

Women Between a Rock and a Hard Place: State Neutrality vs. EU Anti-Discrimination Mandates in the German Headscarf Debate

By Joyce Marie Mushaben*

A. Introduction

Although it guarantees individual religious freedom and the inviolability of “human dignity,” the German Basic Law also infers the principle of *state neutrality* regarding the exercise of religious freedom in public life and civil service domains. The *Länder* (states), however, enjoy substantial discretion in matters of religion and education, which has led to major divisions as to whether *Muslimas* (Muslim women) can wear headscarves as *public* employees. In 2006 Berlin adopted its own Neutrality Law (*Berliner Neutralitätsgesetz*) prohibiting religious attire among teachers, judges, and police. Within weeks, the city-state’s first anti-discrimination officer was overwhelmed with new discrimination cases involving private sector employers as well. This essay examines the tensions and paradoxes inherent in Berlin’s efforts to uphold religious “neutrality” among civil servants while also meeting the requirements of Germany’s General Equal Treatment Act and three recent EU Directives 2000/43/EC, 2000/78/EC, and 2002/73/EG), addressing race, religion and equal treatment in employment, respectively. This article argues that the Neutrality Law not only violates national and supranational anti-discrimination regulations but that local officials are actually drawing upon the latter to undermine the enforcement of their own statute, in the hope that it will be repealed.

*Discrimination, like traffic through an intersection, may flow into one direction and it may flow into another. If an accident happens at an intersection, it can be caused by cars travelling from any number of directions, and, sometimes, from all of them.*¹

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¹ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U CHI. LEGAL F. 139, 149.

Since the terrorist attacks of September 11, 2001, public responses to the growing presence of Islam have mirrored an overwhelming tendency to conflate religiously-motivated attire with political expression across a variety of European states. The regulation of headscarves and *burqas* has been rendered a litmus test of state efforts to combat religious fundamentalism and/or terrorism within national boundaries. Responses nonetheless vary across borders, owing to differences in historically negotiated church-state relations, conflicting juridical cultures,² and diverging framing concepts embedded in national constitutions, e.g., *laïcité*, secularity, and neutrality. Most case studies involving the practice of *hejab* have been grounded in regulatory models rooted solely in national-institutional factors; policies cover the spectrum from outright prohibition to multicultural tolerance. Scholars involved in the Values Equality & Differences In Liberal Democracies (VEIL) Project, for example, compared domestic citizenship regimes, formal church-state relations, rules for “recognizing” faith communities, anti-discrimination policies, and gender framing strategies.³ Public and private employers in the Netherlands, the United Kingdom, and Austria display significant tolerance for Muslim headscarves, while France and Germany insist on their constitutional obligations to preserve *laïcité* and neutrality vis-à-vis would-be proselytizers in public schools. Neither the Mediterranean nor the Scandinavian states have witnessed major debates, although some have begun to take action against *burqas*.

Few national lawmakers regulating headscarf use have recognized the implications for equal employment opportunity, much less the problem of intersectionality or multiple discrimination.⁴ Despite the obvious fact that all of these cases involve women, German courts have framed their rulings primarily in terms of the “negative” rights of unnamed parents and children—i.e., their right *not* to be influenced by a teacher’s religious beliefs. Judges across the Federal Republic have either ascribed their own political meaning to this “piece of cloth”⁵ or accorded priority to (presumed) “public perceptions” of head-scarf wearers, rather than balancing the positive, fundamental rights of Muslimas against the abstract negative freedoms of third-parties. They construe neutrality as a carved-in-stone value, ignoring both its penumbral nature and the many state practices that openly privilege some religions over others by way of recognition as “corporations in public law,” or *Körperschaftsrecht*.

² See Joyce Marie Mushaben, *Separate and Unequal: Judicial Culture, Employment Qualifications and Muslim Headscarf Debates*, 2 LAWS (forthcoming 2013).

³ See POLITICS, RELIGION AND GENDER: FRAMING AND REGULATING THE VEIL (Sieglinde Rosenberger & Birgit Sauer eds., 2011).

⁴ Crenshaw, *supra* note 1, at 137–167. See also Nira Yuval-Davis, *Intersectionality and Feminist Politics*, 13 EUR. J. WOMEN’S STUD. 193 (2006).

⁵ See DER STOFF AUS DEM KONFLIKTE SIND: DEBATTEN UM DAS KOPFTUCH IN DEUTSCHLAND, ÖSTERREICH UND DER SCHWEIZ (Sabine Berghahn & Petra Rostock eds., 2009).

Home to an estimated 20–25 million Muslims, the European Union ordained in 1992 that only EU-nationals were entitled to the privileges of supranational citizenship wherever they reside under Article 8 TEU.⁶ Minorities who lack national qua EU-citizenship are denied rights to free movement, religious expression, and social mobility accorded to indigenous residents even though a majority have been born and/or educated in member-states. For women with migrant backgrounds, this amounts to double or even triple discrimination, insofar as female residency status may depend on a male breadwinner rather than on their own employment status.⁷ The irony regarding vehement *Kopftuch* (headscarf) debates affecting Germany's 3.2 million Muslims is that all women barred from classrooms have been citizens, who have nonetheless been denied full protection under the Basic Law. Indeed, their pursuit of civil service jobs offers positive proof of their embrace of national constitutional values, ranging from human dignity and religious freedom, to the free choice of profession and gender equality.

Although the EU possesses no formal competencies regarding the regulation of religion in national public life, the Commission has come to recognize diverse faith communities as dialogue partners, resulting in the professionalized interest representation of religious denominations in Brussels.⁸ Explicitly prohibiting discrimination rooted in race, sex, national origin, religion, and sexual orientation, Article 13 of the Amsterdam Treaty marked the first Community effort to extend equal treatment beyond the realm of paid employment. As witnessed throughout its history, EU equality initiatives tend to become more concrete over time, particularly once the European Court of Justice enters the debate. This has not only led to a gradual harmonization of contradictory member-state approaches but also to directly effective "best practices," particularly when sex and gender are at issue.⁹

Challenging under the best of circumstances, the transposition, implementation, and monitoring of EU law under the rubric of *multi-level governance* proves even more

⁶ The Treaty of European Union is more commonly known as the Maastricht Treaty.

⁷ See Joyce Marie Mushaben, *Up the Down Staircase: Redefining Gender Identities through Ethnic Employment in Germany*, 35 J. ETHNIC & MIGRATION STUD. 1249 (2009) [hereinafter *Mushaben 2009*].

⁸ See Sara Silvestri, *Islam and Religion in the EU Political System*, 32 W. EUR. POL. 1212 (2009); Norman Doe, *Towards a 'Common Law' on Religion in the European Union*, in RELIGION, POL. AND L. IN THE EUR. UNION 141 (Lucian N. Leustean & John T.S. Madeley eds., 2010) [hereinafter *Doe*]; Martin Steven, *Religious Lobbies in the European Union: from Dominant Church to Faith-Based Organisation?*, in RELIGION, POL. AND L. IN THE EUR. UNION 175 (Lucian N. Leustean & John T.S. Madeley eds., 2010).

⁹ See Joyce Marie Mushaben, *Women on the Move: EU Migration and Citizenship Policy*, in GENDERING THE EUROPEAN UNION: NEW APPROACHES TO OLD DEMOCRATIC DEFICITS 208 (Gabriele Abels & Joyce Marie Mushaben eds., 2012) [hereinafter *Mushaben, Women on the Move*]; Mark Bell, *The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?*, 79 THE POL. Q. 36 (2008).

complex within federal systems; in Germany, this means multiplying implementation headaches by a factor of sixteen. Unlike France, where a school-related headscarf ban was unilaterally imposed “from above,” school-related decisions involving religious neutrality in Germany fall to the *Länder*, producing sixteen possible outcomes. While the Basic Law upholds religious freedom as a “fundamental right,” devout Muslim women have been legally subjected to unequal protection across the country in the educational and employment domains. Eight *Länder* have banned headscarf use in public schools and other state sectors; the rest have not.¹⁰ Some, like Bavaria, still allow Catholic nuns to wear habits as a “reflection of western culture”; Hessen, by comparison, has barred Baghwan cloaks, monks’ frocks and nuns’ habits since the 1960s. A Human Rights Watch Report (2009) openly rejected the Federal Republic’s prohibitions as discriminatory, suggesting that an appeal lies ahead.¹¹ That appeal, I argue, is most likely to occur at the European level, resulting in a serious strike against the traditional powers of German *Länder*.

In 2006, the city-state of Berlin adopted a Neutrality Law prohibiting civil servants and public authorities exercising “sovereign functions”—e.g., judges, police and teachers—from “wearing” religious symbols.¹² True to the *law of unintended consequences*, its first anti-discrimination officer, Sabine Kroker-Stille, soon found herself overwhelmed with new discrimination cases involving private sector employers as well. When I interviewed her prior to the law’s passage at the office complex of Berlin’s Integration Commissioner, she supported it as the “best possible option” for the metropolis. During a subsequent interview the next year at her new location in the Senate (Ministry) of Social Affairs, she sighed before stating, “the law was unnecessary, it was so unnecessary.”¹³

Facing mounting EU pressure, Germany was forced to adopt an already long-overdue anti-discrimination law the same year in order to meet the requirements of the EU Race Directive,¹⁴ the Framework Directive on Employment,¹⁵ the “Recast” Directive on the Equal

¹⁰ See JULIA VON BLUMENTHAL, *DAS KOPFTUCH IN DER LANDESGESETZGEBUNG: GOVERNANCE IM BUNDESSTAAT ZWISCHEN UNITARISIERUNG UND FÖDERALISIERUNG* (2009).

