ed., 1988) (discussing the constitutional review process in France); ALEC STONE SWEET, GOVERNING WITH JUDGES 50–51, 63 (2000).

118. Conseil constitutionnel [CC] [Constitutional Court] decision No. 74-54DC, *supra* note 117, at ¶¶ 8–11. *See* James Beardsley, *Constitutional Review in France*, 1975 SUP. CT. REV. 189, 235–36 (1975).

119. GLENDON, *supra* note 113, at 15.

120. Dorothy McBride Stetson, *Abortion Policy Triads and Women's Rights in Russia, the United States, and France, in* ABORTION POLITICS: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVE 97, 109 (Marianne Githens & Dorothy McBride Stetson eds., 1996).

121. Allison, *supra* note 110, at 231; Colette Gallard, *France, in* ABORTION IN THE NEW EUROPE: A COMPARATIVE HANDBOOK, *supra* note 96, at 101, 105.

122. GLENDON, *supra* note 113, at 18.

123. *Id.*; *see also* Yamileth Granizo, *Law on Voluntary Interruption of Pregnancy*, WOMEN'S HEALTH J., Jan. 2006, at 15–16 (documenting later changes to the law).

124. Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to* Roe v. Wade, 9(3) J. MARSHALL J. PRAC. & PROC. 605, 611–12 (1976) (translating Section 218 of the Imperial Penal Code on the first abortion ruling of the Federal Administrative Court, 39 BVerfGE 1 (1975) [hereinafter *First Abortion Ruling*]); *see also* Monika Prützel-Thomas, *The Abortion Issue and the Federal Constitutional Court*, 2 GERMAN POLITICS 467, 469 (1993).

disagreements over the method of reform were divided along liberal-conservative lines.[125]

Following lengthy and intense parliamentary deliberations a narrow majority (247 votes to 233) legalized abortion in the first trimester when performed by a physician with the consent of the pregnant woman following mandatory counseling.[126] This politically-sensitive legislation was immediately challenged by the Christian Democrats (CDU/CSU) at the Federal Constitutional Court as incompatible with the fundamental obligation of the state to protect life under the German basic law.[127]

The German court constructed a constitutional hierarchy between the protection of the fetus and the personal choice of the mother, asserting that given Germany's modern history the obligation of the state to protect the fetus existed "even against its mother."[128] Thus, the state is constitutionally barred from legalizing abortion and "must proceed . . . from the duty to carry the pregnancy to term and . . . view . . . its interruption as an injustice."[129] Nevertheless, the Court laid out four types of indications—criminal, medical, eugenic, and social—that if certified by a physician can render permissible justifications for abortion.[130] Mandatory counseling "with the goal of reminding the pregnant woman of the fundamental duty to respect the

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125. *See* Albin Eser, *Reform of German Abortion Law: First Experiences*, 34 AM. J. COMP. L. 369, 372 (1986); Joyce M. Mushaben, *Feminism in Four Acts: The Changing Political Identity of Women in the Federal Republic of Germany*, *in* THE FEDERAL REPUBLIC OF GERMANY AT FORTY 76, 92 (Peter H. Merkel ed., 1989).

126. *See First Abortion Ruling*, *supra* note 124, at 611–12, 621 (providing a translation of Section 218a–c of the Imperial Penal Code in the version of the Fifth Statute to Reform the Penal Law (5 PLRS) and the vote tally).

127. *See* Mushaben, *supra* note 125, at 92; *see also First Abortion Ruling*, *supra* note 124, at 605–09.

128. *See First Abortion Ruling*, *supra* note 124, at 642.

129. *Id.* at 644.

130. *See id.* at 648. The indications are (i) dangers to the life or health of the pregnant woman (medical indications); (ii) a pregnancy resulting from criminal offenses such as rape or incest (criminal indications); (iii) severe genetic defects (eugenic indications); and (iv) a general "social indication" intended to address circumstances where the continuation of the pregnancy would "impose on the pregnant woman exceptional hardships comparable in severity to those encompassed by the other three enumerated indications." *See* Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, *in* CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 93, 95–96 (Susan H. Williams ed., 2009).

right to life of the unborn," was ordered as well.[131] Complying with the Court's ruling, the *Bundestag* enacted the four indications as permissible justifications for an otherwise unlawful abortion.[132] The law also required social and medical counseling designed to "make the continuation of the pregnancy and the situation of the mother and child easier," as well as a three-day waiting period between the counseling and procedure.[133] Abortions that failed to meet any of these conditions were punishable with up to a year in prison for the pregnant woman and up to three years for other participating parties.[134] This legislation did not end political controversy.[135]

In the following years, both sides of the abortion debate manifested growing discontent with the existing legislation.[136] The unification of Germany presented an opportunity for change, since the Indication model of West Germany had to be reconciled with the abortion on-demand available in East Germany; a process that "almost brought the German unification process to a standstill."[137] Following a protracted period of debates, a substantial majority (357 votes to 283) of the unified *Bundestag* enacted the Pregnancy and Family Assistance Act ("PFAA").[138] Assuming a preventative (as opposed

131. *First Abortion Ruling*, *supra* note 124, at 649.

132. DONALD P. KOMMERS, CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 347 (2d ed. 1997).

133. *See* Eser, *supra* note 125, at 378; Rainer Frank, *Federal Republic of Germany: Three Decisions of the Federal Constitutional Court*, 33 U. LOUISVILLE J. FAM L. 353, 355 (1995) (noting the specifications of Section 218b of the Criminal Code).

134. *See* MYRA MARX FERREE ET AL., SHAPING ABORTION DISCOURSE 34–35 (2002).

135. *See* SWEET, *supra* note 117, at 110–11; *see also* KOMMERS, *supra* note 132, at 347; Susanne Walther, *Thou Shalt Not (But Thou Mayest): Abortion After the German Constitutional Court's 1993 Landmark Decision*, 36 GERMAN Y.B. INT'L L. 385, 386 (1993).

