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<b>Autor:</b>	Joppke, Christian
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## Political Sociology

### Political Sociology of Islam Integration: The Role of Liberal Law

Christian Joppke\*

#### Abstract

In Europe and North America, migration and integration has become a busy subfield of political sociology. Of particular interest in this respect is the integration of Muslims and Islam, which has dominated the debate in Europe. Broadly conceived «political opportunity structures» have received much attention in this context. But the role of liberal law in the integration of Islam has been largely ignored, not by lawyers of course, but by political sociologists who have thus delivered far too negative and truncated pictures of Muslims and Islam in Europe. This is the deficit we sought to redress in *Legal Integration of Islam: A Transatlantic Comparison* (2013) (co-authored with John Torpey). Some of this study's main ideas and findings are presented in the following.

#### 1. Introductory remarks

Written by a group of constitutional lawyers, the first comprehensive study of «legal integration» of Islam in Europe concludes, surprising for many, that the «legal systems of the European Union countries have the necessary instruments to deal with and solve most of these problems,» and that the issue was mostly not «innovating but rather applying rules that already exist.»<sup>1</sup> This must appear strange to Swiss readers, in whose country the inclusive thrust of liberal law, to be unfolded in the following pages, is seriously undercut by the democratic referendum process. So it may be all the more apposite to learn how the legal integration of Islam has proceeded outside the *Eidgenossenschaft*,

<sup>1</sup> Felice Dassetto, Silvio Ferrari, and Brigitte Maréchal, *Islam in the European Union* (Brussels: European Parliament, 2007), 59.

\* University of Bern, Institute of Sociology, Fabrikstrasse 8, 3012 Bern.  
E-mail: [joppke@soz.unibe.ch](mailto:joppke@soz.unibe.ch)



Christian Joppke, geboren 1959, erhielt seinen Ph.D. in Soziologie von der University of California in Berkeley (1989). Nach Professuren an der University of Southern California, European University Institute, University of British Columbia (Vancouver), International University Bremen, und der American University of Paris, ist er seit Herbst 2010 Inhaber des Lehrstuhls für allgemeine Soziologie an der Universität Bern. Forschungsgebiete: Politische Soziologie, Migration und Integration, Religion, Soziale Bewegungen. Zu seinen jüngsten Buchveröffentlichungen zählen *Legal Integration of Islam: A Transatlantic Comparison* (Ko-Autor: John Torpey, Cambridge, 2013) und *Citizenship and Immigration*, (2010).

where the demos is much more restricted by liberal constitutional norms.

Especially where a «Jewish precedent» existed<sup>2</sup> – as with respect to ritual slaughtering, food in public canteens, or recognition of religious holidays in work and educational settings – Islam integration was simply a question of extending already existing exemptions or arrangements from Jews to Muslims. Freedom and equality, liberalism's two core principles, have been the benchmark of the institutional integration of Islam (like that of any minority religion). This is consistent with the separation of religion and state in liberal societies, but it is still an astonishing achievement that is notably *not* reciprocated in Islamic majority societies (or anywhere else outside the West).

Felice Dassetto, Silvio Ferrari, and Brigitte Maréchal identify a common «European model of relation between states and religions»<sup>3</sup> that consists of three elements: religious freedom, autonomy of religious communities, and cooperation between the state and religious communities. This is unorthodox reasoning, for two reasons. First, many see «Europe» combined as marked by particular proximity between the state and only one religion, Christianity (and its various branches and incarnations), making it especially difficult for minority religions to find their place at the table.<sup>4</sup> Moreover, the emphasis on convergence on a «European model» deviates from the standard «national model» account of religion-state regimes, which distinguishes between separationist (or laicist) regimes of the American or French kind, the established church regime of the Scandinavian or British kind, and – somewhat in the middle – the public recognition of plural religions in Germany, Austria, or Spain.<sup>5</sup> The important message of Dassetto, Ferrari,

<sup>2</sup> Christian Joppke, «Successes and Failures of Muslim Integration in France and Germany,» in *Bringing Outsiders In: Transatlantic Perspectives on Immigrant Political Incorporation*, Jennifer Hochschild and John Mollenkopf (eds.) (Ithaca, NY: Cornell University Press, 2009), 123.

<sup>3</sup> Dassetto, Ferrari and Maréchal, *Islam in the European Union* (above n. 1), 36.

<sup>4</sup> For example, Martha Nussbaum, *The New Religious Intolerance* (Cambridge, MA: Harvard University Press, 2012).

