

Böckenförde Theorem and Burqa Ban

By Ralf Michaels*

Abstract

When France and Belgium banned face veils in 2010 and 2011, they were the first European countries to do so in a comprehensive matter. Now Austria has its own ban, Denmark is on track to have one too, and several other countries are toying with the idea. Such bans are often considered incompatible with the rights of veil wearers (especially Muslim women). Less prominent is the question whether such bans are incompatible with the modern state.

Such a critique can be grounded on the work of the leading German constitutional law scholar Ernst-Wolfgang Böckenförde and his famous dictum, according to which “[t]he liberal, secularized state draws its life from preconditions it cannot itself guarantee.” For Böckenförde, this means that headscarves, a different type of veil, cannot be banned—not because this would violate a woman’s rights, but because it would undermine the very character of the state itself.

The article transposes this argument from the German discourse over headscarves to the European discourse over face veils. It demonstrates the potential of Böckenförde’s dictum for the face veil debate, but also its limitations.

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A. Introduction

In the spring of 2017, Germany's Minister for the Interior, Thomas de Maizière, published ten theses towards a German "*Leitkultur*"¹ in Germany's biggest tabloid, *Bild am Sonntag*.² He listed a number of predictable things as parts of such a leading culture—music, law, etc. But the most important information about German *Leitkultur*, at least according to the newspaper title for his contribution, concerned what German *Leitkultur* is *not*: "Wir sind nicht Burqa;" or "We are not Burqa."³ Opposition to the burqa is part of the first of de Maizière's ten points, which emphasizes the importance of showing our face:

"Show your face"—that is an expression of the way we live together in our democracy. In our daily lives it is important that we be able to see whether the person we talk to shows a friendly or a sad face. We are an open society. We show our face. We are not burqa.⁴

De Maizière's remarks were criticized politically, as populist and as attempts to cater to far right voters. But they were also criticized philosophically, as incompatible with the nature

¹ See *What is German "Leitkultur"?*, DEUTSCHE WELLE (May 3, 2017), <http://www.dw.com/en/what-is-german-leitkultur/a-38684973> (explaining that *Leitkultur* is a largely non-translatable German concept that describes some kind of core culture, characteristic of the country, and therefore functioning as a guideline).

² See Thomas de Maizière, *Wir sind nicht Burka*, BILD AM SONNTAG (Apr. 29, 2017), <http://www.bild.de/bild-plus/politik/inland/thomas-de-maiziere/leitkultur-fuer-deutschland-51509022>. The article was republished on the government's website, with a different title, also in English: Thomas de Maizière, *A Leitkultur for Germany: What exactly does it mean?*, FEDERAL MINISTRY OF INTERIOR (May 1, 2018), <http://www.bmi.bund.de/SharedDocs/Interviews/EN/2017/namensartikel-bild.html>. The reference to the burqa is not the only implicit rejection of certain habits that are often connected with Islam. De Maizière also emphasizes that "[t]o us there is no linkage between the concept of honour and violence," demanded that immigrants "must show respect in the way they interact with others and accept the precedence of law over religion" and alluded to the primacy of Christianity: "Religious holidays are part of our calendar. Church spires are part of our landscapes. Our country is based on Christian tradition."

³ The grammar used here is incorrect. It may reference, implicitly, a famous headline in *Bild* when German Cardinal Ratzinger was elected Pope, reading "*Wir sind Papst*" (*We are Pope*). It expresses a forceful, and deeply problematic, system of inclusion and exclusion, of identification and non-identification. "We" is not used here as a contingent and internally plural community. It is a value-laden concept, invoking a national community of a particular nature.

⁴ De Maizière, *supra* note 2 (where the last sentence is inaccurately translated as "We don't do burqas"). The German original is this:

'Gesicht zeigen'—das ist Ausdruck unseres demokratischen Miteinanders. Im Alltag ist es für uns von Bedeutung, ob wir bei unseren Gesprächspartnern in ein freundliches oder ein trauriges Gesicht blicken. Wir sind eine offene Gesellschaft. Wir zeigen unser Gesicht. Wir sind nicht Burka.

of the German State. Jürgen Habermas suggested that a *Leitkultur* is incompatible with the German Constitution: What is needed—he suggested—is not a *Leitkultur* but a political culture.⁵ And the remarks were brought in connection with perhaps the most famous sentence about the relation between state and society in Germany ever formulated—the so-called Böckenförde theorem: “The liberal, secularized state draws its life from preconditions it cannot itself guarantee.”⁶

This is the topic of this Article: The application of the Böckenförde theorem to the question of face veil bans in particular, and Islam in general. Böckenförde formulated his theorem in the 1960s, with Christianity and Catholicism in mind. How well does it work with Islam? And what is to be done if it does not work as well?

Such an inquiry has two directions. One goes outwards, towards the debate on face veil bans which runs through all of Europe, and thereby also to the relationship between Europe and Islam.⁷ Within this debate, Böckenförde’s argument is so far discussed only in Germany. My hope is that introducing him beyond Germany will help move that debate forward and indeed suggest an approach to the burqa debate that may be fruitful.

The other direction goes inward, toward the theorem itself. That theorem was formulated more than fifty years ago, in a context very different from ours and with a view towards a religion—Christianity, or more specifically Catholicism—very different from Islam which presents the biggest challenge today. It must prove its strength anew in the face of Islam. Here, the theorem shows its limitations.

My argument has four steps. I will first present the debate on face veils in Europe (Part B.), followed by a discussion of the Böckenförde theorem and its meaning (Part C.). I will then talk about applying the theorem to the debate and demonstrate, hopefully, that it can bring considerations in that are underestimated (Part D.). At the same time, the face veil debate demonstrates limits of the theorem (Part E.).

⁵ Jürgen Habermas, *Keine Muslima muss Herrn de Maizière die Hand geben*, RHEINISCHE POST (May 3, 2017), <http://www.rp-online.de/politik/deutschland/leitkultur-das-sagt-juergen-habermas-zur-debatte-aid-1.6793232>. See also Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18 GERMAN L. J. 1595, 1603 (2017).

⁶ See *infra* Section C.

⁷ The literature is enormous. For two collections of contributions, see HELEN HALL, *THE BURQA AFFAIR ACROSS EUROPE: BETWEEN PUBLIC AND PRIVATE SPACE* (Alessandro Ferrari & Sabrina Pastorelli eds., 2013); DAVID KOUSSSENS, *QUAND LA BURQA PASSE À L’OUEST* (David Koussens & Olivier Roy eds., 2013). My own analysis is Ralf Michaels, *Banning Burqas: A View from Postsecular Comparative Law*, 28 DUKE J. COMP. & INT’L L. 213–45 (2018).

B. Face Veils in Germany and Europe

Thomas de Maizière's mention of the burqa was no coincidence. The banning of face veils has become—against all odds perhaps—a hot topic in Germany, as well as other countries in Europe. The background is, of course, a general fear of Islam, which is expressed, perhaps not coincidentally, in attempts to regulate Islamic, or presumably Islamic, female attire. Two types of such attire have captured regulators' attention and continue to do so: Headscarves and face veils. Because headscarves came earlier, I will discuss them first.

I. Headscarves

For a long time, the fight against headscarves and other Islamic garb was a concern mainly in majority Muslim countries that hoped to modernize. Turkey is perhaps the most famous country in which a headscarf ban was central to a specific project of modernization,⁸ but similar developments could be observed in many other countries in the 20th century. Western countries, by contrast, while deeply concerned with headscarves in their colonies,⁹ remained largely unconcerned with the regulation of Islamic garb at home. This was in accordance with Western ideas of liberalism and secularity, where matters of religion were separate from state concerns. President Barack Obama, during his 2009 speech in Cairo, suggested that “it is important for Western countries to avoid impeding Muslim citizens from practicing religion as they see fit—for instance, by dictating what clothes a Muslim woman should wear.”¹⁰ The United Nations Committee on Human Rights has repeatedly declared religiously required clothing to be protected by human rights.¹¹

At the time of these statements, the situation of Islamic dress codes in the West had already changed. The rise of Wahhabism in Saudi Arabia, the Islamic revolution in Iran, and similar movements created, in much of the Islamic world, a return to more conservative dresses for women. These movements also moved to the West.¹² In the late 1980s, both in

⁸ ANNA C. KORTEWEG & GÖKÇE YURDAKUL, THE HEADSCARF DEBATES: CONFLICTS OF NATIONAL BELONGING 57 (2014).

⁹ Todd Shepard, *La bataille du voile pendant la guerre d'Algérie*, in LE FOULARD ISLAMIQUE EN QUESTIONS 134–41 (Étienne Balibar & Charlotte Nordmann eds., 2004).

¹⁰ President Barack Obama, Address in Cairo (Jun. 4, 2009), reproduced in NY TIMES (Jun. 6, 2009), <http://www.nytimes.com/2009/06/04/us/politics/04obama.text.html>.

¹¹ General Comment no. 22, concerning Article 18 of the International Covenant on Civil and Political Rights (freedom of thought, conscience and religion), adopted on July 20, 1993, No. 4, <http://www.refworld.org/docid/453883fb22.html>; General Comment no. 28, concerning Article 3 (equality of rights between men and women), adopted on Mar. 29, 2000, No. 13, <http://www.refworld.org/docid/45139c9b4.html>; Hudoyberganova v. Uzbekistan, 2004) 12 IHRR 345, IHRL 1714 (UNHRC 2004).

¹² See Sara Silvestri, *Comparing Burqa Debates in Europe: Sartorial Styles, Religious Prescriptions and Political Ideologies*, in RELIGION IN PUBLIC SPACES: A EUROPEAN PERSPECTIVE 275 (Silvio Ferrari & Sabrina Pastorelli eds., 2012).

France, and in England, students were banned from schools for wearing headscarves.¹³ In England, courts decided to leave those conflicts to be resolved within the regulatory power of the schools, which has by and large been successful.¹⁴ In France, by contrast, the “*affaire du foulard*” led to a legislative ban on headscarves in schools, later to be approved by the courts, including the European Court of Human Rights.¹⁵ Other countries followed suit, although with varying levels of intensity and degree. France expanded the ban in 2007, applying it to those delivering a public service. This ban was just recently upheld by the European Court of Human Rights.¹⁶

In Germany, developments were more ambivalent.¹⁷ In the late 1990s, several *Länder* (states) began to ban headscarves for teachers in schools—sometimes with explicit exceptions for Christian and Jewish garb. In 2003, the second chamber (‘*Senat*’) of the Constitutional Court rendered its *Ludin* judgment with a rather ambivalent message: The state has a right to ban headscarves for teachers, but it has to do so on the basis of formal legislation; an executive decree is not sufficient.¹⁸ As a consequence, several *Länder* passed legislation, and the Federal Administrative Court upheld such a general legislation only slightly later.¹⁹ In 2015, the Constitutional Court, this time the first Chamber, had to assess such scarf-banning legislation again.²⁰ Now the Court went further than before, holding a

¹³ See CHRISTIAN JOPPKE, *VEIL: MIRROR OF IDENTITY* (2009).

