

SOCIAL SHAPING IN THE CLASSROOM: REGULATIONS OF ISLAMIC HEADSCARVES IN THE SCHOOLS OF GERMANY, TURKEY, AND INDIA

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ABSTRACT

Islamic headscarf restrictions are not limited to Europe. Countries with relatively new Muslim minorities, Muslim majorities, and historic Muslim minorities have all attempted to regulate the wearing of headscarves. For twelve years, Germany allowed its federal states (*Länder*) to disqualify potential teachers because they wear headscarves. For nearly thirty years, Turkey removed students who wore headscarves from schools—and many government jobs. Each country lifted its restrictions through different means. Germany's Federal Constitutional Court recognized that the freedom of religious faith protects teachers who wear headscarves. Turkey lifted its bans and, in doing so, changed its established constitutional interpretation of secularism. Presently, India faces the constitutional question of whether to allow students to wear headscarves in state-run schools where mandated uniforms do not include headscarves. Arguments in support of headscarf regulations rely on presumptions that headscarves inherently oppress women and on the belief that states should strive to create and maintain homogeneous populations—or at least an illusion of homogeneity. These arguments are flawed because (1) they rely on simplistic or incorrect understandings of Islam and Islamic law, (2) they ignore how bans undermine the agency of individual women, and (3) they undervalue rich, visible diversity in pluralist societies.

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INTRODUCTION

In 2023, the global population of Muslims grew past two billion members.¹ Around the world, states and societies have pushed visions of what women ought—and ought not—to wear. From 1997 until 2008, the Turkish military pressured its government to prohibit women wearing headscarves from attending universities.² In Germany, the state has an obligation “to project a neutral image,” an obligation which the government claims “opposes the right to religious freedom,” thereby permitting bans on religious attire for public sector workers.³ Further, in many circumstances, private German employers may maintain their “neutral image” by prohibiting employees from wearing headscarves.⁴ Legal disputes over whether the state of Karnataka, India, may enforce school uniforms which prohibit headscarves led the state’s High Court to hold that “wearing of hijab” is not an essential practice of Islam, declaring that individuals forgoing hijab would not be considered sinners.⁵

The terms “hijab” and “headscarf” are not identical, but they are often used interchangeably and imprecisely.⁶ Hijab, literally meaning “curtain” or “partition,” refers to a broad range of *sharia* (divine) rules on modest attire and conduct and applies to both men and women.⁷ This Comment will focus on a particular form of hijab: wearing a headscarf to cover one’s hair.

Many proponents of bans that limit women’s ability to wear headscarves claim state intervention is necessary to promote certain

¹ Sara Zouiten, *Global Muslim Population Exceeds 2 Billion*, MOROCCO WORLD NEWS (Apr. 6, 2023), <https://www.moroccoworldnews.com/2023/04/354870/global-muslim-population-exceeds-2-billion> [https://perma.cc/45R3-RKBD].

² *Turkey Eases Ban on Headscarves*, BBC NEWS (Feb. 9, 2008, 11:43 GMT), <http://news.bbc.co.uk/2/hi/europe/7236128.stm> [https://perma.cc/R9LP-NSDJ].

³ Antidiskriminierungsstelle des Bundes [Federal Anti-Discrimination Agency], *Wearing a Headscarf in the Workplace*, https://www.antidiskriminierungsstelle.de/EN/about-discrimination/areas-of-life/work-life/headscarf_workplace/headscarf-node.html [https://perma.cc/5P5Z-AF9H].

⁴ *Id.*

⁵ *Smt Resham v. State of Karnataka*, No. 2347/2022, at 87 (Karnataka HC Mar. 15, 2022) (India) (preliminary order); *Hijab Verdict: India Supreme Court Split on Headscarf Ban in Classrooms*, BBC NEWS (Oct. 13, 2022), <https://www.bbc.com/news/world-asia-india-63225351> [https://perma.cc/LP2V-SUHZ].

⁶ Nadia B. Ahmad & Asifa Quraishi-Landes, *Five Myths About Hijab*, WASH. POST (Mar. 15, 2019), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-hijab/2019/03/15/d1f1ea52-45f6-11e9-8aab-95b8d80a1e4f_story.html [https://perma.cc/N45H-H58P].

⁷ *Id.*

values. These values usually include the preservation of secularism, the liberation of women, or the assimilation of minority groups.⁸ State regulation of headscarf-wearing undermines these efforts by mobilizing religious fundamentalists, diminishing the opportunities and agency of Muslim women, and hardening social divides.⁹

This Comment contextualizes and evaluates the various legal frameworks used to regulate wearing headscarves in educational settings in Germany, Turkey, and India. First, this Comment identifies three values at play in the discussion of these regulations: secularism, religious expression, and feminism. Next, it will briefly describe the historical backgrounds that inform each of these states' approaches to this issue. After providing this necessary context, it will analyze the relevant legal structures in India, Germany, and Turkey which regulate—or have regulated—wearing headscarves. After comparing these approaches, this Comment will conclude by identifying the deficiencies in purported justifications for headscarf regulations.

I recognize and acknowledge that I am not directly affected by the regulations I will analyze in this Comment. My background is that of a white, Catholic American who grew up male. I did not grow up in a predominantly Muslim community and needed to undertake additional efforts to learn about the social, religious, and gender dynamics of these different communities. I hope that my efforts here will serve to meaningfully advance the ongoing discussion of whether and how states may regulate wearing headscarves.

⁸ See Anissa Helie & Marie Ashe, *Multiculturalist Liberalism and Harms to Women: Looking Through the Issue of "The Veil"*, 19 U.C. DAVIS J. INT'L L. & POL'Y 1, 22 (2012); Karima Bennouna, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L L. 367, 381 (2007); Ece Goksedef, *France to Ban Female Students from Wearing Abayas in State Schools*, BBC NEWS (Aug. 27, 2023), <https://www.bbc.com/news/world-europe-66634890> [<https://perma.cc/E4RS-GQJP>]; *Hijab Campaign Tweets Pulled by Council of Europe After French Backlash*, BBC NEWS (Nov. 3, 2021), <https://www.bbc.com/news/world-europe-59149035> [<https://perma.cc/9ZDE-CZY6>]; Sandra Feder, *Stanford Scholars Report French Headscarf Ban Adversely Impacts Muslim Girls*, STAN. SCH. OF HUMS. & SCIS. (Aug. 25, 2020), <https://humsci.stanford.edu/feature/stanford-scholars-report-french-headscarf-ban-adversely-impacts-muslim-girls> [<https://perma.cc/W3LT-Q8HF>].

⁹ Feder, *supra* note 8; Gozde Corekcioglu, *Unveiling the Effects of a Headscarf Ban: Evidence from Municipal Jobs in Turkey*, 49 J. COMPAR. ECON. 382, 402–03 (2021); Aida Salihović-Gušić, *The Hijab Ban and Human Rights of Muslim Women in Europe*, GLOB. CAMPUS OF HUM. RTS. (Apr. 27, 2023), <https://www.gchumanrights.org/preparedness/the-hijab-ban-and-human-rights-of-muslim-women-in-europe/> [<https://perma.cc/BX3V-HRX2>].

I. BACKGROUND

A. VALUES

Regulating Islamic headscarves in the classroom implicates three primary values: secularism, religious expression, and feminism. Commentators often contend that secularism is opposed to religious law and practice.¹⁰ With respect to traditional Muslim law, that view is not only simplistic but also wrong.¹¹ While Muslim law does require individuals to dress modestly, this requirement is neither centralized nor self-executing as Islam itself provides no mechanism for enforcement of proper attire.¹² Defenses of headscarf regulations often argue that headscarves symbolically and actively oppress women.¹³ As such, they assert, states advance gender equality by banning the garments.¹⁴ This approach fails to account for the harms to women's agency that result, including exclusion from education, limited career paths, and diminished self-expression.¹⁵

1. Secularism and Islamic Law

For most of Muslim legal history, state political authorities shared lawmaking authority with religious legal scholars.¹⁶ Muslim legal systems were made up of two types of law: *siyasa* (state law) and *fiqh* (non-state law).¹⁷ *Siyasa*'s fundamental purpose was for rulers to serve the general public good (*maslaha 'amma*).¹⁸ In contrast, *fiqh* consisted of collections of rules extrapolated from Islamic scripture by the *fuqaha* (religious legal scholars).¹⁹ In the framework of *fiqh*, "every human action is qualified as either obligatory, recommended, permissible, discouraged or forbidden."²⁰

¹⁰ See, e.g., Bennoune, *supra* note 8, at 374.

¹¹ See discussion *infra* Part I.A.1.

¹² *Id.*

¹³ Helie & Ashe, *supra* note 8, at 55.

¹⁴ See *id.* at 25–26.

¹⁵ See discussion *infra* Part I.A.2.

¹⁶ Asifa Quraishi-Landes, Three Pillars Constitutionalism: A New Model for Islamic Government 58 (Oct. 23, 2023) (unpublished manuscript) (on file with author); see also Asifa Quraishi-Landes, *The Sharia Problem with Sharia Legislation*, 41 OHIO N.U. L. REV. 545, 556 (2015).

¹⁷ See Quraishi-Landes, Three Pillars Constitutionalism, *supra* note 16, at 58.

¹⁸ *Id.* at 62.

¹⁹ *Id.* at 18.

²⁰ *Id.* at 19 (citing Sherman Jackson, *The Islamic Secular*, 34 AM. J. ISLAMIC SOC. SCIS. 1, 8 (2017)).

The authority of the *fuqaha* came, not from any government appointment, but from the scholarly reputation each one had built over time.²¹ As such, no individual *faqih* (singular of “*fuqaha*”), nor any particular school of thought, reigned absolute; *fiqh* consisted of a plurality of equally authoritative interpretations.²² Strikingly, much of *fiqh* was voluntarily enforced as it recognized a difference between God’s evaluation of different actions and whether state intervention was necessary to enforce that evaluation.²³

The realms of *siyasa* and *fiqh* collapsed into a monist legal structure because of the influence, direct or indirect, of Western, imperial nation-states.²⁴ Colonial rulers directly rewrote legal systems within the framework of monism: the idea that law is located in one place, typically the state.²⁵ Even the Ottoman Empire, which was not itself directly colonized, nevertheless codified its *fiqh* because of the influence of European positivism.²⁶ This collapse into monism in Muslim states created distortions in contemporary understandings of Islamic law.²⁷ One common distortion often places *siyasa* outside of Islamic normativity and often labels it as “secular,”²⁸ ignoring the dynamic relationship between *fiqh* and *siyasa*.²⁹ Another misconception characterizes Muslim systems as having only recently begun to separate “church” and state.³⁰ This church-state paradigm does not easily match reality; Islam has no ordained clergy, has never had a state “church,” and private scholars, not state rulers, hold religious authority within Muslim masses.³¹ Further, this view often treats secularism as a marker of civilizational progress, a special achievement of the West.³²

The collapse of *fiqh* and *siyasa* fuels the historic tension between Islamism and secularism. Islamists often claim that Islam is both a religion and a state, and they conflate this position with anti-colonialist rhetoric,

²¹ *Id.* at 21.

²² *Id.* at 38.

²³ *Id.* at 25–26.

²⁴ *Id.* at 236 (quoting Scott Kugle, *Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia*, 35 MOD. ASIAN STUD. 257, 282 (2001)).

²⁵ *Id.* at 7.

²⁶ *Id.* at 228–29.

²⁷ *Id.* at 146.

²⁸ *Id.* at 147.

²⁹ *Id.* at 53–54.

³⁰ *Id.* at 149.

³¹ *Id.*

³² *Id.* at 54.

urging a return to a theocratic past that never was.³³ Secularists argue against governments dictating belief and enacting *fiqh*. In a monist paradigm, the struggle between secular and religious forces for control over “the law” is an all-or-nothing proposition.³⁴ In contrast, “the pluralist *fiqh-siyasa* framework made it possible for premodern Muslim legal systems to be ‘religious’ without being theocratic, and yet ‘secular’ but still enforcing religious law.”³⁵

2. Religious Expression and Modesty

Traditionally, in Islam, *fiqh* would govern what women should wear.³⁶ A diversity of *fiqh* scholarship placed wearing various different garments into one of the five categories of human action ranging from required to prohibited, though such scholarship was neither uniform nor enforced by the state.³⁷ Ultimately, Muslim women were free to select the *fiqh* teachings they believed best accorded with their faith.³⁸ “Some Muslim women cover their hair because they say the faith requires it. Others say it’s not required. Muslims can find support for both approaches.”³⁹

More recently, states have begun pressuring women to refrain from wearing certain garments. France, for example, has imposed many restrictions on traditional Islamic dress, including bans on abayas in schools⁴⁰ and face-covering veils in public.⁴¹ Proponents of regulations on headscarves often justify them with progressive or liberal aims; they say

³³ *Id.* at 55.

³⁴ *Id.* at 149.

³⁵ *Id.* at 150.

³⁶ See discussion *supra* Part I.A.1.

³⁷ See discussion *supra* Part I.A.1.

³⁸ Quraishi-Landes, Three Pillars Constitutionalism, *supra* note 16, at 37.

³⁹ Ahmad & Quraishi-Landes, *supra* note 6.

⁴⁰ Dalal Mawal et al., *French Schools Turn Away Girls Wearing Abayas as Muslim Rights Group Challenges Ban*, CNN WORLD (Sept. 6, 2023, 8:38 AM EDT), <https://www.cnn.com/2023/09/06/europe/france-abaya-ban-scli-intl/index.html> [<https://perma.cc/A7EU-9XN5>].

⁴¹ Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 10, 2010 on Prohibiting Concealment of the Face in Public Space], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 7.

these regulations protect secularism⁴² and counteract religiously enforced gender norms.⁴³ Other less progressive and less openly articulated justifications for the regulations center around identity. These arguments view conspicuous symbols of minority religion, culture, and identity as threats to the essential character of the state.⁴⁴ In these contexts, many Muslim women consider wearing headscarves empowering.⁴⁵

Muslim women, both in the West and elsewhere, do experience pressures telling them how to dress; these pressures are not uniquely Islamic. All women, Muslim or not, encounter cultural pressures daily. These pressures include conservative pressure to conform to gender roles and to wear modest clothing. They can also include pressure to wear “modern” dress and to conform to conventional beauty standards. While these pressures often are connected to religious histories, they are not unique to Islam.

3. *Feminism, Gender Equality, and Agency of Women*

The term “feminism” contains multitudes. Feminism is a political movement stretching back to the nineteenth century.⁴⁶ But feminism is also an idea that predates the political movement, holding that women are people deserving of equal treatment.⁴⁷ Many different visions of feminism exist; however, they all posit, first, that society inflicts certain injustices and disadvantages on women, forcing them into a subordinate role, and, second, that this situation can and should be changed through political action.⁴⁸

Islam and feminism can, and do, coexist. Though many Islamic fundamentalists, including the government of Iran, the Taliban, and ISIS,

⁴² Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT’L L. 1, 21 (2008); Anayasa Mahkemesi [Constitutional Court], Esas No. 2008/16, Karar No. 2008/116 (Resmî Gazete, 2008, sayı 27032) [Official Gazette, 2008, No. 27032] (Turk.).