<sup>5</sup> For an account that holds these distinctions key to the relative successes and failures of Islam's integration, see Joel Fetzer and Christopher Soper, *Muslims and the State in Britain, France, and Germany* (New York: Cambridge University Press, 2005).

and Maréchal's «European model» account, which we largely confirm in *Legal Integration of Islam* (2013), is that these national differences are secondary to the overall inclusive stance of liberal state institutions toward Islam.<sup>6</sup>

Furthermore, in *Legal Integration of Islam* (2013) we propose that for properly assessing the institutional accommodation of Islam, one must distinguish between an individual rights path and a corporate recognition path. Each path operates at a different speed and with a different logic. The distinction itself reflects the fact that religion includes both individual and collective practice, and that the recognition of religious freedoms may not be enough to satisfy religion's collective dimension. But Europe differs here from the United States. In its constitutional «free exercise» clause, the United States guarantees maximum liberties, individual and collective, to all religions, while denying them qua corporate body (or «church») any «cooperation» with the state in its «no establishment» clause. The situation is different in Europe, where the state and the Catholic Church have been fighting for supremacy over the centuries, and where the state only gradually absorbed certain functions that traditionally had been exercised by the church, from the very power to govern the commonwealth in the early Middle Ages to the 20<sup>th</sup> century hold-outs of providing education and welfare, but also the supply of meaning and identity, which, in a way, was taken over by modern nationalism.<sup>7</sup> In the process, compromises had to be struck between two equal powers that were often fighting for the same terrain. These compromises are by definition asymmetric and sticky, and they do not automatically extend to newcomers. This history and the nature of corporatist compromise marks *all* European religion-state regimes, including the «laïc» French regime that has always been counterpointed by the state-focused «Gallican church» tradition.<sup>8</sup> It is thus astonishing that «equality» is the benchmark of integrating Islam not just at individual level but at group or corporate level also. European states cannot but do so because, despite factual amalgams between state and (some) religion(s), state and religion are still separate *in principle* and qua liberal state the state has to be agnostic and even-handed on religion.

Corporatist integration is certainly a much slower and messier process than integration on the basis of religious liberties, which operates instantly and symmetrically and does not allow any exception. Dassetto, Ferrari, and Maréchal judiciously submit that the «cooperation» between state and organized religion is always of a «selective and gradual nature,» and they even see it controlled by «the values on which the political system and social peace are based: dignity of the human being, democratic citizenship, freedom of conscience, equality, and so on.»<sup>9</sup> Accordingly, they argue, corporatist integration must be «undiscriminating,» certainly, but it cannot occur «indiscriminately.»<sup>10</sup> If this is correct, there is a delicate problem for Islam: Can it really subscribe to all of these «liberal» values, including «freedom of conscience,» which demands the right to exit from one's religion – a right that Islamic law [*sharia*] in all shades infamously does not recognize even today? While the degree of ideological compatibility required for «cooperating» with the state is contested (see below), there is an even more fundamental problem for Islam to be corporately included: It requires a church-like central organization that is foreign to Islam, which has no clergy formally empowered to speak for all Muslims. Corporatist inclusion is thus likely to remain incomplete, not because of an inherent Christian bias of the European state, but because of historical inertia – the slate can never be clean.

Apart from their different speeds and levels of inclusiveness, a further difference between individual and corporatist integration is their respective mechanisms and ways of operating. Individual-level integration is mostly legally driven, while corporate integration is primarily a political process. The central actors in the first path are courts, especially constitutional courts that watch over religious liberty rights. By contrast, central to the second path are national governments that often propel the organizational formation of Islam for the sake of public order and policy effectiveness. This does not mean that either political actors or courts are absent from the individual and corporate integration paths, respectively. On the contrary, the dynamics between politics and law fundamentally shapes the development of both paths, as political «integration» concerns have recently moved courts to hold religious liberty rights less absolute than they did before, and as courts have often forced

<sup>6</sup> An excellent study that retains an emphasis on differently successful Muslim accommodation across European states is, Angelika Schlanger, *The Accommodation of Muslim Minorities in Western European Societies* (unpublished manuscript in author's possession). Schlanger argues that pluri-confessional and federalist states have been better at integrating Islam than mono-confessional and centralized states.

<sup>7</sup> See James Q. Whitman, «Separating Church and State: The Atlantic Divide,» *Historical Reflections* 34/3 (2008): 86–104.

<sup>8</sup> See John Bowen, «A View from France on the Internal Complexity of National Models,» *Journal of Ethnic and Migration Studies* 33/6 (2007): 1003–1016.

<sup>9</sup> Dassetto, Ferrari and Maréchal, *Islam in the European Union* (above n. 1), 36.

<sup>10</sup> Ibid.

governments to do more on the corporate «cooperation» front than they were initially prepared to do.

