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What is This?
Integrating Different Pasts, Avoiding Different Futures?
Recent conflicts about Islamic religious practice and their judicial solutions

Monika Wohlrab-Sahr

ABSTRACT. In several European countries there have been judicial decisions relating to the religious practice of Muslim immigrants: Law suits about headscarves in public schools and ritual slaughter are prominent examples. When issues of religious difference are being treated at the Supreme Court level, this indicates a problem of social integration in a growingly multicultural society. In this article such decisions are interpreted as an effort to integrate references to a foreign religious past while avoiding references to a future that might arise from it. Through this, the unstructured and conflicting simultaneity of different religious pasts and presents is shaped into a structured ‘simultaneity of the non-simultaneous’. KEY WORDS • Islam • law • multiculturalism • simultaneity • social integration

1. Introduction

During the last two decades several Western European societies have witnessed a series of public debates and sometimes passionate conflicts about the religious practice and visible presence of Muslim migrants in public. The affaire des foulards about Muslim girls who insisted on wearing head scarves in French public schools has revived the old conflict between religion and laïcité in France. In Germany, law suits concerning a Muslim teacher have brought forward references to a Christian ‘leading culture’ (Leitkultur) and the public has reinforced those references. At the same time, Europe has witnessed the political success of right-wing populist parties that focus mainly on the presence...
of foreigners. Jean-Marie Le Pen’s Front National in France, List Pim Fortuyn in the Netherlands, Lega Nord in Italy, Jörg Haider’s FPÖ in Austria, as well as the ‘Republikaner’ and several local parties in Germany are all examples of this tendency. Some of these parties are not simply ‘racist’ and ‘right-wing,’ but combine such positions with an explicit reference to the ‘liberal’ – sometimes explicitly to the ‘Christian’ – traditions of their countries, which they see as threatened by the ‘illiberal’ tradition of Islam and the ‘fundamentalist’ future allegedly aimed at by Muslim immigrants. Muslim immigrants are used as the prototype of strangers whose culture is incompatible with Western European ways of living. In particular, Pim Fortuyn was especially successful with his combination of a plea for ‘rescuing’ the Netherlands’ liberal Judeo-Christian tradition with an anti-immigrant and Chauvinist rhetoric (Fortuyn, 1997/2001; see also Pennings and Keman, 2002).

Global conflicts in which fundamentalist Muslim groups are involved, especially after 11 September 2001, but also fundamentalist tendencies among Muslim immigrants in Europe, play into these debates as well. They tend to be used as a scenario for an imminent fundamentalist future that Muslim immigrants might have in mind, when they practise their religion ‘ostentatiously’. Through this, a ‘civilizational’ perspective infiltrates local or national debates and court procedures: It is not only Muslims in the country whose behaviour is at stake, but also their possible embeddedness in global movements referring to the idea of an Islamic civilization. Consequently, the Courts not only decide upon the compatibility of a specific practice with the laws of a given society, but also upon its ‘authenticity’ and upon its ‘implications’. The issue is the foundation of a specific practice in an unquestionable binding past and in a community that takes this tradition seriously, as well as its possible ties to fundamentalist future projects.

These conflicts and the efforts to solve them also indicate the shifting grounds of national integration. As historians have pointed out with reference to the diversity of existing national myths, the European nation-states can be seen as ‘daughters of religion and of revolution’ (François and Schulze, 1998: 25). In spite of the variety of mythological references and the forms of remembrance related to them (Nora, 1984–1992), as well as the diversity of languages and traditions, the emerging nation-states tried to create common and binding points of reference in history for those who ‘belonged’ to the nation (Connor, 1992), and thereby tried to build a national identity which was supposed to neutralize or at least subordinate existing ethnic and religious identities. Language policies, specific church–state relations, the shaping of national identities through the educational system, as well as the definition of criteria for citizenship (ius solis or ius sanguinis) are elements of these processes of nation-building.

In terms of temporality, the process of nation-building has been described as
an attempt to invent a past that is considered relevant for the nation (Hobsbawm, 1993) which implies distinguishing it from competing ethnic and religious pasts. At the same time citizenship laws, especially those based on the *ius solis*, and the Republican pacts going along with them (Dubet, 1993), symbolically create a kind of ‘zero hour’ for those living on the same ‘soil’. Their ethnic and religious pasts and the traditional practices referring to these pasts from then on are considered private, whereas they share the common past of the nation with other citizens. This construction is typical for France and very different from the German citizenship law. However, on the structural level it indicates a common problem of national integration: Nation-states, in order to integrate their population, somehow have to ‘neutralize’ and depose the different pasts people bring with them and the possible future projects (for example possible attempts to get ethnically based autonomy) that may arise out of them. Even if neutralizing works differently under different frameworks of nationality, the underlying problem remains the same. It is obvious that even countries based on immigration, like the United States with its specific myth of the ‘melting pot’ – a symbol for the ‘zero hour’ as well as for the idea that different pasts dissolve into something new – face severe problems on this point. Recall, for example, the policies of mistrust towards Japanese Americans during and after the Second World War as well as the quarrels about the language that may legitimately be spoken in school. As far as France is concerned, the symbolic weight of the French language and the attempt to keep public language pure from foreign – especially English – contamination, indicates this structural problem of integration as well.