⁴³ Helie & Ashe, *supra* note 8, at 55.

⁴⁴ See Danchin, *supra* note 42, at 23.

⁴⁵ Ahmad & Quraishi-Landes, *supra* note 6.

⁴⁶ DEBORAH CAMERON, FEMINISM: A BRIEF INTRODUCTION TO THE IDEAS, DEBATES, AND POLITICS OF THE MOVEMENT 5 (Univ. Chi. Press 2019).

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* at 8.

“appropriate Islamic text to justify discrimination against women,”⁴⁹ many Muslim scholars are working to promote Islamic feminism, rooted in scripture and committed to gender liberation.⁵⁰ Islam, like other religions, is dynamic: “There cannot be any scripture—revealed or otherwise—which is uni-dimensional, i.e. it reflects only given situation [*sic*].”⁵¹ Also like many other religions, Islam’s “exegeses [were] compiled centuries ago.”⁵² Muslim feminists stand directly opposed to the notion that Islam is incompatible with feminism; they pursue the project of liberating women as one of divine justice.⁵³

B. HISTORY

Germany, Turkey, and India each have very different historical relationships with Islam and Muslims. Germany, predominantly Christian, had vanishingly few Muslim citizens until the later twentieth century.⁵⁴ Though it strives to protect both religious freedoms and religious neutrality,⁵⁵ the reaction to a growing Muslim population has tested those

⁴⁹ Tamara Kharroub, *Five things you need to know about women in Islam: Implications for advancing women’s rights in the Middle East*, ARAB CTR. WASH. D.C. (Oct. 4, 2015), <https://arabcenterdc.org/resource/five-things-you-need-to-know-about-women-in-islam-implications-for-advancing-womens-rights-in-the-middle-east/> [<https://perma.cc/XFB9-SJV5>]; see also OFF. OF INT’L RELIGIOUS FREEDOM, U.S. DEP’T STATE, 2023 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: IRAN, <https://www.state.gov/reports/2023-report-on-international-religious-freedom/iran/> [<https://perma.cc/2P6J-YG9W>]; Alison Davidian, *Back to Basics: Fighting for Women’s Rights Under the Taliban*, UN WOMEN (Sept. 17, 2024), <https://www.unwomen.org/en/news-stories/op-ed/2024/09/back-to-basics-fighting-for-womens-rights-under-the-taliban> [<https://perma.cc/S853-87L2>]; Syria: *Extremists Restricting Women’s Rights Harsh Rules on Dress, Work, School*, HUM. RIGHTS WATCH (Jan. 13, 2014, 12:00 AM EST), <https://www.hrw.org/news/2014/01/13/syria-extremists-restricting-womens-rights> [<https://perma.cc/ZF9T-US4A>].

⁵⁰ See generally ASMA LAMRABET, *WOMEN IN THE QUR’AN* (Myriam Francois-Cerrah trans., Kube Publ’g Ltd 2016); Asghar Ali Engineer, *Islam Women and Gender Justice*, in *FEMINISM, MODERNITY AND HARMONY IN ISLAM* 167, 167 (Akhtarul Wasey ed., 2014); see also *The Best Books on Islam and Feminism Recommended by Margot Badran*, FIVE BOOKS (Jun. 6, 2010), <https://fivebooks.com/best-books/feminism-islam-margot-badran/> [<https://perma.cc/JN2A-QPRY>].

⁵¹ Engineer, *supra* note 50, at 167.

⁵² LAMRABET, *supra* note 50, at 6.

⁵³ See LAMRABET, *supra* note 50, at 8.

⁵⁴ Deniz Gökürk et al., *Working Guests: Gastarbeiter and Green Card Holders*, in *GERMANY IN TRANSIT* 21, 25 (2007).

⁵⁵ See Grundgesetz [GG] [Basic Law] art. 4 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0020 [<https://perma.cc/PW27-UAWH>]; see also Antidiskriminierungsstelle des Bundes, *supra* note 3.

values.⁵⁶ The modern nation-state of Turkey, predominantly Muslim, abolished the Islamic Caliphate⁵⁷ and militantly enforced strict secularism for most of its history.⁵⁸ Decrying decades of religious suppression, Turkey's president has recently prioritized religious freedom—at least for the religious majority, Sunni Muslims.⁵⁹ India, predominantly Hindu, has Muslim communities that are centuries old and predate both the state and British occupation.⁶⁰ Partition uprooted millions to create states that were more religiously homogeneous;⁶¹ despite this, today, India possesses the third greatest Muslim population of any country.⁶²

1. Germany

The Federal Republic of Germany represents the culmination of liberal and democratic efforts dating back to 1848. The 1848 German revolutions saw the efforts of democrats dashed because of internal division, the dual tasks of forming a nation and a democracy, and shrewd monarchist strategy.⁶³ Seventy years later, in the twilight of World War I, the November Revolution toppled the German Empire and produced the Weimar Republic.⁶⁴ This republic established in its constitution certain fundamental rights, including a guarantee of “the undisturbed exercise of religion” for “all inhabitants of the Reich.”⁶⁵ Though the Weimar Constitution remained on the books until Germany's unconditional surrender at the end of World War II, Hitler's rise to power and the

⁵⁶ See discussion *infra* Part I.B.1.

⁵⁷ BANU TURNAOĞLU, THE FORMATION OF TURKISH REPUBLICANISM 224–25 (2017).

⁵⁸ See discussion *infra* Part I.B.2.

⁵⁹ SUSAN BISHAI, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, COUNTRY UPDATE: TURKEY [TÜRKIYE] (July 2024).

⁶⁰ JOHN F. RICHARDS, THE MUGHAL EMPIRE 2 (1995).

⁶¹ See discussion *infra* Part I.B.3.

⁶² Anam Zakaria, *The Ongoing Legacies of the Partition of British India*, ASIA SOC'Y MAG. (Dec. 9, 2022), <https://asiasociety.org/magazine/article/ongoing-legacies-partition-british-india> [https://perma.cc/WJ3D-FU2A]; *Muslim Population by Country 2024*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/muslim-population-by-country> [https://perma.cc/8UM9-EQW4].

⁶³ MIKE RAPPORT, 1848: YEAR OF REVOLUTION 294, 297 (Basic Books 2009).

⁶⁴ ROBERT GERWARTH, NOVEMBER 1918: THE GERMAN REVOLUTION 5, 16–17 (2020).

⁶⁵ Die Verfassung des Deutschen Reichs [The Constitution of the German Reich] art. 135, Aug. 11, 1919.

Enabling Act of 1933 ended any pretenses to democracy or the rule of law.⁶⁶

Three years after Germany's surrender in the war, the Western Allies—France, the United Kingdom, and the United States—pushed for a new West German constitution.⁶⁷ West German drafters refused to label their product a constitution, fearing a document of such station might cement Germany's post-war partition; instead, they dubbed the document the Grundgesetz (Basic Law) of the Federal Republic of Germany.⁶⁸ These drafters sought to form a democracy that would be more resilient—a regime that would hold fundamental rights as inviolable.⁶⁹ As such, they “placed the Basic Law's fundamental rights catalogue at the very beginning of the document and gave fundamental rights central significance.”⁷⁰ Indeed, Article 1 proclaims that “the following fundamental rights bind legislature, executive, and judiciary as directly valid law.”⁷¹ In 1990, the parliaments of both West and East Germany approved a unification procedure whereby the *Länder* (federal states, s. *Land*) of East Germany and a reunified Berlin, would join the Federal Republic of Germany under the Basic Law.⁷²

Though Muslims have lived in Germany since the eighteenth century,⁷³ Germany sparked a dramatic increase in its Muslim population starting in the latter half of the twentieth century.⁷⁴ In the 1960s and 1970s, West Germany invited millions of guest workers, and their families, to come supply labor for the German economy through the *Gastarbeiter*

⁶⁶ Astrid Wiik, *Weimar Constitution (1919)*, in OXFORD CONST. L. (June 2017), <https://oxcon.oup.com/display/10.1093/law-mpeccol/law-mpeccol-e44?prd=OXCON> [https://perma.cc/ZHK6-AF8D].

⁶⁷ JUSTIN COLLINGS, Preface to *DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT, 1951-2001*, at xix–xx (2015).

⁶⁸ *Id.* at xx.

⁶⁹ *Id.* at xxiii–xxiv.

⁷⁰ *Id.* at xxiv.

⁷¹ Grundgesetz [GG] [Basic Law] art. 1 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0020 [https://perma.cc/PW27-UAWH].

⁷² Bundesministerium des Innern und für Heimat [Federal Ministry of the Interior and Community], *Constitution of the Federal Republic of Germany*, <https://www.bmi.bund.de/EN/topics/constitution/constitutional-issues/constitutional-issues.html> [https://perma.cc/P5T2-CTHW].

⁷³ See Thomas Scheffler, *Political Religion and Autocracy: Wilhelm II's encounter with Ottoman Islam*, in RELIGION, IDENTITY AND POLITICS: GERMANY AND TURKEY IN INTERACTION 12 (Haldun Gülalp & Günter Seufert eds., 2013).

⁷⁴ Houssain Kettani, *Muslim Population in Europe: 1950 – 2020*, 1 INT'L J. ENV'T SCI. & DEV. 154, 159 (2010 (Table 6 showing dramatic growth of German Muslim population in the late 20th century).

(guest worker) program.⁷⁵ Under former Chancellor Angela Merkel's pledge "*Wir schaffen das!*" (We can do it!), Germany admitted millions of asylum seekers and migrants from predominantly Muslim countries.⁷⁶

These developments might betray a figurative opening of the door between Germany and the Muslim world, but caveats abound. Of the 5.5 million Muslims currently living in Germany, one third have experienced hostility due to their religion.⁷⁷ Few *Länder* have granted Muslim communities the status of "corporation under public law," which would afford them various rights, including the ability to receive certain subsidies and to collect taxes from adherents, despite broad recognition afforded to Christian groups.⁷⁸ Germany's mixed relationship with Islam informs the country's mixed approach to regulating headscarves.

2. Turkey

The Turkish Republic has grappled with the tension between secularism and piety since its establishment. After World War I, "the terms imposed on the Ottoman Empire by the Allied Powers . . . made it totally dependent on their arbitrary will, and brought its ultimate collapse."⁷⁹ In 1919, the modern Turkish state claimed its independence from what remained of the five-hundred-year-old Ottoman Empire and fought off British, French, and Greek forces, among others.⁸⁰ The Ottoman Empire had been a caliphate, an Islamic state that, in theory, leads the whole of the

⁷⁵ *Id.*

⁷⁶ Matthew Kamitschnig, *5 Years on from Angela Merkel's Three Little Words: 'Wir schaffen das!'*, POLITICO (Aug. 31, 2020, 4:05 AM CET), <https://www.politico.eu/article/angela-merkel-wir-schaffen-das-5-years-on/> [<https://perma.cc/H288-PUZ2>].

⁷⁷ Kirsten Greishaber, *Germany's 5.5 Million Muslims Are Often Exposed to Everyday, Structural Racism, Report Finds*, ASSOCIATED PRESS (June 29, 2023, 8:56 AM CST), <https://apnews.com/article/germany-muslims-racism-islam-hostility-immigration-705155b8da000d2501c5b02f5bec7078> [<https://perma.cc/43EY-DERK>].

⁷⁸ Haldun Güllalp, *Introduction*, in RELIGION, IDENTITY AND POLITICS: GERMANY AND TURKEY IN INTERACTION 5 (Haldun Güllalp & Günter Seufert eds., 2013); OFF. OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, 2022 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: GERMANY, <https://www.state.gov/reports/2022-report-on-international-religious-freedom/germany/> [<https://perma.cc/BC79-8NHM>]. Germany's Basic law provides that new religious societies "shall be granted the same rights [as granted to existing religious societies] upon application, if their constitution and the number of their members give assurance of their permanency." Grundgesetz [GG] [Basic Law] art. 137(5) (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0020 [<https://perma.cc/PW27-UAWH>].

⁷⁹ See TURNAOĞLU, *supra* note 57, at 197.

⁸⁰ *Id.* at 209–10.

Islamic world.⁸¹ The Republic of Turkey abolished both the Ottoman Empire and the caliphate, rejecting theories of sovereignty based on rule by caliph.⁸² Republican Calal Nuri argued that “as the Grand National Assembly was to be the sole representative government of the Turkish people, it was impossible to allow the coexistence of secular and religious governments within national boundaries.”⁸³ Since its establishment, the Republic of Turkey has served as a political—and sometimes actual—battleground between factions asserting secular and Islamist visions.

Without the binding gravity of the Ottoman Empire, the Republic of Turkey sought to form an orderly and homogeneous society by imposing an oppressive Turkification (*Türkleştirme*) policy in the 1920s and 1930s, stressing citizens’ obligations to adopt Turkish “language, sentiments, ideas and culture.”⁸⁴ Mustafa Kemal Atatürk, the founder and first president of the Republic of Turkey,⁸⁵ stated that “it is not possible to believe a person’s claims that he belongs to the Turkish nation, to the Turkish culture, if he does not speak Turkish.”⁸⁶ Additionally, the early republic promoted adoption of Turkish family names and civic education.⁸⁷ Further, the republic sought moral and spiritual unity both through population exchanges—deporting Orthodox Christians—and through the principle of *laïcité*,⁸⁸ influenced by the analogous French concept.⁸⁹ Turkey institutionalized its power to regulate ecclesiastical affairs by establishing the Diyanet İşleri Başkanlığı (Directorate of Religious Affairs).⁹⁰ The function of the Diyanet is “to carry out affairs related to the faith and worship of the Islamic religion and to manage

⁸¹ HÜSEYİN YILMAZ, *CALIPHATE REDEFINED: THE MYSTICAL TURN IN OTTOMAN POLITICAL THOUGHT* 235 (2018).

⁸² See TURNAOĞLU, *supra* note 57, at 224–25.

⁸³ *Id.* at 229.

⁸⁴ *Id.* at 247 (citing Taha Parla, *Türkiye’de Siyasal Kültürün Resmî Kaynakları: Kemalist Tek Parti İdeolojisi ve CHP’nin Altı Oku*, vol. 3 (İstanbul: İletişim Yayınları, 1995), 27).

⁸⁵ Norman Itzkowitz, *The Nationalist Movement and the War for Independence*, BRITANNICA, <https://www.britannica.com/biography/Kemal-Ataturk/The-nationalist-movement-and-the-war-for-independence> [https://perma.cc/UQA8-TUGB].

⁸⁶ TURNAOĞLU, *supra* note 57, at 247 (citing “Mustafa Kemal’in Adana Türk Ocağı’ndaki Nutku,” *Vakit*, 19 February 1931, 1–2).