¹⁴ See Javier García Oliva, *Religious Dress Codes in the United Kingdom Comparing Burqa Debates in Europe: Sartorial Styles, Religious Prescriptions and Political Ideologies*, in *RELIGION IN PUBLIC SPACES: A EUROPEAN PERSPECTIVE* 217, 223 (Silvio Ferrari & Sabrina Pastorelli eds., 2012).

¹⁵ See JOHN BOWEN, *WHY THE FRENCH DON’T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE* (2007); Anna C. Korteweg & Gökçe Yurdakul, *THE HEADSCARF DEBATES: CONFLICTS OF NATIONAL BELONGING* 15 (2014).

¹⁶ Sabrna Garahan, *Ebrahimian v France: Application no 64846/11: European Court of Human Rights, Fifth Section: Casadevall, Yudkivska, De Gaetano, Potocki, Jäderblom, Pejchal, O’Leary JJ; De Gaetano J dissenting; O’Leary J partly dissenting: 26 November 2015*, 5 *OXFORD J. OF L. & RELIGIONS* 365 (2016).

¹⁷ RUDOLF STEINBERG, *KOPFTUCH UND BURQA: LAIZITÄT, TOLERANZ UND RELIGIÖSE HOMOGENITÄT IN DEUTSCHLAND UND FRANKREICH* (2015).

¹⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Sept. 24, 2003, 2 BvR 1436/02, 108 BVERFGE 282, 2–3 *ANNUAL OF GERMAN & EUROPEAN LAW* 533; for discussion in English see CHRISTIAN JOPPKE, *VEIL: MIRROR OF IDENTITY* 53–80 (2009); Axel Frhr. von Campenhausen, *The German Headscarf Debate*, 2004 *BYU L. REV.* 665 (2004); see also DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 585–87 (3d ed. 2012).

¹⁹ Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], June 24, 2004, 2 C 45.03, 59 *JURISTENZEITUNG [JZ]* 1178 (2004), with a note by Böckenförde.

²⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 27, 2015, 1 BvR 471, 1181/10, 138 BVERFGE 296; see Matthias Mahlmann, *Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court’s Second Head Scarf Decision*, 16 *GERMAN L.J.* 887 (2015); Johann Ruben Leiss, *One Court, Two Voices: Case Note on the First Senate’s Order on the Ban on Headscarves for Teachers from 27 January 2015: Case No. 1 BvR 471/10, 1 BvR 1181/10*, 16 *GERMAN L.J.* 901 (2015).

general ban on headscarves to be an unconstitutional infringement on religious freedom. In order to ban a headscarf, the state had to demonstrate a concrete danger; the mere abstract dangers that might arise from a teacher wearing a headscarf would not be sufficient. In recent years, this path towards liberalization has become less certain. In 2017, a German lawyer-in-training challenged a decision that banned her from leading argument in the court while wearing a headscarf, although she would be under supervision of the real judge, as is common for lawyers-in-training. The Court, this time again the second chamber, rejected the challenge in response to a request for interim relief.²¹ Its detailed reasoning suggests, however, that it sees good reasons for a ban, because the state's duty to appear neutral would, in its mind, be undermined by a judge wearing a headscarf.²²

II. Face Veils

Germany's first pertinent Constitutional Court decision in 2003 included a dissent from three of the Court's more conservative judges. These judges argued that a teacher wearing a headscarf was already creating tensions with the constitutional order, and they tried to preempt the next step towards the face veil:

Just one further step towards the complete concealing of the face, which is likewise practiced within the Islamic faith community, could, from the perspective of German Constitutionalism, be viewed as incompatible with human dignity: A free person shows the other her face.²³

Indeed, face veils have become the new object of attention in Europe. Other than headscarves, which long existed also in Western cultures and which have become widespread, face veils remain rare. Moreover, unlike headscarves, face veils do not allow a view of the face, making them mysterious to some and threatening to others. One type of this veil is the niqab, a veil originating in the Arab world, which covers the whole face except for the eyes. The other is the burqa, technically a whole-body veil originating from Afghanistan, which covers the eyes with a grid. The niqab has long been known and

²¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 27, 2017, 2 BvR 1333/17, 70 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2333 (2017).

²² *Contra*, Anna Katharina Mangold, *Justitias Dresscode: Wie das BVerfG Neutralität mit „Normalität“ verwechselt*, VERFASSUNGSBLOG (July 6, 2017), <http://verfassungsblog.de/justitias-dresscode-wie-das-bverfg-neutralitaet-mit-normalitaet-verwechselt/>; Nahed Samour, *Rechtsreferendarin mit Kopftuch: Rosa Parks im Zuschauerraum des Gerichts*, VERFASSUNGSBLOG (July 7, 2017), <http://verfassungsblog.de/rechtsreferendarin-mit-kopftuch-rosa-parks-im-zuschauerraum-des-gerichts/>.

²³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 108 BVERFGE 282, at 334.

fascinating for the European imagination.²⁴ The burqa, by contrast, came into view with the Taliban reign in Afghanistan. When we speak of burqa bans rather than niqab bans, this is symptomatic: What is being rejected here is an Islam that is considered dangerous, linked to terrorism. The term “burqa ban” therefore is a loaded term; its use in this title is intended to make this clear.

Similar to headscarves, France led the way with national legislation in regulating face veils.²⁵ In 2008, France saw the *affaire* of Madame M, a Moroccan woman whose application for French citizenship was refused in part because she wore a face veil. The *Conseil d’Etat*, the highest court in administrative matters, upheld the refusal, arguing that wearing a face veil was incompatible with key values of French society, and she therefore did not satisfy the condition of assimilation.²⁶ The following year, the legislator set up a fact-finding commission—the Gérin commission—to research whether face veils should be banned. The commission held a vast number of interviews with experts, including—we are in France—a number of philosophers. The commission could not agree on recommending a general ban but suggested a number of educational and institutional measures, including a ban of face veils in public places.²⁷ The report suggests the grounds on which face veil bans are typically based: Protection of women, surveillance of faces, and face-to-face communications. Other institutions, notably the National Advisory Commission on Human Rights and the *Conseil d’Etat*, were much more doubtful that a ban could be justified. Nonetheless, a legislative act in 2010 banned face veils in public spaces.²⁸ The Act provided modest criminal penalties both for women who wear a face veil and higher fines for those who force women to do so. The reasoning was that a ban on face veils was required because the ability to see each other’s faces was necessary for an orderly “living together.”²⁹

At the time, this might have seemed like a French eccentricity, representative of the French excessive views of the separation of state and religion. Other countries, however,

²⁴ See RACHEL BAILEY JONES, POSTCOLONIAL REPRESENTATIONS OF WOMEN 135–67 (2011) (referencing further analysis).

²⁵ For the history, I draw on Anne Fornerod, *The Burqa Affair in France*, in *THE BURQA AFFAIR ACROSS EUROPE: BETWEEN PUBLIC AND PRIVATE SPACE* 59 (Alessandro Ferrari & Sabrina Pastorelli eds., 2013).

²⁶ Conseil d’État, June 27, 2008, no. 286798, “Madame M.”; see Anastasia Vakulenko, *Gender Equality as an Essential French Value: The Case of Mme M*, 9 OXFORD HUM. RTS. L. REV. 143 (2009) (discussing issue in English); Erik Nilsson, *Who is Madame M?: Staking Out the Borders of Secular France*, in *RELIGION AS A CATEGORY OF GOVERNANCE AND SOVEREIGNTY* 21, 25–33 (Trevor Stack, Naomi R. Goldenberg & Timothy Fitzgerald eds., 2015).

²⁷ Rapport d’information fait en application de l’article 145 du règlement au nom de la mission d’information sur la pratique du port du voile intégral sur le territoire national, No. 2262 (Jan. 26, 2010), <http://www.assemblee-nationale.fr/13/rap-info/i2262.asp> (Fr).

²⁸ Loi 2010-1192 du 11 octobre 2010 de interdisant la dissimulation du visage dans l’espace public.

²⁹ Gérin, *supra* note 27, at 13–14, 85, and *passim*.

followed suit. In Belgium, some municipalities had banned face veils since around 2004; a comprehensive national ban had failed earlier because the government broke down.³⁰ In 2011, adopting much of the argument from the French debate, a similar ban was passed. The third country with a complete burqa ban in public spaces is Austria, where wearing a burqa in public became illegal in 2017.³¹

Other countries ban face veils only in certain places. The Dutch parliament voted for a ban on face veils in certain public places, including schools, hospitals, government buildings, and public transportation; but the ban did not become law.³² This occurred even though the Netherlands Council of State, in 2011 and again in 2015, considered a ban incompatible with freedom of religion—especially since the government had not demonstrated a pressing need for it.³³ In Switzerland, one *Canton* (state)—Ticino—changed its constitution in 2013 to ban the veiling of faces in public places. The Federal Parliament voted to enter a similar duty to show one's face in the Federal Constitution, but the bill did not pass.³⁴ Currently, a referendum is being prepared.³⁵ Bulgaria recently legislated that face veils may not be worn in the institutions of Bulgaria's central and local administrations, schools, cultural institutions, and places of public recreation, sports, and communications.³⁶ A bill in

³⁰ Jogcum Vrieling, Saïka Ouad Chaib & Eva Brems, *The Belgian 'Burqa Ban': Legal Aspects of Local and General Prohibitions on Covering and Concealing One's Face in Belgium*, in *THE BURQA AFFAIR ACROSS EUROPE: BETWEEN PUBLIC AND PRIVATE SPACE* 143 (Alessandro Ferrari & Sabrina Pastorelli eds., 2013).