¹¹ See HUMAN RIGHTS WATCH, *DISCRIMINATION IN THE NAME OF NEUTRALITY* (2009), available at http://www.hrw.org/sites/default/files/reports/germany0209_webwcover.pdf.

¹² Germany’s few private schools are largely denominational and thus not subject to civil-service regulations. So far, no challenges have been raised regarding elected officials.

¹³ Interview with Dr. Sabine Kroker-Stille, Anti-Discrimination Director for Berlin, in Berlin, Germany (9 July 2007) (discussed in JOYCE MARIE MUSHABEN, *THE CHANGING FACES OF CITIZENSHIP: INTEGRATION AND MOBILIZATION AMONG ETHNIC MINORITIES IN GERMANY* 318 (2008)).

¹⁴ Council Directive 2000/43, para. 6, 2000 O.J. (L 180) 22, 22 (EC).

¹⁵ Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC).

Treatment of Men and Women,¹⁶ and the Gender Directive on Civil Law.¹⁷ Rather than guaranteeing neutrality in matters of religious expression, the Berlin statute is reinforcing exactly the kind of discrimination the EU directives seek to eliminate. This study examines the tensions and paradoxes inherent in Berlin's efforts to uphold religious "neutrality" among public service employees while also banning discrimination regarding access to employment, goods, and services based on race/ethnicity, sex, and religion, respectively. I argue that neither the Neutrality Law nor the General Equal Treatment Act—in German, the *Allgemeines Gleichbehandlungsgesetz* (AGG)—meet the fundamental rights standards of the Basic Law, much less the "spirit of the law" underlying EU anti-discrimination directives. In my assessment, it will require future interventions by the European Court of Justice to turn implicit EU imperatives into explicit, effective German law.

The study begins with a brief summary of key EU directives, followed by background on Berlin's Neutrality Law and the General Equal Treatment Act. It then analyzes developments engendered by the Neutrality Law to date and the extent to which the AGG might remedy or otherwise nullify what has become an ever more discriminatory *Lex Kopftuch* over time. Finally I reflect on the concept of *multiple discrimination* and the extent to which anti-discrimination provisions at all three levels call for recognition of the "greater problem" it poses for Muslim women. I then address reasons why the European Court of Justice is better positioned than member-state governments or judiciaries to untangle this proverbial Gordian knot.

B. Setting the Standards: The EU Race and Framework Directives

The 1957 Rome Treaties established a set of fundamental freedoms intended to secure the unimpeded movement of people, goods, services, and capital throughout the member states.¹⁸ Subsequent treaties have served to operationalize these freedoms, as well as to extend them to broader groups participating in the single European market. The Maastricht and Amsterdam Treaties (AT) moreover enhanced the EU's ability to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation," under Article 13 AT and the Equal Treatment Directives. Concerns rooted in mounting demographic deficits, new migration waves, and member-state failures to adopt effective integration policies vis-à-vis countless

¹⁶ Council Directive 2002/73, 2002 O.J. (L 269) 15 (EC) (amending Council Directive 76/207, 1976 O.J. (L 039) 40 (EC)).

¹⁷ Directive 2004/113 of the European Council of 13 December 2004 Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, 2004 O.J. (L 373) 37.

¹⁸ The EU espouses eight "fundamental principles" regarding religion, none with the binding power of its gender equality precepts. It accepts the value of religion in national cultures, subsidiarity, dialogue with faith communities, the autonomy of denominational associations, religious equality through non-discrimination, and limited special protections for religion.

residents lacking EU-citizenship generated a flurry of principles and proposals addressing these problems as of 2000.¹⁹

A further driving force was the EU's embrace of the 1995 Beijing Declaration and Platform for Action, along with its subsequent adoption of *gender mainstreaming*.²⁰ The former set out to guarantee the routine collection of sex-disaggregated statistics and use of concrete indicators in research, planning, and program implementation, further committing states to increase women's presence in public and private decision-making structures per se. Adopted in 1996, gender mainstreaming mandates the inclusion of gender-sensitive data in the formulation, implementation, and monitoring of all EU policies and programs. While Community practice often falls short of its declared equality theories and principles, at least it sets itself ambitious goals, allowing for real forward movement over time.

Among the many EU provisions relating to anti-discrimination, those pertaining directly to religious expression and employment can only be briefly summarized here. Council Regulation 1612/68, amended in 1976 and 1998, was among the first to posit: "Any national of a Member State shall, irrespective of his [sic] place of residence, have the right to seek employment, to join a vocational training course or to take up an activity as an employed person"²¹ European decision-makers inserted Article 1a, which states: "Within the scope of this Regulation, all discrimination on the grounds of sex, racial or ethnic origin, religion, belief, disability, age or sexual orientation shall be prohibited." Article 6 of the Lisbon Reform Treaty upholds the freedom "to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance."²² Afforded essentially the same legal value as the Treaties, Article 21 of the Charter of Fundamental Rights—incorporated into the Lisbon Reform Treaty in 2009—holds: "Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion, belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited,"²³ rendering religious affiliation a protected category.

The pluralization of religions among the EU population has given rise to a positive Community responsibility for ensuring that socio-economic inclusion also covers members

¹⁹ See Mushaben, *Women on the Move*, *supra* note 9.

²⁰ See GENDERING THE EUROPEAN UNION: NEW APPROACHES TO OLD DEMOCRATIC DEFICITS 208 (Gabriele Abels & Joyce Marie Mushaben eds., 2012).

²¹ Council Regulation 1612/68, 1968 O.J. (L 257) 2 (EEC) (amended in 1976 and 1998).

²² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community art. 6, Dec. 13, 2007, 2007 O.J. (C306) 1.

²³ Doe, *supra* note 8, at 145.

of different faith groups. Within the parameters of “soft law,” Council Directive 2000/43/EC (6) (Race Directive or RD) explicitly extends equal treatment to persons irrespective of racial or ethnic origin, warranting protection against employment discrimination.²⁴ It extends protections beyond formal conditions of *employment* to include social advantages, education, and access to/supply of goods and services available to the public, including housing. While this Directive allows some exceptions for age discrimination, it obliges ever more employers to undertake reasonable accommodations for persons with disabilities.

Establishing a framework for equal treatment in employment, Council Directive 2000/78/EC (the Framework Directive or FED) asserted, for the first time, that eliminating religious discrimination—like sex discrimination—comprises a fundamental principle of Community law.²⁵ Stressing that women frequently become the victims of multiple discrimination, it construes employment and occupation as key to equal opportunities, given their major contributions to full participation in economic, cultural, and social life. The FED applies to conditions governing employment, promotion, and self-employment, including: selection criteria and recruitment conditions; access to basic or advanced vocational training and practical work experience; rules affecting jobs, working conditions, dismissals, and pay; and rights to membership or participation in unions, employers’ associations, and professional organizations.

The Framework Directive on Employment (FED) applies to national laws deemed necessary for maintaining security, public order, public health, crime prevention, and protecting “the freedoms of others.” The EU pledges to “take into account the different ways in which men and women experience discrimination on grounds of religion” as it seeks a “workable unity in the European approach to the regulation of religion.”²⁶ As noted earlier, however, German federalism allows states to double the “unequal treatment” facing Muslimas whose employment rights not only deviate from those of their counterparts in other EU member-states—e.g., Sweden, Netherlands, the UK—but also from Land to Land—e.g., Hamburg versus Bavaria. Having already proven that it is willing and able to nullify Basic Law provisions with its *Tanja Kreil v. Federal Republic of Germany* ruling,²⁷ the European Court of Justice (ECJ) will hardly feel cowed by eight out of sixteen *Länder* constitutions used to justify headscarf bans, especially in light of the fact that the latter only came into force after the German High Court declared that Fereshta Ludin (see case below) could not be barred from teaching because no such state laws existed in 2003.

²⁴ See Council Directive 2000/43, *supra* note 14, at 22.

²⁵ See Council Directive 2000/78, *supra* note 15.

²⁶ Doe, *supra* note 8, at 152.

²⁷ *Kreil v. Bundesrepublik Deutschland*, CJEU Case C-285/98, 2000 E.C.R. I-69.

C. Legislative Layers, Conflicting Principles: National Law and State Regulation

Berlin's special Four-Power status exempted it from Basic Law provisions through 1989, as did Soviet General Schukow's insistence in 1947 that school law allow parents to decide to impart—or not impart—religious education to their children. After the fall of the Wall, Berlin became a full party to the Basic Law, which explicitly guarantees: human dignity; free personality development; sexual equality; freedom of faith, conscience, and creed; free expression, association, movement; and educational as well as occupational choice. Article 7 (3) of the Basic Law curiously obliges the state to provide religious instruction in public schools, but neither Article 6 nor Article 7 explicitly mentions neutrality, much less the preeminence of Judeo-Christian values found in various *Länder* constitutions. Article 33 accords equal eligibility for “any public office” based on aptitude, qualifications, and professional achievements; no rights accorded to civil servants can be challenged “by reason of adherence . . . to a particular religious denomination.”