⁸⁷ *Id.*

⁸⁸ “French religious policy is based on the concept of *laïcité*, a strict separation of church and state under which public life is considered completely secular.” *France*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFS. (last archived July 17, 2015), <https://web.archive.org/web/20150717102521/http://berkeleycenter.georgetown.edu/resources/france> [https://perma.cc/KYD8-CV4U].

⁸⁹ See TURNAOĞLU, *supra* note 57, at 247, 249.

⁹⁰ *Id.* at 249.

religious institutions.”⁹¹ By adopting the Swiss Code in 1926, Turkey subsumed *fiqh*⁹² into a system of state law divorced from religious affiliation.⁹³

In the following decades, Turkey experienced political tumult involving multiple coups and attempted coups. In 1960, a military coup ousted the democratically elected government⁹⁴ and executed its prime minister.⁹⁵ The next year, a popular referendum ratified a new constitution.⁹⁶ In 1980, a military coup seized power again, purportedly to save Turkey from political instability and civil war.⁹⁷ The military junta appointed a fifteen member committee, tasked with drafting another new constitution.⁹⁸ This constitution was ratified by popular referendum in 1982.⁹⁹

In the postmodern coup of 1997, Turkish military officers asserted that “religious reaction” posed the greatest threat to the country.¹⁰⁰ This time the military ousted the government with a memo instead of tanks and soldiers,¹⁰¹ and it did so without suspending the constitution. In an effort to weaken the influence of religion and Islamism, the chair of the Higher Education Council forbade students from wearing headscarves at all Turkish universities.¹⁰² Police prevented veiled students from attending classes, and the University of Istanbul set up “persuasion rooms” to convince students to not wear headscarves.¹⁰³ Though the postmodern

⁹¹ T.C. Cumhurbaşkanlığı [Turkish Presidency], Diyanet İşleri Başkanlığı [Presidency of Religious Affairs] *Corporate History*, (last archived July 9, 2022) <https://web.archive.org/web/20220709152210/https://www.diyaret.gov.tr/en-US/Institutional/Detail/1/establishment-and-a-brief-history> [https://perma.cc/9URU-A3NC].

⁹² See discussion *supra* Part I.A.1.

⁹³ TURNAOĞLU, *supra* note 57, at 249–250.

⁹⁴ George S. Harris, *The Causes of the 1960 Revolution in Turkey*, 24 MIDDLE E.J. 438, 454 (1970).

⁹⁵ Ishaan Tharoor, *The Execution of a Former Turkish Leader That Still Haunts Erdogan*, WASH. POST (July 30, 2016), https://www.washingtonpost.com/world/the-execution-of-a-former-turkish-leader-that-still-haunts-erdogan/2016/07/29/4772c256-54b4-11e6-994c-4e3140414f34_story.html [https://perma.cc/59KL-PSQL].

⁹⁶ Joseph S. Szyliowicz, *The 1961 Turkish Constitution—An Analysis*, 2 ISLAMIC STUD. 363, 364 (1963).

⁹⁷ Jennifer Widner, *Turkey 1982*, CONSTITUTION WRITING & CONFLICT RESOLUTION, <https://pcwcr.princeton.edu/reports/turkey1982.html> [https://perma.cc/RZ88-KVNN].

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ KEREM ÖKTEM, ANGRY NATION: TURKEY SINCE 1989, at 106 (2011).

¹⁰¹ *Turkey’s Erdogan Pardons Elderly Generals Imprisoned Over 1997 ‘Postmodern Coup’*, AP NEWS, (May 17, 2024, 7:16 AM) <https://apnews.com/article/turkey-erdogan-pardon-1997-coup-73349e0ca0594c8e104a8e53c4708ddd> [https://perma.cc/7EPU-4BBD].

¹⁰² ÖKTEM, *supra* note 100, at 107.

¹⁰³ *Id.*

coup was short lived, this ban on headscarves at universities persisted until 2010.¹⁰⁴

Recently, Turkey has taken a historic turn towards embracing religious expression and redefining Turkish secularism.¹⁰⁵ Under President Recep Tayyip Erdoğan's leadership, Turkey dramatically increased funding for religious education programs,¹⁰⁶ converted the Hagia Sophia from a museum back into a mosque,¹⁰⁷ and eliminated the various Turkish bans on wearing headscarves.¹⁰⁸ These developments, paired with Erdoğan's durability as a leader, demonstrate Turkey's movement away from strict ideals of Kemalism¹⁰⁹ and *laïcité*.

3. India

Muslims have lived in the Indian subcontinent almost since the religion's founding.¹¹⁰ Trade between the Arabian Peninsula and the Indian subcontinent allowed people, goods, and ideas—including Islam—to flow between them since ancient times.¹¹¹ In addition to commercial relations, conflict between Muslims and Hindus dates back to the seventh century.¹¹² Muslim conquests eastward “reached Kabul in the ninth century, Delhi in the early thirteenth century, and the cities of Deccan and South India in the fourteenth century.”¹¹³ Though the region remained largely populated by Hindus, Muslims occupied many positions of

¹⁰⁴ Jonathan Head, *Quiet End to Turkey's College Headscarf Ban*, BBC NEWS (Dec. 31, 2010), <https://www.bbc.com/news/world-europe-11880622> [<https://perma.cc/Z3V7-W6ZN>].

¹⁰⁵ Seval Yildirim, *Conceptions of Religion in the Secular State: Evolving Turkish Secularism*, 41 PEPP. L. REV. 1049, 1053 (2014).

¹⁰⁶ Daren Butler, *With More Islamic Schooling, Erdogan Aims to Reshape Turkey*, REUTERS (Jan. 25, 2018, 11:00 AM), <https://www.reuters.com/investigates/special-report/turkey-erdogan-education/> [<https://perma.cc/3M66-PVHZ>].

¹⁰⁷ Umut Uras, *Turkey Turning Hagia Sophia Back Into Mosque Divides Social Media*, AL JAZEERA (July 11, 2020), <https://www.aljazeera.com/news/2020/7/11/turkey-turning-hagia-sophia-back-into-mosque-divides-social-media> [<https://perma.cc/PSC5-P5VE>].

¹⁰⁸ *Turkey Reverses Female Army Officers' Headscarf Ban*, BBC NEWS (Feb. 22, 2017), <https://www.bbc.com/news/world-europe-39053064> [<https://perma.cc/P9XR-9R9U>].

¹⁰⁹ See Malcolm Edward Yapp & John C. Dewdney, *Turkey – Kemalist Policies*, BRITANNICA, (Mar. 17, 2025) <https://www.britannica.com/place/Turkey/Kemalist-policies> [<https://perma.cc/E86H-V8EL>].

¹¹⁰ See RON GEAVES, *ISLAM AND BRITAIN: MUSLIM MISSION IN AN AGE OF EMPIRE* 6 (2017) (discussing India's first mosque, claimed to be built in 629 CE).

¹¹¹ *Did You Know?: The Spread of Islam in Southeast Asia Through the Trade Routes*, UNESCO, <https://en.unesco.org/silkroad/content/did-you-know-spread-islam-southeast-asia-through-trade-routes> [<https://perma.cc/GH8A-NCLG>].

¹¹² See RICHARDS, *supra* note 60, at 2.

¹¹³ *Id.*

political power by the sixteenth century.¹¹⁴ In the following century, the Mughal Empire (a Muslim dynasty) conquered and consolidated much of the Indian subcontinent.¹¹⁵ After 1720, Mughal ascendancy waned as the formerly centralized empire became a loose-knit collection of regional kingdoms, offering only nominal tribute and fealty to the emperor.¹¹⁶

The British Empire conquered the Indian subcontinent and held it for nearly a century. The British East India Company exiled the last Mughal emperor after emerging victorious from the Indian Rebellion of 1857.¹¹⁷ Through imperial force, the British Empire unified modern-day India, Pakistan, and Bangladesh into the British Raj.¹¹⁸ During the Indian independence movement of the twentieth century, the All-India Muslim League successfully advocated for decolonization to include partitioning majority Muslim and majority Hindu regions into separate states.¹¹⁹

Partition involved both forming political boundaries between the new states and an immense migration of Muslim and Hindu minorities from their homes to states reflecting their religion.¹²⁰ Though over fifteen million people left their homes, Partition did not create states with religiously homogeneous populations.¹²¹ Today, over two hundred million Muslims make up 14 percent of India's population.¹²² After Partition, the Constituent Assembly of India adopted the Constitution of India in 1950, proclaiming the state to be a "Sovereign Socialist Secular Democratic Republic."¹²³ More recently, under the leadership of Prime Minister Narendra Modi, new populist politics have taken hold in India.¹²⁴ This new paradigm seeks to define India as a Hindu nation and indicates a renewed hostility toward Muslims in India.¹²⁵

¹¹⁴ *Id.* at 3.

¹¹⁵ *Id.* at 56.

¹¹⁶ *Id.* at 281, 297.

¹¹⁷ JOHN MCLEOD, *THE HISTORY OF INDIA* 83 (2002).

¹¹⁸ *See* Government of India Act 1858, 21 & 22 Vict. c. 106 (Eng.).

¹¹⁹ MCLEOD, *supra* note 117, at 118–19, 124–27.

¹²⁰ William Dalrymple, *The Great Divide*, *THE NEW YORKER* (June 22, 2015), <https://www.newyorker.com/magazine/2015/06/29/the-great-divide-books-dalrymple> [<https://perma.cc/45GM-L4NZ>].

¹²¹ *Id.*

¹²² U.S. DEP'T STATE, OFF. INT'L RELIGIOUS FREEDOM, 2022 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: INDIA (2022).

¹²³ India Const. pmbl., amended by The Constitution (Forty-second Amendment) Act, 1976.

¹²⁴ CHRISTOPHE JAFFRELOT, *MODI'S INDIA: HINDU NATIONALISM AND THE RISE OF ETHNIC DEMOCRACY* 5 (Cynthia Schoch trans., Princeton Univ. Press 2021) (2019).

¹²⁵ *Id.* at 5, 6.

II. ANALYSIS

Germany, Turkey, and India each guarantee some form of freedom of religion. Germany holds the “freedom of faith and of conscience and freedom to profess a religious or philosophical creed . . . inviolable.”¹²⁶ Further, it guarantees the “undisturbed practice of religion.”¹²⁷ Turkey’s constitution declares that “everyone has the freedom of conscience, religious belief and conviction.”¹²⁸ Additionally, “acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14.”¹²⁹ Article 14 prohibits using constitutional rights and freedoms “to endanger the existence of the democratic and secular order of the Republic.”¹³⁰ India equally entitles to all persons the “freedom of conscience and the right freely to profess, practice and propagate religion” though such freedom and rights are “subject to public order, morality and health and to the other provisions of” Part III of the Indian Constitution.¹³¹

Though Germany, Turkey, and India all guarantee some freedom of religion, each banned headscarves in their classrooms. For twelve years, Germany allowed its *Länder* to disqualify potential teachers on the basis of whether they wore headscarves. For nearly thirty years, Turkey removed students who wore headscarves from schools and many government jobs. Each country lifted its restrictions through different means. Germany’s Federal Constitutional Court recognized that the freedom of religious faith protects teachers who wear headscarves. On the basis of secularism, Turkey’s Constitutional Court effectively mandated headscarf bans by holding that legislation and constitutional amendments intended to lift the bans were unconstitutional. Turkey’s ruling AKP party lifted the bans by declawing the two bulwarks of militant secularism: the military and the Constitutional Court. Presently, India’s Supreme Court faces the constitutional question of whether to allow students to wear headscarves in state-run schools where mandated uniforms do not include headscarves. Three opinions, one from the High Court of Karnataka and two from a two-judge panel of the Indian Supreme Court, endeavored to

¹²⁶ Grundgesetz [GG] [Basic Law] art. 4(1), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0020 [<https://perma.cc/457A-PG37>] (Ger.).

¹²⁷ *Id.* art. 4(2).

¹²⁸ Türkiye Cumhuriyeti Anayasası [CONSTITUTION] Nov. 7, 1982, art. 24 (Turk.).

¹²⁹ *Id.*

¹³⁰ *Id.* art. 14.

¹³¹ India Const. art. 25, cl. 1.

answer that question using three different analytical frameworks: determining whether wearing headscarves constitutes an essential practice of Islam, determining whether wearing headscarves in a state school undermines Indian secularism, and determining whether permitting students to modify their uniforms by wearing headscarves constitutes a reasonable accommodation of those students' freedom of religion.

A. GERMANY—A RELUCTANT ACCEPTANCE

Germany is not a strictly secular state. Germany's Basic Law, preserving certain provisions from the old Weimar Constitution,¹³² merely prohibits the establishment of a "state church"¹³³ and guarantees that "civil and political rights and eligibility for public office shall be independent of religious affiliation."¹³⁴ As such, the German government has a duty to maintain "neutrality in ideology and religion."¹³⁵ The term, "secular," does not appear in the German Basic Law.¹³⁶

Germany's approach to regulating state school teachers' headscarves is a "special case."¹³⁷ Unlike other public sector employees, where bans are permissible so long as "preservation of State neutrality outweighs that of religious freedom," a ban for teachers "is only justified in very specific cases."¹³⁸ Such cases include circumstances where the outer appearance of educational staff constitutes or contributes to a sufficiently specific danger to the peace at school or state neutrality.¹³⁹ Germany's Federal Constitutional Court hypothesized that this occurs where "the visibility of religious convictions and clothing practices were to generate or fuel" a conflict "on the question of correct religious conduct . . . in a way that seriously interfered with school processes and

¹³² Grundgesetz [GG] [Basic Law] art. 140, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0020 [<https://perma.cc/EUL8-M993>] (Ger.) ("The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be an integral part of this Basic Law.").

¹³³ Die Verfassung des Deutschen Reichs [The Constitution of the German Reich] Aug. 11, 1919, art. 137(1).

¹³⁴ *Id.* art. 136(2).

¹³⁵ See Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jan. 27, 2015, 1 BvR 471/10, ¶ 110 (Ger.) (Note that only the German version is authoritative).

¹³⁶ See Grundgesetz [GG] [Basic Law], translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0020 [<https://perma.cc/Z8HE-ZZXL>] (Ger.).

¹³⁷ Antidiskriminierungsstelle des Bundes [Federal Anti-Discrimination Agency], *supra* note 3.

