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# Islam as a Civilizational Threat: Constitutional Identity, Militant Democracy, and Judicial Review in Western Europe

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## Abstract

Multiple laws and regulations in Western Europe have been enacted on the premise that headscarves and face veils constitute an existential threat to the constitutional identity of the respective legal systems. Thus, the logic of militant democracy as a justification for restricting fundamental rights have been applied in order to restrict the freedom to manifest one's religion. Yet, the policymakers claiming to defend the constitutional identity through militant democracy have not been able to prove the existence of a concrete, imminent threat against the state from the women who wear headscarves or face veils. Nonetheless, the European judiciaries have taken the political claim at face value and allowed the restrictions without compelling the political decision-makers to provide substantive justifications. Thus, the cases of headscarves and face veils offer a prism, through which we can study fundamental paradoxes of liberal democracy and constitutionalism.

**Keywords:** Militant democracy; constitutional identity; religious freedom; judicial review; Islam

## A. Introduction

The European restrictions on the use of face veils and headscarves offer a prism through which we can view some of the fundamental questions in liberal, democratic lawmaking. A wave of new laws and regulations aimed at restricting the use of Islamic dress has swept Western Europe. Technically, the laws and regulations do not discriminate between religions, but the preparatory works leave no doubt about the intention of their drafters. The restrictions are carefully designed to target the use of Islamic headscarves and face veils. When examined in comparison to the generally lenient approach by the state towards symbols of Christianity—which remains the dominant faith in Western Europe—it is clear that policymakers wish to impose culturally motivated restrictions on individuals belonging to the Muslim minority.

The idea that a political majority wishes to impose its conception of the good on the rest of society is not controversial in itself, and indeed it is a founding principle of democracy. Yet, in a liberal democracy, this interest must be balanced with the respect for individual, fundamental freedoms, such as the freedom to manifest one's religion. The restriction of such freedoms must be justified substantively beyond the wish of enforcing the majority group's cultural preferences.

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How, then, can it be that multiple liberal democracies have introduced restrictions that, in effect, discriminate on the sole basis of religion?

In this Article, I will propose an explanatory framework based on the interplay between the concepts of militant democracy, constitutional identity, and judicial review. I will argue that policymakers appear to have successfully convinced their constituents that wearing headscarves and face veils not only offends the cultural preferences of the majority, but also threatens the very foundations of the state, namely its constitutional identity.

Accordingly, the policymakers in question do not see themselves bound by the ordinary requirements of justification, but instead, resort to means of militant democracy. The concept of militant democracy was originally coined to overcome the problems arising from a formalistic conception of democracy. In response to deliberate and imminent attacks on the foundations of liberal democracy, it is argued, the state must strike back and, if necessary, compromise with its own principles of liberty, tolerance, and equality. Although originally reserved for political movements and parties, the logic of militant democracy has, in recent years, been applied to justify the restrictions of Islamic dress.

Due to the potential for abuse, it is generally agreed that militant democracy must be delimited by an independent arbiter. Following the Second World War, the choice for this role has most often fallen on the ordinary courts or a designated constitutional or international court. Through the application of proportionality analysis, judges are expected to weigh the factual and normative aspects of a political militant democracy claim in order to ensure that it is well founded. Yet, it is my claim that this control mechanism has failed in nearly all instances relating to headscarves and face veils.

## B. Militant Democracy

### I. Militancy in Liberal Theory

“Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.”<sup>1</sup> With these words in 1945, Karl Popper formulated the paradox of tolerance.

One way to overcome this paradox had been proposed by Karl Loewenstein eight years earlier. While in exile from the German Nazi regime, he formulated the concept of militant democracy. Loewenstein argued that the democratic governments of the world must apply harsher means in the struggle against the threat of fascism, “fire is fought with fire,”<sup>2</sup> or else fall victim to the cruel irony of letting undemocratic powers destroy democracy from within using legal means. Thus, he launched a direct attack on the procedural conception of democracy advocated by Hans Kelsen, that being that “one should stick to one’s colors, even when the ship is sinking.”<sup>3</sup> Loewenstein accused Kelsen of allowing the rise of fascism because “[d]emocratic fundamentalism and legalistic blindness were unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the city.”<sup>4</sup> Loewenstein’s solution—militant democracy—is based on a specific conception of fascism as a method of power grabbing by abuse of political liberties rather than a coherent ideology. Thus, according to Loewenstein, democracies could stem the fascist movement by denying them the use of these methods. Be that as it may, Loewenstein himself draws on the logic of state of exception with all that that entails, including, in particular, curtailing political freedoms. He argues that:

<sup>1</sup>KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 581 (2011).

<sup>2</sup>Karl Loewenstein, *Militant Democracy and Fundamental Rights*, II, 31 AM. POL. SCI. REV. 638, 656 (1937).

<sup>3</sup>HANS KELSEN, *VERTEIDIGUNG DER DEMOKRATIE: ABHANDLUNGEN ZUR DEMOKRATIETHEORIE* 237 (Matthias Jestaedt & Oliver Lepsius eds., 2006) [author translation].

<sup>4</sup>Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417, 424 (1937).

If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles.<sup>5</sup>

Thus, Loewenstein's solution to the paradox of tolerance creates what Alexander S. Kirshner refers to as "the paradox of militant democracy," namely that the defense of democracy against undemocratic forces may bring about the fall of democracy.<sup>6</sup> Carlo Invernizzi Accetti and Ian Zuckerman argue that this constitutes the fundamental weakness in Loewenstein's theory. Drawing on Carl Schmitt, they argue that what constitutes a threat to the political core of the state must be decided by the sovereign, and this decision necessarily contains an element of arbitrariness, which cannot be overcome. Because militant democracy requires a substantive understanding of democracy—as opposed to a purely procedural one—the main concern is how to decide which values the state needs to protect militantly. Accetti and Zuckerman therefore ultimately reject Loewenstein's militant democracy as fundamentally flawed and beyond remedy.<sup>7</sup>

This critique notwithstanding, it appears that Loewenstein's general idea of democratic self-defense enjoys near universal support.<sup>8</sup> The conventional conception of militant democracy contains both normative and empirical elements that must be present for it to justify restrictions on fundamental rights. First is an element of actual urgency. Although a democratic state "need not wait until those who aim to destroy or overturn the system have real opportunities to do so,"<sup>9</sup> it also cannot lash out against any potential threat. A certain level of plausibility must be required. Second, the restrictions in question must be aimed at an enemy of the democratic state—for example, an individual or, more commonly, a group abusing their political freedoms in an effort to undermine the liberal democracy, and thus deny others those same freedoms. The enemy must also perceive themselves as such; someone who merely behaves unreasonably or inappropriately cannot be said to be an enemy of the state. A certain level of malicious intent must be required. Third, the measures must be apt to defend the democratic structures and not merely take the form of punishment of political opponents. Falling short of these basic requirements, a militant democracy claim is illegitimate. As will be discussed further, these requirements are necessarily closely linked with the concept of proportionality.

## II. Militant Democracy as Justification

In legal and political theory, the obligation to justify restrictions on fundamental rights has been conceptualized in various ways. On the fundamental level, Robert Alexy interprets it as a demand that law—including laws that restrict fundamental rights—must be reasonable.<sup>10</sup> Building on Etienne Mureinik's idea of law as justification,<sup>11</sup> Moshe CohenEliya and Iddo Porat argue that modern constitutionalism has caused a shift from a "culture of authority" to a "culture of justification"—meaning that policymakers must substantively justify all their actions—in particular

<sup>5</sup>*Id.* at 432.

<sup>6</sup>ALEXANDER S. KIRSHNER, *A THEORY OF MILITANT DEMOCRACY: THE ETHICS OF COMBATTING POLITICAL EXTREMISM* 2 (2014).

<sup>7</sup>See generally Carlo Invernizzi Accetti & Ian Zuckerman, *What's Wrong with Militant Democracy?*, 65 *POL. STUD.* 182 (2017).

<sup>8</sup>Giovanni Capoccia, *Militant Democracy: The Institutional Bases of Democratic Self-Preservation*, 9 *ANN. REV. LAW SOC. SCI.* 207, 210 (2013).

<sup>9</sup>SVELLANA TYULKINA, *MILITANT DEMOCRACY: UNDEMOCRATIC POLITICAL PARTIES AND BEYOND* 14 (2015).

<sup>10</sup>See Robert Alexy, *The Reasonableness of Law*, in *REASONABLENESS AND LAW* 5 (Giorgio Bongiovanni et al. eds., 2009).

<sup>11</sup>See generally Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 *S. AFR. J. HUM. RTS.* 31 (1994).

when restricting fundamental rights.<sup>12</sup> Similarly, Mattias Kumm speaks of the “right to justification that is connected to a particular conception of legitimate legal authority: That law’s claim to legitimate authority is plausible only if the law is demonstratively justifiable to those burdened by it in terms that free and equals can accept.”<sup>13</sup> These conceptions demonstrate that there is also a normative and substantive threshold—in addition to a procedural and formal threshold—for what constitutes a legitimate restriction.

As argued forcefully by Neville Cox and multiple other scholars, the restrictions placed upon headscarves and face veils could not have been justified satisfactorily by ordinary considerations.<sup>14</sup> In other words, legitimate reasoning does not allow for the restrictions. The reason for this is that most of the laws in question suffer from one or more of what Mattias Kumm has termed “pathologies of reason”:

First, there is the vice of thoughtlessness based on tradition, convention or preference, that give rise to all kinds of inertia to either address established injustices or create new injustices . . . . Second, there are illegitimate reasons relating to the good, which do not respect the limits of public reason and the grounds that coercive power of public authorities may be used for . . . . Third, there is the problem of government hyperbole or ideology. Hyperbolic and ideological claims are claims loosely related to concerns that are legitimate. But they fail to justify the concrete measures they are invoked for, because they lack a firm and sufficiently concrete base in reality and are not meaningfully attuned to means-ends relationships.<sup>15</sup>

As it will be demonstrated further below, the restrictions on headscarves and face veils do in fact suffer from a combination of these pathologies. Visible signs of Islam are constructed as symbols of a subversive ideology and an affront to “our way of life.” Rather than demonstrating the concrete danger posed by these garments, policymakers resort to an abstract and hyperbolic dichotomy between “the enlightened West” and “the dangerous Islam.” The abuse of militant democracy claims is a prime example of majoritarian cultural preference and hyperbolic exaggeration of urgency and danger.

The normative requirements for a legitimate restriction on fundamental rights are high, and policymakers may want to escape strict scrutiny when their policies suffer from one or more pathologies of reason. One of the few ways to relax the scrutiny is to draw on the concept of militant democracy:

Where governments can claim to act in the name of protecting democracy, they may feel less compelled to supply convincing and legitimate reasons for their actions. By the same token, individuals or groups of individuals will find it challenging to resist such a declaration and defend their rights. In this respect, militant democracy measures are more difficult to challenge than ordinary rights limitations.<sup>16</sup>

In order to understand what is at play when policymakers target visible signs of Islam, we must understand the concept of constitutional identity, how it is constructed, and why it matters to the discussion of militant democracy.

<sup>12</sup>See generally Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463 (2011).

<sup>13</sup>Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 L. & ETHICS HUM. RTS. 142, 143 (2010).

<sup>14</sup>See generally NEVILLE COX, *BEHIND THE VEIL: A CRITICAL ANALYSIS OF EUROPEAN VEILING LAWS* (2019).

<sup>15</sup>Kumm, *supra* note 13, at 163.

<sup>16</sup>TYULKINA, *supra* note 9, at 47.

## C. Civilizational Threats to the Constitutional Identity

### I. Constructing and Instrumentalizing the Constitutional Identity

Constitutional identity is a term with various meanings, and it resurfaces in different discourses. For the purpose of this Article, I apply Monika Polzin's definition of the concept:

Constitutional identity can only be understood as an abstract, constructed—and therefore, to some extent, imagined, simplified and fictitious—specific understanding by a people or nation of itself in relation to its constitution, in other words its constitution-related, constructed, collective self-identity.<sup>17</sup>

The idea that the constitutional identity is constructed is shared by Michel Rosenfeld, who writes that the “[c]onstitutional identity like national identity can be conceived as belonging to a collective self,”<sup>18</sup> and although “[m]odern constitutional identity is distinguished from national identity . . . , both originate in the late eighteenth century and both are identities constructed and projected by what Benedict Anderson has labeled ‘imagined communities.’”<sup>19</sup> Rather than seeing a community inventing itself as fabrication or falsity, Anderson sees it as creation and imagining.<sup>20</sup>

Jan-Werner Müller argues that “national identity and constitutional identity are not the same (the term ‘political identity’ often runs them together in a profoundly unhelpful way),”<sup>21</sup> and that this distinction matters because “[t]hreats to the latter can legitimately be subject to militant democratic measures, although constitutional identity can be interpreted more or less narrowly and therefore give rise to more or less tolerance vis-à-vis parties and movements.”<sup>22</sup> Although it is true that national identity and constitutional identity are two different concepts, I disagree with Müller on his second point; not every element of constitutional identity can legitimately be subject to militant democratic measures. Only those elements that concern the functioning of liberal democracy itself can.