As prominent legal experts Dagmar Schiek,²⁸ Susanne Baer,²⁹ Ernst-Wolfgang Böckenförde,³⁰ and Ernst Gottfried Mahrenholz³¹ attest, federal laws involving fundamental constitutional rights automatically trump *Länder* laws. In domains covered by “supranational constitutionalism,”³² state laws are also subject to EU supremacy rules. In legal theory, the clash between *Bund und Länder* statutes regarding fundamental rights is not at issue; in political practice, however, German case law regarding headscarves has rendered this the crux of the matter.

Re-instated in the early 1990s as the capital city, Berlin has supplied national lawmakers with many positive examples of proactive integration, rooted in twenty years of

²⁸ Dagmar Schiek, *From European Union non-discrimination law towards multidimensional equality law for Europe*, in EUROPEAN UNION NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES ON MULTIDIMENSIONAL EQUALITY LAW 3–28, 73–89 (Dagmar Schiek & Victoria Chege eds., 2009).

²⁹ See Susanne Baer & Kirsten Wiese, IST DAS BERLINER NEUTRALITÄTSGESETZ MIT DEM ALLGEMEINEN GLEICHBEHANDLUNGSGESETZ VEREINBAR?: EXPERTISE IM AUFTRAG DER LANDESTELLE FÜR GLEICHBEHANDLUNG – GEGEN DISKRIMINIERUNG IN BERLIN (2008).

³⁰ See Ernst-Wolfgang Böckenförde, *Bekenntnisfreiheit in einer pluralen Gesellschaft und die Neutralitätspflicht des Staates*, in DER STOFF, AUS DEM KONFLIKTE SIND: DEBATTEN UM DAS KOPFTUCH IN DEUTSCHLAND, ÖSTERREICH UND DER SCHWEIZ 175 (Sabine Berghahn & Petra Rostock eds., 2009).

³¹ See Ernst Gottfried Mahrenholz, *Das Kopftuch und seine Verwicklungen: Anmerkungen zum Urteil des Bundesverfassungsgerichts vom 24.09.2003*, in DER STOFF, AUS DEM KONFLIKTE SIND: DEBATTEN UM DAS KOPFTUCH IN DEUTSCHLAND, ÖSTERREICH UND DER SCHWEIZ 193 (Sabine Berghahn & Petra Rostock, eds. 2009).

³² See RACHEL A. CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE (2007).

engagement by its first Foreigners' Commissioner Barbara John (CDU). The federal SPD-Green Coalition (1998–2005) finally enacted a new citizenship law in 2000, offering Germany the chance to remedy 40 years of non-integration affecting guest-worker offspring.³³ Children born on German soil since 1991 are accorded *jus soli* (birth place) citizenship, provided one parent is a permanent resident -- although adolescents must decide by age 23 which of two possible citizenships they will "keep." Meanwhile, Berlin's Reigning Mayor, Klaus Wowereit, convened the city's first Integration Summits in 2005 and 2006. The new CDU chancellor Angela Merkel followed suit, personally introducing a groundbreaking National Integration Plan in 2007, which drew on many of the principles, indicators, time-tables, and benchmarks advanced by the EU Commissioners.³⁴

As of January 2005, 212,723 of Berlin's 450,900 non-German residents were at least nominally Muslim. They are, however, far from mono-cultural or mono-denominational; the total encompasses 170,000 persons of Turkish descent, 34,000 from Arabic states, and 12,000 more from "countries with Muslim majorities."³⁵ Roughly 72 Sunni mosques minister to persons of Turkish, Arabic, Bosnian, or Pakistani origin and German converts; they are joined by two Alevi and two Ahmadiyya communities, along with seven Shiite entities with Azerbaijan, Iranian, and Lebanese roots.³⁶ Some 70% of all pupils in Mitte, Neukölln, and Kreuzberg are non-nationals. Given the demographic shift, Berlin's ruling SPD-PDS coalition decided in 2005 to copy a "religious instruction" model introduced in Brandenburg, utilizing a non-denominational "life training and ethics" approach. It obliges students in grades 7 through 10 to participate in an ethics/world religions course, rendering denominational classes voluntary. In 2006, the Senate made "non-professing" ethics instruction mandatory for all students as of 7th grade.

Amidst these developments, the Constitutional Court issued a "cowardly" verdict in 2003,³⁷ ruling that Baden-Württemberg schools could not refuse to hire Fereshta Ludin

³³ JOYCE MARIE MUSHABEN, *THE CHANGING FACES OF CITIZENSHIP: INTEGRATION AND MOBILIZATION AMONG ETHNIC MINORITIES IN GERMANY* (2008) [hereinafter MUSHABEN, *THE CHANGING FACES OF CITIZENSHIP*].

³⁴ See Joyce Marie Mushaben, *From Ausländer to Inländer: The Changing Faces of Citizenship in Post-Wall Germany*, 28 *GERMAN POL. & Soc'y* 141 (2010); Mushaben, *Women on the Move*, *supra* note 9.

³⁵ ISLAMISCHES GEMEINDELEBEN IN BERLIN 19 (Riem Spielhaus & Alexa Färber eds., 2007), available at <http://www.berlin.de/imperia/md/content/lb-integration-migration/publikationen/religion/islamischesgemeindeleben.pdf?start&ts=1176203977&file=islamisc hesgemeindeleben.pdf>.

³⁶ *Id.* at 106–108.

³⁷ See Helmut Kerscher, *Karlsruhe verlangt klare Entscheidung der Politik*, *SÜDDEUTSCHE ZEITUNG* (Sept. 25, 2003); Jost Mueller-Nuehof, *Mit Kopfschütteln*, *DER TAGESSPIEGEL* (Sept. 26, 2003), available at <http://www.tagesspiegel.de/zeitung/mit-kopfschuetteln/451138.html>.

insofar as it had no state statute expressly prohibiting headscarves.³⁸ Eight *Länder* immediately jumped to create one: Baden-Württemberg, Bayern, Berlin, Bremen, Hessen, Niedersachsen, Nordrhein-Westfalen, and Saarland. The other eight either took no action or legislated freedom of choice.³⁹

After months of committee wrangling between the SPD-PDS coalition partners (stressing Enlightenment traditions), the Berlin Assembly adopted its Neutrality Law in February 2005, barring all persons exercising high state functions from wearing religious clothing or symbols. Libertarian FDP members and egalitarian Greens supported the bill, while security-minded CDU delegates attacked it for its “anti-religious understanding of the state”⁴⁰ in equating Christian symbols with Islamic ones. Marion Seelig (PDS) erroneously declared: “Berlin is the only state in which all religions are treated equally.”⁴¹ Özcan Mutlu (Greens) asked: “Why does your proposal differentiate between “ostentatious clothing items,” on the one hand, and “demonstrative symbols,” on the other?”⁴²

The explicit ban against the “wearing of visible religious and world-view items of clothing and symbols” applies to: (1) employees and civil servants who exercise sovereign functions in the legal and judicial domains as well as in the police force; (2) teachers, to the extent that they do not instruct in vocational schools or in schools offering alternative paths to tertiary education; (3) nursery school teachers in publically administered day-care facilities, if expressly desired by parents or legal guardians; and (4) all civil servants in preparatory or probationary service, or others in training for such posts, although exemptions can be granted. “Symbols worn as jewelry items” (e.g., Christian crosses) are explicitly excluded from the ban as “not demonstrating belonging to a faith community.”⁴³ Thus, despite their claims of prohibiting all religious symbols, Land-level parliamentarians disproportionately hit only one religion, and not just in Berlin. Dagmar Schiek opined: “The ‘*Kopftuchverbote*’ currently under discussion in Germany are so overwhelmingly configured and applied in such a way that they can only be targeted against Islamic rules regarding attire.”⁴⁴ Indeed,

³⁸ Ludin was the daughter of an Afghani diplomat who had lived in Saudi Arabia, moved to Baden Württemberg, and became a citizen in 1987. She studied German, English, and Social Studies to qualify for a career in teaching. The State Education Minister insisted she had a right to complete her training but school officials refused to hire her in 1998. Ludin filed multiple lawsuits, claiming her exclusion violated *state neutrality*.

³⁹ See VON BLUMENTHAL, *supra* note 10.

⁴⁰ Article on file with the author.

⁴¹ Article on file with the author.

⁴² See ÖZCAN MUTLU: FÜR MITTE IN DEN BUNDESTAG, <http://www.mutlu.de>.

⁴³ Baer & Wiese, *supra* note 29, at 48.

⁴⁴ Dagmar Schiek, *A Comparative Perspective on Non-Discrimination Law*, in CASES, MATERIALS, AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW (2007). See also SUSANNE BURRI & DAGMAR SCHIEK, MULTIPLE DISCRIMINATION IN EU LAW: OPPORTUNITIES FOR LEGAL RESPONSES TO INTERSECTIONAL GENDER

the term *Kopftuchgesetz* (Headscarf Law) was invoked by local legislators throughout the 2006 parliamentary debate.