¹³⁸ *Id.*

¹³⁹ BverfG [Federal Constitutional Court] Jan. 27, 2015, 1 BvR 471/10, ¶ 113 (Ger.) (Note that only the German version is authoritative).

the fulfilment of the state's educational mandate."¹⁴⁰ In these specific cases, any ban must be "limited in place and time" and must be balanced with a teacher's fundamental rights of faith and religious practice.¹⁴¹ These comparatively stronger protections for teachers are both controversial and relatively new.¹⁴²

1. The First Encounters: Ludin I and II

The Federal Constitutional Court's 2015 decision, which deemed a *Land*'s blanket ban on headscarves to be unconstitutional,¹⁴³ marked a turning point in the court's treatment of headscarves in education. In 2003, the court heard the case of Fereshta Ludin, a German national of eight years who had lived in Germany for more than half of her life.¹⁴⁴ In Baden-Württemberg, a *Land* in southwestern Germany, the Stuttgart Higher School Authority denied Ludin's application "on the grounds of lack of personal aptitude" citing her refusal to teach without a headscarf. The Authority asserted that wearing headscarves constituted both a religious and a political symbol because it "was an expression of cultural separation."¹⁴⁵ Further, the Authority argued that Ludin's "freedom of religion was limited by the fundamental right of the pupils to negative religious freedom, the parents' right of education . . . and the obligation of the state to preserve neutrality in ideology and religion."¹⁴⁶ The Authority surmised that young people, who are still developing their personalities, would be acutely sensitive to "the objective effect of the headscarf."¹⁴⁷ Further, it argued that a teacher wearing a headscarf might, in the case of Muslim schoolgirls, pressure students to conform to the teacher's

¹⁴⁰ *Id.*

¹⁴¹ *Id.* ¶ 114.

¹⁴² Pia Lorenz & Anne-Christine Herr, *Provoziert Karlsruhe Krawall an Schulen?* [Does Karlsruhe Provoke Riots in Schools?], LEGAL TRIB. ONLINE (Mar. 13, 2015) (Ger.), <https://www.lto.de/recht/nachrichten/n/bverfg-beschluss-1bvr471110-1bvr118110-pauschales-kopftuchverbot-oeffentliche-schulen-verfassungswidrig/2/> [<https://perma.cc/5KES-MUZK>].

¹⁴³ See generally, BverfG [Federal Constitutional Court] Jan. 27, 2015, 1 BvR 471/10, (Ger.) (Note that only the German version is authoritative).

¹⁴⁴ BverfG [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02 ¶ 2 (Ger.) (Note that only the German version is authoritative).

¹⁴⁵ *Id.* ¶ 3.

¹⁴⁶ *Id.* ¶ 5.

¹⁴⁷ *Id.*

example.¹⁴⁸ In its argument, the Authority also described the integration of Muslim students as its “pedagogical duty.”¹⁴⁹

Neither the lower courts nor the Federal Constitutional Court provided Ludin lasting relief. The lower courts dismissed Ludin’s complaint that the Authority’s decision violated her fundamental right of freedom of religion.¹⁵⁰ Though the Federal Constitutional Court issued a judgment for Ludin, it held that the Authority’s conduct was impermissible only because Baden-Württemberg’s legislature had not yet provided a statutory basis linking headscarves to the inaptitude of teachers.¹⁵¹ Moreover, the court held: “The teacher’s right to conduct herself in accordance with her religious conviction must have lower priority than the conflicting freedom of faith of the pupils and parents during lessons.”¹⁵² The Federal Constitutional Court overruled the lower court’s decision and remanded the case to the Federal Administrative Court but, before the next proceeding, the Baden-Württemberg legislature sprang into action.¹⁵³

2. *Unaccommodating Adjustments: Länder Regulations and Ludin* *III*

By the time the Federal Administrative Court reheard Ludin’s case nearly a year later, the Authority had its statutory basis. The Baden-Württemberg legislature updated its school law, specifically prohibiting teachers from emitting political, religious, or ideological statements which endanger or disturb school peace.¹⁵⁴ Notably, the act specifically carved out an exception for Christian and Western educational and cultural values, protecting nuns who wear habits while teaching.¹⁵⁵ On remand, the court recognized the updated law and upheld the Authority’s decision on

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* ¶ 6.

¹⁵¹ *Id.* ¶ 72.

¹⁵² *Id.* ¶ 15.

¹⁵³ *Id.* ¶ 72.

¹⁵⁴ Gesetz zur Änderung des Schulgesetzes Baden-Württembergs [Act Amending the School Code of Baden-Württemberg], Apr. 1, 2004, Baden Württemberg GBl. S. 178, Nr. 6 (F.R.G.) (Ger.), https://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Deutschland/Kopftuchverbot/BaWue_Gesetz_zur_Aenderung_des_Schulgesetzes_1.4.2004.pdf [https://perma.cc/EP2M-QSCP].

¹⁵⁵ *Id.*

that basis.¹⁵⁶ Moreover, the court upheld the law's exception for Christian values, interpreting the exception to refer to "a world of values that is detached from religious content and emerges from the tradition of Christian Western culture;" the exception "concerns values to which every civil servant based on the Basic Law can unreservedly agree, regardless of his or her religious beliefs."¹⁵⁷ After six years of fighting, and as many judgments, Ludin decided to not appeal the decision for a sixth time.¹⁵⁸

Soon afterward, several *Länder* enacted legislation restricting teacher attire. Of Germany's sixteen *Länder*, eight enacted and another three proposed bans in the three years following the Federal Constitutional Court's ruling.¹⁵⁹ Seven of the eight *Länder* that enacted bans included exceptions for Christian and Western symbols.¹⁶⁰ These bans forced Muslim teachers in half of Germany to decide between careers in education and their sincere sense of religious obligation.

3. Reversal

In 2015, twelve years after spurring the *Länder* to draft bans, the Federal Constitutional Court revisited the topic to review a ban in North Rhine-Westphalia, a *Land* in western Germany. The court held that the Basic Law's protection of the freedoms of faith and professing a belief "can be invoked by Muslim women for the wearing of a headscarf . . . including when they exercise their profession in interdenominational state schools."¹⁶¹ Further the court held that even though teachers wearing headscarves "does impact the pupil's negative freedom of faith," doing so

¹⁵⁶ Bundesverwaltungsgerichts [BVerwG] [Federal Administrative Court] June 24, 2004, 2 C 45.03 (Ger.).

¹⁵⁷ *Id.* at 13.

¹⁵⁸ *Muslimische Lehrerin beendet Kopftuchstreit [Female Muslim Teacher Ends Headscarf Battle]*, SPIEGEL PANORAMA (Oct. 8, 2004) (Ger.), <http://www.spiegel.de/unispiegel/studium/0,1518,322310,00.html>. [<https://perma.cc/8QXR-U72Q>].

¹⁵⁹ *Arbeitsmaterialien zum Staatskirchenrecht: Kopftuchverbot für Lehrkräfte in Deutschland [Working Materials on State-Church Law: Headscarf Prohibition for Teachers in Germany]*, UNIVERSITÄT TRIER [UNIVERSITY OF TRIER] (Oct. 17, 2024) (Ger.), <https://www.uni-trier.de/universitaet/fachbereiche-faecher/fachbereichv/forschung/ievr/forschungsschwerpunkte/staatskirchenrecht/deutschland/kopftuch> [<https://perma.cc/DY4W-6EHR>].

¹⁶⁰ Ruben Seth Fogel, *Headscarves in German Public Schools: Religious Minorities are Welcome in Germany, Unless—God Forbid—They are Religious*, 51 N.Y.L. SCH. L. REV. 619, 641 (2006-2007).

¹⁶¹ BVerfG, [Federal Constitutional Court] Jan. 27, 2015, 1 BvR 471/10, ¶ 87 (Ger.) (Note that only the German version is authoritative).

“is not *per se* apt to interfere with the pupils’ negative freedom.”¹⁶² Abstract assertions by *Länder* legislatures that teachers wearing headscarves will endanger state neutrality and pupils’ negative religious freedoms are insufficient to overcome teachers’ freedom of faith.¹⁶³ Additionally the court held that the ban, by exempting Christian and Western values and traditions, contradicted the Basic Law’s guarantee of equal treatment.¹⁶⁴ Ultimately, the court remanded the joint cases to lower courts to determine whether there was a factual basis to show requisite specific dangers.¹⁶⁵

Notably, the court affirmed that “the free state of the Basic Law is characterized by openness towards the variety of ideological and religious convictions,” which is not to be understood as a “distancing attitude in the sense of a strict separation of state and church.”¹⁶⁶ By this, the court makes clear that the German Basic Law does not postulate secularism but, rather, embraces a neutral state which is open and inclusive towards the religions and worldviews of its citizens.¹⁶⁷

In 2020, the Federal Labor Court heard a case challenging Berlin’s ban. The court used the Federal Constitutional Court’s 2015 framework as well as the General Act on Equal Treatment to uphold a finding for the plaintiff-applicant.¹⁶⁸ The court held that, in order to be constitutional, Berlin’s ban could apply only after a showing of a concrete threat to school peace or state neutrality.¹⁶⁹ Lacking such a showing, the court held that Berlin had religiously discriminated against the plaintiff, in violation of § 7(1) of the act.¹⁷⁰ Berlin attempted to appeal the decision but the Federal Constitutional Court rejected the petition to hear the case.¹⁷¹ In 2023, the Berlin Senate Department for Education, Youth, and Family issued a

¹⁶² *Id.* ¶ 105.

¹⁶³ *Id.* ¶ 112.

¹⁶⁴ *Id.* ¶ 123.

¹⁶⁵ *Id.* ¶ 157.

¹⁶⁶ BverfG, [Federal Constitutional Court] Jan. 27, 2015, 1 BvR 471/10, ¶¶ 109–10 (Ger.) (Note that only the German version is authoritative).

¹⁶⁷ Johann Ruben Leiss, *One Court, Two Voices: Case Note on the First Senate’s Order on the Ban on Headscarves for Teachers from 27 January 2015: Case No. 1 BvR 471/10, 1 BvR 1181/10*, 16 GER. L. J. 901, 910 (2015).

¹⁶⁸ Bundesarbeitsgericht [BAG] [Federal Labor Court] Aug. 27, 2020, 8 AZR 62/19, ¶ 13 (Ger.).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Berlin scheitert mit Verfassungsbeschwerde zum Kopftuch* [Berlin Fails with Constitutional Complaint About Headscarf], WELT [WORLD] (Feb. 1, 2023), <https://www.welt.de/politik/deutschland/article243557387/Neutralitaetsgesetz-Berlin-scheitert-mit-Verfassungsbeschwerde-zum-Kopftuch.html> [https://perma.cc/9WXU-Z84X].

circular to Berlin schools.¹⁷² It noted the decisions of the courts and instructed administrators to enforce the ban only when there is a concrete threat to school peace or state neutrality.¹⁷³

B. TURKEY—A RIGID RULE IS BRITTLE

In Turkey, the status of headscarf bans appears deceptively simple.¹⁷⁴ Over the last ten years, Turkey incrementally dismantled its headscarf bans; the state will not punish Turkish women for their choice to wear headscarves.¹⁷⁵ Almost unthinkable as recently as 2010, now even members of the police, military, and judiciary may wear headscarves while undertaking their duties.¹⁷⁶ Previously, the Constitutional Court held that parliamentary efforts to lift headscarf bans undermined Turkey's secular character, which is held inviolable by the constitution.¹⁷⁷ Further, Turkey's military has repeatedly (and as recently as 2007) inserted itself into Turkish politics to protect the secular nature of the republic.¹⁷⁸ Historically, these institutions banned political parties and executed government coups, preventing overly vigorous discussion of lifting the

¹⁷² Susanne Vieth-Entus, *Update/Unterrichten mit Kopftuch: Die Berliner Bildungsbehörde beugt sich der Justiz* [Update/Teaching with a Headscarf: The Berlin Education Authority Bows to the Judiciary], TAGESSPIEGEL [DAILY MIRROR] (Mar. 28, 2023, 6:12 PM), <https://www.tagesspiegel.de/berlin/unterrichten-mit-kopftuch-die-berliner-bildungsbehoerde-beugt-sich-der-justiz-9574394.html> [https://perma.cc/REZ8-TNEW].

¹⁷³ *Id.*

¹⁷⁴ This Comment focuses on the post-1982 headscarf bans; however, the Turkish efforts to “modernize” attire through regulation stretch back at least to the late-Ottoman sartorial regulations, which promoted the fez as “a homogenizing status marker.” Camilla T. Nereid, *Kemalism on the Catwalk: The Turkish Hat Law of 1925*, 44 J. SOC. HIST. 707, 709–10 (2011); see also discussion *infra* Part II.B.1 (discussing the 1925 Hat Law).

¹⁷⁵ Head, *supra* note 104; Humeyra Pamuk, *Turkey Lifts Generations Old Ban on Islamic head Scarf*, REUTERS (Oct. 8, 2013, 12:08 PM CDT), <https://www.reuters.com/article/idUSBRE997089/> [https://perma.cc/2LUT-AEC7].

¹⁷⁶ Resmi Gazete [Official Gazette], Aug. 27, 2016, No. 29814; *Turkey Allows Policewomen to Wear Headscarves*, AL JAZEERA (Aug. 28, 2016), <https://www.aljazeera.com/news/2016/8/28/turkey-allows-policewomen-to-wear-headscarves> [https://perma.cc/EEG2-5A9Z]; *Turkey Lifts Military Ban on Islamic Headscarf*, THE GUARDIAN (Feb. 22, 2017, 9:47 EST), <https://www.theguardian.com/world/2017/feb/22/turkey-lifts-military-ban-on-islamic-headscarf> [https://perma.cc/H5VW-JF4T]; *Top Court Gives Green Light to Headscarf Freedom in Turkish Military*, TURKISH MINUTE (Apr. 8, 2021), <https://www.turkishminute.com/2021/04/08/top-court-gave-green-light-to-headscarf-freedom-in-turkish-military/> [https://perma.cc/3YYJ-UV6L].

¹⁷⁷ See discussion *infra* Part II.B.1.

¹⁷⁸ See Widner, *supra* note 97; ÖKTEM, *supra* note 100, at 107; *No to Military Intervention*, DEUTSCHE WELLE [DW] [GERMAN WAVE] (Apr. 30, 2007), <https://www.dw.com/en/council-of-europe-urges-turkish-army-to-stay-out-of-elections/a-2462367> [https://perma.cc/9NEP-BUG4].

bans.¹⁷⁹ The constitution has not been amended—Turkey is ostensibly still a secular republic¹⁸⁰—yet the old, assertive secular order has given way.

1. *The Old Secular Order 1982–2008*

In 1982, Turkey's then-governing military junta drafted the country's current constitution.¹⁸¹ Drawing on the previous constitution, it enshrines the republic as "a democratic, secular and social State governed by the rule of law . . . loyal to the nationalism of Atatürk."¹⁸² The constitution holds these characteristics to be so fundamental that Article 4 prohibits their amendment, or even the proposal of their amendment.¹⁸³ Article 24 establishes and limits the freedom of religion, stating, "no one shall be allowed to exploit or abuse religion or religious feelings . . . for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets."¹⁸⁴

After the Turkish War of Independence, Mustafa Kemal Atatürk, sought to "modernize Turkish society and join ranks with the 'contemporary civilization' of Europe."¹⁸⁵ Toward that end, "the Hat Law of 1925 required the Turkish people to wear western hats and forbade" wearing turbans or fezzes by threat of imprisonment.¹⁸⁶ The 1982 constitution incorporated and protected the Hat Law and several other "Reform Laws" from the early days of republic.¹⁸⁷

Additionally, the constitution established and empowered the Constitutional Court to issue decisions which are "binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies" of Turkey.¹⁸⁸ This

¹⁷⁹ Widner, *supra* note 97; ÖKTEM, *supra* note 100 at 57–58; *No to Military Intervention*, *supra* note 178.