My critique of Müller's distinction between constitutional and national identity finds support in Liav Orgad's seminal work on cultural majority rights. Orgad blends the concepts of constitutional identity and national identity into the concept of constitutional nationalism.<sup>23</sup> Rather than focusing on terminology, Orgad argues that the legitimacy of cultural defense laws must be assessed on the basis of their function, purpose, and legality.<sup>24</sup> These three elements are all contained in the proportionality test, which I apply as the standard for when the concept of militant democracy is said to have been abused. It is my proposition that in nearly all instances where policymakers have relied on militant democracy as a justification for restricting headscarves and face veils, they have done so without proper regard for the individual elements of the proportionality test. So, although they claim to defend the constitutional identity, the militant measures are illegitimate.

Turning to the other element of constitutional identity: what makes this collective self-constitution related, is that—according to Polzin—it can primarily be constructed from constitutional norms that can be explained by distinct national peculiarities reflected in the constitution or through judicial interpretation.<sup>25</sup> There are two aspects of particular relevance to the present study, however, which Polzin does not emphasize sufficiently.

<sup>17</sup>Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18 GERMAN L.J. 1585, 1599 (2017).

<sup>18</sup>Michel Rosenfeld, *Constitutional Identity*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 756, 757 (Michel Rosenfeld & András Sajó eds., 2012).

<sup>19</sup>*Id.* at 758.

<sup>20</sup>BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6 (2016).

<sup>21</sup>Jan-Werner Müller, *Militant Democracy*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1253, 1266 (Michel Rosenfeld & András Sajó eds., 2012).

<sup>22</sup>*Id.*

<sup>23</sup>See LIAV ORGAD, *THE CULTURAL DEFENSE OF NATIONS* 203–29 (2015).

<sup>24</sup>*Id.* at 159.

<sup>25</sup>Polzin, *supra* note 17, at 1605, 1610.

One aspect is the construction of a constitutional identity by the policymakers. Although Polzin does note that the “constitutional understanding of the ‘self’ can also be expressed in the work of the legislature,”<sup>26</sup> her main focus is on judicial interpretation. In my opinion, Gary Jeffrey Jacobsohn comes closer to the heart of the matter. He conceptualizes the evolution of the constitutional identity as a dialogical process “through interpretive and political activity occurring in courts, legislatures, and other public and private domains.”<sup>27</sup> Neither specific constitutional norms nor the overall constitutional identity is primarily constructed and interpreted by the courts, but rather, by policymakers upon whom the principal responsibility of upholding and fulfilling the constitutional promise rests.

The other aspect, which Polzin neglects, is the role of negation as a method of identity construction, which according to Rosenfeld “is crucial to the extent that the constitutional subject can only emerge as distinct, through exclusion and renunciation.”<sup>28</sup> Polzin’s conception of constitutional identity is framed entirely in positive terms—“who are we?” rather than “who are we not?”—including, notably, her mention of the French face veil ban,<sup>29</sup> which so manifestly relies on a negation of the face veil as an affront to the Republic and all its values. Although negation cannot stand alone and ideally must be supplemented by constructive methods,<sup>30</sup> it appears that negation has been the strongest force when it comes to constructing a constitutional identity in the meeting with Islam. The method of negation is crucial to my argument because, as it will be demonstrated, it is the deliberate interpretation of the constitutional identity as a negation of Islam that allows policymakers to claim that certain Islamic practices pose a threat to the constitutional identity in the first place. The selective and often incoherent negative self-identification in opposition to Islam has also been observed by Brubaker:

Christianity is embraced not as a religion but as a civilizational identity understood in anti-theological opposition to Islam. Secularism is embraced as a way of minimizing the visibility of Islam in the public sphere. Liberalism—specifically, philo-Semitism, gender equality, gay rights, and freedom of speech—is selectively embraced as a characterization of “our” way of life in constitutive opposition to the illiberalism that is represented as inherent in Islam.<sup>31</sup>

The resulting “self-identification of the state, which identifies itself in opposition to the visible religion of Islam”<sup>32</sup> has also been criticized by Ralf Michaels:

Face-veil bans reflect a Western state in perceived need of asserting its own conception in defense against the other. In regulating clothes by banning the face veil, the Western state demonstrates a remarkable lack of confidence. It is therefore fruitful to consider how the state defines religion, and itself, and what that demonstrates.<sup>33</sup>

Although Polzin argues that constitutional identity “exists only as a constructed reality and should not be treated as something sacred or absolute,”<sup>34</sup> in the legal discourses on headscarves and face

<sup>26</sup>*Id.* at 1614.

<sup>27</sup>Gary Jeffrey Jacobsohn, *Constitutional Identity*, 68 REV. POL. 361, 370 (2006).

<sup>28</sup>MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 45 (2009).

<sup>29</sup>Polzin, *supra* note 17, at 1612, 1614.

<sup>30</sup>Rosenfeld, *supra* note 18, at 759.

<sup>31</sup>Rogers Brubaker, *Between Nationalism and Civilizationism: The European Populist Moment in Comparative Perspective*, 40 ETHNIC & RACIAL STUD. 1191, 1194 (2017).

<sup>32</sup>Ralf Michaels, *Banning Burqas: The Perspective of Postsecular Comparative Law*, 28 DUKE J. COMP. & INT’L L. 213, 242 (2018).

<sup>33</sup>*Id.*

<sup>34</sup>Polzin, *supra* note 17, at 1615.

veils, policymakers have construed the constitutional identity exactly as something that requires militant defense. Additionally, although constitutional principles have been reinterpreted or invented as a negation of Islam, the fact that the constitutional identity is constructed has been denied by policymakers, who instead have emphasized continuity and coherence where there is none. That the constitutional identity is a construction is not in itself a problem; how could it be anything other than a construction? It is also not in itself problematic that a state wishes to perpetuate certain cultural values through its constitutional politics. The problem arises when this construction becomes an arbitrary tool to exclude a religious minority without proper justification.

## II. Islam as the Civilizational Enemy

As recently demonstrated by Olivier Roy, the arrival of a substantial Muslim presence in Western Europe coincided with a collapse of Christian values and the detachment of religion from culture.<sup>35</sup> This has caused what Effie Fokas describes as “major crises of identity” fueled by an unease with Islam,<sup>36</sup> and thus, according to Roy, Islam has become “a mirror in which the West projects its own identity crisis.”<sup>37</sup>

Although it would be a mistake to ascribe the roots of the modern anxiety with Islam to Samuel Huntington alone, he did provide an often-cited framework for dealing with the Muslim other. By combining a conflation of religion and civilization with an almost apocalyptic sense of urgency, he elevated the purported conflict between “Islam” and the “West” to an existential level. Seen through this prism, the growing presence of devout Muslims in Western Europe is not an annoyance or a challenge to the majority culture, but a threat to the civilization as such, because their loyalty will remain with the Islamic civilization.<sup>38</sup>

One does not need to embrace Huntington’s theory in order to recognize its profound influence on national and international politics since the fall of the Soviet Union. Despite being criticized for reductionism and essentialism, the perceived fault lines between “Western” and “Islamic” civilizations have been rearticulated and actualized in such diverse questions as the identity and membership of the EU, immigration and integration, the so-called war on terror, as well as the visibility of religion in the public sphere. Whether or not these perceptions of Islam are true is of secondary importance because they need not be true to have real effects. These perceptions matter because they influence the policies on issues relating to Islam and Muslims. According to Roy, “the political debate over the potential danger allegedly represented by Muslims is more or less inspired by the intellectual debate about the ‘clash of civilizations.’”<sup>39</sup> John R. Bowen has also observed how the idea has seeped into mainstream political and legal discourse.<sup>40</sup>

## III. Headscarves and the Principle of Neutrality

In 2004, lawmakers in France passed a law, which in the name of *laïcité* bans the wearing of “ostentatious religious symbols” for pupils in public schools.<sup>41</sup> The 2004 Law was the culmination

<sup>35</sup>See generally OLIVIER ROY, *L’EUROPE EST-ELLE CHRÉTIENNE?* (2019).

<sup>36</sup>Effie Fokas, *Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence*, 4 OXFORD J. L. & RELIG. 54, 55 (2015).

<sup>37</sup>OLIVIER ROY, *SECULARISM CONFRONTS ISLAM* (George Holoch Trans., 2007); See also CHRISTIAN JOOPKE, *VEIL: MIRROR OF IDENTITY 2* (2009).

<sup>38</sup>See generally Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. (1993).

<sup>39</sup>ROY, *supra* note 37, at x.

<sup>40</sup>John R. Bowen, *How the French State Justifies Controlling Muslim Bodies: From Harm-Based to Values-Based Reasoning*, 78 SOC. RESEARCH 325, 345 (2011).

<sup>41</sup>Loi 2004-228 du 15 mars 2004 est prise en application du principe constitutionnel de laïcité qui est un des fondements de l’école publique [Law 2004-228 of March 15, 2004 is taken in application of the constitutional principle of secularism which is one of the foundations of public school], MINISTÈRE ÉDUCATION NATIONALE ENSEIGNEMENT SUPÉRIEUR

of what in France had become known as *l'affaire du foulard*—the headscarf controversy—which began in 1989 when three schoolgirls were suspended for refusing to remove their headscarves despite being asked to do so by the teaching staff and the principal of the school. The story captured the public imagination, and soon it turned into a matter of national interest. From the very beginning, the rhetoric was militant and drew on civilizational tropes. The principal responsible for the expulsions maintained that the school system was the first line of defense against “the insidious jihad.”<sup>42</sup> As Roy explains, “The 1980s were a turning point; just when militant *laïcité* seemed about to disappear for want of opponents, it reconstructed itself around a new enemy, Islam.”<sup>43</sup>

Throughout the 1990s, multiple cases reached the Council of State, which kept a relatively liberal approach in line with the original intents of the principle of *laïcité*.<sup>44</sup> Thus, the Council of State developed a distinction between ostentatious and non-ostentatious behavior and “ruled that wearing a headscarf is not automatically *ostentatoire* and that expulsion is permissible only if the student’s action constitutes a threat to public order over and above the mere wearing of the headscarf.”<sup>45</sup> This would only be the case “when the display of religious insignia involved pressure, proselytism, propaganda or provocation, when it disturbed the good order of the school, or posed a threat to health and safety.”<sup>46</sup>

The bill for the 2004 law was a result of the so-called Stasi report, which made several recommendations for the strengthening of *laïcité* on the occasion of the approaching centennial of the 1905 Law on the Separation of the Churches and the State.<sup>47</sup> Motivated by the headscarf controversy, one of these recommendations was that the state should clarify its position on religious symbols in the school.<sup>48</sup> Interestingly, although the report recommended multiple actions to be taken in order to strengthen *laïcité* and combat discrimination,<sup>49</sup> the government was not eager to follow those. This reinforces the idea that *laïcité* as a constitutional identity was defined by the French lawmakers as a negation of Islam rather than a positive project in need of completion.

In the explanatory memorandum to the bill, the drafters distinguished between “conspicuous religious symbols” and “discrete signs of religious affiliation” without clearly defining those terms. And Islamic headscarves per definition belonged to the former group.<sup>50</sup> Thus, the fact-based and balanced approach of the Council of State was cut short by a legislative classification of the headscarf as inherently ostentatious, and as a result, a threat to the constitutional identity of France.

There is no doubt that *laïcité* has been not only a constitutional principle, but also part of the French constitutional identity for a long time.<sup>51</sup> But as Cécile Laborde notes, the hostility to headscarves is also underpinned by a nationalist consideration.<sup>52</sup> Eoin Daly goes even further when

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RECHERCHE BULLETIN OFFICIEL [B.O.] [OFFICIAL BULLETIN FOR THE MINISTRY OF NATIONAL EDUCATION HIGHER EDUCATION RESEARCH OFFICIAL BULLETIN], MAY, 18 2004.

<sup>42</sup>Joan W. Scott, *Symptomatic Politics: The Banning of Islamic Head Scarves in French Public Schools*, 23 FRENCH POL., CULTURE & SOC’Y 106, 106 (2005).

<sup>43</sup>ROY, *supra* note 37, at 29.

<sup>44</sup>Herman T. Salton, *France’s Other Enlightenment: Laïcité, Politics and the Role of Religion in French Law*, 5 J. POL. & L. 30, 33 (2012).

<sup>45</sup>Elisa T. Beller, *The Headscarf Affair: The Conseil d’État on the Role of Religion and Culture in French Society*, 39 TEX. INT’L L.J. 581, 585 (2004).