Some analysts have even proposed that the constitution of nation-states as such relies on the formation of ‘sacred centres’ as foundational signifiers and symbols of collectivity – in which sacred space and time materialize (Friedland and Hecht, 1998). Even if European nations have undergone profound processes of secularization, their cities with big churches in their centres, some of which have served as places of national representation (like the Berliner Dom), still embody the close linkage of European nations to Christianity. In the nineteenth and early twentieth centuries the link between religion and nationality was especially strongly enforced. In Germany, on 18 October 1817, the first national celebration took place on the Wartburg, where Luther had translated the Bible into German. He was celebrated not only as a hero of freedom, but also as the founder of what was supposed to be a ‘national religion’ (Flacke, 1998). The link between religion and the State during this time strongly enforced nation-building, but also created conflicts between different confessions as well as between the Churches and secularist movements. This is especially visible in France, with its double background of Catholicism and laïcité (Willaime, 1986), symbolized for example in the Basilica of Sacré Cœur, which was placed on the exact location where the French Commune began (Harvey, 1985; Friedland and Hecht, 1998: 139). The confessions involved in
these processes were the Protestant and Catholic Churches, and – marginally – sometimes also the Jewish Community. Consequently, whereas Christianity can be considered an element of the *ego* of the newly establishing nations, Islam was definitely the *alter*. In the myths of European nations Islam and its embodiments – like the Sarazenes, the Tatars, and the Turks – are represented as Europe’s enemy *par excellence*, the conflicts against whom always have an existential, even religious dimension (François and Schulze, 1998: 25).

However, European nation-states in their constitutions also included the guarantee of basic rights for each individual, including freedom of religion. These rights are understood as universal, ‘culture-blind’ rights, granted to each individual. This was strongly enforced after the experience of National Socialism. The guarantee of individual rights can be related to the process of nation-building as well: The neutralization of *collective* ethnic and cultural pasts people bring with them, to a certain degree is compensated for by the guarantee of *individual* freedom of religion. Nevertheless, the formulation of such rights and their formation into practical law reflect a specific Christian tradition and proceed in accord with societal understandings of this tradition (Hellermann, 1994; Goerlich, 2001).

The process of establishing a common past for each society has changed remarkably with the growing presence of migrants, especially Muslims, in many European countries. These immigrants have not only become more visible in terms of numbers, but also tend to present themselves differently in public compared to the generations before them. They become visible as *Muslims* in public, claim religious rights and question the dominant construction according to which religion is considered a private issue and the Judeo-Christian tradition is seen as the only and unquestioned religious tradition of any cultural relevance. This affects the ‘universalism’ of basic rights, since it becomes obvious that these rights have worked under the condition that there was not too much diversity to be handled and that they implicitly were shaped according to the cultural customs and the religious affiliation of the majority. The growing diversity in Western European societies, especially through the presence of Muslims, has made these presuppositions obvious.

Although this cultural variety has been celebrated by many as the emergence of a multicultural society, another group of observers – conservative as well as liberal – point out the deep differences in culture, religion and mentalities. Some even see their countries’ ‘ways of life’ as endangered (Gurfinkiel, 1997) by the growing Muslim population. Surveys show large numbers of people rejecting expressions of Muslim religiosity in public life, such as the building of mosques with minarets and muezzins calling at the times of prayer, or the presence of veiled teachers in schools, and express their fear of Islamic fundamentalism.

In 2002 a survey was conducted in Germany among members of the
Protestant church as well as among the population without any church affiliations, altogether representing two thirds of the overall population (EKD, 2003). One set of questions in the questionnaire referred to the presence of Muslims in Germany, another one referred more specifically to the building of mosques (Wohlrab-Sahr, 2003b).

Surprisingly large proportions of people supported the idea that there is something like a ‘leading culture’ (*Leitkultur*) in Germany, that Christianity is a part of, and that Muslim migrants have to adjust to it. Even more surprising was that East Germans supported this idea more strongly than West German respondents, despite the fact that only 25 percent of the East Germans are church members. Among the general population (of Protestants and non-members) 48 percent agreed strongly or very strongly, in East Germany those numbers were even higher. East German non-members even supported this idea slightly more often (51 percent) than Protestant church-members in the west (47 percent).

Furthermore, most people felt negatively about Muslim teachers wearing headscarves in school. On a scale of one to seven only 17 percent agreed strongly or very strongly that it might be necessary for a good coexistence with Muslim immigrants to get used to teachers with headscarves on, whereas 41 percent strongly or very strongly rejected this position.