¹⁸⁰ Türkiye Cumhuriyeti Anayasası [CONSTITUTION] Nov. 7, 1982, art. 1, 2 (Turk.).

¹⁸¹ Widner, *supra* note 97.

¹⁸² Türkiye Cumhuriyeti Anayasası [CONSTITUTION] Nov. 7, 1982, art. 2 (Turk.).

¹⁸³ *Id.* art. 4.

¹⁸⁴ *Id.* art. 24.

¹⁸⁵ Nereid, *supra* note 174, at 707.

¹⁸⁶ *Id.*

¹⁸⁷ Article 174 states "No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws indicated below, which aim to raise Turkish society above the level of contemporary civilization and to safeguard the secular character of the Republic, and which were in force on the date of the adoption by referendum of the Constitution of Turkey." Türkiye Cumhuriyeti Anayasası [CONSTITUTION] Nov. 7, 1982, art. 174 (Turk.).

¹⁸⁸ *Id.* art. 153.

constitution entered into force after confirmation by a popular referendum.¹⁸⁹

Five years after Turkey's referendum, which brought an end to military rule, the parliament attempted to lift a ban on wearing headscarves in universities.¹⁹⁰ The Higher-Education Authority had imposed the ban in 1982, during the military junta, and the Supreme Administrative Court upheld it, stating that headscarf wearing was contrary to women's freedoms and the republic's fundamental principles.¹⁹¹ In response, Parliament passed the Higher Education Act (Law No. 2547) which both required the wearing of "modern clothes and appearance in higher education institutions" and protected a freedom "to cover the neck and hair with a veil or headscarf due to religious beliefs."¹⁹² The Constitutional Court struck down the measure for violating secularism.¹⁹³ The court held that by conditioning the freedom on "religious belief," the law regulated on "religious principles . . . while regulating the clothing of women in higher education institutions."¹⁹⁴ The court further held that "a regulation that gives emphasis to religious requirements through administration cannot be democratic."¹⁹⁵ The court had established a rule that the democratically elected parliament could not recognize freedoms based on someone's religious beliefs.

The parliament again attempted to lift the headscarf ban in universities in 1990 by passing Law No. 3670, which amended existing laws. Section 12 of the new law declared that the "dress code is free in Higher Education Institutions, provided that it is not contrary to the Laws in force" and "all kinds of disciplinary punishments regarding dress and dress in Higher Education Institutions before the entry into force of this Law shall be abolished together with all their provisions and

¹⁸⁹ Widner, *supra* note 97.

¹⁹⁰ DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE 135 (2006).

¹⁹¹ *Id.*

¹⁹² Anayasa Mahkemesi, Esas No. 1989/1, Karar No. 1989/12 (Anayasa Mahkemesi Kararları Dergisi, 2001, 25 sayı 141) [25 CONST. CT. J., 2001, No. 25, 141] (Turk.).

¹⁹³ *Id.* at 141. In addition to detailing the constitutional character of Secularism, the court unabashedly endorsed Secularism, claiming "it is actually the last stage of the intellectual and organizational evolution of societies . . . It is the principle that gives the individual personality and free thought opportunities by prioritizing his dignity, and thus ensures freedom of conscience and religious belief by requiring the distinction between politics and conscience." *Id.* at 145.

¹⁹⁴ *Id.* at 148.

¹⁹⁵ *Id.* at 151.

consequences.”¹⁹⁶ The Constitutional Court upheld the law; however, it interpreted it to not lift the headscarf ban.¹⁹⁷ Because the law limited itself to areas “not contrary to the Laws in force” it was subject to the principles of the constitution.¹⁹⁸ The court interpreted its earlier 1989 decision as holding that “covering the neck and hair with a veil or headscarf due to religious belief is not in accordance with” the constitution and could, therefore, not be permitted in university dress codes.¹⁹⁹ Thus, the court interpreted the law intended to lift the ban as excluding headscarves from its scope. Further, while the 1982 attempt to lift the ban violated secularism because it provided exceptions to the dress code which were based on religious beliefs,²⁰⁰ here the court found that a generally available freedom to wear headscarves violated secularism.²⁰¹ Even though the law did not condition headscarf wearing on religious belief, the law was unconstitutional because it would permit people to wear headscarves in accordance with their beliefs.²⁰² The court refined its earlier rule: the democratically elected parliament could not recognize a freedom to wear a headscarf.

The character of the headscarf ban changed in 1997 during the postmodern coup. Instead of overthrowing the government or suspending the constitution again, the military issued several suggestions—which the prime minister accepted under the specter of military action.²⁰³ The military declared Islamist fundamentalism as the greatest threat to national security and designed its suggestions to eliminate Islamist influences in Turkish society.²⁰⁴ Previously, the government implemented the headscarf

¹⁹⁶ Anayasa Mahkemesi, Esas No. 1990/36, Karar No. 1991/8 [Constitutional Court, Case No. 1990/36, Decision No. 1991/8], 27 ANAYASA MAHKEMESİ KARARLARI DERGİSİ, 1993 at 285, 295 [27 CONST. CT. J., 1993, at 285, 295] (Turk.).

¹⁹⁷ *Id.* at 306–07.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 305.

²⁰⁰ Anayasa Mahkemesi, Esas No. 1989/1, Karar No. 1989/12 (Anayasa Mahkemesi Kararları Dergisi, 2001, 25 sayı 148) [Constitutional Court Journal, 2001, No. 25, 148] (Turk.).

²⁰¹ Anayasa Mahkemesi, *supra* note 196, at 305 (“As a result, whether due to religious belief *or for other reasons*, the dress code in higher education institutions should not contradict the contemporary situation.”) (emphasis added) (Turk.).

²⁰² *Id.* at 306.

²⁰³ Hulya Arik, *Speaking of Women? Exploring Violence against Women through Political Discourses: A Case Study of Headscarf Debates in Turkey*, 16 E-CADERNOS CES [CES e-notebooks] 10, 17–18 (2012), <https://journals.openedition.org/eces/1009> [<https://perma.cc/6ANN-YQ7Z>]; ÖKTEM, *supra* note 100 at 107.

²⁰⁴ Arik, *supra* note 203, at 17 n.9.

ban loosely and inconsistently; after 1997, the military pressed for strict implementation.²⁰⁵

In 2007, the military, again, intervened in Turkish politics.²⁰⁶ The ruling Justice and Development Party (AKP) nominated Abdullah Gul for president and likely had the parliamentary votes.²⁰⁷ Gul and then-Prime Minister Tayyip Erdoğan had both previously been members of two parties that the Constitutional Court banned for anti-secular activities before founding AKP in 2001.²⁰⁸ During the election process, the Turkish military released an electronic statement which noted escalated efforts to disturb the fundamental value of secularism.²⁰⁹ “The problem that emerged in the presidential election process is focused on arguments over secularism . . . It should not be forgotten that the Turkish Armed Forces are a party in those arguments . . . It will display its attitude and action openly and clearly whenever it is necessary.”²¹⁰ Ultimately, after words of warning and condemnation from within and beyond Turkey, the military did not take further action in the 2007 presidential election.²¹¹

A year later, the parliament again attempted to lift the headscarf ban in universities.²¹² In 2008, the parliament passed Law No. 5735, attempting to add the paragraph, “no one can be deprived of the right to higher education for any reason not expressly written in the law. The limits of the use of this right are determined by law,” to Article 42 of the

²⁰⁵ *Id.* at 17; see also discussion *supra* Part I.B.2 (discussing enforcement of the headscarf ban).

²⁰⁶ *No to Military Intervention*, *supra* note 178.

²⁰⁷ *Turkey Polarized*, DEUTSCHE WELLE [GERMAN WAVE] (Apr. 27, 2007), <https://www.dw.com/en/turkish-presidential-race-divides-country/a-2460358> [<https://perma.cc/E38K-F93>].

²⁰⁸ Christian Moe, *Refah Partisi (The Welfare Party) and Others v. Turkey*, 6 INT’L J. NOT-FOR-PROFIT L., Sept. 2003, https://web.archive.org/web/20080925194912/http://www.icnl.org/KNOWLEDGE/ijnl/vol6iss1/special_5.htm [<https://perma.cc/W5UB-XWW2>]; *Turkey Polarized*, *supra* note 207; Paul Kirby, *Erdogan: Turkey’s All-Powerful Leader of 20 years*, BBC NEWS (last updated Mar. 24, 2025), <https://www.bbc.com/news/world-europe-13746679> [<https://perma.cc/DRY5-N9NS>]; *Abdullah GÜL*, REPUBLIC OF TÜRKİYE MINISTRY OF FOREIGN AFFS. (last visited Mar. 30, 2025), <https://www.mfa.gov.tr/sayin-abdullah-gul.en.mfa> [<https://perma.cc/3BY2-T5QF>].

²⁰⁹ *Excerpts of Turkish army statement*, BBC NEWS (Apr. 28, 2007, 9:25 GMT), <http://news.bbc.co.uk/2/hi/europe/6602775.stm> [<https://perma.cc/Q5C8-TNQB>].

²¹⁰ *Id.*

²¹¹ *Id.*; *Secular Tensions in Turkey*, DEUTSCHE WELLE [GERMAN WAVE] (Apr. 28, 2007), <https://www.dw.com/en/eu-warns-turkish-army-about-meddling-in-presidential-elections/a-2460934> [<https://perma.cc/V5HX-J53J>]; *No to Military Intervention*, *supra* note 178.

²¹² *Anayasa Mahkemesi*, Esas No. 2008/16, Karar No. 2008/116 [Constitutional Court, Case No. 2008/16, Decision No. 2008/116], 45 ANAYASA MAHKEMESİ KARARLARI DERGİSİ, 2009 at 1195, 1196 [45 CONST. CT. J., 2009, at 1195, 1196] (Turk.).

constitution.²¹³ Even though the amendment did not explicitly base freedoms on individuals' religious beliefs, its purpose was to allow individuals to wear headscarves for religious reasons.²¹⁴ The Constitutional Court annulled the amendment, holding that it invalidly undermined secularism, contrary to Article 4's principle of unchangeability.²¹⁵ Even a constitutional amendment which allowed all manner of dress at universities was unconstitutional if it allowed people to wear headscarves for religious reasons.

Less than a month after the case against the amendment was filed, the Chief Public Prosecutor of the Supreme Court of Appeals of Turkey petitioned the Constitutional Court to permanently ban AKP.²¹⁶ The petition argued that "the Justice and Development Party has become the focus of actions contrary to the principle of secularism" and, therefore, "should be permanently closed."²¹⁷ The Constitutional Court decided not to ban AKP, falling one vote short of the supermajority required to ban a party.²¹⁸ Instead, it sanctioned the party by reducing its funding by half, indicating that the court believed that while AKP had been guilty of anti-secularism, it was not enough to justify an outright ban.²¹⁹ By surviving both judicial and military threats, AKP signaled a new status quo.

2. *How Erdoğan and the AKP Transformed Turkey 2001-2016*

The assertive secular bulwarks in Turkey, the military and judiciary, no longer dictate what is possible in the republic. The old status quo, where these institutions answered efforts to lift the headscarf ban with coups, annulments, and sanctions from political life, is over. This new

²¹³ *Id.* at 1195.

²¹⁴ *Id.* at 1196–97.

²¹⁵ *Id.* at 1198.

²¹⁶ Yargıtay Cumhuriyet Başsavcılığı [Supreme Court of Appeals Chief Public Prosecutor's Office], *Adalet ve Kalkınma Partisinin Temelli Kapatılması İstemine İlişkin Savcılık İddianamesi* [Prosecutor's Office Indictment Requesting the Permanent Closure of the Justice and Development Party] (2008/01), https://tr.wikisource.org/wiki/Adalet_ve_Kalk%C4%B1nma_Partisinin_Temelli_Kapat%C4%B1lmas%C4%B1_%C4%B0stemine_%C4%B0li%C5%9Fkin_Savc%C4%B1l%C4%B1k_%C4%B0ddianamesi [https://perma.cc/88SN-65XE] (Turk.).

²¹⁷ *Id.*

²¹⁸ *Turkey's Governing Party Avoids Being Shut Down for Anti-Secularism*, THE GUARDIAN (July 30, 2008, 7:01 PM EDT), <https://www.theguardian.com/world/2008/jul/30/turkey.nato1> [https://perma.cc/YF9M-KAG2].

²¹⁹ *Id.*

world, where even members of the military and the judiciary may wear headscarves, was not possible—it was unconstitutional. Yet, here it is.

In 2001, less than two months after the Constitutional Court banned the Virtue Party for anti-secularism, many of its younger members established the AKP.²²⁰ The new party attempted to distinguish itself by espousing support for Turkish accession to the EU, democracy, and secularism, though it remained decidedly conservative.²²¹ In its debut 2002 parliamentary election, AKP won 34 percent of the popular vote, earning it 363 seats in a landslide victory.²²² AKP members have aimed to reinterpret secularism to imitate American secularism, insofar as they aim to emphasize religious freedoms and weaken the ideological state.²²³ AKP's conservative, democratic, and unorthodoxly (i.e. passively) secular stances afforded it great popularity and a substantial mandate.

Two years after the Constitutional Court struck down AKP's constitutional amendment that would have lifted the headscarf ban, AKP successfully passed a different, and ultimately more impactful, amendment. In 2010, AKP drafted a raft of amendments which, among other things, overhauled the Constitutional Court, modified the Supreme Board of Judges and Prosecutors (which serves as the disciplinary and personnel body for Turkey's legal system), and hemmed in the military.²²⁴ They expanded the Constitutional Court from eleven members to seventeen members,²²⁵ giving Parliament the new power to select three members and reducing senior judges' ability to vet candidates.²²⁶ The

²²⁰ Ahmet T. Kuru, *Reinterpretation of Secularism in Turkey: The Case of the Justice and Development Party*, in *THE EMERGENCE OF A NEW TURKEY: ISLAM, DEMOCRACY, AND THE AK PARTI* 141 (M. Hakan Yavuz ed., 2010).

²²¹ *Id.*

²²² İhsan D. Dağı, *The Justice and Development Party: Identity, Politics, and Human Rights Discourse in the Search for Security and Legitimacy*, in *THE EMERGENCE OF A NEW TURKEY: ISLAM, DEMOCRACY, AND THE AK PARTI* 89 (M. Hakan Yavuz ed., 2010).

²²³ Kuru, *supra* note 220 at 143.