<sup>46</sup>Cécile Laborde, *Secular Philosophy and Muslim Headscarves in Schools*, 13 J. POL. PHIL. 305, 326 (2005).

<sup>47</sup>Loi du 9 décembre 1905 de séparation des Églises et de l’État [Law of December 9, 1905 of Separation of Church and State].

<sup>48</sup>COMMISSION DE RÉFLEXION, SUR L’APPLICATION DU PRINCIPE DE LAÏCITÉ DANS LA RÉPUBLIQUE: RAPPORT AU PRÉSIDENT DE LA RÉPUBLIQUE (2003).

<sup>49</sup>*Id.* at 66–69.

<sup>50</sup>Loi 137 du 28 janvier 2004 du principe de laïcité dans les écoles, collèges et lycées publics [Law 137 of January 28, 2004 on the principle of laïcité in public schools, colleges, and high schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190.

<sup>51</sup>ROY, *supra* note 37, at 20.

<sup>52</sup>Laborde, *supra* note 46, at 306.



claiming that the ethno-nationalist trend has been intentionally conflated with the constitutional principle of *laïcité* in order to create “an exclusionary criterion of cultural belonging, a disciplinary tool of social cohesion, directed at culturally threateningly [*sic*], ‘ostentatious’ religious practices.”<sup>53</sup> In the course of this transformation of constitutional identity, a reinterpretation of the principle of *laïcité* has become necessary. The development of *laïcité* has become so radical that Stéphanie Hennette Vauchez calls it “new *laïcité*” in order to emphasize:

The shift that has occurred from a human rights-compatible *laïcité* regime, in which all individuals are equal irrespective of their religion in terms of religious belief and expression, to a regime in which *laïcité* becomes the defense of a particular cultural and political identity.<sup>54</sup>

In line with the idea of negation as a method of creating a constitutional identity, one could add that *laïcité* also has been used as a defense against a particular cultural, religious, or political identity.

Before the passing of the 2004 law, the headscarf controversy had already crossed the border into the French-speaking Swiss canton of Geneva, where a local primary school terminated the employment contract of a teacher, Lucia Dahlab, because she had started wearing a headscarf after converting to Islam. Among the reasons given for the school’s decision to terminate her employment was that her headscarf challenged the *laïc* school system of Geneva. Dahlab appealed the decision to the Council of State, whose decision on the matter was subsequently adopted by the Grand Council. In its resolution, the Grand Council gave the authorities its full support in firmly enforcing the principle of *laïcité* against teachers wearing headscarves.<sup>55</sup>

During this process, no decision-making body considered that Dahlab had been wearing a headscarf for a while prior to the termination of her employment contract, and neither colleagues, parents, nor pupils had filed complaints against her for wearing a headscarf. In the subsequent court case at the Swiss Federal Supreme Court (FSC),<sup>56</sup> the government argued that, although there had been no concrete instances of proselytism or other misconduct by Dahlab, her headscarf in and of itself constituted a threat to the principle of *laïcité*. The Court sided with the government and characterized the headscarf as a “powerful religious symbol,” without defining the meaning of “powerful” in this context. In Strasbourg, Dahlab’s case was rejected as manifestly ill-founded.<sup>57</sup>

The headscarf debate in Geneva did not end with the case of Dahlab. In February 2019, a new law was passed.<sup>58</sup> Article 3 demands that all public officials in the executive, judicial, and most notably the legislative branches of cantonal government refrain from showing their religious affiliation through external signs. The original bill for the 2019 law was a consequence of the 2012 amendment of the cantonal constitution of Geneva, which, among other things, inscribed the principle of *laïcité* for the first time. In August 2013, the Geneva Council of State appointed a committee to study the definition of religious communities in a republican framework as well as the appropriate relations to such communities.<sup>59</sup> Directly motivated by the case of Dahlab,

<sup>53</sup>Eoin Daly, *The Ambiguous Reach of Constitutional Secularism in Republican France: Revisiting the Idea of Laïcité and Political Liberalism as Alternatives*, 32 OXFORD J. LEGAL STUD. 583, 592 (2012).

<sup>54</sup>Stephanie Hennette Vauchez, *Is French laïcité Still Liberal? The Republican Project Under Pressure (2004–15)*, 17 HUM. RTS. L. REV. 285, 312 (2017).

<sup>55</sup>Grand Conseil, R319, 53e legislature, 3e année, 11e session, 39e séance (Oct. 10, 1996), <https://ge.ch/grandconseil/memorial/seances/530311/39/18/>.

<sup>56</sup>Bundesgericht [BGer] [Federal Supreme Court] Nov. 12, 1997, 123 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] I 296 (Switz.).

<sup>57</sup>Dahlab v. Switzerland, App. No. 42393/98, (Feb. 15, 2001), <http://hudoc.echr.coe.int/eng?i=001-22643>.

<sup>58</sup>Loi sur la laïcité de l’Etat [LLE][State Secularity Act] Apr. 26, 2018, 11764 (Switz.).

<sup>59</sup>RAPPORT DU GROUPE DE TRAVAIL, SUR LA LAÏCITÉ À L’ATTENTION DU CONSEIL D’ÉTAT DE LA RÉPUBLIQUE ET CANTON DE GENÈVE, 2 (2014).

the committee recommended prohibiting all public employees and public institutions from displaying their religious affiliation.<sup>60</sup>

The committee did not elaborate on the reasoning behind this recommendation, but when the Grand Council discussed the bill in March 2018, the drafters had the opportunity to present their motives and deliberations. When asked about the presence of a bible when taking oath, the committee's reply was that "this is indeed a religious sign," but stressed that "it is not possible to remove all the signs from history."<sup>61</sup> The President of the Grand Council expressed that he understood the need for removing the headscarf, but not the cross, to which the head of the committee replied that this concerned the "the distinction between the ostentatious [*l'ostentatoire*], which is intended to provoke a reaction, and the ostensible [*l'ostensible*]."<sup>62</sup> This appears to draw on the idea that headscarves are inherently a provocation, whereas signs of Christianity may be visible but are harmless. From the sparse reasons given, it seems that the 2012 constitutional amendment and the 2019 law are purely symbolic reinforcements of the constitutional identity of Geneva. It is a restatement of a *laïcité* that is combative towards signs of Islam, but lenient towards Christian symbols. Rather than enforcing *laïcité* generally, the principle is articulated specifically to negate Islam.

As already mentioned, the headscarf debates have not been limited to legal systems, which—as part of their constitutional identity—build on a particularly strong brand of secularism. This is evident from the debates that have taken place in Germany, Denmark, and Austria, none of which can be termed *laic*. Although these restrictions, admittedly, have been less extensive than in France and Geneva, they have, curiously, been justified in the same ways.

About the same time as the first headscarf case was discussed in Geneva, a similar case arose in the German state Baden-Württemberg, where a newly educated schoolteacher, Fereshta Ludin, was denied employment because of her intention to wear a headscarf at work. The local school administration justified the decision by claiming that the headscarf was "not only a religious symbol, but also a political symbol,"<sup>63</sup> whereas Ludin claimed that her constitutionally enshrined freedom of religion had been violated.<sup>64</sup> Although the Federal Constitutional Court (FCC) decided the immediate case in favor of the complainant, it also said that a restriction on headscarves for civil servants could be envisaged if prescribed by law.<sup>65</sup>

The state lawmakers could essentially choose between two interpretations of neutrality within the constitution. Either they could keep the status quo of an open and inclusive neutrality in accordance with German tradition, or they could opt for a stricter French style *laïcité*. In either case, they would have to accept that the constitutional principle of non-discrimination on religious grounds could not be paired with a restriction on headscarves while maintaining a privileged position for Christian symbols.<sup>66</sup>

Based on their responses to this problem, the German states can be divided into three groups: The first group decided not to pass legislation on the matter;<sup>67</sup> the second group opted for a stricter neutrality in the style of France;<sup>68</sup> and the third group attempted to create a legislative

<sup>60</sup>*Id.* at 38.

<sup>61</sup>Grand Conseil, PL 11764-A, Projet de loi du Conseil d'Etat sur la laïcité de l'Etat (LLE), 13 (March 6, 2018).

<sup>62</sup>*Id.* at 14.

<sup>63</sup>Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Case No. 2 BvR 1436/02, para. 3, (Sept. 24, 2003), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924\\_2bvr143602en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924_2bvr143602en.html).

<sup>64</sup>*Id.* at para. 4.

<sup>65</sup>*Id.* at para. 71.

<sup>66</sup>See Christian Joppke, *State Neutrality and Islamic Headscarf Laws in France and Germany*, 36 THEORY & SOC. 313, 328 (2007).

<sup>67</sup>Rhineland-Palatinate, Hamburg, Saxony, Saxony-Anhalt, Schleswig-Holstein, Brandenburg, Mecklenburg-West Pomerania, and Thuringia.

<sup>68</sup>Berlin and Bremen.

solution that would prohibit headscarves while maintaining a privilege for Christian and Western symbols.<sup>69</sup>

The most remarkable is, of course, the third group, which chose the normatively unavailable way of discriminating blatantly against visible signs of Islam. One example of a provision with express emphasis on the inherent unconstitutionality of the headscarf was enacted in Bavaria:

External symbols and garments expressing a religious or ideological conviction may not be worn by teachers in class if the symbols or garments can also be understood by pupils or parents as an expression of an attitude which is incompatible with the fundamental constitutional values and educational goals of the constitution, including the educational and cultural values of the Christian Occident.<sup>70</sup>

In the explanatory memorandum to the bill, it is stated that the Christian “churches and the Jewish communities comply unconditionally with the fundamental values and educational goals of the constitution,” so the provision would not apply to them.<sup>71</sup> Again, we see that the constitutional identity is constructed as a negation of Islam as symbolized by the headscarf.

In the meantime, the headscarf debate had reached Denmark. As opposed to the strict neutrality of France and Geneva as well as the open neutrality of Germany, the Danish constitution does not proclaim neutrality or distance to religion at all. This notwithstanding, there have been several attempts at restricting the use of headscarves. Already in 2004, a far-right party in parliament proposed a ban on religious headgear falling outside the Judeo-Christian culture for all civil servants.<sup>72</sup> The proposal was expressly inspired by France. The Danish Institute for Human Rights assessed that the proposed ban would be inconsistent with Danish law,<sup>73</sup> and the proposal did not gather broader support in the parliament. Nonetheless, in December 2008 the Minister of Justice tabled a bill banning judges and magistrates from wearing religious clothing.<sup>74</sup> The bill was not motivated by any concrete instances or complaints, but because “in recent years, questions of religion have played an increasing role in the national public debate, among others in light of the immigration of people with another religious background, and that questions of religious affiliation etc. in that connection have been significantly more controversial than previously.”<sup>75</sup>

In Austria, “public disputes over religious attire worn in public institutions [had] remained rather modest . . . in contrast to some Western liberal democracies,”<sup>76</sup> but in the spring of 2019 Austria adopted a headscarf restriction. This restriction appears to have been inspired by the French 2004 law as it only applies to schoolchildren. The targeting of Islamic headscarves is made as direct as possible, as the law bans only the “veiling of the head,” which is defined

<sup>69</sup>Baden-Württemberg, Bavaria, Saarland, North Rhine-Westphalia, Hesse, and Lower Saxony.

<sup>70</sup>Bayerisches Gesetz über das Erziehungs- und Unterrichtswesen (BayEUG) [Bavarian Law on Education and Teaching], May 31, 2000, at art. 59, para. 2. (author’s translation).

<sup>71</sup>Bayerischer Landtag, Gesetzentwurf der Staatsregierung zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen [State Government Bill amending the Bavarian Law on Education and Teaching], 15/368, 4 (Feb. 18, 2004) [http://www1.bayern.landtag.de/www/ElanTextAblage\\_WP15/Drucksachen/Basisdrucksachen/0000000001/000000281.pdf](http://www1.bayern.landtag.de/www/ElanTextAblage_WP15/Drucksachen/Basisdrucksachen/0000000001/000000281.pdf) (author’s translation).

<sup>72</sup>Beslutningsforslag nr. B 201 [Motion for Resolution No. B 201], Folketinget 2003-4 [Parliamentary Year 2003-04], Folketingstidende A [Official Publication of the Danish Parliament A], (Den.).

<sup>73</sup>Beskæftigelsesministerens besvarelse af spørgsmål nr. 1 [The Minister of Employment’s Answer to Question No. 1], 19. maj 2004 [May 19, 2004], fra Folketingets Uddannelsesudvalg [from the parliamentary education committee], B 201–bilag 1 [B 201–appendix 1], (Den.).

<sup>74</sup>L 98 Forslag til lov om ændring af retsplejeloven (Dommeres fremtræden i retsmøder) [L 98 Proposal for a law amending the Code of Judicial Procedure (Judges’ appearance at hearings)], Folketinget 2008-09 [Parliamentary Year 2008-09], Dec. 19, 2008, (Den.).