136. *See* FERREE ET AL., *supra* note 134, at 41; Eva Maleck-Lewy & Myra Marx Ferree, *Talking About Women and Wombs: The Discourse of Abortion and Reproductive Rights in the G.D.R. During and After the Wende*, *in* REPRODUCING GENDER: POLITICS, PUBLICS, AND EVERYDAY LIFE AFTER SOCIALISM 92, 94 (Susan Gal & Gail Kligman eds., 2000); Gabriele Czarnowski, *Abortion as a Political Conflict in the Unified Germany*, 47 PARLIAMENTARY AFF. 252, 252–54 (1994).

137. SHELDON, *supra* note 103, at 2.

138. The Pregnancy and Family Assistance Act's full title is The Act for the Protection of Prenatal/Developing Life, Promotion of a More Child Friendly Society, Assistance in Pregnancy Conflicts, and Regulation of Pregnancy Termination. *See* Prützel-Thomas, *supra* note 124, at 474 (discussing the debates and providing the final vote tally); Rosemarie Will, *German Unification and the Reform of Abortion Law*, 3

to punitive) approach to abortion,[139] the law decriminalized (declared "not-unlawful") first-trimester abortions for any reason subject to a counseling requirement, a three-day waiting period and a doctor's performance of the procedure,[140] along with additional social measures designed to reduce the need for abortion.[141]

Almost immediately the CDU and CSU in the *Bundestag*, along with the government of Bavaria, contested the PFAA before the Federal Constitutional Court.[142] The Court annulled substantial parts of the unified legislation, reaffirming its earlier rationale on the fundamental unlawfulness of abortion.[143] However, taking into account the post-unification reality, the Court amalgamated its original policy framework with additional preventative measures of assistance and counseling designed to dissuade abortions.[144] According to the Court:

> The state does not comply with its obligation to protect the unborn human life merely by averting attacks emanating from other human beings. It must also avert the dangers to this life following from the present and foreseeable real living conditions of the woman and her family which adversely affect the readiness to carry the child to term.[145]

Correspondingly, the Court required the enactment of legislative measures providing economic and social support to

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CARDOZO WOMEN'S L.J. 399, 415 n.86 (1996) (providing a translation of the relevant article).

139. Blanca Rodríguex Ruiz & Ute Sacksofsky, *Gender in the German Constitution, in* THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 149, 171 (Beverly Baines & Ruth Rubio-Marin eds., 2005).

140. Prützel-Thomas, *supra* note 124, at 477; Christina P. Schlegel, *Landmark in German Abortion Law: The German 1995 Compromise Compared with English Law*, 11 INT'L J. L. POL'Y & FAM. 36, 40–41 (1997).

141. KOMMERS, *supra* note 132, at 348 (noting that the social measures included family planning, daycare funding and availability, and education and vocational training for pregnant women and mothers of young children); FERREE ET AL., *supra* note 134, at 42 (noting that the bill increased funding for kindergartens which was intended to encourage childbearing as an option).

142. Bundesverfassungsgerich [Federal Constitutional Court], May 28, 1993 BVerfGE 88, 203 (Ger.), *available at* http://www.servat.unibe.ch/dfr/bv088203.html, *translated in* KOMMERS, *supra* note 132, at 349–54.

143. Will, *supra* note 138, at 419–21.

144. FERREE ET AL., *supra* note 134, at 42; Case, *supra* note 130, at 97.

145. SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 145 (1999).

pregnant women in education, housing, childcare and employment oriented toward the creation of a "child-friendly" society.[146] Among these instructions were specific suggestions for financial subsidies, proposals on how to protect women from educational and occupational disadvantages resulting from childbearing, possible reforms to specific laws (social security and credit laws), and specific instructions on the duties of landlords.[147] Finally, according to the Court, counseling "must be orientated towards the protection of the unborn life. Merely informative counseling . . . would not achieve its purpose. The counselors must have the motivation to encourage the woman to continue her pregnancy and to provide perspectives for her life with a child."[148]

Constrained by the Court's constitutionally acceptable standards on abortion, the *Bundestag* then enacted the Court's framework with minor modification as Germany's current legal arrangement on abortion.[149] Now in its second decade, judicial mandate remains uneasy, but acceptable enough not to be seriously challenged by either side of the abortion debate.[150]

In the Netherlands, reform proposals surfaced in 1970 as part of growing pressures by women's organizations, academics, and the medical community to rectify discrepancies between restrictive nineteenth century legislation and contemporary practices enabling abortion.[151] Yet, the legislative reform came to

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146. *See* Walther, *supra* note 135, at 394.

147. *See* Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 281 (1995).

148. MICHALOWSKI & WOODS, *supra* note 145, at 146.

149. *See* Will, *supra* note 138, at 422–23, n.112. The revised law maintained abortion's unlawfulness, merging non-indicated abortions for the first trimester with the indication model of the first German ruling and an expansive pro-child counseling model. *See* Schlegel, *supra* note 140, at 45–48.

150. *See* FERREE ET AL., *supra* note 134, at 43; Case, *supra* note 130, at 99; Neuman, *supra* note 147, at 273.

151. Prior to reform, abortion was outlawed in Articles 295–98 of the Penal Code 1886, as amended by the Morality Act of 1911. *See* Matthijs de Blois, *The Netherlands, in* ABORTION AND PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE 167, 170–71 (S.J Frankowski & G.F. Cole eds., 1987); SARAH L. HENDERSON & ALANA S. JEYDEL, WOMEN AND POLITICS IN A GLOBAL WORLD 198 (2d ed. 2010); Everett Ketting, *Netherlands, in* ABORTION IN THE NEW EUROPE: A COMPARATIVE HANDBOOK, *supra* note 96, at 173, 173–74; Joyce Outshoorn, *The Rules of the Game: Abortion Politics in the Netherlands, in* THE NEW POLITICS OF ABORTION, *supra* note 103, at

pass only after an eleven year delay resulting from political opposition and parliamentary stalemates facilitated by the Netherlands' multi-party politics.[152] The Termination of Pregnancy Act of 1981 was enacted by the narrowest majority of votes (76 to 74 in the First Chamber; 38 to 37 in the Second Chamber) and came into force only three years later, after additional regulations designed to ensure that any decision to terminate a pregnancy carefully balanced the protection of the fetus and the rights of the mother were issued.[153] Abortion was decriminalized until the twenty-fourth week when a woman is in a "distressed situation" with "no other choice," a determination made by the woman in consultation with a physician.[154] Additional requirements stipulated that abortions will be performed in licensed medical facilities, mandatory counseling, a five day waiting period and a system of aftercare as well as governmental financing for legal abortions.[155]

