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

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INTRODUCTION

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

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

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

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

\begin{enumerate}
\item\hspace{1em}In the nineteenth century, the formative sociological works of Maine, Durkheim and Weber, which traced the evolution of society from pre-modern state to its industrialized form, identified law’s functions as providing rules, institutions and processes to facilitate social interaction and achieve social goals. \textit{See Emile Durkheim, On the Divisions of Labour in Society} (1893); \textit{Henry Sumner Maine, Ancient Law: The Early History of Institutions} (1888); \textit{Max Weber, Economy and Society} (1914). In the twentieth century, sociological jurisprudence including \textit{Huntington Cairns, The Theory of Legal Science} 55–56 (1941) and \textit{Roscoe Pound, Social Control Through Law} 64–65 (1942), legal realism of Karl N. Llewellyn, \textit{The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method}, 49 YALE L.J. 1355, 1373 (1940), and the functionalist theory of Talcott Parsons, \textit{The Law and Social Control, in Law and Sociology: Exploratory Essays} 56, 58 (William M. Evan ed., 1962) and \textit{Niklas Luhmann, Law as a Social System} 164 (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004) have also emphasized law’s facilitative and engineering functions.
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transformative device in current Islam-based conflicts engaging Western-European countries with substantial Islamic population, compared with law’s integrative role in past political debates in these countries over abortion reform. Using examples from Germany, Italy, France, Belgium, Britain, the Netherlands, and Switzerland, this Article seeks to demonstrate that legal actions concerning rights of Muslim minorities typically focused on generating social and cultural change. In prescribing legal norms pertaining to Islamic practices, courts and legislatures have been pursuing by-and-large political goals of assimilation and secularization, thus foreclosing the likelihood of political compromise. In contrast, when these nations debated abortion reform, legal processes acted as a mechanism of social and cultural order. Courts and legislatures framed debates beyond the clash of rights or worldviews, generating legal arrangements that incorporated additional social and public policy concerns for the purpose of generating compromises. This process had a calming effect on abortion politics.

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

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

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


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

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

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

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5. For a discussion of the German context, see Peter Frank, Welcoming Muslims into the Nation: Tolerance, Politics and Integration in Germany, in Muslims in the West After 9/11: Religion, Politics, and Law 119, 122–26 (Jocelyne Cesari ed., 2009).


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

8. John R. Bowen, Why the French Don’t Like Headscarves 1 (2007) (“Although worded in a religion-neutral way, everyone understood the law to be aimed at keeping Muslim girls from wearing headscarves in school.”); Scott, supra note 6, at
a governmental request to France’s highest administrative tribunal to advise on the legal compatibility of wearing religious symbols and the principle of laïcité (secularism) in public education following the expulsion of veiled Muslim girls from public school. In its decision, the Conseil d’État laid out a vague balancing formula on the permissibility of religious symbols in public schools:

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

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

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

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


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

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


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

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

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

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

\textsuperscript{20} O’BRIEN, supra note 19, at 52–54.  

\textsuperscript{21} JOPPE, supra note 19, at 50 (noting 494 députés in favor, 36 against, and 31 abstentions).  

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

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


36. Id. ¶ 4.
reasonable and proportionate balance “between safeguarding public order and guaranteeing constitutionally protected rights,” the law was construed constitutional. Accordingly, the public and political “values-based condemnation of practices that some Muslim women undertake on the basis of their religious convictions” became legal justifications.

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

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

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37. *Id.* ¶ 5.
example of courts’ active roles in constructing limits and expectations of Islamic manifestations in the public sphere. To harmonize its religiously diverse student body, the school designated the *shalwar kameez*, a traditional South and Central-Asian dress, as its dress-code option for Muslim students.\(^4\) The school refused Begum’s wish to wear the more traditional *jilbab* out of concern that this would pressure other students and threaten social cohesion.\(^5\) Notwithstanding the incorporation of the European Convention on Human Rights (“ECHR”) into English law via the Human Rights Act (“HRA”),\(^6\) the House of Lords unanimously affirmed Begum’s exclusion, with three justices finding no interference with Begum’s rights and two finding the interference justified.\(^7\) Anxiety over radical Islam manifested by the *jilbab* is evident in the ruling’s narrative, depicting sheer praise of the school’s inclusive conduct and disapproval toward the confrontational and uncompromising attitudes of the Begums.\(^8\) Lord Scott found it “extraordinary” that the *shalwar kameez* would not be regarded modest enough for Muslim girls.\(^9\) Lord Hoffmann, while acknowledging that it would be “irrelevant” to assess how obligatory is the *jilbab* in Islam, still expected “common civility” in religious conduct.\(^10\) Finally, echoing the prevailing French approach, Baroness Hale