³¹ *Anti-Gesichtsverhüllungsgesetz*, 68 BUNDESGESETZBLATT 1 (2017), https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_68/BGBLA_2017_I_68.pdf; cf. Lizzie Dearden, *Austrian parliament passes burqa ban seeing Muslim women face £130 fines for wearing full-face veils*, INDEPENDENT (May 18, 2017), <http://www.independent.co.uk/news/world/europe/austria-burqa-ban-parliament-fines-150-full-face-veils-muslim-islam-niqabs-public-transport-a7742981.html>; see also Bundesministerium für Inneres, *Verbot der Gesichtsverhüllung trat am 1. Oktober 2017 in Österreich in Kraft* (Sept. 28, 2017), <http://www.bmi.gv.at/verhuellungsverbot>. Contra Flora Alvarado-Dupuy, *Anti-Gesichtsverhüllungsgesetz: Zwang zur Entschleierung*, 2017 JURIDIKUM 152 (2017).

³² Harriet Agerholm, *Dutch Parliament Approves Partial Burqa Ban in Public Places*, INDEPENDENT (Nov. 29, 2016), <http://www.independent.co.uk/news/world/europe/dutch-burqa-veil-ban-holland-votes-for-partial-restrictions-some-public-places-a7445656.html>.

³³ Raad van State [Council of State], Advies W04.11.0379/I, Kamerstukken II 2011/2012 33 165, 4, <https://www.raadvanstate.nl/adviezen/zoeken-in-adviezen/tekst-advies.html?id=10095>; Advies W04.15.0170/I, 15 July 2015, Kamerstukken II 2015/2016, 34 349, 4, <https://www.raadvanstate.nl/adviezen/zoeken-in-adviezen/tekst-advies.html?id=11944>. For background, see Adriaan Overbeeke, *Introducing a General Burqa Ban in the Netherlands*, in *THE BURQA AFFAIR ACROSS EUROPE: BETWEEN PUBLIC AND PRIVATE SPACE* 101 (Alessandro Ferrari & Sabrina Pastorelli eds., 2013).

³⁴ Steven Wildberger, *Switzerland Lawmakers Approve Public Burqa Ban*, JURIST (Sept. 28, 2016), <http://www.jurist.org/paperchase/2016/09/switzerland-lawmakers-approve-public-burqa-ban.php>.

³⁵ *Switzerland Moves a Step Closer to Voting on Nationwide Burqa Ban*, THE LOCAL (Sept. 13, 2017), <https://www.thelocal.ch/20170913/switzerland-moves-step-closer-to-voting-on-nationwide-burqa-ban>.

³⁶ *Bulgaria Imposes Burqa Ban – And Will Cut Benefits of Women Who Defy It*, INDEPENDENT (Oct. 1, 2016), <http://www.independent.co.uk/news/world/europe/bulgaria-burqa-ban-benefits-cut-burkini-niqab->

Estonia that was directed specifically against burqas and niqabs has been withdrawn in favor of legislation that focuses more generally on the concealment of individuals' faces in public.³⁷

In Germany, to many people's surprise, Chancellor Merkel declared in December 2016 that she wanted to ban burqas insofar as such a ban would be compatible with existing law.³⁸ Subsequently, the federal legislature passed a law that bans public employees from wearing a face veil.³⁹ The legislation is symbolic; there seems to be no single public employee wearing a face veil.⁴⁰ A Bavarian law goes further; it bans face veils not only for public employees, but also in schools and universities, kindergartens, and polling stations, and allows municipalities to ban them in individual cases at congregations.⁴¹ Stores in Munich will not be affected; they can continue to attract rich tourists from Arab countries.⁴²

Not surprisingly, these bans have been attacked in courts—both national and supranational—as both conflicting with religious freedom and as constituting discrimination based on religion. The success of such attacks has been mixed. Two institutions of the Council of Europe—the Parliamentary Assembly and the Commissioner for Human Rights—although critical of face veils, nonetheless called on member states not to ban such veils.⁴³ The Constitutional courts in Belgium and France both upheld the respective national bans and limited them only insofar as they concern houses of

a7340601.html; See also, Maya Kosseva & Iva Kyurkchieva, *Religious Dress Codes: The Bulgarian Case*, in RELIGION IN PUBLIC SPACES: A EUROPEAN PERSPECTIVE 255 (Silvio Ferrari & Sabrina Pastorelli eds., 2016).

³⁷ *EKRE Withdraws Bill Calling for Face Veil Ban*, ERR (July 2, 2017), <http://news.err.ee/120601/ekre-withdraws-bill-calling-for-face-veil-ban>.

³⁸ Philip Oltermann, *Angela Merkel Endorses Party's Call for Partial Ban on Burqa and Niqab*, GUARDIAN (Dec. 6, 2016), <https://www.theguardian.com/world/2016/dec/06/angela-merkel-cdu-partial-ban-burqa-niqab-german>.

³⁹ Gesetz zu bereichsspezifischen Regelungen der Gesichtsverhüllung und zur Änderung weiterer dienstrechtlicher Vorschriften, 8 BUNDESGESETZBLATT [BGBl.] 1570 (2017).

⁴⁰ Janina Lückoff, *Das Burkaverbot läuft ins Leere*, TAGESSCHAU (Apr. 28, 2017), <https://www.tagesschau.de/inland/burkaverbot-bundestag-103.html>.

⁴¹ Gesetz über Verbote der Gesichtsverhüllung in Bayern, 2017 GESETZ- UND VERORDNUNGSBLATT [GVBl.] 362 (2017) <https://www.verkuendung-bayern.de/gvbl/jahrgang:2017/heftnummer:12/seite:362>.

⁴² Edith Kresta, *Ganzkörpersprache statt Arabisch*, TAGESZEITUNG [TAZ] (Aug. 1, 2017), <http://www.taz.de/15438040/>.

⁴³ Resolution 1743 (2010) and Recommendation 1927 (2010) of the Parliamentary Assembly of the Council of Europe on Islam, Islamism and Islamophobia in Europe, *Penalising Women Who Wear the Burqa Does Not Liberate Them* (2011), <https://www.coe.int/en/web/commissioner/-/penalising-women-who-wear-the-burqa-does-not-liberate-th-3>.

worship.⁴⁴ By contrast, the Spanish Constitutional Tribunal, when striking down a municipal ban, upheld principles of pluralism and pointed out that certain differences had to be tolerated.⁴⁵

Both the French and the Belgian bans have been upheld by the European Court of Human Rights. In 2014, the Grand Chamber of the European Court of Human Rights addressed the French ban.⁴⁶ Its decision provided a comprehensive overview of developments in France and other European countries. The Court, despite expressing severe doubts, upheld the French ban as lying within the member states' "wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is 'necessary.'"⁴⁷ Two judges gave a partly dissenting opinion, suggesting that the legislation had no legitimate aim and was not proportional.⁴⁸ When the Belgian ban came to the court three years later, the Court, despite strong doubts, felt bound by its earlier decision and upheld the Belgian ban in two separate decisions, too.⁴⁹ The Court expressed its concerns in even stronger words, and a concurring vote emphasized the narrowness of the holding, but the Court did not dare to change its approach.⁵⁰

⁴⁴ Conseil Constitutionnel [Constitutional Council], Déclaration de conformité [DC] decision No. 2010-613, Oct. 7, 2010, English translation available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010613DCen2010_613dc.pdf (Fr.); for analysis, see, e.g., Noemi Gal-Or, *Is the Law Empowering or Patronizing Women? The Dilemma in the French Burqa Decision as the Tip of the Secular Law Iceberg*, 6 RELIGION & HUM. RTS. 315 (2011).
Cour Constitutionnelle [Constitutional Court], No. 145/2012, Dec. 6, 2012, <http://www.const-court.be/public/f/2012/2012-145f.pdf> (Belg.).

⁴⁵ Tribunal Constitucional [Constitutional Tribunal], J.T.S., no. 4118/2011, Sala de lo Contencioso-Administrativo Appeal, Feb. 4, 2013 (Spain); English summary in 2 OXFORD J. L. & RELIGION 476 (2013). Cf. Robert Gould, *Moors and Christians: Fear of Islam in Spanish Political Debates*, in FEAR OF MUSLIMS? INTERNATIONAL PERSPECTIVES ON ISLAMOPHOBIA 191, 203–06 (Douglas Pratt & Rachel Woodlock eds. 2016); Agustín García Ureta, *Signos Religiosos, Autonomía Municipal y Derechos Fundamentales: Comentarios Sobre la STS de 14 de Febrero de 2013 (prohibición de uso del velo integral)*, 191 REVISTA DE ADMINISTRACIÓN PÚBLICA 201 (2013).

⁴⁶ S.A.S. v. France, App. No. 43835/11, 2014 III Eur. Ct. H.R. 314.

⁴⁷ *Id.* at para. 129.

⁴⁸ *Id.* (dissenting partly opinion by Judges Nussberger and Jäderblom).

⁴⁹ Belcemi & Oussar v. Belgium, App. No. 37798/13 (July 11, 2017), <http://hudoc.echr.coe.int/>; Dakir v. Belgium App. No. 4619/12 (July 11, 2017), <http://hudoc.echr.coe.int/>.

⁵⁰ *Id.*

C. The Böckenförde Theorem

What use does the so-called Böckenförde theorem have for the debate? It seems worthwhile to start with the theorem as formulated by Böckenförde in the 1960s:

The liberal, secularized state draws its life from preconditions it cannot itself guarantee. This is the great venture (Wagnis) it has made for the sake of liberty. On the one hand, as a liberal state it can only survive if the freedom it grants to its citizens is regulated from within, out of the moral substance of the individual and the homogeneity of society. On the other hand, it cannot seek to guarantee these inner regulatory forces by its own efforts – that is to say, with the instruments of legal coercion and authoritative command—without abandoning its liberalness, and relapsing, on a secularized level, into the very totalitarian claim it had lead away from during the confessional civil wars.⁵¹

This theorem is a curse and a blessing at the same time. More than anything else, it has made Ernst-Wolfgang Böckenförde a household name in Germany and to some extent even beyond. It may well be one of the most-cited statements about the Federal Republic of Germany specifically, and the liberal state in general, that exists.⁵² Which means, at the same time, that it tends to outshine everything else that Böckenförde thought and did. And, consequently, even the theorem itself tends to be read out of context—both the context of Böckenförde’s broader thought on the liberal state and on religion, and the concrete historical context in which it was formulated. As a consequence, the theorem is often misinterpreted, used for purposes that it cannot serve.

The theorem consists of two parts that are logically separate even though Böckenförde links them. In the following, each of these elements and the link are discussed separately.