Finally, a conscientious clause exempted physicians from the duty to perform or arrange for abortions.[156] This legal reform "pacif[ied] the abortion issue . . . and public opinion

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5, 17 [hereinafter *Outshoorn Rules*]; Jany Rademakers, *The Netherlands, in* INTERNATIONAL HANDBOOK ON ABORTION 333, 333–35 (Paul Sachdev ed., 1988).

152. *See* de Blois, *supra* note 151, at 175–77; Jeanne de Bruijn & Barbara Henkes, *The Women's Strike in Holland 1981*, 12 FEMINIST REV. 37, 37–38 (1982); HENDERSON & JEYDEL, *supra* note 151, at 198–99; Joyce Outshoorn, *Policy-Making on Abortion: Arenas, Actors, and Arguments in the Netherlands, in* ABORTION POLITICS, WOMEN'S MOVEMENTS, AND THE DEMOCRATIC STATE, *supra* note 116, at 205, 206 [hereinafter *Outshoorn Policy-Making*] (discussing the political debates that delayed legislative reform); *Outshoorn Rules, supra* note 151, at 19–22.

153. *See* Termination of Pregnancy Act of 1 May 1981, Stb. 1981, p. 257 § 5(1) [hereinafter Termination of Pregnancy Act]; Decree on the Termination of Pregnancy of 17 May 1984, Stb. 1984, p. 356, *available at* http://www.hsph.harvard.edu/population/abortion/NETHERLANDS.abo.htm [hereinafter Decree on the Termination of Pregnancy]; Marc Groenhuijsen & Floris van Laanen, *Euthanasia in the Broader Framework of Dutch Penal Policies, in* EUTHANASIA IN THE BROADER FRAMEWORK OF DUTCH PENAL POLICIES 195, 196 (Marc Goenhuijsen & Floris van Laanen eds., 2006) ("[The 1981 Act] was specifically designed to warrant a careful decision-making process before any abortion can take place."). Article 296(5) of the Dutch Penal Code now states that termination of pregnancies "is not punishable where the treatment was given by a physician at a hospital or clinic where such treatment is legal under the Termination of Pregnancy Act." *See* THE DUTCH PENAL CODE 201 (Louise Rayar & Stafford Wadsworth trans., 1997); *Outshoorn Policy-Making, supra* note 152, at 216.

154. Termination of Pregnancy Act, *supra* note 153, § 5.

155. *Id.* §§ 2, 3; Decree on Termination of Pregnancy, *supra* note 153, §§ 2, 3, 8, 25; *see also* Rademakers, *supra* note 151, at 336.

156. Termination of Pregnancy Act, *supra* note 153, § 20.

on the whole has been supportive of its content" keeping it in force thus far.[157]

In Italy, abortion debates sparked in the early 1970s as part of broader socio-political debates over the public role of Catholicism and patriarchal dominance in society.[158] It instantly became "the most discussed issue in the country" with women's groups and the political left rallying around the idea of women's choice against a consolidating pro-life movement of Christian Democrats and "good Catholics."[159] Amid ongoing parliamentary debates over possible avenues to reform the fascist regime's criminalization of abortion, the tribunal of Milan remitted existing abortion law for constitutional review arising as part of criminal abortion proceeding.[160] The Italian *Corte Costituzionale* (Constitutional Court), concerned by the rise in life-threatening backstreet abortions, declared the existing law unsatisfactory in giving absolute priority to the fetus's constitutional right without adequate protection to the health of the mother.[161] Addressing a heated political atmosphere in an overwhelmingly Catholic nation, the ruling contributed to the mobilization of both camps, but at the same time, framed the direction of the legislative debates toward reaching an acceptable compromise over contested values.[162] Following additional back and forth legislative deliberations, the two

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157. *Outshoorn Policy-Making*, *supra* note 152, at 205; *see also* Groenhuijsen & van Laanen, *supra* note 153, at 195; HENDERSON & JEYDEL, *supra* note 151, at 197; Ketting, *supra* note 151, at 173, 176; Rademakers, *supra* note 151, at 336.

158. *See* Marina Calloni, *Debates and Controversies on Abortion in Italy*, *in* ABORTION POLITICS, WOMEN'S MOVEMENTS AND THE DEMOCRATIC STATE, *supra* note 116, at 184, 184–86; PATRICK HANAFIN, CONCEIVING LIFE: REPRODUCTIVE POLITICS AND THE LAW IN CONTEMPORARY ITALY 28–30 (2007); Jacqueline Andall, *Abortion, Politics and Gender in Italy*, 47 PARLIAMENTARY AFF. 238–39 (1994).

159. Eleonore Eckmann Pisciotta, *Challenging the Establishment: The Case of Abortion*, *in* THE NEW WOMEN'S MOVEMENT 26, 35, 40 (Drude Dahlerup ed., 1986).

160. Calloni, *supra* note 158, at 185 (discussing the increased public debates on gender specific issues). The process of indirect constitutional review arising as part of judicial proceedings in Italy is discussed in Alessandro Pizzorusso, *Constitutional Review and Legislation in Italy*, *in* CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON, *supra* note 117, at 109, 109. On the parliamentary debates over abortion, see generally Lesley Caldwell, *Abortion in Italy*, 7 FEMINIST REV. 49, 52–59 (1981).

161. Carmosina et al., Corte Cost., 18 Febbraio 1975, nn. 27, 43 Racc. uff. corte cost. 2011975, *translated excerpts available at* MAURO CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS 612–14 (1979).