Regarding the building of mosques, only 11 percent felt that if the Turkish minority in a city wants to build a mosque, they should be allowed to have a mosque complete with minaret and a muezzin calling. 37 percent rejected the building of a mosque altogether; 17 percent agreed to the building, but not to the minaret; 20 percent agreed to a mosque with minaret but rejected the calling of the muezzin.

These numbers indicate that anti-Islamic sentiment is not only prevalent among right-wing parties, but concerns much larger numbers of the population. Both the past and the future are relevant time perspectives in this respect. Different religious traditions – i.e. *pasts* – are taken as indicators of cultural difference as well as evoking the fear of fundamentalist *future* projects that parts of the Muslim population might have in mind.

Against this backdrop, the law suits relating to Muslim religious practice in public gain importance not only as instruments of setting disputes and solving conflicts. Also of interest is how they order the temporal implications of different *pasts* and possible *futures*: Through interpretation as well as through action. In the following sections I will deal especially with law suits concerning Islamic matters in Germany, all of which have already been decided by the Federal Constitutional Court. These are: The law suit about a Muslim female teacher who insisted on wearing a headscarf in school and the law suit about a Muslim butcher who wanted to butcher animals as prescribed by Muslim law, a practice termed ‘ritual slaughter’.
Both issues have also been dealt with in France and other European countries, and have been considered by the European Court of Human Rights. In spite of differences due to specific church-state relations among European countries, the outcomes of the law suits indicate similar trends.

2. Adjudicating Religious Difference: Headscarf Affairs and Halal Meats

2.1 Headscarf affairs and their interpretations: References to a fundamentalist future?

a. The cases
There have been several ‘headscarf cases’ in different European countries, referring to different social arenas and with different outcomes. Most intensely discussed were the cases of women wearing headscarves in public schools. In France the affaire des foulards (Thommes, 1989; Baubérot, 1996; Hervieu-Léger, 1997) started in 1989, when Muslim pupils in Creil began to wear their headscarves in school. By doing so, they confronted the principles of French laïcité in the realm with the closest link to Republican ideas and ideologies: the public school (Epp, 1982). The French public responded deeply emotionally. Some opted for the freedom of public religious expression and fought against what seemed to be racism. Others defended the traditions of laïcité and the Republican principles, fighting against what seemed to be the discrimination of women in Islam and expressing their fear of Islamic fundamentalism. In the course of these debates, the Conseil d’État became involved, suggesting that flexible solutions should be found in schools, on the grounds that the laïcist school was supposed to integrate, not to exclude. As the conflicts went on, educational minister Bayrou eventually came up with the distinction between ‘discreet’ and ‘ostentatious’ religious symbols, with the latter considered incompatible with the rules of laïcité. It was clear that the Islamic headscarf was regarded as an ostentatious symbol as opposed to a cross on a necklace or a kipa on the head (Hervieu-Léger, 1997).

In Germany the headscarf debate focused on a female Muslim teacher, Fereshta Ludin (Bader, 1998; Alan and Steuten, 1999; Zuck, 1999; Halfmann, 2000; Wohlrab-Sahr, 2003a). Ludin, a German citizen of Afghan descent, had been living in Germany since she was 14 years old. Her father was Afghanistan’s ambassador in Germany before the Russian occupation in Kabul. The family received asylum in Germany later. Ludin graduated from a German university in the field of primary school teaching. From the very beginning she had problems with the supervisory school authority because she insisted on wearing the headscarf. While she was still a student teacher, the minister of education supported Ludin in order to enable her to complete the second, practical,
part of her education. But after this supervised teaching was completed, Ludin was not accepted as a teacher. The supervisory school authority questioned her suitability as a teacher because she insisted on wearing the headscarf in school. There were no reports about conflicts in the school where Ludin was teaching. Instead, from the very beginning this was a confrontation over the principle of Muslim teachers wearing head scarves in German schools. The parliament of Baden-Württemberg debated the case, and – with only one exception – all parties concurred with the decision of the supervisory school authority. Ludin went to appellate courts twice and failed each time. The judges argued that her behaviour was a breach of neutrality and an offence to the freedom of religion in its negative aspect: To pupils’ and parents’ rights not to be confronted with a foreign religion in school. The wearing of the headscarf in school was interpreted as an ostentatious religious avowal and therefore not acceptable in school because pupils were obliged to go there and could not avoid looking at the headscarf (Bundesverwaltungsgericht, 2001). The headscarf was explicitly distinguished from the Bavarian custom of having a crucifix on classroom walls, which had been the subject of a law suit some years before. It was argued that pupils do not have to look at classroom walls, but they have to look at their teacher. In spite of the limitation of Ludin’s personal religious freedom (freedom of religion in its positive aspect), the judges argued that a demonstrative avowal was not in accord with the necessary neutrality of a representative of the state. For these reasons they negated Ludin’s aptitude as a teacher in general.