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\(^4\) [2006] UKHL 15, ¶ 6 (discussing dress codes at the school).
\(^5\) [2006] UKHL 15, ¶ 18 (discussing the threat to social cohesion).
\(^6\) European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, [hereinafter ECHR], available at http://www.unhcr.org/refworld/docid/3ae6b3b04.html. Article 9 of the ECHR prescribes: “(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.” *Id.* art. 9. The ECHR was incorporated into English Law by the Human Rights Act (“HRA”) of 1998. See Human Rights Act, 1998, c. 42 (Eng.).
\(^7\) [2006] UKHL 15, ¶¶ 25, 41, 55, 72, 94 (noting that Lords Bingham, Hoffmann and Scott found no interference in Begum’s right to religious freedom, while Lord Nicholls and Baroness Hale found the interference justified).
\(^8\) *Id.* ¶¶ 25, 34, 44, 46, 50, 52, 77, 80, 83, 98.
\(^9\) *Id.* ¶ 83.
\(^10\) *Id.* ¶ 50.
focused on the transformative duties of public education and the protection of gender equality.\footnote{Id. ¶¶ 95, 96, 97.} Hence, Islam can be fitting for the educational public sphere as long as it can find expression under the religiously neutral \textit{shalwar kameez}. Anything more extensive is a slippery slope for social cohesion and endangers the liberal mission of schools.

Established to oversee the implementation of ECHR, the European Court of Human Rights ("ECtHR") systematically deferred to national policies and the expertise of domestic courts in cases concerning the Islamic headscarf.\footnote{See Isabelle Rorive, \textit{Religious Symbols in the Public Space: In Search of a European Answer}, 30 Cardozo L. Rev. 2669, 2285–86 (2009) (analyzing European Court of Human Rights ("ECtHR") jurisprudence on the headscarf).} In its leading ruling, \textit{Leyla Sahin v. Turkey},\footnote{Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 117.} the ECtHR relied on the margin of appreciation doctrine and endorsed Turkey’s position legitimizing the prohibition on the headscarf as a threat to secularism and democratic values.\footnote{Id. ¶¶ 39, 114.} A similar rationale guided the ECtHR in finding “not unreasonable” the expulsions of Muslim French students wearing Islamic headscarves during sports classes in light of domestic criteria on health, safety and assiduity.\footnote{Dogru v. France, 49 Eur. H.R. Rep. 179 (2009); Kervanci v. France, App. no. 31645/04, ¶ 73, Eur. Ct. H.R. (2008), \textit{available at} \url{http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en}.} A veiled-teacher’s dismissal was upheld in \textit{Dahlab v. Switzerland}.\footnote{Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 430.} The ECtHR found the infringement on religious freedom justified since it was “difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.”\footnote{Id. at 463.}

The educational arena furnished additional assimilationist legal measures against Muslims. Judicial proceedings from Germany and Switzerland exemplified how earlier religion-based exemptions from mandatory physical education classes have increasingly been replaced with denials of such exemptions on the basis of public interests. In Germany, lower courts have
been narrowing a 1990s German Federal Administrative ruling, finding physical education to outweigh the potential infringement on religious freedom. In Switzerland, a similar shift has taken place within the jurisprudence of the Federal Supreme Court. Whereas in 1993 the Court exempted a minor female Muslim from mandatory swimming lessons on the basis of her religious faith, the Court overruled its own judgment in 2008 in relation to two minor Muslim males. Framing the latter case “as an issue of immigration, and consequently, of integration of migrants rather than one of religion per se,” the Court construed public interests realized through swimming classes, (i.e., personal safety, equal opportunity and cultural integration) as overriding individual religious freedom.

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

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


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


63. Reich, supra note 60, at 762.

64. Id. at 762–63.


66. See Silvio Ferrari & Rossella Bottone, Legislation Regarding Religious Slaughter in EU Member, Candidate and Associated Countries 5–6, 88 (2010),
Protection Act (Tierschutzgesetz) prohibited the slaughter of animals without previous stunning in the interest of sparing avoidable pain. Because this prohibition negated methods of religious slaughter, the law granted an “exceptional permission for slaughter without stunning” when “necessary to meet the needs of members of certain religious communities . . . whose mandatory rules required slaughter without stunning.”