162. Calloni, *supra* note 158, at 186; GLENDON, *supra* note 113, at 43.

houses of parliament finally approved Law no. 194 of 22 May 1978 entitled Norms for the Social Protection of Motherhood and the Voluntary Termination of Pregnancy ("Law 194"),[163] whose title and content reflected the depth of the political compromise.[164] Abortion was not removed from the criminal code, but the law established conditions—health, economic, social, or family circumstances—under which legal abortions in the first ninety days of pregnancy were permitted.[165]

Although the ultimate decision on whether to terminate a pregnancy was left with the woman, the law prescribed medical and social counseling specifically designed to help her overcome the circumstances leading to the abortion decision.[166] Following this substantive consultation, if the woman still wanted her pregnancy terminated, a seven-day waiting period "to reflect" was required to elapse (absent a state of emergency), as medical personnel were granted the right to conscientiously object to performing abortions.[167]

The enactment of the law did not end public contestations. The heated debate finally culminated in 1981 with simultaneous referendum initiatives challenging the law—a liberal one to legalize abortions and a conservative one to revoke them.[168] Both referendums failed, indicating that a general consensus had emerged on the contours of Law 194.[169] This conclusion is further supported by repeated judicial rejections of abortion

163. Legge 22 maggio 1978, n. 194 [Italian Law No. 194 of May 22, 1978] in G.U.2 May 1978, n. 140 (It.), *translation available at* http://www.hsph.harvard.edu/population/abortion/ITALY.abo.htm.

164. *Id.* §1 ("[T]he state guarantees the right to responsible and planned parenthood, recognizes the social value of motherhood and shall protect human life from its inception."). *See generally* Irene Figà-Talamanca, *Italy, in* INTERNATIONAL HANDBOOK ON ABORTION 279–92 (Paul Sachdev ed., 1988); Andall, *supra* note 158, at 244.

165. Italian Law No. 194 of May 22, 1978 at §4; *see also* Calloni, *supra* note 158, at 188.

166. Italian Law No. 194 of May 22, 1978 at § 5.

167. *Id.*

168. *See* MACHTELD NIJSTEN, ABORTION AND CONSTITUTIONAL LAW: A COMPARATIVE EUROPEAN-AMERICAN STUDY 102 (1990) (discussing referendum proposals).

169. Figà-Talamanca, *supra* 164, at 282; Andall, *supra* note 158, at 245.

challenges over the years, leaving the 1978 legal compromise thus far intact.[170]

The tumultuous abortion politics engulfing Western Europe from the late 1960s to the late 1980s ended with the Belgian reform in 1990. An arrest of a physician performing abortions in the early 1970s mobilized intense political controversies, generating dozens of legislative proposals and a long political stalemate over reforming the criminalization of abortion under the Penal Code.[171] Closely resembling the French and Dutch compromises, the Law on the Termination of Pregnancy of 1990 decriminalized abortion in the first trimester when the woman is in a "state of distress as a result of her situation."[172] The law required a six day waiting period and mandatory counseling on alternatives to abortion, but left the decision as to the state of distress to the sole discretion of the woman and her physician's confirmation.[173] The refusal of the Catholic King to then sign the law and bring it into effect necessitated a creative political solution. The King was declared "unable to govern" for a day to avert a constitutional crisis and allow the law to pass.[174]

Hence, a period of turbulent abortion politics between the late 1960s and the late 1980s concluded with the emergence of relatively cohesive legislative compromises across Western Europe. Their main feature was to maintain normative

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170. In 1997, another attempt at referendum over Law 194 reached the Constitutional Court, which was dismissed on the grounds that the existing law "has as its rationale and guiding values precisely those values of motherhood and the protection of human life." HANAFIN, *supra* note 158, at 33.

171. CODE PÉNAL [C. PÉN] arts. 348–53 (Belg.). *See also* Reed Boland, *Recent Developments in Abortion Law in Industrial Countries*, 18 LAW, MED. & HEALTH CARE 405, 410 (1990) (discussing Articles 348–53 of the Penal Code of 1867); Karen Celis, *The Abortion Debates in Belgium 1974–1990*, *in* ABORTION POLITICS, WOMEN'S MOVEMENTS, AND THE DEMOCRATIC STATE, *supra* note 116, at 39, 39–61 (discussing the political debates); Vicky Claeys, *Belgium*, *in* ABORTION IN THE NEW EUROPE: A COMPARATIVE HANDBOOK, *supra* note 96, at 19, 19–23.

172. Loi du 3 Avril 1990 relative à l'interruption volontaire de grossesse [The Law of Apr. 3, 1990 on the Termination of Pregnancy], MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Apr. 5, 1990), 6379–80, *translated in* 17 ANN. REV. POP. L. 336 (1990) [hereinafter Belgium Termination Law].

173. Belgium Termination Law, *supra* note 172.

174. Joyce Outshoorn, *The Stability of Compromise: Abortion Politics in Western Europe*, *in* ABORTION POLITICS: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVE, *supra* note 120, at 145, 158.

disapproval toward the termination of pregnancies as part of vital concern for the unborn life, yet permit abortion during the first trimester (and even in later weeks when the well-being of the woman is at stake) in the interest of protecting the freedom of the woman to choose once several safeguards were fulfilled. These safeguards included: (i) mandatory waiting periods, (ii) limitations on places where abortions can be performed, (iii) processes for decision-making on abortion, and (iv) social and financial incentives for life with a child. Finally, conscientious exemption clauses have also acted as controversy-pacifying strategies.