The General Equal Treatment Act (AGG), adopted on 18 August 2006, was much longer in the making. The AGG had been proposed under the SPD-Green Schröder government, already under pressure to transpose the four EU directives adopted between 2000 and 2004.⁴⁵ The draft was actively supported by all five female SPD-Green Cabinet members, subsequently accused of “breaking confidentiality” when their critique of a very watered-down version was leaked to the public. The Greens reintroduced a draft bill in December 2005 but failed to generate majority support, having been interrupted by Schröder’s call for early elections.

Negotiations resumed under the Grand Coalition, resulting in a new draft-law accepted by the SPD, CDU and CSU in May 2006. The fact that the statute was not adopted until 14 August 2006—under major EU pressure—is reflected in its official name: Law on the Transposition of European Directives for the Realization of the Principle of Equal Treatment.⁴⁶ The legal package amends other regulations, adding new rules precluding discrimination in the military.⁴⁷ National judicial interpretations of the EU directives, particularly in regard to sex discrimination, have lagged behind ECJ case law. Indeed, since the AGG’s adoption, the Commission has formally required Germany to respond to charges (issued on 23 March 2007, 23 October 2007, and 31 March 2008, respectively), that it is still failing to implement the four directives adequately.⁴⁸

Covering all of the categories outlined in Article 13 AT and recent EU directives, the AGG applies to public service employees as well as to applicants, trainees, Land-level civil servants, and judges concerning selection criteria, hiring, and working conditions. It ensures “reasonable accommodation” for religious beliefs and disabilities. Its formal definitions of *direct* and *indirect discrimination* adhere closely to the wording found in the EU directives:

DISCRIMINATION? (2009) available at http://ec.europa.eu/justice/gender-equality/files/multiplendiscriminationfinal7september2009_en.pdf.

⁴⁵ See DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 15/453, available at <http://dip21.bundestag.de/dip21/btd/15/004/1500453.pdf>; THE ACADEMY OF EUROPEAN LAW, IMPLEMENTATION OF EU ANTI-DISCRIMINATION LAW IN THE MEMBER STATES: A COMPARATIVE APPROACH (2011), available at http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf.

⁴⁶ Baer & Wiese, *supra* note 29, at 29.

⁴⁷ MATTHIAS MAHLMANN, REPORT ON MEASURES TO COMBAT DISCRIMINATION: DIRECTIVES 2000/43/EC AND 2000/78/EC (2010), available at http://www.non-discrimination.net/content/media/2010-DE-Country%20Report%20LN_FINAL_0.pdf.

⁴⁸ The Merkel Government insists no amendments are necessary. The AGG restricts class action suits and legal liability for employers based on third-party actions.

Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the prohibited grounds. The guarantee of equality establishes the principle of equal treatment as a fundamental right at the constitutional level

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having one of the characteristics within the scope of the AGG at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.⁴⁹

Section 8 of the General Equal Treatment Act likewise employs directive language in stipulating that exceptions only be permitted in cases involving “genuine and determining occupational requirements.”⁵⁰

Pursuant to the AGG, lawmakers established the Federal Anti-Discrimination Agency (ADG) in August 2006, supported at various levels by state-level agencies (LADS), Commissioners for Migration, Refugees & Integration/Foreigners, Commissioners for National Minorities & Immigrants of German Ethnicity, and the Concerns of Disabled Persons, and the German Institute for Human Rights. The latter are charged with advising the government, publishing extensive reports, and supplying limited advice to victims. The ADG is tied to the Ministry of Family, Senior Citizens, Women and Youth; its independent director can only be removed under exceptional circumstances. Funding through the Ministry of Family amounted to roughly € 3 million in 2010.⁵¹

D. Double Jeopardy: How Anti-Discrimination Laws Backfired in Berlin

The eight *Länder* adopting bans after 2003 have seen a significant number of court cases challenging their respective statutes; those verdicts, in turn, have reinforced various misinterpretations of constitutional law, according to a number of former Bundesverfassungsgericht (BVerfG) justices such as Limbach, Böckenförde and

⁴⁹ MAHLMANN, *supra* note 47, at 34, 39–40.

⁵⁰ Allgemeines Gleichbehandlungsgesetz [AGG] [General Equal Treatment Act], Aug. 14, 2006, BGBl. I at 1897, § 8.

⁵¹ MAHLMANN, *supra* note 47, at 98–99

Mahrenholz.⁵² There is mounting anecdotal evidence that Berlin Muslimas have faced mounting discrimination regarding internships and job placement since 2006.⁵³ Although the EU clearly wants member-states to generate gender-disaggregated statistics regarding implementation of its anti-discrimination directives, my two months of fieldwork revealed that few official statistics are available at the state level thus far.

Experts point to seven major juridical “misconceptions” evident in the employment backlash, especially against young Muslim women in Berlin. The first problem is that policymakers set out to resolve a “non-existent conflict” between teachers and parents; only two women were reported to have previously worn headscarves in the Justice division, none in public schools. Nordrhein-Westfalen is the only German state to count at least 20 *hejab* wearers among its teachers, with no known conflicts to date. Ludin, ironically, had to move to Berlin to teach in a private Islamic school after a quickly adopted law barred her from employment in Baden-Württemberg.

Secondly, the 2003 *Ludin* verdict rests on a faulty reading of Article 6 of the Basic Law prioritizing the “negative freedoms” of parents.⁵⁴ There is no empirical evidence to date that children’s exposure to persons of different faiths is harmful, nor is there evidence that headscarves lead to “a disturbance of school peace,” although German judges are free to solicit further information along these lines. Former BVerfG justice Mahrenholz contends that disrupting school peace implies a major deviation from normal pedagogical activities, precipitated “by violence, drugs, provocations through radical political posters or against unpopular teaching staff,” all of which would invoke disciplinary measures based on established school rules.⁵⁵ What is really at stake are not abstract threats to “school peace” but day-to-day conflicts among individuals that need to be resolved through pre-existing, legitimate procedures.

Third, instead of treating neutrality as a means to an end, warranting that that no single religion prevails at the expense of others, headscarf opponents define it as a “collective good” superseding fundamental individual rights. As the Constitutional Court opined: “The religious-worldview neutrality required of the state does not entail a distancing in the sense of a strict separation of state and church but is rather to be understood as a position

⁵² For a listing of the 20 cases filed by 2008, see Ute Sackofsky, *Kopftuchverbote in den Ländern – am Beispiel des Landes Hessen*, in DER STOFF, AUS DEM KONFLIKTE SIND: DEBATTEN UM DAS KOPFTUCH IN DEUTSCHLAND, ÖSTERREICH UND DER SCHWEIZ UNTER MITARBEIT VON ALEXANDER NÖHRING 281 (Sabine Berghahn & Petra Rostock eds., 2009).

⁵³ See ANTIDISKRIMINIERUNGSSTELLE DES BUNDES, MIT RAT ZUR TAT – FÄLLE AUS DER BERATUNG DER ANTIDISKRIMINIERUNGSSTELLE (Christine Lüders ed., 2010) [hereinafter Lüders]; Baer & Wiese, *supra* note 29.

⁵⁴ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I, Art. 6.

⁵⁵ Mahrenholz, *supra* note 31, at 210.

that promotes an open and overarching freedom of belief for all denominations.”⁵⁶ The Basic Law’s neutrality mandate is intended to guarantee openness to persons of all faiths, grounded in human dignity and personal self-actualization, likewise deemed fundamental freedoms.

Fourth, rather than recognize that “integration begins with a respect for difference,” a wide array of lower courts have turned negative parental freedoms into a “personal right to reject” tolerance and mutual learning possibly preferred by a majority.⁵⁷ Previous rulings have affirmed that Article 6 GG does not accord parents an absolute power over classroom instruction; fundamentalist Christians would have no right to exclude evolutionary theory from the curriculum, for example. As Böckenförde also stresses, “no right is without boundaries.”⁵⁸ Objecting to someone’s mode of dress is not equivalent to engaging intensely and substantively with the religious convictions of the teacher in question. Other parents might have equally good reasons for wanting to protect *their* offspring from the inappropriate fashions that other classmates wear to school, including strapless tops, revealing shorts, and T-shirts with obscene logos (appalling to this feminist mother of a teenage boy). Neutrality rules would offer those parents no comparable legal grounds for dictating school attire, even if they were religiously motivated.

Just as importantly, officials have either ignored or over-interpreted the precept of “sovereign functions” in relation to religious attire. Personnel decisions for a specific teaching post need to be made on an individual basis, not targeted against an entire social group. Article 33 GG reinforces protection against sex, religious, and ethnic discrimination for federal civil servants, as do state laws regulating public offices and services. One instance centered on a school director who denied use of a classroom for an after-hours *Volkhochschule* course to a language teacher practicing *hejab*. Instruction taken on a voluntary basis, especially by adults, is explicitly excluded from provisions intended to protect children who are required to attend school on a daily basis from potentially unwanted exposure to a different religion. Another supervisor denied employment to a Muslima seeking a menial job in a school kitchen.