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

The Federal Constitutional Court reversed these judicial rationales in 2002. Recognizing halal slaughtering as a fundamental right of Muslims, the Court concluded that it surpassed animal protection construed as “a public interest [of]
. . . high importance among the population.” 71 The ruling generated a speedy legislative backlash in the form of a constitutional amendment “directed against the Muslim ritual,” elevating animal protection to a “national objective” in the German Constitution. 72 Bestowed with its invigorated constitutional status, animal welfare now enjoys equal weight when balanced against other fundamental rights including religious freedom, which opened a new legal avenue for reluctant courts and administrative authorities to restrict halal slaughtering in Germany. 73

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

71. Id. ¶ 41 (emphasis added).
72. See Lavi, supra note 66, at 178. The Bundestag voted overwhelmingly (549 to 19) in 2002 to add “and the animals” (“und die Tiere”) to Article 20a of the German constitution. Kate M. Nattrass, “. . . Und die Tiere”: Constitutional Protection for Germany’s Animals, 10 Animal L. 283, 302 (2004) (discussing the politics preceding the amendment).
73. Case law remains divergent. Compare Verwaltungsgericht [VG] [administrative trial court] AU 5 E 03.2198, with Oberverwaltungsgericht [OVG] [higher administrative court] 4 M B 4/04. See also Ferrari & Bottoni, supra note 66, at 21; Lavi, supra note 66, at 178.
institutions and social norms for new and settled immigrants, (iii) an unpublished naturalization exam; (iv) income level requirements and various fees, and (v) a given time frame and limited number of chances to complete the integration process.\textsuperscript{77}

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

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

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\bibitem{See id.} See id.

\bibitem{See id.} See id.

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

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

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

84. See Italy Report, supra note 4. These denials “take the form of ‘selective enforcement’ of rules that already exist but which are only highlighted when dealing with mosques and Muslims.” Allievi, supra note 83, at 67.
85. Allievi, supra note 83, at 45.
86. Id. at 46.
87. See id. at 47 (noting that anti-minaret legislation was also passed earlier in Austria).
88. See Bundesverfassung [BV] [Constitutition] Apr. 18, 1999, art. 72 (Switz.) (“[T]he construction of minarets will be forbidden.”); Joanna Pfaff-Czarnecka, Accommodating Religious Diversity in Switzerland, in International Migration and the Governance of Religious Diversity 223, 243–44 (Paul Bramadat & Matthias Koenig eds., 2009).
Accordingly, direct democracy provided a majority of the Swiss citizenry a legal venue to ban the construction of minarets against the position of the Federal Supreme Court, the Federal Council, and both chambers of parliament, which viewed the proposed ban as violating the Swiss Constitution and Switzerland’s international obligations. Four minarets currently exist throughout Switzerland, highlighting the depth of anti-Muslim sentiments shared across Switzerland.

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

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II. ABORTION REFORMS ACROSS WESTERN EUROPE

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

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

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98. [U.K.] Abortion Act, 1967 C. 87. The Act was amended once in 1990 through Section 37 of the Human Fertilization and Embryology Act to reduce legal abortions from twenty-eight to twenty-four week gestation as a result of medical advancements in technology related to pregnancies. See Simms, supra note 96, at 40; see also MELANIE LATHAM, REGULATING REPRODUCTION: A CENTURY OF CONFLICT IN BRITAIN AND FRANCE 89 (2002); Ellie Lee, Reinventing Abortion as a Social Problem: “Postabortion
Abortion Act, titled “Medical Termination of Pregnancy,” created a series of statutory defenses for medical professionals performing abortions, refraining altogether from rights discourse or the assignment of moral weight either to the women’s choice or the fetus’s life.99

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

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

100. JACKSON, supra note 96, at 110.

101. Lee, supra note 98, at 43–44.

102. JACKSON, supra note 96, at 83.

possibility (and mobilizing potential) of protest against abortion clinics.\textsuperscript{104}