III. *COMPARING LAW'S SOCIAL ROLE IN WESTERN-EUROPEAN CULTURAL DEBATES*

Problem-driven, inference-oriented qualitative inquiry, a common research methodology in the social sciences, has been gradually permeating comparative constitutional analysis.[175] Its *similar case studies* research design does not necessitate an exact match of variables in case study selection. Rather, resemblance is necessary in the non-central characteristics of the cases along with varying independent and dependent variables.[176] As the principal cultural conflicts engaging Europe in recent decades, abortion and Islam-based controversies seem to conform to this research design. The surveys above highlight how in these conflicts law-making institutions across this constant set of countries attempted to address the constitutional clash between fundamental rights and religious creeds. The two case studies differed in that the abortion debates engaged the beliefs of Western Europe's religious majority, while its largest religious minority currently follows Islam. Moreover, these issues vary in their contentiousness, namely a pacified pro-choice/pro-life politics compared with deeply seated Islam-based controversies that are currently at the forefront of Europe's cultural clashes.

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175. *See generally* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 125–55 (2005); Christopher A. Whytock, *Taking Causality Seriously in Comparative Constitutional Law: Insights from Comparative Politics and Comparative Political Economy*, 41 LOY. L.A. L. REV. 629, 629–82 (2008).

176. *See* John Gerring, *Case Selection for Case-Study Analysis: Qualitative and Quantitative Techniques*, *in* THE OXFORD HANDBOOK OF POLITICAL METHODOLOGY 645, 645–48 (Janet M. Box-Steffensmeier et al. eds., 2008).

To substantiate the thesis of this Article—that this difference in intensity can be plausibly explained through the contribution of a legal process diverging along its social functions (*integrative* versus *transformative*)—attention is now turned to assessing the realization of law's social function in each of the debates, namely (i) law's contribution to resolving the abortion conflict and (ii) law's capacity in transforming European Islam. The *legal outcomes* of abortion policies enacted across Western Europe between the late 1960s to the late 1980s were undoubtedly transformative in responding to pressing social problems and legalizing avenues for abortions. Nonetheless, the *legal process* ushering these outcomes has clearly taken an integrative approach enabling tensed compromises that ultimately moved society forward.

Moreover, while there are many ways to pursue social change in the modern world (economic factors, technology, protest, and so forth), law as a strategy of social change has been largely harnessed with safeguarding rights and reversing inequalities.[177] Nonetheless, the primary narrative in Western European abortion laws has not been rights focused, but one of rights protection interwoven with economic policies, social concerns over family welfare, and political objectives for the society as a whole. Particularly striking in this regard has been the British example. Despite launching the common law system where the judiciary has become the "institution of choice" for activists seeking social change, British courts have shown an unwavering stance to keep the "medicalized" statutory compromise regardless of an institutional capacity to override them.[178]

In principle, legal arrangements that side step rights-based narratives could have worked against the entrenchment of abortion rights. American observers even suggested that the European legal compromises codifying pro-life rhetoric with pro-choice options are "empty promise[s]," if not "hypocrisy," that "can take an unacceptably high toll on confidence in the

177. *See generally* CAROL HARLOW & RICHARD RAWLINGS, PRESSURE THROUGH LAW (1992); GERALD M. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 2, 430 (2d ed. 2008).

178. Tom Ginsburg, *The Global Spread of Constitutional Review*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 81, 81, 89 (Keith E. Whittington et al. eds., 2008).

rule of law and the integrity of the legal system as a whole."[179] Nonetheless, evidence suggests that the uneasy reconciliation of opposing principles seemed to have been quite effective. Recent years have been marked by tranquility in abortion debates, with feasible, durable access to abortion across Western Europe.[180] This is not to imply that Western European abortion debates are over. The political nature of the law, namely the recognition that shifts in political power could translate into legal change, remains an ever-attractive incentive for pro-life/pro-choice politics.[181] Yet, when compared to the tensed debates currently engaging the United States, contemporary Western-European controversies over abortion are irrefutably moderate.[182]

Consequently, how effective has the attempt to *Europeanize* Muslims been thus far? Naturally, any such assessment is premature considering the prominence of the controversies, the freshness of the adopted legal measures, and the variation in Muslim integration across different European countries. Yet, interim observations are at the very least not particularly encouraging. Whereas studies highlighted aspects of Muslim assimilation, these are regularly amalgamated by discussions of Muslim radicalization particularly among the younger Muslim generations experiencing stigmatization, alienation and social marginalization. [183] Consequently, literature is mounting with

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179. *See* Kim Lane Scheppele, *Constitutionalizing Abortion, in* ABORTION POLITICS: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVES, *supra* note 120, at 46, 46–47; Lawrence H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 73–74 (1990).

180. *See* Outshoorn, *supra* note 174, at 145. A recent comparative examination of abortion availability in Western Europe and the United States concluded that "Western Europe has had a quite stable abortion environment. In contrast to the situation in the USA, access to abortion providing facilities . . . is substantially easier . . . [and] free from the extremes of violence and controversy that have characterized abortion care in the USA." Carole Joffe, *Abortion and Medicine: A Sociopolitical History, in* MANAGEMENT OF UNINTENDED AND ABNORMAL PREGNANCIES 1, 4 (Maureen Paul et al. eds., 2009); *see also* Giovanni Bognetti, *The Concept of Human Dignity in European and US Constitutionalism, in* EUROPEAN AND US CONSTITUTIONALISM 85, 88 (Georg Notle ed., 2005) (arguing that European abortion laws are "liberal in practice.").

181. *See* Liviatan, *Faith in the Law, supra* note 95 (discussing the political nature of law).

182. *See* Ofrit Liviatan, *Social Change v. Social Peace: Comparing Law's Role in American and Western European Conflict over Abortion, in* RELIGION AND CONSTITUTION (Ana Maria Celis, ed., forthcoming).

183. AYHAN KAYA, ISLAM, MIGRATION AND INTEGRATION 7–8 (2009); JYTTE KLAUSEN, THE ISLAMIC CHALLENGE: POLITICS AND RELIGION IN WESTERN EUROPE (2005); JONATHAN LAURENCE & JUSTIN VAISSE, INTEGRATING ISLAM: POLITICAL AND

urgent calls for the institutionalization of dialogue with Muslim communities and the strengthening of their political and social engagement.[184] Moreover, the recent global financial recession suggests the probability of greater complications for Muslim integration. Rising unemployment, the curbing of social welfare programs and deteriorating working and living conditions do not hold great promise for accelerating the integration of a community already suffering from poverty and ghettoization.