Even more erroneous, of course, is the conflation of women’s clothing with forces behind the terrorist attacks beginning on September 11th. All of the known perpetrators to date in the United States, Madrid, and London, have been men devoid of head-coverings. The Administrative Court in Lüneberg confirmed that “the lack of suitability [*Eignung*] for

⁵⁶ Bundesverfassungsgericht [BverfG - Federal Constitutional Court], Case No. 2 BvR 1436/02, 108 BverfGE 282, 300 (Sep. 24, 2003) (cited in Sacksofsky, *supra* note 52, at 283).

⁵⁷ Mahrenholz, *supra* note 31, at 222, 209.

⁵⁸ Böckenförde, *supra* note 30, at 180.

service in public schools cannot be solely derived from the wearing of a headscarf.”⁵⁹ As Ute Saksofsky puts it: “To overstate the issue: No one would ever conclude on the basis of a single teacher with a headscarf that the German state now professes Islam.”⁶⁰

A further flaw in lawmakers’ logic derives from the *model function* that civil service laws hold for employers in the private sector, many of whom immediately began barring *hejab* in sectors never anticipated under the Neutrality Law.⁶¹ By February 2008, Berlin’s SPD Interior Minister Ehrhart Körting noted in a press interview: “I do not believe that the law can persist in the long run.” Integration Commissioner Günter Piening declared further that the legislation had achieved exactly the opposite of what had been intended: “Now all those who think that headscarf wearing just doesn’t belong here have had their feelings confirmed.” Private companies have reacted accordingly, announcing that “if it isn’t allowed in the civil service we will do the same here.” Interior-expert for *Die Linke*, Marion Seelig also learned, “[t]he law is out of touch with reality. I wouldn’t be opposed to the law now being repealed.”⁶²

Perhaps the most serious charge raised against state bans on headscarf use, however, is that the *Ludin* verdict amounts to a dereliction of duty on the part of the Federal Constitutional Court itself; the core responsibility of the latter consists of supplying a binding interpretation of “fundamental rights” to ensure equal protection before the law for all citizens, irrespective of their place of residence or employment. The High Court turned over to state lawmakers the power to concretize both implicit and explicit constitutional boundaries, although these can be adequately and concretely derived from the Basic Law itself:

Ultimately it is the binding responsibility of the BVerfG to determine the nature and scope of immanent boundaries regarding fundamental rights. It is not the charge of state lawmakers to outline in a declaratory fashion, after the fact, the limitations that indirectly emerge out of constitutional law Having subsequently provoked exactly such laws in half of the

⁵⁹ Mahrenholz, *supra* note 31, at 197.

⁶⁰ Sacksofsky, *supra* note 52, at 284.

⁶¹ See SUSANNE BAER ET AL., MEHRDIMENSIONALE DISKRIMINIERUNG – BEGRIFFE, THEORIEN UND JURISTISCHE ANALYSE (2010); Lüders, *supra* note 53.

⁶² All press citations come from Marlies Emmerich, *Umstrittenes Neutralitätsgesetz steht auf der Kippe. Körting: Kopftuch-Verbot wird nicht auf Dauer bleiben*, BERLINER-ZEITUNG, Feb. 9, 2008, available at <http://www.berliner-zeitung.de/archiv/umstrittenes-neutralitaetsgesetz-steht-auf-der-kippe-koerting--kopftuch-verbot-wird-nicht-auf-dauer-bleiben,10810590,10537890.html>.

German states [with its verdict], the Senate has pulled out the rug from under an alternative constitutional legal view of the court.⁶³

Earlier German rulings against private employers reveal that individual religious rights often do trump abstract interests, customer preferences, and third-party risks, setting the parameters for headscarf rulings. A 1995 verdict banned the display of crucifixes in all public classrooms in Bavaria, despite that state's contention that "the crucifix is 'value-neutral' and the Muslim headscarf is 'religious proselytizing' because the former is part of the value heritage of occidental nations and the latter is not . . ." ⁶⁴ Crucifixes required, paid for, and installed by the state in every Bavarian classroom violated the *neutrality norm* in ways that personal religious expressions do not; the latter are clearly protected by Article 4 GG. In 2002 the Federal Labor Court rejected an employer's claim that customers *might* object to a veiled woman at a department store perfume counter. The saleswoman's concrete religious rights were held to outweigh an unsubstantiated claim that her attire could "hurt sales."⁶⁵ One court did prevent a *burqa*-clad woman from drawing social benefits, insofar as her complete covering rendered her "unemployable."⁶⁶

A recent brochure issued by the Berlin Anti-Discrimination Office claims that "one can observe a growing consciousness regarding discrimination, as well as an increasing interest in relation to the contemporary rights framework, offering special protection for Muslimas."⁶⁷ It nonetheless attributes this protection to the AGG, which the *Landesstelle* sees as the result of its "broad public educational work" and efforts to empower affected victims, "including those targeted towards female and male migrants."⁶⁸ Statistics provided

⁶³ Mahrenholz, *supra* note 31, at 199.

⁶⁴ JYTTE KLAUSEN, THE ISLAMIC CHALLENGE. POLITICS AND RELIGION IN WESTERN EUROPE 178 (2005). The High Court declared in May 1995 (BverfG, Case No. 1 BvR 1087/91, 93 BverfGE 1) that state placement of crucifixes in the classrooms of obligatory, non-denominational schools violates Article 4 GG, rendering school law unconstitutional. For details, see Kerscher, *supra* note 37; Mueller-Nuehof, *supra* note 37.

⁶⁵ BverfG, Case No. 1BvR 792/03, 1 BVerfGK 308 (July 30, 2003).

⁶⁶ A more recent case in Switzerland resulted in a similar ban. See, "Keine Sozialhilfe für Seeländer Burka-Trägerin," Bieler Tagblatt, Aug. 27, 2010, <http://www.bielertagblatt.ch/nachrichten/biel/keine-sozialhilfe-fuer-seelaender-burka-traegerin>.

⁶⁷ LANDESSTELLE FÜR GLEICHBEHANDLUNG – GEGEN DISKRIMINIERUNG, IST DAS DISKRIMINIERUNG? RECHTLICHE FACHEINSCHÄTZUNGEN FÜR DIE AGG-BERATUNGSPRAXIS (Monika Brodehl ed., 2010), available at http://www.berlin.de/imperia/md/content/lb_ads/materialien/lads_broschuereidd_barrierefrei.pdf?start&ts=1295618787&file=lads_broschuereidd_barrierefrei.pdf.

⁶⁸ Civil society organs supporting the *Landesstelle für Gleichbehandlung* (LADS) are the Antidiskriminierungsnetzwerk Berlin; Bund für Antidiskriminierungs- und Bildungsarbeit; Antidiskriminierungsbüro Berlin; Senatsverwaltung für Wirtschaft, Technologie und Frauen; Schwulenberatung Berlin; Lesbenberatung Berlin; Sonntagsclub; Lesben- und Schwulenverband Deutschland LV Berlin; Netzwerk behinderter Frauen; Landesvereinigung Selbsthilfe; and Eltern beraten Eltern.

by seven participating institutions reveal that 724 discrimination complaints were processed in Berlin between 2008 and 2009, rising from 319 cases to 403 (26%) within that period (Table 1). Of those, 34% were judged “AGG relevant;” in 2009, the share of AGG-relevant cases rose to 37%. More women than men filed complaints (405 versus 370); only 62 involved trans- and bisexual persons.⁶⁹

I. Table 1 Types of Discrimination Complaints under the AGG, registered by the Berlin Landes-Antidiskriminierungsstelle, 2008-2009⁷⁰

Domain (multiple responses possible)	2008		2009	
	Absolute	%	Absolute	%
All Complaints				
Public Offices	63	19.63	85	19.91
Schools, Educational System	24	7.48	66	15.46
Police	15	4.67	15	3.51
Private Sector	72	22.43	92	21.55
Clubs, Bars, Fitness	17	5.30	9	2.11
Business World	11	3.43	21	4.92
Public Arena	36	11.21	24	5.62
Social Arena	26	8.10	30	7.03
Healthcare	22	6.85	29	6.79
Housing Market	12	3.74	17	3.98
OPNV	11	3.43	5	1.17
Other	12	3.74	34	7.96
Total	321	100.00	427	100.00

⁶⁹ CANAN BAYRAM, WIRKUNGSVOLLE ANTIDISKRIMINIERUNG? (2010), available at http://www.berlin.de/imperia/md/content/lb_ads/materialien/ka16_14467.pdf?start&ts=1291907805&file=ka16_14467.pdf.