While thinking in terms of «convergence» on religious liberty and cooperation is more fruitful than traditional «church-state regime» reasoning, there is still one distinction that fundamentally divides European states in their approaches to the integration of Islam. From a liberal point of view, states have the possibility of either distancing themselves from religion or recognizing religion – the only condition being that such distancing or recognition occurs *equally* toward *all* religions, old and new, majority and minority. As clichéd as it is, France and Germany still stand for these opposite choices, in terms of French *laïcité* (secularism) versus German *offene Neutralität* (open neutrality). These choices bear specific liabilities or difficulties for Islam. The distancing from religion generates risks for religious liberties, which is epitomized by France's two-decade-long Islamic headscarf struggles. Conversely, the recognition of religion raises the question of whether full equality for Islam as a «church» can ever be reached, as reflected in Germany's persistent reticence to grant Islam the status of «corporation under public law» (*Körperschaft des öffentlichen Rechts*).<sup>11</sup>

In the following section, I further explore the existing limits of Islam's integration on both the individual and corporate paths. In a third section, I address tensions between (inclusive) law and (restrictive) politics in the process of Islam's integration.

## 2. Limits of Religious Liberty

Overall, in the case of Muslims and Islam, European courts have lived up to their function to «protect those who can't protect themselves politically»<sup>12</sup> – that is, minorities in majoritarian democracies. The main source for this protection has been religious liberty rights, but also parental education rights, which are enshrined in all European state constitutions, including the supranational European Convention of Human Rights. One critical scholar thus found that «the future of the Muslim minority . . . depends not so much on how the law might be expanded to accommodate its concerns but on a larger transformation of the cultural and ethical sensibilities of the majority Judeo-Christian population that undergird the law.»<sup>13</sup> While the first half of this

analysis is correct, one wonders about the second half: Is this a plea for re-education?

Limits to religious liberty are most visible in the long-standing attempts to restrict the Islamic headscarf, which recently reached new heights in laws prohibiting extreme veiling (burqas) in France and Belgium. The headscarf or veiling struggles are an exception to the rule of quiet integration by law, and thus require further attention. In this ideological minefield, where the traditional symbol of female subordination in Islam to some is the badge of female emancipation to others, it is important to differentiate. In round one of the European headscarf struggles, the issue was sector-specific restrictions of the ordinary headscarf (covering hair and ears, but not the face), especially in schools and the workplace. Interestingly, the courts went to some length to protect headscarf-wearing women in the workplace, even if it was in the cosmetics section of a department store, where «appearance» is not unrelated to work performance.<sup>14</sup> However, the real site of conflict in round one was public education, where religious attire on the part of public school teachers has often been perceived as conflicting with the state's mandate to be «neutral» on religion. But France went further and legislated against the headscarf of *pupils* in 2004. This law, which overturned a Council of State-driven liberal practice in place since 1989, entails a novel definition of state neutrality, even under a traditionally expansive French *laïcité*, as obliging not only the «providers» of state services but also their «users,» in this case schoolchildren. However, rather than reflecting a «racist» animus against Muslims, as feminist historian Joan Scott thinks,<sup>15</sup> the 2004 law stands in a long tradition of the republican state holding religion at bay, first Catholicism and now Islam, the latter seemingly set to invade the one remaining bastion of French nation-building – public education.<sup>16</sup>

Round two in the European headscarf struggles is about the veil proper, which the French and Belgian «burqa» laws seek to suppress in public space at large.<sup>17</sup> This entails a polarization and radicalization on both sides: First, because it concerns only the fundamentalist *Salafi* sect that quite visibly shows no inclination to «integrate» into liberal societies; but, secondly, because it constitutes the perhaps most

<sup>14</sup> Dagmar Schiek, «Just a piece of cloth?» *The Industrial Law Journal* 33/1 (2004): 68–73.

<sup>15</sup> Joan Scott, *Politics of the Veil* (Princeton, NJ: Princeton University Press, 2007).

<sup>16</sup> See Christian Joppke, *Veil: Mirror of Identity* (Cambridge: Polity, 2009), chapter 2.

<sup>17</sup> All quotes and references in the following two paragraphs are taken from Joppke and Torpey, *Legal Integration of Islam: A Transatlantic Comparison* (above n. 11), chapter 2.

<sup>11</sup> Christian Joppke and John Torpey, *Legal Integration of Islam: A Transatlantic Comparison* (Cambridge, Mass.: Harvard University Press 2013).

<sup>12</sup> John Eley, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980), 152.

<sup>13</sup> Saba Mahmood, «Religious Reason and Secular Affect: An Incommensurable Divide,» *Critical Inquiry* 35 (2009): 860.

drastic liberty restriction imaginable in the contemporary liberal state, what to wear in the streets. How can it be justified?

Predictably, the French government proclaimed that this was no attempt to erase «Islam» from the texture of French society. To make this liberty restriction compatible with European human rights law, it was even necessary to argue, however implausibly, that the burqa is not really a religious symbol because it is not required by Islamic core doctrine and that it is, instead, exclusively a political expression. Nevertheless, the legal-constitutional hurdles to pass such a law were dauntingly high. *Laïcité*, which justified the 2004 anti-headscarf law, was not a possible recourse, because this is a principle to regulate the relationship between the state and religion, not private people in public places. The emphasis, therefore, shifted to «human dignity,» which may be taken to be violated by the veil, this «sign of subjugation (and) of debasement» (President Sarkozy). This approach squared with the focus on women's equality that had undergirded the French (and European) conflict with Islam all along.