⁵¹ ERNST-WOLFGANG BÖCKENFÖRDE, *The Rise of the State as a Process of Secularization*, in 2 LAW, RELIGION AND DEMOCRACY (Mirjam Künkler & Tine Stein eds., forthcoming 2018); originally BÖCKENFÖRDE, *Die Entstehung des Staates als Vorgang der Säkularisierung*, in DER SÄKULARISIERTE STAAT 43, 71 (2007). An earlier translation is ERNST-WOLFGANG BÖCKENFÖRDE, *The Rise of the State as a Process of Secularization*, in STATE, SOCIETY AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW 26–46 (1991). In the new translation, *Wagnis* is translated as “gamble.”

⁵² See Hermann-Josef Große Kracht, *Fünfzig Jahre Böckenförde-Theorem. Eine bundesrepublikanische Bekenntnisformel im Streit der Interpretationen*, in RELIGION—RECHT—REPUBLIK. STUDIEN ZU ERNST-WOLFGANG BÖCKENFÖRDE 155–83 (Hermann-Josef Große Kracht & Klaus Große Kracht eds., 2014) (summarizing analysis of the discussion).

I. The Preconditions

First, the link is the important part of his argument. The first part is that the state has certain preconditions. What exactly those preconditions are is not part of the theorem itself, but it becomes clear both from the context and from later statements.

The theorem originally emerged in an article on the secularization of the state and thus against an explicitly religious background. Nonetheless, its relation to religion is ambiguous. In the article itself, it was quite clear that religion—more precisely, Christianity—should provide the necessary preconditions for the state. The article was, as Böckenförde himself reported later, an attempt to invite Catholics to take part in the Federal Republic of Germany with the assurance that they had to contribute something that the young state needed and could not produce on its own.⁵³ And indeed, Böckenförde originally suggested explicitly that the State would “live by the religious faith of its citizens.”⁵⁴ This is how, for example, German chancellor Angela Merkel has used and understood the theorem.⁵⁵

On the other hand, neither the theorem itself nor the idea it expresses requires religion to serve as its basis. Something else could hold society together, too. Indeed, some critics of Böckenförde accepted the theorem but rejected the necessity of religion. Böckenförde himself suggested later in his career that other shared normativities could fill the gap. When he revisited his earlier article some forty years later in 2007, he discussed possible alternatives. Although he did not trust that a civil religion could perform the task,⁵⁶ he did believe that general culture could.⁵⁷ Böckenförde opposed the idea of a *Leitkultur*, calling the term “indeed not good”⁵⁸ and opposed in particular a culture that would prioritize Christianity over other religions. Relatedly, he opposed the idea of a law, or a state, based

⁵³ See Ernst-Wolfgang Böckenförde, “Der freiheitliche säkularisierte Staat...”, in ‘UM DER FREIHEIT WILLEN...!’. KIRCHE UND STAAT IM 21. JAHRHUNDERT 19–23 (Susanna Schmidt & Michael Wedell eds., 2002); see also Kracht, *supra* note 52, at 156–160; Christoph Möllers, *Römischer Konziliarismus und politische Reform—Ernst-Wolfgang Böckenförde zum 80. Geburtstag*, 4 ZEITSCHRIFT FÜR IDEENGESCHICHTE 107, 107–09 (2010); Jan-Werner Müller, *What the Dictum Really Meant – and What it Might Mean for Us*, 25 CONSTELLATIONS (forthcoming, 2018).

⁵⁴ Böckenförde, *supra* note 53, at 72.

⁵⁵ Tom Heneghan, *Merkel Cites Christian Roots as Berlin Resumes Muslim Dialogue*, REUTERS (May 17, 2010), <http://blogs.reuters.com/faithworld/2010/05/17/merkel-cites-christian-roots-as-berlin-resumes-muslim-dialogue/>.

⁵⁶ Böckenförde, *supra* note 53, at 27–30.

⁵⁷ *Id.* at 30.

⁵⁸ *Id.* at 33.

on specific values.⁵⁹ At the same time, Böckenförde made clear that Western democracy emerged traditionally in part from religious (and that means: Christian) roots.⁶⁰

II. The Inability of the State

The second part of the theorem is that the state cannot itself guarantee these preconditions. This is the more interesting and more controversial part of the argument. Böckenförde is not saying that the state *should not* attempt to create and guarantee its own preconditions, by ordering citizens to behave in a certain way. His argument is more radical; his claim is that the state *cannot* do this without giving up its liberal, secularized nature. Part of this argument is immediately intuitive—the *liberal* state, by ordering its citizens to behave in a certain way, would undermine its own nature; it would cease to be liberal. What is less intuitive is why it is impossible for the state as a *secularized* state to bring about these prerequisites—unless these prerequisites necessarily have a quasi-religious character. I will return to this point later in this article.

The claim is not absolute. Although Böckenförde suggests that the state cannot guarantee its preconditions, he does not claim that there is nothing the state can do. What the state can do is create the conditions within which the necessary preconditions can grow, especially through education and media—both of which have, in Germany, traditionally been state-run.⁶¹ And indeed, Böckenförde suggests more ominously, that at some stage the State will, for the sake of its own survival, engage in the very suppression that is incompatible with its liberal nature:

This is not to say that if this situation should come to pass concretely, such an attempt would not be undertaken—after all, the state wants to survive as a political entity. But we are then talking about a strategy of brute political survival (grains of sand can be held together only by the clenched fist), and to that end all means that promise success are acceptable. Of course,

⁵⁹ ERNST-WOLFGANG BÖCKENFÖRDE, *Critique of the Value-based Grounding of Law*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 217–34 (Mirjam Künkler & Tine Stein eds., 2017); BÖCKENFÖRDE, *Staatliches Recht und sittliche Ordnung*, in STAAT, NATION, EUROPA 208–32 (1999).

⁶⁰ See CHRISTENTUM UND DEMOKRATIE (Manfred Brocker & Tine Stein eds., 2012).

⁶¹ ERNST-WOLFGANG BÖCKENFÖRDE, *The State as an Ethical State*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 86, 101–04 (Mirjam Künkler & Tine Stein eds., 2017); Böckenförde, *supra* note 53, at 31; Böckenförde, “Der freiheitliche säkularisierte Staat...”, in “UM DER FREIHEIT WILLEN...” – KIRCHE UND STAAT IM 21. JAHRHUNDERT – Festschrift für Burkhard Reichert 19–23 (Susanna Schmidt & Michael Wedell eds., 2002); see Mirjam Künkler & Tine Stein, *Böckenförde’s Political Theory of the State*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 38, 46–47 (Mirjam Künkler & Tine Stein eds., 2017).

this strategy describes the regression to a primitive, nature-like state for the organization of political coexistence.⁶²

III. The Interconnection

Finally, both parts are logically separate, but of course, for Böckenförde, they are intimately linked. The theorem is sometimes called a dilemma or even a paradox,⁶³ but this seems inaccurate. Indeed, if anything, what would be paradoxical would be a state that could, autopoietically, create its own preconditions.⁶⁴ Instead, the theorem could be viewed as an application of Gödel's incompleteness theorem: the idea that every axiomatic system—and the state can surely be viewed as one—is necessarily limited. In this sense, Böckenförde's theorem bears a close relation not only to H.L.A. Hart's rule of recognition—as a social recognition necessary for law to exist—but also to Hans Kelsen's theory of the basic norm. Kelsen—in this sense like Gödel—suggested that a legal system draws its entire validity from a source that is not in itself. For Kelsen's secular positivism this source—the basic norm—was a fiction.

What makes this linkage especially interesting is the fact that Kelsen formulated the need for the basic norm against a problem very much like the one Böckenförde formulates—the loss of God and religion as an ultimate source of normativity for the state and its law. Only their responses to this problem are different. Kelsen introduced the basic norm to take the place that God had in natural law before him—and made clear how much the structure of the modern state and its law resembles that of a religion-based law.⁶⁵ Böckenförde, by contrast, suggested that the state cannot survive without a foundation, which for him, must lie in society—and most plausibly in religion, and thus God. For both, the secularized state is a logical continuation of the religious state, and for both it is incomplete.

⁶² BÖCKENFÖRDE, *The State as an Ethical State*, *supra* note 61, at 105.

⁶³ Ralf Dahrendorf, *Freiheit und soziale Bindung*, in *DIE LIBERALE GESELLSCHAFT* 11 (Krzysztof Michalski ed., 1993).

⁶⁴ Gunter Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 *L. & Soc. Rev.* 727, 736 (1989).

⁶⁵ Hans Kelsen, *On the Basic Norm*, 47 *CAL. L. REV.* 109 (1957).

D. Böckenförde Theorem and Burqa Ban

I. Invocations of Böckenförde in the Face Veil Debate

What is the relation between the theorem and the face veil debate? Remarkably, it has been used on both sides. On the one hand, after de Maizière formulated his ten theses on a German *Leitkultur*,⁶⁶ his fellow party member Ruprecht Polenz invoked the theorem against him, emphasizing that the Constitution requires citizens to comply with the law, not to follow an amorphous culture.⁶⁷ On the other hand, journalist Thomas Ihm uses the theorem in favor of banning burqas: It is, he suggests, one of the prerequisites of this state that we conduct ourselves in a certain way, with which burqas are incompatible.⁶⁸ Similarly, the organization Christen in der AfD (Christians in the Alternative for Germany, Germany's right wing part) cites the theorem in its manifesto, in which it demands a more aggressive confrontation of Islam.⁶⁹

This ambivalence is understandable in view of the analysis of the theorem in the previous section. It appears that each side of the debate emphasizes one aspect of the theorem, ignoring the other and the interrelation. Ihm's argument in favor of the ban—that the burqa is incompatible with the prerequisites of our state—adopts the position that the state rests on certain preconditions but ignores the other point—namely that the state cannot guarantee them. This incomplete adoption of the theorem has a long tradition in Germany. Once the Catholic Church gave up on its claim for the supremacy of religious truth over secular truth in the public sphere, some in the Church came to adopt a similar (mis-)reading of the theorem in favor of stronger Christian values in politics.⁷⁰

However, the view that the Böckenförde theorem counsels against a ban, as presented by Polenz, is also not without its problems. It ignores the question pertaining to the nature of the face veil, and the assumed risk it presents. If indeed the face veil stand in the way of the formation of the community that carries the state, as Ihm suggests, what follows? Can the state nonetheless risk the venture of recognizing the face veil and the person who wears it? Or is that risk too great, because the wearer of the face veil threatens to

⁶⁶ DEUTSCHE WELLE, *supra* note 1.