<sup>75</sup>*Id.* (author’s translation).

<sup>76</sup>Gresch et al., *Tu felix Austria? The Headscarf and the Politics of ‘Non-issues’*, 15 SOC. POL.: INT’L STUD. GENDER, ST. & SOC’Y 411, 412 (2008).

as “every type of clothing, which covers the entire hair or a large part of it.”<sup>77</sup> The ban also only applies to “ideologically and religiously influenced clothing,”<sup>78</sup> and the assessment of the religious nature of the clothing “does not depend on the intention of the wearer.”<sup>79</sup> Although the explanatory memorandum to the bill focuses on the rights of children, the symbolic nature of this law became clear in the ensuing parliamentary debate. According to one proponent, the headscarf ban is “an important sign in the battle against political Islam,” and another proponent of the ban described it as an “important symbolic measure.”<sup>80</sup>

These examples show that the negative methods of constructing a constitutional identity dominate when it comes to Islam. Although countries such as Austria, Germany, and Denmark have never had combative secularism as a part of their constitutional identities, the policymakers have drawn on justifications from France and Geneva in order to express an opposition to Islam. Nonetheless, by not being able to provide a coherent counter-image, proponents of Christian privilege ironically end up furthering a secularization of the state in their attempt to combat Islam. Thus, the claim of defending the neutrality of the state comes with its own paradoxes, which can make it difficult for some legal systems to apply it forcefully. This problem has been overcome in the legal discourse on face veils.

#### IV. Face Veils and the Idea of “Living Together”

During the 2000s, the discourse on headscarves morphed into a discourse on face veils. The link between the two discourses can be demonstrated with examples from France and Belgium, where the unease with face veils first took legal shape. In the very first Belgian proposal for a nationwide general ban on face veils, the drafters referred to the ongoing headscarf controversy in Belgium and abroad and called for a clear stance as the one purportedly taken by the German FCC in its 2003 headscarf decision.<sup>81</sup> The first proposal for a face veil ban in France referred to the 2004 law and relied expressly on the principle of *laïcité*.<sup>82</sup> The true transformation, however, took place in the so-called Gerin report, which was produced by a French parliamentary committee headed by the delegate André Gerin.<sup>83</sup>

The Gerin report is integral to understanding the European face veil discourse. In the report, we see an important shift from justifying restrictions with *laïcité* to justifying them with a particular republican conception of “living together” (*vivre ensemble*). In order to facilitate this shift, the authors of the report had to underplay the religious aspects of the face veil and emphasize its political uses:

This touches on the political dimension of the practice of wearing the full veil in many respects. In the eyes of many specialists and members of the committee, the full veil is not reduced to mere dress: It affirms in the public space values that separate those who wear it from the rest of society. . . . In so doing, it signals the militant and proselytizing character of a missionary movement which, in its efforts to establish the existence of a Muslim community separated from the rest of society by specific rights and duties, challenges individual freedoms and undermines the foundations of the Republic.<sup>84</sup>

<sup>77</sup>Schulunterrichtsgesetz, Änderung [School Education Act, Amendment] Nov. 22, 2018 No. 495/A, as amended, [https://www.parlament.gv.at/PAKT/VHG/XXVI/A/A\\_00495/index.shtml](https://www.parlament.gv.at/PAKT/VHG/XXVI/A/A_00495/index.shtml) (Austria).

<sup>78</sup>*Id.*

<sup>79</sup>*Id.*

<sup>80</sup>Parlamentsskorrespondenz Nr. 33 [Parliamentary Correspondence No. 33], Jan. 16, 2019, [https://www.parlament.gv.at/PAKT/PR/JAHR\\_2019/PK0033/#XXVI\\_A\\_00495](https://www.parlament.gv.at/PAKT/PR/JAHR_2019/PK0033/#XXVI_A_00495) (Austria).

<sup>81</sup>Document parlementaire No. 51-880, Chambre 2003-04 (Belg.).

<sup>82</sup>Loi 3056 du 4 mai 2006 de atteintes à la dignité de la femme résultant de certaines pratiques religieuses [Law 3056 of May 4, 2006 on the attacks on the dignity of women resulting from certain religious practices].

<sup>83</sup>Loi 2262 du 26 janvier 2010 Sur La Pratique Du Port Du Voile Intégral Sur Le Territoire National [Law 2262 of January 26, 2010 on the practice of wearing the full veil in the national territory].

<sup>84</sup>*Id.* at 59 (author’s translation).

According to Jennifer A. Selby, this portrayal of face veils as a dangerous political problem “conceptualizes a problem (the full-face veil) and a clear solution (complete removal) by a sound and just government.”<sup>85</sup> As the co-rapporteur of the Gerin report explained when presenting the report to the public: “We want to fight Islamic fundamentalism. And the burqa is a manifestation of that fundamentalism.”<sup>86</sup>

Although the Gerin report had laid down the political groundwork for a face veil ban, the French had still to overcome the legal obstacles, which had stopped several other European face veil bans in their tracks. Therefore, the French Prime Minister François Fillon commissioned the Council of State to provide a legal basis “as wide and effective as possible” for banning Islamic face veils as they were deemed contrary to the values of the Republic.<sup>87</sup>

Whereas the French 2004 law had merely drawn on an ongoing redefinition of the existing principle of *laïcité*, the 2010 law required the invention of a completely new legal principle. A specific ban on Islamic face veils was rejected as directly discriminatory,<sup>88</sup> and the justifications—such as gender equality and national security—offered for a general ban on the veil were considered inadequate.<sup>89</sup> Reluctantly, the Council of State formulated the possibility of interpreting the non-material dimension of public policy to include “the minimum requirement for the reciprocal demands and essential guarantees of life in society.”<sup>90</sup> Thus, a legal formula for justifying a general face veil ban had been found and would be upheld by both the French Constitutional Council and the European Court of Human Rights.

The legislative history of the French face veil ban cannot be meaningfully separated from the Belgian one. Parallel to the debate in France, multiple proposals were tabled in the Belgian parliament, several of which referred to the idea of living together. Due to various political circumstances, however, it was not until 2011 that a law was actually passed. When the bill was discussed in parliament, one of its drafters openly admitted that the justification of national security was only chosen to make the bill as “incontestable” as possible.<sup>91</sup> The real reason for the bill was the purported repugnancy against societal values associated with the face veil.

Although Germany ultimately did not introduce a general face veil ban,<sup>92</sup> prominent politicians were clear about their view on the matter. While Federal Chancellor Angela Merkel merely noted that face veils constitute an obstacle to the integration of the women in question,<sup>93</sup> Federal Minister of Interior Thomas de Maizière provided the clearest example of self-identification by negation with the infamous and grammatically curious statement “we are not burqa” (*wir sind nicht Burka*) among his ten statements of German *Leitkultur*.<sup>94</sup>

As already mentioned, Austria had been known for a long time as more liberal and tolerant towards religious attire. Apart from a single quip about banning the face veil from the Minister of Interior Johannes Hahn,<sup>95</sup> face veils had been considered a “non-issue.”<sup>96</sup> As observed in 2008,

<sup>85</sup>Jennifer A. Selby, *Islam in France Reconfigured: Republican Islam in the 2010 Gerin Report*, 31 J. MUSLIM MINORITY AFF. 383, 387 (2011).

<sup>86</sup>Kyle James, *French commission recommends banning the burqa*, DEUTSCHE WELLE (Jan. 26, 2010), <https://www.dw.com/en/french-commission-recommends-banning-the-burqa/a-5169860>.

<sup>87</sup>CONSEIL D'ÉTAT, ETUDE RELATIVE AUX POSSIBILITÉS JURIDIQUES D'INTERDICTION DU PORT DU VOILE INTEGRAL, Annex I, as adopted, par l'Assemblée générale plénière du Conseil d'Etat (2010) [official translation].

<sup>88</sup>*Id.* at 19.

<sup>89</sup>*Id.* at 21–23.

<sup>90</sup>*Id.* at 29.

<sup>91</sup>Document parlementaire, Chambre, Séance plénière 30, 2e Session, 53e Législature, 60 (Belg.).

<sup>92</sup>See *infra* Section E(IV).

<sup>93</sup>Merkel nennt Burka ein Integrationshemmnis, DER SPIEGEL (Aug. 18, 2016), <https://www.spiegel.de/politik/ausland/angela-merkel-nennt-burka-ein-integrations-hemmnis-a-1108392.html>.

<sup>94</sup>Thomas de Maizière, *Leitkultur für Deutschland, was ist das eigentlich?*, BILD (April 29, 2017), <https://www.bild.de/politik/inland/thomas-de-maiziere/leitkultur-fuer-deutschland-51509022.bild.html>.

<sup>95</sup>Martina Salomon, *Hahn will Burka-Verbot in der Öffentlichkeit*, DIE PRESSE (April 18, 2008), <https://diepresse.com/home/innenpolitik/377884/Hahn-will-Burka-Verbot-in-der-Oeffentlichkeit>.

<sup>96</sup>Gresch et al., *supra* note 76.

however, “this silent compromise [was] getting fragile due to the re-framing strategies of right-wing parties in the context of an ethno-cultural citizenship regime.”<sup>97</sup> This is quite visible in the parliamentary debate on the Austrian 2017 law banning the wearing of a face veil in public in order to promote integration by strengthening the participation in society and ensuring peaceful coexistence.<sup>98</sup> During the debates, the Federal Minister for Europe, Integration, and Foreign Affairs, Sebastian Kurz, repeatedly called face veils symbols of the “counter-society,”<sup>99</sup> and presented the ban as a communication of values (*Wertevermittlung*).<sup>100</sup>

Although Denmark was among one of the first countries where the parliament discussed legislating against face veils, it was not until 2018 that a general ban was actually enacted. This was not so much due to lack of political will as due to the perceived legal constraints. Nonetheless, with inspiration from the French and Belgian face veil bans, these constraints were overcome by justifying the ban with reference to strengthening coexistence and combatting parallel societies. When the Danish face veil bill was presented in parliament by the government, the Minister of Justice painted a dystopian picture: “We say no to walking symbols of parallel societies and a Shadow Denmark beyond law and order.”<sup>101</sup>

In Switzerland, the face veil debate has fluctuated for a while, and the mixture of strong federalism and semi-direct democracy creates a mosaic impression. In the summer of 2016, the Italian-speaking canton of Ticino introduced a general face veil ban inspired by the French 2010 law.<sup>102</sup> In parallel with the debate in Ticino, a member of the National Council, together with twenty-five co-signers, tabled a proposal for banning face veils on the federal level. Justifying the proposal, which was tabled in December 2014 and prompted by the decision in *S.A.S. v. France*, the drafters wrote that adopting one federal ban—as opposed to different rules in the cantons—would create clarity and reduce confusion.<sup>103</sup> When presenting the proposal to the National Council in September 2016, another reason for introducing a ban was given: “In our culture, you show your face in the public space. The veiling of the face contradicts our liberal-democratic social order deeply.”<sup>104</sup>

The proposal passed with a narrow majority in the National Council and was submitted to the Council of States, which debated it in March 2017. During the debate, another proponent of the face veil ban justified his support in this way: “Minarets and the complete veiling of the woman’s face are downright symbols for a different social model, for different social values. They are diametrically opposed to our Christian-Occidental culture and social order.”<sup>105</sup> The proposal, however, was met with significant opposition in the Council of States—not so much to defend the freedom of religion as to protect the federalist respect for the cantons—and was ultimately rejected.

While the parliamentary process was still ongoing, a civil society organization collected the required 100,000 signatures to demand a referendum on the question of face veils within two years from October 11, 2017. One of their motives for banning the face veil clearly drew on the

<sup>97</sup>*Id.* at 427.

<sup>98</sup>Bundesgesetz über das Verbot der Verhüllung des Gesichts in der Öffentlichkeit [AGesVG] [Federal law prohibiting the masking of the face in public] July 11, 2020 BUNDESGESETZBLATT I [BGBl I] No. 68/2017, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009892> (Austria).

<sup>99</sup>Nationalrat [NR][National Council] Gesetzgebungsperiode [GP] 25 Beilage [Blg] No. 1586 (Austria).

<sup>100</sup>Bundesrat [BR][Federal Council] Gesetzgebungsperiode [GP] 25 Beilage [Blg] No. 1586 (Austria).

<sup>101</sup>Fremsættelsestale [presentation speech], L 219 den 11 april 2018, Forslag til lov om ændring af straffeloven (Tildækningsforbud) [L 219 April 11, 2018, Proposal for amending the Criminal Code (Prohibition on Cover)] (Den.)(Author’s translation).

<sup>102</sup>Ulrike Spohn, *Die Burka als aktuelle Herausforderung für die Religionspolitik in Europa*, in *RELIGIONSPOLITIK HEUTE: PROBLEMFELDER UND PERSPEKTIVEN IN DEUTSCHLAND* 314, 315 (Daniel Gerster et al. eds., 2018).