However, the visibly astounded French lawmakers had to learn from constitutional jurists that, as a legal principle, «dignity» denotes a subjective reality that can be impaired only by a third party – and not by persons against themselves. Legally understood, dignity is thus tantamount to human freedom. Factoring in the little sociological evidence that exists, which suggests that the burqa is usually «chosen» by the woman and not imposed on her, the incriminated garb becomes, weirdly, an *expression* rather than *negation* of the woman's dignity, contrary to what its opponents argued. As «dignity» was off the table, rescue was sought in a third legal principle, «public order,» according to which the burqa might be construed as a security threat. However, from the point of view of «security,» a public dress restriction had to be tailored to specific times and places and could not be general, because this would amount to a level of surveillance and restriction of elementary liberties that is incommensurate with a liberal society.

After the main legal-constitutional avenues were ruled out, a significant amount of political will and legal engineering was required to legislate against the «integral veil.» As for «political will,» a burqa prohibition was supported by the large majority of the French public. The «legal engineering» part was provided by lawyers who now argued that «public order» contained not only a «security» dimension but also a dimension of «morality.» Considering that nudity had always been outlawed in these terms,

why not prohibit its exact opposite? The «non-material» dimension of public order was never «legally theorized,» the Council of State warned in a negative opinion on the proposed Burqa Law, but here was the tunnel that could be dug. «Public order rests on a minimal foundation of reciprocity and of essential guarantees of life in society,» the Council of State declared, anticipating the case that *could* be made against the burqa. «The Republic is lived with the face uncovered,» said the justice minister when presenting the Burqa Bill to the National Assembly in July 2010. Or rather: «France is the country where everyone says *bonjour*,» as sociologist and former member of the Constitutional Council, Dominique Schnapper, put it almost comically. The French Burqa Law of 2010, indeed, is an «affirmation of a right and an equal belonging of everyone to the social body,» as the Council of State critically described, in not exactly clear terms, the prospect of such a law. But then, this is the land of Durkheim, which always took «integration» more seriously than most others.

### 3. Limits of Corporatist Inclusion

Corporatist inclusion is two-pronged. It naturally grows out of the collective dimension of religion and is thus a «bottom-up» demand by Muslims; but it also has become, particularly in Europe, a «top-down» process driven by national governments. These are rather different faces of the same process, raising different questions. The first raises the question of whether Islam, much like any other new religion, can ever achieve full equality with the established religions that have been integral to the process of European state-building and thus inevitably enjoy some privileges and advantages, even though «equality» is still the stance a liberal state must take toward *all* religions, old and new. The second face is one of nationalizing and domesticating Islam, or of the «institutionalization of a moderate, Euro-friendly Islam.»<sup>18</sup> This is often experienced by Muslims as an affront to Islam's inherently transnational ambition of assembling the *umma*, that is, the community of believers, which stands above and beyond worldly state borders.

Jonathan Laurence has usefully described the top-down process in terms of «neo-corporatism,» which has a long pedigree as a state instrument for incorporating transnational movements, while depoliticizing the respective conflict and moderating the demands that may arise from it: «[J]ust as the state acted to collectively integrate their Jewish and working-class communities, so have recent governments attempted to «transform» the major representatives of Islam in

<sup>18</sup> Yvonne Yazbeck Haddad and Tyler Golson, «Overhauling Islam,» *Journal of Church and State* (Summer 2007).

Europe.»<sup>19</sup> From this angle, if corporatist inclusion is part of a «dual movement» of «expanding religious liberty and increasing control exerted over religion,»<sup>20</sup> which is a very accurate description of the relationship between Islam and Europe today, it happens to be strongly on the «control» side of this process (though of course not devoid of «liberty» elements, in terms of benefits that accrue from cooperating with the state). Laurence even nonchalantly characterizes corporatist inclusion as the «reassertion of nation-state sovereignty»<sup>21</sup> and «prioritization of national laws over religious texts.»<sup>22</sup> Indeed, part of this process is to make corporate Islam accept the constitutional law, often by having Muslims sign an official charter that lays out this commitment, such as the German «Islamic Charta» of 2002.<sup>23</sup> Laurence already sees the fruits of neo-corporatism's «transformative powers,»<sup>24</sup> which have been deployed vis-à-vis Muslims only since the 1990s: «French Muslim leaders no longer insist upon ritual burial without coffins, German Muslim leaders have dropped their insistence on religious education in Turkish language.»<sup>25</sup>