⁶⁷ Ruprecht Polenz, *Für eine verpflichtende Leitkultur gibt es in unserer Verfassung keine Rechtsgrundlage*, HUFFPOST (Apr. 30, 2017), http://www.huffingtonpost.de/ruprecht-polenz/demaiziere-leitkultur-keine-rechtsgrundlage_b_16337804.html?

⁶⁸ Thomas Ihm, *Burqa—Sein oder Nichtsein*, SWR (Sept. 23, 2016), <https://www.swr.de/swr2/kultur-info/burqa-sein-oder-nichtsein/-/id=9597116/did=18194626/nid=9597116/1ruzmmf/index.html>.

⁶⁹ *Wofür steht ChraFD?*, CHRAFD, <http://www.chrafd.de/index.php/grundsatzserklaerung>.

⁷⁰ Kracht, *supra* note 52, at 166.

undermine the very foundations that the state needs? And if so, how should a liberal, secularized state, respond?

II. Böckenförde's Own Positions on the Headscarf

What is Böckenförde's own position? Although Böckenförde himself did not discuss the face veil except in passing, he has frequently commented on the other issue of Islamic clothing, the headscarf. His position in this context is clear: General headscarf bans are unconstitutional.⁷¹ He bases his position on a series of arguments. Headscarves are protected through the constitutionally guaranteed freedom of religion. This freedom, as guaranteed today, is not confined to protection from forced conversions, nor to a merely private faith; it protects the faithful in her exercise of her faith, even where this takes place publicly.⁷² Indeed, like Habermas in his later texts on the "postsecular society," Böckenförde recognizes the political relevance and force of religion.⁷³

Furthermore, the state has a duty to be neutral vis-à-vis religion. This is a distancing neutrality insofar as direct state functions are at stake. The state has to be the representative of everyone, not just of individual religions—comparable in this regard to the establishment clause in US constitutional law. But the state, Böckenförde suggests, must also be open towards religion and must enable its exercise. This second aspect is

⁷¹ See, Ernst-Wolfgang Böckenförde, 'Kopftuchstreit' auf dem richtigen Weg?, 54 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 723 (2001); Ernst-Wolfgang Böckenförde, *Case note*, 59 JURISTENZEITUNG 1181 (2004); Ernst-Wolfgang Böckenförde, *Bekenntnisfreiheit in einer pluralen Gesellschaft: Bemerkungen zum Kopftuchstreit in Deutschland*, JAHRBUCH MENSCHENRECHTE 173, 314–17 (2005); Ernst-Wolfgang Böckenförde, *Bekenntnisfreiheit in einer pluralen Gesellschaft und die Neutralitätspflicht des Staates*, in DER STOFF, AUS DEM KONFLIKTE SIND: DEBATTEN UM DAS KOPFTUCH IN DEUTSCHLAND, ÖSTERREICH UND DER SCHWEIZ 175, 187 (Sabine Berghahn & Petra Rostock eds., 2004); Ernst-Wolfgang Böckenförde, *Wie weit müssen wir Muslimen entgegenkommen?*, in VERHÄRTETE FRONTEN: DER SCHWERE WEG ZU EINER VERNÜNFTIGEN ISLAMKRITIK 53 (Thorsten Gerald Schneiders ed., 2012). Böckenförde also expressed his views in various interviews, e.g. "Das Kopftuchverbot trifft auch Kreuz und Kippa", SÜDDEUTSCHE ZEITUNG, Oct. 13, 2004; *Das Kopftuch ist ein Stück Integration*, SÜDDEUTSCHE ZEITUNG, July 17, 2006; *Ex-Verfassungsrichter: Kopftuch-Gesetze nicht vereinbar mit Religionsfreiheit*, TAGESSPIEGEL, July 15, 2007; "Freiheit ist ansteckend", DIE TAGESZEITUNG [TAZ], Sept. 23, 2009; "Freiheit ist ansteckend", FRANKFURTER RUNDSCHAU, Nov. 2, 2010.

⁷² Böckenförde, *Bekenntnisfreiheit in einer pluralen Gesellschaft und die Neutralitätspflicht des Staates*, in DER STOFF, AUS DEM KONFLIKTE SIND: DEBATTEN UM DAS KOPFTUCH IN DEUTSCHLAND, ÖSTERREICH UND DER SCHWEIZ 175, (Sabine Berghahn & Petra Rostock eds., 2004).

⁷³ *Id.* at 183.

Religion und religiöses Bekenntnis zur Betätigung und Wirksamkeit im Bereich individueller und gesellschaftlicher Freiheit positiv freigegeben werden; sie vermögen daher, je nach der Kraft und dem Engagement ihrer Anhänger, durchaus gesellschaftliche und auch politische Bedeutung zu erlangen, entbehren keineswegs des potentiell öffentlichen Charakters.

what he sees as the important distinction from the French concept of *laïcité* with its stricter separation.⁷⁴

Although Böckenförde developed his approach to the relation between state and religion with regard to Christianity, he expanded it to the treatment of other religions, in particular Islam. Böckenförde recognizes at various places that the challenge from Islam is more pressing than that of Christianity was, though he mostly does not go into deeper analysis into why this is so.⁷⁵ Insofar as the headscarf is concerned, he sees no good reason to treat Islam differently from the Christian religions. The constitutional reason for this is the state's duty to neutrality: If Jews are entitled to religiously required methods of butchering then so are Muslims—as indeed the German Constitutional Court has held.⁷⁶ But there is also a pragmatic reason. Böckenförde expresses his hope that Muslims could be convinced to actively support the liberal state today, just as Catholics do today.

In view of this background, it is consistent that Böckenförde presents himself as an outspoken critic of bans on headscarves in schools. On the one hand, he suggests, teachers benefit from religious freedoms. Böckenförde's reading of religious freedom is consistent with that of the Constitutional Court but goes further than that of other analysts. First, he extends religious freedom into the job: The teacher, even in a public school, still benefits from the right. The state must be neutral vis-à-vis religions, but this does not mean that teachers must be areligious. The school is not the state, but a place in which state and society meet. And the teacher appears as a person, not as an abstract representative of the state, stripped of her religious freedom.⁷⁷ The teacher's religious expression cannot be attributed to the state—unlike a crucifix that is hung up on the wall of a public school,⁷⁸ and unlike, perhaps, a judge or another state official. Second, this religious freedom encompasses public as well as private expressions of religion. It is not confined to prayer

⁷⁴ See *infra* Section D. III.

⁷⁵ See, e.g., Böckenförde *supra* note 72, at 180:

Fremdheit besonderer Art, die nicht vergleichbar ist mit der früheren Distanz und vereinzelt auch Feindseligkeit zwischen den christlichen Bekenntnissen, die heute einem offenen Miteinander in gegenseitigem Respekt gewichen ist.

⁷⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 15, 2002, 104 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 337, 347. An English translation with annotation can be found in 60 YEARS GERMAN BASIC LAW: THE GERMAN CONSTITUTION AND ITS COURT: LANDMARK DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY IN THE AREA OF FUNDAMENTAL RIGHTS 276 (Jürgen Bröhmer, Clauspeter Hill & Marc Spitzkatz eds., 2d ed. 2012), http://www.kas.de/wf/doc/kas_32858-1522-1-30.pdf?121123115540.

⁷⁷ Böckenförde, *supra* note 72, at 184–86.

⁷⁸ E.g., Böckenförde, *Kreuze (Kruzifixe) im Gerichtssaal? Zum Verhältnis von staatlicher Selbstdarstellung und religiös weltanschaulicher Neutralität des Staates*, 20 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 119 (1975).

and matters of inner conscience—of “faith”—but also concerns religiously required or motivated dress, especially the headscarf. Third, the content of religious freedom is not determined by some official statement of an organized religion. It includes also religiously motivated habits and even matters of personal religious conviction. It does not matter, therefore, whether the Koran does or does not require a headscarf. With all of that in mind, the headscarf is a matter of religious freedom, as long as the person wearing it can plausibly claim to be wearing it for religious reasons.

On the other hand, non-Muslims must, at least in principle, tolerate such religious expressions. Böckenförde emphasizes that the state needs to demonstrate concrete dangers emerging from the headscarf—a general ban, based on an abstract general danger, is not justified. Such concrete dangers can emerge from concrete situations, for example when the headscarf distracts. Merely seeing a headscarf, however, is not such a distraction, because students should assume that teachers may be religious. Indeed, a teacher who wears a headscarf as an expression of her faith is thus not only justified to do so but actually representative of the pluralism that exists within the liberal and secularized state. By contrast, a teacher who tries to indoctrinate her students is not justified, but that is a function of her conduct and intentions, not of the garb she wears.

The consequence is that headscarf bans are severely restricted in two ways. First, they can exist only as against concrete dangers; a general ban is disproportionate. Second, they cannot exist in a way that discriminates, explicitly or implicitly, against one religion in favor of another. The secularized state must not discriminate; it must not favor Christianity merely because it is the majority religion or the cultural basis.

III. Extension to the Face Veil?

What follows for the face veil? *Prima facie*, the same kind of argument could be available. Like the headscarf, the face veil must be viewed as an expression and exercise of religion. The person who wears it exercises her freedom of religion, and the secularized state must accept and be open to the kind of plurality that is expressed in it. It cannot ban the face veil merely on the basis of an abstract danger, because this is not sufficient justification for a ban. All in all, an extension from Böckenförde’s position on headscarves, which was adopted by the Constitutional Court, suggests that a general face veil ban would be problematic. It may be easier for the state to ban face veils in concrete situations, because the face veil is more intrusive. But an abstract danger for “living together”—as argued in France in Belgium—seems to run afoul of this restriction, and also against the theorem at large.

However, Böckenförde himself suggested in passing already in 2001 that the face veil deserved different treatment from the headscarf because it made communication

impossible.⁷⁹ In a 2010 interview, when asked about headscarf and burka, he responded only with regard to the former.⁸⁰ And indeed, the face veil is different. It is not only a symbol, it also makes the face under it invisible. The French and Belgian legislators based their bans on the presumed importance of “living together”—it is necessary for members of a functioning state to live together and see each other’s faces. The concept of “living together,” upheld as a justification by the European Court of Human Rights, has led to confusion and criticism. The concept is excessive insofar as an idea of communal life is allowed to essentially swallow an individual right—religious freedom—whole. It is nebulous insofar as it appears unclear where it comes from and what it means.