It is of special interest here that the judges explicitly referred to the constitution of Baden-Württemberg, which claims to educate pupils ‘in responsibility before God and in the spirit of Christian charity’. On these grounds, they concluded that the exercise of (positive) freedom of religion may legitimately be more restricted for teachers of non-Christian beliefs than for those of Christian belief. This line of argument has been repeated by several judicial commentators who have pointed out that Islam is not part of the cultural tradition of Germany, whereas Christianity is.

Similar arguments were used by Annette Schavan, Baden-Württemberg’s Minister of Education, who explicitly distinguished between wearing a cross on a necklace or a kipa on the head and wearing the headscarf (Klingst, 1998; see Wohlrab-Sahr, 2003a). This distinction became relevant in the judicial debate in Germany (Bader, 1998) as well as in France (Baubérot, 1996; Hervieu-Leger, 1997). Although France, due to its laïcité, has very different church-state relations from Germany’s (Robbers, 1995), the same formula was found in both countries during these conflicts. A distinction was drawn between ‘discreet’ and ‘ostentatious’ symbols, the headscarf being considered an ostentatious one. This eventually came to serve as a distinction between culturally familiar and foreign forms of religious practice.

In argumentation similar to that practised in the context of French laïcité,
German judges gave priority to the negative dimension of religious freedom. In this case it refers to the right to not be confronted with a foreign religion – not even a symbol of a foreign religion – by a public school teacher, if there is no way to avoid looking at this symbol (Bundesverwaltungsgericht, 2001). Consequently, Fereshta Ludin lost the law suits in all instances and today she works in a private Muslim primary school.

Just recently, on 24 September 2003, the Federal Constitutional Court in a majority decision of five against three votes ruled on this case (Bundesverfassungsgericht, 2003). Whereas the minority position supports former decisions while arguing against the necessity of a legal solution on the federal state level, the majority of judges declare that the former decisions were not in accordance with the constitution, mainly because there was no legal basis for them in the federal states. For such a legal basis they see different possible solutions that may do justice to the growingly multicultural society in Germany. One option may be to refer positively to the religious variety in schools and use it as an instrument for practising tolerance, another one may be to interpret neutrality in a stricter way than has been done in Germany up to now (Bundesverfassungsgericht, 2002: 65). The future will show which legal actions will be taken by the federal states. It may be assumed that – if they chose the first option – they need to interpret the headscarf much more as a traditional religious symbol than previously. The Federal Constitutional Court has already moved in this direction. The second option would bring the German system closer to the model of French laïcité, even though this would not exclude the possibility of distinguishing between ‘discreet’ and ‘ostentatious’ symbols.

Looking at other European countries, the former decisions of German Administrative Courts were in line with decisions about a Muslim teacher in Switzerland – a woman who converted to Islam after she had been a teacher for several years – as well as with decisions about Muslim students in Turkey, all of which were affirmed by the European Court of Human Rights (EGMR, 2001; Wittinger, 2001). In these cases – which referred, in contrast to the German one, to an educational system based on the principles of laïcité – the headscarf was considered a ‘strong symbol’. In Switzerland it was regarded as incompatible with the principle of gender equality. The European Court of Human Rights pronounced it incompatible with the principles of tolerance, equality and non-discrimination. In Turkey, it was considered likely to create conflicts among students since it could suggest that non-veiled women were atheists.

b. Strong and weak symbols – factual, social and temporal dimensions of cultural distinctions

A closer look at the logic of distinctions that have been made in the course of the political debates and the law suits, reveals temporal, social, and factual dimensions (Luhmann, 1995).
The temporal dimension refers to the distinction of past and future. The judges and politicians occupied with these cases related to the past in negative terms in their arguments about the cultural and religious tradition veiling was supposed to be founded in. In the German case, the minister of education in Baden-Württemberg explicitly questioned that veiling was founded in the Koran and therefore concluded that it could not be considered obligatory for Muslim believers. She referred to Islamic scholars in her judgement (Klingst, 1998: 3). While questioning the authenticity of veiling as an Islamic tradition, she interpreted the headscarf as a symbol of fundamentalism and of cultural and civilizational distinction. Islam was not interpreted in terms of its past, but seen as related to an imminent political and religious future. This shows how the evaluation of foreign religious practice depends on the way this practice is seen to be anchored in tradition. But this approach puts the representatives of the State as well as the judges into a problematic position. The separation of Church and State puts the responsibility for religious contents and practices explicitly into the hands of religious communities. But in cases of conflict the State needs to decide if a practice which is not in line with the law or the cultural tradition of a country legitimately can be treated as an exceptional case based on the right of religious freedom. In those situations the State gets into the role of deciding whether a claim is ‘truly’ religious or simply based on non-religious interests masquerading as religious. In this case whether or not something must be considered ‘truly religious’ depended upon it being anchored in a binding past. With respect to the headscarf this was questioned. Consequently, the headscarf was looked upon mainly in present and future terms: As a symbol of cultural distinction oriented toward societal rules of a different civilization and thereby linked to a fundamentalist future project.