While «primary loyalty»<sup>26</sup> to nation over religion may be the purpose of state-driven corporatist inclusion, Muslims do not see it this way. In a compelling ethnography of the Islamic *Milli Görüs* community in Germany, Werner Schiffauer stressed that «*integration* into German society» – a public policy obsession in Germany and other European states at least since 2001 – «is not a question for the concerned Muslims most of the time . . . Their question rather is . . . «How can I serve God in the diaspora and fulfill his commands?» or «How can I avoid that my children become alienated from me?»<sup>27</sup> John Bowen, in an equally intriguing analysis of rapprochement between the French administrative state and *banlieue* Islam, characterized the attitude on the ground as «social pragmatism.»<sup>28</sup> It consists of finding an Islamic justification for a secular law, such as marrying in town hall, for which there is no religious alternative in France. Interestingly, the tools for this rapprochement exist within Islamic doctrine in terms of the so-called *maqasid* approach, very much the high road of Islamic

reformism today. It looks for the «purposes» behind a scriptural obligation that may then be flexibly (that is, non-literally) implemented. As Bowen illustrates workings of *maqasid*, «Marrying in city hall is thus indicated by scripture, because scripture's passages on marriage have as their purpose to make marriage a stable contract.»<sup>29</sup> However, social pragmatism thus understood implies that Muslims «define the space as Islamic, rather than French or European or «modern» or «liberal.»»<sup>30</sup> If there is «*integration*,» it is by stealth only, happening *despite* the intentions of the Muslim actors involved rather than *because* of them. And it may fail, because Muslims are never forced to step outside their religion – or rather, they will follow the secular law only to the degree that their religion permits. Therefore, Tariq Ramadan stridently says, «what Islam will contribute to the West is Islam» and a failure to take this into account would «produce radical resistance and clashes.»<sup>31</sup> On the other side, social pragmatism à la Bowen resonates with an ethically thinned «political» liberalism that stipulates the possibility of an «overlapping consensus» on shared rules derived from *within* one's religion or «comprehensive doctrine.»<sup>32</sup>

Apparently rejected by Muslims and not required by political liberalism, «primary loyalty»<sup>33</sup> is also legally anachronistic. As noted above, Dassetto, Ferrari, and Maréchal reasonably argued that subscribing to the «values on which the political system and social peace are based» is a precondition for the state's «cooperation» with Islam, which is to occur, to repeat their felicitous phrase, in an «undiscriminating» way but «not indiscriminately.»<sup>34</sup> But the German Federal Constitutional Court has thrown out such consideration as a precondition for assigning the privileged status of «corporation under public law,» which organized Islam in Germany has sought for many years. By contrast, the Christian churches and the organized Jewish community have always or long enjoyed this status, respectively (among other privileges, this status entitles a religious community to tax its members with the state's assistance.) In its landmark decision of September 2000 that opened the door for Jehovah's Witnesses to be granted the desired public corporation status, the German Federal Constitutional Court held that only formal «*fidelity to the law*» (*Rechtstreue*) could be expected of the sect, but not any deeper

<sup>19</sup> Jonathan Laurence, *The Emancipation of Europe's Muslims* (Princeton, NJ: Princeton University Press, 2012), 132.

<sup>20</sup> Ibid., 6.

<sup>21</sup> Ibid., 25.

<sup>22</sup> Ibid., 131.

<sup>23</sup> See Nathal Dessing, «The Islamic Charter as a Tool for Integration,» *ISIM Newsletter* 11 (2002): 36.

<sup>24</sup> Laurence, *The Emancipation of Europe's Muslims* (above n. 19), 243.

<sup>25</sup> Ibid., 199.

<sup>26</sup> Ibid., 174.

<sup>27</sup> Werner Schiffauer, *Nach dem Islamismus: Die Islamische Gemeinschaft Milli Görüs* (Frankfurt am Main: Suhrkamp, 2010), 28.

<sup>28</sup> Bowen, «A View from France on the Internal Complexity of National Models» (above n. 8), 154.

<sup>29</sup> Ibid., 166.

<sup>30</sup> Ibid., 155.

<sup>31</sup> Quoted in Christopher Caldwell, *Reflections on the Revolution in Europe* (New York: Penguin, 2009), 244.

<sup>32</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

<sup>33</sup> Laurence, *The Emancipation of Europe's Muslims* (above n. 19), 174.

<sup>34</sup> Dassetto, Ferrari and Maréchal, *Islam in the European Union* (above n. 1), 36.

«loyalty» because «this concept [of *Rechtstreue*] aims at an inner disposition, an attitude, and not an external behavior.»<sup>35</sup> This placed the political state and its «integration» interest on a collision course with the more anodyne (but Kantian liberal) norms prevailing in the legal system.