²²⁴ Hillary Stemple, *Turkish Parliament Approves Constitutional Reforms*, JURIST (May 7, 2010, 3:21:41 PM), <https://www.jurist.org/news/2010/05/turkish-parliament-approves-constitutional-reforms/> [<https://perma.cc/F949-2JLS>].

²²⁵ Following the passage of another raft of constitutional amendments by popular referendum in 2017, the court would later be reduced to 13 members, five of which are presidential appointments. Angela Dewan, *Turkey referendum: What Happened and What Comes Next*, CNN (Apr. 18, 2017, 5:47 AM EDT), <https://www.cnn.com/2017/04/17/europe/turkey-referendum-explainer/index.html> [<https://perma.cc/GJB3-N2DT>].

²²⁶ Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun [Law on Amendments to Certain Articles of the Constitution of the Republic of Turkey], Kanun No.: 5982 R.G.: 13.05.2010 Sayı: 27580, Kabul Tarihi: 07.05.2010, Madde 16 [Law No.: 5982 Official

amendments increased the supermajority required for the court to ban a political party from three-fifths to two-thirds of the present members.²²⁷ The Supreme Board swelled from seven members to twenty-two members and drew its members from a greater number of bodies.²²⁸ The amendments also abolished Provisional Article 15 of the 1982 Constitution, paving the way for the prosecution of members of the military responsible for the 1980 coup.²²⁹ Further, the amendments stipulated that cases of military justice “regarding crimes against the security of the State, constitutional order and its functioning shall be heard before the civil courts.”²³⁰ AKP, and its allies, cast enough votes in Parliament to advance the proposed amendments to a binding popular referendum but failed to muster the two-thirds majority required to enact them immediately.²³¹ The September 12 referendum, coinciding with the thirtieth anniversary of the 1980 coup, passed with 58 percent of votes in favor, with 78 percent turnout.²³² Though none of these amendments addressed secularism, headscarves, or universities, they are crucial for explaining Turkey’s dramatic lift of headscarf bans.

In less than a decade, Turkey’s headscarf policies reversed course, ending bans across the country. The same month as the referendum, the government issued a statement saying it would support students who were

Gazette: 13.05.2010 Number: 27580, Date of Acceptance: 07.05.2010, Article 16] (Turk.); *Can Erdogan Pull It Off?*, THE ECONOMIST (Sept. 11, 2010), <https://www.economist.com/europe/2010/09/09/can-erdogan-pull-it-off> [<https://perma.cc/H6CA-2GHZ>].

²²⁷ Türkiye Cumhuriyeti Anayasasının Bazi Maddelerinde Değişiklik Yapılması Hakkında Kanun, Kanun No.: 5982 R.G.: 13.05.2010 Sayı: 27580, Kabul Tarihi: 07.05.2010, Madde 19.

²²⁸ *Id.* at 22.

²²⁹ *Id.* at 24. Provisional Article 15 provided “No allegation of criminal, financial or legal responsibility shall be made, nor shall an application be filed with a court for this purpose in respect of any decisions or measures whatsoever taken by: the Council of National Security formed under Act No. 2356 which will have exercised legislative and executive power on behalf of the Turkish Nation from 12 September 1980 to the date of the formation of the Bureau of the Turkish Grand National Assembly which is to convene following the first general elections; the governments formed during the term of office of the Council, or the Consultative Assembly which has exercised its functions under Act No. 2485 on the Constituent Assembly. . .” Türkiye Cumhuriyeti Anayasası [CONSTITUTION] Nov. 7, 1982, provisional art. 15 (Turk.), <http://hrlibrary.umn.edu/research/constitution-turkey.html> [<https://perma.cc/CKW6-JKJG>].

²³⁰ Türkiye Cumhuriyeti Anayasasının Bazi Maddelerinde Değişiklik Yapılması Hakkında Kanun, Kanun No.: 5982 R.G.: 13.05.2010 Sayı: 27580, Kabul Tarihi: 07.05.2010, Madde 15.

²³¹ Stemple, *supra* note 224.

²³² Q&A: *Turkey’s Constitutional Referendum*, BBC NEWS (Sept. 12, 2010), <https://www.bbc.com/news/world-europe-11228955> [<https://perma.cc/969Y-8CG7>]; The CNN Wire Staff, *Turkey’s Erdogan Hails Constitutional Referendum Win*, CNN (Sept. 12, 2010, 6:45 PM EDT), <https://www.cnn.com/2010/WORLD/europe/09/12/turkey.referendum/index.html> [<https://perma.cc/Y25W-KDWV>].

expelled or disciplined for covering their heads.²³³ In the following months, almost every university in Turkey dropped the headscarf ban.²³⁴ In response, the Supreme Court stated that “recognition of headscarf use on the basis of religious convictions when regulating the dress codes for university students violates the principle of secularism by using religious fundamentals as a basis for a regulation concerning public space.”²³⁵ Despite its concern, the judiciary did not take further action. In 2013, the AKP-led Parliament issued a by-law lifting the headscarf ban in state institutions.²³⁶ Though the measure did not reach the judiciary, military, or police, it allowed teachers and other civil servants to wear headscarves for the first time in over thirty years.²³⁷ In 2014, the government amended the law governing the dress code for Turkish middle and secondary schools (grades 5 through 12).²³⁸ The amended dress code omitted the requirement that students must be “bareheaded” while inside school premises.²³⁹ In 2016, the parliament amended the regulations for police officer attire to permit wearing headscarves, notwithstanding other uniform requirements.²⁴⁰ Early the next year, the Turkish Armed Forces—the very same military responsible for multiple coups of governments deemed overly Islamist or anti-secular—amended its dress code.²⁴¹ The new rule allows officers to wear headscarves under their cap or beret, so long as they are the same color as their uniform and the officer’s face is not covered.²⁴² Each component of the old militantly assertive secular project to restrict the wearing of headscarves had failed.

²³³ *Quiet End to Turkey’s College Headscarf Ban*, *supra* note 104.

²³⁴ *Id.*

²³⁵ *Turkish Headscarf Legal Warning by Supreme Court*, BBC (Oct. 20, 2010) <https://www.bbc.com/news/world-europe-11590588> [<https://perma.cc/3XMD-V94K>].

²³⁶ Resmi Gazete [Official Gazette], Oct. 8, 2013, No. 28789, Decision No. 2013/5443; Kerime Sule Akoglu, Note, *Piecemeal Freedom: Why the Headscarf Ban Remains in Place in Turkey*, 38 B.C. INT’L & COMPAR. L. REV. 277, 278 (2015); Pamuk, *supra* note 175.

²³⁷ Akoglu, *supra* note 236 at 278; Pamuk, *supra* note 175.

²³⁸ *Turkey Lifts Controversial Headscarf Ban in Middle, Secondary Schools*, DAILY SABAH (Sept. 23, 2014, 12:00 AM GMT+3), <https://www.dailysabah.com/politics/2014/09/23/turkey-lifts-controversial-headscarf-ban-in-middle-secondary-schools> [<https://perma.cc/A8DN-TVSE>]; *Turkey Lifts Ban on Headscarves at High Schools*, AL ARABIYA ENGLISH (May 20, 2020, 10:42 AM GST), <https://english.alarabiya.net/life-style/art-and-culture/2014/09/23/Turkey-lifts-ban-on-headscarves-at-high-schools-> [<https://perma.cc/2F6F-G5B4>].

²³⁹ *Turkey Lifts Controversial Headscarf Ban in Middle, Secondary Schools*, *supra* note 215.

²⁴⁰ Resmi Gazete [Official Gazette], Aug. 27, 2016, No. 29814; *Turkey Allows Policewomen to Wear Headscarves*, *supra* note 176.

²⁴¹ *Turkey Lifts Military Ban on Islamic Headscarf*, *supra* note 176; *Top Court gives Green Light to Headscarf Freedom in Turkish Military*, *supra* note 176.

²⁴² *Turkey Lifts Military Ban on Islamic Headscarf*, *supra* note 176.

3. *The Bans Have Been Lifted, But Has the Law Changed?*

As discussed above, over the last thirteen years Turkey rapidly lifted its headscarf bans but it may not have done so constitutionally. While lifting the bans may prove to be sound democratic, feminist, and anti-racist policy, it still required a re-interpretation of Turkish secularism.

The parliament's string of failed attempts to lift the ban established a constitutional rule: Turkey may not lift its headscarf bans, particularly in public institutions.²⁴³ In striking down the 1989 attempt, the Constitutional Court held that Parliament may not violate Turkish secularism by legislating on the basis of religious beliefs.²⁴⁴ That is, Parliament could not recognize exceptions to dress codes that prohibited headscarves based on religious beliefs.²⁴⁵ Further, it held that hair coverings were inconsistent with modern attire.²⁴⁶ In 1991, the court held that Parliament possessed no constitutional power to lift headscarf bans.²⁴⁷ Any governmental permission to wear a headscarf, regardless of whether it depended on the wearer's religious belief, violated the constitution.²⁴⁸ In 2008, Parliament attempted to amend the constitution to abrogate the 1991 decision.²⁴⁹ The Constitutional Court held that the unchangeability of Turkish secularism, as guaranteed by Article 2 and 4 of the constitution,²⁵⁰ precluded amending the constitution to allow the lifting of headscarf bans.²⁵¹ Under Turkey's constitutional order, as it existed in 2008, no constitutional path to lifting the bans existed.

Turkey's commitment to militant secularism, oftentimes amounting to denials of basic religious expression, betrayed a distrust of its own population. In its 1989 decision, the Constitutional Court showed that secularism was inviolable while freedoms could be limited; rather than being merely a useful means to promote freedoms, equality, and

²⁴³ See discussion *supra* Part II.B.1.

²⁴⁴ Anayasa Mahkemesi, Esas No. 1989/1, Karar No. 1989/12 (Anayasa Mahkemesi Kararları Dergisi, 2001, 25 sayı 148) [Constitutional Court Journal, 2001, No. 25, 148] (Turk.).

²⁴⁵ See discussion *supra* Part II.B.1.

²⁴⁶ Mahkemesi, *supra* note 244.

²⁴⁷ Anayasa Mahkemesi, Esas No. 1990/36, Karar No. 1991/8 (Anayasa Mahkemesi Kararları Dergisi, 1993, 27 sayı 305) [Constitutional Court Journal, 1993, No. 27, 305] (Turk.).

²⁴⁸ See discussion *supra* Part II.B.1.

²⁴⁹ Anayasa Mahkemesi, Esas No. 2008/16, Karar No. 2008/116 (Anayasa Mahkemesi Kararları Dergisi, 2009, 45 sayı 1198) [Constitutional Court Journal, 2009, No. 45, 1198] (Turk.).

²⁵⁰ Türkiye Cumhuriyeti Anayasası [CONSTITUTION] Nov. 7, 1982, art. 2, 4 (Turk.).

²⁵¹ Mahkemesi, *supra* note 249 at 1220–21.

harmony, secularism is an end in itself.²⁵² In the same decision, the court explained that secularism need not be enforced identically in countries with different histories, religions, and cultures.²⁵³ The court held that Turkey required a special understanding of secularism because of its historical development.²⁵⁴ The court implied that Turkey and its Muslim populace were less capable of maintaining secularism without strong government intervention than Western countries.²⁵⁵ Furthermore, it declared that the headscarf “does not have a contemporary appearance,” demonstrating the courts exclusion of Turkish customs and culture from “contemporary” practices.²⁵⁶ Instead of conceiving for itself how to liberate women, the militant secular order bent to colonial prejudices and tropes of what a free and modern woman looks like. Instead of advancing women, it punished the women who choose not to conform to this Western standard. The Turkish headscarf bans were undemocratic, limited women’s agency, and rested on orientalist²⁵⁷ foundations.

Though Turkey’s constitution has undergone substantial reforms since 2008,²⁵⁸ the constitutional status of headscarf bans had not changed before parliament enacted the 2013 by-law. Since 2008, Turkey amended its constitution four times with the most substantial changes passing in 2010 and 2017. The 2010 and 2017 amendments substantially reorganized Turkish governing structures and the distribution of power and influence throughout them;²⁵⁹ however, they did not change the constitutional status of headscarf bans. The amendments also did not remove or redefine “secular” in Turkey²⁶⁰ nor, per the Constitutional Court’s 2008 decision, could they have done so.²⁶¹

²⁵² See Anayasa Mahkemesi, Esas No. 1989/1, Karar No. 1989/12 (Anayasa Mahkemesi Kararları Dergisi, 2001, 25 sayı 143–46) [Constitutional Court Journal, 2001, No. 25, 143–46] (Turk.).

²⁵³ *Id.* at 145.

²⁵⁴ *Id.* at 146.

²⁵⁵ See *id.* 145–46.

²⁵⁶ *Id.* at 158.

²⁵⁷ “Orientalist” referring to “Western ideas about the Middle East and about East and Southeast Asia, especially ideas that are too simple or not accurate about these societies being mysterious, never changing, or not able to develop in a modern way without Western help.” *Orientalism*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/orientalism> [https://perma.cc/PXE9-6YGS].

²⁵⁸ See Türkiye Cumhuriyeti Anayasasının Bazı Maddesinde Değişiklik Yapılması Hakkında Kanun, Kanun No.: 5982 R.G.: 13.05.2010 Sayı: 27580, Kabul Tarihi: 07.05.2010.

²⁵⁹ *Id.*

²⁶⁰ See *id.*

²⁶¹ See discussion *supra* Part II.B.1; Mahkemesi, *supra* note 249 at 1220–21.

Despite this, in 2014, a majority of the Constitutional Court affirmed a lawyer's right to wear her headscarf in a courtroom.²⁶² During a hearing in a divorce case, a judge had stated that the lawyer would not be permitted to represent her client while wearing her headscarf.²⁶³ The judge made the familiar argument that a headscarf is a strong religious and political symbol contrary to secularism.²⁶⁴ In its judgment, the Constitutional Court acknowledged its prior decisions on headscarf bans, reaffirming that "secularism is an indispensable principle and is necessary for the protection of the democratic system."²⁶⁵ However, it identified both a "strict secularism," which holds that religion should be present only in the conscience of the individual, and a "more flexible or libertarian interpretation of secularism," which conceives of religion as an important element of identity and "allows for its social visibility."²⁶⁶ The court's analysis followed this flexible secularism.²⁶⁷ As such, it held that objections to the headscarf on the basis of secularism must show that a specific instance of wearing a headscarf "is aggressive or intervenes in the faiths of the others, is oppressive, provocative, has an aim of imposing its own faith by force or disrupts the social functioning, causes some disorders and irregularities."²⁶⁸ Without this showing, the court found that the judge's action was disproportionate to any risk that the lawyer would prevent others from exercising their own rights or would cause social conflicts or tension by wearing her headscarf.²⁶⁹

Instead of changing secularism through constitutional amendment, AKP changed secularism by replacing who decides what secularism means. AKP found a way to lift the headscarf bans, thwarting the old militantly secular order. By lifting its headscarf bans, Turkey eliminated an unpopular policy which had restricted women's agency and opportunity, and it rejected a legacy of internalized colonial attitudes.