<sup>103</sup>Parlamentarische Initiative [Parliamentary Initiative], *Verbot der Verhüllung des eigenen Gesichts* [Prohibition of covering your own face], No. 14.467 (Dec. 11, 2012)(Den.).

<sup>104</sup>Amtliches Bulletin, Nationalrat, Herbstsession 2016, Zwölfte Sitzung, 14.467 (Sept. 29, 2016).

<sup>105</sup>Amtliches Bulletin, Ständerat, Frühjahrssession 2017, Siebente Sitzung, 14.467 (March 9, 2017).

perceived civilizational divide between “the West” and “Islam,” and was described as: “In enlightened European states such as Switzerland, one of the central, inalienable fundamental values of coexistence is to show one’s face.”<sup>106</sup>

#### V. Battle of Symbols

Throughout the lawmaking processes, policymakers have been notoriously uninterested in the opinions of the women who wear face veils or headscarves as well as the provable and objectifiable effects of these practices.<sup>107</sup> No concrete examples have been provided to support the claim of imminent danger, which would normally be required when invoking militant democracy. In other words, the concern has not been the factual threat of the religious practices, but rather the symbolic effect of restricting them.

The shift in focus to face veils rather than headscarves allowed the militant democracy claim to become simultaneously more abstract and detached from any existing constitutional basis, and as a result, more purely culturally majoritarian and decisionist than it had ever been before. This, in turn, made the justification appealing to a broader range of legal systems, because it did not come with the same paradoxes as the claim of neutrality had.

The fact that these laws and regulations are entirely symbolic is not a groundbreaking conclusion; the most recent literature on the subject supports this assessment. Michaels calls the face veil bans “purely symbolic, so clearly ineffective at fending off a real danger,” and adds that even if “political Islam is viewed as a real risk for the Western state, that danger lies with terrorists with bombs and preachers with hate speech, not with women who wear a veil.”<sup>108</sup> Cox agrees and calls the symbolic effect of the laws enormous.<sup>109</sup> Invernizzi Accetti and Zuckerman do not hesitate to label the laws as outright abuse of majoritarian power: “The framework of militant democracy, then, can and at times does provide an ostensibly democratic and constitutional fig leaf to an essentially decisionistic and anti-democratic politics, restricting the scope of democratic membership within a misleadingly democratic guise.”<sup>110</sup> So, the question remains: how could this very questionable application of militant democracy gain legal currency across Europe?

### D. Delimiting Militant Democracy

#### I. Two Guardian Visions

Jan-Werner Müller warns us that “all measures of militant democracy are at risk of being abused for political purposes (or for purely symbolic, which is to say ineffective, politics along the lines of ‘something has to be done!’).”<sup>111</sup> Therefore, “extremely careful attention has to be paid to safeguarding against such abuse.”<sup>112</sup>

The risk of abuse is not exclusive to the case of headscarves and face veils. In fact, militant democracy is historically and conceptually closely linked to the question of constitutional review. In the years between the two world wars, Hans Kelsen and Carl Schmitt engaged in a protracted debate, where the two scholars developed their opposing visions of how to safeguard the constitution. Although the debate occurred in the specific context of the tumultuous interwar period and with the Weimar constitution as the concrete frame of reference, it has since come to stand as the paradigmatic opposition of two guardian visions.

<sup>106</sup>Egerkinger Komitee, *Ja zum Verhüllungsverbot: Kurz-Argumentarium* (April 2018) (on file with the author).

<sup>107</sup>See Sâila Ouald Chaib & Eva Brems, *Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe*, 2 J. MUSLIMS EUR. 1 (2013); THE EXPERIENCES OF FACE VEIL WEARERS IN EUROPE AND THE LAW (EVA BREMS ed., 2014).

<sup>108</sup>Michaels, *supra* note 32, at 242.

<sup>109</sup>COX, *supra* note 14, at 247.

<sup>110</sup>Accetti & Zuckerman, *supra* note 7, at 193.

<sup>111</sup>Müller, *supra* note 21, at 1266.

<sup>112</sup>*Id.*

Kelsen essentially argues that the most appropriate institution would be a centralized constitutional court with the power to annul unconstitutional legislation. The theory is closely tied to the hierarchy of norms.<sup>113</sup> In order to ensure the legality of the totality of the state's functions, and thus, ultimately the full legal bindingness of the constitution, one needs a guarantee. This guarantee should be organized as a specialized, centralized constitutional court overseeing the formal and substantial constitutionality of laws. Apart from its expertise, the primary quality of a constitutional court is its political independence and autonomy from other branches of government, because it would be “politically naïve” to expect the parliament to annul its own unconstitutional acts.<sup>114</sup>

It is, however, exactly the question of independence that is Schmitt's central argument against a constitutional court—or the judiciary in general—as the guardian of the constitution. Schmitt agrees that the guardian must be independent and politically neutral, but he does not believe that a constitutional court would fulfil these requirements in their proper sense.<sup>115</sup> To Schmitt, a constitutional court is essentially a political authority acting as constitutional legislator—an “aristocracy of the robe.”<sup>116</sup> Instead, he argues that the president ought to be the guardian of the constitution, because this office enjoys the independence and the immediate plebiscitary connection with the unified political will of the people.<sup>117</sup> Thus, Schmitt favors a political rather than judicial review of constitutionality.

Kelsen's guardian vision has since become a cornerstone in modern constitutional theory,<sup>118</sup> although in a way that Kelsen himself had hardly expected, because “constitutional review has evolved from an institution primarily directed at enforcing structural provisions of constitutions, such as federalism, to a close identification with rights and democracy.”<sup>119</sup>

Kelsen himself identified two possible objections to his proposed constitutional court, both belonging to what Mauro Cappelletti has called the “mighty problem of judicial review”:<sup>120</sup> 1) Inconsistency with parliamentary sovereignty, and 2) transgression of the separation of powers.<sup>121</sup> Predictably, Kelsen refutes both objections. Nonetheless, these exact objections resurface regularly in the literature on constitutional theory. Michel Troper frames the problem as a matter of reconciliation between safeguarding the supremacy of the constitution while not inhibiting democracy. Troper argues that one must justify why supremacy of the constitution is desirable in a democracy in the first place. Even then, the argument comes in two variations. Either democracy is directly reinforced by constitutional review, or that constitutional review is not necessary for democracy, but it is necessary to attain other ends compatible with democracy. Troper argues that—depending on the exact definition of democracy—constitutional review will serve as a limitation on the majority principle of democracy rather than a reinforcement of it.<sup>122</sup> One therefore needs to demonstrate that this is indeed a desirable goal. In arguing this, however, one will meet obstacles. In particular, the mistrust of majorities in the legislature could be applied to constituent

<sup>113</sup>Hans Kelsen, *Kelsen on the Nature and Development of Constitutional Adjudication*, in *THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW* 22, 28 (Lars Vinx ed., Lars Vinx trans., 2015).

<sup>114</sup>*Id.* at 45.

<sup>115</sup>Carl Schmitt, *The Guardian of the Constitution: Schmitt on Pluralism and the President as the Guardian of the Constitution*, in *THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW* 125, 164 (Lars Vinx ed., Lars Vinx trans., 2015).

<sup>116</sup>*Id.* at 168.

<sup>117</sup>*Id.* at 173.

<sup>118</sup>ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 37 (2000).

<sup>119</sup>Tom Ginsburg, *The Global Spread of Constitutional Review*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 81, 88 (Gregory A. Caldeira et al. eds., 2008).

<sup>120</sup>See generally Mauro Cappelletti, *The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis*, 6 *LEGAL ISSUES ECON. INTEGRATION* 1 (1979).

<sup>121</sup>Kelsen, *supra* note 113, at 45.

<sup>122</sup>Michel Troper, *The Logic of Justification of Judicial Review*, 1 *ICON* 99, 114 (2003).



assemblies and thus undermine the legitimacy of the constitution itself. Additionally, there is no evidence that judges would be more willing to side with minorities in cases of different ideas about the common good.<sup>123</sup>

Nonetheless, Troper does not argue for the abolishment of constitutional adjudication, but rather for a more careful consideration, because the continued failure to reconcile the supremacy of the constitution and uninhibited democracy is “a failure of doctrine, not the institution itself.”<sup>124</sup> These objections remind us that constitutional review by the judiciary is not a panacea for political pathologies. Although I maintain that the judiciary, generally speaking, is the best suited branch to keep a check on political excesses, exceptional situations may nevertheless arise. The claim that the courts lack democratic legitimacy can force them to defer controversial political decisions to the policymakers without proper review. Thus, although the Kelsenian guardian vision won out on paper, the Schmittian specter still haunts the courts’ self-perception.

## II. Delimiting Militant Democracy

Whereas Troper’s objections to the Kelsenian guardian vision primarily are a question of theory, recent arguments in favor of judicial review—in particular as a means to overcome the paradox of militant democracy—are rather pragmatic.

Dieter Grimm agrees with Troper that judicial review is not indispensable for democracy,<sup>125</sup> but he argues that it does come with a number of democratic advantages. Because lawmakers operate under competitive circumstances, they may be less inclined to apply the constitution objectively. This does not mean that they intend to breach the constitution, but rather that they will understand it in a way favorable to their political purposes. Thus, there is a constant risk of letting political expediency take precedence over the respect for fundamental rights. This seems particularly pertinent in cases where the policymakers claim to apply militant democracy. In such cases, “[c]onstitutional law functions as a subsequent corrective” to legislative politics, but it needs a third-party arbiter to apply it.<sup>126</sup>

Another democratic advantage of constitutional review that Grimm puts forward is that, although constitutions from the beginning have encompassed certain fundamental rights, “constitutional history teaches that most bills of rights remained a merely symbolic, legally irrelevant part of constitutional laws as long as they were not accompanied by constitutional adjudication.”<sup>127</sup> Tim Koopmans agrees that in “most countries, the judiciary is considered as the principal institutional device for protecting citizens against violation of their rights and liberties.”<sup>128</sup>

Turning specifically to militant democracy, Patrick Macklem shares the notion that it is a first-order task for national courts to define the legal contours of militant democracy “to the extent they bear the constitutional responsibility for policing the exercise of legislative and executive power,”<sup>129</sup> and Müller writes: “Clearly, it helps if the decisions about militancy are removed from day-to-day decision-making by executives and legislatures.”<sup>130</sup> Also, Samuel Issacharof emphasizes the judiciary’s role as an “independent arbiter of the legitimacy of the government’s professed need to suppress an antidemocratic threat.”<sup>131</sup>

<sup>123</sup>*Id.* at 115–16.

<sup>124</sup>*Id.* at 121.

<sup>125</sup>Dieter Grimm, *Constitutional Adjudication and Democracy*, in JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE: LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY 103, 108 (Mads Andenas ed., 2000).

<sup>126</sup>*Id.* at 110.

<sup>127</sup>*Id.* at 111.

<sup>128</sup>TIM KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW* 216 (2003).

<sup>129</sup>Patrick Macklem, *Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe*, 19 CONSTITUTIONS 575, 576 (2012).

<sup>130</sup>Müller, *supra* note 21.

<sup>131</sup>Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1453 (2007).

Finally, Michel Rosenfeld argues that the “strongest case for entrusting a matter to judicial politics arises where the issue to be adjudicated ought to be preferably submitted to an anti-majoritarian institution and when it can be best accommodated within the language game of judicial politics,” because “[u]npopular views, historically reviled religious minorities, and traditionally persecuted racial and ethnic minorities seem bound to fare better with judges who are insulated from majoritarian pressures.”<sup>132</sup>

### III. Proportionality Analysis and Militant Democracy

Although it has been argued that courts lack democratic legitimacy in a narrow sense, they possess other types of legitimacy. The fact that judges are—ideally—insulated from day-to-day politics and enjoy a high level of institutional autonomy speaks in favor of the judiciary as a neutral and disinterested arbiter of conflicts, including complaints by individuals against the state. Another type of legitimacy stems from the fact that judges must give legal reasons for their decisions.<sup>133</sup> Thus, the judges speak through their decisions in the language with the highest normative status perceivable in a secular state, which is what Rosenfeld calls “the language game of law.”<sup>134</sup>

A key element in the language game of law is the method of reasoning. Depending on the area of law and the particular legal culture,<sup>135</sup> judges may use a number of different methods and styles. Still, in the available repertoire, proportionality analysis has established its dominance within the area of rights-based adjudication in all constitutional states,<sup>136</sup> even to the point of being accused of “doctrinal imperialism.”<sup>137</sup> Although significant national differences persist, proportionality analysis has become the gold standard for how to scrutinize alleged violations of fundamental rights.<sup>138</sup>

A full proportionality analysis consists of four elements: 1) Does the restriction serve a legitimate aim? 2) Is the chosen method suitable for achieving the aim? 3) Could a less restrictive method achieve the aim with the same efficiency? 4) Is the good achieved by the restriction proportionate to the weight of the right being restricted? In German jurisprudence, these elements are strictly cumulative,<sup>139</sup> whereas other courts—including the ECtHR—tend to use it rather as a structured framework for an overall balancing and reasonability test.<sup>140</sup> In France, the constitutional council may even rely on the “manifest error” (*l’erreur manifeste*) test, meaning that a law cannot be “challenged in the absence of unmistakable error.”<sup>141</sup>

Due to the nature of militant democracy, the four elements of proportionality analysis are arguably the best way of testing whether the invocation is genuine and legitimate because a properly performed proportionality analysis captures both the normative and factual aspects of a justification based on militant democracy. Thus, the policymakers must not only demonstrate that the intervention does indeed protect the democracy from a serious threat, they must also prove that an intervention is necessary to prevent the threat from materializing—in terms of urgency and

<sup>132</sup>Michel Rosenfeld, *Judicial Politics Versus Ordinary Politics: Is the Constitutional Judge Caught in the Middle?*, in JUDICIAL POWER 36, 46-47 (Christine Landfried ed., 2019).