But the throwing out of the loyalty requirement, which had been the state's routine justification for denying Islam its long-standing quest for public corporation status, also engendered internal legal inconsistencies. Article 4 of the Basic Law, which already guarantees religious liberty, includes the collective right of association, independent of Article 140 of the Basic Law that, in addition, provides public corporation status to religious communities. If the latter was now famously interpreted, in the Constitutional Court's 2000 Jehovah's Witnesses decision, as a «means to unfold religious liberty», the difference between the religious liberty (Article 4) and corporate church (Article 140) provisions was void. Or rather, this was the moment when the old institution-centered «State Law of the Churches» (*Staatskirchenrecht*), which had long regulated the relationship between the state and organized religion in Germany, became subordinated to the new individual-centered «Constitutional Law of Religion» (*Religionsverfassungsrecht*), in which the individual's religious liberties are held above all institutional considerations in a perfectly symmetric way that knows no distinction between «old» and «new» religions. Now the paradoxical possibility arose that a religious community, not satisfied with merely associating according to Article 4 of the Basic Law, «seeks proximity to the state» by way of invoking public corporation status under the church provision (Article 140), while at the same time «question(ing) the bases of the state's existence in a principled way.»<sup>36</sup> As long as the respective religious group did not smash windows or throw bombs, there was nothing the state could do about this.

After the German Constitutional Court's *Jehovah's Witnesses* decision, the door is wide open in principle for organized Islam to be recognized as a «corporation under public law.» In addition to the aforementioned tax privilege, this status would automatically entitle it to teach the Islamic creed at public schools at the state's expense and to participate in the control of public television and radio, among other pub-

lic functions. In stubbornly denying this status to Islam, the state can only resort to formal concerns about the Islamic organizations' «durability» – essentially suggesting that they lack the requisite size, level of representativeness, and years of existence. But these concerns are bound to wither away over time, because Muslims are here to stay in German society.

The matter is slightly more complicated when looking at the right to teach Islam as a creedal subject (*Bekenntnisunterricht*) in public schools, under Article 7 of the Basic Law. In order to acquire this right, a religious community must meet the «durability test» that is similar to the one applied in decisions about «public corporation» status. While there is consent in the German political elite that the Islamic confession should be taught in public schools (if only to bring Islamic education under state control), the «loyalty» question cannot be so easily discarded here. Public education, after all, is under the «supervision of the state,» as § 7 of the Basic Law stipulates. As one lawyer argues, the state's education mandate requires that mere «fidelity to the law» (*Rechtstreue*) by a religious group is not sufficient – a «counter-instruction to the state's instruction (is) not acceptable.»<sup>37</sup> This was affirmed in a decision by the Hesse Upper Administrative Court that denied the Islamic Religious Community of Hesse (IRH) the status of *Religionsgemeinschaft* (religious community) that would allow it to teach Islam in the state's public schools. The court ruled that those engaged in public education must demonstrate a «special faithfulness to the law» (namely, «faithfulness to the constitution»). In the court's view, the IRH was beholden to a «traditionalist,» Salafi understanding of Islam and failed to meet this test.<sup>38</sup>

Due to a quirk in the German constitution, no «supervision of the state» constrains the right to conduct religious instruction in Berlin. Promptly, the Islamic Federation of Berlin (IFB), a spinoff of the *Milli Görüs* organization, won this right in a local court decision in 1998, and it now offers creedal Islamic instruction at public expense to about 20 percent of Berlin's Muslim pupils. When Berlin's Senate (the state government) complained that the IFB's Islamic instruction conflicted with the state's educational goals of fostering «autonomy» and «equality» in the young generation, the administrative court countered that, in Berlin at least, religious instruction was entirely a «matter of the religious communities» that could «not be

<sup>35</sup> Here, and in the following few paragraphs, all quotes and references are taken from Joppke and Torpey, *Legal Integration of Islam* (above n. 11), chapter 3.

<sup>36</sup> Quoted from the 1997 decision of the German Federal Administrative Court, which rejected the Jehovah Witnesses' request for public corporation status in these terms, pointing to a «loyalty» deficit vis-à-vis the state.

<sup>37</sup> Christine Langenfeld, quoted in Joppke and Torpey, *Legal Integration of Islam* (above n. 6), chapter 3

<sup>38</sup> The Hesse Upper Administrative Court in a September 2005 decision, quoted in Joppke and Torpey.

influenced by the state in any way.»<sup>39</sup> A respected left-liberal newspaper described the atmosphere in Berlin schools after the IFB had moved in as follows: «Women are reduced in Islamic instruction to the role of housewives, and even very small children are obliged to fast during Ramadan. Suddenly there is anti-Semitism in the schoolyards, even young girls wear headscarves, and the number of parents removing their daughters from biology or sport lessons or from class retreats is growing.»<sup>40</sup>

As these examples show, organized Islam is only an inch away from «cooperating» with the state in fulfilling important public functions, including the most precious and delicate of all, which is to educate the next generation. German law even forces the state to «cooperate» with certain religious organizations that may be inimical to its liberal and secular values. To the degree that the state insists on its mandates of «integration» and citizen-formation, which the very encounter with Islam has recently reinforced, there are obvious limits to corporatist inclusion. These limits cannot but move to the fore to the degree that it becomes implausible for the state to hide behind formalistic recognition criteria that obscure the real issues at stake.