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

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

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

\begin{footnotesize}
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\item [104.] Furedi & Nolan, supra note 103, at 7.
\item [105.] Erdmann, supra note 103, at 108; JOHN KENYON MASON, THE TROUBLED PREGNANCY: LEGAL WRONGS AND RIGHTS IN REPRODUCTION 14 (2007).
\item [106.] Paton v. British Pregnancy Advisory Service Trustees, [1979] Q.B. 276, at 281–82 (Eng.).
\item [108.] R. (Axon) v. Secretary of State for Health, [2006] EWHC 37 (Eng.).
\item [109.] Id. ¶ 33.
\item [110.] Abortion was outlawed in France in Article 317 of the 1810 Napoleonic Penal Code. Bartha Maria Knoppers, Isabel Brault, & Elizabeth Sloss, Abortion Law in
\end{enumerate}
\end{footnotesize}
over-population growth and life-endangering clandestine abortions, all generated a growing demand for the reevaluation of reproductive legislation with the abortion question at its axis. Amid “sensational and extreme” public debate framed along a feminist-conservative and Catholic divide, the government introduced in 1975 the Voluntary Interruption of Pregnancy Act (“VIP Act”), whose “moral thrust [was] much one of prevention as one of liberalisation.” The VIP Act was “pervaded by compassion for the pregnant women, by concern for fetal life, and by expression of the commitment of society as a whole to help minimize occasions for tragic choices between them.” Accordingly, abortion remained a criminal act, although one that could be medically authorized until the tenth week of pregnancy were a woman “in a situation of distress.” Abortion procedure had to be preceded by mandatory counseling emphasizing family-oriented policies and positive alternatives to pregnancy, as well as a week long waiting period. Eighty-one Gaullist and center députés (deputies) of the Assemblée Nationale (Lower House of Parliament) opposing the bill immediately referred it to the review of the Conseil Constitutionnel, which cleared its enactment. Resting on the


 112. DOROTHY McBRIEDE STETSON, WOMEN’S RIGHTS IN FRANCE 65 (1987).


 114. GLENDON, supra note 113 at 156.

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


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

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

Until the 1970s abortion was a punishable crime in Germany. Motivation for reform emerged from the need to provide solutions for dangerous clandestine abortions, yet
disagreements over the method of reform were divided along liberal-conservative lines.\textsuperscript{125}

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

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


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

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

\textsuperscript{128} See id. at 648. The indications are (i) dangers to the life or health of the pregnant woman (medical indications); (ii) a pregnancy resulting from criminal offenses such as rape or incest (criminal indications); (iii) severe genetic defects (eugenic indications); and (iv) a general “social indication” intended to address circumstances where the continuation of the pregnancy would “impose on the pregnant woman exceptional hardships comparable in severity to those encompassed by the other three enumerated indications.” See Mary Anne Case, Perfectionism and Fundamentalism in the Application of the German Abortion Laws, in CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 93, 95–96 (Susan H. Williams ed., 2009).
right to life of the unborn,” was ordered as well.\textsuperscript{131} Complying with the Court’s ruling, the Bundestag enacted the four indications as permissible justifications for an otherwise unlawful abortion.\textsuperscript{132} The law also required social and medical counseling designed to “make the continuation of the pregnancy and the situation of the mother and child easier,” as well as a three-day waiting period between the counseling and procedure.\textsuperscript{133} Abortions that failed to meet any of these conditions were punishable with up to a year in prison for the pregnant woman and up to three years for other participating parties.\textsuperscript{134} This legislation did not end political controversy.\textsuperscript{135}

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

\textsuperscript{131} First Abortion Ruling, supra note 124, at 649.

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


\textsuperscript{134} See MYRA MARX FERREE ET AL., SHAPING ABORTION DISCOURSE 34–35 (2002).

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


\textsuperscript{137} SHELDON, supra note 105, at 2.

\textsuperscript{138} The Pregnancy and Family Assistance Act’s full title is The Act for the Protection of Prenatal/Developing Life, Promotion of a More Child Friendly Society, Assistance in Pregnancy Conflicts, and Regulation of Pregnancy Termination. See Prützel-Thomas, supra note 124, at 474 (discussing the debates and providing the final vote tally); Rosemarie Will, German Unification and the Reform of Abortion Law, 3
to punitive) approach to abortion, the law decriminalized (declared “not-unlawful”) first-trimester abortions for any reason subject to a counseling requirement, a three-day waiting period and a doctor’s performance of the procedure, along with additional social measures designed to reduce the need for abortion.