Regarding the social dimension – referring to the distinction of ego and alter – by the minister as well as by the judges the headscarf was considered an objective symbol of religious fundamentalism and of the oppression of women, irrespective of the intentions of the person wearing it (Wohlrab-Sahr, 2003a). This implies that the individual perspective – the perspective of ego – was considered completely irrelevant compared to the perspective of alter in terms of the meaning ascribed to the symbol as such. From this point of view, it is the symbol that communicates dissensus. In contrast – explicitly in the German case, but implicitly also in the French one – the Christian and Jewish symbols were considered problematic only when used in an ostentatious way. Here the ego-perspective was decisive, whereas – regarding these judgements – there was obviously no alter-perspective at all attached to the symbol. This perspective was affirmed by the most recent decision of the Federal Constitutional Court: A cross on a necklace was interpreted as decoration only. The symbol as such – according to this reading – does not communicate anything. Therefore, with symbols of the Judeo-Christian tradition it was a matter of course to look
for personal motives behind the outer appearance, with reference to Islam such motives did not count in view of the outer appearance.

The **factual dimension** relates to the question of social differentiation. In this dimension, the headscarf was considered to function like a *signal* of inequality and intolerance as well as of cultural distinction indicating a societal model incompatible with a modern, functionally differentiated and liberal society. By distinguishing between different societal systems of reference and at the same time defining ‘what matters’ to a given society, the factual dimension refers to the question of membership, of belonging or not belonging. The headscarf becomes a sign of not belonging – from the view of the non-Muslim observer and this non-belonging is also ascribed to the Muslim actor.

Of course, it remains an open – empirical – question, how far these distinctions reflect actual differences between types of religiosity in Islam and Christianity, with different emphases on the dimensions of outward practice and inner conviction in religiosity. But it is striking to see to what degree the debates and political decisions presupposed an individualized approach (and thereby emphasized personal motives) for Christianity, whereas they neglected the same for Islam. Consequently the debates constructed Islamic modes of dressing as symbols of fundamentalism per se.

France in the meantime has made attempts to integrate French Muslims into the judicial order of *laïcité*. The Minister of the Interior, Jean-Pierre Chevènement, started an initiative in 1999, inviting representatives of Muslim organizations, of the ‘big mosques’ in the country as well as certain Islamic personalities, in order to discuss the possibility of a French Muslim organization (Etienne, 2003: 169). This should serve as an interlocutor between Muslims in France and the State in religious matters, like the building of mosques, ritual slaughter, the education of imams or Islamic sections in public cemeteries. The beginning of this initiative was very controversial among Muslims because the delegates were required to declare in writing at the beginning of these consultations that they accept the French constitution including its *laïcité*, and that they give up wearing ostentatious signs of religious affiliation in public institutions, especially in public schools. This puts the headscarf and the distinction between ostentatious and discreet religious symbols on the agenda again. Many French Muslims considered this declaration discriminatory since it works with the implicit suspicion that Muslims might not be in line with the French constitution. Nevertheless, in April 2003 there was the first election for the *Conseil Français du Culte Musulman* (CFCM).

One could interpret the broad attention that was paid to the headscarf debates in different European countries, and the similarity of the conflicts in Germany and France as well as in other countries as an indicator of a kind of counter-movement (Neidhardt, 1986) against the movement of multiculturalism, which usually emphasizes the positive opportunities offered by an ethnically and
religiously pluralistic society, and at the same time plays down the difficulties of
diverse cultural backgrounds coming together. Nevertheless, looking at
this ‘countermovement,’ it is striking to see the unquestioned reference to
Christianity as part of the cultural heritage, being mixed with assumptions of
how religious symbols and personal religiosity are to be presented in the public
sphere. It is obvious, that the discreet presentation of symbols as opposed to
their ostentatious presentation is immediately linked to the fact, that some of
these symbols are culturally common and well known and therefore not ‘visible’
any more (just decoration), whereas others are foreign and new and for such
reason get more attention and ‘visibility’.

2.2 Ritual slaughter – giving space to an Islamic past?

There have also been several law suits about ritual slaughter in different
European countries. In general there are animal protection laws prescribing
that warm-blooded animals need to be anaesthetized before being killed.
Methods of ritual slaughter do not allow for this. For this reason, in some
European countries – like Sweden, Norway, Iceland, and Switzerland – ritual
slaughter is prohibited. In other countries – for example in Germany, France,
Austria, Great Britain, Spain, Italy, Portugal and the Netherlands – the law
allows exceptions for ritual slaughter, in order to grant freedom of religion.
But, other than in the United States, usually there is no general allowance for
ritual slaughter, instead a special permit is required for each case. In Germany in
the past those permits have usually been given in order to enable the orthodox
Jewish rite of slaughtering, but have rarely been given to Muslims.

a. The case

During the 1990s there were several law suits concerning a Muslim butcher of
Turkish origin who had been living in Germany for 20 years. He had his own
butcher’s shop and up to 1995 he got several exceptional permits for ritual
slaughter in order to satisfy the needs of his Muslim customers. From 1995
on those permissions were denied by the Administrative Court, on the grounds
that there is no definite obligation in Islam to eat only halal meat, and that
the Muslim tradition itself offers exceptions for situations where this is not
possible.