A further validation to law's diverging role in the debates over abortion and Islam derives from the shortcomings of alternative explanations. One possible explanation may be the time factor. Europe's abortion dilemmas are decades distant compared with ongoing battles over Islam's place in the European public sphere. Hence, an argument can be made that the study effectively compares a long-finished legal product with legal solutions in the making. Nonetheless, as revealed by the foregoing sections, legal proceedings pertaining to each of the conflicts have taken quite a different path from the get-go. The legal process proved pivotal in institutionalizing structures and processes for dialogue and compromise over abortion reform.[185]

In France, the *Conseil Constitutionnel's* affirmation of the "distress" formula legitimized the legislative reconciliation that rejected abortion on-demand but left recourse to abortion in exceptional circumstances at the woman's discretion. In Germany, the Federal Constitutional Court dictated not once, but twice the constitutionally acceptable standards for abortion against popular legislative constructions. Mirroring the German jurisprudence in an overwhelmingly Catholic nation, the Italian

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RELIGIOUS CHALLENGES IN CONTEMPORARY FRANCE 170 (2006); Bhiku Parekh, *Europe, Liberalism and the Muslim Question, in* MULTICULTURALISM, MUSLIMS AND CITIZENSHIP, *supra* note 39, at 179, 179 (Tariq Modood et al. eds., 2006). For the British context, see QUINTAN WIKTOROWICZ, RADICAL ISLAM RISING: MUSLIM EXTREMISM IN THE WEST (2005).

184. Recent selective examples include: ZEYNO BARAN, CITIZEN ISLAM: THE FUTURE OF MUSLIM INTEGRATION IN THE WEST 177–82 (2011); ISLAM & EUROPE: CRISES ARE CHALLENGES 8 (Marie-Claire Foblets & Jean-Yves Carlier eds., 2010); Olivier Roy, *Islamist Terrorists and Radicalization, in* EUROPEAN ISLAM: CHALLENGES FOR SOCIETY AND PUBLIC POLICY, *supra* note 4, at 56, 56–57. *See generally* JOHN R. BOWEN, CAN ISLAM BE FRENCH: PLURALISM AND PRAGMATISM IN A SECULARIST STATE (2010); JUSTIN GEST, APART: ALIENATED AND ENGAGED MUSLIMS IN THE WEST (2010).

185. *See generally* Donald P. Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985 BYU L. REV. 371 (1985).

Constitutional Court invalidated an exclusively pro-life arrangement, instructing the parliament to seek a more balanced statutory resolution. Similar integrative processes were evident as part of protracted legislative debates in the Netherlands and Britain, allowing the emergence of refined compromises between competing values.

In a striking departure from this compromise-effectuating function of the legal process in the abortion context, the willingness of legislators and judges to construct legal compromises in the context of Islamic practices has been effectively nonexistent. Echoing a growing social anxiety over the spread of Islam,[186] legal proceedings have largely corrected and contained Islamic practices in the public sphere. With the formal recognition of Islam yet to be achieved in the "concordat-type regimes"[187] of Germany and Italy, opportunities regularly arose to restrict the building of mosques, outlaw the *burqinis* in public pools and limit halal slaughter.[188] Along similar lines, social and cultural assimilation has become the defining element in immigration and educational policies. Compared with abortion jurisprudence, judicial rulings on Islamic practices revealed an overall deference by courts to the prevailing social attitudes. As illustrated above, Islamic veiling was construed extremist and backward in the rulings of *Begum, Sahin* and *Dahlab,* as well as in the *Conseil d'État's* rejection of the immigration petition by a *niqab*-wearing woman and the subsequent clearance by the *Conseil Constitutionnel* of the ban on

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186. *See* Casanova, *supra* note 4, at 65–67.

187. The term is borrowed from Valérie Amiraux, *Discrimination and Claims for Equal Rights Amongst Muslims in Europe, in* EUROPEAN MUSLIMS AND THE SECULAR STATE, *supra* note 4, at 25, 26.

188. *See* Silvio Ferrari, *The Secularity of the State and the Shaping of Muslim Representative Organization in Western Europe, in* EUROPEAN MUSLIMS AND THE SECULAR STATE, *supra* note 4, at 11, 11; *see also* Sara Silvestri, *Public Policies Towards Muslims and the Institutionalization of "Moderate Islam" in Europe: Some Critical Reflections, in* MUSLIMS IN 21ST CENTURY EUROPE, *supra* note 3, at 44, 47–49; Sara Silvestri, *Muslim Institutions and Political Mobilization, in* EUROPEAN ISLAM: CHALLENGES FOR SOCIETY AND PUBLIC POLICY, *supra* note 4, at 169, 173–75 (Samir Amghar et al. eds., 2007); Dilwar Hussain, *The Holy Grail of Muslims in Western Europe: Representation and Their Relationship With the State, in* MODERNIZING ISLAM: RELIGION IN THE PUBLIC SPHERE IN THE MIDDLE EAST AND EUROPE 215 (John L. Esposito & Francois Bugart eds., 2003); Bernard Goddard, *Official Recognition of Islam, in* EUROPEAN ISLAM: CHALLENGES FOR SOCIETY AND PUBLIC POLICY, *supra* note 4, at 183, 183; Aluffi Beck Peccoz, *Islam in the European Union: Italy, in* ISLAM AND THE EUROPEAN UNION 181, 187 (R. Potz & W. Wieshaider eds., 2004).

the full face veil. More restrainedly, yet in clear contrast to its proactively mediating role in the context of abortion, the German Federal Constitutional Court left a legal vacuum in *Ludin* orienting the legislative process toward bans. A similar controversial path was evident in the German judicial approach to halal slaughtering. Finally, by coining an ambiguous balancing test the *Conseil d'État* effectively, even if unintentionally, paved the course for the eventual French ban on headscarves in schools.