The latter problem can be resolved.⁸¹ The concept has a very specific origin in the French debate. There, it emerges from Ernest Renan’s text “*Qu’est-ce qu’une nation (What is a nation)*” which defines the French state as based not on race—nor, one may add, on religion—but instead on a “desire to live together” in view of common past experiences and future projects.⁸² Renan, insofar like Böckenförde, views the modern state as the result of violent clashes between religious confessions. Unlike Böckenförde, however, who sees state and religion in coexistence, Renan views the secular state as an achievement of rationality against the irrationality and backwardness of religion. The consequence for Renan is that the modern state must be reestablished again and again through a “daily plebiscite.”⁸³

Böckenförde cannot, from his perspective, share the requirement of a daily plebiscite.⁸⁴ His state cannot compel such a plebiscite. All that the state can require, Böckenförde emphasizes, is that its citizens comply with its laws; a positive attitude is desirable but unenforceable. Nor is Renan’s idea of “living together” unproblematic for Böckenförde—at least insofar as its conditions are guaranteed by the state. Böckenförde does not address this very idea, but he does discuss, and reject, a related idea, namely Rousseau’s concept of a “civil religion,” which was later adopted by the French Revolution.⁸⁵ The secularized

⁷⁹ Ernst-Wolfgang Böckenförde, “*Kopftuchstreit auf dem richtigen Weg?*,” 54 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 723, 727 (2001).

⁸⁰ Ernst-Wolfgang Böckenförde, “*Freiheit ist ansteckend*,” FRANKFURTER RUNDSCHAU, Nov. 2, 2010, at 32.

⁸¹ See Michaels, *supra* note 7, at 233ff.

⁸² ERNEST RENAN, QU’EST-CE QU’UNE NATION? (1882); English translation in SHLOMO SAND & ERNEST RENAN, ON THE NATION AND THE ‘JEWISH PEOPLE’ 37, 63–64 (2010).

⁸³ *Id.* at 64.

⁸⁴ Böckenförde himself insisted that Renan’s daily plebiscite went to the existence, not the essence of a nation. BÖCKENFÖRDE, *supra* note 59, at 34, 35. It seems doubtful whether Renan’s conception of the nation does allow for that distinction.

⁸⁵ Böckenförde, *supra* note 53, at 28–30.

state cannot establish a religion, and that includes a so-called “civil religion.” Renan’s concept of “living together” is not the same as Rousseau’s civil religion; Renan sees its great advantage in its non-religious character.

Despite the difference, Böckenförde’s own position is in important ways not fundamentally different from Renan’s. Living together is for Böckenförde, like for Renan, a core concern for a state based neither on race nor on religion. He defines this with regard to a “relative homogeneity,” understood as a common conception on how one wants to live together. As he says, “[s]uch relative homogeneity need not be of an ethnic nature. It rather consists of shared visions for the way of living together.”

Does this allow for the argument, offered in France, that the woman in the burqa refuses to live together with others? Or is the Spanish Constitutional Court more in accordance with the theorem when it suggests that the burqa ban, not the burqa, makes it impossible for the woman to live together with others, because it forces her to remain in her home?⁸⁶ That position is grounded in a different conception of living together—the idea of *convivencia*. *Convivencia* describes the centuries of more or less peaceful living together between Muslims and Christians in the Middle Ages.⁸⁷ That idea of peaceful coexistence may not match reality; it has long been romanticized, and current relations between the state and the Muslim minority are rife with tensions. Nonetheless, what the concept of *convivencia* invokes is tolerance between Islam and Christianity (and, by extension, the secular state,) not the restriction of religion. This may explain why the French argument of “living together” to support a face veil ban has not been successful in Spain. During discussions about a national ban, one representative complained about the plagiarism implicit in simple attempts to copy a solution from France.⁸⁸ And while Spanish municipalities justified their bans with the needs of civility and living together—*civismo y convivencia*—they were unsuccessful before the courts. The Spanish Supreme Court suggested that “[t]he argument that the burqa disturbs our Western culture lacks a convincing demonstration.”⁸⁹ More importantly, the Court noted that even if the burqa did create friction, it would be the task of the state to “reconcile the interests of the diverse groups and guarantee the respect to all faiths.”⁹⁰ Religious plurality is thus a part of the

⁸⁶ Tribunal Supremo (T.S.), Feb. 6, 2013 (4118/2011) (Spain); see Robert Gould, *Islam Returns to Spain: Religious Diversity, Political Discourse and Women’s Rights*, 26 ISLAM AND CHRISTIAN–MUSLIM RELATIONS 186 (2015). see also Resolution 1743 (2010) of the Parliamentary Assembly of the Council of Europe on Islam, Islamism and Islamophobia in Europe, no. 17.

⁸⁷ Kenneth Baxter Wolf, *Convivencia in Medieval Spain: A Brief History of an Idea*, 3 RELIGION COMPASS 72 (2009).

⁸⁸ Senator Baig i Torras, *Diario de Sesiones del Senado*, IX Legislatura 2010, number 85, June 23:4540, 4548, as cited in Gould, *supra* note 45, at 198.

⁸⁹ Tribunal Supremo (T.S.), Feb. 6, 2013 (4118/2011) (Spain).

⁹⁰ *Id.* (citing TEDH de la Gran Sala, Nov. 10, 2005, paras 106–8).

Spanish public order, not its enemy.⁹¹ Or, put differently, the idea of living together places the burden of tolerance on the majority.

The preconditions of the liberal state are thus, it appears, different in different countries. In France, they are—thus at least the argument—strictly secular, and in this sense homogeneous and in opposition to Islam. In Spain, they rest more on a history of pluralism—which can accommodate Islam. In Germany, they are informed by a tradition of pluralism and homogeneity at the same time: On the one hand stands the pluralism of different Christian traditions—Protestants and Catholics—which leads to the secularized state. On the other hand, stands the Christian tradition of that state, and the requirement of a relative homogeneity that comes with it. The state, as we learn from Böckenförde, cannot bring these preconditions about, an important corrective of the French and Belgian (and now Austrian) position. At the same time, these preconditions look different in different countries, and arguments from one country are not automatically applicable in another.

E. Limitations

Böckenförde thus provides helpful arguments against a burqa ban—arguments worthy of debate also elsewhere in Europe. Yet, the confrontation with Islam also shows the limits of his position. Some of these have to do with Islam—its difference from Christianity and its treatment as “the other” in the West. Some, however, have to do with the limits of Böckenförde’s conception of society—which can only partly be pluralist—and the state—which can, arguably, only be partly secularized. I will address these in this order.

I. Islam as Similar

A first limit of the theorem concerns the treatment of Islam. Böckenförde suggests that Islam is at a stage similar to that of Catholicism at an earlier stage. This correlates with the hope—but also the demand—, that Islam, just like the Catholic Church, will accept the secularized state, so the state in turn can accept Islam. This has become a frequent trope among German democrats, and also within the Catholic Church. The Pope has also expressed similar ideas.

The idea is problematic. Granted, there are certainly similarities between the situation of Catholicism before the second Vatican council (1962–65) and much of Islam today. Both presented the challenge that they would not accept the existence of the secular state that is not subject to their own claim to truth. This similarity may be the main ground for

⁹¹ In the European Court of Human Rights, a similar argument garnered only two dissenting votes (*supra* note 48): “There is no right not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the traditional French and European lifestyle.”

Böckenförde's hope that Islam may develop in ways similar to those in which Catholicism developed earlier. Some leading Islamic scholars also see similar possibilities. Abdullah An-Na'im, to name just one prominent example, forcefully refuses an Islamic state as incompatible not just with the idea of the secular state, but also with the idea of Islam.⁹² Islam explicitly rejects any compulsion in faith (which means that it, implicitly, is subject to a weakness similar to that of Böckenförde's secular state: Islam cannot guarantee its own preconditions. An-Na'im's proposal for a secular state as compatible with, indeed supportive of and supported by, a modern view of Islam is very much in accordance with Böckenförde's concept of the secularized state vis-à-vis Catholicism. Similarly, Hadi Enayat has recently suggested the possibility of a genuine Islamic version of secularity.⁹³

But this is by no means certain. There are important distinctions between Catholicism and Islam that make a simple transference doubtful. The first concerns the specific relation between state and religion from the perspective of religion. It is true that Christianity, especially Catholicism, took a long time to accept the secular state and to withhold its own claim to supremacy over the state (without giving up its own claim to truth). But it is also the case that the idea of the separation of religion and state has existed in Christianity since its beginning. When Jesus proclaims that his kingdom is not of this world,⁹⁴ when he asks his followers to render to Caesar the things that are Caesar's; and to God the things that are God's,⁹⁵ he already lays down the potential of a separation between the church (for spiritual matters) and the state (for earthly matters), as later endorsed, for example in the Gelasian doctrine,⁹⁶ in Martin Luther's teaching on the two kingdoms—which Böckenförde discusses at length in his history of legal and political philosophy⁹⁷—and elsewhere. Christianity rejects the explicit legalistic foundation that can be found in both Judaism and Islam.

Islam, by contrast, although it does have a theory of the state, does not similarly rest on a distinction between spiritual and worldly life, between religion and law. Islam, in principle, is all-encompassing. Islamic doctrine requires Muslims who live as a minority in a non-Islamic state to comply with that state's laws. Where they are the majority, by contrast, that state is, according to traditional doctrine, compelled to comply with Islam. The happy coexistence between the Western state and religion is arguably the fruit of a very specific

⁹² ABDULLAHI AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A* (2007).

⁹³ HADI ENAYAT, *ISLAM AND SECULARISM IN POST-COLONIAL THOUGHT: A CARTOGRAPHY OF ASADIAN GENEALOGIES* (2017).

⁹⁴ John 18: 36.

⁹⁵ Matthew 22: 21.

⁹⁶ See *Gelasian Doctrine*, in *THE OXFORD DICTIONARY OF THE MIDDLE AGES* (Robert E. Bjork ed., 2010).

⁹⁷ ERNST-WOLFGANG BÖCKENFÖRDE, *GESCHICHTE DER RECHTS- UND STAATSPHILOSOPHIE: ANTIKE UND MITTELALTER 407* (2d ed. 2006); see the review of the first edition by Betsy Röben, 4 *GER. L. J.* 183–84 (2003).

historical development, with very specific ideologies; it cannot be generalized. Böckenförde appears to realize this; he speaks, consistently, of a secularized, not a secular state, thereby suggesting that secularity is the result of a specific process, not an abstract situation. If that is so, then generalizations to religions other than the one from which secularization emerges is not a given.