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

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

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

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141. KOMMERS, supra note 132, at 348 (noting that the social measures included family planning, daycare funding and availability, and education and vocational training for pregnant women and mothers of young children); FERREE ET AL., supra note 134, at 42 (noting that the bill increased funding for kindergartens which was intended to encourage childbearing as an option).
143. Will, supra note 138, at 419–21.
144. FERREE ET AL., supra note 134, at 42; Case, supra note 130, at 97.
pregnant women in education, housing, childcare and employment oriented toward the creation of a “child-friendly” society.\textsuperscript{146} Among these instructions were specific suggestions for financial subsidies, proposals on how to protect women from educational and occupational disadvantages resulting from childbearing, possible reforms to specific laws (social security and credit laws), and specific instructions on the duties of landlords.\textsuperscript{147} Finally, according to the Court, counseling “must be orientated towards the protection of the unborn life. Merely informative counseling . . . would not achieve its purpose. The counselors must have the motivation to encourage the woman to continue her pregnancy and to provide perspectives for her life with a child.”\textsuperscript{148}

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

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

\textsuperscript{146} See Walther, \textit{supra} note 135, at 394.


\textsuperscript{148} Michalowski & Woods, \textit{supra} note 145, at 146.

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

\textsuperscript{150} See FERREE ET AL., \textit{supra} note 134, at 43; Case, \textit{supra} note 130, at 99; Neuman, \textit{supra} note 147, at 273.

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

Finally, a conscientious clause exempted physicians from the duty to perform or arrange for abortions. This legal reform “pacified the abortion issue . . . and public opinion

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

on the whole has been supportive of its content” keeping it in force thus far.\textsuperscript{157}

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

\textsuperscript{157}. Outshoorn Policy-Making, supra note 152, at 205; see also Groenhuijsen & van Laanen, supra note 153, at 195; Henderson & Jeayel, supra note 151, at 197; Ketting, supra note 151, at 173, 176; Rademakers, supra note 151, at 336.


\textsuperscript{159}. Eleonore Eckmann Pisciotta, Challenging the Establishment: The Case of Abortion, in The New Women’s Movement 26, 35, 40 (Drude Dahlerup ed., 1986).

\textsuperscript{160}. Calloni, supra note 158, at 185 (discussing the increased public debates on gender specific issues). The process of indirect constitutional review arising as part of judicial proceedings in Italy is discussed in Alessandro Pizzorusso, Constitutional Review and Legislation in Italy, in Constitutional Review and Legislation: An International Comparison, supra note 117, at 109, 109. On the parliamentary debates over abortion, see generally Lesley Caldwell, Abortion in Italy, 7 Feminist Rev. 49, 52–59 (1981).


\textsuperscript{162}. Calloni, supra note 158, at 186; Glendon, supra note 113, at 43.
houses of parliament finally approved Law no. 194 of 22 May 1978 entitled Norms for the Social Protection of Motherhood and the Voluntary Termination of Pregnancy (“Law 194”), whose title and content reflected the depth of the political compromise. Abortion was not removed from the criminal code, but the law established conditions—health, economic, social, or family circumstances—under which legal abortions in the first ninety days of pregnancy were permitted.

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

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

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

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

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

167. Id.


169. Figà-Talamanca, supra 164, at 282; Andall, supra note 158, at 245.
challenges over the years, leaving the 1978 legal compromise thus far intact.\textsuperscript{170}

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

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

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\item \textsuperscript{170} In 1997, another attempt at referendum over Law 194 reached the Constitutional Court, which was dismissed on the grounds that the existing law “has as its rationale and guiding values precisely those values of motherhood and the protection of human life.” HANAFIN, supra note 158, at 33.
\item \textsuperscript{173} Belgium Termination Law, supra note 172.
\item \textsuperscript{174} Joyce Outshoorn, The Stability of Compromise: Abortion Politics in Western Europe, in ABORTION POLITICS: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVE, supra note 120, at 145, 158.
\end{itemize}
disapproval toward the termination of pregnancies as part of vital concern for the unborn life, yet permit abortion during the first trimester (and even in later weeks when the well-being of the woman is at stake) in the interest of protecting the freedom of the woman to choose once several safeguards were fulfilled. These safeguards included: (i) mandatory waiting periods, (ii) limitations on places where abortions can be performed, (iii) processes for decision-making on abortion, and (iv) social and financial incentives for life with a child. Finally, conscientious exemption clauses have also acted as controversy-pacifying strategies.