In 2002 the Federal Constitutional Court decided in favour of the Muslim
butcher (Bundesverfassungsgericht, 2002), arguing that ritual slaughter has to
be considered a religious duty according to the Koran and the Muslim tradition;
but – irrespective of that – a sufficient condition for allowing an exception
would be that a specific community (that the butcher belongs to) considers it
obligatory to consume only ritually slaughtered meat. It was further argued that
it would destroy the butcher’s professional existence if he weren’t able to
deliver halal meat to his customers. Consequently the prohibition of ritual slaughter would not only violate the religious freedom of the butcher, but also his freedom of profession.

As in the case of headscarf affairs, the public debate about ritual slaughter included positions claiming that this practice was a step backwards compared with the civilizational progress achieved in European countries (Hefty, 2002). Statements like this were supported by earlier decisions of the Federal Constitutional Court employing the idea that foreign religious behaviour needs to be ‘culturally adequate’ (Pabel, 2002: 226) if religious freedom is supposed to be guaranteed. But the Federal Constitutional Court later explicitly withdrew from this idea, and with very few exceptions the judicial debate as well as the decisions of Supreme Courts in different European countries have been in favour of allowing ritual slaughter without anaesthetizing as an exception for religious reasons. So in this case the outcome was very different compared to the outcome of the headscarf issue.

Nevertheless, ritual slaughtering was not allowed in the case of a canteen in the city of Hamburg (Brandhuber, 1994; Pabel, 2002: 222). Here the judges of the Administrative Court argued that the canteen was not related to a religious community and therefore was not acting out of religious reasons. In this context it was also argued that the leading authority for legal questions in Sunni Islam, the head of the Al-Azhar University in Cairo, considered it in accordance with the religious law if animals were anaesthetized by electro-shock.

b. Constructing religiosity as tradition: Temporal, social, and factual dimensions in the debate about ritual slaughter

Why were the headscarf cases and the cases of ritual slaughter treated so differently? At first glance, there is certainly a difference regarding the social arenas in which the conflicts took place. Whereas ritual slaughter concerned private enterprises and issues of professional freedom there, the headscarf cases concerned state schools and the professional freedom of teachers (or the freedom of students there). There is no doubt that the school is much closer to the State’s own interests and ideology and therefore issues of religious freedom are treated more rigidly in this field. Nevertheless, this does not explain the whole difference, since neither judges nor politicians referred to the role of the teacher alone, but to the distinction between strong and weak symbols, between discreet and ostentatious behaviour. Regarding ritual slaughter the lines of argumentation were different.

In the temporal dimension, there was no relation to a religiously motivated future at all. The religious practice on the one side was seen to be anchored in a binding past as well as in the presence of a community (and a person belonging to this community) for whom this tradition was obligatory. Although this was
considered a step backwards in terms of civilizational progress by some commentators (Hefty, 2002), the issue of fundamentalism as a possible future project did not play a role.

Referring to the social dimension – the distinction of alter and ego – the alter-perspective of ‘How could ritual slaughter be interpreted by an external observer?’ hardly played a role for the judicial debate. The person of the butcher was considered to be authentically religious and his actions in line with the Islamic tradition. And – in what constitutes a major difference to the headscarf cases – ideas of any kind of ‘objective meaning’ attached to the ritual did not play a role in the judicial debate. One could even conclude that the judicial results could only be the way they were because ritual slaughter was seen mainly as a tradition that is sacrosanct for a minority, without any significant meaning for an external observer (no relevant alter-perspective) and with no relevance for any possible future project. Obviously the violation of animal protection laws was not sufficient to constitute such an ‘objective meaning’, even though commentators in the media as well as activists of animal protection groups heavily stressed this aspect.

This is indicated also by the factual dimension: The issue of ritual slaughter remained almost completely in the religious field and without any political reference. The issue was treated in isolation from possible ‘implications’ and ‘future projects’. It was only because of this isolation that the butcher’s perspective could be included in the legal construction as a legitimate exception from the rule. But this inclusion into the legal domain was realized through social exclusion: The subject did not intrude into the society in general. It remained the request of a distinct minority.

This outcome is not necessarily inherent in the subject itself. Since the dissent is about the question of anaesthetizing which certainly could not have been raised during the time Islamic law was founded, a position that insists on killing animals without anaesthetizing them could easily be related to a fundamentalist position. The position of the head of Al-Azhar University indicates that Islamic law as a casuistic law develops further and might very well be adjusted to the values of Western societies. But obviously, in reality this connection between ritual slaughter and fundamentalism was not made by Muslims nor by their judges. For this reason it was possible to treat the issue as one relevant only to the religious field as well as to the tradition of a minority.