A related distinction concerns the specific theological role that clothing, especially veils, plays in Islam. Such veils were, of course, once quite universal; they also permeated the Christian world. But Christianity—certainly in its protestant version, but also as Catholicism—places less weight on material symbols in this world than does Islam. As a consequence, there are fewer strict theological requirements as to dress codes. This remains the important distinction between Christian crucifix pendants and Islamic headscarves. The crucifix is a symbol of faith, but wearing it is not required by religion: Christianity is very much a religion that focuses on the next life instead of this and on what is within man instead of what is outside. This is different for Islam. Regardless of the important debate to what extent female dress codes are a religious requirement of Islam or a mere cultural heritage, the case that women regularly make—namely, that their understanding of Islam requires them to wear a veil—is theologically not implausible. This is why the ban on Islamic veils is, in fact, a greater infringement of religious freedom than the ban on Christian pendants—it forbids a believer not merely from expressing her faith in public, but indeed from complying with a religious requirement.

II. Islam as the Other

In this sense, the hope in the West that Islam will accept secularization in the same way as Christianity has, seems ill-founded. Equally problematic, however, is the flipside of this view—the perspective, namely, that as long as Islam is not like Christianity today, it cannot be accepted, that it is, unlike Christianity and Judaism, by necessity separate from Western society.⁹⁸

As to Christians and Christianity, Böckenförde leaves no doubt as to their role within the state. Christianity provides the historical background for the modern state (even though this state itself is no longer Christian), and Christians provide the majority of its citizens (even though, as he deplores,⁹⁹ their number is declining). Indeed, throughout his work, Böckenförde argues the distinction of state and religion from both sides. It is clear that the modern state and the modern Christian church are co-emergent. Religious freedom as granted by the State and acceptance of the state's unfettered role in the political realm are both the results of the same struggle of secularization.

⁹⁸ Such “othering” is a main theme in GÜNTER FRANKENBERG, *Case Study on Muslim Veils*, in *COMPARATIVE LAW AS CRITIQUE* 113 (2016).

⁹⁹ BÖCKENFÖRDE, *supra* note 51.

A similar acceptance is given to Jews, even though Judaism does not represent the foundation of the German State. With regard to relations to the state, Böckenförde views Christianity and Judaism as similar—perhaps more than is historically accurate, given the Christian history of antisemitism.¹⁰⁰ Jews, Böckenförde emphasizes, were and are citizens, which makes the crime of the holocaust something more than only a crime against humanity: By killing its own citizens, the state broke its compact with its citizens. Non-Jewish citizens who allowed such killings were therefore guilty of the crime as well.¹⁰¹ The Holocaust is a crime both by the state and by society, against members of society and citizens of the state. It was made possible, he suggests, because the integration of Jews was historically incomplete as long as the state defined itself through its Christianity (so that Jews felt they had to be baptized) and its ethnicity. One sees here the importance of the liberal secularized state which is grounded in neither religion nor race.

As to Muslims, by contrast, Böckenförde does not appear willing to provide the same level of full acceptance—even if they are citizens. This becomes apparent from three elements. The first element concerns a rhetorical distancing. In a chapter title like “[h]ow far must we accommodate Muslims?,” the juxtaposition of “we” and “Muslims” suggests that Muslims are not really part of whatever the “we” here refers to.¹⁰² “We” could be the state, but elsewhere when he refers to the state, Böckenförde speaks explicitly of the state, not of “we”. That Muslims remain other becomes clear in substance when Böckenförde discusses Muslims in the context especially of migration. Muslims, he suggests, brought Islam with them in their luggage.¹⁰³ Christians, and also Jews, are seen as citizens; Muslims are seen only as immigrants, and their prime identity is not that of citizen but that of Muslim.

A second aspect concerns mutual trust. Böckenförde’s position with regard to the relation between Christianity and the Western State rests on mutual trust: Both sides can engage in the venture because the state knows that Christianity will accept it, and Christianity knows

¹⁰⁰ ERNST-WOLFGANG BÖCKENFÖRDE, *Religion in a Civil Society, in* JEWS AND CHRISTIANS IN A PLURALISTIC WORLD 125, 127, 137 (Ernst-Wolfgang Böckenförde & Edward Shils eds., 1991). See also BÖCKENFÖRDE, *supra* note 51, at 41 (speaking about an “antique-Jewish-Christian tradition”).

¹⁰¹ ERNST-WOLFGANG BÖCKENFÖRDE, *The Persecution of the German Jews as a Civic Betrayal*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 309–317 (Mirjam Künkler & Tine Stein eds., 2017); originally ERNST-WOLFGANG BÖCKENFÖRDE, *Die Verfolgung der deutschen Juden als Bürgerverrat*, in STAAT, NATION, EUROPA 276–86 (1999).

¹⁰² Ernst-Wolfgang Böckenförde, *Wie weit müssen wir Muslims entgegenkommen?*, in VERHÄRTETE FRONTEN 53–56 (Thorsten Gerald Schneiders ed., 2012). The text was published before with different titles as *Ver(w)irrung im Kopftuchstreit*, SÜDDEUTSCHE ZEITUNG, Jan. 16, 2004, at 2; and as *Bekenntnisfreiheit als Menschenrecht. Bemerkungen zum Kopftuchstreit in Deutschland*, JAHRBUCH MENSCHENRECHTE 173, 314–17 (2005).

¹⁰³ Böckenförde, *supra* note 80. See also Ralf Michaels, *Gehört der Islam zu Deutschland? Beyond Böckenförde*, VERFASSUNGSBLOG (Mar. 22, 2018), <https://verfassungsblog.de/ gehoert-der-islam-zu-deutschland-beyond-boeckenfoerde/>.

that the state will grant it religious freedom. Muslims, although they too are granted religious freedom, are not granted a similar trust. When several German politicians proclaim that Islam is part of Germany, Böckenförde insists on the distinction: Muslims who live there are part of Germany; Islam, however, is not.¹⁰⁴ The reason for him is that, historically, Christianity, not Islam, has provided the societal foundation of Germany, and of Europe. Even in the secularized state, Christianity has a special status. And although Muslims are protected, in the end the distrust of their religion extends to them as individuals. When speaking of headscarves, Böckenförde emphasizes his liberal position: All that we can require from the Muslim is that they comply with the state's laws; a positive attitude cannot be made a requirement. This is afforded only to the individual, however, not the Muslim community. Insofar, Böckenförde requires acceptance of the state first. In 2007 he expresses ambivalence about Islam's position towards the liberal state: He suggests that if Muslims accept the state, they can be part of it just as Christians are; if they oppose it, they cannot.¹⁰⁵ Not much later, in a review of a book on theological positions within Islam vis-à-vis the constitutional state, Böckenförde sees his fears confirmed that Islam does, indeed, pose such a threat, and that therefore caution is required.¹⁰⁶ In doing so, Böckenförde ignores the book author's own emphasis that what is analyzed are theological positions, not the positions of actual Muslims, which are often quite different.¹⁰⁷ Moreover, in assuming that Muslims generally have a negative attitude towards the liberal state, Böckenförde turns the liberal potential of his theorem on its head: It is precisely because the state cannot compel Muslims to support it that the state cannot trust them as a group.

Third, the consequence is, for Böckenförde, that Muslims must remain a minority in the Western state. Such a requirement is not made for Christians—where it would be fatal—nor for Jews—where it would be not only hypothetical but also, for historical reasons, indefensible. With regard to Muslims, it becomes crucial. Cultural discrepancies, not economic concerns, are Böckenförde's argument for opposing Turkish membership in the EU. Turkey would be the most populous country, and the free movement of people might

¹⁰⁴ Böckenförde, *supra* note 80.

¹⁰⁵ Böckenförde, *supra* note 51, at 39, 41.

¹⁰⁶ Ernst-Wolfgang Böckenförde, *Religionsfreiheit ist kein Gottesgeschenk*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Apr. 22, 2009 (reviewing LUDWIG WICK, ISLAM UND VERFASSUNGSSTAAT: THEOLOGISCHE VERSÖHNUNG MIT DER MODERNE? (2009)).

¹⁰⁷ Thus the critique by Jochen Müller, *Wie sich der Staatsrechtler Böckenförde in Fragen Islam und Demokratie vergaloppiert* (Aug. 28, 2009), <http://islam.de/13735.php>. Ludwig Wick, *Der moderne Verfassungsstaat aus islamisch-theologischer Perspektive*, in DEMOKRATIE UND ISLAM. THEORETISCHE UND EMPIRISCHE STUDIEN 203–16 (Ahmet Cavuldak, Oliver Hidalgo, Philipp W. Hildmann & Holger Zapf eds., 2014) (emphasizing the limited influence of theological positions on sociological realities).

enable Muslims to populate Germany.¹⁰⁸ The way to defend is migration control, as he makes clear.¹⁰⁹

The State must ensure that, as long as the reservations expressed by Wick persists, Muslims remain in a minority position, by means of appropriate measure in the areas of freedom of movement and of migration, not least with regard to Turkey. They must thereby be prevented from using democratic political opportunities to attack the state's order, which is structure towards openness, from the inside. This is no more than the self-defense which the liberal constitutional state owes itself.

This seems to demonstrate the limits of the Böckenförde theorem. The venture which the liberal secularized state was able to risk with regard to Christianity is too risky with regard to Islam. Böckenförde defends his position as a self-defense of the liberal state. But the result is not far from that more primitive, nature-like state for the organization of political coexistence that he discusses elsewhere.¹¹⁰

III. The Pluralist Society

Why does it seem necessary to depict Islam as the other—to be tolerated, but not integrated? The foundation lies in Böckenförde's understanding of what kind of society is necessary as a precondition for the state. Böckenförde is aware of, and indeed largely endorses, the pluralism of modern society. Indeed, it is definitional for the liberal and secular state that it does not represent the medieval ideal of the perfect society, but instead that it is plural internally. There are for Böckenförde, however, limits to this pluralism. When he discusses religion or culture as foundation of the state, he assumes that a certain homogeneity is necessary.¹¹¹

¹⁰⁸ See Ernst-Wolfgang Böckenförde, *Europa und die Türkei. Die europäische Union am Scheideweg* (2004), https://www.boell.de/sites/default/files/assets/boell.de/images/download_de/Boeckenfoerde_Arendt_2004.pdf.