<sup>133</sup>SWEET, *supra* note 118, at 62.

<sup>134</sup>Rosenfeld, *supra* note 132, at 40.

<sup>135</sup>András Jakab, *Judicial Reasoning in Constitutional Courts: A European Perspective*, 14 GERMAN L.J. 1215, 1230 (2013).

<sup>136</sup>Rosenfeld, *supra* note 132, at 42.

<sup>137</sup>MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 150 (2013).

<sup>138</sup>DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004).

<sup>139</sup>Michaela Hailbronner & Stefan Martini, *The German Federal Constitutional Court*, in COMPARATIVE CONSTITUTIONAL REASONING 356, 387 (András Jakab et al. eds., 2017).

<sup>140</sup>Stefan Sottiaux & Gerhard van der Schyff, *Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights*, 31 HASTINGS INT’L & COMP. L. REV. 115, 131 (2008).

<sup>141</sup>Dominique Rousseau, *The Constitutional Judge: Master or Slave of the Constitution*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 261, 265 (Michel Rosenfeld ed., 1994).

probable consequences of non-intervention—and that the restrictions put on political opponents are not excessive. In the context of militant democracy, the two last elements of proportionality analysis could be read as a way of preventing the democracy from undermining its own core values through a draconian overreaction. Even in its less systematic form, an overall balancing test would at least require that the policymakers invoking militant democracy prove the factual existence of an imminent threat as well as its gravity, against which one could balance the necessary infringement of fundamental rights.

The invocation of militant democracy in the case studies constitutes an abuse of the concept because its primary purpose is to veil the underlying pathologies of the laws. Thus, the way this concept has been used cannot stand up to a proportionality analysis.

When assessing the legitimacy of the aim, one must necessarily distinguish between the stated reason and the ulterior motive. As demonstrated above, policymakers have occasionally attempted to justify restrictions on headscarves and face veils with reference to various interests, including gender equality and security. These arguments, however, have only been advanced to bolster the legality of the measures, not because they were the actual motives. Furthermore, all the laws carry an appearance of neutrality and general applicability. However, when seen in the context of their preparatory works as well as the surrounding public discourse, it is evident that these laws have a discriminatory intent, and their purpose is to defend a non-Islamic or even anti-Islamic constitutional identity. In fact, these two elements are inseparable because the constitutional identity has often purposefully been constructed as a negation of Islam.

Although discrimination on the basis of religion is never a proper purpose, and although deceptive neutrality should not be taken into account, one could—for argument's sake—disregard the discriminatory intent for a moment and focus on the other elements of the proportionality test. Thus, it must be considered whether the laws are suitable for achieving their purpose; for example, whether there exists a rational connection between the aim and the effects of the restriction. Is it plausible that Muslim women who wear a headscarf or face veil constitute a fundamental threat to the states in question? Do the laws in question address a real problem in a fair, objective, and rational way? Ralf Michaels has given an unequivocal answer to this question:

[T]he ban on face veils appears implausible because it is so purely symbolic, so clearly ineffective at fending off a real danger. Even if political Islam is viewed as a real risk for the Western state, that danger lies with terrorists with bombs and preachers with hate speech, not with women who wear a veil.<sup>142</sup>

Although it is irrelevant to discuss the necessity of a rights restriction which does not have a legitimate aim and no rational connection between aim and restriction, it should be noted that the laws in question also do not fulfill the criterion of necessity. This assessment can only be made if we choose to assume that the laws do pursue a legitimate aim, and that there is a rational connection between that aim and the function of the law. In the debate on male circumcision, we have seen policymakers advance with caution, preferring dialogue and information campaigns over hard restrictions. This is a stark contrast to the approach to headscarves and face veils, where policymakers have gone directly to hard restrictions in the form of restrictions to the access to employment and education, or even penalties under criminal law. This ties directly into the assessment of the final criterion, namely the proportionality between means and aim in a narrow sense. Thus, the conclusion is that the use of militant democracy to justify the restrictions on headscarves and face veils fails on all criteria in a proper proportionality analysis.

Although the requirement of proportionality applies to all branches of government and in the first instance to the policymakers, I have argued that the judiciary is both in theory and practice the most appropriate branch to apply remedial proportionality analysis and root out pathologies

<sup>142</sup>Michaels, *supra* note 32, at 242.

in the process of policymaking. We have seen that variations in institutional strength of the judiciaries affect their ability to try legislation. The overall conclusion, however, was that the courts in question are reasonably equipped to perform the task from an institutional perspective, making it unlikely that institutional strength is the most decisive element in the cases of headscarves and face veils.

Therefore, not only is the judiciary arguably the most appropriate institution to review the application of militant democracy by the policymakers, its preferred method of reasoning is also the most apt tool for scrutinizing the legitimacy of the object and methods of the particular interference. Accordingly, the next question is how the courts have, in fact, reacted to claims by Muslim women whose religious freedom has been restricted in the name of militant democracy. In other words, have the relevant courts scrutinized the claim that headscarves and face veils in and of themselves pose a threat to the constitutional identity so imminent and concrete that it warrants a preemptive restriction on the right to manifest one's religion? Or have they deferred this assessment to the policymakers?

## E. Deference in Cases of Militant Democracy

### 1. Mitigating Political Backlash

In practice, the judiciary may have reasons for relaxing the scrutiny of political claims. Among those reasons, the legitimacy of the respective judicial institutions—as perceived by other branches of government or the public in general—appears to be the most influential. The perceived legitimacy of the judiciary is important because it determines to what extent the court can translate its institutional strength into real power. As Sascha Kneip argues in his comparative study of constitutional review:

For the assertiveness of a constitutional court in a particular government process, its empirical legitimacy is also of decisive importance, since political actors cannot ignore court rulings without political risks or costs if the constitutional court has a high reputation among the population—or at least a higher reputation than the political actors themselves.<sup>143</sup>

Several scholars share Kneip's view. Georg Vanberg writes that the “power of the constitutional courts is considerable but constrained.”<sup>144</sup> This is the case because the judiciary relies on the other branches of government for the implementation of its decisions, which in turn, means that it cannot consistently rule against the political will of the majority. This is also the reason why Dominique Rousseau paradoxically calls the French Constitutional Council an “unfree master” of the constitution, as it must interpret the constitution, but is not entirely free to do so.<sup>145</sup> Although the Council's decisions are binding on other branches of government, it must limit itself in order to retain its legitimacy as constitutional interpreter among the institutions on which it depends.<sup>146</sup> From this, Alec Stone Sweet draws the conclusion that “[c]onstitutional judges and legislators are partners—in cooperation or rivalry—in the development of constitutional rights.”<sup>147</sup>

Faced with a question of an existential threat to the constitutional identity, the judiciary needs to mitigate potential backlash from clashing too hard with large legislative majorities or widely held opinions in the public. As Constance Grewe argues, if judges sense that the judicial legitimacy

<sup>143</sup>Sascha Kneip, *Verfassungsgerichtsbarkeit im Vergleich*, in *DIE EU-STAAATEN IM VERGLEICH: STRUKTUREN, PROZESSE, POLITIKINHALTE* 631, 635-36 (Oscar W. Gabriel & Sabine Kropp eds., 2008) [author's translation].

<sup>144</sup>GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 175 (2005).

<sup>145</sup>Rousseau, *supra* note 141, at 263.

<sup>146</sup>*Id.* at 270.

<sup>147</sup>Alec Stone Sweet, *Constitutional Politics in France and Germany*, in *ON LAW, POLITICS, AND JUDICIALIZATION* 184, 206 (Martin M. Shapiro & Alec Stone Sweet eds., 2002).

is at stake, they will reduce the level of scrutiny. This will particularly be in the case of socially and politically controversial topics.<sup>148</sup> This observation is shared by Müller, who notes that “in times of genuine (or just genuinely felt) threat and emergency courts tend to defer to the executive.”<sup>149</sup> This tendency of deference is clearly visible in the cases on headscarves and face veils.

## II. Domestic Courts

In Switzerland, the FSC interprets its role in light of parliamentary sovereignty and frequently abstains from giving its opinion on the subjects that it deems too political.<sup>150</sup> Still, it would be wrong to say that the Court in the case of *X v. the Council of State* merely deferred without considering the substance. Nonetheless, in its reasoning, the Court relies on the political characterization of the headscarf as a “powerful religious symbol” without seeking to qualify this claim.<sup>151</sup> Thus, the Court accepts that the headscarf is an inherently subversive practice without scrutinizing that claim. When the case reached Strasbourg, the ECtHR did not try it in its substance with reference to the margin of appreciation.<sup>152</sup>

A more extreme case of deference happened when the French Constitutional Council reviewed the French face veil ban. After having reproduced the political arguments without scrutiny, the Council performed the entire proportionality test in a single sentence:

In view of the purposes which it is sought to achieve and taking into account the penalty introduced for non-compliance with the rule laid down by law, Parliament has enacted provisions which ensure a conciliation which is not disproportionate between safeguarding public order and guaranteeing constitutionally protected rights.<sup>153</sup>

Aurore Gaillet identifies multiple flaws in the decision, including in particular the meager proportionality test, which does not live up to current standards. Instead of considering the necessity and the relationship between means and end as well as performing a careful balancing of interests, the Council merely checks whether the means are manifestly disproportionate.<sup>154</sup> Saïla Ouald Chaïb and Eva Brems similarly chide the Council for choosing “only to reiterate the legislator’s assumptions.”<sup>155</sup> Gaillet ascribes the shortcomings of the decision to the circumstances under which it came about. Because the law was submitted to review by its own proponents, she argues that this has created a spillover effect, where parliamentary consensus is conflated with constitutionality.<sup>156</sup> Furthermore, the abstract type of review allows the Council to consider the arguments on an abstract and hypothetical level without being forced to consider the arguments from a concrete complainant.<sup>157</sup>

Nonetheless, it is worth noting that although the case on the face veil ban in Belgium did result from a number of concrete complaints *ex post*, the Constitutional Court only refers to the

<sup>148</sup>Constance Grewe, *Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofes für Menschenrechte*, 61 ZAÖRV 459, 465 (2001).

<sup>149</sup>Müller, *supra* note 21.

<sup>150</sup>Christine Rothmayr, *Towards the Judicialisation of Swiss Politics?*, 24 WEST EUR. POL. 77, 85 (2001).

<sup>151</sup>Bundesgericht [BGer] [Federal Supreme Court] Nov. 12, 1997, 123 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] I 296 (Switz.).

<sup>152</sup>*Dahlab*, App. no. 42393/98.

<sup>153</sup>Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, Rec. 276., at para. 5 (Fr.) [official translation].

<sup>154</sup>Aurore Gaillet, *La loi interdisant la dissimulation du visage dans l'espace public et les limites du contrôle pratiqué par le Conseil constitutionnel*, in SOCIÉTÉ, DROIT ET RELIGION 47, 59 (2012).

<sup>155</sup>Chaïb & Brems, *supra* note 107, at 9.

<sup>156</sup>Gaillet, *supra* note 154, at 52.