#### 4. Tensions between Law and Politics

The integration of Islam is a little noticed example of the constitutionalization of politics. Its most important chronicler in Europe has aptly described the process: «Today judges legislate, parliaments adjudicate, and the boundaries separating law and politics – the legislative and judicial functions – are little more than academic constructions.»<sup>41</sup>

In *Legal Integration of Islam* (2013), we move beyond conventional legal analysis in reconnecting law with politics. As we could see already, the integration of Islam by law is accompanied by friction with the political process. One could summarize the relationship between law and politics in terms of a three-stage model. In Stage 1, when the topic of Islam is not yet politicized, independent courts (especially constitutional courts) mobilize the religious liberty clauses of liberal constitutional states, often successfully. Yet in doing so, the courts also outpace, and may even contradict public sensibilities. For example, the decisions of the French Council of State regarding the headscarves of Muslim girls in public schools were strikingly liberal and inclusive between 1989 and 2004.<sup>42</sup> In Ger-

many, there was a true «march through the courts,»<sup>43</sup> which culminated in Islam-friendly judgments by the Federal Constitutional Court on ritual slaughtering and on the headscarf (worn by teachers, which would be unthinkable west of the Rhine River).

In Stage 2, the integration of Islam becomes a political topic, and democratically accountable (and thus chronically populist) political forces seek to counterbalance a perceived over-the-top integration by law through restrictive legislation. Accordingly, the French parliament put an end to the liberal legacy of the Council of State through a law prohibiting «ostentatious religious symbols» in 2004. This law was passed by a center-right government, yet also supported by the socialist opposition. However, the envisaged restrictions must always meet the high hurdles of constitutional law, and therefore politicians consult legal experts or put on their legal hat to anticipate and neutralize judicial opposition from the start. A textbook example is the parliamentary «Burqa Commission» in France, which was almost entirely a dialogue between politicians and constitutional lawyers about the limits of what is legally possible in the liberal-constitutional order, both at national and European levels.<sup>44</sup> If this commission would not recommend a «general and total» burqa ban (against the intentions of all of its cross-party members and, of course, their principal, the French president), this is only because such a ban seemed to contradict the French constitution and the European Human Rights Convention (ECHR). If such a burqa ban was nevertheless passed, one must interpret this as a rebellion of politics against a perceived «dictate» of constitutional law.<sup>45</sup>

Finally, in Stage 3, politics feeds back on the law, changing the latter's parameters. Judges and courts now hesitate to resolve a societal conflict by means of law – that is, «undemocratically.» After all, the integration of Islam as a religion and of Muslims as a minority is primarily a political task that must not be blockaded by an autonomous legal system. So one can observe that as politics has moved away from a de facto multiculturalism to «civic integration» in the past decade or so,<sup>46</sup> courts have backed away from their previous practice of generously granting

<sup>39</sup> Joppke and Torpey, *Legal Integration of Islam* (above n. 11), 59–66.

<sup>40</sup> *Frankfurter Rundschau*, quoted in Joppke and Torpey.

<sup>41</sup> Alec Stone Sweet, *Governing with Judges* (Oxford: Oxford University Press, 2000), 130.

<sup>42</sup> Joppke, *Veil: Mirror of Identity* (above n. 16), 37–45.

<sup>43</sup> Joppke and Torpey, *Legal Integration of Islam* (above n. 11), 42–46.

<sup>44</sup> First noted in Christian Joppke, «Beyond National Models: Civic Integration Policies for Immigrants in Western Europe,» *West European Politics* 30/1 (2007): 1–22; and more recently in Sara Wallace Goodman, «Fortifying Citizenship,» *World Politics* 64/4 (2012): 659–698.

religious exemptions from general laws, particularly in the sensitive area of public education.

This is evident, for example, in recent more restrictive court decisions on requests for religious exemption from the public school curriculum. I will mention here only one of the latest judgments in a series of very similar decisions by German administrative courts.<sup>47</sup> In June 2012, the Upper Administrative Court of Bremen decided that a Muslim girl in elementary school had to participate in co-educational swimming lessons.<sup>48</sup> This case shows that an increasingly restrictive court approach coincides with a radicalization of Muslim claimants on the ground, which was likely encouraged by the previously liberal court practice.<sup>49</sup> The Bremen case is about a girl who is just eight years old, in third grade, which suggests that the sexual shame barrier has been lowered far into the pre-puberty phase. Moreover, the girl's parents rejected the school's compromise offer to have her participate with an all-body swimsuit («burqini»), claiming that this would entail the «stigmatization» of their daughter.<sup>50</sup> The court rejected the parental claim also by citing an influential benchmark decision of the Federal Administrative Court from 1993, which allowed an abstention from co-educational sports instruction only from the beginning of «religious autonomy» (in that case, the age of 12 or 13). More interesting than this formal continuity of jurisdiction is the court's new emphasis on the «weight» of the «state educational mandate» that in previous judgments had played no role whatsoever. Now the court declared that a seemingly trivial school subject like sports instruction is important for «instilling the fundamental values of equality and equal treatment of men and women,» and it described this sports instruction as «principally geared towards socializing the children into a respectful and natural relationship between the sexes» and as «work[ing] against rigid role patterns.»<sup>51</sup> The court thus incorporated the «liberal» integration and identity discourse that has become dominant in the political system of European societies in the wake of the Islam debate.<sup>52</sup> However, this amounts to a restriction of religious liberty rights and of parental education rights.