¹⁰⁹ *Id.*

¹¹⁰ Böckenförde, *supra* note 59.

¹¹¹ Böckenförde, *supra* note 51; see also ERNST-WOLFGANG BÖCKENFÖRDE, *Die Nation: Identität in Differenz*, in STAAT, NATION, EUROPA 34, 57 (1999); BÖCKENFÖRDE, *The Future of Political Autonomy*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 324, 328 (Mirjam Künkler & Tine Stein eds., 2017); originally *Die Zukunft politischer Autonomie*, in STAAT, NATION, EUROPA 103 (1999). For discussion, see FELIX HANSCHMANN, DER BEGRIFF DER HOMOGENITÄT IN DER VERFASSUNGSLEHRE UND EUROPARECHTSWISSENSCHAFT 41 (2008).

Böckenförde is adamant to emphasize that such homogeneity is relative, not absolute. To some extent he channels more the liberal pluralist tradition of Hermann Heller: Relative homogeneity allows for differences in values; all that is required is a consensus over certain basic preconditions.¹¹² He cites Adolf Arndt—an influential Social Democratic politician post-World War II: “Democracy as a system of majority decision presupposes agreement about what is beyond voting.”¹¹³ This endorsement of pluralism enables Böckenförde—other than conservative Christians and German nationalists alike—to accept the wearing of Islamic headscarves as a right.

But there are relevant limits to Böckenförde’s pluralism. Besides Heller, the influence of Carl Schmitt’s anti-pluralist thinking is clearly palpable and even openly acknowledged. Schmitt’s view of political life rested on an ontological distinction between friends and enemies.¹¹⁴ Political groups, Schmitt, suggested, form because a group of people is willing to engage in political life together. In order to do so, these people will recognize each other as friends, and at the same time distinguish themselves from others as enemies. Böckenförde, in his reception of Schmitt, focuses especially on the first aspect, that of friendship, and ties it to the liberal state.¹¹⁵ Friendship becomes, here, the relative homogeneity he talks about. But Böckenförde also accepts the second aspect, that of the enemy, as a necessary element in the dialectic:

What is unique to a group, what creates togetherness and commonality, is always experienced—and thus reinforced—not only as inherently positive, but also by way of demarcation against an Other. And it is something that is stronger and more intense than the commonality resulting from the equality of humans as humans, which is an abstraction that rises above peculiarities and specifics. Commonality and otherness are two sides of the same coin. And otherness is not inherently hostile, initially it does not go beyond simple foreignness and unfamiliarity. Yet it can escalate, become emotionally charged, and then easily turn into

¹¹² Künkler & Stein, *supra* note 61, at 22–25.

¹¹³ BÖCKENFÖRDE, *The Future of Political Autonomy*, *supra* note 111, at 332 (citing Adolf Arndt, *Christentum und freier Sozialismus*, in *POLITISCHE REDEN UND SCHRIFTEN* 128 (Horst Ehmke & Carlo Schmid eds., 1976)).

¹¹⁴ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (1932, 2007).

¹¹⁵ See, most pronouncedly, ERNST-WOLFGANG BÖCKENFÖRDE, *The Concept of the Political: A Key to Understanding Carl Schmitt’s Constitutional Theory*, in 1 *CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS* 69 (Mirjam Künkler & Tine Stein eds., 2017); originally ERNST-WOLFGANG BÖCKENFÖRDE, *Der Begriff des Politischen als Schlüssel zum staatsrechtlichen Werk Carl Schmitts*, in *RECHT, STAAT FREIHEIT* 344 (1991).

an aggression-laden otherness and eventually aggressive rejection and hostility.

In structural terms, this commonality—which, on the one hand, defines itself positively and, on the other hand, differentiates itself negatively—is the *relative homogeneity* within a society. These are the attitudes and beliefs—pre-rational at their core—that sustain the political order and the social coexistence.¹¹⁶

One can see that Böckenförde does not want to follow Schmitt all the way: the relation to the other need not be one of enmity, it is merely one, he suggests, of foreignness and unfamiliarity. One may well question whether simple foreignness and unfamiliarity are sufficient for the process of demarcation that is necessary for the group identity. But one can also recognize that Böckenförde sees a potential for aggression, and does not really offer a remedy, except to keep the other out.

And one can easily see that in this concept the role of the other is easily taken up by Islam. De Maizière, in the quote with which this essay began, uses a similar kind of dialectics—German *Leitkultur* is defined not only by what we have in common, but also by differentiation from what we are not, and we are not Burqa. Böckenförde does not go as far. But the othering is a necessary part of his theory, and this creates the limits of commonality with Muslims and Islam.

F. Assessment

The result is ambivalent. On the one hand, Böckenförde's theorem—his understanding of the relation the secular state takes towards religion—contributes to the current debate in very useful ways. On the other hand, there are limits to this contribution.

What is the value, first, of Böckenförde's take? Böckenförde contributes to the face veil debate a question that others, certainly outside Germany, rarely ask, but that is extremely helpful. The general debate focuses largely on questions of rights—religious freedom in particular, but also non-discrimination, against women. Are burqa bans infringements on religious freedom? Is the face veil a violation of women's rights, or is the ban such a violation? Does a face veil ban remedy discrimination against women, or does it establish discrimination against Muslims? Böckenförde's important contribution is to direct our gaze away from the regulated individuals and on to the regulator—the liberal state itself, the

¹¹⁶ BÖCKENFÖRDE, *The Future of Political Autonomy*, *supra* note 111, at 331; *see also* BÖCKENFÖRDE *The Concept of the Political*, *supra* note 115, at 71–72; KLAUS GROBE KRACHT, *Unterwegs zum Staat: Ernst-Wolfgang Böckenförde auf dem Weg durch die intellektuelle Topographie der frühen Bundesrepublik, 1949–1964*, in RELIGION—RECHT—REPUBLIK, *supra* note 52, at 11, 18–20.

blind spot of so many legal analyses. His analysis makes clear that what is at stake are not only, perhaps not even primarily, the rights of a relatively small group of people who would not normally require such intensive regulation. Instead, what is at stake is the self-assurance of the state itself. In banning face veils, the state says very little about Islam, but it says very much about itself. In its rejection of a religion that shows its symbols, the state defines itself, and demonstrates the limits of its own liberalism.¹¹⁷

And Böckenförde—whose liberal position with regard to headscarf bans deserves the praise it did not always receive when he expressed it—not only asks the right question. His answer—implicit in the theorem already when formulated with regard to Christianity—is also convincing, as far as it goes. Banning Islamic clothing is not only disproportionate, as many have held, but much more importantly, it is self-defeating. By banning headscarves, the state changes its own nature—it gives up its own liberal nature. Islam's dress code may well be illiberal and objectionable, but the liberal state cannot answer that dress code with its own dress code without becoming similarly illiberal.

In this sense, Böckenförde's rejection of headscarf bans is perhaps the most powerful defense of liberalism in the liberal state. For that reason, the weakness of his position is intimately related to the weakness of the secular liberal state itself. Secularization is a particularly European—and that means Christian and post-Christian—development. The modern secular state has its roots in Christianity. In this sense it seems precise and useful that Böckenförde regularly speaks of the secularized, not the secular state. The secularized state is a state that has emerged from a specific, pre-secular position; it still carries those roots in itself. Böckenförde is explicit about the fact that the society which is expected to carry the state is itself Christian in its origins, even though the importance of faith may be shrinking. And he remains aware that the secularized state itself bears its own origins in Christianity, as well. But it appears that this secularized state cannot, ultimately, be fully neutral. It is therefore not a coincidence but instead a normalcy that this state interacts more successfully with the religion from which it emerges—namely Christianity—than with others. In the end, what emerges is a state that is Christian in its origins and therefore accepts Christianity without problems, while it poses increased demands on other religions.

This secular liberal state still bears its origins in Christianity, and Böckenförde's own account makes that clearer than others. The state presents itself in many ways as a continuity of Christian concept. Böckenförde opposes Carl Schmitt's specific political theology which suggests exact parallels between Church and State. But in his own account, political theology must still establish the specific Christian origins and foundations of the

¹¹⁷ Michaels, *supra* note 7, at 230ff., 243–44.

state.¹¹⁸ In the end, Böckenförde recognizes—albeit implicitly—that the foundation of his liberal state is not merely cultural but religious and Christian—not only genealogically but also substantively. In this position, he is indeed—as Jean Cohen has recently pointed out—closer to Talal Asad’s analysis of postsecularism than to Habermas’s.¹¹⁹

This, explains the difficulty that the liberal and secularized state has with the face veil, and indeed with Islam. It is true that Islam does not accept the secularized state, in the way in which Christianity has done so. It is desirable that it would, although in all likelihood an Islamic enlightenment would look different from the European one. But that is only one side of the problem, and maybe not even the most pressing one—many Muslims have accepted the state, even though the official position of their religion may still be different. The other side of the problem, the one less visible, is this: Although Muslims can accept the state, the liberal secularized state in turn has great difficulty in accepting Muslims as Muslims, in the way in which it recognizes Christians. The state is brave enough to undergo the venture of fully accepting Christians and trusts that they will not undermine it. The state does not have the same courage vis-à-vis Muslims. In this sense, at least part of the difficulty is inherent in the post-Christian state, which is neither truly secular nor truly pluralist, and which can therefore treat Muslims in no other way than as “the other”—to be tolerated, but at the same time to be kept at bay.

¹¹⁸ See ERNST-WOLFGANG BÖCKENFÖRDE, *Politische Theorie und politische Theologie: Bemerkungen zu ihrem gegenseitigen Verhältnis*, in *KIRCHE UND CHRISTLICHER GLAUBE IN DEN HERAUSFORDERUNGEN DER ZEIT* 317 (2004), translated in ERNST-WOLFGANG BÖCKENFÖRDE, *Political Theory and Political Theology: Comments on their reciprocal relationship*, in 2 *LAW, RELIGION AND DEMOCRACY: SELECTED WRITINGS* (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

¹¹⁹ Jean L. Cohen, *On the Genealogy and Legitimacy of Politically Liberal Secular Polity: Böckenförde and the Asadians*, *CONSTELLATIONS* (forthcoming); see Peter E. Gordon, *Between Christian Democracy and Critical Theory: Habermas, Böckenförde, and the Dialectics of Secularization in Postwar Germany*, 80 *SOC. RES.* 173 (2013).