<sup>157</sup>*Id.* at 57.

arguments of the legislature in its actual reasoning. One paragraph in particular shows the leniency shown towards the legislature in determining the appropriateness of the face veil ban:

It is not because a certain type of conduct has not yet attained a level that would endanger the social order or safety that the legislature is not entitled to intervene. It cannot be blamed for anticipating such risks in a timely manner by penalizing a given type of conduct when its generalization would undoubtedly entail a real danger.<sup>158</sup>

The preemptive intervention is classical for militant democracy, but the Court does not compel the policymakers to prove the concrete and imminent threat purportedly warranting such response. Also, with respect to the purported protection of the constitutional identity, the Court defers to the policymakers:

Taking into account the essential values that the legislature sought to defend, it was entitled to take the view that the creation of human relationships, being necessary for living together in society, was rendered impossible by the presence in the public sphere, which quintessentially concerned the community, of persons who concealed this fundamental element of their individuality.<sup>159</sup>

Thus, despite the different circumstances, the decision by the Belgian Constitutional Court has been criticized for suffering from the same defects as the French decision. In a comment published shortly after the decision was handed down, Chaib wrote that without proper scrutiny and based on purely hypothetical assumptions, the Constitutional Court “fully endorses the vision of society expressed during the parliamentary debates.”<sup>160</sup> This means that although “the Court does bring nuance to the legislator’s general assumptions, these nuances do not affect the reasoning whatsoever.”<sup>161</sup>

### III. The European Court of Human Rights

It is not only domestic courts that are struggling with balancing their perceived legitimacy against their role as guardians of fundamental rights. The ECtHR has also found itself in what has been termed a “legitimacy crisis,” which is exacerbated by the fact that the ECtHR not only lacks democratic legitimacy in a narrow sense, it is also a supranational institution. Thus, it runs the risk of colliding with general notions of both horizontal and vertical separation of powers. In order to mitigate the risk of “jeopardizing its legitimacy and opening itself to accusations of over-reaching,”<sup>162</sup> the ECtHR has developed a special doctrine of deference to national authorities, namely the margin of appreciation. As Brems points out in her seminal study of the doctrine: “If the Court adopted a too activist approach, it would risk losing the confidence of the member states.”<sup>163</sup>

In the two parallel cases of *Dogru v. France* and *Kervanci v. France*,<sup>164</sup> the margin of appreciation became a decisive factor in not finding a violation of ECHR Art. 9. Thus, the legitimacy of

<sup>158</sup>Cour Constitutionnelle [CC] [Constitutional Court] decision no 145/2012, Dec. 6, 2012, at para. B.20.3, <https://www.const-court.be/public/f/2012/2012-145f.pdf> (Belg.).

<sup>159</sup>Cour Constitutionnelle [CC] [Constitutional Court] decision no 145/2012, Dec. 6, 2012, at para. B.21, <https://www.const-court.be/public/f/2012/2012-145f.pdf> (Belg.).

<sup>160</sup>Saïla Ouald Chaib, *Belgian Constitutional Court says Ban on Face Coverings does not violate Human Rights*, STRASBOURG OBSERVERS (Dec. 14, 2012), <https://strasbourgobservers.com/2012/12/14/belgian-constitutional-court-ban-on-face-coverings-does-not-violate-human-rights/>.

<sup>161</sup>Chaib & Brems, *supra* note 107, at 10.

<sup>162</sup>Sottiaux & van der Schyff, *supra* note 140, at 134.

<sup>163</sup>Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 ZÅÖRV 240, 298 (1996).

<sup>164</sup>*Dogru v. France*, App. No. 27058/05, (March 3, 2009) <http://hudoc.echr.coe.int/eng-press?i=003-2569490-2781270>, combined with *Kervanci v. France*, App. No. 31645/04, (March 3, 2009) <http://hudoc.echr.coe.int/eng-press?i=003-2569490-2781270>.

the pursued aim was left completely to the respondent state's discretion.<sup>165</sup> Moreover, the assessment of whether the administrative restriction on headscarves in public schools was necessary in a democratic society was based entirely on the constitutional identity of France:

The Court also notes that in France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools . . . . Having regard to the margin of appreciation which must be left to the Member States with regard to the establishment of the delicate relations between the Churches and the State, religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention.<sup>166</sup>

The ECtHR refrained from second-guessing the proportionality analysis performed by national courts determining whether the pupil in question “overstepped the limits of the right to express and manifest her religious beliefs on the school premises, as the Government maintain and appears to conflict with the principle of secularism.”<sup>167</sup> In the cases that arose in the wake of the French 2004 law, the Court simply relied on the precedent of *Dogru* and *Kervanci* and did not try the substance of the cases of *Bayrak v. France*, *Gamaleddyn v. France*, and *Ghazal v. France*.<sup>168</sup>

On November 26, 2015, the ECtHR delivered yet another decision on headscarves in the case of *Ebrahimian v. France*.<sup>169</sup> This time, however, the applicant was a publicly employed nurse whose contract had not been renewed with explicit reference to her wearing a headscarf at work. Thus, the Court could not verbatim reiterate its reasoning from the previous cases on headscarves among schoolchildren and had to try the case in its substance. The Court's use of a broad margin of appreciation, however, remained the same, and the case was decided in favor of the respondent state. The reasons for this choice were that the church-state relations vary from state to state,<sup>170</sup> that it must be left to the state to strike a balance between the principle of the neutrality of the public authorities with religious freedom,<sup>171</sup> and that the “Court considers that the national authorities are best placed to assess the proportionality of the sanction.”<sup>172</sup>

Following the French face veil ban, the ECtHR again had to decide on Islamic dress. The arguments from the national authorities in the case of *S.A.S. v. France* differed from those put forward in the headscarf cases. The newly invented principle of “living together” had taken the place as the pursued aim of the restriction. The margin of appreciation, however, was as broad as ever. As in the cases of *Dogru* and *Kervanci*, the margin was applied to all levels of the court's reasoning. The absence of a European consensus was given as a reason for the broad margin,<sup>173</sup> but also the way in which the ban came into place was taken into consideration: “The Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question.”<sup>174</sup>

<sup>165</sup>*Dogru*, App. no. 27058/05 and *Kervanci*, App. No. 31645/04 at para. 60.

<sup>166</sup>*Id.* at para. 72.

<sup>167</sup>*Id.* at para. 75.

<sup>168</sup>*Bayrak v. France*, App. no. 14308/08, combined with *Gamaleddyn v. France*, App. no. 18527/08, and *Ghazal v. France*, App. no. 29134/08, (June 30, 2009), <http://hudoc.echr.coe.int/eng-press?i=003-2801594-3071237>.

<sup>169</sup>*Ebrahimian v. France*, App. No. 64846/11, (Feb. 26, 2016) <http://hudoc.echr.coe.int/eng-press?i=003-5236474-6495425>.

<sup>170</sup>*Ebrahimian*, App. No. 64846/11 at para. 56.

<sup>171</sup>*Id.* at para. 65.

<sup>172</sup>*Id.* at para. 69.

<sup>173</sup>*S.A.S. v. France*, App. No. 43835/11, para. 156 (July 1, 2014) <http://hudoc.echr.coe.int/eng-press?i=003-4809142-5861661>.

<sup>174</sup>*Id.* at para. 154.

Despite the pervasiveness of the margin of appreciation in *S.A.S.*, the ECtHR claimed that in view of its flexibility and resulting risk of abuse, the new concept of “living together” would require a particularly careful scrutiny.<sup>175</sup> As argued by Sune Lægaard and several other scholars, however, the Court in fact did not fulfill this promise. Lægaard accuses the Court of creating a false equivalency between democratic legitimacy in a narrow sense and proportionality by relying so heavily on the margin of appreciation.<sup>176</sup> Whereas majority rule may be well-suited in determining the democratic legitimacy of an aim, it is irrelevant to the other elements of the proportionality analysis. Thus, as we have seen in the aforementioned cases, the political claim that the restrictions on face veils and headscarves pursues the aim of defending the state’s constitutional identity swallows all other considerations and undermines the concept of proportionality by taking the militant democracy claim at face value. The dissenting judges Nussberger and Jäderblom noted that, though “it is perfectly legitimate to take into account the specific situation in France, especially the strong and unifying tradition of the ‘values of the French Revolution’ as well as the overwhelming political consensus which led to the adoption of the Law, it still remains the task of the Court to protect small minorities against disproportionate interferences.”<sup>177</sup>

When the Belgian 2011 face veil ban was brought before the ECtHR some years later in the cases of *Belcacemi & Oussar v. Belgium* and *Dakir v. Belgium*, the Court could rely on its established case law for granting an exceptionally broad margin of appreciation in such cases. Thus, the Court, without further analysis, concluded as it had done in *S.A.S.*<sup>178</sup>

Although the cases of *Belcacemi & Oussar* and *Dakir* received significantly less attention than the case of *S.A.S.*, there is one thing in particular about these cases worth noting. They represent the first two cases on face veils not originating from a member state with a particularly strong brand of secularism. Michaels has argued that it constitutes a flaw in the Court’s reasoning that it does not recognize the difference between the Belgian and French church-state regimes.<sup>179</sup> But this only shows the enormous argumentative strength of a concept so doctrinally empty as “living together.” In other words, not every state can claim to have a concept of neutrality so combative that it would exclude Muslim dress, but every society has a conception of what it means to “live together.” What this conception entails can differ endlessly between societies, but when the political majority is non-Muslim, it may very well serve to exclude Muslims—or at least visible signs of Islam.

Because the ECtHR has developed such a consistently broad margin of appreciation in cases on headscarves and face veils, the way that the Court controls majoritarian encroachments on fundamental freedoms of individuals belonging to a minority is naturally affected, in that, these cases become little more than a ratification of national action.<sup>180</sup> George Letsas argues that when the margin of appreciation is used as a final conclusion to the deliberation, it obscures the intermediate steps of reasoning.<sup>181</sup> Thus, the margin of appreciation is not so much a type of reasoning as it is the absence of reasoning. Other scholars are even more critical of the ECtHR’s use of the margin of appreciation. Eyal Benvenisti argues that the use of the doctrine is wholly inappropriate in conflicts between majorities and minorities as it “assists the majorities in burdening politically powerless minorities.”<sup>182</sup> Stephanie E. Berry similarly argues that by developing minimum standards

<sup>175</sup>*Id.* at para. 122.

<sup>176</sup>Sune Lægaard, *Burqa Ban, Freedom of Religion and ‘Living Together’*, 16 HUMAN RIGHTS REVIEW 203, 216 (2015).

<sup>177</sup>*S.A.S.*, App. No. 43835/11 at para. 20.

<sup>178</sup>*Belcacemi & Oussar v. Belgium*, App. No. 37798/13 (Dec. 11, 2017) <http://hudoc.echr.coe.int/eng-press?i=003-5788361-7361157>, combined with *Dakir v. Belgium* (App. no. 4619/12), para. 61 (Dec. 11, 2017) <http://hudoc.echr.coe.int/eng-press?i=003-5788361-7361157>.

<sup>179</sup>Michaels, *supra* note 32, at 242.

<sup>180</sup>Brems, *supra* note 163, at 313.

<sup>181</sup>George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 712 (2006).

<sup>182</sup>Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843, 847 (1999).



that defer to the prejudices of the majority, the ECtHR is in danger of undermining consistent minority rights across Europe.<sup>183</sup> Melanie Adrian argues that the legal rationale on religious clothing has moved away from reasoned adjudication of harm and mindful evaluation of facts to an over-emphasis on abstract principles, and that this trajectory is perilous because it is expanding the already wide margin of appreciation, thus undermining minority protections.<sup>184</sup> With a specific view to religious clothing, Tom Lewis argues the ECtHR's extremely deferential approach has resulted in a virtual absence of scrutiny of the actual circumstances of alleged violations of religious rights; thus easing the way for states that wish to curtail the use of religious clothing.<sup>185</sup> Finally, Dominic McGoldrick notes:

In many cases concerning religious rights, the ECtHR not only affords states a MoA, but a “wide” one at that. The scope of the MoA afforded directly relates to the strictness of review. Broadly speaking, the wider the margin, the less strict the scrutiny and vice versa.<sup>186</sup>

To put the above observations in the terminology of the debate between Schmitt und Kelsen, one could say that although the European courts generally function within a Kelsenian guardian vision, they do tend to fall back on a Schmittian guardian vision when faced with a perceived existential threat to the constitutional identity of the state, which means that the courts defer to the policymakers in such questions. The problem is that the courts have taken the claims of militant democracy at face value instead of compelling the policymakers to prove that the state is indeed facing an imminent and grave threat. Once the aim of protecting the constitutional identity of the state has been established, the courts barely consider the other elements of the proportionality analysis. The urgency and gravity of the militant democracy argument appears to trump ordinary judicial considerations. Thus, it appears that the most important procedural corrective to the possible abuse of militant democracy as a justification for restricting the rights of religious minorities has failed in the cases on headscarves and face veils.

#### IV. The German Exception

The only exception to the overreliance on deference to policymakers is the German FCC, which distinguishes itself by performing an intense scrutiny in politically sensitive questions.<sup>187</sup> In fact, in Germany, the expectations of the FCC's role in shaping political matters is so great that in response to the first headscarf decision in 2003, one prominent German commentator chided the Court for having unleashed an avalanche of controversy. He mandated “elected legislatures to create a ‘sufficiently clear legal basis’ on which to justify such a limitation of religious freedom, yet provided them with no guidance in doing so.”<sup>188</sup> Juliane Kokott wrote that “in the headscarf decision, the FCC attempts to hand over the sensitive role of the judge over foreign religions to the state legislatures,”<sup>189</sup> implying that the FCC judges should have made this decision themselves. The German newspaper *Der Spiegel* wrote in its coverage of the subject that “[t]he truth is that

<sup>183</sup>See generally Stephanie E. Berry, *A Tale Of Two Instruments: Religious Minorities And The Council Of Europe's Rights Regime*, 30 NETH. Q. HUM. RTS. 11 (2012).