²⁶² *Tuğba Arslan* [GK], B. No: 2014/256, 25/6/2014; see discussion *supra* Part II.B.1; Mahkemesi, *supra* note 249 at 1220–21.

²⁶³ *Id.* at ¶ 13.

²⁶⁴ *Id.* at ¶ 92.

²⁶⁵ *Id.* at ¶ 139.

²⁶⁶ *Id.* at ¶ 134.

²⁶⁷ *Id.* at ¶ 140 ("In the societies, where the pluralistic secularism understanding is accepted, there is an opportunity of ensuring peaceful coexistence of the people, whose faiths, thoughts and lifestyles that are in conflict with each other, and of securing a pluralistic environment in the society, where all types of faiths can express themselves. Seeing the pluralism and social diversity as an element that threatens the social unity without considering these opportunities leads to a monolithic society understanding that does not accord with the democracy.").

²⁶⁸ *Id.* at ¶ 142.

²⁶⁹ *Id.* at ¶ 153.

Even under Turkey's efforts to restrict headscarf wearing, many women wore headscarves when they left their homes. For decades, democratically elected governments, responding to the desires of their constituents, attempted to lift the bans. Their efforts were thwarted by unelected military and judicial officials who, at best, annulled or reinterpreted laws and, at worst, banned parties and toppled governments. The headscarf bans stripped women of their agency by compelling exposed hair. Many women had to choose between dressing in a manner they found objectionable or facing additional barriers to education and employment opportunities.

Now, Turkish women are not compelled by their government to wear or not wear a headscarf, they decide for themselves.²⁷⁰ Any alleged inherent "coercion" or "social pressure" exerted by women who choose to cover their hair on women who choose not to, pales in comparison to the old regime of state enforced restrictions on dress and "persuasion rooms" for women who did not comply. Turkey's headscarf bans, as well as many aspects of its "modernization" programs, demonstrated efforts to prove the country's worth and right to sovereignty on archaic orientalist terms.

C. INDIA—AT THE CROSSROADS

In 2022, two of India's Supreme Court judges heard arguments on whether to uphold or strike down a government order from the Indian state of Karnataka.²⁷¹ The order mandated "all the government schools in the state . . . to abide by the official uniform."²⁷² In enforcing the uniform, several schools prevented students wearing headscarves from entering classrooms—though headscarves were sometimes permitted elsewhere on campus.²⁷³ The challengers—a collection of female Muslim students—argued that the order violated their religious freedoms, among other

²⁷⁰ This is not to dismiss other sources faced by Turkish women, or any women under patriarchal systems. See Gönül Tol, *Up for Debate Again: Politics and the Headscarf in Turkey*, MIDDLE E. INST. (Nov. 16, 2022), <https://www.mei.edu/publications/debate-again-politics-and-headscarf-turkey> [<https://perma.cc/7MA7-ZDDQ>] (critiquing Erdoğan's efforts to lift the headscarf bans as merely advancing a symbol of his vision for the country, identifying instances of victimization of women who choose to not cover their hair, and arguing that under Erdoğan Turkish women are worse off—in terms of labor participation, leadership, access to finance, civil and political freedoms, education, and health).

²⁷¹ *Aishat Shifa v. State of Karnataka*, (2022) 5 SCR 426 (India).

²⁷² *Id.* at 454.

²⁷³ Anusha Ravi Sood, *Viral photos, Bruised Egos, Radical Student Groups: Inside Story of Karnataka's Hijab Crisis*, THE PRINT (Feb. 11, 2022, 9:04 AM IST), <https://theprint.in/india/viral-photos-bruised-egos-radical-student-groups-inside-story-of-karnatakas-hijab-crisis/827262/> [<https://perma.cc/C69T-P47W>].

freedoms, by prohibiting them from wearing headscarves.²⁷⁴ The state government of Karnataka defended the order, arguing that wearing a headscarf is not an “essential practice” of Islam.²⁷⁵ As such, Karnataka argued that it could prohibit students from wearing headscarves in classrooms in order to maintain an educational environment.²⁷⁶

The case sparked protests and counter-protests at schools across the country²⁷⁷ and served to focus attention on the question: “what is Indian secularism?” Each of the state courts held that the order was permissible, leading the students to petition India’s Supreme Court. The two Supreme Court judges hearing the case issued opposing judgments.²⁷⁸ A year into the controversy, the two judges were unable to resolve the issue; instead, they referred the case to the Chief Justice of India to assemble a larger, odd-numbered panel of judges to hear the case again.²⁷⁹

1. Essentiality and Religious Rights: The Karnataka State High Court

Because the petitioners argued that the government order violated their religious rights, the High Court of Karnataka discussed whether wearing a headscarf constitutes an essential religious practice for Muslim women.²⁸⁰ India’s constitution guarantees freedoms of conscience and free profession, practice, and propagation of religion.²⁸¹ The Indian judiciary

²⁷⁴ Smt Resham v. State of Karnataka, 2347/2022 of 2022, decided on Mar. 15, 2022, High Ct. of Karnataka, at 22 (India).

²⁷⁵ *Id.* 31–32.

²⁷⁶ *Id.* 32–33.

²⁷⁷ BBC, *supra* note 6.

²⁷⁸ Aishat Shifa v. State of Karnataka, (2022) 5 SCR 426 (India).

²⁷⁹ *Id.* at 578. Since then, the 2023 Karnataka Legislative Assembly election dethroned the BJP led government and elevated the Indian National Congress (INC), which won a majority of the Assembly’s seats. Manjiri Chitre, *Karnataka election results: Congress Wins by Biggest Vote Share in 34 Years*, THE HINDUSTAN TIMES (May 13, 2023, 6:47 PM IST), <https://www.hindustantimes.com/india-news/karnataka-election-results-congress-wins-by-biggest-vote-share-in-34-years-101683976728769.html> [<https://perma.cc/AM5C-RS3X>]. Appearing to support the plight of headscarf wearing students, the new Chief Minister of Karnataka stated “No more will there be a ban on hijab. You can wear a hijab and go (to schools).” CM Siddaramaiah makes U-turn, says hijab ban not revoked yet, THE TIMES OF INDIA (Dec. 24, 2023, 2:45 AM IST), <https://timesofindia.indiatimes.com/india/cm-siddaramaiah-makes-u-turn-says-hijab-ban-not-revoked-yet/articleshow/106239807.cms> [<https://perma.cc/25NF-H8H7>]. As of March 2024, Karnataka has not yet lifted the government order which empowers the headscarf ban in schools. *Id.*

²⁸⁰ See Smt Resham v. State of Karnataka, 2347/2022 of 2022, decided on Mar. 15, 2022, High Ct. of Karnataka, at 54 (India).

²⁸¹ India Const. art. 25, cl. 1.

has often limited these protections to only a religion's essential religious practices.²⁸² The High Court listed four elements of essentiality:

(i) Not every activity associated with the religion is essential to such religion. Practice should be fundamental to religion and it should be from the time immemorial. (ii) Foundation of the practice must precede the religion itself or should be co-founded at the origin of the religion. (iii) Such practice must form the cornerstone of religion itself. If that practice is not observed or followed, it would result in the change of religion itself, and (iv) Such practice must be binding nature of the religion itself and it must be compelling.²⁸³

Additionally, for a practice to warrant constitutional protection, the court requires “that what is protected is in conformity with fundamental constitutional values and guarantees and accords with constitutional morality.”²⁸⁴ Under the High Court's test, if a religious practice lacks any of these five requirements—the four essentiality elements plus conformity with constitutional values—the constitution affords it no protection.

In determining the degree of protection owed to the petitioners, the High Court endeavored to interpret Islamic law to determine whether, for Muslim women, wearing a headscarf constituted an essential religious practice.²⁸⁵ It parsed the Quran (the central religious text of Islam) looking for a mandate for women to wear headscarves.²⁸⁶ Failing to find a direct quotation requiring headscarves, the court stated that the scripture supported a “view that wearing *hijab* has been only recommendatory, if at all it is.”²⁸⁷ Further, the High Court declared that “this apparel at the most is a means to gain access to public places and not a religious end in itself.”²⁸⁸ Attempting to dissolve the nexus between wearing headscarves and Islam, the High Court cited a research paper to say “that wearing *hijab* is not religion-specific . . . ‘Islam was not the first culture to practice

²⁸² Smt Resham, 2347/2022 at 39, 54 (“The protection guaranteed under Articles 25 and 26 of the Constitution . . . extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion.” (quoting Acharya Jagadishwarananda Avadhuta).

²⁸³ *Id.* at 55.

²⁸⁴ *Id.* at 56 (citing Indian Young Lawyers Association).

²⁸⁵ *Id.* at 57.

²⁸⁶ Interestingly the court felt “it appropriate to quote what Prophet had appreciably said at *surah* [chapter] (ii) verse 256 in Holy Quran: ‘*Let there be no compulsion in religion . . .*’” *Id.* at 62–73.

²⁸⁷ *Id.* at 65. Here the court defines the term, “hijab,” to mean “a veil ordinarily worn by Muslim women. *Id.* at 64.

²⁸⁸ *Id.* at 66.

veiling their women.”²⁸⁹ Finally the High Court bargains, “at the most the practice of wearing this apparel may have something to do with *culture* but certainly not with religion.”²⁹⁰ Finding that Islam does not compel women-faithful to wear headscarves, the High Court held that the practice does not constitute an essential religious practice.²⁹¹ As such, the High Court upheld the government order,²⁹² forcing female Muslim students to choose between getting an education at a state school and fulfilling their sincere religious sense of obligation.

2. *Secularism and Uniformity: Judge Gupta*

As one of the two Supreme Court judges who heard this case, Judge Hemant Gupta upheld the Karnataka order, though he approached the issue differently than the Karnataka High Court. Like the High Court, Judge Gupta discussed India’s essentiality test and referenced verses of the Quran;²⁹³ however, unlike the High Court, he did not rule on whether, for Muslim women, wearing headscarves constitutes an essential religious practice.²⁹⁴ Instead, he held that “the religious belief cannot be carried to a secular school maintained out of State funds,” regardless of its essentiality.²⁹⁵

Judge Gupta’s interpretation of Indian secularism drove his entire judgment. The preamble of India’s constitution declares that the republic is secular;²⁹⁶ however, the constitution does not explicitly explain how India’s secular character should manifest.²⁹⁷ Judge Gupta posits that a “Secular State means rising above all differences of religions, and attempting to secure the good of all its citizens irrespective of their religious beliefs and practices . . . Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions.”²⁹⁸ Any deviation from a uniform practice, even to

²⁸⁹ *Id.* at 69.

²⁹⁰ *Id.* at 70.

²⁹¹ *Id.* at 71 (“What is not religiously made obligatory therefore cannot be made a quintessential aspect of the religion through public agitations or by the passionate arguments in courts.”).

²⁹² *Id.* at 121.

²⁹³ *Aishat Shifa v. State of Karnataka*, (2022) 5 SCR 426, 478–79, 486–509 (Gupta, J., split decision) (India).

²⁹⁴ *See id.* at 509.

²⁹⁵ *Id.*

²⁹⁶ India Const. Preamble, amended by the Constitution (Forty-second Amendment) Act, 1976.

²⁹⁷ *See generally id.*

²⁹⁸ *Aishat Shifa*, 5 SCR at 506–07 (Gupta, J., split decision).

accommodate religious practices, violates Judge Gupta's sense of secularism.²⁹⁹

India's constitution both guarantees and limits the freedom of religion.³⁰⁰ Though "all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion," that entitlement is "subject to public order, morality and health and to the other" fundamental rights.³⁰¹ Further, the constitution preserves the state's ability to legislate to regulate or restrict "any economic, financial, political or other secular activity which may be associated with religious practice" and to provide "for social welfare and reform" among other things.³⁰² Judge Gupta calls attention to a fundamental right, equality before the law, as limiting the freedom of religion.³⁰³

Judge Gupta levies two more perambulatory ideals, fraternity and dignity,³⁰⁴ to justify Karnataka's government order. He held fraternity "to be understood in the breed of homogeneity in a positive sense and not to trample dissent and diversity."³⁰⁵ If some students wear headscarves, they "would stand out and overtly appear differently. The concept of fraternity will stand fragmented as the apparent distinction of some of the students wearing headscarf [*sic*] would not form a homogenous group of students."³⁰⁶ As such, Judge Gupta held that the government order promotes constitutional fraternity.³⁰⁷ Further, Judge Gupta argued that wearing headscarves does not provide dignity, simply stating, "The students are attending an all-girls' college."³⁰⁸ Though the colleges' student bodies are all-girl, they employ male teachers.³⁰⁹

Judge Gupta navigated the government order past any remaining constitutional dangers. The constitution protects minorities from being

²⁹⁹ "[S]ecularism is applicable to all citizens, therefore, permitting one religious community to wear their religious symbols would be antithesis to secularism." *Id.* at 509–10.

³⁰⁰ India Const. art. 25.

³⁰¹ *Id.* at art. 25, cl. 1.

³⁰² *Id.* at art. 25, cl. 1.

³⁰³ *Aishat Shifa*, 5 SCR at 485–86 (Gupta, J., split decision). Article 14 provides, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." India Const. art. 14.

³⁰⁴ The Indian Constitution's Preamble provides that the constitution promotes "FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation." India Const. Preamble, amended by the Constitution (Forty-second Amendment) Act, 1976.

³⁰⁵ *Aishat Shifa*, 5 SCR at 520–21 (Gupta, J., split decision).

³⁰⁶ *Id.* at 527.

³⁰⁷ *Id.* at 527.

³⁰⁸ *Id.* at 529.

³⁰⁹ Sood, *supra* note 273.

“denied admission into any educational institution maintained by the state . . . on grounds only of religion.”³¹⁰ Further, the state may not require citizens to barter or surrender fundamental rights in order to enjoy a different fundamental right.³¹¹ Judge Gupta cleared these hurdles with a creative framing of the issue. “The State has not denied admission to the students from attending classes. If they choose not to attend classes due to the uniform that has been prescribed, it is a voluntary act of such students.”³¹² Though the Indian courts have recognized state obligations to ensure reasonable accommodations,³¹³ Judge Gupta distinguished the government order. Though many reasonable accommodation cases concern physical disability,³¹⁴ in *Bijoe Emmanuel* students who were Jehovah Witnesses, as a matter of faith, could not sing for anyone but Jehovah.³¹⁵ Instead of singing the Indian national anthem, they would stand respectfully.³¹⁶ After the students were expelled for their failure to sing the anthem, the Supreme Court reversed their expulsion.³¹⁷ It held that, by respectfully standing, the students did not disrespect the national anthem.³¹⁸ Their school would have to make the reasonable accommodation to allow the students to stand respectfully and not sing the national anthem.³¹⁹ Judge Gupta found *Bijoe Emanuel* to have no bearing on the case at hand.³²⁰ “In the case of the appellants, democracy [i.e., respecting the national anthem] is not in test but the question is whether the school, having prescribed the uniform, has a right to insist that all students wear the same uniform.”³²¹ As such, Judge Gupta held that the principle of reasonable accommodation did not apply.³²² He punctuated his point by asserting, “constitutional goals such as secularism, fraternity, dignity mean equality for all, preference to none. The accommodation sought is contrary to spirit [*sic*] of Article 14 [equality before the law] as

³¹⁰ India Const. art. 29, cl. 2.