Moreover, these differences in either of the debates cannot be explained under the normative premise that courts provide for greater protection of minorities compared with legislatures.[189] Proponents of constitutional review will likely point to the German federal rulings protecting halal slaughtering, earlier judicial exemptions from coed swimming classes, the Swiss courts' positions on minarets and the French and German permissive jurisprudence on Islamic veiling as evidence for judicial willingness to protect Islamic practices. Yet, this argument is severely weakened in comparison to the pivotal role of constitutional courts in furthering the abortion debate toward legal resolutions. Moreover, not only were judicial rulings protecting Islamic practices seemingly scarce, but when courts opted to limit Islamic practices the grounds offered in these rulings to justify such limitations all seem to support the alignment of courts with the growing popular push to "civilize" and "adjust" Islamic practices.

Finally, even the argument that limitations on Islamic practices should be viewed as the outcome of substantive constitutional balancing between the right to religious freedom and other fundamental rights and interests of multicultural

189. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (Terrence Ball ed., 2003) (providing early justifications for judicial review). Selected contemporary sources include DWORKIN, *supra* note 93; CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001); and JOHN ELY HART, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). For the competing view see RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM (2007); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). Arguments summarized in Ofrit Liviatan, *Judicial Activism and Religion-Based Tensions in India and Israel* 26 ARIZ J. INT'L & COMP. L. 583, 587 (2009).

societies[190] does not seem to counteract the premise of this study. Rationales offered in the rulings on Islamic veiling, halal slaughtering and co-ed classes that restricted Islamic practices reveal just how little emphasis was given to the fact that the Islamic practices at stake may actually be true manifestations of religious beliefs.

Europe's growing secularization could be suggested as another alternative explanation to the pacification of abortion politics and the continent's general unreceptiveness to Islamic manifestations in the public square. Notwithstanding the sociological disagreements over the true nature of Europe's secularization,[191] the surveyed data challenges this explanation in either context as well. European secularization was one of many social developments prompting the reform of abortion restrictions. Pressing social needs, including clandestine dangerous abortions, dwindling population, the thalidomide problem, as well as specific historical developments such as the unification of Germany, all acted as pivotal engines of reform in the reconsideration of abortion laws. Moreover, in every case examined earlier, reform processes met fierce anti-abortion religious opposition leading to protracted debates stretching the reform process over many years.

In the context of Islamic practices, European observers have explained the forceful integrationist approach in the pervasive identification of Islam as a security threat rather than a sheer commitment to secularism.[192] Securitization concerns have

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190. *See* Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 39 (1943) (advocating for balancing). More recent advocacy for balancing includes AHARON BARAK, THE JUDGE IN A DEMOCRACY 164, 173 (2006); DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 159–61 (2004); Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 L. & ETHICS HUM. RTS. 73, 84–85 (2010).

191. Scholarship countering European secularization include JOSÉ CASANOVA, PUBLIC RELIGION IN THE MODERN WORLD (1994); GRACE DAVIE, RELIGION IN BRITAIN SINCE 1945: BELIEVING WITHOUT BELONGING (1994); and Rodney Stark, *Secularization R.I.P.*, 60 SOC. RELIGION 249 (1999).

192. *The Radicalisation of Muslim Youth in Europe: The Reality and the Scale of the Threat, Hearing Before the Subcomm. on Europe and Emerging Threats of the H. Comm. on International Relations*, 101st Cong. 1 (2005), *available at* http://www.investigativeproject.org/documents/testimony/302.pdf (last visited Oct. 27, 2011) (statement of Claude Moniquet, Director General, European Strategic Intelligence and Security Center); Erik Bleich, *State Responses to "Muslim" Violence: A Comparison of Six West European Countries*, *in* MUSLIMS AND THE STATE IN THE POST 9/11 WEST 9, 10 (Erik Bleich ed., 2010); *see also* KAYA, *supra* note 183, at 7–11.

been leading politicians and academics to conflate "factors such as immigrant background, ethnicity, socio-economic deprivation and the war on terror with Islam as a religion," justifying exclusionary politics and anti-immigration attitudes.[193] If any, these securitization concerns may have actually strengthened Europe's Christian identity rather than dissolved it, as Christian forces proved pivotal in advancing bans on the Islamic veil, halal slaughtering, and the ban on minarets.[194]

CONCLUSION

Western Europe undoubtedly faces complex and pressing challenges in coping with its changing socio-cultural composition. Yet, so far the surveyed data suggests that legal processes have been reflecting the prevailing social panic over the "Islamic threat" rather than act as conflict-defusing instruments in the debates over Islam and the European public sphere. Decades old legal reforms on abortion present an opportunity to reconceptualize the law's role in pacifying socio-cultural tensions, as once fiercely-fought abortion controversies have substantially subsided even as value-based disagreements endured.

The rise of judicialized politics in recent decades, namely "the infusion of judicial decision-making and of court-like procedures into political arenas,"[195] gave rise to a growing body of scholarship representing two leading scholarly approaches. On the one hand, rooted in Marxist and realism theories the "critical" literature demonstrated the role of the courts in disguising and legitimizing social hierarchies,[196] in lacking a

193. *See* KAYA, *supra* note 183, at 2.

194. Peter J. Katzenstein, *Multiple Modernities as Limits to Secular Europeanization*, *in* RELIGION IN AN EXPANDING EUROPE, *supra* note 4, at 1, 33 (Timothy A. Byrnes & Peter J. Katzenstein eds., 2006) ("[R]eligion continues to lurk underneath the veneer of European secularization.").

195. Torbjörn Vallinder, *When the Courts Go Marching In*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER 13, 13 (Neal C. Tate & Torbjörn Vallinder eds., 1995). *See* MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION 1 (2002); *see generally* John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41 (2002); Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008).