<sup>184</sup>See generally Melanie Adrian, *The Principled Slope: Religious Freedom and the European Court of Human Rights*, 45 RELIG., ST. & SOC'Y 174 (2017).

<sup>185</sup>See generally Tom Lewis, *What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation*, 56 INT'L & COMP. L.Q. 395 (2007).

<sup>186</sup>Dominic McGoldrick, *Religious Rights and the Margin of Appreciation*, in HUMAN RIGHTS BETWEEN LAW AND POLITICS: THE MARGIN OF APPRECIATION IN POST-NATIONAL CONTEXTS 145, 155 (Petr Agha ed., 2017).

<sup>187</sup>Grewe, *supra* note 148.

<sup>188</sup>Axel Frhr. von Campenhausen, *The German Headscarf Debate*, BYU L. REV. 665, 666 (2004).

<sup>189</sup>Juliane Kokott, *Laizismus und Religionsfreiheit im öffentlichen Raum*, 44 DER STAAT 343, 361 (2005) [author's translation].

the supreme constitutional guardians have merely decided not to decide—the states, they think, should do their homework and see how they cope with one of the greatest challenges of German legal culture.”<sup>190</sup>

It is not correct, however, as Jens T. Theilen has claimed, that the “FCC had, for all intents and purposes, given the legislature *carte blanche* to decide as it saw fit.”<sup>191</sup> Rather, when delegating the task to the state legislatures, the Court emphasized that an “introduction of an official duty that prohibits teachers from allowing their outward appearance to show their religion must be expressly laid down by statute, for one reason because such an official duty can only be justified and enforced in a constitutional manner . . . if members of different religious groups are treated equally by it.”<sup>192</sup>

The high expectations appear to go hand in hand with a very high legitimacy of the FCC in the eyes of the public,<sup>193</sup> and arguably, the FCC did fulfill them in its second headscarf decision, which was handed down in January 2015.<sup>194</sup> Although the FCC considered every element of a full proportionality analysis,<sup>195</sup> the most significant aspect was the distinction between abstract and concrete, which the headscarf purportedly posed. To reiterate, it is the requirement of a demonstrable and imminent threat to democracy that links legitimate militant democracy most closely to proportionate lawmaking. So, rather than accepting the blanket claim that headscarves undermine the constitutional identity of Germany, the FCC demands a concrete proof of the garment’s subversive qualities:

A prohibition of the expression of religious belief by outer appearance, on the basis of a mere abstract danger to the peace at school or to the neutrality of the state, is in any case not appropriate and therefore disproportionate in light of the educational staff’s freedom of faith and freedom to profess a belief, if the expression of that belief can plausibly be traced to a religious duty perceived as imperative. A sufficiently specific danger is required instead.<sup>196</sup>

Naturally, such proof cannot be produced, as it would always depend on the wearer’s behavior rather than the headscarf itself.<sup>197</sup> Furthermore, the Court stated that even if the headscarf was problematic in a specific situation, the reaction would need to be equally specific.<sup>198</sup> Finally, the FCC, of course, struck down the exemption of Western symbols as directly discriminatory, as no legitimate interest could justify such distinction.<sup>199</sup> Through the use of the proportionality analysis, the FCC struck at the core of the abuse of militant democracy and exposed the underlying legislative pathologies, namely ideological hyperbole and discrimination based in religious prejudices. In doing so, the Court actively contributed to the construction of a specific constitutional identity that was inclusive and non-discriminatory:

<sup>190</sup>Dominik Cziesche et al., *Das Kreuz mit dem Koran*, DER SPIEGEL (Sept. 29, 2003), <https://www.spiegel.de/spiegel/print/d-28721204.html> [author’s translation].

<sup>191</sup>Jens T. Theilen, *Towards Acceptance of Religious Pluralism: The Federal Constitutional Court’s Second Judgment on Muslim Teachers Wearing Headscarves*, 58 GER. Y.B. INT’L L. 503, 504.

<sup>192</sup>Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], 2 BvR 1436/02, at para. 71, (Sept. 24, 2003), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924\\_2bvr143602en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924_2bvr143602en.html) [hereinafter *Judgement of Sept. 24, 2003*].

<sup>193</sup>See generally Werner J. Patzelt, *Warum verachten die Deutschen ihr Parlament und lieben ihr Verfassungsgericht? Ergebnisse einer vergleichenden demoskopischen Studie*, 36 ZEITSCHRIFT FÜR PARLAMENTSFragen 517 (2005).

<sup>194</sup>Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], 1 BvR 471/10 & 1 BvR 1181/10, (Jan. 27, 2015), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/01/rs20150127\\_1bvr047110en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/01/rs20150127_1bvr047110en.html).

<sup>195</sup>*Id.* at paras. 80–122.

<sup>196</sup>*Id.* at para. 80.

<sup>197</sup>*Id.* at paras. 93–94.

<sup>198</sup>*Id.* at para. 101.

<sup>199</sup>*Id.* at para. 129.

The religious and ideological neutrality required of the state is not to be understood as a distancing attitude in the sense of a strict separation of state and church, but as an open and comprehensive one, encouraging freedom of faith equally for all beliefs.<sup>200</sup>

The fact that the FCC can and will break the cycle when needed may explain why the German parliament decided not to even attempt a general, nation-wide face veil ban. The decision was based on a report from the *Wissenschaftliche Dienste des Deutschen Bundestages* (The Parliamentary Research Services), which concluded that:

The wearing of the burqa in public spaces is protected by Article 4 of the Basic Law. A general prohibition of the burqa in public space violates the neutrality requirement of the Basic Law and cannot be constitutionally justified. A prohibition can only be considered in individual cases as the result of weighing conflicting constitutional interests.<sup>201</sup>

This position was expressly maintained in the wake of S.A.S.,<sup>202</sup> when policymakers across Europe revived the idea of banning the face veil with renewed force.

## F. Conclusion

Important institutional lessons can be drawn from the legislative histories and case law on headscarves and face veils. Rather than trying to integrate these discourses into the general understanding of constitutional frameworks through the use of doctrinal legal method, we must recognize them as exceptional and legally questionable.

By using the logic and rhetoric of militant democracy, policymakers have successfully circumvented the normal requirements to legitimate justification for restricting fundamental rights. Furthermore, by aligning the goal of enforcing arbitrary cultural preferences of the majority on minorities without proper justification with a generally accepted exception in liberal democracy, policymakers have succeeded in making fundamentally illiberal policy goals appear liberal. Not only does this way of reasoning not live up to normal requirements for legitimate justifications, it also leads to an amputated constitutional identity where some culture-specific elements are exaggerated to the detriment of other constitutional values, such as the principle of non-discrimination and the freedom of religion.

Although militant democracy draws on the logic of exception and emergency, it is not beyond scrutiny. In fact, modern constitutionalism already contains the elements required to check abusive invocations of militant democracy. From an institutional perspective, different approximations of the Kelsenian guardian model are in place in most modern democracies. Alternatively, the ordinary judiciary has taken it upon itself to review laws for their constitutionality. Furthermore, the ECtHR has assumed a quasi-constitutional role in the area of fundamental rights. Not only is the judiciary the most appropriate and common institutional check on policymakers, it has also refined a substantive standard that is particularly apt at detecting abuse of militant democracy, namely the proportionality analysis.

A militant democracy claim will always contain both factual and normative elements. In other words, it must be demonstrated that an enemy of liberal democracy actually abuses the democratic freedoms in an attempt to subvert liberal democracy. Previously, the application of militant

<sup>200</sup>*Id.* at para. 110.

<sup>201</sup>WISSENSCHAFTLICHE DIENSTE DES DEUTSCHEN BUNDESTAGES [PARLIAMENTARY RESEARCH SERVICES], AUSARBEITUNG: DAS TRAGEN EINER BURKA IM ÖFFENTLICHEN RAUM [ELABORATION: WEARING A BURKA IN PUBLIC SPACES] (2010) [author's translation].

<sup>202</sup>See generally WISSENSCHAFTLICHE DIENSTE DES DEUTSCHEN BUNDESTAGES [PARLIAMENTARY RESEARCH SERVICES], SACHSTAND: VERBOT DER VOLLVERSCHLEIERUNG IN STATEN DER EU [STATE OF PLAY: BAN ON FULL VEILING IN EU COUNTRIES] (2017).

democracy was reserved for political movements, but lately policymakers have used the logic of militant democracy to justify restrictions on individual women's religious appearance in public spaces. In order for this justification to be effective, the headscarf and face veil must be interpreted as symbols of a religion inherently repugnant to the constitutional identity of the given state, which in turn must be constructed as a negation of this religion, Islam. It is evident from legislative debates on headscarves and face veils that the perceived civilizational divide between "the West" and "Islam" has been a driving force, and other justifications have only been added in order to buttress the legality and legitimacy of the laws.

Nevertheless, when faced with existential questions—such as the claim that policymakers defend the constitutional identity—most courts tend to defer the decision to the policymakers in accordance with the Schmittian guardian vision. In other words, when the courts accept the logic of militancy, it swallows all other considerations. When the court defers to policymakers, they do not perform an intense scrutiny of the motivation, necessity, and proportionality of the militant democracy claim. Thus, they fail to detect the abuse of the concept. Not only does this mean that the laws and regulations go unchecked, it also lends a veneer of judicial legitimacy to political claims, thereby strengthening their precedential value domestically and abroad.

Although the militant discourse appears both persuasive and pervasive, it is not inevitable. Lawyers, scholars, and judges can and must insist on the fundamental principles of liberal democracy, namely the principles of non-discrimination and proportionality. The German FCC provides a paradigmatic exception showing how it could be different. By insisting on performing a fact-sensitive proportionality analysis and strictly scrutinizing the political reasoning, the Court has not only remedied the headscarf discourse but also had a cooling effect on the face veil discourse in Germany. It is doubtful, however, whether this paradigmatic exception can be used as an example for other courts in Europe. The German FCC is widely considered to be the strongest and most courageous of its kind in Europe, if not the entire world. Furthermore, the Court enjoys an exceptionally high level of legitimacy, which enables it to transform its strength into real influence on the policymaking.

Militant democracy as a justification for restricting Islamic dress is a product of the anxiety with Islam that currently consumes Western Europe. Although a full investigation of its use beyond this context lies outside the purview of this Article, one must consider the broader implications of this idea. At its core, the political claim, and in particular its legal form—the principle of "living together"—has revived the debate between liberals and communitarians that culminated in political theory literature of the early 1990s. Although the confrontations turned out to have been more polemical than necessary, the debate revealed a fundamental difference between the two positions, namely the answer to the question: Who is to decide what the "good life" is? The answer to this question in the context of liberal human rights has been that—provided that it does not harm others—it is the prerogative of the individual to decide what the good life is and how they intend to pursue it. The use of militant democracy in the present context breaks with this tradition by allowing the cultural majority to enforce its preferences on unwilling minorities without proper justification.

This is even acknowledged by some of its proponents. In her concurring opinion in the case of *Dakir v. Belgium*, Judge Karakaş wrote:

The substance of the "living together" principle is so malleable and unclear that it can potentially serve as a rhetorical tool for regulating any human interaction or behaviour purely on the basis of a particular view of what constitutes the "right way" for people to interact in a democratic society. That is anathema to the fundamental values of the autonomy of self, human dignity, tolerance and broadmindedness which are the foundations of the Convention system . . . . The requirement of "living together" has its ideological basis in some kind of societal consensus or a majoritarian morality of how individuals should act in the public space. This is nothing short of Government imposed assimilation of human

interaction and behaviour. An aim invoked for restricting human rights that is in fact based on a transient majority's opinion of what is suitable and right, and without the majority being required to define in concrete terms particular harms or mischiefs that need clearly to be addressed, can not in principle form the basis of justifiable restrictions of Convention rights in a democratic society.<sup>203</sup>

Despite this concern, judge Karakaş voted with the majority. And already, in the following year, the precedent of *S.A.S. v. France* was cited in the case of *E.S. v. Austria*, where the Court sided with the member state in its decision to fine a woman for blasphemy.<sup>204</sup> Yet, I do not believe that the damaging potential of the militant discourse has been fully realized by its proponents.

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<sup>203</sup>*Dakir*, App. No. 4619/12 at paras. 6–7.

<sup>204</sup>*E.S. v. Austria*, App. No. 38450/12, (Oct. 25, 2018), <http://hudoc.echr.coe.int/fre?i=001-187188>.