⁷⁰ *Id.*

Characteristic (multiple responses possible)	2008		2009	
	Absolute	%	Absolute	%
All Complaints				
Ethnic Origin	123	36.50	167	35.61
Skin Color	24	7.12	18	3.84
Sexual Identity	106	31.45	105	22.39
Sex	38	11.28	85	18.12
Disability	18	5.34	46	9.81
Age	15	4.45	11	2.35
Religion	13	3.86	33	7.04
Social Status	n/a	n/a	4	0.85
Total	337	100.00	469	100.00

Although the AGG adds protections pertaining to discriminatory hiring practices in the private sector, many jobs remain out of reach for Muslim women—and men—due to the privileged status the “neutral state” has accorded to Catholic and Evangelical Lutheran institutions. In theory, faith communities can only refuse to hire persons who do not ascribe to their religion in arenas where upholding the faith is germane to the position—e.g., as clerics, religion teachers, or in other dogma-relevant functions. More young Muslims are opting to pursue occupations in the educational, health, and social services fields, yet these sectors have been historically dominated by private agencies delivering welfare services, the *Paritätische Wohlfahrtsverbände*. Employing over 1.3 million workers, they receive major state subsidies for supplying multiple state social services, the two largest being the Catholic-run *Caritas* and the Protestant-managed *Diakonie*. While both have expanded their activities to include a wide assortment of migration services, integration courses, refugee counseling, and even job programs, Muslims paradoxically “hardly have a chance in Germany these days” to secure regular employment in these sectors, despite the fact that many have direct experience with such issues.⁷¹

Beyond the double protection against discrimination guaranteed civil servants under Article 33 GG and the AGG, Berlin’s own bureaucrats should enjoy the full equal protection afforded by the the State Civil Service Law (*Landesbeamtengesetz*, LBG). According to §12 LBG, the selection and promotion of applicants involved in public administration must

⁷¹ DOROTHEE FRINGS, DISKRIMINIERUNG AUFGRUND DER ISLAMISCHEN RELIGIONSZUGEHÖRIGKEIT IM KONTEXT ARBEITSLEBEN – ERKENNTNISSE, FRAGEN UND HANDLUNGSEMPFEHLUNGEN. HOCHSCHULE NIEDERRHEIN 41–42 (2010), available at http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/rechtswissenschaftliche_expertise.pdf?__blob=publicationFile.

follow without regard to sex, ethnic origin, race, religion, world-view, or political convictions. The Neutrality Law, however, renders this LBG protection null and void.⁷²

Referencing a Konrad Adenauer Foundation survey involving 315 head-scarved Muslimas and the Berlin Neutrality Law, Heidi Knake-Werner, then Senator for Integration, Labor and Social Affairs, reported that none of those questioned could follow the logic of legislators who claimed to be protecting freedom of religion by dictating they could no longer practice *hejab*. The respondents believed that, rather than leading to a more rational debate, it had sooner triggered the opposite effect. Because none of these women engaged in religious agitation or proselytizing, they simply could not comprehend the purpose of a law which actually allowed “the public” to voice its prejudices against Muslimas more openly and to foster a social climate of rejection sanctioning exclusionary behavior.⁷³

In short, the Berlin *Landesstelle* seems to be using the AGG to override its own state law. Growing vocational and professional discrimination inflicted on Muslimas under the Neutrality Law is paradoxically credited with raising consciousness about the rights they ought to enjoy under the Basic Law, as well as under the General Equal Treatment Act that only came about after the EU threatened to impose sanctions in response to Germany’s ongoing failure to transpose and implement the RED and FED. We now turn to the ways in which Land-level headscarf bans, in general, and the Berlin Neutrality Law, in particular, contravene these European directives.

E. Assessing Direct and Indirect Discrimination Under EU Case Law

Constitutional rights matter, but so do the “judicial cultures” that ultimately shape the binding interpretations of core legal concepts, evidentiary standards, and the weights accorded conflicting sets of rights.⁷⁴ Because EU anti-discrimination directives are fairly new, no test case is under ECJ review as of this writing, although gender equality cases trigger many “preliminary ruling” submissions. Just as importantly, citizens need not exhaust all national judicial options before taking their cases to the ECJ, in contrast to individuals seeking redress before the European Court of Human Rights.

The ECJ will eventually uphold women’s right to practice *hejab* at the workplace for two reasons. First, in contrast to national courts charged with protecting traditional, mono-cultural identities, and unlike the European Court of Human Rights which relies on a single Convention that takes national constitutions as a given, the EU Court must pull together

⁷² Baer & Wiese, *supra* note 29, at 19.

⁷³ LANDESSTELLE FUER GLEICHBEHANDLUNG – GEGEN DISKRIMINIERUNG, MIT KOPFTUCH AUßEN VOR? (July 17, 2008), available at <http://www.berlin.de/landespressestelle/archiv/2008/07/17/105230/>.

⁷⁴ Mushaben, *supra* note 2.

and supersede a complex web of dynamic and often conflicting member-state legal cultures. Secondly, given the fundamental freedoms rooted in the 1950s and the heavy focus on economic integration prior to social inclusion, the ECJ must consider the “single market” qua employment dimensions inherent in all gender-relevant cases.

While the standards for assessing direct discrimination are well established, few national courts pursuing headscarf cases have willingly tackled the challenges inherent in indirect discrimination outside the field of gender and employment policy. Indirect discrimination involves an ostensibly neutral provision, criterion, or practice that disproportionately harms, hinders, or excludes members of an identifiable group, i.e., women or minorities. What counts is not the intention to discriminate but rather the outcome, unless an employer can demonstrate that the criterion or practice in question “is appropriate and necessary and can be justified by objective factors unrelated to sex.”⁷⁵ Statistical evidence can be used to show a disparate impact, but it is not imperative. Indeed, for a person facing multiple discriminations, one of the main problems lies in identifying a “statistically significant” group of comparators.⁷⁶

While the AGG is open to the use of quantitative evidence, it only requires sufficient qualitative evidence that a concrete danger of discrimination exists. My own futile hunt for data over several months suggests that the Berlin LADS is not systematically collecting the complex data that would be needed to provide a representative “comparator” group in cases of indirect or multiple discrimination. Given its SPD-Green government, its gay mayor, its surfeit of available academic researchers (including those at the Gender Competence Center), along with its ethnically and religiously diverse population, one would expect this *Land* to be much more active than others in establishing just such a data base.

Baer and Wiese attest that the AGG builds on a conceptualization of “religion” that covers “belonging to” and the “practice/manifestation of” a particular belief, both of which are protected by Article 4 GG.⁷⁷ Insofar as modes of dress may be more essential to religious practice for some faiths than others, this ban disproportionately affects members of a *particular* religion, constituting indirect discrimination, which “is hybrid of individual and group disadvantage.”⁷⁸ Moreover, this purportedly “neutral” rule against wearing religiously motivated garb simultaneously disadvantages only one sex: Women. Beards, a

⁷⁵ Dagmar Schiek, *A New Framework on Equal Treatment of Person in EC Law? Directives 2000/43/EC, 2000/78/EC and 2002/??/EC changing Directive 76/207/EEC in Context*, 8 *EUR. L. J.* 290, 296 (2002).

⁷⁶ See Crenshaw, *supra* note 1.

⁷⁷ See Baer & Wiese, *supra* note 29.

⁷⁸ Schiek, *supra* note 75, at 305.

symbol of religious orthodoxy among male Muslims and Jews, find no mention in the law.⁷⁹ Not a single case has surfaced in Germany automatically disqualifying Muslim men from teaching based on religious practice, although beards are also “visible symbols” of fundamentalist orientation. Thus headscarf bans automatically exclude women while allowing devout men to teach with no *a priori* restraints. Both individually and as a group, Muslimas are presumed guilty of fundamentalist inculcation before they can prove themselves innocent. This reverses both national and European burden of proof standards used in most sex discrimination cases.⁸⁰

Indirect discrimination thus invokes the use of three core jurisprudential tests: (1) plausibility; (2) objective, essential, and determining qualifications; and (3) proportionality, including appropriate and necessary measures. Section 8 of the General Equal Treatment Act refers to genuine and determining occupational requirements, corresponding closely with the EU Directives. Article 4 AGG moreover holds that unequal treatment based on any one of many prohibited grounds must be “justified” in relation to each of these grounds. Once the applicant supplies *prima facie* evidence of plausibility, i.e., “facts from which discrimination may be presumed to exist,” it becomes the employer’s burden “to prove that there has been no contravention of the principle of equality.”⁸¹

Muslims account for a significant share of Berlin’s devout religious adherents: In 2007, the city registered 732,890 Evangelical Lutherans and 321,445 Roman Catholics as church members, compared to 220,000 Muslims (100,000 of whom are female), 30,000 Orthodox Christians, and 11,022 Jewish community members.⁸² Given their majority status, Christians should be most affected by the Neutrality Law, yet they are least likely to wear any identifiable attire subjected to this Law, crosses having been explicitly exempted. Further, accounting for a disproportionate number of teachers in public schools, women are the only ones affected by a rule known as *Lex Kopftuch*, inferring legislators intended to target one group. Further, despite a number of German converts, Muslimas with migrant backgrounds are disproportionately denied advantages enjoyed by an ethnically-defined majoritarian society. Finally, banning only women from civil service posts based solely on attire fails to meet the constitutional imperative of Article 3(2) GG: “The state shall promote the actual implementation of equal rights for women and men and take

⁷⁹ Baer & Wiese, *supra* note 29, at 52.

⁸⁰ Directive 1997/80 of the European Council of 15 December 1997 on the Burden of Proof in Cases of Discrimination Based on Sex, 1997 O.J. (L 014) 6 (amended by Council Directive 1998/52, 1998 O.J. (L 205) 66 (EC)).