This was different for the headscarf cases. Since the wearing of headscarves intervened into the realm of the State and not only in private enterprises, the issue was treated completely differently from ritual slaughter, although the practice as such may be anchored in the Koran as much or little as killing animals without anaesthetizing. The headscarf had been used as a symbol for a political Islam in different parts of the world, and was interpreted as such by the judges. This differentiated treatment could only work by cutting the headscarf’s
ties with the past it shares with ritual slaughter and linking the headscarf to the future of a different civilization.

3. The Simultaneity of the Non-simultaneous

The law suits about headscarves in schools and ritual slaughter indicate that in European countries the judicial practice regarding religious freedom needs to be readjusted to an increasingly multicultural society. The growing presence of Muslim immigrants and especially their visibility as religiously different from the majority population challenge the old contracts between the states and the churches. For a long time the idea seemed to work well that granting the same citizen rights (as in France) or just spending enough time in the receiving country (as in Germany) would in the long run make immigrants similar to the majority population. This also implied the expectation that Muslim immigrants would practise their religion privately instead of practising it visibly in public. The law suits concerning headscarves and ritual slaughter as well as local debates about the building of mosques indicate that this idea has not been realized in practice. It has become clear that Muslim immigrants bring their own religious tradition and practice with them and that – at least parts of this population – want to live a life that draws on this tradition and practice. This necessarily leads to a simultaneity of different cultures including their references to different pasts: A ‘simultaneity of the non-simultaneous’ that becomes visible and evokes comments referring to the notion of civilizational backwardness and of fundamentalism.

Jose Casanova (2003) has argued most recently that the process of globalization ‘threatens to dissolve the intrinsic link between sacred time, sacred space and sacred people common to all world religions, and with it the seemingly essential bond between histories, peoples and territories which have defined all civilizations ... The one thousand year old association between Christianity and Western European Civilization is coming to an end. Western Europe is less and less the core of Christian civilization and Christianity in its most dynamic forms today is less and less European’ (p. 19). On the other side, as Casanova states, Islam, formerly embedded in territories defined by the historical continuity of peoples and civilizations, is becoming global and de-territorialized through global immigration, its diaspora becoming a dynamic centre for its global transformation (p. 20).

The debates about headscarves and ritual slaughter may be seen as indicators of this process. But these cases also show that globalization does not simply lead to ‘generalization’ in the sense of overcoming cultural and religious particularities and integrating different religious traditions into a more general framework. Instead, it involves conflicting frames for relating religion, politics, culture and the law to each other. These conflicting frames make the simultane-
ity of cultural diversity visible as an unstructured and conflicting ‘simultaneity of the non-simultaneous’, as a simultaneity of different cultural practices referring to different pasts in different ways.

The way the Courts have dealt with these issues may be understood as an attempt to structure and appease this conflicting simultaneity. The implicit distinction between past-related and future-related religious practice served as a means to differentiate between what might be culturally acceptable and what might not be. Although up to now the wearing of headscarves in schools has not been accepted as an individual religious right, ritual slaughter has been.

The law suits gave space to the simultaneity of cultural and religious expressions as well as to different time horizons. This is especially relevant with respect to the law. Next to the secular positive law of European countries, certain enclaves have been established for parts of the population who convincingly claim to be committed to Islam. By the judges this has been interpreted as enabling the pursuit of a religiously founded way of life and therefore as the consequence of individual religious freedom. From an Islamic perspective it could also have been interpreted as giving space to the Islamic Sharia in the framework of German law. It is controversial among scholars of Islam to what degree the interpretational framework of the Sharia plays a role for Muslim migrants in Europe. But, certainly, the decision in the case of ritual slaughter depends on the fact that this issue was discussed solely as an outcome of a religious tradition, but not as a result of a different judicial presence. Treating it as a result of a different judicial system and, consequently, as an expression of a lack of differentiation between religion and the law, the outcome would probably have been different. The semantics of conflicting civilizational models then would certainly have been much more to the forefront.

In the case of teachers wearing headscarves this is obviously what happened. At least on the level of Administrative Courts the headscarf was not treated primarily as a religious tradition – its very foundation in Islamic tradition was even questioned. Therefore the civilizational dimension – its reference to a different model of civilization and to future projects for building a society in accord with this model – was much more prominent in the discussion. But the most recent decision of the German Federal Constitutional Court at least indicates the possibility of treating the headscarf as an expression of traditional religious behaviour instead.