## 5. Conclusion

This reflection on the integration of Islam through law, as developed in more detail in *Legal Integration of Islam* (2013), demonstrates the elasticity of liberal institutions toward a religion that, perhaps more than others, is a source of irritation for liberal societies. Both aspects – the elasticity of liberal institutions and Islam-specific irritations – are often ignored. But integration by law disproves the alleged incapability of «Christian» (or rather «secularized») Europe to deal fairly with the more vital religions of immigrant minorities, especially Islam. On the other hand, integration deficits on the demand side tend to be ignored, as the slightest intervention in this mined terrain is immediately branded as «Orientalism» or «essentialism» or worse.

However, Islam-specific difficulties in adjusting to liberal societies are patent. At least one should mention the paradox that the central resource of Islamic integration through law – individual rights – is foreign to the Islamic tradition. In a passionate analysis of the «crisis of Islamic civilization,» the Iraqi intellectual and statesman Ali Allawi conceded that «the entire edifice of individual rights . . . is alien to the structure of Islamic reasoning.»<sup>53</sup> Individual rights separate the individual and society, and such a provincially «Western» separation could not occur in the «God-centered community» of Islam. «Rights» in Islam, says Allawi, «are in the nature of obligations» that stem from God.<sup>54</sup> Similarly, the human rights scholar Jack Donnelly<sup>55</sup> notes that in an Islamic perspective, individual rights are not «obligation(s) of others» (as in Hohfeld's analytic jurisprudence<sup>56</sup>), but obligations «of the alleged rights holder(s)» themselves. Then it should be no surprise that the Cairo Declaration on Human Rights in Islam (1990), issued by the Organization of Islamic States (OIS) in response to the human rights declaration of the United Nations (1948), differs importantly from the tenor of the UN declaration. Central to the Cairo Declaration is the *sharia* proviso in its Article 24: «All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.» In Article 1 of this Islamic declaration on human rights, the word «right» does not appear at all. Instead, it begins: «All humans beings form one family, whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and

<sup>47</sup> Joppke and Torpey, *Legal Integration of Islam* (above n. 6), 61–62.

<sup>48</sup> Oberverwaltungsgericht (OVG) [Higher Administrative Court] Bremen, 1 B 99/12, «Befreiung vom koedukativen Schwimmunterricht,» Decision of June 13, 2012.

<sup>49</sup> On the latter, see Joppke and Torpey, *Legal Integration of Islam* (above n. 6), 59–61.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Christian Joppke, *Citizenship and Immigration* (Cambridge: Polity, 2010), chapter 4.

<sup>53</sup> Ali A. Allawi, *The Crisis of Islamic Civilization* (New Haven, CT: Yale University Press, 2009), 11.

<sup>54</sup> Ibid., 194.

<sup>55</sup> Jack Donnelly, «Human Rights and Human Dignity,» *American Political Science Review* 86/2 (1982): 306.

<sup>56</sup> Wesley Newcomb Hohfeld, *Fundamental Legal Concepts* (Westport, CT: Greenwood Press, 1965 (1919).

basic obligations and responsibilities ...» (Article 1A). The central reference to «submission to God,» «obligations,» and «responsibilities» is unusual for a «human rights declaration.» In her detailed study on *Islam and Human Rights*, Ann Elizabeth Mayer concludes that in Islamic human rights discourse, «Islam is not conceived of as offering the basis for protecting rights but solely as the basis for limiting ... rights.»<sup>57</sup> However central or peripheral «Islam» may be to the

Islamic understanding of human rights, the integration of this religion into liberal institutions is still remarkable. On the other hand, the possibility of integrating Islam, like any religion, is fully consistent with liberal principles. This is because the liberal state's «neutrality» obliges it to refrain from evaluating the contents of religion. In this respect, the question of the compatibility of theological doctrine and liberal principles does not even arise.<sup>58</sup> ■

<sup>57</sup> Ann Elizabeth Mayer, *Islam and Human Rights* (Boulder, CO: Westview, 1999), 71.

<sup>58</sup> See Olivier Roy, «Secularism and Islam: The Theological Predicament,» *The International Spectator* 48/1): 763–97.

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