196. *See generally* V. KERRUISH, JURISPRUDENCE AS IDEOLOGY (1991); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE (1997). For collections offering an overview of Critical Legal Studies, see THE POLITICS OF LAW: A PROGRESSIVE

meaningful judicial impact on public policy compared with political and cultural factors,[197] and lastly, in offering paths to overcome legislative stalemates or structural barriers to the ideological goals of the dominant national coalition.[198] On the other hand, the "refined" approach focused on analyzing judicial processes as instrumental in providing strategic possibilities to achieve political goals in the long term that are unencumbered or may even be strengthened by legislative or administrative circumventions in the short term.[199] The surveyed examples in the context of Islam further substantiate the critical view of the legal process. Nevertheless, since law increasingly

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CRITIQUE (David Kairys ed., 1990); RADICAL PHILOSOPHY OF LAW (D. Caudill & S. Stone eds., 1994). Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 368 (1982). For a critique, see Alan Hunt, *The Critique of Law: What is "Critical" About Critical Legal Theory?*, 14 J. L. & SOC'Y 5, 7–8 (1987). On the influence of Marxist theories and legal realism, see VAGO, *supra* note 2, at 66.

197. ROSENBERG, *supra* note 177, at 72; *see also* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

198. Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–91, 96*, AM. POL. SCI. REV. 511, 517–21 (2002); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 35–46 (1993); Stefan Voigt & Eli M. Salzberger, *Choosing Not to Choose: When Politicians Choose to Delegate Powers*, 55 KYKLOS 289, 293–300 (2002); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584–94 (2005). On courts' roles in "hegemonic preservation" of endangered groups elites, see RAN HIRSCHL, TOWARDS JURISTOCRACY (2004).

199. Legal mobilization and agenda-setting is discussed in A.M. MARSHALL, CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERDAY LIFE (2005); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); S.M. OLSON, CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS (1984); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS (2d ed. 2004); HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT (1996). Opportunity structures are discussed in E. ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS (2006); CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVES (1998). Strategic usages of law analyzed in critical feminist and race theory can be found in FEMINIST LEGAL THEORY (K. B. Artlett & R. Kennedy eds., 1991); MARI MATSUDA, WHERE IS YOUR BODY? (1996); RICHARD DELGADO & JEAN STEFANIC, CRITICAL RACE THEORY (2001); KIMBERLE W. CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995); Phyllis Goldfarb, *From the Worlds of "Others": Minority and Feminist Responses to Critical Legal Studies*, 26 NEW. ENG. L. REV. 683, 689–707 (1992). On the constructive aspects of political and popular backlashes against activist courts, see Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R-C.L. L. REV. 373 (2007).

functions as the primary governing instrument in multicultural democracies, the search for a legal resolution to socio-cultural conflicts seems ever more acute.

The European model of constitutional review appears to possess distinct properties and institutional machineries to enable the construction of durable socio-cultural compromises. Generally, under the abstract review process typical of national legal systems in Western Europe, laws can be referred to constitutional review during or soon after they were adopted to ensure their constitutionality and integrality with existing norms and values.[200] Under the concrete review process shared by various nations across the European continent, judicial officials are to refer to the constitutional court questions about the constitutionality of existing laws or administrative acts arising in the course of the litigation process.[201] Internal variations aside, these procedures empower constitutional courts to act as policymakers and actively counterbalance majority's legislative actions disadvantaging constitutional guarantees or fundamental social values.[202]

The opportunity to deliberate unbound by specific facts, identifiable parties or the need to proclaim a winner or a loser, confers constitutional courts with the capacity to launch the currently absent constitutional conversation over the social effects of Europe's changing demography. As "pure oracles of

200. On European review processes, see MAURO CAPPELLETI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 132–45 (1989); VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE (2009); JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION 134–42 (3d ed. 2007); Michel Rosenfeld, *Constitutional Adjudication in Europe and the Unites States: Paradoxes and Contrasts, in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 180, at 197, 199–203; SWEET, *supra* note 117, at 50–52; John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe,* 82 TEX. L. REV. 1671, 1671–1704 (2004).

201. *See* SWEET, *supra* note 117, at 45–46.

202. For variations in constitutional review processes, see SWEET, *supra* note 117, at 47; Ferejohn & Pasquino, *supra* note 200, at 86. Several European constitutional courts also accept personal complaints of basic rights violations, a power recently granted to the *Conseil Constitutionnel* (known there as "priority questions of constitutionality"). *See generally* CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON, *supra* note 117.

the constitutional law,"[203] these courts also seem relatively immune toward legislative backlashes, which in the common-law context have shown to generate judicial tendency to retreat from rights protection in order to avoid political clipping of judicial wings.[204] Finally, the European constitutional dialogic process in the context of abortion reputably demonstrated that judicial nullifications of politically accepted legislation steered a middle course and ultimately generated decades-old settled compromises.

Spearheading compromise building in conflicts pertaining to the Muslim community would first and foremost require constitutional courts to guarantee greater safeguards to Islamic based expression. Yet, following the example of abortion reforms, these safeguards must be effectuated by attempting the mutual preservation of competing rights and interests. Reaching beyond proportional balancing, constitutional courts should tackle the roots and causes of Muslim disadvantages *as well as* the public anxieties across Europe, and dictate detailed policy frameworks to guide and constrain the legislative process in accordance with the specific political context of each state.

Recent outcomes of constitutional review demonstrate that receptive constitutional interpretations pertaining to Islamic practices so far have met legislative resistance and administrative defiance. However, according to the refined literature such circumventions should not be understood as necessarily negating long term positive progress. Moreover, a compromise-seeking constitutional process modeled after the abortion examples is yet to be tested as part of the debate over the place of Islam in the European public sphere. If indeed, American-based theories are applicable across the Atlantic, the attempt to harmonize Muslim interests with the majority's concerns may hold promise for a more inclusive and culturally serene Western European future.

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203. Alec Stone Sweet, *Judging Judicial Review: Marbury in the Modern Era: Why Europe Rejected American Judicial Review and Why It May Not Matter*, 101 MICH. L. REV. 2744, 2771 (2003).

204. *See* Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights—And Democracy—Based Worries*, 38 WAKE FOREST L. REV. 813, 820–30 (2003).