Some of the European nation-states seem to have found a specific solution in dealing with Islamic difference by means of temporalization of complexity (Luhmann, 1978): They integrate the simultaneity of different pasts, but only if these are seen to be not connected to future projects. Consequently, if a specific religious practice may be interpreted in terms of such a future, its reference to a binding past tends to be denied. Ultimately these practices are not treated as religious then.
Nevertheless, the granting of judicial exceptions to certain ‘traditional’ practices in Islam bears risks as well. Since the traditionalist positions are the ones that need exceptions from the given law based on the freedom of religion, the judges – by giving space to these positions – implicitly draw on traditionalist definitions of Islam and support such definitions among the Muslim and non-Muslim population. Consequently, they tend to give legal shelter and symbolic support to a traditionalist interpretation of foreign religions, which actors in other societal fields try to overcome. There seems no way out of this dilemma.

Notes

1. ‘Laïcité’ is the untranslatable expression for the strict separation between Church and State in France.
2. This is different from the position of the ‘Republikaner’ in Germany who – referring to the headscarf affairs – have opted for a strict separation between Church and State.
3. The German historian Hans-Ulrich Wehler (2002: 9) discusses these issues with reference to the debate about the integration of Turkey into the European Union.
4. The muezzin is a representative of a local Muslim community who calls the believers to pray five times a day.
5. The statement the respondents needed to relate to was: ‘There is something like a Leitkultur in Germany, and Christianity is part of it. Muslims in Germany need to adjust to that.’ Answers could be given within a scale of seven, one expressing no agreement at all, seven expressing total agreement. 61.5 percent of the Protestant East Germans strongly agreed with this statement (levels 7 + 6), compared to 50.9 percent of East Germans without church affiliation. In West Germany the relation was 46.7 percent (Protestants) compared to 37.2 percent of non-members.
6. Here the question was: ‘We need to get accustomed to teachers wearing the headscarf in order to have a good coexistence with Muslims’ (EKD, 2003).
7. In this question a community conflict was described about the building of a mosque for the Turkish minority. Whereas the city council advocates the building without minaret and muezzin calling, a group of church members supports all of these, while others in the city reject the whole plan. The respondents had five options and after choosing one they could formulate their reasons in their own words. Here the options were: (a) The mosque should not be built; (b) The mosque should be built without minaret; (c) The mosque should be built with minaret, but the muezzin should not call; (d) The mosque should be built with minaret, and the muezzin should call; (e) Can’t tell (EKD, 2003).
8. The only exception was a representative of the Free Democratic Party, a minister of the Protestant Church. But the party as a whole was in line with the decision against Ludin.
9. Unlike in the United States, in Germany – due to the specific status of civil servants (Beamte) – the school teacher as a ‘Beamter’ actually represents the State. For this reason it has been argued that the obligation for a teacher to behave in a ‘neutral’ manner regarding political or religious commitments, outweighs his/her personal religious freedom.
10. See the press release by the Administrative Court, Stuttgart (Verwaltungsgericht Stuttgart, 2000), relating to the judgement of 24 March 2000.

11. According to the federal system and to the Constitution of Germany, the federal states are responsible for their public schools. Therefore – according to the Federal Constitutional Court – they are the ones to deal with the tension between: (a) The personal religious freedom of the teacher; (b) The teacher’s obligation to behave in a neutral way with respect to religion; (c) The negative religious freedom of pupils and their parents as well as (d) The bid of tolerance. In their search for compromise the federal states may come to different solutions according to specific school traditions as well as to the confessional composition and the strength of religious commitments in the population (Bundesverfassungsgericht, 2003: 47).


13. Whereas this seemed clear for the realm of public schools – as the realm in which the State represents its foundational values – there are indicators that matters are going to be seen differently regarding private enterprises. Just recently (Müller-Neuhof, 2003), the Federal Constitutional Court of Germany decided upon the case of a Muslim salesperson in a supermarket, who was responsible for selling perfumes. The woman had been dismissed by her employer after she decided to wear the headscarf. The Federal Constitutional Court has now declared that the wearing of the headscarf was not a sufficient reason for the dismissal, arguing for the religious freedom and the professional freedom of the clerk.

14. Regarding ritual slaughter see Pabel (2002) for Germany, Austria and Europe and Bernegger (1999) for Austria.

15. During the regime of National Socialism in Germany ritual slaughter was prohibited as part of the politics against Jews. It was partly due to this background that Jews got the allowance for ritual slaughter more easily than Muslims after the Second World War.

16. In the United States – according to the Humane Methods of Slaughter Act of 1978 – different kinds of slaughtering are allowed, ritual slaughter being one of them.

17. Claus Leggewie (2002) is convinced that the interpretational frame of the Sharia could not spread to the German system of law. But at the same time – somewhat contradictorily – he is opting for a ‘European system of fetwas’ as an expression of an authentic ‘Euro-Islam’. Others, like Tilman Nagel (2002) consider the interpretational frame of the Sharia as relevant also for Muslim migrants due to the conception of Islam as a general order of life. In his argument he draws on attempts to found the Declaration of Human Rights in the Sharia.

References


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