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

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


176. See John Gerring, Case Selection for Case-Study Analysis: Qualitative and Quantitative Techniques, in The Oxford Handbook of Political Methodology 645, 645–48 (Janet M. Box-Steffensmeier et al. eds., 2008).
To substantiate the thesis of this Article—that this difference in intensity can be plausibly explained through the contribution of a legal process diverging along its social functions (integrative versus transformative)—attention is now turned to assessing the realization of law’s social function in each of the debates, namely (i) law’s contribution to resolving the abortion conflict and (ii) law’s capacity in transforming European Islam. The legal outcomes of abortion policies enacted across Western Europe between the late 1960s to the late 1980s were undoubtedly transformative in responding to pressing social problems and legalizing avenues for abortions. Nonetheless, the legal process ushering these outcomes has clearly taken an integrative approach enabling tensed compromises that ultimately moved society forward.

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

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

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

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


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

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


183. AYHAN KAYA, ISLAM, MIGRATION AND INTEGRATION 7–8 (2009); JITTE KLAUSEN, THE ISLAMIC CHALLENGE: POLITICS AND RELIGION IN WESTERN EUROPE (2005); JONATHAN LAURENCE & JUSTIN VAISSE, INTEGRATING ISLAM: POLITICAL AND
urgent calls for the institutionalization of dialogue with Muslim communities and the strengthening of their political and social engagement. Moreover, the recent global financial recession suggests the probability of greater complications for Muslim integration. Rising unemployment, the curbing of social welfare programs and deteriorating working and living conditions do not hold great promise for accelerating the integration of a community already suffering from poverty and ghettoization.

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

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

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Religious Challenges in Contemporary France 170 (2006); Bhikhu Parekh, Europe, Liberalism and the Muslim Question, in Multiculturalism, Muslims and Citizenship, supra note 39, at 179, 179 (Tariq Modood et al. eds., 2006). For the British context, see Quintan Wiktorowicz, Radical Islam Rising: Muslim Extremism in the West (2005).

184. Recent selective examples include: Zeyno Baran, Citizen Islam: The Future of Muslim Integration in the West 177-82 (2011); Islam & Europe: Crises Are Challenges 8 (Marie-Claire Foblets & Jean-Aves Carlier eds., 2010); Olivier Roy, Islamist Terrorists and Radicalization, in European Islam: Challenges for Society and Public Policy, supra note 4, at 56, 56-57. See generally John R. Bowen, Can Islam Be French?: Pluralism and Pragmatism in a Secularist State (2010); Justin Gest, Apart: Alienated and Engaged Muslims in the West (2010).

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

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

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

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

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

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

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

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


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

**CONCLUSION**

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

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

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193. See *Kata*, *supra* note 183, at 2.
194. Peter J. Katzenstein, *Multiple Modernities as Limits to Secular Europeanization, in Religion in an Expanding Europe,* *supra* note 4, at 1, 33 (Timothy A. Byrnes & Peter J. Katzenstein eds., 2006) (“[R]eligion continues to lurk underneath the veneer of European secularization.”).
meaningful judicial impact on public policy compared with political and cultural factors, and lastly, in offering paths to overcome legislative stalemates or structural barriers to the ideological goals of the dominant national coalition. On the other hand, the “refined” approach focused on analyzing judicial processes as instrumental in providing strategic possibilities to achieve political goals in the long term that are unencumbered or may even be strengthened by legislative or administrative circumventions in the short term. The surveyed examples in the context of Islam further substantiate the critical view of the legal process. Nevertheless, since law increasingly

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


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

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

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


201. See Sweet, supra note 117, at 45–46.

202. For variations in constitutional review processes, see Sweet, supra note 117, at 47; Ferejohn & Pasquo, supra note 200, at 86. Several European constitutional courts also accept personal complaints of basic rights violations, a power recently granted to the Conseil Constitutionnel (known there as “priority questions of constitutionality”). See generally Constitutional Review and Legislation: An International Comparison, supra note 117.
the constitutional law." these courts also seem relatively immune toward legislative backlashes, which in the common-law context have shown to generate judicial tendency to retreat from rights protection in order to avoid political clipping of judicial wings. Finally, the European constitutional dialogic process in the context of abortion reputedly demonstrated that judicial nullifications of politically accepted legislation steered a middle course and ultimately generated decades-old settled compromises.

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

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