⁸¹ *Id.*

⁸² Baer & Wiese, *supra* note 29, at 47. German law permits persons to register as members of a particular faith, to ensure a flow of tax subsidies to “state-recognized” religions. For criteria, see Joyce Marie Mushaben, (2010). *Educating for Citizenship: Re-assessing the Role of Islamic Instruction in German Schools*, 3 POL. & RELIGION 518 (2010).

steps to eliminate disadvantages that now exist.” If actively supporting the constitutional mandate for gender equality is deemed an absolute “job qualification” requirement for Muslim women, it should likewise be a binding requirement for all men in civil service positions, as well as for conservative politicians and judges.

Regarding the second test, the criteria for *objective justification* closely follow those found in the EU Burden of Proof Directive.⁸³ The Race Directive explicitly mandates that “qualification” be understood as competencies which “by reason of the nature of the particular occupation activities concerned or the context in which they are carried out . . . constitute[s] a genuine and determining occupational requirement”; derogations are only acceptable to the extent that “the objective is legitimate and the requirement is proportionate.”⁸⁴ The ECJ applies “strict scrutiny” to equal-treatment exceptions; it permits the use of sex as “determining” factor only for select occupations—e.g., prison wardens or policing posts involving violence—even where national constitutional principles are at stake, as illustrated by the *Tanja Kreil* verdict.⁸⁵

Rooted in the abstract notion of “suitability,” Baden-Württemberg’s law would certainly fail the “essential and determining” test. Instead of concentrating on an applicant’s formal training and experience, it declares that:

[A]ny conduct or demeanor . . . is impermissible which *might* give pupils or parents *the impression* that a member of the teaching staff stands in opposition to human dignity, opposes equality as defined in Article 3 of the Basic Law, or rejects the basic right to liberty and the country’s free-democratic constitution.⁸⁶

A higher administrative court (Leipzig circuit) ruled in January 2009 that Baden-Württemberg could bar a Muslim convert from covering her hair at school but exempted Catholic nuns.⁸⁷ Similarly, Article 59(2) of Bavaria’s law regulating educational matters states:

⁸³ Council Directive 1997/80, *supra* note 80.

⁸⁴ Schiek, *supra* note 75, at 298.

⁸⁵ *Kreil*, CJEU Case C-285/98. In 1949, the Basic Law established universal conscription for men over 18. Although women could volunteer for some units, they were explicitly prohibited from service involving the use of arms.

⁸⁶ SCHULGESETZ FÜR BADEN-WÜRTTEMBERG [BW SCHG] [EDUCATION ACT FOR BADEN WÜRTTEMBERG], Aug. 8, 1983, as amended, § 38 (emphasis added).

⁸⁷ See *Lehrerin muss Kopftuch ablegen*, DER TAGESSPIEGEL, Jan. 26, 2009, available at <http://www.tagesspiegel.de/politik/deutschland/religion-lehrerin-muss-kopftuch-ablegen/1429012.html>.

External symbols and articles of clothing that express a religious conviction or world-view may not be worn by teaching faculty during classroom instruction, insofar as the symbols or clothing items *could be understood* by pupils or their parents as an expression of such a conviction that is not reconcilable with *fundamental constitutional values* and educational goals, *including Christian-occidental educational and cultural values*.⁸⁸

It speaks volumes that lower courts have nullified bans for clerical staff relegated to back offices, staff lacking customer contact, and janitorial workers, but uphold them for highly skilled professions. As dissenting European Court of Human Rights justice, Françoise Tulkens, wrote following *Sahin v. Headteacher and Governors of Denbigh High School*⁸⁹: “It is ironic that young women should be deprived of [that] education on account of the headscarf. Advocating freedom and equality for women cannot mean depriving them of the chance to decide on their future.” They are being excluded “from exactly the liberated environment where knowledge can be freely pursued without external societal pressures,” mirroring “that very fundamentalism these measures are intended to combat.”⁹⁰

Finally, the *proportionality test* centers on the “intensity of the specific disadvantage incurred.”⁹¹ Employers need to choose the least exclusive means in order to achieve workplace ends. They must strike a balance between the legally recognized rights of conflicting parties, in addition to weighing the intensity with which one or the other set of fundamental rights is affected—e.g. hypothetical versus material damage. Neither employers nor the *Länder* are at liberty to choose which constitutional right can be denied in exchange for another, causing one party to suffer *a priori* inequality.

The High Court declared in the *Ludin* verdict that: “A headscarf worn by a teacher for religious reasons can indeed have an especially intense effect on pupils because pupils are confronted by a teacher who stands at the center of instructional activity for the entire period of their school attendance, from which they cannot deflect their attention.”⁹² Focusing on one potential but unproven effect on pupils, the Constitutional Court curiously neglected to mention the intense, concrete, and multifaceted impact on the teacher

⁸⁸ BAYERISCHES GESETZ ÜBER DAS ERZIEHUNGS- UND UNTERRICHTSWESEN [BAYEUG] [BAVARIAN LAW ON EDUCATION AND PUBLIC EDUCATION], May 31, 2000, as amended, Art. 59(2) (emphasis added).

⁸⁹ R (Begum) v. Headteacher and Governors of Denbigh High School, [2006] UKHL 15.

⁹⁰ See *Şahin v. Turkey*, ECHR App. No. 44774/98, [2005] EUR. Ct. H.R. 819 (J. Tulkens, dissenting).

⁹¹ See Baer & Wiese, *supra* note 29.

⁹² BVerfG, Case No. 2 BvR 1436/02.

herself. The ECJ, by comparison, has “never explicitly justified an employment policy which disproportionately disadvantages women.”⁹³ The disadvantages here entail multiple violations of constitutional rights, albeit only for women.

For starters, veiled women reveal in interviews that some would experience feelings of “shame” or exposure without head-coverings,⁹⁴ constituting a violation of human dignity under Article 1 GG. Second, religious identity has been judicially recognized as an essential component of the personality, protected by Article 2 GG. Article 3 GG, moreover requires the state to actively eliminate inequality rather than to introduce new types of inequality among women, as well as between women and men. Next, *Länder* governments are not empowered to suspend Art4 GG religious freedoms for any citizen, especially as reinforced by Article 33 GG and the AGG.

Moreover, the state’s monopoly on education and training for the teaching profession cannot be used to deny a citizen’s free choice of training and profession guaranteed under Article 12 GG. A blanket exclusion of headscarf-wearers from public schools amounts to a life-long employment ban or, alternatively, a life-long denial of religious expression. In either case, the denial of a fundamental right is hardly “proportionate” to the purported harm that any one (hypothetical) child might incur during a year of classroom exposure. Finally, because there is no empirical evidence of injury, an overall *Verbot* (ban) is neither proportionate nor pedagogically necessary. One could argue that Articles 6 and 7 GG actually confer a material duty upon the state to promote youth development through cultural pluralism, preparing them for life in a globalizing society.

If the Berlin Neutrality Law is unlikely to survive these tests under an ECJ challenge, it is even less conceivable that Bavaria and Baden-Württemberg will succeed, insofar as those states do not even claim to be treating all religions equally. Questions of real neutrality aside, “the current ‘rag rug’ of regulations” spread across the *Länder* hardly supplies “a feasible approach for dealing with the challenges of religious diversity.”⁹⁵ The next step is to find the right case for a possible “preliminary ruling,” particularly in light of the fact that Susanne Baer, a key witness to Berlin developments, now sits on the Constitutional Court bench herself.

⁹³ Schiek, *supra* note 75, at 297.

⁹⁴ See SARA SILVESTRI, EUROPE’S MUSLIM WOMEN: POTENTIAL, ASPIRATIONS AND CHALLENGES (2008) (qualitative study based on interviews with Muslim women in Brussels, London and Turin).

⁹⁵ Michael Bommes & Holger Kolb, *Germany*, in IMMIGRANT INTEGRATION IN FEDERAL COUNTRIES QUEBEC 113, 130 (Christian Joppke & F. Leslie Seidle eds., 2012).

F. Conclusion: Multiple Discrimination and Freedom of Movement

More often than not, discrimination is a multi-faceted phenomenon. As headscarf debates across Europe easily demonstrate, Muslim women in Berlin and elsewhere face a very complex web of gender, religious, and ethnic discrimination. Headscarves involve a high degree of intersectionality or in recent EU parlance, multiple discrimination that, at a minimum, would require application of the same juridical tests invoked by indirect discrimination. While the Berlin Neutrality Law ignores the problem of multiple discrimination, the AGG contradicts itself: In Section 1, it proposes to stop discrimination rooted in race/ethnic origin *or* gender *or* religion, *or* sexual orientation.⁹⁶ At the same time, Section 4 AGG holds: “Where unequal treatment occurs on several of the grounds referred to under Section 1, this unequal treatment may only be justified under Sections 8 to 10 and 20 when the *justification extends to all those grounds* for which the unequal treatment occurred.”⁹⁷

Women comprise at least half of any group sharing a religious, racial, or ethnic trait, thus any response to discrimination must be gender-centered to achieve its goal. “Acknowledging multiplicity and intersectionality has the potential to strengthen the issue of gender equality,” first and foremost, because “most people disadvantaged by intersectional discrimination are female.”⁹⁸ Structural inequality, in and of itself, derives historically from the intersectional advantages enjoyed by white Christian men and the norms they have embedded into the foundations of western democratic institutions. Drawing on 21 expert interviews and 290 sequential reports from *Beratungsstellen* in the Rhein-Main region, Susanne Dern, Lena Inowlocki, and Dagmar Oberlies show that German cases often involve three or more discrimination variables simultaneously.⁹⁹

⁹⁶ See Lüders, *supra* note 53.