³¹¹ *Aishat Shifa v. State of Karnataka*, (2022) 5 SCR 426, 531–34 (Gupta, J., split decision) (India).

³¹² *See id.* at 530–31, 534.

³¹³ *Id.* at 534–36.

³¹⁴ *Id.*

³¹⁵ *Id.* at 557 (Dhulia, J., split decision).

³¹⁶ *Id.*

³¹⁷ *Id.* at 557, 560.

³¹⁸ *Id.* at 560.

³¹⁹ *See id.*

³²⁰ *Id.* at 535–36 (Gupta, J., split decision).

³²¹ *Id.*

³²² *Id.* at 536.

it would result in different treatment of students.”³²³ For Judge Gupta, equality precludes accommodation.

In Judge Gupta’s view, allowing students to wear headscarves would subvert the state’s interest in promoting literacy and education.³²⁴ He fixated on the notion that allowing students to wear headscarves—even while otherwise complying with the dress code—would obliterate the very concept of a uniform.³²⁵ He argued that uniforms remove distinctions between students of diverse backgrounds.³²⁶ “The uniform is an equalizer of inequalities. Therefore, prescribing uniform [*sic*] for children at an impressionable age is not only important but has a salutary effect on the mental development of the child to grow in the environment of oneness.”³²⁷ As such, Judge Gupta stood against this supposed obliteration, upholding the government order.³²⁸

3. *Individual Rights and Diversity: Judge Dhulia*

The judgment of Judge Sudhanshu Dhulia, the second Supreme Court judge to hear this case, charted a sympathetic course. Unlike Judge Gupta, Judge Dhulia would have struck down Karnataka’s government order.³²⁹ He held that prohibiting female Muslim students from wearing headscarves in the classroom violated their fundamental rights:³³⁰ “If the belief is sincere, and it harms no one else, there can be no justifiable reasons for banning hijab in a classroom.”³³¹ As such, he stated that schools must make the reasonable accommodation of allowing students—who otherwise comply with the uniform—to wear headscarves.³³²

Similarly to his counterpart, Judge Dhulia felt no need to determine whether, for Muslim women, wearing headscarves constitutes an essential religious practice.³³³ Judge Dhulia distinguished prior

³²³ *Id.*

³²⁴ *See id.* at 539.

³²⁵ *Id.* at 471.

³²⁶ *Id.* at 539.

³²⁷ *Id.*

³²⁸ *Id.* at 541.

³²⁹ *Id.* at 577–78 (Dhulia, J., split decision).

³³⁰ *Id.*

³³¹ *Id.* at 554.

³³² *See id.* at 572, 577–78.

³³³ “In my opinion, the question of Essential Religious Practices . . . was not at all relevant in the determination of the dispute before the Court.” *Id.* at 547.

essentiality cases by the type of rights they considered.³³⁴ He argued that the prior cases focused on community rights, concerning Articles 25(2) and 26 of the constitution.³³⁵ Moreover, he argued that this case concerned individual rights, concerning only Article 25(1).³³⁶ This reasoning is strange. Though Article 25(1) refers to “persons,” Article 25(2) does not refer to religions or other collectives; it arguably serves only to limit the scope of Article 25(1).³³⁷ Regardless, Judge Dhulia stated that an assessment of essentiality “comes in only when we are dealing with Article 25(2) or Article 26, and where there is an inter-play of these two Articles.”³³⁸ As such, the assessment is unnecessary.³³⁹ Further, Judge Dhulia seemed to critique prior judges’ attempts to solve theological questions as part of performing essentiality tests.³⁴⁰

Free of the essentiality test, Judge Dhulia emphatically held that the government order violated the students’ fundamental rights. “It is an attack on their dignity, and then ultimately it is a denial to them of secular education. These are clearly violative of Article 19(1)(a), Article 21 and Article 25(1) of the Constitution of India.”³⁴¹ His reasoning is stunningly direct.

Judge Dhulia’s judgment considered the practical effects of Karnataka’s government order on female Muslim students:

One of the best sights in India today, is of a girl child leaving for her school in the morning, with her school bag on her back. She is our hope, our future. But it is also a fact, that it is much more difficult for a girl child to get education, as compared to her brother. . . . The question this Court would therefore put before itself is also whether we

³³⁴ *Id.* at 533.

³³⁵ *Id.* Article 25 establishes the “freedom of conscience and the right freely to profess, practice and propagate religion” in India. India Const. art. 25(1). India explicitly limits these freedoms from interfering with any laws “(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; [or] (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.” India Const. art. 25(1). Article 26 establishes the freedom for religious denominations to manage their own affairs; however, this freedom is “[s]ubject to public order, morality and health.” India Const. art. 26.

³³⁶ *Aishat Shifa v. State of Karnataka*, (2022) 5 SCR 426, 533 (Dhulia, J., split decision) (India).

³³⁷ *See* India Const. art. 25.

³³⁸ *Aishat Shifa*, 5 SCR at 554 (Dhulia, J., split decision).

³³⁹ *Id.* at 554.

³⁴⁰ He opined: “Courts are not the forums to solve theological questions. Courts are not well equipped to do that for various reasons, but most importantly because there will always be more than one viewpoint on a particular religious matter, and therefore nothing gives the authority to the Court to pick one over the other.” *Id.* at 555.

³⁴¹ *Id.* at 577.

are making the life of a girl child any better by denying her education, merely because she wears a hijab!³⁴²

Judge Dhulia cited a similar UK case which warned that prohibiting students from veiling “may also result in traditionalist families not sending their children to the state educational institutions.”³⁴³ Striking down the government order would have allowed Judge Dhulia to mitigate the barriers to education for female Muslim students that he lamented.

The government order exasperated Judge Dhulia. “All the Petitioners want is to wear a hijab! Is it too much to ask in a democracy? . . . It does not appeal to my logic or reason as to how a girl child who is wearing a hijab in a classroom is a public order problem.”³⁴⁴ He countered, “reasonable accommodation in this case would be a sign of a mature society which has learnt to live and adjust with its differences,”³⁴⁵ in contrast with an immature society which obsesses over maintaining homogeneity—or an illusion of homogeneity.

Judge Dhulia also responded to the High Court of Karnataka’s dismissal of diversity concerns.³⁴⁶ The High Court asserted, “Petitioners’ contention that ‘a class room should be a place for recognition and reflection of diversity of society, a mirror image of the society (socially and ethically)’ in its deeper analysis is only a hollow rhetoric, ‘unity in diversity’ being the oft quoted platitude.”³⁴⁷ Rather than seeing “hollow rhetoric,” Judge Dhulia considered school to bear substantive importance.³⁴⁸ Schools “are the perfect institutions . . . to foster in [children] sensitivity, empathy and understanding towards different religions, languages and cultures.”³⁴⁹ Emphasizing his point, Judge Dhulia invoked the constitutional duty to “value and preserve the rich heritage of our composite culture.”³⁵⁰ Judge Dhulia recognized India’s diversity as a boon, not a problem to be solved.

³⁴² *Id.* at 571.

³⁴³ *Id.* at 569 (citing *Regina (SB) v. Governors of Denbigh High School* (Baroness Hale of Richmond) (citing “Culture Religion and Gender” (2003) by Professor Frances Raday ¶ 98)).

³⁴⁴ *Aishat Shifa v. State of Karnataka*, (2022) 5 SCR 426, 572 (Dhulia, J., split decision) (India).

³⁴⁵ *Id.* at 572.

³⁴⁶ *Id.* at 573.

³⁴⁷ *Smt Resham v. State of Karnataka*, 2347/2022 of 2022, decided on Mar. 15, 2022, High Ct. of Karnataka, 101 (India).

³⁴⁸ *Aishat Shifa*, 5 SCR at 573 (Dhulia, J., split decision).

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 575 (citing India Const. art. 51A, cl. (f)).

III. CONCLUSION

The ideals of gender liberation, equality, and secularism are not inherently opposed to religious expression. Despite this, the governments of Germany, which holds dearly a principle of state neutrality; Turkey, which has recognized two different interpretations of secularism; and India, which is considering three different frameworks, each viewed wearing headscarves as a dangerous activity worthy of regulation.³⁵¹ Though the exact regulations varied between each country, they operated on similar justifications.

Some declare that headscarves radiate an undesirable influence. In Germany and Turkey, proponents justified headscarf restrictions partly by arguing that wearing headscarves is more than a personal choice.³⁵² It broadcasts to everyone who can see the headscarf: “Wearing a headscarf is okay.” Teachers wearing headscarves amplify this broadcast through their position as an authority figure. The existence of this amplified broadcast supports headscarf restrictions only where regulators already disagree with the statement, believing that headscarves ought not to be worn. As such, this proposition cannot, on its own, justify headscarf regulations.

Some stress that headscarves shatter the illusion of homogeneity. In Germany and India, proponents justified headscarf restrictions partly by arguing that wearing headscarves disrupts social order.³⁵³ When a Muslim woman or girl wears a headscarf, she is visibly Muslim. These proponents argue that by advertising one’s Muslim-ness, a student causes the bullying and spite directed at her by other students and that a Muslim teacher is to blame when community members are incensed that a Muslim woman is allowed to teach children. This proposition supports headscarf regulation only where regulators believe (1) people have a duty to dress “normally” in public and (2) “normal” does not—and should not—include wearing headscarves. Neither premise is self-evident.

³⁵¹ Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02 ¶ 4 (Ger.) (Note that only the German version is authoritative); MCGOLDRICK, *supra* note 190 at 135; *Aishat Shifa*, 5 SCR at 527 (Gupta, J., split decision).

³⁵² See Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02 ¶ 4 (Ger.) (Note that only the German version is authoritative); *Anayasa Mahkemesi*, Esas No. 2008/16, Karar No. 2008/116 (*Anayasa Mahkemesi Kararları Dergisi*, 2009, 45 sayı 1237) [Constitutional Court Journal, 2009, No. 45, 1237]; MCGOLDRICK, *supra* note 190 at 135.

³⁵³ Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jan. 27, 2015, 1 BvR 471/10, ¶ 113 (Ger.) (Note that only the German version is authoritative); *Aishat Shifa*, 5 SCR at 539 (Gupta, J., split decision).

Some fear that headscarves undermine secularity and state neutrality. Regulators in each country assessed in this Comment argued that allowing individuals to choose whether to wear headscarves or not violates religious equality.³⁵⁴ Building off of the previous argument, proponents of regulations argue that religious beliefs cannot justify behavior which deviates from “normal.” In this framework, accommodations of religious practices do not promote equal access to education and opportunities; rather, they violate the equal enforcement of facially neutral rules—even where those rules disproportionately harm specific religious groups.

Arguments supporting headscarf regulations rest on deeper assumptions that headscarves are inherently harmful. Many proponents of these regulations argue that wearing a headscarf is inherently oppressive.³⁵⁵ It is true that many women wear headscarves because of coercion—state or private.³⁵⁶ This is oppression; it robs women of their agency to decide how to present themselves. It is also true that many women wear headscarves because they choose to.³⁵⁷ Regulations on headscarves also are oppression; they force women to choose between their education or career and their ability to decide how to present themselves. This choice is hardly free.

Headscarf related oppression is contextual. Where a state or society mandates headscarves, choosing to not wear a headscarf can be liberating. Where a state or society restricts headscarves, choosing to wear a headscarf can be just as liberating. The headscarf is not so simple as to mean one thing in every time and place.

After grappling with arguments and assumptions purportedly justifying headscarf regulations, each country assessed in this Comment has entertained arguments in favor of lifting them. In the last decade, both Germany and Turkey made impressive strides in this regard;³⁵⁸ however, their methods were markedly different. Germany’s constitutional courts

³⁵⁴ Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02 ¶ 4 (Ger.) (Note that only the German version is authoritative); *Anayasa Mahkemesi*, Esas No. 2008/16, Karar No. 2008/116 (*Anayasa Mahkemesi Kararları Dergisi*, 2009, 45 sayı 1218) [Constitutional Court Journal, 2009, No. 45, 1218]; *Aishat Shifa*, 5 SCR at 506, 509 (Gupta, J., split decision).

³⁵⁵ MCGOLDRICK, *supra* note 190 at 135; *Aishat Shifa*, 5 SCR at 529 (Gupta, J., split decision); *Hijab Campaign Tweets Pulled by Council of Europe after French Backlash*, *supra* note 8.

³⁵⁶ See, e.g., OFF. OF INT’L RELIGIOUS FREEDOM, U.S. DEP’T STATE, *supra* note 49; Syria: *Extremists Restricting Women’s Rights Harsh Rules on Dress, Work, School*, *supra* note 49.

³⁵⁷ See Ahmad & Quraishi-Landes, *supra* note 6.

³⁵⁸ See discussion *supra* Part II.A.3, II.B.2.

recognized that the country's freedoms of faith and profession of belief include a teacher's choice to wear a headscarf.³⁵⁹ Through official statements and parliamentary by-laws, Turkey lifted its extensive headscarf bans³⁶⁰ in spite of then-existing constitutional rules to the contrary³⁶¹ and a history of military influence—some instances stronger than others—intended to maintain the bans.³⁶²

India now faces a similar issue: whether to allow students to wear headscarves in state-run schools where mandated uniforms do not include headscarves.³⁶³ India, and other secular states, should avoid the temptation to maintain and legitimize an illusion of homogeneity. If the Indian Supreme Court looks to the examples of Germany and Turkey, it will find that secularism does not require banishing religion to the inner life of the citizen. Instead, secularism can be a powerful force for pluralism, ensuring that dominant groups cannot regulate minority groups—or at least their conspicuous identifiers—out of existence.

³⁵⁹ Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jan. 27, 2015, 1 BvR 471/10, ¶ 87 (Ger.) (Note that only the German version is authoritative).

³⁶⁰ Resmi Gazete [Official Gazette], Aug. 27, 2016, No. 29814; *Turkey allows policewomen to wear headscarves*, *supra* note 176; *Turkey lifts military ban on Islamic headscarf*, *supra* note 157; *Top court gives green light to headscarf freedom in Turkish military*, *supra* note 176.

³⁶¹ See discussion *supra* Part II.B.1.

³⁶² Widner, *supra* note 97; ÖKTEM, *supra* note 100 at 107; *No to Military Intervention*, *supra* note 178.

³⁶³ See *Aishat Shifa v. State of Karnataka*, (2022) 5 SCR 426 (India).