⁹⁷ Art. 4 AGG (emphasis added).

⁹⁸ SUSANNE BURRI & DAGMAR SCHIEK, MULTIPLE DISCRIMINATION IN EU LAW: OPPORTUNITIES FOR LEGAL RESPONSES TO INTERSECTIONAL GENDER DISCRIMINATION? 5 (2009).

⁹⁹ See SUSANNE DERN ET AL., MEHRDIMENSIONALE DISKRIMINIERUNG – EINE EMPIRISCHE UNTERSUCHUNG ANHAND VON AUTOBIOGRAPHISCH-NARRATIVEN INTERVIEWS (2010), available at http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/expertise_mehrdimensional_e_diskriminierung_empirische_untersuchung.pdf?__blob=publicationFile.

I. Table 2 Complaints Filed according to Type of Discrimination¹⁰⁰

Dimension 2 Criteria	Age	Disability	Sex	National Origin	Sexual Orientation	Total
Age	-	6	16	5	1	28
Disability	7	-	20	4	1	32
Sex	11	4	-	24	9	48
Origin	1	2	31	-	1	35
Sexual Orientation	5	3	24	10	-	42
Total	24	15	91	43	12	-

Teachers are real people with real identity needs, as well as with material constitutional rights that cannot be sacrificed in favor of hypothetical or “assumed” public perceptions projected by third parties—i.e., judges—far removed from daily classroom experiences with children. Indeed, the rule of law in democratic societies has always depended on high evidentiary standards excluding hear-say, while including the presumption of “innocent until proven guilty.” It is deeply troubling that routine standards of evidence can be so easily overturned over a simple “piece of cloth,” due to the usually ill-informed meanings that everyone but the wearer herself chooses to associate with it. “If religion as a free choice is given less protection than other discrimination grounds,” Sara Benedi Lahuerta argues, “it is not only the right to equality that is being hampered, but also the right to hold a religion or belief freely, which is a right inherent to the dignity of the person.”¹⁰¹

This renders the proactive approach to equal treatment, social inclusion, and anti-discrimination pursued at the European level over the last twenty years all the more significant. EU case law to date, coupled with recent anti-discrimination provisions, will make it extremely hard for any member-state, much less any one of the sixteen German *Länder*, to insist on unique constitutional mandates regarding “freedom from” one religion, while privileging another as “cultural” heritage. In my judgment, no individual EU member-state will succeed in extending “negative freedom” to hypothetical parents and children in the face of employment consequences for real women insofar as equal treatment in employment is a driving force of EU jurisprudence.

¹⁰⁰ *Id.* at 7.

¹⁰¹ Sara Benedi Lahuerta, *Race Equality and TCNs, or How to Fight Discrimination with a Discriminatory Law*, 15 EUR. L. J. 748 (2009).

Berlin's Neutrality Law and the headscarf bans prevailing in seven other *Länder* not only deny *hejab*-wearers equal protection before the law within Germany based on their place of residence; they also violate the EU's fundamental guarantee of freedom of movement across national boundaries. An experienced teacher who relocates from Hamburg to Munich or from Amsterdam to Berlin in search of work does not lose her "qualifications"—she is merely denied the right to utilize them in the pursuit of paid employment. Because this ban disproportionately—or, more accurately, only—disadvantages women, the ECJ will be quicker than national courts to address *indirect* as well as *direct discrimination*. Having invoked proportionality in other verdicts, the ECJ recognized in the *Tanja Kreil* case that denying women the right to bear arms excludes them from virtually all military posts, justified neither by the specific nature nor by the particular context of their duties.¹⁰²

In the gender and employment domain, European law "breaks" national law, leading to ever more reliance on preliminary ECJ rulings. Ironically, Germany, along with the Netherlands, is the country evincing the most extensive web of state/local equality agencies (over 1,500), coupled with top-quality EU lawyers who network regularly with academics and judges regarding transposed EU equality regulations. *Länder* activists have a formidable track record in targeting their own state labor courts for ECJ referrals, to preempt conservative Constitutional Court interpretations. From 1971 to 2003, German judges themselves initiated the most Article 234 EC equality references for a preliminary ruling, amounting to 42 out of 147 judgments.¹⁰³ Even more astounding: The ECJ ruled that German practices violated Community law in 76% of those cases.¹⁰⁴

This is not to say that the EU approach is perfect: "Paradoxically, both the RED and the FD make explicit reference to the problem of multiple discrimination, but then, the overall picture they provide does not allow for it to be addressed effectively."¹⁰⁵ If lawmakers hoping to eliminate discrimination do so in ways "that ignore specific needs engendered by religious convictions or a certain life style without objective reason," they wind up forcing individuals to assimilate instead of incorporating diversity into the fabric of democratic society.¹⁰⁶ The inclusion of disability into the Race Directive is also relevant here: Would a

¹⁰² *Kreil*, CJEU Case C-285/98. Germany's "general position that the composition of all armed units in the *Bundeswehr* had to remain exclusively male" violated the proportionality principle. Not even pregnancy or maternity allows women's exclusion from posts "on the ground that they should be given greater protection than men against risks to which both men and women are equally exposed."

¹⁰³ Treaty Establishing the European Community Art. 141, Dec. 24, 2002, 2002 O.J. (C 325) 96 (lacking a specific provision giving national courts the ability to refer questions on gender equality in pay to the CJEU, thus making the default provision Art. 234).

¹⁰⁴ RACHEL A. CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE* 94 (2007).

¹⁰⁵ Lahuerta, *supra* note 101, at 750.

¹⁰⁶ Schiek, *supra* note 75, at 310–311.

public school authority terminate a Muslim teacher who is a breast cancer survivor, if she were to wear a headscarf after losing her hair during chemotherapy?

I concur with Yavasi that comparable reasoning will hold regarding the Race Directive and the Framework Directive: Derogations justifying discrimination on religious grounds will be limited insofar as an employer would have to prove that a person's religion is a determining factor in her/his actual ability to discharge the duties of the job (e.g., as a cleric), rather than merely invoking perceptions that a customer might associate with a particular religion.¹⁰⁷ The ECJ will ultimately permit member states to engage in "difference of treatment" only if: (a) religious affiliation constitutes a genuine, determining occupational requirement; (b) the broader objective is legitimate; and (c) the requirement is proportionate to the organizational ethos.

This study has shown that German federalism is becoming increasingly problematic in educational arenas bearing on religion, insofar as *Länder* priorities often deviate from national and supranational rights frameworks. By nature, the EU accords greater weight to concrete employment rights over moral, theological, or abstract political concerns for "public order." High courts in the member states have been just as derelict in pursuing "balanced participation of women and men" as judges. This partly explains the weakening of burden of proof and strict scrutiny requirements when it comes to religious freedom and gender equality.

In contrast to national courts, the ECJ is compelled to reconcile the competing needs of a multicultural constituency whose nearly 500 million members differ not only in their understanding of citizen-state relations, but also with respect to customs, languages, and religions. It cannot uphold the (allegedly) mono-cultural foundations of individual member-states. Their diverse legal reasoning modes and discursive styles notwithstanding, ECJ justices comprise a unitary team intent on defining, preserving, and consolidating a community of shared values, institutions and policies. They have become key allies in realizing the EU's primary goal: "[T]he free movement of people, goods, services, and capital," social cohesion, and anti-discrimination by way of "strategic initiatives" (Barcelona, Lisbon, Luxembourg).

Mindful of the adage "if you only have a hammer, everything looks like a nail," I conclude that the ECJ will allow employment consequences to outweigh political-religious constraints on headscarf use because that is the largest body of case law and the strongest supranational tool at its disposal. Equally important is the degree to which judges are asked to resolve conflicts of a national, transnational, or supranational nature. The European Court of Justice seems more capable of transcending national politicizations of

¹⁰⁷ See Mahmut Yavasi, *Elimination of religious Discrimination at Workplace in the EU with Particular Reference to the UK*, 3 Rev. Int'l L. & Pol. 115 (2007).

the constitution invoked by a post-9/11 anti-Muslim frenzy than courts in Germany and elsewhere. The ECJ's best bet for achieving this is to remove highly gendered controversies from the electoral haggling dominating the national political arena, in order to transform them into "constitutional" issues to be resolved by Community adjudication, rooted in painstakingly slowly but deliberately negotiated fundamental freedoms. The core lesson stemming from Berlin's experience with the Neutrality Law substantiates Lissy Gröner's crucial insight that "anti-discrimination policy can only be credible if it itself does not discriminate further."¹⁰⁸

¹⁰⁸ Cited by Lahuerta, *supra* note 101, at 755.

